

# A human rights framework for Indigenous children's welfare and well being

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**A Human Rights Framework for  
Indigenous Children's Welfare and  
Wellbeing**

**by Teresa Libesman**

# **Doctor of Philosophy, Law (1730)**

**2012**

## **Abstract**

The failure of contemporary child welfare systems with respect to Indigenous children and young people points to the need for change. This thesis looks at why bureaucratic and mainstream responses to Indigenous children's wellbeing have not been successful and whether a human rights framework can respond to Indigenous children's needs in more just and effective ways. Consideration is given to why bureaucratic decision making structures inhibit, and what structures promote, moral and fair judgements with respect to Aboriginal and Torres Strait Islander children and young peoples' welfare and wellbeing. These questions are addressed from interdisciplinary perspectives, drawing on comparative national and international jurisprudential, empirical and doctrinal responses to Indigenous children's welfare and wellbeing. The core thematic question being whether pluralisation of responses to Indigenous children and young peoples' wellbeing, within a cross-cultural post-colonial context, can provide better outcomes for Indigenous children and young people than they currently experience?

The thesis argues that the conceptualisation of human rights as pluralised and inclusive, compared with understandings which are universal and standard setting, can and has contributed to the establishment of international and national human rights frameworks and processes for reforms to law and service delivery with respect to Indigenous children's welfare and wellbeing. Further, the engagement with comparative legal and service delivery frameworks for Indigenous children's welfare and wellbeing across Australia, Canada, the United States and New Zealand has contributed to the development of normative understandings with respect to the relationship between cultural care and Indigenous children's wellbeing in the context of child welfare. This thesis suggests that the extension of a pluralised understanding of human rights from child welfare to structural reforms which underlie abuse and neglect, offers the scope to extend the benefits

of a participatory approach from welfare to development style responses to Indigenous children's wellbeing. Such an approach will not only improve Indigenous children's wellbeing but will also strengthen democratic ideals by enlarging debate and democratic structures to incorporate Indigenous peoples' experiences.

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## **Originality Statement**

'I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgment is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.'

## **Chapters of the thesis which have been published or publications which draw on work from my thesis:**

Libesman T (2012), 'International human rights law and the needs of Indigenous children' in Sheehan R, Rhoades H & Stanley N (eds), *Vulnerable Children and the Law*. London: Jessica Kingsley Publishers, 181 -201

Libesman T (2007), 'Can International Law Imagine the world of Indigenous children?' 15(2) *International Journal of Children's Rights* 283-309

Libesman T (2004), 'Child Welfare Approaches for Indigenous Communities: International Perspectives,' 20 *Child Abuse Prevention Issues* 1-39

Cunneen C & Libesman T (2002), 'Removed and Discarded: The Contemporary Legacy of the Stolen Generations,' 7(4) *Australian Indigenous Law Reporter* 1-26

## Chapter 1

### From Indigenous Child Welfare to Indigenous Children's Wellbeing

In 2000, an estimated 250 000 people walked across the Sydney Harbour Bridge in a march for reconciliation. It was three years after the seminal report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (NISATSIC)<sup>1</sup> had been released and just a little longer since the conservative Howard Government had been elected to office. It was a clear, cold morning in May, and Town Hall station was packed with people, young and old, cramming into trains to get to Milsons Point, the northern side of the Harbour Bridge, for the start of the walk. The atmosphere was charged and highly anticipatory. Trains full of human cargo passed by and when we eventually made our way into an already packed train, pushed tight against strangers, incongruous images of cattle trucks forcibly removing Aboriginal communities from their lands and Nazis with batons pushing Jews towards death camps, crossed my mind. I wondered if these strange images crossed the minds of others on the train? This march was about history and memory: about how collective and individual memories of the past would be carried into the future. The atmosphere on the train was in fact full of camaraderie and consideration. It was immensely exciting to walk with thousands of others across the magnificent symbol that unifies the north and south of the city, an icon of Sydney's beauty and the imagination of colonial forebears, which had now been reinvented as a symbol of justice.

An ephemeral 'sorry' flared from a plane across the sky in defiance of the Howard Government's refusal to apologise to the stolen generations. The debate around an apology symbolised contested and dichotomised commitments to the

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<sup>1</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Sydney: Human Rights and Equal Opportunity Commission.



past: one of heroic and noble forebears who had through ingenuity and hard work built a prosperous nation and another of violence, destruction of Aboriginal and Torres Strait Islander communities and breach of the most primal of human bonds between Indigenous mothers and their babies. But within these dualised commitments to the past, the meanings of ‘sorry’ and justice, are founded on very different memories, histories, experiences and understandings. While common ground exists across many institutions and individuals about the unjustified removal of Aboriginal and Torres Strait Islander children from their families in the past, how this translates into responses to the contemporary welfare and wellbeing of Indigenous children is more ambivalent. What structures are available to transform the sympathy which is expressed in ‘sorry’ into restitution and a commitment to future generations? Australian State and Territory Governments, although not specifically called upon to by the National Inquiry, apologised to the stolen generations. Former Premier Bob Carr moved that New South Wales (NSW):

apologise unreservedly to the Aboriginal People of Australia for the systematic separation of generations of Aboriginal children from their parents, families and communities and acknowledges and regrets Parliament’s role in enacting laws and endorsing policies of successive governments whereby profound grief and loss have been inflicted upon Aboriginal Australians.<sup>2</sup>

Yet these same governments and child welfare services continue to fail Aboriginal and Torres Strait Islander children.

### **Can a human rights framework respond more effectively to vulnerable Indigenous children?**

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<sup>2</sup> Human Rights and Equal Opportunity Commission (2007), *Content of apologies by state and territory parliaments*. Sydney: HREOC. Available at: [http://www.hreoc.gov.au/social\\_justice/bth\\_report/apologies\\_states.html](http://www.hreoc.gov.au/social_justice/bth_report/apologies_states.html)

The failure of contemporary child welfare systems with respect to Aboriginal Australian children and young people points to the need for change.<sup>3</sup> This thesis considers why bureaucratic and mainstream responses to Indigenous children's wellbeing have not been successful and whether a human rights framework can respond to Indigenous children's needs in more just and effective ways. In what ways has international engagement amongst Indigenous children's organisations, through United Nations (UN) human rights bodies and with Indigenous peoples in comparative jurisdictions, opened up possibilities for Indigenous children's welfare and wellbeing which had previously seemed impossible? Can pluralisation of responses to Indigenous children and young peoples' wellbeing, within a cross-cultural post-colonial context, provide better outcomes for Indigenous children and young people than they currently experience?

The following are the core questions which are addressed in this thesis:

- How are rights within the UN human rights system, in particular rights under the Conventions on the Rights of the Child and principles of self-determination, framed with reference to Indigenous children and young people?
- How do competing conceptualisations of human rights, as universal and standard setting compared with pluralised and inclusive, translate into different understandings of social and political relationships with respect to Indigenous children and young peoples' welfare and wellbeing?
- How in practice are Aboriginal and Torres Strait Islander children and young people who come to the attention of the NSW Department of Family and Community Services (formerly the Department of Community Services (DOCS)), a bureaucratic Australian Government child welfare department, responded to?
- How do bureaucratic decision making structures inhibit moral and fair judgments with respect to Indigenous children and young peoples' welfare

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<sup>3</sup> See Contemporary Australian child welfare and Indigenous peoples below.

and wellbeing and would a human rights framework promote better decision making?

- What is the theoretical and practical relationship between making judgments with respect to child welfare matters and human rights principles?
- How does engagement with international human rights principles and with Indigenous children's organisations in comparative jurisdictions influence national law reform with respect to Indigenous child welfare and how in turn does this influence the sensibilities and practice of child welfare?

### **Methodology**

A number of methodologies are used to investigate why the current bureaucratic case based approach to child welfare is not working for Indigenous children and young people and whether a human rights approach can provide better outcomes for them. Desk based research is used to consider United Nations (UN) human rights jurisprudence with specific reference to the rights of Indigenous peoples and their intersection with the rights of the child. This requires consideration of the ways in which UN human rights bodies have institutionally incorporated Indigenous peoples' participation in the development of treaty based jurisprudence, with particular reference to the development of the principle of self-determination with respect to Indigenous peoples, and the rights of the child under the UN Convention on the Rights of the Child (CROC) with respect to Indigenous peoples.

Interdisciplinary research is drawn upon, in particular political theory with respect to participatory democracy, focussing on the ideas of James Tully, Iris Marion Young, Will Kymlicka and Patrick Macklem, to evaluate the validity of pluralising child welfare frameworks to incorporate Indigenous communities and organisations within or separate from established institutional frameworks. These ideas are also applied to competing conceptions of human rights as either universal and primarily establishing processes for standard setting or pluralised

and transformative with the inclusion of a greater diversity of ideas and sensibilities within the UN and state based institutional processes.

Interdisciplinary research is also used to evaluate why bureaucratic decision making processes within child welfare bureaucracies have not been successful and what processes for decision making are likely to lead to better outcomes for Indigenous children. Most contemporary child welfare decision making with respect to Indigenous children takes place within a bureaucracy. Consideration is therefore given to how decision making takes place within bureaucratic structures and why this context often leads to a failure to take responsibility for the wellbeing of Indigenous children and young people. The ideas of critical legal scholar Gerald Frug and moral philosopher Alasdair MacIntyre are drawn upon with respect to evaluating the limitations with bureaucratic modes of decision making within child welfare departments. When evaluating whether a human rights framework can provide a better structure for making judgments with respect to Indigenous children and young people's wellbeing, the ideas of philosopher Immanuel Kant and political theorists Hanna Arendt, Ronald Beiner and Jennifer Nedelsky are drawn upon.

A primarily qualitative assessment of a sample of 80 DOCS substantiated emotional abuse and neglect files for Aboriginal and Torres Strait Islander children and young people in NSW was conducted.<sup>4</sup> This research aimed to verify anecdotal accounts with respect to how Indigenous children and families experienced a bureaucratic child welfare system, and how in fact decisions were made with respect to Indigenous children's welfare and wellbeing within DOCS. A high level of dissatisfaction has been repeatedly expressed with respect to how child welfare departments respond to Indigenous families' needs. This research, using grounded theory, looks closely at how a contemporary case based child welfare service within a bureaucratic department responded to Indigenous

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<sup>4</sup> Since the case study, the Department has been renamed the Department of Family and Community Services.

families who had substantiated findings of neglect or emotional abuse against them. The methodology for this research is outlined more fully in Chapter 3.

The legislative frameworks for the delivery of child welfare services to Indigenous children in Canada, United States, New Zealand and Australia are reviewed and assessed in terms of the degree of self-determination which they afford Indigenous communities. This entailed a review and assessment of reform processes and a comparative review of contemporary legislative frameworks in the United States, New Zealand, Canada and Australia. Indigenous peoples' historical experiences of colonisation have a significant influence on their contemporary experiences with child welfare systems. A brief review of Indigenous peoples' historical experiences of child welfare in each jurisdiction provides the context for current experiences. Many Indigenous communities experience high levels of intergenerational trauma, with associated social and economic problems which impact on the wellbeing of their children and young people. There has been a range of responses to addressing this trauma, from community development and cultural renewal to mainstream rehabilitation and programs which aim to address substance abuse and violence. A comparative review of a range of programs and policies, with an assessment of their efficacy to the extent that such evaluations are possible, is undertaken.

My thesis also draws upon my experience of working with the peak Australian Indigenous children's organisation in Australia, the National Secretariat of Aboriginal and Torres Strait Islander Child Welfare (SNAICC), over the last decade.<sup>5</sup> This has afforded me the opportunity to engage with Aboriginal and Torres Strait Islander community members, members of state and territory peak Indigenous children's organisations, Indigenous and non- Indigenous child welfare agencies in the non-government and government sectors, and to have

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<sup>5</sup> I have served as an expert advisor to SNAICC from 2002 to the present co-investigating on research projects, responding to and providing reports as a consultant for state and territory legislative reviews and presenting background papers to the SNAICC executive and to local member organisations.

contact with advocates for Indigenous children's rights in comparative jurisdictions. The question of whether a human rights framework is able to build bridges of commonality and communication, across Indigenous and non-Indigenous communities of experience, which can be incorporated into child welfare frameworks, is considered across the thesis, drawing on the theoretical, jurisprudential, doctrinal and empirical research referred to above.

### **Defining Indigenous peoples**

Indigenous people across Australia, Canada, the United States and New Zealand identify, define and name themselves in a myriad of ways. They have all been over time subject to governmental, social, psychological, administrative, legislative, judicial, geographical and biological definitions of their Aboriginality. Yet all have cultural, legal and social systems, languages and ways in which they define and name themselves.

In the past in Australia, biological factors have been used to identify Indigenous people and determine who belongs to (or what constitutes an) Aboriginal community. There have been more than 67 identifiable classifications, descriptions or definitions of 'Aborigine' in federal, state and territory legislation in Australia.<sup>6</sup> Mick Dodson writes, 'This right to control one's own identity is part of the broader right to self-determination; that is, the right of a people to determine its political status and to pursue its own economic, social and cultural development.'<sup>7</sup> The Aboriginal and Torres Strait Islander Social Justice Commissioner has noted that 'perceptions of 'real Aborigines' also ignore the fact that cultures evolve and, over time, adapt to new circumstances.'<sup>8</sup> In Australia, descent, self-identification and community recognition are some of the

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<sup>6</sup> McCorquodale J (1997), 'Aboriginal Identity: Legislative, Judicial and Administrative Definitions,' 2 *Australian Aboriginal Studies* 24, 24.

<sup>7</sup> Dodson M (1994), 'The End in the Beginning: Re(de)finding Aboriginality,' 1 *Australian Aboriginal Studies* 2, 5.

<sup>8</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner (2001), *Submission to the United Nations Committee on the Rights of the Child for their Day of General Discussion on the Rights of Indigenous Children (Issue 1)*. Sydney: HREOC. Available at: [http://www.hreoc.gov.au/social\\_justice/croc/sub1.htm](http://www.hreoc.gov.au/social_justice/croc/sub1.htm)

contemporary ways of legally recognising Aboriginality.<sup>9</sup> However Indigenous peoples continue to name and define themselves. For many being Indigenous is less about biological origins and more about relationships.

In New Zealand, contemporary views of Maori identity emphasise its integral 'links to concepts including kin, community, spirituality and a sense of self within the wider collective.'<sup>10</sup> Although there remain 'considerably diverse perspectives on this issue amongst iwi Maori themselves,' Dr Cindy Kiro notes that 'being Maori has a lot to do with how we can support and ensure the safety of our tamariki [children] and mokopuna [grand children] today.'<sup>11</sup> The Mental Health Commission of New Zealand says that '(t)he whanau is viewed as the gateway to the cultural values, distinctive heritage and multiple networks that characterise Te Ao Maori. While not all Maori are able to affiliate to hapu, iwi or a Maori organisation, all are members of a whanau.'<sup>12</sup>

In Canada, the term 'Inuit' has replaced 'Eskimo,' 'First Nation' is often used rather than 'Indian,' and the 'Métis' are peoples originating from the Canadian West whose early ancestors were of mixed heritage (First Nations, or Inuit in the case of the Labrador Métis, and European).<sup>13</sup> First Nations are identifiable as a distinct group with a unique legal status.<sup>14</sup> The term 'Aboriginal Peoples' is used to refer generally to the original peoples of North America without reference to

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<sup>9</sup> The Department of Aboriginal Affairs (1981), *Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders*. Canberra: The Department of Aboriginal Affairs.

<sup>10</sup> Kiro C (Children's Commissioner) (2008), *Challenges for the Future: Opportunities for Maori*. Wellington: Te Mata o Te Tau Academy for Maori Research & Scholarship, Massey University, 5.

<sup>11</sup> Ibid, 5.

<sup>12</sup> Mental Health Commission (2007), *Te Haererenga mo te Whakaoranga 1996-2006: The Journey of Recovery for the New Zealand Mental Health Sector*. Wellington: Mental Health Commission, at 152 cited in Kiro (2008) above n10, 6.

<sup>13</sup> The Royal Commission on Aboriginal People (1996) *Report of the Royal Commission on Aboriginal Peoples*. (Dussault R & Erasmus G, Co-Chairmen), Ottawa: Royal Commission on Aboriginal Peoples, 8.

<sup>14</sup> Blackstock C, Bennett M & De La Ronde R (2005), *A Literature Review and Annotated Bibliography on Aspects of Aboriginal Child Welfare in Canada* (2nd ed). The First Nations Research Site of the Centre for Excellence in Child Welfare and The First Nations Child and Family Caring Society of Canada, 5.

their separate origins and identities. Many nations and tribes such as Mi'kmaq, Dene, and Mohawk identify by either their traditional or common names (for example, 'Siksika' or 'Blackfoot').<sup>15</sup>

In the United States there are 556 federally recognised tribes, 314 federally recognised reservations, and 200 Alaskan Native villages and corporations.<sup>16</sup> Each of these have their own definition of 'American Indian,' which depends on social and cultural contextual factors such as blood ties, children and religious and clan membership, and formal and informal enrolment and census procedures. Some tribes have extended family members, custodians, and accept members through marriage or adoption<sup>17</sup> and some have strict rules regarding matriarchal and patriarchal kinship.<sup>18</sup> Tribal groups have varying requirements for determining tribal membership.<sup>19</sup>

In this thesis the terms 'Indigenous peoples' or 'Aboriginal peoples' will be used to refer to people of indigenous descent from Australia, Canada, the United States and New Zealand when the name of a specific group, or sub group, of peoples is not being used. However in some parts of this thesis 'American Indian' or 'First Nation' and other varied nomenclature is used to retain coherence with the terminology used in legislation, cases and other material being discussed to avoid confusion.

While Indigenous peoples have local and particular traditions there are at a greater level of generality values, shared norms, institutions, ways of ordering the world, family relations, relations with land and community and spirituality which

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<sup>15</sup> The Royal Commission on Aboriginal People(1996) above n13, 8.

<sup>16</sup> Goodluck C & Willetto A (2000), *Native American Kids: Indian Child Wellbeing Indicators*. Portland: The National Indian Child Welfare Association, 22.

<sup>17</sup> Haines R (1997), 'U.S. Citizenship and Tribal Membership: A Contest for Political Identity and Rights of Tribal Self-Determination in Southern California,' 21(3) *American Indian Culture and Research Journal* 211 cited in Goodluck & Willetto (2000) above n16, 22.

<sup>18</sup> Goodluck & Willetto (2000) above n16, 27.

<sup>19</sup> Klein BT (ed) (1998), *Reference Encyclopedia of the American Indian*. New York: Todd Publications, (i), cited in Goodluck & Willetto (2000) above n16, 25.



contribute to a normative 'Indigenous' world which is distinct from the dominant culture. Together with positive values, shared experience of colonialism also contributes to a common experience for many Indigenous peoples of poverty, marginalisation, and loss through a range of experiences including high rates of death due to disease, suicide and trauma. Indigenous traditions and conceptions of the world have in complex ways changed with colonial and modern experiences. The tension between tradition and change has been discussed in considerable detail in the context of native or aboriginal title.<sup>20</sup> A particular concern has been an idealised and frozen in time conception of Indigenous cultures by non-Indigenous decision makers. This thesis acknowledges the importance of Indigenous cultures and takes as a starting point the recognition of Indigenous difference. It also acknowledges the complexity of cultures, the impacts of colonial experiences on Indigenous community and family life, and the understanding that cultures change and adapt over time. These issues are not the subject matter of ,but rather are a necessary background to, the focus of this thesis which is considering whether a human rights framework can advance Indigenous children's welfare and wellbeing.

### **Contemporary Australian child welfare and Indigenous peoples**

Effective contemporary frameworks for addressing Australian Indigenous children's welfare and wellbeing are essential. Indigenous children are over-represented in all indices of disadvantage. It is important that all those indicators of extreme inequality, including inadequate and insufficient housing, lack of appropriate and supported child care and education, lack of adequate policing and welfare services, inadequate income, and inadequate nutrition and health care, are addressed.<sup>21</sup> Many Indigenous children live in environments with alcohol and

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<sup>20</sup> See, for example, Strelein L (2006), *Compromised Jurisprudence: Native Title Cases since Mabo*. Canberra: Aboriginal Studies Press; and Borrows J, Reilly A and Genovese A (2004), 'Claiming the Past: Historical understandings in Australian Native Title Jurisprudence,' 3 *Indigenous Law Journal* 19.

<sup>21</sup> The inequities between Indigenous and non-Indigenous Australians are evident in all spectrums of wellbeing: health, life expectancy, education, employment, income and housing. See, for example, Australian Bureau of Statistics (2010), *National Aboriginal and Torres Strait Islander Social Survey: Users' Guide 2008*. Canberra: Australian Bureau of Statistics. Available at:

other drugs, family and community violence, racism, gambling, pornography, poor health including mental health, poor nutrition, poverty and limited opportunities to participate in the local or wider community. These problems are also frequently experienced by vulnerable non-Indigenous children. However, Indigenous children are not simply a subset of those sections of the community who are poor and disadvantaged.<sup>22</sup> Their inequality is enmeshed in a history of government policies which have dispossessed, marginalised and laid the foundation for ongoing traumatic experiences for many Indigenous children and families.<sup>23</sup> Both the statistics and repeated reviews of child welfare systems across the country tell a story of Australian governments failing Indigenous children, families and communities.<sup>24</sup> The pain, suffering and loss of opportunity for many children and young people is enormous. However, at the same time there is an unrelenting commitment across Indigenous communities to address the problems which beset them and to build on the strengths of Indigenous culture. A growing body of literature points to the importance not only of a secure material world for Indigenous children's wellbeing but also to the importance of a strong cultural identity.<sup>25</sup>

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<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4720.0>. Indigenous peoples have higher levels of contact with child welfare systems in Australia than any other group. They are placed in out-of-home care at a rate nine times higher than all children: Australian Institute of Health and Welfare (AIHW) (2010), *Child Protection Australia 2008-2009: Child Welfare Series no 47*. Canberra: AIHW Canberra: Australian Parliament, 46. The retention rate of Indigenous full time school students, from year 7/8 to year 12 was 39.5% in 2005 compared with the retention rate for all full time school students from year 7/8 to year 12 in 2005 which was 76.6%: Australian Bureau of Statistics (2006), *Schools Australia 2005*. Canberra: Australian Bureau of Statistics, 3.

<sup>22</sup> This thesis, while referring to broader trends with respect to child welfare and, more broadly, children's wellbeing, is focused on Indigenous children and does not attempt to review the extensive mainstream literature on models for the delivery of child welfare services.

<sup>23</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) above n1; Read P (1996), *The Stolen Generations: the Removal of Aboriginal Children in New South Wales 1883 to 1969*. Sydney: NSW Department of Aboriginal Affairs; Haebich A (2000), *Broken Circles: Fragmenting Indigenous Families 1800 –2000*. Fremantle: Fremantle Arts Centre Press. In the Canadian context, see the Royal Commission on Aboriginal People (1996) above n13.

<sup>24</sup> Ibid.

<sup>25</sup> Bamblett M (2007), 'Ten years of truth telling: what Bringing Them Home means to us all' in Secretariat of National Aboriginal and Islander Child Care (ed), *Remember Me – Commemorating the Tenth Anniversary of the Bringing Them Home report*. Melbourne: SNAICC, 8-12; McKenzie B & Morrisette V (2003), 'Social Work Practice with Canadians of Aboriginal background: Guidelines for Respectful Social Work' in Al-Krenawi A & Graham J (eds), *Multicultural Social Work in Canada*. Oxford University, Canada; Blackstock, Bennett & De La Ronde (2005) above

Over the last decade there have been at least 15 reviews into child welfare systems in Australia.<sup>26</sup> These invariably acknowledge the disproportionate contact which Aboriginal and Torres Strait Islander children have with child welfare systems. Most of the reviews make broad statements with respect to the enormity of the problems facing Indigenous children and young people, the incapacity of the child welfare system to address these issues and suggest reforms which, if implemented, would improve child welfare services for Indigenous children but do not either address the systemic underlying issues or recommend fundamental change.<sup>27</sup> There is a tendency within the more recent reviews to acknowledge two

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n14; Libesman T (2011), *Cultural Care for Aboriginal and Torres Strait Islander Children in out of home care*. Melbourne: Secretariat of National Aboriginal and Torres Strait Islander Child Care.

<sup>26</sup> The following is a list of some of the reviews into child protection systems across Australia: Vardon C (Commissioner for Public Administration) (2004), *ACT Government Response to "The Territory as a Parent" Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management*. Canberra: Chief Minister's Department; Allen Consulting Group (2003), *Protecting Children: The Child Protection Outcomes Project (Final Report for the Victorian Department of Human Services)*. Melbourne: Victoria Department of Human Services; Bell T & Libesman T (2005), *Aboriginal and Torres Strait Islander Child Outcomes report: report on national and international child protection frameworks for Indigenous children*. Melbourne: Victoria Department of Human Services; Crime and Misconduct Commission (2004), *Protecting Children: An inquiry into abuse of children in foster care*. Brisbane: Crime and Misconduct Commission; Gordon S, Hallahan K & Henry D (2002), *Putting the Picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*. Perth: State Law Publisher; Layton R (QC) (2003), *Our Best Investment: A State Plan to Protect and Advance the Interests of Children*. Adelaide: Government of South Australia; Board of Inquiry into the Child Protection System in the Northern Territory (2010), *Growing them Strong, Together*. Darwin: Northern Territory Government; Wood J (AO QC) (2008), *Special Commission of Inquiry into Child Protection Services in NSW*. Sydney: New South Wales Government; Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Anderson P & Wild R) (2007), *Little Children are Sacred*. Darwin: Northern Territory Government; Pocock J (2003), *State of Denial: The Neglect and Abuse of Aboriginal and Torres Strait Islander Children in the Northern Territory*. Melbourne: The Secretariat of National Aboriginal and Islander Child Care (SNAICC); Robertson B (2000), *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*. Brisbane: Department of Aboriginal and Torres Strait Islander Development; Mulligan T (2007), *Commission of Inquiry Report (Children on Anangu Pitjantjatjara Yankunytjatjara (APY) lands*. Adelaide: South Australian Government; Aboriginal Child Sexual Assault Taskforce (2006), *Breaking the silence: Creating the future : Addressing child sexual assault in Aboriginal communities in NSW*. Sydney: NSW Attorney General's Department.

<sup>27</sup> For example, recommendations with respect to the reduction of alcohol availability and consumption in Aboriginal communities. All the reviews have some recommendations with respect to this issue. Wood (2008) above n26 recommends the development of procedures to reduce the availability, sale and use of alcohol in Aboriginal communities. The Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n26 and the Aboriginal Child Sexual Assault Taskforce (2006) above n26 also recommended urgent action to reduce alcohol consumption in Aboriginal communities. A number of reviews defer to the need

countervailing trends in terms of responding to child welfare issues impacting on Indigenous communities. The first reflects the advocacy of Indigenous children's organisations with acknowledgment of the relationship between cultural strength and children and young peoples' welfare; the need to involve Indigenous communities in their children's wellbeing,<sup>28</sup> and the need for an interagency or multifaceted response to Indigenous children's welfare.<sup>29</sup> The second reflects the influence of neo-liberal punitive responses to welfare more broadly, with recommendations for income quarantining and ironically greater government oversight over Indigenous communities as a way of addressing child abuse, in particular sexual abuse of children.<sup>30</sup> In a number of reviews, recommendations drawing on both these responses to child welfare are made.<sup>31</sup> Both these responses

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for a separate inquiry and indicate that the issues facing Indigenous children are outside the scope or capacity of the current inquiry. For example, the 2004 Victorian review (Allen Consulting Group (2004) above n26) recommended that a separate report into Aboriginal child welfare be commissioned which resulted in the report by Bell & Libesman (2005) above n26 and the South Australian Children in State Care Inquiry commissioned a separate report into allegations of sexual abuse of children on Anangu Pitjantjatjara Yankunytjatjara (APY) lands (Mulligan T (2007) above n26).

<sup>28</sup> For example, Board of Inquiry into the Child Protection System in the Northern Territory (2010) above n26, recommendations 4.1 to 4.4; Queensland Crime and Misconduct Commission (2004) above n26, recommendation 8.12; Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n26, recommendation 1.

<sup>29</sup> For example, Board of Inquiry into the Child Protection System in the Northern Territory (2010) above n26, recommendations 4.5 and 4.6; Queensland Crime and Misconduct Commission (2004) above n26, recommendation 8; Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n26 recommendation 40; Vardon (2004) above n26, recommendations 3.2 and 3.3; Council of Australian Governments (2009), *Protecting children is everyone's business: national framework for protecting Australia's children 2009-2020*. Canberra: Commonwealth of Australia, 28-29.

<sup>30</sup> The influence of neo-liberalism in child welfare reform can be seen with respect to the ideology which underpins welfare reforms which are intended to make Indigenous peoples and communities comply with European values, in particular economic values. While measures such as quarantining income, compulsory acquisition of land and lease back arrangements to the Commonwealth under, for example, the Northern Territory Emergency Response require greater rather than reduced government intervention in Aboriginal families and communities, which is ironically antithetical to the neo-liberal ideal of minimising government involvement and maximising a laissez faire response to social and economic issues, the ideology which underpins these measures is to individualise and privatise welfare, economic and social arrangements as a medium term outcome. For a discussion of neo-liberalism in welfare see, for example, Carney T (2007), *Welfare reform – following the work first way*, *Social Policy Working Paper Number 7*. Melbourne: Brotherhood of St Lawrence and Centre for Public Policy, University of Melbourne; and for a critique of neo-liberalism in social work practice see Allan J, Briskman L & Pease B (2009), *Critical Social Work – Theories and Practice for a Just World*. Sydney: Allen and Unwin.

<sup>31</sup> For example, Wood (2008) above n26 recommends income management but only with respect to families where there are serious child protection concerns and also an Aboriginal community empowerment approach through the involvement of Aboriginal people in decision making; the

take place within the context of state and territory child welfare systems which are child protection focussed and predominantly operate reactively to notifications of abuse and neglect rather than with the provision of preventative or early intervention services. In addition to state and territory reviews the Council of Australian Governments has developed a National Framework for Protecting Australia's Children which is a 12 year plan for co-operation between State and Territory Governments and the Federal Government with respect to child welfare. This framework does not change governmental responsibility for child welfare, or the structural frameworks within which child welfare services are offered, but rather provides a more co-ordinated response between governments with greater emphasis on early intervention and prevention.<sup>32</sup>

Numerous inquiries, including inquiries which are specifically addressing child welfare and family violence in Aboriginal and Torres Strait Islander communities, have identified the high levels of violence and child abuse within Aboriginal communities and the failure of child welfare systems to adequately respond to these problems.<sup>33</sup> Inquiries which are either specifically focussed on Indigenous communities, or which have a focus within the mainstream review on Indigenous

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Council of Australian Governments (2009) above n29 has an eclectic mix of strategies to support outcome 5 of the National Framework for Protecting Australia's children which is that, 'Indigenous children are supported and safe in their families.' These include planning with Aboriginal organisations the transfer of guardianship responsibilities to designated Aboriginal organisations and ongoing support for and strengthening of the Northern Territory Emergency Response, 29 and 30. These strategies are underpinned by different approaches to child welfare and wellbeing which have been initiated by different governments with differing underlying principles and objectives.

<sup>32</sup> The National Framework for Protecting Australia's children adopts a public health model to address child welfare with a preventative focus with support for universal services for all families (health, education etc), secondary services for families that are vulnerable and need additional support, and tertiary services (that is child protection services) as a last resort: Council of Australian Governments (2009) above n29, 7. For a more detailed overview of the public health model see O'Donnell, M, Scott D & Stanley F (2008), 'Child abuse and neglect - is it time for a public health approach?' 32(4) *Australian and New Zealand Journal of Public Health* 325. The Federal level of government which does not have legislative responsibility for child welfare does have responsibility for funding many of the services pertaining to universal family support such as health care. See also Early Childhood programs in Chapter 7.

<sup>33</sup> See, for example, Gordon, Hallahan & Henry (2002) above n26; Robertson (2000) above n26 and Pocock (2003) above n25. Pocock found that the failure by the Northern Territory child protection service to respond to Indigenous children's protection needs was so significant that the protection service was viewed by non-government children's agencies as almost completely ineffective.

child welfare, also often refer to an approach which builds on the strength of Aboriginal communities and which suggest a whole community approach to responding to Indigenous children's welfare.<sup>34</sup> However, within the prevailing individualistic case based and bureaucratic child welfare framework, these approaches fail to transfer into recommendations which identify and differentiate between individual responsibility for child abuse or neglect and institutional responsibility, for example where children face chronic poverty, homelessness and preventable disease. A community based approach to child welfare requires a rethink of the structural framework within which Indigenous child welfare and wellbeing is addressed, and how responsibility is shared between Indigenous communities and governments.<sup>35</sup>

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (NISATSIC) while initiated to look historically at government policies of forced and unjustified removal of Aboriginal and Torres Strait Islander children from their families devoted a number of chapters to contemporary experiences of removal through child welfare and juvenile justice systems.<sup>36</sup> With an acute sensitivity to the historical impacts of policies of dispossession, violence and control NISATSIC considered contemporary child welfare through a historical lens. NISATSIC found that child welfare systems in all jurisdictions were failing Indigenous children; they were embedded with the imprint of prior colonial policies; and they could not simply be reformed or amended but needed to be completely reconstituted.<sup>37</sup> The National Inquiry recommended a process for transferring responsibility for child welfare to

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<sup>34</sup> Board of Inquiry into the Child Protection System in the Northern Territory (2011) above n26; Gordon, Hallahan & Henry (2002) above n26.

<sup>35</sup> A case study of the case based bureaucratic response to child welfare with respect to Aboriginal children is provided in Chapter 3 and a critical assessment of why bureaucratic decision making gravitates against the taking of moral responsibility for Indigenous children's welfare or good outcomes is provided in Chapter 4.

<sup>36</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) above n1, Chapters 20-26.

<sup>37</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) above n1. See also Cunneen C & Libesman T (2000), 'Postcolonial trauma: the contemporary removal of Indigenous children and young people from their families in Australia,' 35(2) *Australian Journal of Social Issues* 99.

Indigenous communities in accordance with their capacity and desire.<sup>38</sup> The recommendations of NISATSIC, while influential in terms of placing community control and principles of self-determination within the public domain, have not been implemented within a human rights or self-determination framework. NISATSIC is discussed in further detail in Chapter 6.

A number of inquiries found that violence and chronic deprivation were ignored or viewed as ‘normal’ for Aboriginal children.<sup>39</sup> The lack of trust between Indigenous communities and government agencies such as child protection authorities and police which address abuse and neglect within communities is also frequently identified. Usually reports suggest that greater trust should be built but do not identify concrete ways in which this can be done or the depth of abusive historical experience which this mistrust is built upon. The lack of an equitable distribution of resources to Indigenous remote and rural communities has also been identified in a number of reviews together with the fragmented and limited provision of services to vulnerable and at risk Indigenous communities.<sup>40</sup> The need to address intergenerational trauma and the importance of healing programs is also frequently identified.<sup>41</sup> While these observations and recommendations implicitly acknowledge the colonial history which underpins child welfare issues for Indigenous children and young people they do not systematise the implications of, or responses to, this experience.<sup>42</sup>

The Aboriginal and Torres Strait Islander child placement principle is recognised as an important way of supporting Indigenous culture and identity by most

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<sup>38</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) above n1, recommendations 43; Cunneen & Libesman (2000) above n37.

<sup>39</sup> See for example case study Chapter 3; Pocock (2003) above n26; Board of Inquiry into the Child Protection System in the Northern Territory (2010) above n26; Gordon, Hallahan & Henry (2002) above n26; and Robertson (2000) above n26.

<sup>40</sup> For example Gordon, Hallahan & Henry (2002) above n26; Wood (AO QC) (2008 ) above n26; Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n26.

<sup>41</sup> See, for example, Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n26, with recommendation 75 addressing community based Aboriginal violence intervention and treatment programs.

<sup>42</sup> For example, they do not look at how to decolonise child welfare or look at responses to Indigenous children’s welfare or wellbeing as reparations for past wrongs.

reviews.<sup>43</sup> This reflects long term advocacy by Indigenous children's organisations, both nationally and internationally, with respect to the relationship between communities retaining their children and the survival of their culture and collective identity.<sup>44</sup> However, as is recognised by a number of reviews, implementation of the placement principle requires considerable resourcing and support. Reviews have generally failed to look closely at the factors which are impacting on the limited implementation of the placement principle. These include the limited capacity for non-Indigenous child welfare agencies to engage with or recruit Indigenous kin and foster carers because of fear and mistrust on both sides,<sup>45</sup> a lack of cultural understanding or competence on the part of many non-Indigenous child welfare workers and agencies and a lack of knowledge with respect to kinship and community networks.<sup>46</sup> Further, Indigenous communities face the highest levels of poverty in Australia, have inequitable access to housing and other resources which are required for the placement of children in kin or foster care, and have a gross over-representation in the placement of children and young people in out-of-home care compared to non-Indigenous children.<sup>47</sup> The combination of these factors make compliance with the placement principle challenging. A number of reviews have recommended, particularly at the out-of-home care placement stage of intervention, greater engagement between child welfare departments, Aboriginal children's organisations and Aboriginal communities.<sup>48</sup>

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<sup>43</sup> See, for example, Vardon (Commissioner for Public Administration) (2004) above n26, recommendations 8.13, 8.14 and 8.15; and Crime and Misconduct Commission (2004) above n26, recommendation 8. For review of the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle see Libesman (2011) above n25.

<sup>44</sup> See Chapters 5 and 6.

<sup>45</sup> Libesman (2011) above n25. Ford Review, recommendation 44 acknowledges the need for Aboriginal agencies to recruit and support Indigenous out-of-home carers: Ford P (2007), 'Review of the Department of Community Development.' Available at: [http://www.merredin.com/merredin/d/Residents/Your\\_Community/Government\\_Portal/Department\\_for\\_Child\\_Protection/Downloads/FXQZZ639L6QKMTE12KI2P3UA9UC4CZ/0A2UICTV6IL2OM3.pdf/DCDRPTFordReview2007.pdf](http://www.merredin.com/merredin/d/Residents/Your_Community/Government_Portal/Department_for_Child_Protection/Downloads/FXQZZ639L6QKMTE12KI2P3UA9UC4CZ/0A2UICTV6IL2OM3.pdf/DCDRPTFordReview2007.pdf)

<sup>46</sup> Public Accounts and Estimates Committee (2001), *Report on the Review of the Auditor-General's Special Report No 43 –Protecting Victoria's Children: The Role of the Department of Human Services*. Melbourne: Parliament of Victoria, recommendation 16.

<sup>47</sup> Libesman (2011) above n25.

<sup>48</sup> See for, example, Ford (2007) above n45, Recommendation 41.



A number of reviews have specifically focussed on, or have been initiated in response to, child sexual abuse within Aboriginal or Torres Strait Islander communities.<sup>49</sup> These have generally recommended a multi-focussed response including increased law enforcement, early intervention and prevention strategies and building community capacity and leadership.<sup>50</sup> These three foci were central to the Aboriginal Child Sexual Assault taskforce (NSW).<sup>51</sup> The Commission of Inquiry into Children on Anangu Pitjantjatjara Yankunytjatjara (APY) lands recommended changes to governance on APY lands which would create a safer environment for disclosing sexual abuse and for the establishment of prevention and treatment programs with protocols established between the state child protection body and APY governing bodies.<sup>52</sup> Recommendations were also made for training Aboriginal professionals and for the development of drug and alcohol misuse and other mental health programs which address problems which are associated with child abuse.<sup>53</sup> The *Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (The Little Children are Sacred Report)* found that sexual abuse of Aboriginal children in Aboriginal communities in the Northern Territory is a serious and widespread problem with

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<sup>49</sup> See, for example, The Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n26; NSW Aboriginal Child Sexual Assault Task Force (2006) above n26; and Gordon, Hallahan & Henry (2002) above n26, which was initiated in response to the suicide of a 15-year-old girl who had faced sexual abuse. Violence against Aboriginal and Torres Strait Islander women and children is an issue which has been raised, most frequently by Indigenous women, for more than two decades. See, for example, the Special Issue of the *Aboriginal Law Bulletin* which focussed on women and violence: Aboriginal Law Centre (1990), *Aboriginal Law Bulletin*, 2(46); and the powerful report of the Task Force on Violence against Aboriginal Women, Robertson (2000) above n26.

<sup>50</sup> See, for example, Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n26, recommendations 5, 6 and 7.

<sup>51</sup> NSW Aboriginal Child Sexual Assault Task Force (2006) above n2.

<sup>52</sup> Mulligan (2007) above n26.

<sup>53</sup> A large number of reviews which look more broadly at child welfare refer to the relationship between alcohol and other drug abuse and violence against women and children. Recommendations with respect to addressing drug and alcohol misuse tend to be very general. For example, the Queensland Crime and Misconduct Commission (2004) above n26 recommends that the Department of Community services provide 'child protection services that take account of the drug- and alcohol-related problems besetting some remote communities' at recommendation 8.10; The Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n26 provides more detailed recommendations with respect to measures to address access to alcohol. See recommendations 61- 69 and recommendation 70 which addresses other drug misuse.

many cases unreported.<sup>54</sup> This report related the abuse to a breakdown of Aboriginal culture and society. Recommendations were made specifically relating to community education with respect to child sexual abuse and how to respond to it; the impact of drugs and alcohol, pornography and gambling on communities, families and children; and the value of schooling and education for children. The report determined that the current abuse is founded in entrenched social problems which have developed and have been ignored over a long period. Many of the report's recommendations were based on building community capacity and leadership and co-operation between governments and Aboriginal communities.

The Federal Government responded with the Northern Territory Emergency Response (NTER), which rejected the central platforms of the *Little Children are Sacred Report*, these being support for culture and community development and participation and co-operation between all stakeholders. The NTER took place separately from the Northern Territory child welfare system, the recommendations of the *Little Children are Sacred* report or any child welfare framework nationally or internationally. Further it was initiated without consultation with the Aboriginal communities it was meant to benefit, the Northern Territory Government or any other organisation.<sup>55</sup> The NTER was initiated in June 2007 and was meant to be implemented in three stages. The third stage was meant to be completed in 2011 with the provision of services to Northern Territory communities based on the 'same norms and choices that other

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<sup>54</sup> The finding that sexual abuse of children is widespread and significantly underreported was also made by the NSW Aboriginal Child Sexual Assault Task Force (2006) above n26 and in Gordon, Hallahan & Henry (2002) above n26.

<sup>55</sup> While the NTER took place with no consultation, subsequent to the Labour Federal government's election, a range of critical reports have pressured the Government into undertaking consultations. See, for example, Anaya J (UN Rapporteur from the Human Rights Council) (2010), *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people*, UN Doc A/HRC/15/37Add.4. Available at: <http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitAustralia.pdf>; and the Northern Territory Emergency Response Review Board (NTER Review Board) (2008), *Report of the NTER Review Board*. Canberra: Australian Government. These however have been stringently criticised. See, for example, Nicholson A, Watson N, Vivian A, Longman C, Priest T, De Santolo J, Gibson P, Behrendt L & Cox E (March 2012), *Listening but not hearing – A response to the NTER stronger future consultations June to August 2011*. Sydney: Jumbunna Indigenous House of Learning, University of Technology.

Australians enjoy.’<sup>56</sup> The first phase, which was framed as an emergency measure to protect children, took place in 78 proscribed communities and included the compulsory acquisitions of Aboriginal land, the introduction of government managers to administer communities, doctors were brought in to conduct health checks on Aboriginal children, alcohol and pornography were banned and half of all welfare payments were quarantined to be used only to purchase necessities from designated stores. The first stage was facilitated with the Australian army securing communities and building houses and facilities for the new government managers. The NTER stands apart from other child welfare reform in Australia and internationally with its overt paternalism and, until 2009, the explicit exclusion of the *Race Discrimination Act 1975* (Cth) from its measures. In 2008, over a decade after the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (NISATSIC), the then Labor Prime Minister Kevin Rudd delivered from Parliament House a moving ceremonial apology to the stolen generations.<sup>57</sup> At the same time his government not only refused to compensate those affected and make reparation for the wrongs which the government had now apologised for, but was continuing to execute the NTER, with its paternalism echoing the sentiment of the protection legislation which facilitated past removals. The NTER is discussed below and in Chapter 6.

The magnitude of vulnerability and risk facing Indigenous children, the need to respond to their over-representation in all Australian child welfare systems and the need to take measures to improve their welfare and life chances has been extensively documented and acknowledged. However, the implementation of recommendations from this plethora of reviews has been hampered by a lack of an alternative structural framework within which recommendations can be framed and coherently implemented and a lack of adequate funding to implement them.

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<sup>56</sup> Northern Territory Emergency Response Taskforce (2008), *Final Report to Government – June 2008*. Canberra: Department of Families, Housing, Community Services and Indigenous Affairs, 7.

<sup>57</sup> See transcript, audio and audiovisual copies of the speech on the Australian Government’s official website, available at: <http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>.

While a number of inquiries into state and territory child welfare systems identified the need for community based responses, they were then unable to fit these recommendations into reform of the mainstream child protection systems which are premised on bureaucratic and individualised responses to abuse and neglect. An approach which looks historically and collectively at Indigenous community experience does not fit neatly with the individual case based responses to abuse and neglect which is the dominant and presumed child welfare framework in all Australian jurisdictions. This thesis considers whether a pluralised human rights framework for Indigenous child welfare can respond to the historical and collective experiences of Indigenous peoples and offer a more effective way of responding to Indigenous children who are vulnerable and at risk.

### **Thesis outline**

#### **Chapter 2 – International Law and the Rights of Indigenous Children**

Chapter 2 considers competing conceptualisations of international human rights, as they are framed within UN human rights jurisprudence and how Indigenous peoples have engaged with and transformed their meaning. Consideration is also given to how and whether this experience is relevant to the welfare and wellbeing of Aboriginal and Torres Strait Islander children at a local level. The focus is on UN human rights jurisprudence which has particular relevance to Indigenous children and young people. Human rights are not a static given but rather are dependent on how they are framed and understood. This research is therefore not about discovering and enunciating human rights law and then testing if it sets an adequate standard for Indigenous children and young people. Rather it considers how competing conceptions of human rights translate into different social and political relationships, and the possibilities which these relationships offer for addressing Indigenous children and young peoples' welfare and wellbeing.

Rights can be framed as fixed and universal standards which are temporal and independent of cultural or historical influence. In the alternative they can be

framed as aspirational and with the capacity to pluralise, challenge and generate meaning. How do these competing understandings pertain to different ways of responding to Aboriginal and Torres Strait Islander children's welfare and wellbeing? Consideration is given to ways in which both pluralised and universalised understandings of human rights are embodied in developing and established norms; how there is tension and contestation between them; and whether recognition of human rights within child welfare frameworks can help to facilitate recognition and inclusion of Indigenous understandings in responses to Indigenous children and young peoples' welfare and wellbeing. If human rights are founded in the traditions and experiences of the diversity of those who are included in the rights community, and limited to the extent to which this community can accommodate the diversity of its members in form and substance, how can judgments about the welfare and wellbeing of children be made which are not simply subjective and based on indeterminate standards? The tension between the indeterminacy of plurality and the solidity of universality is considered with respect to the formation of international human rights standards in Chapter 2 and with respect to making judgments about child welfare matters in Chapter 4.

The formal and permanent inclusion of Indigenous peoples in the UN human rights system is enormously significant. This brings aspects of Indigenous peoples' history, experiences and voices into UN forums, not as 'politely received guests' but as members of the international community.<sup>58</sup> This is part of a process, which at an international level has over the past two decades been drawing new contours with respect to state sovereignty and which in turn creates possibilities of shared jurisdiction at a national level. While the meaning of rights is created by those participating in all the forums through which human rights jurisprudence is generated, these structures in turn influence those who participate and frame their claims in the language and through the mechanisms of UN and domestic forums.

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<sup>58</sup> Rosenfeld M (2006), 'Equality and the Dialectic Between Identity and Difference' in Payrow Shabani A (ed), *Multiculturalism and law: a critical debate*. Cardiff: University of Wales Press, 40.

Human rights jurisprudence is no doubt mediated and limited by the constraints of power imbalance and the interplay between established and contested ways of understanding, conceptualising and implementing rights. Developing human rights rely on, and become embedded within, established institutions, both at a national and international level. Indigenous and others peoples' conceptualisation of their rights claims through national and international institutions therefore resists but also generates aspects of dominant identity and influence. The impossibility of separating the claims and their meaning and transformation from the language and structure of existing (albeit transforming) institutions and processes is considered in particular in Chapter 2 but also across the thesis.

### **Chapter 3 – The Legacy of the Stolen Generations**

Chapter 3 considers how an Australian Government child welfare department responded to Aboriginal and Torres Strait Islander children and young people with substantiated neglect and emotional abuse findings against them. The limitation with non-Indigenous bureaucracies responding to Indigenous children's needs is investigated in this case study which evaluates how DOCS responded to Aboriginal and Torres Strait Islander children and young people under its care in NSW and why this Department, which had a commitment to servicing Indigenous children appropriately, was not able to fulfil this commitment. The case study investigates what kinds of social and political relationships develop between Indigenous children, families and communities in the context of a bureaucratic government department's 'care' for Indigenous children and young people. The complexities of post-colonial life are highlighted in the domain of child welfare. This is because the trauma of colonialism is experienced acutely by children and young people and is evident in their high levels of contact with child welfare systems.

The case study, which found a disturbing disregard for the humanity of many of the Indigenous children under its care, considers how the Department addressed (or failed to address) intergenerational experiences of removal, Indigenous

identity and poverty related problems. It also evaluates how the Department placed children in out-of-home care, carried out psychological and other assessments of children and families, and how common problems experienced by families who had contact with the department such as family violence, drug and alcohol abuse or mental health problems were addressed. Consistent with a large body of literature with respect to both Indigenous and non-Indigenous children's wellbeing, a child protection focus which fails to resource early intervention and prevention of child abuse, is doomed to face the pressures and consequent failure which is evident in this case study and more broadly in Australian child protection systems.<sup>59</sup> While there has been a shift in philosophy from protection to prevention and early intervention in Australia and internationally, this has not been matched with adequate legislative reform or resources.<sup>60</sup> Consideration is given to how case work is conducted, the impact of inadequate resourcing and how Indigenous children and young peoples' community and historical context is addressed. All children and young people in the case study experienced a significant exacerbation of their problems while under the Department's care and almost all lived insecure lives marked by constant fear of violence, despair and deprivation. The reasons why a bureaucratic mode of decision making harnesses an institutional environment of poor decision making and systemic failure to

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<sup>59</sup> With respect to a public health response to child abuse and neglect see above n32. See also Chapter 7 with respect to Early Childhood programs.

<sup>60</sup> The ever increasing number of children coming to the attention of child welfare departments can be attributed to a number of factors including increased awareness of abuse and neglect (in particular publicity around some types of abuse such as sexual abuse); mandatory reporting by groups including, in some jurisdictions, people with little or no child protection expertise resulting in large numbers of non-substantiated cases reported. See Cashmore J, Scott D & Calvert G (2008), *Think child, think family, think community: From a child protection system, to a system for protecting children (Joint Submission to the Special Commission of Inquiry into Child Protection Services in NSW)*. Sydney: NSW Commission for Children and Young People. Available at:

[http://kids.nsw.gov.au/uploads/documents/childprotectionservices\\_joint\\_submission.pdf](http://kids.nsw.gov.au/uploads/documents/childprotectionservices_joint_submission.pdf). For a list of who is required to report and the kinds of maltreatment which must be reported see Higgins D, Bromfield L, Richardson N, Holzer P and Berlyn C (2010), *Mandatory reporting of child abuse*. Canberra: Australian Institute of Family Studies. Available at:

<http://www.aifs.gov.au/nch/pubs/sheets/rs3/rs3.htm>; increased polarisation of wealth and poverty in the community, and harsher government policies with respect to welfare and support for marginalised and disaffected sections of the community. See, for example, Martin S (2007), *Welfare reform, the underclass thesis and the process of legitimising social divisions*. Melbourne: The Australian Centre, Melbourne University. Available at: <http://arts.monash.edu.au/psi/news-and-events/apsa/refereed-papers/public-policy/martins.pdf>. Indigenous communities are affected by all of these factors in an amplified manner because of their experiences of colonisation.

respond to Indigenous children and young people's welfare or wellbeing is considered in Chapter 4.

Since this case study some attempts have been made to service Indigenous communities in a culturally appropriate way. These reforms are discussed in Chapter 6 which addresses Australian legislative frameworks for delivering child welfare services to Indigenous children and young people. However, the reforms discussed have been hampered by the crises driven, individualised and de-contextualised responses to substantiated findings of abuse or neglect which are illustrated in the case study. This case study investigates the generic (the impact on all children including Indigenous children) and the specific impact which bureaucratic delivery of child welfare services has on Aboriginal and Torres Strait Islander children who come to the attention of a mainstream bureaucratic child welfare department.

#### **Chapter 4 - Locating Moral Responsibility**

Drawing on the case study, consideration is given to what kinds of structures inhibit and what structures promote moral and fair judgments with respect to Aboriginal and Torres Strait Islander children and young peoples' welfare and wellbeing. The reasons for the failure of bureaucratic decision making and consideration of whether incorporation of Indigenous peoples' participation in decisions about their children's welfare will result in better outcomes is analysed in Chapter 4. This chapter reflects on how substantially different experiences can be incorporated into decision making with a particular focus on the exercise of judgment in decision making with respect to Indigenous children's welfare.

Aboriginal and Torres Strait Islander children, and Indigenous children in comparative jurisdictions such as New Zealand, the United States and Canada, who have also experienced the onslaught of colonialism, are amongst the most vulnerable in their countries. A particular focus with respect to rights and inclusive judgment therefore relates to how those most marginalised can have



their experiences included in decision making processes. This question is also considered comparatively with respect to child welfare frameworks in Chapters 5 and in the Australian contexts in Chapter 6.

There is a concern in child welfare systems nationally and internationally with universal standards and that Indigenous children's organisations and communities exercising jurisdiction over their children's welfare and wellbeing may lead to child welfare frameworks which do not meet 'societies'' standards of protection which should be afforded to all children. These fears have gravitated against decentralised child welfare systems, departments relinquishing control to Indigenous agencies and especially against governments transferring jurisdiction from mainstream standardised governing legislation to Indigenous communities. Chapter 4 examines the underlying presumptions which inhere in the idea that a single, universal system will offer the safest and best way to address all children's wellbeing. It considers whether a human rights framework can provide ways of developing pluralised frameworks for Indigenous children's wellbeing which can offer the opportunity to devolve jurisdiction to Indigenous communities where there is the desire and capacity, while retaining standards which protect all vulnerable children. There is great interest and excitement in many communities about the renewal of cultural practices and building on Indigenous community strengths such as extended family.<sup>61</sup> Chapter 4 explores how the involvement of Indigenous peoples in their children's welfare and wellbeing influences understandings of Indigeneity in the context of child welfare and more broadly how this involvement influences child welfare work.

Chapter 4 focuses on the relationship between making judgments with respect to child welfare matters and human rights principles. Will the same criteria apply with respect to evaluating how for example to respond to abuse and neglect experienced by Indigenous children within a human rights framework compared

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<sup>61</sup> For a discussion of the value of cultural knowledge and reviving cultural practices for securing identity, healing and wellbeing see Wharf B and McKenzie B (2010), *Connecting Policy to Practice in the Human Services*. Canada: OUP, especially Chapters 6 and 10.

to a case based system of decision making from within a bureaucracy? Consideration is given to what elements are necessary to make responsible decisions about Indigenous children's wellbeing and whether inclusion of Indigenous decision making, in the form of shared jurisdiction, would undermine the impartiality of decision making processes making them subjective and thereby illegitimate? Can child welfare laws and decision making be pluralised while adhering to foundational principles of democracy such as equality and the rule of law? Is there some common ground across which difference can be included in decision making processes without subsuming that difference as simply an interest amongst many in the dominant decision making paradigm? Chapter 4 considers how participatory decision making could impact on the relationship between service providers and Indigenous children and families, their understanding of the problems faced by Indigenous children and families and issues with respect to the legitimacy and efficacy of decision making with respect to Indigenous children's welfare.

## **Chapter 5 – Comparative Legal Frameworks**

Child welfare systems in the United States, Canada and New Zealand are described and evaluated in terms of how they have reformed their child welfare legislation to incorporate greater levels of Indigenous participation in decision making with respect to their children's welfare and wellbeing. The claim to self-determination is closely associated with both cultural rights and the right of Indigenous peoples to participate in decisions which impact on their lives. The meaning of and extent to which principles of self-determination have been incorporated into child welfare legislative frameworks is explored in Chapters 5 and 6 which review international and national child welfare frameworks with respect to Indigenous children and young people. Chapter 5 examines the shifting exercise of jurisdiction by Indigenous peoples with respect to their children's welfare and wellbeing at a national level in the United States, Canada and New Zealand. It considers how rights which are claimed form part of an interactive process between established institutions and their transformation.

Indigenous children and young peoples' contemporary welfare is closely associated with colonial experiences of dispossession and violence. While each jurisdiction and community has its own particular history of colonisation there are commonalities with respect to the impact of forced and unjustified removals of children from their families, the undermining of cultural traditions and norms, the loss of traditional lands and the marginalisation of Indigenous peoples from the economic and social benefits of colonial society. A brief historical review of colonial impacts on Indigenous children's welfare is therefore provided before contemporary child welfare frameworks in each jurisdiction are reviewed.

The legislative models reviewed range from imposed and paternalistic frameworks, which fail to acknowledge Indigenous peoples' difference or the specific impacts of colonialism on child welfare, to models which recognise Indigenous legislative, judicial and administrative authority. In national legislation across the jurisdictions, and reflecting parallel tensions with the recognition of Indigenous rights in international law, there is tension between recognition of the collective rights of Indigenous communities and the individual rights of the child. The contrasting values reflected in this tension and ways in which these are reconciled or exacerbated is explored across the chapter.

While constitutional arrangements, colonial histories and Indigenous traditions differ across jurisdictions, the influence of globalised Indigenous relations on children's organisations and international human rights law is evident in normative expectations with respect to child welfare frameworks for Indigenous children in comparative jurisdictions. These expectations include recognition of the significance of cultural care for Indigenous children's welfare and wellbeing and related principles of self-determination. Chapter 5 describes and evaluates reforms to child welfare legislation, and related administrative processes, which have incrementally been adopted in each jurisdiction in response to Indigenous advocacy. It is particularly interested in the imaginative and persuasive capacity

of human rights law and global interactions to challenge, resist and transform values and understandings with respect to Indigenous children and young peoples' welfare and wellbeing at a national level through law reform. This influence is evident in the adoption of an Aboriginal child placement principle, cultural recognition, and recognition of Indigenous peoples' rights to participate in child welfare processes impacting on their children, families and communities across all jurisdictions. However the extent to which Indigenous peoples' right to self-determination is recognised, the manner in which recognition is accorded and the boundaries which Indigenous children's organisations are pushing with respect to the exercise of jurisdiction over their children's welfare and wellbeing varies considerably across and within the United States, Canada and New Zealand.

## **Chapter 6 - Australian Legal Child Welfare Frameworks**

Child welfare systems in Australia are evaluated in terms of how international human rights principles and experiences in the United States, Canada and New Zealand have influenced law reforms with respect to the inclusion of Aboriginal and Torres Strait Islander peoples in decision making with respect to their children's welfare and wellbeing. This chapter, while reviewing child welfare legislation nationally, focusses on two contrasting case studies: the incorporation of an Aboriginal and Torres Strait Islander child placement principle into child protection legislation with particular reference to the state of Victoria; and the paternalistic NTER which, as discussed above, is a Federal Government response to Aboriginal child welfare in the Northern Territory. The NTER, in contrast to state and territory law reforms with respect to Aboriginal child welfare, rejected human rights principles or comparative experience from other Australian or international jurisdictions.

Aboriginal and Torres Strait Islander peoples' history of advocacy with respect to their right to participate in decisions with respect to their children's welfare and wellbeing, and more broadly to retain their cultural traditions, frame their

contemporary claims and national and international advocacy.<sup>62</sup> The relative effectiveness of their advocacy with respect to recognition of principles of self-determination in the area of child welfare compared with the lack of recognition with respect to principles of self-determination in the area of community development is contrasted. This is most sharply illustrated with the NTER, which attempts to address child welfare with measures which target underlying structural disadvantage but does so in a manner which is paternalistic and fails to include Aboriginal peoples.

Contemporary Australian child welfare legislation, which falls within the jurisdiction of states and territories, is attempting to address Indigenous children and young peoples' welfare in a manner which incrementally transfers aspects of responsibility for Indigenous children to Indigenous organisations.<sup>63</sup> However, as the plethora of reviews referred to above indicate, despite reforms to child welfare systems in each state and territory, contemporary mainstream responses to child welfare have not been able to address the deep set underlying causes of vulnerability and risk experienced disproportionately by Indigenous communities. This is reflected in the ongoing gross over-representation of Aboriginal and Torres Strait Islander children in child welfare systems nationally.<sup>64</sup> These require structural reforms which target community development and the systemic

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<sup>62</sup> Briskman L (2003), *The Black Grapevine – Aboriginal Activism and the Stolen Generations*. Sydney: Federation Press.

<sup>63</sup> The more inclusive understanding of child welfare is part of a broader shift and contestation of Australian historiography. See, for example, Attwood B and Markus A (1999), *The Struggle for Aboriginal Rights: A Documentary History*. Sydney: Allen and Unwin; Goodall H (1996), *Invasion to Embassy: Land in Aboriginal Politics, 1770-1972*. Sydney: Allen and Unwin; Reynold H (1989), *Dispossession*. Sydney: Allen and Unwin. They are also part of a shift in understanding of mainstream child welfare issues requiring policy and legislation which is attentive to local communities, families within communities, and individual children's particular circumstances understood in their historical, social and economic contexts. For a case study of a holistic approach to children living in a disadvantaged community see the discussion of Tallaght West, Ireland, where the local community has been targeted with new specialist services for individual children and families and there has been an integration and improvement of existing services, and improvements have been made to the neighbourhood see Cashmore, Scott & Calvert (2008) above n60, 34.

<sup>64</sup> Australian Institute of Health and Welfare (2011), *Child protection Australia 2009–10*. Canberra, ACT: AIHW. See also Berlyn C, Bromfield L & Lamont A (2011), *Resource Sheet – Child Protection and Aboriginal and Torres Strait Islander Children*. Melbourne: Australian Institute of Family Studies.

underlying causes of abuse and neglect. Such measures are targeted by the NTER, but within a paternalistic framework which breaches core human rights.<sup>65</sup> The NTER, which was renamed ‘Closing the Gap NT’ in 2011, is the largest government welfare program targeting remote Indigenous peoples in Australia’s history,<sup>66</sup> tying enormous resources to the macro and micro management of Aboriginal communities. This chapter considers the extent to which human rights jurisprudence has influenced law reform with respect to Indigenous children’s welfare and the possibilities which extension of a human rights framework, in particular to community development style responses to child welfare such as the NTER, could achieve with respect to Aboriginal and Torres Strait Islander children’s wellbeing.

## **Chapter 7 – Comparative service delivery frameworks**

Comparative international experience is drawn upon to consider what values and principles are necessary to develop and deliver effective child welfare services to Indigenous communities who are facing the legacy of brutal colonial histories. As the reviews of child welfare across Australian jurisdictions referred to above suggest, service delivery and programs which are developed and implemented in an ad hoc manner without fitting into a broader reform agenda can only achieve limited success. However, legislative reform agendas, without practical implementation through effective translation into service delivery, programs and more broadly transformed values with respect to child welfare are equally ineffective. Indigenous designed and controlled service delivery offers scope to

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<sup>65</sup> The NTER’s enabling legislation; *Northern Territory National Emergency Response Act 2007*; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*; *Families, Community Services and Indigenous Affairs and Other legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*; *Appropriation (Northern Territory National Emergency Response) Act (No1) 2007-2008*; *Appropriation (Northern Territory National Emergency Response) Act (No2) 2007-2008* explicitly overrode provisions of the *Racial Discrimination Act 1975* (Cth).

<sup>66</sup> It was launched with a budget of \$1.5 billion dollars in 2007: Stewart P (2008), ‘The Northern Territory Intervention phase one : Mission accomplished in Central Australia?’ CAPER Seminar, 17 September 2008, Australia National University, Canberra. In 2008-2009 the Federal Government budget states that \$ 323.8 million dollars was specifically allocated to the NTER. It is extremely difficult to obtain accurate information with respect to how much the NTER has cost and what percentage of this money has been spent on infrastructure and administration costs for implementing the NTER.

institutionalise Indigenous understandings of wellbeing and to bring to both Indigenous and non-Indigenous people and agencies a renewed respect for Indigenous ways of addressing child welfare. This can contribute to the creation of a context which is more conducive to shared jurisdiction with respect to Indigenous child welfare and more effective implementation of pluralised legislative frameworks for Indigenous children's welfare and wellbeing.

Unfortunately there is limited information available on Indigenous child welfare services and even more limited is research conducted by and for Indigenous organisations. However, a selection of service delivery programs, in particular those that have been developed by Indigenous agencies are reviewed and (to the extent that information is available) evaluated. The legacy of colonialism has resulted in a deficit of capacity in many Indigenous communities and this makes consideration of effective collaboration between Indigenous agencies and non-Indigenous departmental and non-government partners a significant factor. This chapter thematically explores what is cultural competence and options for culturally competent and substantively inclusive services and programs for supporting Indigenous children's wellbeing.

### **Colonial experience and Indigenous child welfare/ identity**

Indigenous children's current inequality is founded in a history which accepted and even justified inequality and discrimination on the basis of a hierarchy of races.<sup>67</sup> Framing Indigenous child protection issues within a historical context takes not only dispossession and the history of traumas into account but also the social and cultural complexity of many individuals and communities. While Indigenous peoples have been both legally and socially excluded from many of the benefits of western culture they have also been subjected to its worst aspects. Many Indigenous communities have had their culture, laws and languages suppressed and in many instances have also had drugs, alcohol, pornography and other destructive aspects of western culture foisted upon them.<sup>68</sup> The impact of this dual colonial assault on Indigenous communities is evident in the high levels of social breakdown in many communities. Can a human rights framework for Indigenous children's welfare assist to support cultural norms which establish rules and standards of safe and appropriate behaviour accepted by communities and where necessary assist to create and reinvigorate these?

Most contemporary Australian, Canadian, United States and New Zealand Governments and child welfare service providers acknowledge the significance of culture and there is a growing recognition of the nexus between cultural strength and children's wellbeing. There is also a greater recognition of the immersion of western and Indigenous cultural experiences for many individuals and communities and of the relevance of separating out oppressive colonial experiences from the rights of Indigenous peoples to the benefits which all members of the community in wealthy and developed democracies should have. These include adequate service provision and infrastructure support as well as the right on the part of Indigenous children to their cultural identity.

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<sup>67</sup> Behrendt L, Cunneen C & Libesman T (2009), *Indigenous Legal Relations in Australia*. Melbourne: Oxford University Press, at Chapters 1, 2, 9, 10 and 12.

<sup>68</sup> Libesman T (2007), 'Indigenising Indigenous child welfare,' *Indigenous Law Bulletin*, 6(24), 17-19.



The theme of recognition of Indigenous identity being central to securing Indigenous children's wellbeing is embedded across this thesis. Cultural identity is closely associated with the right to self-determination as the ongoing survival of Indigenous cultures is dependent on Indigenous communities transmitting their culture to the next generation. Understandings of and support for Indigenous children's identity can be complex. Many Indigenous children have multiple familial affiliations and experiences including connections to the dominant culture.<sup>69</sup> Further, many Indigenous families experience fractured identities because of past colonial experiences, in particular policies of assimilation and forced and unjustified removal of children from their families. The past and ongoing domination of mainstream non-Indigenous culture adds an additional level of complexity to the recognition of Indigenous peoples' affiliation with the dominant culture. Both child welfare frameworks and individual children's circumstances require a sensitive approach which enables engagement with the overlapping and sometimes practically challenging arrangements and understanding which are necessary if a non-essentialised Indigenous identity is to be fostered and acknowledged.

A nuanced understanding of identity and ways in which Indigenous cultural identity can be acknowledged and supported in the context of child welfare is explored across the thesis. Consideration is given to ways in which a human rights framework is able to incrementally incorporate Indigenous sensibilities and processes into children's rights and child welfare jurisprudence and practice. The recognition of sensibilities in the plural is significant because Indigenous peoples experience their cultures in many different ways. Can legislative frameworks for Indigenous children's welfare and wellbeing, founded in human rights, avoid universalising values in a manner which essentialises Indigenous culture and is able to cognise the spectrum of ways that Indigenous peoples identify with their own, other Indigenous, the dominant and other cultures?

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<sup>69</sup> See Wharf & McKenzie (2010) above n61; Libesman (2011) above n25.

## **Conclusion**

The vulnerability and risk which many Indigenous children face, together with the failure of contemporary child welfare systems to address their needs, is well documented. Their experiences are founded in violent histories of dispossession and loss. Indigenous peoples have responded both nationally and internationally with claims to participate in and exercise jurisdiction over their children's welfare and wellbeing. The following chapters consider how human rights with respect to Indigenous children's welfare and wellbeing are framed at an international level and the relationship between conceptualisation of human rights and law reform and practice nationally. Can a human rights framework for Indigenous child welfare be part of a process of transforming political relationships and understandings between Indigenous communities and non-Indigenous government agencies and non-government child welfare organisations in a manner which shifts underlying sensibilities, understandings and relationships with respect to Indigenous children's welfare and wellbeing? How do competing conceptions of human rights at an international and national level transform into changing legislative, policy and interpersonal responses to Indigenous children's welfare and wellbeing at national and international, governmental and organisational, community and individual levels? The possibilities which a human rights framework offers for transforming responses to, and addressing Indigenous children's welfare and wellbeing, is considered in the following chapters.

## **Chapter 3**

### **The Legacy of the Stolen Generations**

#### **Introduction**

Indigenous children's experiences of child welfare departments are often, as discussed in Chapter 2, the subject of concern in Non Government Organisations reports to the Committee on the Rights of the Child with respect to States compliance with Convention on the Rights of the Child. Central to these concerns are how decisions are made with respect to Aboriginal and Torres Strait Islander children who come to the attention of child welfare departments. While governments usually claim to be acting with sensitivity to Indigenous children's experiences, repeated reports into child welfare systems, as discussed in Chapter 1, have found that they are failing Indigenous children and families. A pervasive perception amongst Indigenous peoples is that they are treated arbitrarily by child welfare departments, that contact with child welfare often makes life worse for their children and that their experiences are not understood or respected by child welfare departments. This chapter investigates how Aboriginal and Torres Strait Islander children, and their families, who had substantiated findings of neglect or emotional abuse, were looked after by a bureaucratic child welfare department.

The research analysed New South Wales Department of Community Services (DOCS) case files for Indigenous children who were found to be neglected or emotionally abused in 1996-1997.<sup>70</sup> The research reviewed files from the date of initial contact with the Department up until 1999. The research was undertaken after the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (NISATSIC) identified serious deficiencies in information about contemporary welfare removals of Indigenous children in

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<sup>70</sup> The Department has subsequently changed its name to the Department of Family and Community Services.

Australia.<sup>71</sup> Submissions from Indigenous organisations to NISATSIC, as well as individual evidence and other anecdotal material, suggested a high level of dissatisfaction with the DOCS' practices in relation to Indigenous families.<sup>72</sup> Data presented to the NISATSIC demonstrated a disproportionately high rate of Aboriginal and Torres Strait Islander children in contact with child welfare services compared with other children. The disproportion increased with the severity of the welfare intervention. As at June 30 1997 the rate of Indigenous children on care and protection orders in New South Wales was 25.6 per thousand children which was over six times the rate for other children in New South Wales.<sup>73</sup> As at June 30 2009, the rate of Indigenous children on care and protection orders in New South Wales was 56.9 per thousand children which is over eight times the rate for other children in New South Wales.<sup>74</sup> This would suggest that the over-representation of Indigenous children within the child protection system is not ameliorating. Departmental policy and publicity material suggested a sensitivity to Aboriginal and Torres Strait Islander families' cultural experience, yet anecdotal evidence from families suggested a failure to respond to their situation with respect, dignity or a transformed cultural awareness. This case study looked at whether these anecdotal claims were more systematically founded. A subsequent qualitative study into cultural care for Aboriginal and Torres Strait Islander children in out-of-home care also found that Indigenous families continue to perceive child welfare departments as disparaging towards them and unable to engage with Indigenous families who have contact with them.<sup>75</sup> Very little quantitative or qualitative research evaluating departmental

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<sup>71</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC) (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Sydney: Human Rights and Equal Opportunity Commission, Chapter 21.

<sup>72</sup> Ibid; and Cunneen C & Libesman T (2000), 'Postcolonial Trauma: The Contemporary Removal of Indigenous Children and Young People from their Families in Australia,' 35(2) *Australian Journal of Social Issues* 99, 104-105.

<sup>73</sup> Australian Institute of Health and Welfare (1998), *Child Protection Australia 1996-97*. Canberra: Australian Institute of Health and Welfare, 30.

<sup>74</sup> Australian Institute of Health and Welfare (2010), *Child Protection Australia 2008-2009 (Child Welfare Series no 47)*. Canberra: Australian Institute of Health and Welfare, 35.

<sup>75</sup> Libesman T (2011), *Culture Care for Aboriginal and Torres Strait Islander Children in Out of Home Care*. Melbourne: The Secretariat of National Aboriginal and Islander Child Care (SNAICC).

involvement with Indigenous families had been conducted and it was within this context that this primarily qualitative study investigated the ways in which DOCS worked with Indigenous families.

## **Methodology**

The aim of this case review was to systematically investigate contemporary cases of neglect and emotional abuse involving Indigenous children. The research identified Indigenous children who had substantiated cases of emotional abuse and neglect before the New South Wales Children's Court during 1996-1997. While the research specifically identified substantiated cases of neglect and emotional abuse, many of the files raised issues with respect to identification of and departmental responses to sexual and physical abuse of children. Initial research involved matching the Children's Court database, held by the Department of Juvenile Justice, with the DOCS database the Client Information System (CIS). Neither database in itself held all the information which was required to identify Aboriginal and Torres Strait Islander children with substantiated findings of neglect or emotional abuse, so matching information on both systems was necessary. Matching the systems was also necessary so that the case files from DOCS, where the complaint had been successfully upheld in court, could be identified. The files of these cases were obtained from DOCS and formed the substance of the research.

The Children's Court data for the financial year 1996-1997 was selected as the base for the research. There were 1632 welfare matters determined in the Children's Court during that period. Of the 1632 court matters, some 1384 records had corresponding DOCS records. This constituted 84.8% of the total number of court records. The matching between the two databases was conducted on the basis of surname, given name and date of birth. It is probable that the unidentified cases arose through various typographical errors and incomplete or inaccurate entries in these fields on the databases. From the 1384 DOCS files, initially 67 Indigenous children who had substantiated cases of neglect or emotional abuse were identified. Through the use of the CIS numbers, the files relevant to these cases were ordered. Four files, which had

been identified as part of the relevant group, could not be located. During the process of evaluating the files it became apparent that the files in some cases related to or referred to other siblings. Thus in some cases there were a number of Indigenous siblings involved in the matter before the court either at the same time or during the research period (1996-1997) which had not been identified through the database search. These children were added to the case study. In total the research assessed the files of 80 individual children. The assessment was completed using a standard template.

### **Departmental responses to Indigenous families**

A number of issues characterised the intervention and case management work of the Department with respect to Indigenous children emotionally abused or neglected in New South Wales. While the Department had a commitment to appropriate service provision to Indigenous families they failed to translate this policy into practice. The reasons for this failure included limited resources, bureaucratic procedure, a lack of awareness of Aboriginal community experiences, and an entrenched method of casework that did not facilitate a holistic approach. The most significant of these factors was the failure by caseworkers to connect the community and personal history of Aboriginality with the families with whom they were working.

Limited departmental resources and the individual case method resulted in a crisis style response to particular incidents with a failure to treat the family's circumstances holistically, in a community or historical context, or to deal with underlying issues. In many files which this research assessed, there seemed to be an abandonment of any real commitment to assisting the children or family. Many of the children lived lives characterised by dysfunction, abuse and violence, with little or no intervention despite reporting their abuse. Many children lived with constant fear of abuse and little or no security. It appeared that a process of objectification, to the point of dehumanising these children, was evident in the Department's response to a number of families within

their 'care.'<sup>76</sup> Interventions occurred when it was far too late and appeared to have greater bureaucratic than practical or humanitarian significance.

Many children in the file cohort examined were trapped in circumstances where they experienced emotional, physical and sexual abuse as a 'normal' aspect of their daily lives. A lack of long-term planning or initiatives to break this pattern of behaviour was evident. Some files examined had been under the Department's attention for over a decade, yet a critical incident approach remained the dominant approach. That people living in such despair may become frustrated, violent and anti-social should not surprise anyone. That these children should not perceive themselves to have a meaningful future is also not surprising. A number of young children in the file cohort had made serious suicide attempts.

The importance for Indigenous families of community based rather than isolated family casework has been highlighted in a number of reports.<sup>77</sup> The systematic forced separation of Indigenous children from families, as well as the high levels of sickness and trauma in families, has led to many Indigenous parents not experiencing their own cultural or family context. These experiences of loss need to be understood before outcomes of this loss can be addressed.<sup>78</sup> The Department's crisis style response to child abuse precluded this understanding.

In many files assessments by the Department of the capacity of carers to provide adequate care was often functional. For example the assessment may have focused on

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<sup>76</sup> See Chapter 4 for a discussion of reasons for the abrogation of responsibility facilitated by bureaucratic organisation.

<sup>77</sup> Libesman (2011) above n6; Wharf B & McKenzie B (1998), *Connecting Policy to Practice in Human Services*. Ontario: Oxford University Press; and the Gungil Jindibah Centre (1994), *Learning from the Past*. Lismore: Southern Cross University, see especially 92-93.

<sup>78</sup> Training about the impact of colonial process on community and personal circumstances has been found to be valuable in the Canadian context. See Brave Heart MYH (1999), 'Oyate Ptayela: Rebuilding the Lakota Nation through addressing historical trauma among Lakota parents,' 2 (1-2) *Journal of Human Behaviour and Social Environment* 109.

appropriate furniture being in place, an adequately tidy home, the length of grass, and other similar factors. A common experience in the files assessed was the placement of children in foster care or with extended family carers where they faced further abuse. In a few instances children were placed in a home where notifications related to abuse by members of the carer's family. For example in file 68, A, a 10 year old boy, was placed in a maternal uncle's home when there had been notifications of sexual assault by the uncle on a number of the children in the family including A. A few months later a further two siblings, T and W, were placed in the uncle's home. Less than a month after this placement T reported to a teacher that she was upset and did not want to go back to the carer's home as she had been sexually assaulted by her uncle and a friend of his the previous night.

In many files children with substantial problems were placed with foster carers with little Departmental assistance or support. Many family or foster carers in the file sample faced financial difficulties. These were exacerbated by failure on the Department's part to provide the financial support which carers were entitled to. For example, in file 44 the maternal grandparents were looking after the children. They were extremely poor invalid pensioners. They only received the payments which they were entitled to after they complained to the New South Wales Department of Aboriginal Affairs. Only a year after the initial failure they were again not paid for 5 months after they moved to Sydney. Mistakes with their care allowance over a 5 year period caused severe deprivation. For example, at times the children could not afford to go to school. This case involved carers who were extremely persistent in following up all avenues to obtain the allowance which they were entitled to. Many other families, particularly those facing the pressures which are often associated with poverty, would not have the resourcefulness or energy to pursue the matter.



In other instances, foster carers were not provided with adequate support or advice when taking on children.<sup>79</sup> In a number of cases, placements of difficult children were described as breaking down after further children were placed with the same carer. This may reflect the shortage of Indigenous foster carers. For example, in file 4 a child, who at eight years old already had contact with the juvenile justice system, by nine years old was described as totally out of control and very emotionally damaged and disturbed and by 12 years old, had a substantial juvenile justice record, was placed with a carer who was already looking after seven children, two of whom were disabled. In other instances, essential assistance such as housing with sufficient space to enable foster caring was denied by the Department of Housing.

A tragic feature of the files was the predictability of the escalation of problems for children who had long term contact with the Department. The files were characterised by desperation and emergency/crisis responses to symptoms rather than dealing with underlying problems.<sup>80</sup> Major events in the family's life, such as serious parental illness, severe domestic violence including murder, death of siblings, sexual assault on the mother, or the fact that the father was in jail, were mentioned only in passing. This frequently meant that placement was sought for children at a stage when they had compounded behavioural problems and may have alienated all potential family or foster carers.

### **Identifying Indigenous children and Indigenous identity**

A notable aspect of the Department's work was the incidental way in which Aboriginality was treated in case management. This was initially evident in the failure by

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<sup>79</sup> The placement of children with foster and kin carers where they are already caring beyond their capacity or without adequate capacity to care because there are insufficient Aboriginal carers is an issue which may exacerbate with the proposed transferral of all Indigenous children in out-of-home care in NSW to Indigenous organisations in 2012.

<sup>80</sup> Systemic problems with DOCS operations are discussed in a special report to parliament prepared by Bruce Barbour, the NSW Ombudsman. See Barbour B (2002), *DOCS: Critical Issues: Concerns arising from investigations into the Department of Community Services*. Sydney: NSW Ombudsman's Office.

the Department to keep records that would enable identification of Indigenous children under the Department's attention. As described under methodology above, it was necessary to undergo a complex data matching exercise with DOCS and Children's Court records, in order to identify Indigenous children under the Department's attention. While Departmental policy documents recognised the impact of previous welfare policies on Indigenous communities, this was treated as all but irrelevant to an understanding of, or response to, current child welfare issues in Indigenous families.<sup>81</sup> Each Departmental file included a space for recording information about the implications of ethnicity for the child. The largest recording in the files reviewed stated 'family is Aboriginal.' Frequently the file simply stated 'none.' Within the body of the files Aboriginality was often only recorded in passing, and then usually after a substantial period of intervention. This was despite the extensive publicity which was given to issues pertaining to the separation of Aboriginal and Torres Strait Islander children from their families from the late 1980s onwards.

The issue of Indigenous identity received least attention where there was no Indigenous family involved in the care of an Indigenous child. This was frequently the case where the father was Indigenous but was no longer involved with the family. For example, in file 14 the father of the child was Indigenous. He was absent and had left the area, however the mother had informed the Department that he had 'threatened to take the child away.' The Department's first awareness of the child's Aboriginality was when a notifier, 18 months after initial contact with the family, mentioned that 'the child is Koori.' The Departmental Officer's report after this notification recorded under implications of ethnicity, 'This is not applicable, however note, that the child is of Aboriginal descent.' A year later the child's Aboriginality was no longer acknowledged in the file. The non-Indigenous stepfather had custody over the child and her siblings who

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<sup>81</sup> For example, DOCS begins *Working with Aboriginal People and Communities: A Practice Resource*, a staff manual outlining how Department members should sensitively engage with Aboriginal people and communities, with a historical overview including an extract from Prime Minister Kevin Rudd's 2008 apology for the government's role in the separation of Indigenous children from their families. See Department of Community Services (undated), *Working with Aboriginal People and Communities: A Practice Resource*. Sydney: Department of Community Services, Sydney.

were not Indigenous. He was resistant to acknowledging any difference between her and the other siblings. The Department neither liaised with Indigenous service providers or organisations nor attempted to make arrangements for her to have contact with her extended Indigenous family or community.

A further issue arose where a parent or both parents were Indigenous but did not want their child placed with an Indigenous carer. In some instances parents had expressly noted their specific concern about the child being raised with an Indigenous family.<sup>82</sup> Balancing the rights and interests of parents and children is a complex issue. This is discussed in more detail in the context of Aboriginal parent's preferences for adopting out their children to non-Aboriginal families in Chapter 5 with respect to the *Indian Child Welfare Act* 1978 (US). Ambivalence amongst children and adults towards their Indigenous identity was a feature in many of the files reviewed. For example, in file 40 the Indigenous father's unstable identification with his Indigenous background was a factor which contributed to the children not being placed in accordance with the Indigenous child placement principle. The father was 'brought up as white' by his Indigenous mother, and he vacillated between identifying as Indigenous and not identifying. Placement of Aboriginal children in non-Aboriginal out-of-home care raises issues in terms of the child's interest in the longer term, particularly in adolescence, in establishing a stable identity. Confused identity is frequently associated with earlier removals and with children brought up in racist environments without Indigenous role models.

A number of the issues raised by removal of Aboriginal and Torres Strait Islander children from their families and culture were addressed by the Full Family Court with reference to evidence presented to the Court in the custody dispute in the *Marriage of B & R*.<sup>83</sup> These include the experiences of racism and discrimination which permeate all aspects of life including schooling, forming relationships, seeking housing and

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<sup>82</sup> See files 27 and 28 where the father is Aboriginal, mother non-Aboriginal and both parents have specifically indicated a preference for placement with a non-Aboriginal family.

<sup>83</sup> *In the Marriage of B and R* (1995) 19 Fam LR 594.

employment, the enormous impact on children of their removal from family and an Indigenous community environment; and the greater capacity of Indigenous people and communities to assist children to cope with discrimination and to reinforce self-identity and self-esteem, especially in adolescence, in the context of racist experiences.<sup>84</sup> While an Indigenous child placement principle is not applicable in family law disputes in Australia, the Family Court has recognised the significance of Aboriginality and the *Family Law Act 1975* (Cth) requires the Court to consider, when assessing the best interests of the child, his or her background, including any need to maintain a connection with Aboriginal or Torres Strait Islander culture.<sup>85</sup> The Family Court has considered the relevance of a child's Aboriginality in a number of cases and has indicated recognition that different family structures, values, and material standards of living may have to be taken into account, as well as the significant identity and esteem issues referred to above, when determining the best interests of Indigenous children.<sup>86</sup> When administrative decisions were made with respect to child welfare matters by Departmental offices on the files assessed, such factors were not taken into account. This is despite the *Children and Young Persons (Care and Protection) Act 1998* (NSW) in addition to the inclusion of an Aboriginal and Torres Strait Islander child placement principle,<sup>87</sup> providing that Aboriginal and Torres Strait Islander families were to be given the opportunity to participate, by means approved by the Minister, in significant decisions which concerned their children and young people.<sup>88</sup> The manner in which files were managed and kept by the Department placed serious impediments on effective

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<sup>84</sup> *In the Marriage of B and R* (1995) 19 Fam LR 594, 604-605. At the First Australian Conference on Adoption the issue of racist attitudes and imposed definitions of Aboriginality on Aboriginal children was noted: 'The major point which whites fail to grasp is that in a racist society an individual is either white or black. One cannot be part black, part white. An aboriginal child will soon learn from his white classmates that he is not one of them, that he is different. And that he belongs to the black community. Even if he looks white. The position taken by Aborigines on this issue is therefore that any child of Aboriginal parentage, no matter what his physical appearance or degree of Aboriginality is an Aboriginal.' While Aboriginal children may be categorised as Aboriginal by others in a derogatory and racist way, this does not capture the complexity of identity issues which are often experienced by Aboriginal children and young people with affiliations to Aboriginal and non-Aboriginal families and cultures.

<sup>85</sup> *Family Law Act 1975* (Cth), s 60CC(6).

<sup>86</sup> See, for example, *Jones v Darragh* (1992) 15 FamLR 757, 768-769.

<sup>87</sup> Section 13

<sup>88</sup> Section 12.

implementation of these provisions of the Act: the most obvious impediment being the failure to identify children under the Department's attention *as* Indigenous.

In the few cases where Aboriginality was recognised within the files it was on the insistence of an Indigenous parent. In file 38 the Indigenous father raised concerns about the child not being with an Indigenous carer and with A's need for contact with her Indigenous culture if she was not to become part of the 'lost generations.' The father was adopted at birth to a non-Indigenous family and later was made a ward of the state. He made contact with his natural family who come from the northern New South Wales coast. The Department officer described A, at three years old, in her care allowance review report, as aware of her Aboriginality but too young to understand and noted that, 'cultural education will be pursued as age appropriate.' The father requested a conference with the Department with a view to obtaining more frequent access to his children. The arrangement in place was three four hour visits per month. The father explained to the conference that he was the only one who could pass on A's specific cultural heritage as he is from a northern tribe which is culturally different from southern tribes. The Department officer challenged this, stating that the father had only learned of his tribal identity in recent years, and that he spent most of his time in the local area associating with local Aborigines, and that he was at one time learning local 'mysteries/totems' from a local tribal leader. The Department officer claimed that the visits 'traumatised the children.' The outcome of the case conference was that the Department psychologist was to assess whether increased access would have a traumatic effect on the children. No explanation for the claim of the children being traumatised after visits was provided. It is possible that children with such limited and infrequent access to their father would be disrupted after visits. This conference, while positive in that issues of cultural identity were raised and discussed which is not usually the case, also indicates the failure on the departmental officers' part to be informed of or understand the complex legacy of identity issues which inhere in most Indigenous families.

Later in file 38, a placement option was being sought for A. The report assessing the suitability of the father and his de facto partner noted, 'house is large and unkempt in appearance, inside and out ... [on the Department officer's visits] there were always several adults and children in the house and yard.' The report noted that the father had failed to show up for access visits. It also notes, 'A is receiving studies in Aboriginal culture at the pre-school two days per week. Other Aboriginal children attend as well ...[F's] objection to his daughter being raised without any knowledge of her cultural heritage is unfounded. Again, as mentioned above, the child's cultural needs are being met.' The report cited overcrowding in the father's home as the reason for non-placement with the father. A report two months later with respect to the father's suitability for placement cited the father's unstable accommodation as the reason for non-placement. This report referred to long grass and rubbish in the back yard. A was placed with her maternal uncle and aunt, and then with a Department foster carer, as the uncle and aunt found her behaviour at six years old to be abusive and uncontrollable. She disclosed to the foster carer that her maternal uncle had sexually abused her. This was referred to the police, but there was no investigation, as the child did not make disclosures to the police or a Departmental Officer.

File 44 is one of the few in which Aboriginality is referred to at the beginning of the file. On the intake summary the child is recorded as 'half Aboriginal.' This reflects a lack of awareness of the historical use of blood quotas to define and control Aboriginal peoples' lives, and the inappropriateness of defining Aboriginality in terms of genetic or blood quotas. The case files also raised the significant issue of caseworkers merging the interests of children with the interests of parents, and possibly ignoring parent's requests which may have been in the best interest of the child, because of judgments made about parents.

Indigenous and non-Indigenous Department officers are limited by the same financial and institutional constraints. More responsive families and more effective intervention

were evident where Indigenous Department officers were used.<sup>89</sup> However, a limitation with the effectiveness of use of Indigenous Department officers was that related intervention services required, such as counselling or psychiatric assistance, were either unavailable, or only available in a limited way. In most of the files reviewed where Indigenous Department officers were involved, they were not responsible for the family, and in common with case work by mainstream Department officers, there was a high turnover of staff working with particular families. In the cases reviewed there was some involvement of Indigenous Department officers with approximately half of the families. However the ethnicity of the Department officers may not have been recorded in all files. As discussed in Chapter 4, the sensibility of Indigenous organisations differs from that of non-Indigenous organisations, and this is also a reason why inclusion of Indigenous caseworkers within departmental structures is different from the provision of services by Indigenous caseworkers from within Indigenous organisations.

The aspect of case management where awareness of Indigeneity was most evident was in placement of children who were removed from their natural parents. The Aboriginal and Torres Strait Islander child placement principle provides for a descending order of priority of placement which prioritises placement with extended family as defined by the community, then with a member of the child's Indigenous community, then with an Indigenous family residing in the area where the child usually lives, and ultimately with a non-Indigenous family if all the above are not practicable or would be detrimental to the child's welfare.<sup>90</sup> In most of the 80 files assessed the principle was acknowledged. However, consistent with the placement principle this did not mean that children were placed with Indigenous carers. A large number of children within the file sample were placed with non-Indigenous carers for periods of time. Children frequently faced

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<sup>89</sup> For example, see file 6 discussed under 'Psychological assessment' below.

<sup>90</sup> Section 87 of the *Children (Care and Protection Act) 1987* (NSW) required compliance with the Indigenous child placement principle. Section 87 has been replaced by s 13 of the *Children and Young Persons (Care and Protection) Act 1998* which provides more detailed directions than s 87 but retains the priority of placement and the proviso that the placement must be practicable and, interestingly, not detrimental to the welfare of the child. That is, it does not require that it be in the best interests of the child, simply that it not be detrimental.

multiple placements making it difficult to provide a breakdown within the file sample of those placed with Indigenous carers.<sup>91</sup>

In file 42 a formalistic and misguided application of the Indigenous child placement principle led to a child being removed from his Indigenous mother. The mother made an informal arrangement with two non-Indigenous carers to look after W for periods when she was unable to. While the standard of care provided by the informal carers was always acknowledged to be high, the Department officer assessment report stated, ‘The situation was complicated by the fact that although the boys received good care from [N] and [E] and the boys are Indigenous and the carers are non-Indigenous. [The mother] however, has stated she regards [N] and [E] as “mothers” to her and her children.’ This seems to be a case where the Department confused their obligations under the Act and the capacity of a parent to make voluntary arrangements. Further it is an example of how Eurocentric notions of appropriate care (that is, that good care is with a single carer) are applied. A neglect application was made to the Children’s Court and the mother made undertakings to maintain full-time care of W and not to place him with other people without permission from the Department.

The failure to address children’s wellbeing in a community and family context leads to situations where children are often taken from one family context with similar intergenerational, health and socio-economic problems to another, without the underlying grief and trauma being identified, let alone addressed. The shortage of carers within communities, and a lack of adequate support for carers, are particular examples of issues which are related to the more general problem of an individual child rather than holistic family and community response to child welfare issues. The implementation of the Indigenous child placement principle gives rise to a number of issues. Child placement out of home usually occurs after considerable involvement with

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<sup>91</sup> See Chapter 6 for a more detailed discussion of cultural care and the Aboriginal and Torres Strait Islander child placement principle; see also Libesman T (2011) above n6.



the Department. It is perceived as the most serious intervention and should be an option of last resort. As was noted by NISATSIC, the application of the Indigenous child placement principle is often a limited and belated gesture towards recognition of Indigeneity.<sup>92</sup> For a more detailed discussion of the Aboriginal and Torres Strait Islander child placement principle see Chapter 6.

In a number of files reviewed, Indigeneity is not recorded at all and the only indication of the child's Indigeneity is in the Children's Court's recording of ethnicity. Matters that proceed to Court account for only a small percentage of children under the Department's attention. For example, in New South Wales between 1 July 2008 and 30 June 2009 there were 213 686 notifications.<sup>93</sup> As at 30 June 2009, there were 13 491 children on care and protection orders.<sup>94</sup> It is likely that a number of Indigenous children within the child welfare system are not identified. This has implications for the unidentified children and for the already unsatisfactory data available on child protection by Indigeneity. It suggests that the disproportionate levels of intervention in Indigenous families is likely to be even higher than that reflected in data compiled by the Department or by the Australian Institute of Health and Welfare.<sup>95</sup>

### **Intergenerational experience of removal**

The impact of colonial processes on Indigenous families has been both direct and indirect, the most obvious direct impact being the forced separation of children from their families under previous governmental assimilation policies.<sup>96</sup> The files reviewed demonstrated a serious lack of understanding of previous governmental policies of

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<sup>92</sup> NISATSIC (1997) above n2, 459.

<sup>93</sup> Australian Institute of Health and Welfare (2010), *Child Protection Australia 2008-2009 (Child Welfare Series no 47)*. Canberra: Australian Institute of Health and Welfare, 13.

<sup>94</sup> Australian Institute of Health and Welfare (2010), *Child Protection Australia 2008-2009 (Child Welfare Series no 47)*. Canberra: Australian Institute of Health and Welfare, 26

<sup>95</sup> The Australian Institute of Health and Welfare relies on data provided by State and Territory community services departments.

<sup>96</sup> NISATSIC (1997) above n2; and Read P (1982), *The Stolen Generations: The Removal of Aboriginal People in NSW 1883 to 1969 (Occasional Paper No. 1)*. Sydney: New South Wales Ministry of Aboriginal Affairs.

forced and unjustified separations of Aboriginal and Torres Strait Islander children from their families. Not a single file reviewed, explored, or explicitly questioned whether an intergenerational experience of previous removal had impacted on the family. This was despite the bodies of literature that document the intergenerational impacts of separations, their relationship to risk factors for child abuse and neglect, and programs designed to promote healing processes.<sup>97</sup>

As the Aboriginal and Torres Strait Islander Woman's Taskforce on Violence noted:

Traumatisation occurs at individual, community and whole group levels ... It is important to remember that human reactions and behaviour in response to trauma are the natural reactions of normal people to abnormal situations, and that abnormal situations may, over time, appear to become the norm when inappropriate responses are made to human needs. However, the situations remain abnormal ...<sup>98</sup>

A failure to acknowledge or have an understanding of intergenerational trauma may contribute to the contempt, objectification, and apparent incomprehension of families whose lives are marked by these experiences. Where intergenerational experiences of forced removal were recorded in the files, they were incidental, as a result of a parent volunteering the information.<sup>99</sup> In file 18 it was noted that the mother was removed from her natural Aboriginal mother at the age of seven months and placed with non-Aboriginal adoptive parents. Despite the mother

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<sup>97</sup> See, for example, Raphael B, Swan P & Martinek N (1998), 'Intergenerational Aspects of trauma for Australian Aboriginal People' in Danieli Y (ed), *Intergenerational Handbook of Multigenerational Legacies of Trauma*. New York: Plenum Press. In the Canadian context see Morrisette P (1994), 'The Holocaust of First Nation People: Residual Effects in Parenting and Treatment Implications,' 16(5) *Contemporary Family Therapy an International Journal* 381.

<sup>98</sup> Aboriginal and Torres Strait Islander Women's Task Force on Violence (1999), *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*. Brisbane: Department of Aboriginal and Torres Strait Islander Policy and Development, 24.

<sup>99</sup> Statements relating to intergenerational experiences of forced removal are usually found within a report by a professional such as a doctor or psychiatrist in the course of an assessment.

demonstrating many of the problems associated with separation from parents at a young age, including alcoholism, this was never explored. The mother had little contact with her natural mother or siblings, and her two children, who were subject to substantiated neglect orders, have not met their Indigenous relatives. Intergenerational impacts of removal often affect the emotional and mental health of those removed and both the attitudes of families to welfare agencies and the capacity of parents to adequately parent.<sup>100</sup> They are, therefore, directly relevant to departmental work.<sup>101</sup>

Insufficient work on the intergenerational impacts of forced removal of Indigenous children from their families has been done. When examining stressor factors in Aboriginal and Torres Strait Islander peoples' lives it is difficult to separate out separation from land and culture, dislocation and dispossession of communities, and ongoing discrimination and marginalisation from mainstream society, from the specific impact of forced and unjustified separations of children from their families. However extensive research across disciplines including the reports of the Royal Commission into Aboriginal Deaths in Custody,<sup>102</sup> research into drug and alcohol abuse in communities,<sup>103</sup> reports on mental health problems within communities<sup>104</sup> and accounts by communities themselves<sup>105</sup> point to the particular trauma caused by forced and unjustified separation of children from their families. Raphael et al, referring to the stolen generations, noted:

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<sup>100</sup> Gungil Jindibah Centre (1994), *Learning from the Past*. Lismore: Southern Cross University; NISATSIC (1997) above n2; and Cunneen C & Libesman T (2000), 'Postcolonial Trauma: the contemporary removal of Indigenous children and young people from their families in Australia,' 35(2) *Australian Journal of Social Issues* 99.

<sup>101</sup> Cunneen & Libesman (2000), *ibid*.

<sup>102</sup> Royal Commission into Aboriginal Deaths in Custody (1991), *Royal Commission into Aboriginal Deaths in Custody: Final Reports*. Canberra: Commonwealth of Australia.

<sup>103</sup> Brady M (1995), *The prevention of drug and alcohol abuse among Aboriginal people: Resilience and vulnerability (Research Discussion Paper No.2)*. Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies.

<sup>104</sup> Hunter E (1995), 'Freedom's just another word: Aboriginal youth and mental health,' 29(3) *Australian and New Zealand Journal of Psychiatry* 374.

<sup>105</sup> See the numerous testimonies in NISATSIC (1997) above n2.

Stressors experienced by these children included intense separation distress; searching behaviours; multiple grief, which was chronic and often unresolvable; emotional and behavioural disturbances in childhood, which arose naturally from their distress; dislocation stressors from loss of home and place; denial and stigmatisation of their Aboriginality and cultural heritage; and loss of identity.<sup>106</sup>

They noted that these experiences were for many children compounded by emotional, physical and sexual abuse in foster homes and institutions. The impact of loss of parenting models, lack of appropriate carers, and frequent abuse is evident in the high levels of domestic violence, alcohol and drug abuse, and susceptibility to unplanned pregnancy among young Aboriginal and Torres Strait Islander women. The Aboriginal and Torres Strait Islander Women's Task Force on Violence noted:

The effects of alcoholism, stress and traumatisation lie dormant in the minds of many Aboriginal people who are now parents and grandparents of the next generation. For many of these people, the ramifications are evident in their dysfunctional and dispirited state. A number of them have been further violated or have become the perpetrators of violence themselves.<sup>107</sup>

A significant feature in the files assessed is the lack of awareness of intergenerational trauma and grief and a lack of counselling services to address unresolved trauma and grief. This makes interventions which occur less likely to be successful, and the factors which make intervention necessary such as domestic violence and drug and alcohol abuse less likely to ameliorate. Many of the children and families in the files reviewed faced multiple and ongoing traumatic experiences, which accumulated and compounded over the period of the Department's intervention, to a point where their lives were characterised by dysfunction and abnormality.

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<sup>106</sup> Raphael et al (1998) above n28, 330.

<sup>107</sup> Aboriginal and Torres Strait Islander Women's Task Force on Violence (1999) above n29, 79.

## **Domestic violence**

Domestic violence was present and recorded in 69 of the 80 case files reviewed. In a number of the files where no domestic violence was recorded there was no male present. Frequently women are recorded as moving from one violent relationship to another. Plainly whole families not just children need support. Domestic violence, although a pervasive factor in many families' lives, is often treated within files as incidental.

In the few files where comments on the domestic violence were recorded by a Department officer a judgmental attitude was evident towards the mother who was the victim of abuse. For example, 'the mother presented as lacking in her own self-care. She also appears lacking in her ability to adequately protect herself and stated a lack of awareness of her own rights despite having had many years of experience in various refuges. She impressed me as possibly borderline in intelligence.' This reflects a lack of understanding of the power dynamics that operate in domestic violence situations. The Department officer seemed to blame the women for her incapacity to escape and demonstrated little understanding of the impact of low self-esteem and the practical difficulties which face a woman in her situation. The files frequently reflected contempt for families and little understanding of the complex practical and psychological problems that effect parents' capacity to adequately care for children. A recent study of cultural care for Aboriginal and Torres Strait Islander children in out-of-home care revealed that non-Indigenous caseworkers are still perceived by Indigenous families and organisations as lacking in understanding of or a capacity to communicate with Indigenous families.<sup>108</sup> It is evident that while a family centred approach to child protection is advocated by Indigenous communities and organisations, in fact the needs of parents, usually mothers, are very rarely considered. A policy of family reunion

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<sup>108</sup> Libesman (2011) above n6. See Chapter 6 for further discussion of cultural care and the significance of Indigenous children's organisations.

cannot work without a policy of family support. However, the most effective way to retain family cohesion is to provide support for families prior to crises.<sup>109</sup>

### **Drug and alcohol issues**

Drug and alcohol problems were present in 64 of the 80 files reviewed. Alcohol abuse problems were most frequently recorded. People facing unresolved trauma and grief often use drugs and alcohol as a coping mechanism. This would appear to be the case with many of the families involved in this case file review. In a number of files parental behaviour appeared to be appropriate except when under the influence of alcohol or other drugs. Drug and alcohol abuse is frequently associated with neglect and emotional and other forms of abuse.

In a number of files children were recorded as begging for food as all the household money had been spent on alcohol or other drugs. For example, in file 17 various notifications related to two brothers aged two and three who were begging for food and scavenging in bins. Other notifications relating to the same children included the children being at the pub all day while their parents were drinking and that the children were left unsupervised while their parents were drinking. In file 38 notifications related to the parent's alcohol and drug abuse which led to a failure to provide clothing or essential asthma medication. In file 46 the mother's drug and alcohol abuse led to confirmed notifications that she was in a state unfit to look after the children and that her addiction also led to a failure to provide food and shelter for them. There was no

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<sup>109</sup> As discussed by Cashmore et al, a public health model of child protection provides a way of moving from protection to early intervention and family support with a focus on evidence based, population/s based risk factors to address primary, secondary and tertiary factors that impact on child abuse and neglect. Primary interventions are universal measures which are available to the whole population. They address factors which fortify against problems arising. Secondary measures are targeted at vulnerable groups, who on the basis of evidence of risk need extra support to avert child abuse and neglect or to ensure the wellbeing of children, and tertiary measures respond to the impacts of abuse and neglect to prevent further harm. See Cashmore J, Scott D & Calvert G (2008), *Submission to the Special Commission of Inquiry into Child Protection Services in NSW – Think Child, Think Family, Think Community – From a child protection system to a system for protecting children*. Sydney: NSW Commission for Children and Young People.

evidence in this file of any referrals for the mother to address her drug and alcohol problems. In a number of files children were left unsupervised or inappropriately supervised when parent/s binge drank.

Little attention was focussed on the intergenerational aspect of many drug and alcohol problems. For example, in file 38 the mother's drug and alcohol problems led to the removal of her children. The mother had long-term drug abuse problems and is recorded as using drugs since she was ten. She was recorded in passing as being sexually abused by her father on a long-term basis until she was eight years old. While the mother attended a number of drug rehabilitation centres the file records that she had received no counselling for the sexual assault, which she faced as a child. Further, her substance abuse was complicated by and probably related to mental health problems. A psychologist's report referred to her prior diagnoses as manic-depressive and described her as presenting with deep endogenous depression and as suicidal. The report noted that previous rehabilitation attempts had failed and future attempts would fail without attention to her mental health problems. This family situation is illustrative of what is more broadly apparent. A holistic and extended family, and where applicable intergenerational, response to child abuse and neglect is necessary if the underlying issues are to be addressed.

Alcohol abuse is often associated with domestic violence and violence against children the children. In file 61 notifications related to the children's repeated exposure to domestic violence and drug abuse, including seeing their father use intravenous drugs. There was often no food in the house, the gas was disconnected and the mother reported that the father sold all the furniture as he was using drugs. The children were left unattended when the parents were drinking.

In file 4 the application for a care order over this twelve year old boy was 'prompted by ongoing criminal activities ie break and enters, stealing combined with his continued

alcohol abuse and drug taking, and the appearance that neither parent was capable of controlling D's behaviour.' The first notification for D occurred when he was seven and he was allegedly hit on the head by a door his father opened. His father was affected by alcohol and he had hidden his father's methylated spirits. In a six year period there were eight notifications relating to the father's drug and alcohol related neglect, including inadequate supervision, no food in the house and D's failure to attend school. Notifications also related to ongoing domestic violence in the family. At 11 years old, D was admitted to hospital for alcohol abuse. He was found on a riverbank with a blood alcohol level of 0.28 and was unconscious for 36 hours. A few months later he was found unconscious under a bush in a local park. He was admitted to hospital with a blood alcohol level of 0.25. The file noted, 'While in the ambulance he had to be revived twice. Later sedatives had to be administered by Dr H as D was running head first into brick walls.'

In cases where life circumstances would provide every indicator that the child was likely to be abusing drugs this was not investigated; for example children whose immediate and extended families had histories of severe drug abuse and where the child was living an itinerant lifestyle with extended periods of homelessness. Alcohol and drug abuse is closely associated with child abuse and neglect. It is often associated with violence and sexual abuse, failure to provide essential material and social care for children, and intergenerational substance abuse. If drug abuse is to be addressed effectively the underlying causes of alcohol and other drug abuse also need to be addressed.

### **Family planning**

Nowhere in the files was family planning raised. Of the 80 files reviewed, 47 had the mother's age recorded. 31 out of 47 of these children were born into families where the mother was 19 years old or younger when the first child was born. The high proportion of teenage births amongst Aboriginal and Torres Strait Islander parents in the file sample reviewed is consistent with national findings. In 2009, births to teenage Indigenous women in Australia (2400 births) accounted for 21% of all births to



Indigenous women (11 500 births). In comparison, births to all teenage women accounted for only 4% of all births. In 2009, the median age of Aboriginal and Torres Strait Islander women who registered a birth in 2009 was 24.5 years, six years lower than the median age of all mothers (30.6 years).<sup>110</sup> The Women's Employment, Education and Training Advisory Group noted:

Teenage maternity is linked to factors associated with being 'at risk' of long term economic disadvantage: low socio-economic status, premature exit from school, difficulties getting a viable job or returning to further education or training, reduced options, and characterised by dependence on public funds or incomes below the poverty line.<sup>111</sup>

A common feature of the files reviewed was young mothers, with substantial personal and financial problems, with many young children to look after. Little if any support networks are in place to assist them. Few Australian studies on teenage pregnancy exist and none of these specifically consider the needs of Indigenous women.

Frequently mothers had children to numerous different partners who played no role, or no constructive role, in the children's lives. A pattern of successive short-term relationships characterised by violence and abuse was evident in many files. The women usually had low self-esteem, which was further eroded by the experience of successive relationships that were dangerous to themselves and their children. Often a large number of children were removed from the same family and further pregnancies occurred while the Department was intervening in very serious matters. Within our file sample 33 files recorded information about siblings. Thirty-one of the thirty-three families had more than one child placed in out-of-home care. Twenty-three of the

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<sup>110</sup> Australian Bureau of Statistics (2009), *Births Australia 2009*. Canberra: Australian Bureau of Statistics, 32-33.

<sup>111</sup> Women's Employment, Education and Training Advisory Group (1996), *Pregnant Futures: barriers to employment education and training amongst pregnant and parenting adolescents*. Canberra: Australian Government Publishing Service, 2.

families had three or more children placed in out of home care. While the subject matter for this research was substantiated cases of emotional abuse and neglect many files included incidents of physical and sexual abuse.

In many cases mothers' or parents' incapacity to cope with numerous children and the risk in which this placed both parents and children was not addressed. A particularly stark example of this was file 58. There were six siblings in the family. Three siblings had died. One sibling was stillborn, another died at three months, and the third died at 6 months. The other three siblings were all under the Department's attention and two had been placed in out-of-home care. Although the family had been under the Department's attention for 10 years, only the computer printout information was available.

In file 72 the mother had eight children by the age of 28. The first was born when she was 18 years old. There were 21 recorded notifications over an 8 year period. By the time she was pregnant with the eighth child she was suicidal and reported no interest in the child she was pregnant with. By this stage there were numerous notifications relating to all her other children. Substantiated notifications included a repeated failure to protect the children from repeated sexual abuse by numerous relatives and visitors, failure to provide food or attend to the children's health needs, and general neglect. A number of these children were unplaceable because of their level of disturbance, including sexual and physical assaults on other children.

It is clear that for many women in the file sample having large families was not a matter of choice. Many of these families would have benefited from early intervention including assistance with family planning.

## **Multiple placements**

The children whose files were assessed had lives that were characterised by instability. This was exacerbated by numerous short-term or failed placements. As the number of placements increased it would appear that their behavioural problems deteriorated, and the chances of failure to settle into a placement increased. Clearly children who have been abused or neglected may feel rejected. Multiple failed placements could only compound identity and esteem problems. Further, where children are removed from an abusive situation and then placed in another, or a number of other abusive situations, this could have a severe impact on their capacity for trust and ability to form stable and appropriate relationships. Children were frequently living in poverty with consequent insecure and/or inappropriate housing. Together with multiple moves, other aspects of stability in their lives were disrupted such as childcare centres and schools.

## **Housing**

Shelter is a basic human right and the lack of adequate housing directly impacts on welfare interventions in children's lives. The need to integrate housing assistance with other policies impacting on Indigenous peoples' lives is recognised and well documented.<sup>112</sup> The chronic lack of adequate crisis and long-term accommodation was reflected in the files examined. In 30 of the 80 files reviewed, periods of homelessness were recorded. In 66 of the 80 files periods in emergency housing, crisis accommodation and/or refuge accommodation were recorded. Many of the case files were characterised by insecure housing with numerous moves between caravan parks, housing commission accommodation and a variety of crisis accommodations. Many of the children in the file sample moved 10 or more times while they were under the Department's attention. In a number of cases the Department provided letters of

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<sup>112</sup> For example, in their 2008 report, Dr Paul Torzillo et al identified the massive deficiencies in Indigenous housing as a key cause of Aboriginal disadvantage and poor health. See Torzillo PJ, Pholeros P, Rainow S, Barker G, Sowerbutts T, Short T & Irvine A (2008), 'The state of health hardware in Aboriginal communities in rural and remote Australia,' 32(1) *Australian and New Zealand Journal of Public Health* 7. Also see NISATSIC (1997) above n2. For statistics and other information on the lack of sufficient housing for Aboriginal and Torres Strait Islander people, see Australian Institute of Health and Welfare (2011), *Housing and homelessness services: access for Aboriginal and Torres Strait Islander people*. Canberra: Australian Institute of Health and Welfare.

support to the Housing Commission indicating that if the parent could not obtain shelter the child would be removed. In a number of files mothers remained with children with an abusive partner, as they could not obtain any alternative accommodation.<sup>113</sup> In six case files a major reason recorded for children being placed in out-of-home care was inadequate shelter. In some files children were separated from their siblings, as the out-of-home carer was unable to obtain accommodation to shelter more than one sibling. For example, in file 32, H and her sister were separated because the Housing Commission waiting list for the carer to get a larger house was three to four years. The sister represented H's only close familial relationship. The following provides an example of the inadequacy of available crisis accommodation. The Department was approached by A, a homeless, pregnant mother of two children, who faced serious domestic violence from the father of her child. The Department attempted unsuccessfully to find refuge accommodation for her in Sydney, Wollongong, Nowra, Port Kembla, and Warilla. The Department persuaded her reluctant parents to allow her to stay with them for the weekend.

### **Psychological assessment**

Children were often subject to psychological testing which had spurious cross-cultural applicability. In many files clear indications of the child's cultural alienation from tests and hence non-responsiveness was evident. The following example from file 6 illustrates this problem.

C was placed with his paternal grandparent in an Aboriginal community when he was between eight months and two years old. Departmental records indicate notifications for neglect prior to this placement. He lived with his grandmother until she became ill (he was about eight years old). C returned to the care of his mother who died two years later. C was in the house and one of the first family members to find his deceased mother's body. He was 10 years old at the time. C lived with his sister after his mother's

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<sup>113</sup> For example, see files 49 and 50.

death. She appeared to have unresolved grief issues and serious drug abuse problems. C was unsettled and moved around between relatives and friends.

The Department had extensive involvement with C and numerous unsuccessful placements including with relatives, foster carers, and short, medium and long-term residential placements are recorded. From the age of 8 to 15, C appeared to have had to rely almost exclusively on his own emotional resources and largely on his own physical resources. His most stable placement in this whole period appeared to have been at a boarding school for Aboriginal children. C expressed the belief that he would be in prison when he grew up and that he would be dead by 20. His need for grief counselling was referred to in many Department reports but was not acted upon. There was no detailed record of an interview with C about the traumas and troubles in his life. A psychiatric report was prepared on the request of the Department of Juvenile Justice for a magistrate at Cobham Children's Court. The report is one and a half pages in length and included the following:

C is unable to read or write. His schooling has been erratic and marked by poor attendance. Even taking this into account, his educational attainments falls a long way below normal for his age ... At interview, I noted that C's communications were vague, hard to follow and inconsequential. His general knowledge and reasoning ability are well below normal for a boy of his age. For example, he was able successfully to subtract 7 from 100 to give the answer 93, but when asked to continue successive subtractions of sevens he produced the answers 83, 73, 63 ... He named the Prime Minister as Bob Carr and had no knowledge of John Howard. He correctly answered 'Melbourne' when asked about the capital of Victoria, but he could not name the capital of South Australia or Western Australia. He could not identify prominent members of the aboriginal [sic] community such as Lois O' Donoghue, nor well known aboriginal [sic] footballers such as Cliff Lyons ... He did not appear severely depressed, nor did he discuss suicidal ideation at this visit ... I think he is not actively suicidal, though his poor self esteem and poor impulse control place him at some increased risk.

However, when C was interviewed by an Aboriginal officer she was able to engage him with shared understanding of Aboriginal culture and heritage. C appeared to be responsive to her and she reported that he had an extensive knowledge of his kinship ties. She was present during an assessment of C by another doctor. It is reported that in her presence it became possible to engage him much more readily. 'It became evident through this assessment that [C] needs questions to be reframed by S using culturally specific phrases and terms to be able to respond in an elaborate manner.' It is difficult to see how the psychiatrist's report prepared for Cobham Children's Court could either have helped with an understanding of C's life or how it could have assisted in dealing with any of C's problems.

The focus on psychological testing was, in many instances, at the expense of contextual considerations. Children were frequently labelled as developmentally delayed and in the lowest percentile for their age group for intellectual functioning. Tests such as the Wechsler Preschool and Primary Scale Of Intelligence – Revised (WPPSI-R) which provide standard psychometric measures of intelligence were used. This test measures IQ using exercises which measure verbal and performance ability. The WPPSI- R focuses on 'the global nature of intelligence with which the individual understands and copes with the environment. Consequently the aim has been to sample the person's experiences through a series of tasks which are seen as representative of verbal and abstract abilities.'<sup>114</sup> It is well recognised that IQ scores measure a combination of ability and experience. Social, cultural and environmental factors play a significant role in test results.<sup>115</sup> Historically racist associations between intelligence and Aboriginality have been made. These have directly impacted on legislation and policies which were implemented to remove children from their families. An

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<sup>114</sup> Boland L (1990), 'Wechsler Preschool and Primary Scale of Intelligence: Revised,' 3 (2) *Psychological Test Bulletin* 100 (book review).

<sup>115</sup> See, for example, Suzuki L & Valencia R (1997), 'Race-ethnicity and measured intelligence,' 52(10) *American Psychologist* 1103.

awareness of this historical context appeared to be absent from testing in the case files. This is significant because the historical experience, at a personal and collective level, is directly relevant to test results.

Accepting that IQ is not immutable, it is important to understand the factors which impact on results. It is also important that prejudices about intelligence are not reproduced through a lack of understanding of the context in which the results are generated. Beit-Hallami noted:

If only psychology had been sufficiently developed in the 1840s ... we would have read a psychological analysis of slavery, describing slaves as 'unable to delay gratification, low on frustration tolerance, having psychopathic tendencies, scoring lower on intelligence tests, and generally being unmotivated, impulsive and violent.' An interesting conclusion would have been that slavery is a psychological syndrome, transmitted from generation to generation.<sup>116</sup>

While the tests are measuring culturally particular understandings of intelligence, contextualising and redressing poor scoring is significant because successful participation in education and many other institutions of society correlates with results. The Aboriginal and Torres Strait Islander Women's Task Force on Violence noted:

Increased funding is needed for learning institutions to prepare training packages specifically designed to address the poor literacy levels of many Indigenous people. They have a critical need to participate in the broader community with equity and respect, and to qualify for employment.<sup>117</sup>

The *Flower of Two Soils* study – a longitudinal study of intellectual development, mental health and academic achievement among Native American children from North America – found lower average scores for Indigenous children than non-

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<sup>116</sup> Beit-Hallahmi B (1974), 'Salvation and its vicissitudes: Clinical psychology and political values,' 29 *American Psychologist* 124, 125.

<sup>117</sup> Aboriginal and Torres Strait Islander Women's Task Force on Violence (1999) above n29, 152.

Indigenous children when using the Wechsler test.<sup>118</sup> This study also examined prenatal, developmental, home, school, and linguistic factors which could help to account for the difference in scoring. This study noted that ‘socio-economic status is a particularly powerful IQ correlate. Low SES reliably predicts low IQ scores, both within and across ethno-racial groups.’<sup>119</sup> This study also noted that Indigenous populations in Canada and the United States are amongst each country’s most economically disadvantaged groups. Likewise, Indigenous Australians are in the lowest economic group within Australia. The socio-economic position of Indigenous Australians is a consequence of historical and ongoing processes of colonisation.

The *Flower of Two Soils* study results also point to the importance of breaking down barriers between home and school: ‘The barriers have multiple origins, including boarding school experiences that have created a legacy of distrust in Native communities and schools curricula that are perceived as assimilative rather than respectful of local cultures.’ These factors are again highly relevant to Australian Indigenous communities and even more directly so when welfare departments are conducting the IQ tests.

Often mothers, as well as children, were labelled as intellectually deficient. This sometimes occurred in incidental comments on a file. For example, a social worker in file 40 suggested that the mother may be intellectually disabled. This assessment was not placed in the context of her facing severe domestic violence over a long period combined with poverty. When looking at the files as a group, it is evident that a contextualised approach will be necessary if effective remedial action is to be taken. The assessments indicated no awareness of the history of exclusion from educational opportunities or the broader issues that result in poor

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<sup>118</sup> Dauphinais P, Beals J, Jones M, Keane E, Manson S, Somervell P, Piaseck J & Redshirt R (1990), *Flower of Two Soils Reinterview Study: Final Report*. Denver, Colorado: The National Centre for American Indian and Alaska Native Mental Health Research, Alaska.

<sup>119</sup> Suzuki & Valencia (1997) above n46.



educational outcomes for Indigenous children. In many files the tests appeared to be primarily used to demonstrate developmental delays and to illustrate neglect rather than as a tool for identifying the child's needs. Few files included any follow up with educational, counselling or other assistance post testing. For example, in file 44 numerous recommendations were made for referral to a range of professionals including occupational therapists and speech pathologists with no follow up. This failure, together with frequent testing, may amount to systems abuse.

Many children's prospect for recovery or life chances were predicted to be extremely poor at a very young age. For example, the child in file 40 was assessed at five and a half years old to be in the lowest 1% of his age group for intellectual functioning and due to extreme emotional damage to have limited prospects for recovery. In files 17 and 18 two brothers aged three and five years old were described in the psychologist's report as significantly developmentally delayed. The psychologist acknowledged his limited authority to 'explore issues of aboriginality' but found that the advantages of placement with the non-Aboriginal maternal grandmother outweighed the disadvantages.

In file 39 the child had four assessments in a period of 10 months, all of which indicated that the child was abused, however, there was no follow up action recorded. The first test records the child as presenting as a 'happy-natured and co-operative testee' who later became restless and less co-operative. By the fourth test he was hostile and unco-operative and is described as curled up in a foetal position on the floor and refusing to move. The caseworker managed to get him to participate by offering him a bag of chips which he 'insisted on munching on during the assessment.' The report noted that most tests were not completed due to non-compliance. He was diagnosed as having 'Oppositional Defiant Disorder.' The psychologist noted that S has been 'over assessed' and was distressed by being repeatedly asked the same questions but also recommended that he should be assessed by a child psychiatrist if his disturbing behaviour in care continued.

The failure to follow up with required assistance once a child had been assessed was often recorded as the cause of deteriorating behavioural problems. For example, in file 38, by the age of six, A already had four psychological reports on her file. She was described at the age of six as ‘a child who will present significant challenges to any caregiver.’ A’s psychologist’s report 9 months after she reported sexual abuse to her carer noted that it is ‘almost inevitable’ that A has been sexually abused, however no counsellor is apparently available for her. A’s case plan five months later proposed urgent sexual assault counselling for her but nothing happened. Her behaviour deteriorated. A repeated request for counselling to be provided was repeated in a letter from a paediatrician three months later. Counselling commenced five months later. A paediatrician placed A on the stimulant medication Ritalin. A large number of children within the file sample are diagnosed as ADD and placed on stimulant medication. 8 months later A was placed with another departmental carer, who after consulting a doctor stopped the Ritalin, and noted that A’s appetite improved. This raises the question of whether stimulant medications are used to manage behavioural problems, which arise from underlying social and emotional problems, instead of addressing the underlying problems.

The psychological assessments, and psychometric testing specifically, like the files more generally, do not examine the children’s skill or development in a historical or social context. It is not entirely surprising that these decontextualised assessments tell little about why a child is behaving in a particular way or what might be done to change his or her situation. Historical and related current environmental factors exert an enormous impact on the development and behaviour of children. If the underlying causes of poor test results are to be addressed, these contextual factors, together with the broader context of Aboriginal and Torres Strait Islander peoples’ relations with the institutions of the dominant society, will need to be addressed. The conditions under which many children are living impact on their intellectual, emotional and physical

development. Awareness of these conditions, and the context in which they were created, will help to make the testing more meaningful.

### **Mental health**

Common features in the files included a lack of safety or support for any family members, social isolation, and parents and children experiencing a lack of control over their own lives. Many people in the file sample lived in circumstances of entrenched social and environmental disadvantage, which frequently encompassed tense and emotionally dysfunctional home environments. This manifested in a large number of files in anger, anxiety, violence, depression, substance abuse, self harm and harm of other family members and a more pervasive sense of hopelessness. In most files mental health was dealt with primarily as a bureaucratic matter, with psychological assessments for the purpose of an assessment of neglect or for a court report for another purpose. Where psychologists or psychiatrists were used there was a serious shortage of both Indigenous mental health care workers and non-Indigenous workers who had an understanding of the factors which impact on many Indigenous peoples' mental health. An important aspect of this understanding is the family and intergenerational experiences which frequently need to be addressed. An inward looking and individualistic psychological approach is frequently not suitable. Where children have faced trauma such as sexual assault or loss of a parent, a notable feature in the files was a lack of counselling or other appropriate mental health service.

### **Suicide**

Suicidal intentions in parents and children were frequently recorded with no action, response or recommendation. For example, the father in file 40, who acknowledged that the children were neglected, reported at the point of their removal that he was suicidal. No recommendation or referral was recorded. In file 46 the mother made numerous suicide attempts. These included cutting her wrists and being taken for medical attention. She was admitted to Dubbo hospital after a

third suicide attempt; the second was not referred to in the file. She was admitted to a hospital in Orange for 7 weeks after a nervous breakdown. She contacted the Department on another occasion indicating that she was suicidal. Despite the record of suicidal tendencies throughout the file there is no evidence of any referral or other action from the Department apart from the removal of the children.

In file 53 a notification was made about L's suicide threats and threats to harm other residents (L was 13 at the time). While a psychologist's assessment of L was conducted just over a month later, no follow up action was evident. The file indicated long-term and extensive emotional and physical harm to L by successive stepfathers including overdosing him with alcohol, which resulted in a hospital admission, attempting to suffocate him with a pillow and beating him severely. It is plain that L required considerable assistance.

File 57 provided an example of escalating trauma over an 11 year period of DOCS involvement with this family. The file was closed with both the mother (M) and child (B) suicidal. B was conceived when M was raped by one of her brother's friends. She was 16 when B was born. She was unable to live with her family because of conflict with her brothers and their heavy drinking and use of heroin. For the first year of B's life, M was homeless and moving between various friends and refuges.

The first record of M's suicidal attempts was when B was 1 and she was homeless and living in an infants' home facility. She was asked to leave after she attempted suicide and she threatened the staff with a knife. M's capacity to look after B, and her second child, C born four years later, subsequently deteriorated with drug, alcohol and poverty related problems.

When B was eight years old the family was itinerant again and M could not cope with B's behavioural problems. She requested assistance from the Department, as she was afraid she would harm B. M, who now had a third child, requested long term care for all her children. The Department officer's report for the court hearing states:

[M] takes a negative and punitive attitude towards [B]. She is likely to continue to mismanage him ... this will lead to increasing acting out on [B's] part. [M] will not be able to cope, may resort to aggression and he will have to be removed from her control...She is not prepared to dedicate her time and energy to establish a functional family unit. She has no suitable accommodation and there is no real commitment to obtain it ... all efforts to change her attitude by this Department have been unsuccessful. There seems no alternative but for [M's] three children to be removed from her care.

From the time when B was born to when M requested long term care for her three children, there is no record of substantial help being offered to M or the family to address underlying problems. She attempted, although unsuccessfully, to deal with some of these problems herself. By the time B was eight he had been in a number of placements, and had disclosed that he was sexually assaulted in one of his placements. His behaviour had deteriorated and he was suspended from school for hitting teachers and pupils. He was referred to a paediatrician who diagnosed him with ADD and placed him on medication and weekly counselling which lapsed shortly after commencement. The aunt B was placed with was described as negative towards him and she reported that 'the man living with her' teased him with racist taunts. B was described as sad and angry and seeing his mother regularly whom he wanted to live with. B's carer requested a review meeting, as she could not cope with his behavioural problems, which included violence at school and damage to property.

B went back to live with his mother for a short time and she again faced numerous life problems including loss of her job and subsequently her house. B was 10 years old at this stage. He was permanently excluded from school for ongoing disruption and

violence. The Department indicated concern about placing B back with his mother as she had no income, however his placement in alternative care would involve considerable expense, as he would have to be placed in institutional care because of his behavioural problems. He was placed back with his mother. When B was 11, M requested respite care for B who had attempted to jump under a train. A few months later the police were notified by B's relatives who reported him as threatening suicide. On attendance his mother reported that he had attempted suicide using a rope prior to the railway incident and before that he had tried to kill himself on the road. B's behaviour continued to deteriorate and he was charged with numerous offences. He also ran away from the Minali Juvenile Justice Centre numerous times and abused and assaulted staff and residents. The Children's Court magistrate ordered a psychiatric assessment of B and his mother, which recommended his reinstatement with his mother. The file was closed shortly after with the case- worker recording that, 'no further action is possible' as the last attempt to remove B failed due to a psychiatric report. It is disturbing that this file was closed when the child of 11 had made three serious suicide attempts in the previous few months and appeared to pose a risk to other children. It is also a file where a very different outcome for B and his mother could have occurred had sufficient support been in place from an early stage, preferably from the point of prenatal care and counselling and assistance for M prior to and after B's birth.

In file 58, a particularly badly kept file with almost all information missing for a 10 year period of involvement with the family, the mother attempted to commit suicide, and threatened suicide, and there is no evidence of follow up by the Department. In file 61 both parents demonstrated suicidal tendencies and the father had attempted suicide at least twice, yet there were no referrals or action in relation to this. In the first two years of the Department's involvement with this family there were no indications on the file about the children's emotional, language or other development other than notifications and records of the parents' behaviour which indicated neglect. In the same period there was considerable concern and detail on file about the house being dirty. In file 4 D's parents had

severe drug and alcohol and domestic violence problems. The file had notifications relating to exposure to domestic violence, failure to provide care, failure to provide food, lack of supervision and general neglect. D was reported as having drug and substance abuse problems at a very young age. At the age of 12 the police picked D up after he threatened other children with a knife, smashed a window and was running head first into walls trying to injure himself. D was described by a paediatrician as having blind rages and the doctor expressed concern that he may kill himself during a rage.

In file 69 W was the fourth child in a family of eight children. Ongoing notifications relating to sexual assault by various parties on various children within the family were recorded through the file. At eight years of age it was very difficult to find a placement for W. Various placements of W broke down because of his difficult behaviour and carers were pressured at times to try to keep him for a little longer until alternative arrangements could be made. By the time he was eight years old W had been suspended from school at various times for wrecking property, throwing rocks at the teacher, attacking the teacher, destroying the executive office at school, hitting the teacher with a steel rod and attempting suicide. There are also notifications on the file of W allegedly sexually assaulting a three year old child. He had threatened and attempted suicide on a number of occasions, including a time when he was nearly killed after he ran onto the road and lay down in the path of oncoming traffic.

The consistent pattern in these files is escalating trauma and anti-social behaviour which is not addressed even when the children or parents are suicidal.

#### **Failure to follow through or adequately investigate**

While the files assessed were identified as substantiated emotional abuse and neglect cases, notifications about physical and or sexual abuse were common. In

many instances these notifications were not followed up. For example, in file 68 a four year old girl (T) disclosed sexual assault including penile and digital penetration. The parents reported the matter to the police. There was no follow up in the file until over a year later, when T's brother, A, informed a Department officer that the same maternal uncle had touched T 'in a rude way.' When the Department officer interviewed the father about this disclosure, he informed the Department officer that he knew that the uncle has touched both A and T but that he allowed his ongoing presence in the family as he relied on him for transport. The parents signed informal undertakings not to allow the maternal uncle access to the home or children. The file progressed with further undertakings relating to protection of the children from lodgers, family and friends with no enforcement of undertakings and ongoing confirmed sexual assaults of the children by various relatives, lodgers and other parties over the next four years. A, then a 10 year old boy, was placed in the residence of a maternal uncle who allegedly sexually assaulted all the children in A's family. Reports of A and his sister T being sexually assaulted by numerous parties including maternal and paternal uncles, and a half brother, B, are on file from when the children were four years old. Seven years later sexual assault counselling had not been implemented.

Files were often chaotically kept with significant information such as notifications about sexual abuse apparently lost in the paper work. Often families moved and cases were transferred to new Departmental offices. Department officers were also changed both by request of clients and for unspecified reasons. Where significant matters relating to children's safety and wellbeing are at stake, secure and reliable records are necessary. This was not evident in the files assessed. In a number of instances later file notes indicate a lack of knowledge about the case history. In file 67 a female child was referred to as a male later in the file. In many instances important court documents, voluntary care agreements and other material was missing from files.



A particularly poor example was file 58. The family consisted of the mother, father and two children under the Department's attention and three children who had died. The family had contact with the Department for more than 10 years but most file information other than a computer printout of general information from the Department's CIS database was missing. This meant that the file consisted largely of notification reports recorded on the CIS database. A number of the notifications related to injuries, with severe bruising noted, including an admission to hospital with the injuries recorded as non-accidental but cause not known. Very little information about the parents is recorded on the file other than, 'It is understood that both parents were wards of the Department.' While a note on the file indicated some concern about the parents' caring skills due to the death of J with the cause noted in the file as 'non-accidental injury,' no follow up of either the circumstances surrounding the death of J or the parents' caring skills is evident in the file. The file briefly notes that J's death was being looked at by the Department of Public Prosecutions (DPP) but that the case was later dropped because of a lack of evidence. While the mother and child are referred for various assessments the follow up details are missing from the file. Important information, such as information regarding court orders and court reports were also missing. Investigation of notifications such as a notification pertaining to the father knocking two of the children's' heads together was investigated two years after the notification. Other programs which were recommended for the family and which the mother seemed willing to participate in, such as the Montrose home based assessment program, never took place because the Department did not provide the file to the programs. Many communications were on the file from Montrose indicating that they needed background information and reports from the file before an assessment could take place. The Montrose program is an intensive program aimed at increasing the possibility of families staying together through intensive assessment and identification of assistance needs.

However, more routine failures to follow up matters included failures to follow repeated recommendations, such as in files 44 and 45, to get psychological assessments and for speech pathology. When assessments were made the

recommendations were then not followed up. Frequently allegations of sexual assault were not followed up and when in departmental terms they were substantiated, damaging delays in follow up action, such as counselling, took place. For example, in file 68 the first notification on record related to general neglect of the children, a lack of food in the house and failure to attend to their health. At this stage the mother reported that she was not allowed out of the house and faced domestic violence by the father. There was no record on file of any intervention to assist her. The mother's self esteem was exceptionally low, she was suicidal, all eight of her children had allegedly been sexually assaulted by various relatives and people who the father would not exclude from the house, and most of the children were so disturbed that it was impossible to find a placement for them. Numerous refuges refused to accept a number of her children because of their disruptive behaviour. A Department court report recommendation was changed from wardship to supervision, not because the family circumstances were suitable for supervision, but because the Department could not envisage finding placements for the children. On an application for funding for intensive family support the following was noted, 'The case for them to be removed from the family is apparent but at present no suitable placement can be found.' At this stage the Department funded a full time refuge worker to work with the family at a cost of \$56 000 per annum. This is a family which had developed intractable problems when it is possible that early and appropriate intervention could have led to a much better outcome for the children, mother and the Department.

No standard forms or method for summarising detailed files had been established. A bureaucratic preference for maintaining ward files, as opposed to general child protection files was apparent and interventions often appeared to be in response to an incident or crisis rather than a more consistent plan for the child and family.

## **Relationship between child protection and juvenile/criminal justice**

Children in this case study were often engaged in substance abuse from a very young age, developed behavioural problems which made their placement almost impossible, and were at risk of moving from the child welfare system to the juvenile justice system. The Royal Commission into Aboriginal Deaths in Custody found that approximately half of those whose deaths they investigated faced forced separations from their families when they were children.<sup>120</sup> The preponderance of evidence suggests a strong relationship between involvement with child welfare and juvenile justice systems. The New South Wales Community Services Commission in 1996 found that wards in New South Wales were 15 times more likely to enter the juvenile justice system than were non-wards and wards were readmitted to Juvenile Justice Centres (detention centres) more often than non-wards.<sup>121</sup> Stewart et al looked at all children born in 1983 in Queensland who were flagged with child protection services, and their relationship with the juvenile justice system. While she acknowledges that the majority of children who experience neglect and abuse do not offend she reiterates that the relationship between child welfare and juvenile justice is 'well established.'<sup>122</sup> Cashmore, in a review of the relationship between child maltreatment and offending, notes the higher correlation between children in out-of-home care and offending and in particular their placement in out-of-care in adolescence, their experience of multiple placements and their placement in a group home rather than in foster or family care. The latter two factors, as Cashmore identifies, may reflect the complexity of the young person's

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<sup>120</sup> Royal Commission into Aboriginal Deaths in Custody (1989), *Royal Commission into Aboriginal Deaths in Custody: National Report Volume 1*. Canberra: Australian Government Publishing Service, 2.2.9.

<sup>121</sup> Community Services Commission (NSW) 1996, 'The drift of children in care into the juvenile justice system: turning victims into criminals. A discussion paper by the Community Services Commission', (New South Wales).

<sup>122</sup> Stewart A, Livingston M & Dennison S (2008), 'Transitions and turning points: Examining the links between child maltreatment and juvenile offending,' 32(1) *Child Abuse & Neglect* 55. Stewart et al examine the relationships between the frequency of maltreatment, age of onset, duration of maltreatment and the correlation between maltreatment which was onset or continued into adolescence and juvenile offending. Their finding of a correlation between maltreatment into or onset at adolescence and juvenile offending confirms findings by Thornberry, Ireland and Smith (2001), Thornberry T, Ireland T & Smith C (2001), 'The importance of timing: The varying impact of childhood and adolescent maltreatment on multiple problem outcomes,' 13 *Development and Psychopathology* 957 cited in Cashmore (2011), 'The Link between child maltreatment and adolescent offending – Systems neglect of adolescents,' 8 *Family Matters* 31.

situation and there may therefore be multiple underlying factors related to their unstable placements or placement in a group home which also contribute to their contact with the juvenile justice system.<sup>123</sup> Indigenous children are as illustrated in Chapter 1 significantly over-represented in child protection systems in every jurisdiction in Australia. Their over-representation exacerbates as interventions become more significant with their greatest over-representation is in out-of-home care.

Research undertaken to explore the relationship between Aboriginal young peoples' involvement with child welfare systems and juvenile justice systems is limited. A survey conducted at Yasmar and Reiby juvenile detention centres in New South Wales on two specific dates found a significant over-representation of Aboriginal youth who had involvement with child welfare services in detention. The research was conducted on two specific dates. A survey of Yasmar Juvenile Justice Centre on the 15 October 1998 against the DOCS database found that of the 24 young women in detention 18 were registered with DOCS. 12 of the 18 young women were Aboriginal. A survey of Reiby Juvenile Justice Centre on 5 January 1999 found that of the 45 young men in the detention centre 39 were registered with DOCS and 18 of the young men in Reiby who were registered with DOCS were Aboriginal.<sup>124</sup> While there is limited data which verifies these findings, the over-representation of Aboriginal children in child welfare and juvenile justice systems together with their poor experiences in both systems suggests that these findings are likely to be replicated if further research is undertaken. Indigenous children's experiences of child welfare systems, as illustrated in this case study, makes interventions less successful, exacerbation of problems more likely and adverse outcomes, including transition to the juvenile justice system, more likely. The multitude of securities and support which stable care offers as a buffer against poor outcomes was lacking for most children in this case study. The cumulative impact of historical and contemporary experiences of Aboriginal people with child welfare

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<sup>123</sup> Cashmore (2011), *ibid*, 35-36.

<sup>124</sup> Marsden A (1998), *The Wards Project: An Initial Review of Recommendations from the Community Services Commission's Report Wards in Juvenile Justice Sub Committee*. Sydney: Department of Juvenile Justice, 11.

systems makes, as this case study illustrates, empathetic and affective response by departmental caseworkers towards Aboriginal families less likely, and in some instances a disregard for the children or young person's humanity more likely, and therefore exacerbation of bad outcomes more prevalent.

## **Conclusion**

The issues which underlie abuse and neglect of Aboriginal children have complex social and psychological roots. These need to be understood within the context of colonial policies, particularly policies of forced and unjustified separations of Indigenous children from their families. As this case study illustrates, a case based bureaucratic approach to Indigenous children's welfare and wellbeing has not been successful. Indigenous children in this case study were denied basic human rights including the right to freedom from violence, adequate food, education, shelter and participation in their culture. The failure to address their most fundamental rights and needs is perpetuating an intergenerational cycle of disadvantage, marginalisation and trauma. It is short-sighted. It not only leads directly to breaches of children's human rights, but frequently to the growth of unhappy young people and adults whose problems impact on the whole community. In effect previous governmental practices of destruction of Indigenous families are being perpetuated through inappropriate child welfare policies and governmental neglect. As crisis management, a case based approach to child protection frequently does not contribute constructively to Indigenous children's wellbeing.

Chapters 2 and 4 outline why a human rights framework, which incorporates Indigenous children's organisations into decision making with respect to Indigenous children's welfare and wellbeing, is likely provide a more successful way of addressing decision making with respect to Indigenous children's welfare and wellbeing. As discussed in Chapters 5 and 6, an incremental shift is taking place in child welfare legislation which is transferring some responsibility for

Indigenous children's welfare and wellbeing , and decision making with respect to Indigenous children and young people, to Indigenous organisations. The next chapter evaluates why an individualised and bureaucratic response to Indigenous child welfare leads to a lack of personal responsibility in child welfare decision making with respect to Indigenous children and why a pluralised human rights framework is likely to lead to better decision making and welfare agencies taking greater care and responsibility for Indigenous children's welfare and wellbeing.

## ***Chapter 4***

### ***Locating Moral Responsibility***

## ***Introduction***

Case based child welfare services, delivered by bureaucratic government departments, as illustrated in the previous chapter and in empirical data do not provide good outcomes for Indigenous children and young people.<sup>125</sup> This chapter examines why decision making within bureaucratic child welfare departments does not attain good outcomes for Indigenous children and why a policy of self-determination, within a human rights framework, is likely to provide a better framework for decision making.<sup>126</sup> The right to, and meaning of, principles of self-determination in international human rights law in the context of child welfare are discussed in Chapter 2. This chapter considers the relationship between modes of decision making and the exercise of moral agency by decision makers and why valid and legitimate decisions with respect to Indigenous children's wellbeing need to substantially include Indigenous experience in the decision making process. Consideration is given to the justification for separate Indigenous decision making bodies, which are implied in policies and processes of self-determination. These justifications are found in terms of a commitment to political equality, in the historical and practical experiences of Indigenous peoples, which distinguish them from other minority or majority groups, and in the rule of law.<sup>127</sup> It is suggested that recognition of Indigenous identity, histories and perspectives in decision

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<sup>125</sup> See the plethora of reviews of child welfare services which find outcomes consistently poor for Australian Aboriginal children in Chapter 1; Australian Bureau of Statistics (2010), *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*. Canberra: Australian Bureau of Statistics. In the Canadian context see, for example, Indian and Northern Affairs Canada (1996), *Report of the Royal Commission on Aboriginal Peoples, Volume 3: Gathering Strength*. Ottawa: Indian and Northern Affairs Canada, 33-54; and Blackstock C & Troeme C (2004), *Community based child welfare for Aboriginal children: supporting resilience through structural change*. Available at: <http://dev.cecw-cepb.ca/files/file/en/communityBasedCWAAboriginalChildren.pdf>.

<sup>126</sup> In this chapter, self-determination is defined as the exercise of limited political and legal powers by Indigenous communities within the purview of Australian sovereignty. There are many contested political and legal meanings of the term self-determination and the meaning of self-determination with respect to Indigenous peoples is discussed in Chapter 2.

<sup>127</sup> Macklem's analysis of arguments for recognition of Indigenous peoples' rights to self-determination is compelling and has been drawn upon. See Macklem P (2001), *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press; Macklem P (1993), 'Distributing Sovereignty: Indian Nations and Equality of Peoples,' 45 *Stanford Law Review* 1345; and Libesman H (2002), 'Review of Indigenous Difference and the Constitution of Canada,' 40 *Osgoode Hall Law Journal* 200 for a discussion of Macklem's reasoning and, in particular, his justification for recognition of Indigenous difference as an expression of commitment to equality.

making with respect to Indigenous children and young people's wellbeing will contribute not only to more just and effective outcomes for Indigenous families but also to a more dynamic and enlarged democracy for the broader community.

### ***Bureaucracy and impartiality***

Contemporary child welfare interventions in Indigenous families are usually, for those families, deeply imbued with collective and individual historical memories of forced and unjustified removal of children by colonial officials.<sup>128</sup> They are also imbued with broader and current experiences of Aboriginality. From the time of colonisation, the removal of children was experienced by Indigenous peoples together with loss of land, loss of economic independence and other forms of dispossession.<sup>129</sup> These experiences have been compounded over the generations with many children who come into contact with child welfare and juvenile justice systems facing intergenerational trauma and loss.<sup>130</sup> There is, however, albeit within a framework of power imbalance and domination, cultural interchange between Indigenous and non-Indigenous peoples and

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<sup>128</sup> See for example, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC) (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Sydney: Human Rights and Equal Opportunity Commission; Indian and Northern Affairs Canada (1996) above n1; Read P (1982), *The Stolen Generations: The Removal of Aboriginal People in NSW 1883 to 1969 (Occasional Paper No. 1)*. Sydney: New South Wales Ministry of Aboriginal Affairs; Haebich A (2000), *Broken Circles – Fragmenting Indigenous Families 1800 –2000*. Freemantle: Freemantle Arts Centre Press; Johnston P (1983), *Native Children and the Child Welfare System*. Toronto: Canadian Council on Social Development in association with James Lorimer & Company; Morrisette PJ (1994), 'The Holocaust of First Nation People: Residual effects on parenting and treatment implications,' 16(5) *Contemporary Family Therapy* 381.

<sup>129</sup> See, for example in the Australian context, Reynold H (1989), *Dispossession*. Sydney: Allen and Unwin. For a discussion of land issues in New South Wales, see, for example, Goodall H (1996), *From Invasion to Embassy. Land in Aboriginal politics in New South Wales from 1780 to 1972*. Sydney: Allen and Unwin.

<sup>130</sup> For discussion of intergenerational trauma, see Atkinson J (2002), *Trauma Trails: Recreating Song Lines, The transgenerational effects of trauma on Indigenous Australia*. Melbourne: Spinifex Press; Gagne M (1998), 'The role of dependency and colonization in generating trauma in First Nations citizens – The James Bay Cree' in Danieli Y (ed), *International Handbook of Multigenerational Legacies and Trauma*. New York: Plenum Press.



institutions in most parts of Australia. This inevitably, and not necessarily exclusively negatively, forms part of most Indigenous communities' identities.<sup>131</sup>

The perceptions and understandings underlying the decisions and procedures undertaken by most departmental child welfare officers are imbued with colonial experience. These are, in subtle as well as more obvious ways, in conflict with bureaucratic understandings of impartial and beneficial processes guided by neutral legislation. Child protection legislation and procedures are from a departmental and dominant community perspective self-justifying. It is easy to create a perception of neutrality and objectivity around legislation and departmental objectives which purport to protect children from abuse and neglect.

The core objective of child welfare policy – that is, to ensure that children are emotionally and physically healthy and looked after – is presumed to be a neutral given, rather than a complex outcome of social, cultural and historical factors. Hence, 'common sense' judgments about children's wellbeing and child protection are made from a dominant community perspective without cause to pause and consider the prejudices and presuppositions inherent within that perspective.<sup>132</sup> Likewise, the 'common sense' judgment of Indigenous families and children are imbued with memories and experience of a colonial character. The case based method of delivering

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<sup>131</sup> For a nuanced discussion of this interchange, in the context of land rights legislation rather than child welfare, see Bird Rose D (1996), 'Histories and Rituals: Land Claims in the Territory' in Attwood B (ed), *In the Age of Mabo*. Sydney: Allen and Unwin.

<sup>132</sup> Arendt suggests that judgment relies on a 'common sense' shared by a judging community, and to move beyond one's private idiosyncrasies one needs to exercise an enlarged mentality and imagine the responses of other judging members of the community. Arendt's understanding of judgment differs from Kant's. For Kant, a judging person could, through imagination, place themselves in the position of all judging people. While Arendt died before writing her theory of judgment her lecture notes on judgment were published posthumously: Beiner R (ed) (1982), *Lectures on Kant's Political Philosophy*. Chicago: The University of Chicago Press. Jennifer Nedelsky discusses Arendt's concept of judging with an emphasis on the particularity of judgments and the meaning of a community's 'common sense' and the process of exercising an 'enlarged mentality' in the context of judging across communities with different values and experiences: Nedelsky J (2000), 'Communities of Judgment and Human Rights,' 1 *Theoretical Inquiries in Law* 245.

child welfare services exacerbates departmental failure to understand Indigenous children's issues in a historical and cultural context.<sup>133</sup> This is, as illustrated in the previous chapter, because caseworkers address children and families in isolation, and usually in the context of a crisis at a particular point in time. They, therefore, do not engage with families in a manner that would cause them to expand their own 'common sense' and incorporate an enlarged understanding of Indigenous children's wellbeing. This is particularly the case in child welfare systems such as those in Australia, Canada, United States and New Zealand where the dominant focus is protective rather than on family and community support or a public health model approach to child welfare.<sup>134</sup> The case based approach to child welfare, in the context of underfunded and overworked child welfare systems, translates to crises management and perceptions of families, parents and communities in their most stressed and least favourable light.

Central to an impartial framework for delivering child welfare services is the presumption that all children are treated with equality. Scott notes, 'To treat unequal people equally is to institutionalise and entrench inequality and in turn to impose division and disunity. This goes to the heart of the debate concerning substantive and formal equality.'<sup>135</sup> A basic precept of equality – that relevant differences be taken into account – is only recognised in limited ways in mainstream child welfare legislation. This recognition takes the form of including provisions, such as an Indigenous child placement principle, into a 'neutral' legislative and policy framework.<sup>136</sup> As discussed in

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<sup>133</sup> The case based method involves primary resources placed in individual child management on a case-by-case basis, rather than looking at the child in the context of their community and broader environment. The lack of resources in most child welfare departments usually means that the case based method of social work involves crisis management as illustrated in the case study in Chapter 3.

<sup>134</sup> A public health model approach to child welfare offers universal measures to fortify the community against problems, secondary measures which target vulnerable groups to support the wellbeing of their children and tertiary measures to respond to neglect and abuse and prevent further harm. O'Donnell M, Scott DA & Stanley F (2008), 'Child Abuse and Neglect – is it time for a public health approach?', 32(4) *Australian and NZ Journal of Public Health* 325; Cashmore J, Higgins DJ, Bromfield LM & Scott DA (2006), 'Recent Australian child protection and out of home care research: What's been done and what needs to be done?', 31(2) *Children Australia* 4.

<sup>135</sup> Scott G (2002), 'ATSIC Setting the Agenda,' 1 *Journal of Indigenous Policy* 117, 117.

<sup>136</sup> In Canada and Australia, child welfare falls under Province or State and Territory jurisdiction. See, for example, s 13 of *The Children and Young Person (Care and Protection) Act 1998* (NSW)

Chapters 5 and 6, changes to child welfare legislation have incrementally included some Indigenous input into decision making with respect to Indigenous children. However, to take recognition of Indigenous children and families' difference seriously requires a willingness to challenge deeply held assumptions about the universality of experience. That is, experience of daily living, of moral values, of family and public life, and all the judgments which people make. Young suggests:

The ideal of impartiality expresses what Theodor Adorno calls a logic of identity that denies and represses difference. The will to unity expressed by this ideal of impartial and universal reason generates an oppressive opposition between reason and desire or affectivity.<sup>137</sup>

The ideal of a universal impartiality privileges dominant community identity. To attain substantive equality legislation and policy would need to incorporate Indigenous community identity. It requires incorporation of local Indigenous understandings of family life, both when welfare concerns are reported and more generally. It requires consideration of Indigenous perspectives at each stage when working with families from the point of contact and through the course of any interventions. It requires impartiality with respect to the particular child and family, but an impartiality which has at the heart

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and ss 57(5) and 61(2) of the *Child and Family Services Act* 2002 (Ontario). There have been greater advances in the transfer of departmental control over child welfare matters to Indigenous agencies in Canada compared with Australia, with Manitoba leading the way. Although Manitoba provides extremely well structured and culturally respectful models for transferring departmental control to First Nations agencies it retains mainstream legislation and child welfare standards. See Chapter 5 for a discussion of comparative legislative models. For a critique of this aspect of the Manitoba model, see McKenzie B & Morrisette V (2003), 'Social Work Practice with Canadians of Aboriginal Background: Guidelines for Respectful Social Work,' 2(1) *Envision: The Manitoba Journal of Child Welfare* 13.

<sup>137</sup> Young IM (1987), 'Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory' in Benhabib S & Cornell D (eds), *Feminism as Critique: On the Politics of*

*Gender*. Minneapolis: University of Minnesota Press, 57.

of decision making an understanding of the family's experiences as an Indigenous family.<sup>138</sup>

Recognition of Indigenous peoples' difference requires recognition that understandings develop from an experiential point of view, a historicised point of view. Identities are often complex and in a colonial context may shift and be contingent and nuanced depending on the relationships which groups have with the colonisers and others whom they have contact with.<sup>139</sup> The way people perceive a situation and make judgments is affected by community and individual experiences, both past and current, which are interrelated and inform how cognitive and emotive information is evaluated and assessed. The identity of those making decisions therefore plays a crucial part in informing those decisions and judging whether they are just and appropriate. Neutrality and impartiality do not imply either fairness or equality where they are serving as intellectual and legal tools for the imposition of dominant experience in judgments about Indigenous families. However, departments or individuals within departments applying 'neutral' legislative or policy standards are not necessarily acting either instrumentally or intentionally when imposing dominant values upon Indigenous families.<sup>140</sup> Rules, which may appear to departments as universal and rational without the need for embodiment, are simply embodying a particular and usually dominant historical and social experience without acknowledging this.

Further it is not sufficient to simply Indigenise child welfare departments or even frameworks for dealing with child welfare. Many Indigenous (and non-Indigenous)

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<sup>138</sup> The ways in which human rights principles have incrementally influenced child welfare reform to incorporate Indigenous sensibilities is discussed in Chapters 5 and 6.

<sup>139</sup> See, for example, Martha Minow's discussion of the difficulties that defining identity legally raises and her comparisons with the more subtle evocations of contingent identities in literature: Minow M (1991), 'Identities,' 3 *Yale Journal of Law and Humanities* 97.

<sup>140</sup> Many Australian departments have explicit policy which recognises the role of Indigenous identity and which acknowledges previous wrong doing to Indigenous families. For example, see the apology of the Director General of the NSW Department of Community Services, Jennifer Mason, to the people of the Stolen Generations and to their families and descendants: Mason J (2008), *Apology*. Sydney: NSW Department of Community Services. Available at: [http://www.community.nsw.gov.au/docswr/\\_assets/main/documents/apology\\_message.pdf](http://www.community.nsw.gov.au/docswr/_assets/main/documents/apology_message.pdf).

parents, leaders, elders and experts have recognised that children's wellbeing depends on a variety of complex social and economic factors.<sup>141</sup> It is well known that Indigenous communities face enormous structural disadvantage which is a legacy of colonial experiences and ongoing racism. It is therefore crucial that responses to Indigenous children's welfare and wellbeing not only involve an understanding of the specific experiences families face but also the broader structural factors which impinge on Indigenous children's and communities' wellbeing.<sup>142</sup> The disparity between reforms to child welfare legislation in Australia, which incorporate aspects of Indigenous understanding, and the paternalistic Northern Territory Emergency Response (NTER), which purports to address systemic and structural causes of child abuse and neglect experienced by Indigenous children and young people, is contrasted in Chapter 6 which evaluates child welfare reform in Australia.

### ***Bureaucracy and accountability***

A large body of literature provides reasons why bureaucratic decision making gravitates against the taking of personal responsibility and therefore provides scope for dilution of moral responsibility.<sup>143</sup> This chapter will focus on MacIntyre's analysis of the ingredients which encourage moral responsibility and why compartmentalised decision making gravitates against institutional morality.<sup>144</sup> Where people have some sense of common belonging and common enterprise, they are more likely to feel responsibility and to take

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<sup>141</sup> Blackstock C (2011), 'The Emergence of the Breath of Life Theory,' 8(1) *Journal of Social Work Values and Ethics*. Available at: <http://www.socialworker.com/jswve/spr11/spr11blackstock.pdf>.

<sup>142</sup> For an analysis of structural factors that affect Australian Indigenous children's and communities' wellbeing, see Australian Bureau of Statistics and Australian Institute of Health and Welfare (2009), *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2008*. Canberra: Commonwealth of Australia.

<sup>143</sup> See, for example, Sjoberg G, Vaughan TR & Williams N (1984), 'Bureaucracy as a Moral Issue,' 20(4) *Journal of Applied Behavioral Science* 441; Foster GD (1981), 'Legalism, Moralism, and the Bureaucratic Mentality,' 10(1) *Public Personnel Management Journal* 93; and Smith M (2010), 'Reading Bauman for Social Work,' 5(1) *Ethics & Social Welfare* 2.

<sup>144</sup> See MacIntyre A (1999), 'Social structures and their threats to moral agency,' 74 *Philosophy: Journal of the Royal Trust of Philosophy* 311; MacIntyre A (1991), 'Community, Law and The Idiom and Rhetoric of Rights,' 26 *Journal of Religion and Culture* 96; Macintyre A (1979), 'Corporate Modernity and Moral Judgment: Are they mutually exclusive?' in **Goodpaster KE & Sayre KM, Ethics and the Problems of the Twenty-First Century**. London: University of Notre Dame Press.

responsibility. Beetson suggests, 'Community organisations will always be accountable to the individuals, families and social groups which they represent; bureaucracies remain accountable to the governments which fund them.'<sup>145</sup> While communities are frequently not unified,<sup>146</sup> the personal commitment and commitment to particular community and people lacking in bureaucracy creates the opportunity to objectify and depersonalise 'clients,' opening the door to treating people in a less empathetic, sympathetic or humane way.

Child welfare departments evoke particular fear, distrust and more pervasive negativity within many Indigenous communities. Caseworkers from Indigenous out-of-home care agencies in a recent study noted:

*'There is a lot of negativity towards Aboriginality – any problems are blamed on their Aboriginality.'*

*'Non-Aboriginal and Torres Strait Islander workers often see the surface but do not understand the underlying circumstances.'*<sup>147</sup>

A number of factors contribute to this widespread response to welfare departments. The failure on the part of departments to incorporate or reflect Indigenous experience heightens the impersonality which is more broadly experienced by parents who deal with welfare departments. This impersonality contributes to a perception of a lack of accountability by departmental officers to Indigenous families. This perception is

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<sup>145</sup> Beetson J (2002), 'Consultation and negotiation with Indigenous Peoples,' 1 *Journal of Indigenous Policy* 87, 90.

<sup>146</sup> The history of forced removals and placement of many 'tribal' groups into a single area can and has generated conflict in some areas. See, for example, the impact of forced relocation in Palm Island in Watson J (2010), *Palm Island: through a long lens*. Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies.

<sup>147</sup> Libesman T (2011), *Culture Care for Aboriginal and Torres Strait Islander Children in Out of Home Care*. Melbourne: The Secretariat of National Aboriginal and Islander Child Care (SNAICC), 43.

exacerbated, as illustrated in the case study in Chapter 3, by historical and current experiences of a lack of accountability to families and communities. Many Indigenous families feel (and, in fact, are) vulnerable because of the problems which they face. Relations with welfare departments are viewed as coercive when compared with encounters with community agencies.<sup>148</sup> Indigenous out-of-home care workers commented:

*‘We understand where people [Indigenous families] come from you can’t just have a mainstream organisation culturally competent, its philosophy is driven by white people, how they were raised, how they understand programs and services.’*

*‘Building the capacity of Aboriginal agencies is an essential part of cultural care. It is really hard for a mainstream agency to provide cultural care – even if they have Aboriginal workers. They have a different background and way of relating to and understanding the world.’*

*‘Aboriginal workers are more likely to understand sensitivities, family histories, they are supersensitive.’<sup>149</sup>*

The power of welfare departments to make life changing decisions, together with the perception of departments as arbitrary, impersonal and lacking in accountability, not surprisingly leads to high levels of fear, resentment and distrust amongst Indigenous families.

The case study in Chapter 3, demonstrates the capacity of ordinary people to make and participate in implementing destructive policy and practices. It provides an example of a bureaucratic structure driven by crisis management and political expediencies and

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<sup>148</sup> See, for example, Weechi-it-te-win Family Services Inc (1995), *Building healthier communities: A report of the operational review of Weechi-it-te-win Family Services*. Ontario: Unpublished report by the Ministry of Social Services.

<sup>149</sup> Libesman T (2011) above n23, 42.

which is unable to deal with the significant issues in its mandate. Many of the children in the case study were placed in, or left in, violent and destructive situations with no one taking responsibility for this failure. Responsibility is diffused within the departmental structure. While many good people do work in welfare department and do their best, they are usually able to leave the decisions made with respect to children and their files in the department's conscience as they are only responsible for implementing departmental policies and play a role within a larger impersonal process. MacIntyre looks at why people substitute their personal moral code for that of the organisation.<sup>150</sup> He suggests that a key factor is the compartmentalised nature of normative standards which define the 'common sense' in different spheres in people's lives. Individuals play particular roles within an organisation and they do not participate holistically. People often only encounter each other within particular spheres of their lives, for example, within a welfare department as a reported parent or as a manager or as a caseworker. The norms within each sphere are insular to that sphere.<sup>151</sup> MacIntyre asserts, 'Within each sphere those norms dictate which kinds of considerations are to be treated as relevant to decision making and which are to be excluded.'<sup>152</sup> The insulated nature of each sphere results in a loss of external reference points to judge decisions against. It therefore results both in a distorted understanding of the people who decisions are being made about and a limited set of values and reference points against which one's decision can be tested.

MacIntyre suggests that the following factors are necessary to understand oneself as, and to act as, a moral agent.<sup>153</sup> One has to have a distinct individual moral, rather than role or office, identity. One has to act as a practically rational individual who is able, where one's judgment so requires, to think and to make decisions which are contrary to

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<sup>150</sup> MacIntyre (1999) above n20.

<sup>151</sup> MacIntyre provides examples such as an executive in a power station would not advocate as a goal reduction in power consumption while the same person in the role of parent or private citizen might do so. He suggests that if this executive did suggest reduction in power consumption at a meeting it would be treated as a joke and that if he persisted with this suggestion he would at least be temporarily treated 'as a source of background noise rather than a participant.': Ibid, 324.

<sup>152</sup> Ibid, 323.

<sup>153</sup> MacIntyre (1991) above n20.



those which most people in that situation or society would make. One has to have confidence in and be able to justify one's judgments that are contrary to dominant and institutionalised opinion. MacIntyre looks at what entitles someone to have confidence in judgments that are contrary to dominant and institutionalised opinion. He says that to have confidence in our judgments we need to subject our reasons to the critical scrutiny of reliable others, for example co-workers, family or friends. He suggests that, where our decisions are contrary to what most people in our society would decide, we need to be accountable as rational human beings to those with whom we have engaged together in critically informed deliberation with and to those whose hitherto unquestioning reliance in the established standards of the social order we challenge by our deliberations and our actions. MacIntyre notes:

To the former they owe an account of why they take it that their reasons for action have been able to withstand the strongest criticisms so far directed against them. To the latter they owe an account of why their reasons for challenging the established standards are good reasons.<sup>154</sup>

MacIntyre argues that compartmentalisation as is experienced in bureaucratic settings gravitates against moral agency. Within a bureaucracy individuals encounter each other in a particular sphere and in a particular role. Within a child welfare environment individuals are encountered as families under investigation, caseworkers, case managers and so forth. They are encountered and responded to as role holders rather than as individuals or members of a group or community who are occupying that role. MacIntyre suggests:

Within each sphere such individuals conform to the requirements imposed in their role within that sphere and there is no milieu available to them in which they are able, together with others, to step back from those roles and those

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<sup>154</sup> MacIntyre (1999) above n20, 322. This conception of moral agency has resonance when considering the failures of bureaucracy. However some may argue that this conception of moral agency is culturally particular and may question whether it can cross cultural boundaries. It would seem by definition to only have application in societies where natural law no longer fully operates and where there is some contact whether through domination or otherwise with more than one way of being.

requirements and to scrutinise themselves and the structure of their society from some external standpoint with any practical effect.<sup>155</sup>

Within a bureaucratic milieu, people to a large extent, particularly with respect to Indigenous 'clients,' lack the community of peers against which they can test their judgments. As a caseworker commented:

*'They [welfare and out-of-home care workers] fear families [Aboriginal and Torres Strait Islander families]. They lack understanding of us so it is difficult for them to make practical judgments about when it is safe to return children....Fear also means they have difficulty building a rapport with families either Aboriginal foster carers or birth families.'*<sup>156</sup>

Within welfare departments significant driving forces include administrative imperatives, financial and political accountability, and career paths. These are all imperatives which are external to the children and families under the department's 'care.'

The fragmented nature of activity within departments enables individual caseworkers to feel relatively uninvolved, powerless and devoid of responsibility. These feelings can be exacerbated in welfare departments where the organisation is itself frequently in crisis and under attack and where morale is low.<sup>157</sup> When the department faces external scrutiny and criticism there is usually a de facto code of silence, with a closing of ranks within the department and attempts are made at self-protection and justification. Within departments, where the resources and procedures are inadequate to deal with the substantial problems that need to be addressed, there is a tendency to substitute

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<sup>155</sup> Ibid, 322.

<sup>156</sup> Libesman (2011) above n23, 43.

<sup>157</sup> See for example Barbour B (NSW Ombudsman) (2002), *DOCS: Critical Issues: Concerns arising from investigations into the Department of Community Services*. Sydney: NSW Ombudsman's Office.

conformity with procedure for taking of moral responsibility.<sup>158</sup> Secondly, within a bureaucracy, decision makers are disconnected from the people whom they are making decisions about. Even within welfare departments, caseworkers are disconnected from policy makers and managers. Further, caseworkers frequently deal with families in isolation enabling them to individualise the problems which families face. Therefore caseworkers are not only often disconnected from the clients and their communities but, as the case study in Chapter 3 would suggest, they usually view clients individually out of their colonial, historical or community context. These factors facilitate the lowering of moral restraints inherent in personal agency, when an individual is acting as their individual self, rather than as an agent of the department.

### **How do bureaucracies justify themselves?**

Gerald Frug provides a detailed analysis of the ideology of bureaucracy.<sup>159</sup> He outlines four models which are used to justify bureaucracies and which attempt to counter the criticisms which are leveled at them. The first is a formalist model which is premised on the idea of legislation providing positive and neutral rules with respect to how decisions are to be made. The second transfers responsibility to the expert who through their objective qualifications can be relied upon to make legitimate decisions. The third relies on judicial review, within this model bureaucratic decisions can be relied upon because they are policed by and therefore have the legitimacy of the courts. The fourth model is the 'pluralist' model which allows stake holders to have input into decision making whilst the bureaucrat/expert retains ultimate decision making power but is assisted with taking interested groups perspective into account. In practice, combinations of all four models are used to justify child welfare bureaucracies.

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<sup>158</sup> See, for example, the arbitrariness in the different treatment of children and young people who are wards of the state compared to those in similar circumstances who are in long-term out-of-home care in the case study in Chapter 3.

<sup>159</sup> Frug G (1984), 'The Ideology of Bureaucracy in American Law,' 97 *Harvard Law Review*, 1276.

The formalist model legitimises bureaucracy on the basis that the organisation is objective and it carries out the subjective will of the legislature. However, the demand for bureaucratic objectivity cannot be separated from the demand for bureaucratic subjectivity. This is evident in welfare departments where the apparently neutral legislative and procedural guidelines always need to be interpreted in light of a child's particular circumstances. Whatever legislative and procedural guidelines a department is given, subjective decisions need to be made in order to implement these. Frug notes, 'Consequently, the project of drawing a line between bureaucratic subjectivity and objectivity is meaningless: each of these concepts can be understood only in terms of its relationship to the other.'<sup>160</sup> The formalist model provides justification to feel good about bureaucratic decision-making:

We can, for example, associate ourselves with the objective side of the model and project important aspects of subjective discretion onto others. As managers or employees, we can perform our daily tasks at work without having to agonise over the decisions we are making or the actions we are taking. Responsibility for them can be displaced onto those –legislators, shareholders, and bosses – whose mandate we are following ... . Alternatively; we can displace responsibility onto our agents; after all, we never decided that our decision should be carried out that way. In this manner all of us can feel that it is really someone else who has the power, and thus the moral duty, to modify the kind of world we are putting into place.<sup>161</sup>

Critiques of the impossibility of separating objective from subjective aspects of decision making have been widely accepted and few people accept the formalist model as a justification, or complete justification, for bureaucratic decision making. However, claims made by child welfare departments to be simply implementing neutral legislation and policy to ensure the physical and emotional safety of children have, as discussed above, enormous popular emotive sway. Further, when children do face bad outcomes,

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<sup>160</sup> Ibid, 1313.

<sup>161</sup> Ibid, 1316.

it is usually the culmination of a complex of factors, with no single decision being the cause of a tragedy.

An alternative way of justifying bureaucratic decision making is to accept that subjective decisions need to be made and that they boost the legitimacy of bureaucrats' decision making by relying on their expertise. The claim being that it is the expertise of policy makers, managers or caseworkers which assist the whole organisation to fulfill its common purpose, which is also the common purpose of the public served by the department. The qualifications and experience of the bureaucrats enable the department to make decisions which can be relied upon by those outside the organisation who do not have the intuition or expertise to carry out the decision making and functions that it does. Frug suggests:

In place of control from the outside, the expertise model substitutes ... the stricter, more exacting and more effective control from the inside ... In the expertise model, the successful operation of the bureaucracy depends on its flexibility and its responsiveness to the personalised judgments of those who function within it ... Only those inside the bureaucracy have the appropriate intuitions about how it works and how best to effectuate its purpose.<sup>162</sup>

This is evident in child welfare departments where a combination of pragmatism and reliance on experts such as social workers, psychologists, lawyers and psychiatrists are used to justify decisions. On the one hand, decisions will be based on the limited resources available and, on the other, decisions will be based on expert reports. The expertise model poses a dual problem for bureaucrats attempting to justify the subjective/objective requirements of their role. On the one hand the problem with too much objectivity is captured in the phrase 'organisation man.' These people are criticised in terms of being subsumed in the organisation ethic and failing to exercise personal judgments about cases. MacIntyre points to the other danger of the expert

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<sup>162</sup> Ibid, 1321.

model, where the bureaucrat exercises too much subjectivity and imposes social control through the fiction of expertise.<sup>163</sup> Frug suggests that:

By deferring to expertise and asserting it ourselves, we help create a world organised around the pretense that some people, armed and limited by their special knowledge, can be trusted to be in charge.<sup>164</sup>

This justifies the community's exclusion or marginalisation from decision making. Decisions are made on the basis of expert evidence rather than what is characterised as the subjective and inconclusive opinions of community members. The problem with reliance on experts is exacerbated for Indigenous people where the experts in a specific discipline (for example, psychiatry) have little if any experience with Indigenous people. This is illustrated in the case study in Chapter 3 where there were failures by caseworkers and psychiatrists to communicate with or assess Indigenous children, young people or families, in a manner which reflects their experience or needs.

Where there are perceived deficiencies in bureaucratic decision making the bureaucracy can retain legitimacy with its 'constituents' through their recourse to the courts. Frug suggests, 'the judicial review model assigns the role of police officer to the courts, and the model's ability to legitimate bureaucracy is derived from the courts' own legitimacy: it is because we can trust the courts that we can trust the bureaucracy.'<sup>165</sup> The theory is that the courts keep the bureaucracy in line and provide some surety of honesty to constituents. Judicial intervention addresses the exceptional circumstances where bureaucratic decisions are questionable. It relies on the presumption that bureaucratic decision making in accordance with either the expertise or the formalist model usually operates effectively. Frug suggests:

The intervention of an authoritative third party might permit a definitive resolution of the proper scope of bureaucratic power. It turns out, however,

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<sup>163</sup> See MacIntyre (1999) above n20.

<sup>164</sup> Frug (1984) above n35, 1333.

<sup>165</sup> Ibid, 1338.

that judicial intervention instead simply absorbs the contradictions of the formalist and expertise models into the courts' own rule.<sup>166</sup>

In addition to the courts replicating the impossibility of melding the objective and subjective aspects of welfare decision making, there are two additional ways in which the judicial review model has been practically undermined. The judiciary has attempted to ensure that bureaucratic decision making is rational rather than arbitrary and this has led the courts to evaluate decisions in the language of technical expertise. Bureaucracies have also changed their procedures in response to judicial review. Frug notes:

Procedures have been altered to allow an increasingly wide range of participation by those affected by the bureaucratic decision making ... Once the process is sufficiently open to permit the expression of some political consensus, the rationale for a judicial role in assessing bureaucratic procedures virtually disappears.<sup>167</sup>

In the area of child welfare, most 'clients,' because of their entrenched disadvantage, have limited access to courts and, particularly, superior courts. The language and mode of Indigenous families' and organisations' participating in decisions, in and out of court, is as the legislative review in Chapters 5 and 6 suggests more inclusive. However, this inclusion remains within a framework and language which is foreign to most Indigenous participants.

Like judicial review the pluralist response to bureaucratic legitimacy looks outside of the bureaucracy to find a mechanism to control bureaucratic decision making. The pluralist model does not change the essential role of case managers and welfare officers as decision maker and expert, but rather checks the power of their decision making. A pluralist bureaucracy appears more responsive to its 'constituency' by allowing

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<sup>166</sup> Ibid, 1339.

<sup>167</sup> Ibid, 1352.

competing interest groups to have input into the decision making. For example, a case conference may include a specialist Indigenous agency such as an Aboriginal medical service. The pluralist model attempts to use egalitarian ideals to boost bureaucratic decision making. The same issue of participation in the framework and language of the courts referred to above applies to the departments. These limitations with decision making are exacerbated by the child protection rather than family or community support/development framework within which most welfare agencies operate. The decision making is, therefore, blinkered both in terms of the constraints created through the individualistic and crisis driven child protection decision making model and in terms of the scope of issues which are made relevant to assessing the child's welfare or wellbeing.

Within child welfare bureaucracies we see all four of Frug's justifications for departmental decision making operating with respect to Indigenous children. The destructive impact of bureaucratic decision making, particularly its capacity to insulate many of those working with Indigenous children from taking personal responsibility, is illustrated in the case study in Chapter 3. However, bureaucratic modes of decision making interface with more inclusive processes, creating at times contradictory and unpredictable ways in which different individual workers and departments address Indigenous children's welfare and wellbeing. Often the way in which these modes of decision making are applied with respect to a particular child or by a child welfare department, will depend on whether an Indigenous agency is engaged with the child or young person and the extent to which a relationship exists between the departmental caseworker who is looking after the child and the Indigenous agency who has some responsibility for that child. As discussed in Chapters 5 and 6, reforms are incrementally taking place with respect to child welfare legislation and these, to varying degrees, are impacting on the bureaucratic models of decision making, including presumptions about the neutrality of laws and standards with respect to Indigenous children's wellbeing. These are, in uneven ways, incorporating Indigenous experiences into child welfare legislation and practice. The next part of this chapter considers how more substantial inclusion of Indigenous peoples' experiences in child welfare law and practice can



improve understandings of the issues pertaining to Indigenous children's welfare and wellbeing and the capacity to make good decisions to address these issues.

### ***Moral agency and decision making***

Arendt suggests that the faculty of judgment relies on a 'common sense' shared by those who are members of a community of judging subjects.<sup>168</sup> She suggests that to make judgments one needs to be part of a judging community. While many factors may contribute to the constitution of a community, shared collective memory is a powerful and emotive cohesive.<sup>169</sup> This is evident amongst Indigenous communities. For example, collective memories about forced and unjustified removals of children from families are, and always have been, a part of the collective memory of almost every Indigenous family in Australia. However, this history was a highly contested revelation to much of non-Indigenous Australia after the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families in the mid-1990s.<sup>170</sup> According to MacIntyre, it is a human quality to be able to make moral judgments.<sup>171</sup> If judgment requires community, as Arendt and MacIntyre suggest, and if exercise of moral agency requires the testing of one's reasons for judging against both institutionalised and alternative opinions, as MacIntyre suggests, then it will be necessary for just decision making with respect to Indigenous families to incorporate the 'common sense' of Indigenous families. One's moral identity is frequently normatively tied to one's group identity. Therefore, creating morally accountable agencies, with respect to decisions about Indigenous children, is tied to effective incorporation of Indigenous communities within decision making structures. To accord equal moral worth to Indigenous families requires recognition of their individual and collective Indigenous identity, which in turn

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<sup>168</sup> Beiner (1982) above n8, 12.

<sup>169</sup> Jennifer Nedelsky notes that 'it may be that in some instances, it is shared memories that define the relevant community of judgment.': Nedelsky (2000) above n8, 268.

<sup>170</sup> NISATSIC (1997) above n4.

<sup>171</sup> According to Kant and Arendt, the faculty of judgment is a universal human faculty. Arendt seems to suggest that making good judgments requires one to be able to enlarge one's mentality to encompass a judging community's 'common sense,' and the greater one's experience of different communities the more scope one will have for enlarging one's mentality and taking different perspectives into account. MacIntyre suggests that making moral judgments is a universal human faculty but that the exercise of moral agency is most enhanced within a community. See Beiner (1982) above n8, and MacIntyre (1999) above n20.

is related to understanding Indigenous children and families in a humane way.<sup>172</sup> As discussed above, effective incorporation into decision making, requires affective participation, which it would seem is limited in a bureaucratic environment and is enhanced in a community based setting.

Just decision making with respect to Indigenous families will need to take place in a structure that incorporates a sufficiently deep understanding of Indigenous community experiences to engage an emotionally intelligent response to this experience. Authoritative decision making bodies, which can communicate alternative, Indigenous ways of understanding family and community crises, are necessary if there is to be a shift in the ‘common sense’ understanding of the problems of child neglect and abuse within Indigenous communities. As discussed in Chapters 5 and 6, legislative reform, which has facilitated substantive participation by Indigenous organisations in decision making with respect to Indigenous children and young people’s welfare, is contributing to a process of incorporating Indigenous communities’ ‘common sense’ in decision making. While there are no true or universally correct judgments in any particular case, judgments are valid for the judging communities. For decision making to obtain and retain legitimacy, Indigenous people need to be members of the judging community. The importance of participation and consultation with respect to decision making which affects particular communities is recognised in the jurisprudence of the major human rights treaties and is a fundamental aspect of the right to self-determination however this is conceptualised.<sup>173</sup> A capacity to make just decisions also presumes a normative framework for just decision making within communities. In some communities, where the fabric of social cohesion and law and order have been undermined, capacity building is necessary

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<sup>172</sup> Will Kymlicka provides a liberal argument for Indigenous self-government. He argues that without group rights a secure societal context in which to render meaningful individual wellbeing is not available. See Kymlicka W (2000), ‘American Multiculturalism and the ‘Nations Within’’ in Ivison P & Saunders (eds), *Political Theory and the Rights of Indigenous Peoples*. Cambridge: Cambridge University Press.

<sup>173</sup> For further discussion of the relationship between international human rights jurisprudence and Indigenous children’s wellbeing, see Chapter 2.

not only with respect to physical infrastructure but also as discussed below with respect to community cohesion.

Child welfare decision making routinely places departmental officers in a position where particular moral contests need to be judged but the 'common sense' and legal and policy framework from which judgments are made does not incorporate the experience of those being judged. This difficulty is experienced from the time of notification, which is the point of initial contact, to the placement in out-of-home care, which is the most severe intervention. Recent research with respect to cultural care for Indigenous children in out- of-home care found that non-Indigenous agencies and caseworkers believed that they did not have the understanding to effectively implement the Aboriginal and Torres Strait Islander child placement principle.<sup>174</sup> Incorporation of the historical and personal experiences of Indigenous families into decision making would help to avoid objectifying Indigenous identity into an idealised or essentialised archetype, which negates, or is unable to understand, lived experience.<sup>175</sup> The capacity to make good moral judgments requires an integrated combination of reason and an appropriate emotional response to that reason and the circumstances which one is reasoning about.<sup>176</sup> Emotional response is at least in part born out of one's experiences. This does not imply that no reasonable or impartial decision can be made, and that all decisions about particular children or families are subjective and random. Rather, it implies that incorporation of different collective experiences into decision making expands the spheres of 'common sense' and understanding which are taken into account when decisions are made. It is, therefore, recognising that the relevant considerations are not neutral and independent of those whom the decision is about but rather that judgments need to be made about a range of subjective factors for a just decision to be made. Subjective impartiality does not simply involve inclusion of extra information into the decision making process. It is a process for including different experiences and affective responses which interpret and judge *all* relevant information

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<sup>174</sup> Libesman (2011) above n23.

<sup>175</sup> The problem of essentialising Indigenous children and young people's identity is also discussed with respect to developing Indigenous child welfare frameworks in Chapter 5.

<sup>176</sup> See discussion by Young of why an emancipatory ethic which does not oppose reason to affectivity needs to develop in Young (1987) above n13, 56.

from this altered viewpoint.<sup>177</sup> It is a way of expanding the 'common sense' and democratic parameters of decision making. This can be differentiated from interest based decision making, such as applied in the pluralist model of bureaucratic decision making discussed above. Key ingredients of a just decision pertain to who participated in making the decision and how these participants engaged in the decision making process.

A significant way in which child welfare bureaucracies have attempted to include Indigenous perspectives is to attempt to recruit Indigenous child protection workers. Indigenous child protection workers are often placed in an invidious and difficult position, both in terms of their personal identity and their role in the community, when working within a departmental framework. Working within bureaucracies where there are not good relations between the department and the community can place particular stress on Indigenous departmental officers in terms of conflicting loyalties and disruption to their role and community identity. Both the failure of policy created for Indigenous peoples in a bureaucratic vacuum and the need for a grass roots approach to addressing family and other issues in Indigenous communities have been noted by community members, policy analysts and those engaged in policy development and implementation.<sup>178</sup> Beetson notes, 'It is misleading and deceptive to describe government-controlled initiatives as partnerships.'<sup>179</sup> Hill comments that initiatives for Indigenous communities from within bureaucracies are often limited by the standard project model which is used because it suits administrative and financial requirements rather than because of its record or suitability.<sup>180</sup> Hill notes:

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<sup>177</sup> See discussion of how exposure to, and inclusion of, diverse experience in judicial decision making can bring a broader understanding of equality to law in Nedelsky J (1997), 'Embodied Diversity and the Challenges to Law,' 42 *McGill Law Journal* 94, 106.

<sup>178</sup> For discussion on the importance of a grass roots approach to policy making for Indigenous peoples, see, for example, Behrendt L (2002), 'Self-determination and Indigenous Policy: the Rights Framework and Practical Outcomes,' 1 *Journal of Indigenous Policy* 43.

<sup>179</sup> Beetson J (2002), 'Consultation and Negotiation with Indigenous Peoples,' 1 *Journal of Indigenous Policy*, 88.

<sup>180</sup> Hill K (2002), 'Aboriginal Peoples the End of the Line – a regional Perspective on Policy and the Benefit of Linkages between Agencies,' 1 *Journal of Indigenous Policy*, 115.

Crafting processes and institutional responses that marry cultural practices with structures in a way appropriate to the community should provide the basis for more effective structures ... Innovative approaches to institutions and processes seem to be missing from an area where cultural conflict has left such devastating legacies.<sup>181</sup>

Pluralist and other similar interest based models of decision making for Indigenous communities filter all information through the dominant decision making lens compared with an inclusive form of decision making which would incorporate the collective experience of *affected* decision makers and in this manner 'enlarges the common sense' used to interpret all information.<sup>182</sup> Tully suggests:

Subjects are permitted and often encouraged to participate in democratic practices of deliberation yet are constrained to deliberate in a particular way, in a particular type of institution and over a particular range of issues so their agreements and disagreements serve to reinforce rather than challenge the status-quo ... This is the unfreedom of assimilation for one is not free to challenge the implicit and explicit rules of the dominant practice of deliberation, but must conform to them and so be shaped by them.<sup>183</sup>

Democratic inclusion in decision making structures and processes at a substantial level opens the possibility for greater moral capacity in the decision making process. This is because decision makers are able to look at and evaluate their decisions at an individual level, with the benefit of group experience, which encompasses a broader spectrum of humanity. Models of deliberative rather than interest based democracy have been developed drawing on the ideas of political theorists and philosophers such as Hannah

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<sup>181</sup> Ibid, 116.

<sup>182</sup> Ibid, 118.

<sup>183</sup> Tully J (2002), 'The unfreedom of the moderns in comparison to their ideals of constitutional democracy,' 65(2) *Modern Law Review* 204, 223.

Arendt and Jurgen Habermas.<sup>184</sup> Deliberative democracy entails decision making focused on attaining the public good rather than forwarding private interests. It is based on the premise that through deliberation about what is in the best interests of the public, ideas will be transformed and better judgments will be made. While deliberative theorists have not ignored differences in cultural background, economic power, education and other such matters, they have been criticised for their emphasis on reaching consensus.<sup>185</sup> Iris Young has coined the term ‘communicative democracy’ which differs from ‘deliberative democracy.’ She suggests that this process is less about deliberation to reach consensus and more about communication across differences.<sup>186</sup> Communicative democracy provides a good basis for developing decision making models where values are contested. In the area of Indigenous children’s welfare it offers scope for ideas from both Indigenous and non-Indigenous experience to be evaluated and adopted where they have merit. While power, language and resource differentials persist, reforms to child welfare legislation in Australia and in comparative jurisdictions such as Canada, the United States and New Zealand have to some extent, as discussed in Chapters 5 and 6, established frameworks for communicative democracy with respect to Indigenous children and young people’s wellbeing .

### ***Commensurability between Indigenous and mainstream common sense***

A core respect for human dignity and integrity, a common commitment to principles of equality and a common desire amongst almost all parents to provide the best they can for their children can provide a bridge across Indigenous and dominant communities of understanding. However, the prerequisite for such a bridge is an institutionalised recognition of Indigenous communities. Without this recognition, neither the ‘enlargement of mind’ that is necessary for decision

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<sup>184</sup> See, for example, Habermas J (1984), *The Theory of Communicative Action*. Boston: Beacon press; Young IM (2002), *Inclusion and Democracy*. Oxford: Oxford University Press.

<sup>185</sup> See, for example, Benhabib S (1986), *Critique, Norm and Utopia*. New York: Columbia University Press.

<sup>186</sup> Young IM (1996), ‘Communication and the other: Beyond deliberative democracy’ in Benhabib S (ed), *Democracy and Difference: Contesting the Boundaries of the Political*. Princeton: Princeton University Press.

making to move beyond mainstream understandings and take Indigenous perspectives into account nor substantive equality can be attained.

Modern western political theory in its many variants has placed emphasis on universal human rights, the rule of law with particular emphasis on equality before the law and individual and collective freedom.<sup>187</sup> Iverson et al pose the question of whether this complex tradition of thought might provide space for the contemporary aspirations of Indigenous peoples.<sup>188</sup> While it is plain that Indigenous and western traditions are in many respects fundamentally different, there are a number of reasons for optimism about finding ways to mediate and translate rights and interests between both groups. At a practical level, there is a need to find ways of reconciling both groups' rights and interests as neither is going to go away and both impact on each other. While consensus between Indigenous and non-Indigenous communities may not be achieved, this does not preclude agreement to disagree, compromise, enlarge understanding of each other and a capacity for mutual acceptance.<sup>189</sup> Macklem argues that conflicting values should not preclude recognition of Indian Government in North America. He suggests that claims that culturally specific conduct or decision making infringe, for example on universal human rights, should be contested in the particular when such conflicts arise.<sup>190</sup> Judgment must always be in the particular and a just and moral resolution of relative and conflicting values can be strived for through consideration of both sets of values in the dialogue and process of decision making. An example of the development of commensurate values across Indigenous and non-Indigenous child welfare organisations is the recognition of the importance of cultural identity for Indigenous children's wellbeing at a

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<sup>187</sup> Iverson D, Patton P & Sanders W (2000), *Political Theory and the Rights of Indigenous Peoples*. Cambridge: Cambridge University Press, 2.

<sup>188</sup> Ibid.

<sup>189</sup> For a discussion of these ideas with a focus on land claims in Canada, see Webber J (1995), 'Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples,' 33(4) *Osgoode Hall Law Journal* 623.

<sup>190</sup> Macklem P (1993), 'Distributing Sovereignty: Indian Nations and Equality of Peoples,' 45 *Stanford Law Review* 1345.

national and international level<sup>191</sup>. This, as discussed in Chapter 6, is implemented in legislation in all states and territories in Australia. The inclusion of Indigenous and non-Indigenous values in decision making processes is institutionalised in some jurisdictions in the United States, Canada, New Zealand and Australia with legislative transfer of decision making power to Indigenous children's agencies or mandatory inclusion of Indigenous agencies in the decision making process.

The meaning of human rights as implemented in local laws and customs is sometimes contested. Jennifer Nedelsky suggests that there is a greater possibility of claiming validity across communities when judging from different communities' standpoints. Nedelsky comments:

Whatever the scope of the dispute and however conflicting communities are constituted, whether as sub-communities within nation state or as Nations whose practices are challenged by international bodies like the United Nations, there is a common challenge: to find ways to engage in debate sufficiently open to enable distinct communities of judgment to hear each other enough to begin to include each other in their exercise of the enlarged mentality.<sup>192</sup>

As discussed in Chapter 2, the United Nations, both through special bodies such as the United Nations Permanent Forum on Indigenous Issues and through the committees which monitor the major treaties are opening their processes to Indigenous participation. This offers reason for optimism about the capacity for human rights principles, through the incorporation Indigenous understanding, to become more inclusive. We also see that in jurisdictions such as Manitoba, Canada processes have been established to incorporate Indigenous communities into the child welfare decision making structures. As discussed in Chapters 5 and 6, most post-colonial countries with Indigenous minorities have implemented some legislative measures which acknowledge Indigenous peoples' right to

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<sup>191</sup> See Chapter 2 for a discussion of how international human rights jurisprudence has incorporated Indigenous interests.

<sup>192</sup> Nedelsky J (2000), above n8, 278.



participate in decision making with respect to their own children. The next step is to progress these initiatives from non-Indigenous forums which facilitate Indigenous interest groups contributions to truly pluralistic decision making bodies which are guided by human rights principles and are sufficiently open to include the 'common sense' of both Indigenous and mainstream communities.<sup>193</sup> Such structures however will still only have limited success if they are not mandated and resourced to address the underlying structural and historical foundations which impact on Indigenous children's wellbeing. A transformation of child protection services, from government to Indigenous organisations, is likely to result in better servicing of Indigenous communities. However, for more fundamental improvements these organisations need to be empowered and resourced to address poverty, trauma, deficits in infrastructure, health, education, substance abuse, violence and other related issues. As discussed in Chapter 6, reforms to address systemic problems which underlie child abuse and neglect were introduced in the Northern Territory in Australia. However, these reforms were introduced within a paternalistic and discriminatory, rather than a human rights framework. The challenge to attain successful outcomes is to develop reforms within a human rights framework which incorporates Indigenous experience and addresses both welfare and broader systemic issues relating to Indigenous children's wellbeing.

### **Is differential treatment of Indigenous child welfare justified and consistent with the rule of law?**

Why should Indigenous people be differentiated from other minority groups and be given special recognition? Should minority Indigenous peoples' self-determination, understood as the exercise of political and legal authority within nation states, be recognised? Macklem suggests, 'Sovereignty's value lies in the fact that it creates a legal space in which a community can negotiate, construct, and protect a collective identity.

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<sup>193</sup> This presumes that agreement on general principles or treaty rights such as the Convention on the Rights of the Child are agreed upon in the abstract.

Sovereignty, simply speaking, permits the expression of collective difference.’<sup>194</sup> Macklem suggests that there are valid reasons why Indigenous peoples should be accorded differential rights, including the right to self-determination, in order for them to attain substantive equality. The differential distribution of rights is founded on a political rather than a racial basis. Macklem notes, ‘Normative significance of some kind must be attached to the factual or historical differences among peoples before those differences can be relied upon to justify differential treatment.’<sup>195</sup> These reasons are founded in Canada in four ‘historical facts:’

First, Aboriginal people belong to distinctive cultures that were and continue to be threatened by non-Aboriginal beliefs, philosophies, and ways of life. Second, prior to European contact, Aboriginal people lived in and occupied North America. Third, prior to European contact, Aboriginal people not only occupied North America; they exercised sovereign authority over persons and territory. Fourth, Aboriginal people participated in and continue to participate in a treaty process with the Crown.<sup>196</sup>

Bar the fourth, Macklem’s reasons also apply in the Australian context. While Australian Indigenous people are not participating in a treaty process with the Crown they have never conceded their claims against the Crown and continue to advocate their rights. The right to self-determination has and continues to be the most consistent human rights claim advocated for by Indigenous peoples in the United Nations and, as discussed in Chapter 2, is understood by many to be the right upon which all others rest.

However a major claim with respect to constitutional democracies is that they protect equality before the law through the exercise of the rule of law – that is, the reliance on

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<sup>194</sup> Macklem (1993) above n66, 1348.

<sup>195</sup> Ibid, 1329.

<sup>196</sup> Macklem P (2001), *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto, i.

general rules, principles and procedures which apply to all people.<sup>197</sup> Is it justified and legitimate for Indigenous communities to have separate laws governing child welfare? Does recognition of separate laws defy principles of democracy or a commitment to the rule of law? It is argued below that recognition of principles of self-determination with respect to Indigenous children's welfare and wellbeing will enhance rather than undermine the underlying principles which give meaning to the rule of law. The rule of law, while a contested concept, is a central tenet of legal systems in western democracies.<sup>198</sup> It is a core legal principle which fosters stability and security for many children in these countries. The rule of law is founded on two essential principles. The first being that laws are not exercised arbitrarily and the second that laws sustain a normative order and thereby law and order in a community. To maintain normative order laws must be more than predictable, well administered and understood by the community. They need to be meaningful and generally accepted by the community.<sup>199</sup>

Australian Indigenous communities have been, and continue to be, denied both fundamental limbs of the rule of law.<sup>200</sup> The arbitrary exercise of colonial powers at the most intimate level of Indigenous community life – the family – has been well documented.<sup>201</sup> The active suppression of Aboriginal and Torres Strait Islander languages, laws and culture by colonial governments has also been extensively

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<sup>197</sup> The rule of law is a contested concept and there are debates about the specific content of the rule of law. Influential conceptualisations include those of Albert Venn Dicey who defines the rule of law as containing the following three features: law's institutional nature, the application of the law to all people and the role of the courts in determining the application of law: Dicey AV (1959), *Introduction to the study of the Law of the Constitution* (10<sup>th</sup> ed). London: Macmillan. In contrast, Lon Fuller's eight features of the rule of law are: '1. general rules; 2. made public; 3. non-retroactive; 4. comprehensible; 5. non-contradictory; 6. possible to perform; 7. relatively stable; 8. administered in ways congruent with the rules as announced.' These are outlined and discussed in Krieger M (2007), 'The Rule of law: Legality, Teleology, Sociology,' 65 *University of New South Wales Faculty of Law Research Series* 3.

<sup>198</sup> For a discussion of the role of the rule of law in contemporary democracies see Bingham T (2011), *The Rule of Law*. London: Penguin Books.

<sup>199</sup> Krygier (2007) above n73.

<sup>200</sup> For a discussion of the failure to apply the rule of law to Indigenous peoples in the Canadian context see Borrows J (2002), *Recovering Canada: The Resurgence of Indigenous law*. Toronto: University of Toronto Press, 111–137.

<sup>201</sup> NISATSIS (1997) above n4; Read P (2000), *A Rape of the Soul So Profound*. Sydney: Allen and Unwin, Sydney.

documented.<sup>202</sup> This denial of the laws and cultural norms which define appropriate conduct goes to the heart of social disorder which is experienced by some Indigenous communities.<sup>203</sup> In a minority of Indigenous communities the devastation of colonial policies is such that law and order has broken down. Many other Indigenous communities have to struggle to maintain their cultural authority and the laws and traditions which sustain it. If the underlying causes of violence and child abuse which is experienced in some Indigenous families and communities is to be addressed, then support for the culture, laws and traditions which nurture and provide order and stability in communities is needed. The right to one's cultural identity is recognised under all the major human rights treaties as a fundamental human right. The right to one's culture can also be framed as an essential element of one's identity and necessary to exercise the freedoms which a liberal democracy offers individuals.<sup>204</sup> Further, while the provision of police, welfare officers, and other institutions which support order and the rule of law are necessary, these cannot without widespread community commitment to the values which these services are enforcing, bring about peace and security within communities. Effective social order requires an internal community commitment to the rule of law which in turn requires order which is meaningful to the community.

Colonial experience has impacted on effective order in Indigenous communities in a number of ways. Two of the deepest impacts have been policies of explicit suppression of Indigenous laws and norms followed by more subtle denial and swamping of these norms and laws with Anglo powers and systems.<sup>205</sup> In many communities, the introduction of the worst of western culture, including drugs and pornography, has

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<sup>202</sup> Chesterman J & Galligan B (1997), *Citizens without Rights*. Melbourne: Cambridge University Press.

<sup>203</sup> Libesman T 2007, 'Indigenising Indigenous child welfare,' 6(24) *Indigenous Law Bulletin* 17.

<sup>204</sup> Kymlicka (2000) above n48.

<sup>205</sup> Attwood B & Andrew M (1997), *The 1967 Referendum or When Aborigines Didn't Get the Vote*. Canberra: Aboriginal Studies Press.

compounded the experiences of dispossession and loss on multiple levels.<sup>206</sup> The combination of these impacts needs to be addressed if Indigenous children are to be afforded the opportunity of growing up in communities which sustain and support their basic human rights.<sup>207</sup> They need to be addressed by supporting and harnessing Indigenous community capacity and by fostering contemporary Indigenous law and order. This must include both support for Indigenous culture and provision of effective law enforcement agencies including child welfare and police services. Even the most stable of societies require effective law enforcement to reinforce the fact that sanctions will result if people breach the law. Indigenous communities in many parts of Australia, including parts of the Northern Territory, which has been subjected to the Australian Government's emergency intervention discussed in Chapter 6, have faced serious law and order problems which, while generated in the colonial context referred to above, have been provided with inadequate or absent support from law enforcement agencies. Addressing Indigenous children's wellbeing requires a fundamental change in the way non-Indigenous organisations and welfare departments work with Indigenous communities. As discussed above there needs to be a shift which respects and recognises Indigenous peoples' difference and the ongoing impacts of colonisation. Such a shift would provide the foundation from which collaborative efforts to address Indigenous children's wellbeing could be grounded. Within such a framework, laws which specifically recognise and include Indigenous communities' understanding in addressing their wellbeing will assist to bring meaningful values and standards to support community stability and security and, with this, an environment more conducive to Indigenous children's welfare and wellbeing .

Two further practical matters suggest that substantive equality requires a special and particular relationship between the State and Indigenous peoples. While these factors are not exclusive to family relations with the state they are exemplified in the area of

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<sup>206</sup> See, for example, Gordon S, Hallahan K & Henry D (2002), *Putting the picture together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities*. Perth: Department of Premier and Cabinet.

<sup>207</sup> Bamblett M (2006), 'Stop the abuse of our children's culture,' *SNAICC News* (August – September 2006), 1.

child welfare. The first is the inherent value of the dignity of all peoples. Recognition of human dignity requires recognition of people's identity and in many instances this is a group identity. The most significant way in which people pass on their identity is through the family, with particular importance being attached to the way in which children are raised. The inherent dignity and value of all peoples is recognised in the negative in international law with genocide being defined as a crime against humanity. It is a universal crime under international law to intentionally attempt:

... to destroy, in whole or part, a national, ethnical, racial or religious groups, as such (a) killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (d) Forcibly transferring children of the group to another group.<sup>208</sup>

The right of all peoples to a group identity, in the form of all peoples' right to self-determination, is recognised in the affirmative in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>209</sup> Aboriginal and Torres Strait Islander peoples require special protection as a people because their survival as a group depends on their survival as a minority culture within Australia. They do not have another spiritual, cultural or geographic homeland that they can return to or from which they have been dispossessed. There is no diaspora of Aboriginal and Torres Strait Islander people outside of Australia. They, therefore, have a unique relation to the State compared with other minorities and the State has a special obligation to Aboriginal and Torres Strait Islander peoples. It is an obligation to Aboriginal and Torres Strait Islander people specifically, but also an obligation to all peoples, to respect and protect the group rights of all peoples to exist. The second reason for the special position of Aboriginal people in

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<sup>208</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* (the Genocide Convention) (1948), Article 2.

<sup>209</sup> However, the Human Rights Committee, which supervises the implementation of the ICCPR, has not provided guidance as to which peoples the right to self-determination in Article 1 applies. For discussion of the right to self-determination in international law see Chapter 2.

relation to the State is the role that the State played in dispossessing Aboriginal peoples. Many of the negative collective experiences which Indigenous peoples have, and have had, can be directly or indirectly associated with the State. The State, therefore, has a particular obligation of justice to redress the wrongs and to acknowledge the particularity of this experience and the way in which it imbues Indigenous peoples' experiences. The significance of this recognition is twofold. First, as a form of reparation and redress for wrongs against Aboriginal and Torres Strait Islander people and, second, as a means of bringing integrity to the non-Indigenous legal system.

Indigenous peoples' claim to recognition of separate laws or specific rights to participate in laws which impact on their children and young people is therefore consistent with the rule of law and can on a normative basis be justified and differentiated from similar claims by other minority groups. They can, therefore, in a manner, which is consistent with democratic political values and the rule of law, legitimately be afforded differential laws and policies for looking after their children's welfare and wellbeing.

## **Conclusion**

At a practical level the experiences of many minority Indigenous communities in former colonies are fundamentally different to that of non-Indigenous communities. It is therefore necessary, if this experience is to be understood and taken into account, that Indigenous peoples participate fully in the decision making processes which affect their children's and families' wellbeing. Through this participation, a fuller understanding of the strengths which communities can offer children and young people as well as what drives neglect and abuse within communities can be attained. Such understanding forms the foundation for building normative values which support the growth of healthy, safe and culturally strong children, families and communities. In the area of family wellbeing it is plain that the imposition of dominant values and bureaucratic interventions has not been able to successfully respond to Indigenous children's needs. Hence, there is pressing reason to try alternatives. The case study in Chapter 3

demonstrated the failure of decision making, in the context of a bureaucratic government department, with respect to Aboriginal and Torres Strait Islander children who had a substantiated case of abuse or neglect against them. There are many instances in the case study of a fundamental disregard for the children's most fundamental rights. Legal spaces for Indigenous decision making with respect to family wellbeing, within a human rights framework, offer the opportunity for better judgment and therefore more effective decision making in this fraught area. It is possible that Indigenous and non-Indigenous communities have values concerned with equality, freedom, and their children's wellbeing in common. To the extent that some values are shared, these can serve as a meeting ground from which understanding can be extended. Whether some core human community exists or not there is the capacity for enlarged understanding through dialogue across communities. The differentiation of the manner in which Indigenous compared to non-Indigenous peoples are included in decision making with respect to their children and young people's welfare and wellbeing is normatively justified on the bases of their different historical and factual circumstances from other minority or majority groups in Australia. Rather than contravening principles of equality or the rule of law, recognition of principles of self-determination with respect to Indigenous child welfare will serve both to improve decision making with respect to Indigenous children and young people's wellbeing and to increase the legitimacy of all institutions and strengthen democratic values through greater inclusiveness. The following chapters consider comparative legislative and service delivery frameworks for Indigenous children's welfare and wellbeing which have incorporated degrees of Indigenous participation in their decision making structures.



## **Chapter 5**

### **Comparative Legal Frameworks**

#### **Introduction**

Indigenous peoples have engaged with child welfare frameworks in jurisdictions with comparable situations to their own across the globe and they have been inspired and influenced by reforms in other jurisdictions. This chapter reviews and evaluates how legislative frameworks in Canada, the United States and New Zealand have reformed colonial child welfare systems and accorded greater recognition to Indigenous peoples' political aspirations and human rights, in particular the right to self-determination. Reforms to Australian child welfare legislation with reference to Indigenous peoples are discussed in Chapter 6. As argued in Chapters 2 and 4, a human rights framework which respects Indigenous peoples' right to participate in decisions impacting on them, offers through the inclusion of Indigenous understandings in legislative and policy frameworks, the opportunity for better outcomes for Indigenous children, families and communities. Numerous reviews of child welfare legislation have taken place in each jurisdiction and as discussed below, and in Chapter 2, reforms to child welfare have also been influenced by the incremental recognition of Indigenous peoples' human rights in the international arena. This is particularly evident with respect to recognition of a qualified right to self-determination and identity and cultural rights within child welfare legislation.

The case study discussed in Chapter 3 found that bureaucratic individualistic responses to child protection do not substantially improve conditions for Indigenous children and families and that more holistic and inclusive responses

are required. This chapter considers legislative models that focus on Indigenous collaboration, community development, community participation and community control. Many of the models reviewed have been developed in legislative environments which are quite different from that in Australia. Before considering current legislative models in each country a brief historical overview of state responses to Indigenous families is provided. This historical background provides a context for understanding the issues relevant to contemporary child welfare reform. It is important to recognise contextual differences as well as similarities between Indigenous communities. Each community has its own particular history and set of circumstances. Legislative reform is more likely to be effective if it is developed locally with the involvement of the communities who are to be governed by it.

While the legislative models considered have been developed in different historical and political contexts, there has been a global resurgence of Indigenous political demands for greater self-determination and control over family life, particularly from the 1970s onwards. The legislative models for the delivery of child welfare services to Indigenous communities reviewed in this chapter and in Chapter 6 range from:

- complete autonomy with the recognition of Indigenous jurisdiction over legislative, judicial and administrative matters pertaining to Indigenous children;
- shared jurisdiction with the transfer of some functions to Indigenous communities;
- delegated authority with jurisdiction over child protection matters retained by the state but delegation of some child protection functions to Indigenous communities;
- mainstream legislation which integrates Indigenous input into existing structures; and
- paternalistic control over communities.

The history of Indigenous peoples being named and defined by colonial authorities remains evident in the definitions in some contemporary legislation and case law. The right of peoples to name and define themselves, as discussed in the introduction, is fundamental to Indigenous peoples' right to self-determination. Although problematic, in some sections of this chapter the definitions found in the relevant legislation are used to retain clarity and consistency.

## **United States**

While the United States is a federation, national legislation – the *Indian Child Welfare Act* 1978 (ICWA) – regulates welfare with respect to Native American children. The ICWA is often referred to as a model for consideration by Indigenous peoples in other countries. This legislation transfers legislative, administrative and judicial decision making to Indian bands where children domicile on a reserve. The ICWA has been controversial, in particular the way in which it accords weight to both the tribe's interests in the child and the individual child's best interests. Child welfare legislation in all other jurisdictions gives priority to the best interests of the child. While this legislation transfers jurisdiction to Indian tribes with respect to Indian children who live on reserves, litigation and consequent case law has attempted to limit this jurisdiction. A doctrine which has been particularly controversial has been the 'existing family' doctrine which has been developed by State Courts in at least 10 states and has had the effect of excluding families who do not have an established cultural connection to the tribe from the jurisdiction of the ICWA. This raises complex issues with respect to the purpose of the Act, the ways in which legal recognition responds to the impact of colonial history on cultural identity and issues regarding choice and cultural membership. While a more inclusive and enlarged understanding of cultural issues has to some extent, as discussed in Chapter 2, been achieved with respect to the inclusion of Indigenous understandings in international law, this inclusion has had a more polarising influence in the context of the ICWA, where differences are contested in an adversarial context.

### *History of child and family services*

Between 1850 and 1960 Native American children were forcibly removed from their families and communities and sent to boarding schools in what is now widely regarded as a policy of assimilation and cultural genocide. Schools were overcrowded and understaffed, and very high death rates were reported among boarders. Attempts to eradicate native languages were carried out through the punishment of children for speaking in their native tongues. All types of abuse and neglect were widely inflicted on children resident at the schools.<sup>210</sup> This history has impacted on how Indigenous Americans define themselves. As referred to in Chapter 1, in the United States there are 556 federally recognised tribes, 314 federally recognised reservations and 200 Alaskan Native villages and corporations.<sup>211</sup> Each of these has their own definition of American Indian, which depends on social and cultural contextual factors. Some tribes have extended family members, custodians, and accept members through marriage or adoption<sup>212</sup> and some have strict rules regarding matriarchal and patriarchal kinship.<sup>213</sup> Utter writes:

The term Indian, which is used in contemporary child welfare with respect to Indigenous Americans is a colonial invention. Before first European contact, the answer to “Who is an Indian?” was easy. Nobody was. Indian is a European-derived word and concept. Prior to contact, Native American people were not Indians but were members of their own socio-political and cultural groups ... native people lost some of their identity when they were lumped together under a single defining word. The distinction between Native and non-Native

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<sup>210</sup> See, for example, Adams DW (1995), *Education for Extinction*. Lawrence: University Press of Kansas.

<sup>211</sup> Goodluck C & Willetto AAA (2000), *Native American Kids: Indian Child Wellbeing Indicators*. Portland: The National Indian Child Welfare Association, 22.

<sup>212</sup> Haines R (1997), ‘U.S. citizenship and tribal membership: A contest for political identity and rights of

Tribal self-determination in southern California,’ 21(3) *American Indian Culture and Research Journal* 211 cited in Goodluck & Willetto (2000) above n2, 22.

<sup>213</sup> Goodluck & Willetto (2000) above n2, 27.

peoples resulted in a highly significant legal, political, and social differentiation that remains with us today and is embodied in this first question.<sup>214</sup>

### *History of tribal jurisdiction*

As early as the 1820s, limited tribal jurisdiction was recognised by the United States Supreme Court in a trilogy of eighteenth century United States cases.<sup>215</sup> In the first Aboriginal title case, *Johnson v McIntosh*, Chief Justice Marshall suggested, 'the rights of the original inhabitants were, in no instance, entirely disregarded: but were necessarily, to a considerable extent impaired ... their rights to complete sovereignty, as independent nations, were necessarily diminished.'<sup>216</sup> Later in the judgment, when discussing the moral foundation for the title, he simply asserted that conquest gives a title which the conquerors' court cannot question regardless of private speculation respecting the 'original justice of the claim which has been successfully asserted.'<sup>217</sup> The exercise of limited Indian jurisdiction was recognised in subsequent cases *Cherokee Nation* and *Worcester*. While elements of nineteenth century paternalism are evident in these judgments, they are powerful acknowledgments of Indian peoples' rights to shared jurisdiction in a colonial context. The phrase 'domestic dependent nations' was coined in *Cherokee Nation*. Recognition of the original sovereignty and rights to self-governance of the Cherokee nations were affirmed in the more powerful *Worcester* decision which was handed down a year later in 1832. In the United States, the recognition of Aboriginal title was closely associated with the recognition of Indian nations and Indian treaty rights. *Cherokee Nation* and *Worcester* were both cases contesting the right of the State of Georgia to make laws which undermined the Cherokee nation's laws and which contravened the Hopewell and Holston treaties.

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<sup>214</sup> Utter J (1993), *American Indians*, 11, cited in Goodluck & Willetto (2000) above n2, 22.

<sup>215</sup> *Johnson v McIntosh* 21 US 8 543 (1823); *Cherokee Nation* 30 US 5 1 (1831); *Worcester* 31 US 16 5115 (1832) hereafter *Johnson v McIntosh*, *Cherokee Nation* and *Worcester*.

<sup>216</sup> *Johnson v McIntosh*, *ibid*, 689.

<sup>217</sup> *Ibid*, 692.

The limited jurisdiction recognised in these early cases has been affirmed in legislation and in more contemporary cases addressing tribal jurisdiction with respect to Indian children's welfare. In the case of *Fisher v District Court of Rosebud County* the Supreme Court of the United States affirmed tribal authority in child placement cases where all parties are members of the tribe and reside on the tribe's reservation. The Court noted that the 'right of the Northern Cheyenne Tribe to govern itself independently of State law has been consistently protected by federal statute ... In 1935, the Tribe adopted a constitution and by-laws pursuant to s16 of the *Indian Reorganization Act* 1934, a statute specifically intended to encourage Indian tribes to revitalise their self-government.'<sup>218</sup> The Cheyenne Tribe established a Tribal Court and granted it jurisdiction over a broad range of matters including child welfare. The United States Supreme Court found that the State Court did not have jurisdiction in *Fisher* to determine an adoption matter where all parties were from the tribe, and resided on the reserve, and that the jurisdiction of the Tribal Court was exclusive. The Court noted that denying the party which was attempting to affect the adoption through the State Court access to the State Court was not racially discriminatory because:

The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.<sup>219</sup>

The origin of the ICWA is found in cases such as *Fisher*. This case embodies core principles embedded within the ICWA, including recognition of exclusive tribal jurisdiction in child welfare matters where all parties are members of the tribe and

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<sup>218</sup> *Fisher v District Court of Rosebud County* 424 US 382 (1976). Although the *Indian Reorganization Act* 1934 did not specifically refer to Tribal Courts, it is acknowledged as affording authority to the Tribal Court system which had been acknowledged by United States courts for nearly 50 years before.

<sup>219</sup> *Fisher v District Court of Rosebud County* 424 US 382 (1976), 390-391.

reside on the reserve. The dual interests of individual parties and the tribal group embodied in the ICWA were also recognised in *Fisher*. However, competing and sometimes contradictory principles developed as cases were brought before State Courts testing Tribal Courts' jurisdiction (for example, in cases where one or both parties lived off the reserve). This conflicting case law together with hugely disproportionate removals of Indigenous children from their families and their placement in non-Indigenous environments lead to the passing of the ICWA in 1978.

### *Indian Child Welfare Act*

A United States Congress Commission into American Indian policy was established in the mid 1970s. This Commission's terms of reference were broad ranging and included child welfare. The task force looked at statistical evidence which demonstrated that a huge number of Indian children were taken from their families and placed with non-Indian families through adoption or child welfare proceedings. It was estimated that 25-35% of all Indian children were raised at some point by non-Indian families or institutions. The Commission found that Indian children suffer severely, particularly at adolescence, in terms of identity and life crises, when removed from their culture and brought up in a non-Indian environment. The hearing recognised that cultural survival of Indian tribes depended on retention and teaching of culture to Indian children. This was explicitly recognised in the ICWA which states in s1901:

Congress finds – ... (3) that there is no resource more vital to the continued existence and integrity of Indian tribes than their children ...

The ICWA was passed with the dual objective of protecting the best interests of Indian children and promoting the stability and security of Indian tribes, communities and families.<sup>220</sup>

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<sup>220</sup> *Indian Child Welfare Act* 25 USC 1901 (1978), 1902.

The ICWA is premised on recognition of limited tribal sovereignty and the collective interest of tribes in children. It is essentially a jurisdictional statute directing that Tribal Courts have authority over Indian child welfare where the child is residing or domiciled on a reservation.<sup>221</sup> State and Tribal Courts have shared jurisdiction over Indian children (about half of all Indian children) who are not residing on a reserve. Proceedings in a State Court must be transferred to a Tribal Court if a transfer is requested by a parent or the tribe unless there is good cause not to transfer the proceedings.<sup>222</sup> Either parent can veto the transfer of proceedings.<sup>223</sup> The tribe, Indian custodian and parents all have full standing in matters involving Indian children in State Courts. The ICWA also provides directions to State Courts where they hear Indian child welfare matters.

Jurisdictional questions have been challenged in the United States Supreme Court. Disputes have focused on what it means to reside or be domiciled within a reservation and what constitutes good cause not to transfer proceedings from a State Court to a Tribal Court. *Mississippi Band of Choctaw Indians v Holyfield* is the only case with respect to interpretation of the term ‘domiciled’ decided by the United States Supreme Court.<sup>224</sup> In *Holyfield*, Indian parents who resided on the Choctaw Reservation made arrangements to have their twin babies two miles from the reservation and to adopt the children to non-Indian parents off the reservation. The adoption of the twins to the Holyfields was given effect by the Local County Court with no reference to the ICWA or their Indian background. Two months later the Tribe challenged the adoption. The adoption was upheld on two grounds by the Chancery Court and then by the Supreme Court of Mississippi: the mother had gone to some lengths to have the babies off the reservation and to organise for their immediate adoption, and the babies had never lived on the reservation. The Tribe appealed to the Supreme Court of the United States. Justice Brennan delivered the decision of the Court. The case turned on whether the children domiciled on the Reservation. The ICWA does not provide a definition of domicile. The Court found that the parents at all relevant times domiciled on the reserve

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<sup>221</sup> Ibid, 1911(a).

<sup>222</sup> Ibid, 1911(b).

<sup>223</sup> Ibid, 1911(a).

<sup>224</sup> *Mississippi Band of Choctaw Indians v Holyfield* 490 US 30 (1989).



(this was not disputed) and therefore the twins at the time of their birth domiciled on the reserve. The Court noted:

Tribal jurisdiction under s1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.<sup>225</sup>

The Court noted that three years had passed between the birth of the twins and their placement in the Holyfield home and the hearing in the Supreme Court, and that a separation at that point in time ‘would doubtless cause considerable pain.’ However, the Supreme Court noted that the ICWA placed the determination of this custody proceeding in the hands of the Choctaw Tribal Court and ‘we must defer to the experience, wisdom and compassion of the Tribal Courts to fashion an appropriate remedy.’<sup>226</sup>

The *Holyfield* decision provides an example of the clash between individual tribal members’ rights and tribal rights which can arise under the ICWA. While parents can make the choice to belong to a tribal group or to leave that group, if they choose membership then they accept the limited sovereignty of the group. As noted by Patrick Macklem, ‘There is an elective aspect to cultural membership. Individuals are not locked into belonging to particular cultures but instead can and do assimilate, break cultural bonds, and change cultural allegiances over time. Cultural membership does not preclude choice.’<sup>227</sup> However, the ICWA and this case draw attention to some of the difficulties of legal assignment of identity. The difficulty of assigning a single identity to children when they have mixed backgrounds, and potentially mixed heritages, is evident

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<sup>225</sup> Ibid, 49.

<sup>226</sup> Ibid, 54. The Choctaw Tribal Court decided that it was in the best interests of the children to remain in their adoptive home and decreed the *Holyfield*’s adoption a matter of tribal law.

<sup>227</sup> Macklem P (2001), *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press, 53.

in the ICWA which essentialises Indian children's identity. This exacerbates the difficulty of adjudicating questions about the best interests of the child, particularly when trying to balance the dual considerations of the Tribe and the child's best interests. *Holyfield* also raises the issue of whether recognition of the limited sovereignty of the Tribe should override principles of equality between Indian and non-Indian American women and whether the ICWA discriminates against Indian women. While Patrick Macklem's recognition that membership of a group has an element of choice partially answers this concern, at a practical level the choice may not exist – for example, in circumstances where for socio-economic reasons a woman remains on a reserve.

### *Existing Indian family exception*

State courts have read into the ICWA a new 'doctrine' – the 'existing Indian family' exception to the Act. This doctrine states that if a child and their parents do not have a social, political or cultural relationship with a tribe, then the ICWA does not apply to the case.<sup>228</sup> The Indian family exception is often invoked in cases where a non-Indian mother wants her child to be adopted at birth by a non-Indian family and the Indian father or Tribe object.<sup>229</sup> The existing family exception has been found on different bases in different jurisdictions. The most compelling of these has been the Supreme Court of California's decision in *Re Bridget R.*<sup>230</sup> In this case the Court held that the ICWA would be unconstitutional on due process, equal protection and Tenth Amendment grounds if the existing family exception was not applied. The argument with respect to breach of the equal protection provisions of the constitution is that a distinction based exclusively on biological grounds amounts to racial discrimination. Therefore, the differential treatment of Indian children under the ICWA is only permissible on the basis that the legislative classification is on political rather than racial grounds. This interpretation is consistent with Supreme Court rulings on permissible differential laws – they are

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<sup>228</sup> The exception was first devised by the Kansas Supreme Court in *Re Baby Boy L* 643 P.2d 168 (Kan. 1982). While at least 10 states have adopted the exception, numerous states have rejected it, and in some states such as California there are conflicting decisions from the Supreme Court.

<sup>229</sup> For review of existing family exception cases see Davis TH (1993), 'The existing Indian Exception to the Indian Child Welfare Act,' 69 *North Dakota Law Review* 465, 478-494.

<sup>230</sup> *Re Bridget R*, 44 Cal Rep 2d 507 (1996).

constitutional as long as they are intended to benefit the class to which the plaintiff belongs, even if they have an adverse impact on particular litigants.<sup>231</sup> On this interpretation, the ICWA did not apply to the twin girls in *Re Bridget R* because they only had a biological connection to the tribe rather than a social, political or cultural connection. The Court also argued that the twins had a fundamental interest under the Due Process clause of the Constitution in maintaining their relationship with their adoptive family. Applying this interpretation, the ICWA could only interfere with the children's existing family relationship if there was a compelling State interest in the matter. The Court found there was no compelling State interest as the children's parents were assimilated Indians and they had voluntarily relinquished the babies for adoption.

However the existing family exception seems to thwart a key objective of the ICWA – the protection of tribes' interest in children and defining who Indian children are. This exception grounds a deeply ironic interpretation of the jurisdiction of the ICWA which was enacted, as noted by the Utah Supreme Court, to redress historical policies of removal which have denied Indian people engagement with their Indian culture.<sup>232</sup> Further, the doctrine gives State Courts a mandate to determine who is 'Indian enough' to fall under the jurisdiction of the ICWA. State judges, through the existing family exception doctrine, are arguably inappropriately making decisions about the legal, cultural and social meaning of Indian identity. This plainly undermines the central purposes of the ICWA – to recognise the sovereignty of Indian tribes and to acknowledge, support and revitalise Indian identity. However State Courts are not simply acting to thwart the objectives of the ICWA. The Act, both through its jurisdictional provisions and through its preferred order of placement of Indian children, essentialises Indian children and presumes that the best interests of the Indian tribe and all Indian children will coincide. State courts frequently subvert the objectives of the

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<sup>231</sup> See, for example, *Fisher v District Court of Rosebud County* (above n9), *Morton v Mancari* 417 US 535 (1974) and more recently and with compelling applicability *Rice v Cayetano* 528 US 495 (2000) where the Supreme Court struck down a Hawaiian voting scheme which granted eligibility to vote on the basis of ancestry.

<sup>232</sup> *Re DAC* 933 P.2d 993 (Utah Ct. App. 1997), 999.

ICWA where children have an established relationship with long-term carers and the court perceives it to be in the best interests of the child to retain this relationship. The prescriptive nature of the order of placement under the ICWA does not sufficiently account for the particular needs of some Indian children. It is particularly deficient considering the significance of continuity of attachment in early childhood, which is considered widely important in cross cultural literature to help children develop into emotionally secure and socially competent adults.<sup>233</sup>

A party seeking foster care placement or termination of parental rights of an Indian child in a State Court has to demonstrate to the court that they have made positive efforts to provide assistance to prevent the breakdown of the relationship which led to the action being taken. The parent or Indian custodian of a child against whom involuntary proceedings are being brought has a right to a court appointed lawyer. The Court also has the discretion to appoint a separate representative for the child. State Courts, when adopting or fostering Indian children, must follow a preferred order of placement which is similar to the New South Wales Aboriginal and Torres Strait Islander Child Placement Principle. The descending order of preference to be followed is:

- with a member of the child's extended family;
- with other members of the child's tribe;
- with another Indian family;
- if the above three options are not possible, with a non-Indian family.

The difficulties which State Courts face with the prescriptive order of placement under the ICWA, when faced with the particularity of a child who would suffer through application of this order, could be reduced by enacting a provision which enables alternative placement if an ICWA placement would be detrimental for the child. This is

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<sup>233</sup> The nature and extent of particular attachments across familial structures is understood to differ in different cultures. For discussion on this point, see National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Sydney: Human Rights and Equal Opportunity Commission, Chapter 11.

the requirement in New South Wales. This would avoid application of the ‘best interests’ test which is notoriously subjective and could be used to thwart the application of the ICWA, while giving State Courts the capacity to make determinations which do not simply universalise the experiences of all Indian children.

United States ‘intergovernmental child welfare agreements’ (in the context of the ICWA) are usually based on the ‘Model Tribal-State Indian Child Welfare Agreement’ drafted by the American Indian Law Centre in 1986. Agreements are made between a tribe/tribes and a state department. Tribes sometimes also develop their own Tribal Resolutions. Intergovernmental agreements are usually modelled on the ICWA itself and include sections following the ICWA structure in areas including confidentiality, authority, jurisdiction, child protection service practice and fiscal structure. Misunderstanding and confusion around legal principles and terms is common in the implementation of these agreements. This is compounded by cultural differences in conceptual approaches to justice.<sup>234</sup> The limited development of tailored agreements is reflective of financial constraints. As limitations with both a Eurocentric and an essentialist ICWA approach become evident, it would seem that a more fluid and inclusive understanding of identity, with both State and Tribal Courts having the opportunity for adopting and adapting each other’s ideas, may provide for greater justice for individual children and a more respectful attitude to the underlying objectives and philosophy of the ICWA. A legislative scheme which requires definition of a child as either Indian or non-Indian, where many children before Courts have multiple identities and allegiances, cannot do justice for those children. However, the ICWA has made great advances in including Indigenous Americans in decision making with respect to their children’s welfare and wellbeing, and has served as an inspiration to Indigenous children’s groups internationally.

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<sup>234</sup> American Humane Association - National Resource Center on Child Abuse and Neglect (1997), *Tribal-State Relationships in Child Welfare: Ensuring High Quality Services to American Indian Children and Their Families*. Englewood: American Humane Association.

## Canada

Canada, like Australia, is a federation with responsibility for child welfare residing with the provinces. Some First Nations organisations have called for national umbrella legislation which would provide a framework for the delivery of all child welfare services to First Nations communities similar to the United States' ICWA. To date, no such legislation has been passed. However, reforms to contemporary Canadian child welfare legislation are characterised by recognition of qualified principles of self-determination with Aboriginal peoples included in decision making with respect to their children. Aboriginal rights and treaty rights in Canada are recognised within s35 of the *Constitution Act 1982*.<sup>235</sup> Despite this the courts have been unable to resolve the scope of these rights and consequently the rights and responsibilities of the federal and provincial governments and First Nations peoples remains uncertain. First Nations peoples in Canada are living in a diverse range of situations and self-government for First Nations in Canada has progressed in different ways. Self-government provisions may include education, housing, property rights, justice services and health care and social services including child welfare. Self-government therefore, can only be considered within the context of each group.<sup>236</sup> However, despite longstanding claims by First Nations with respect to full jurisdiction over their children and families,<sup>237</sup> federal and provincial governments continue for the most part to mandate child welfare through legislation.<sup>238</sup> This means that most power exercised by First Nations children's agencies is delegated power and the agencies administer services under the authority of

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<sup>235</sup> Section 35(1) provides that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'

<sup>236</sup> Bennett M, Blackstock C, & De La Ronde R (2005), *A Literature Review and Annotated Bibliography Focusing on Aspects of Aboriginal Child Welfare in Canada*, First Nations Research Site of the Centre of Excellence for Child Welfare. Available at:

[http://www.fncaringsociety.com/sites/default/files/docs/AboriginalCWLitReview\\_2ndEd.pdf](http://www.fncaringsociety.com/sites/default/files/docs/AboriginalCWLitReview_2ndEd.pdf)

<sup>237</sup> See, for example, Nisga'a Final Agreement, which allows for Nisga'a to develop child welfare laws; the Indian child welfare legislation drafted by First Nations child and family service agencies in Saskatchewan; and in British Columbia, the Sappumcheen Band by-law. See Ibid, 30.

<sup>238</sup> Blackstock C & Trocme N (2005), 'Community Based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change,' 24 *Social Policy Journal of New Zealand* 12.

mainstream legislation. It would appear however, that no matter what the situation, all First Nations children's organisations are acting with limited and insufficient resources.

Despite the prevalence of delegated authority, there are a number of initiatives throughout Canada where responsibility for child welfare is being transferred to Aboriginal controlled agencies and many have to varying degrees been able to provide more culturally appropriate services for children, families and communities.<sup>239</sup> Some of the most detailed and progressive models for the transfer of responsibility from mainstream services to Indigenous agencies have been developed in Canada. For example the process for establishing Aboriginal child welfare authorities in Manitoba and then transferring responsibility for case management to them, has served as an example of what could be possible in Australia and has inspired the development of memorandums of understanding between state child welfare departments and Australian Indigenous organisations such as the Victorian Aboriginal Child Care Agency. Similar to Indigenous peoples in the United States and New Zealand, Aboriginal peoples in Canada have looked to their original sovereignty and the retention of residual jurisdiction as the foundation for their claim to exercise control over their children's welfare and wellbeing. The lack of national framework legislation, and differences across Canadian provinces with respect to treaty agreements and provincial child welfare legislation, has resulted in a patchwork of child welfare legislation and agreements which accord Aboriginal peoples different levels of control.

### *History of Indigenous child and family services*

As with Indigenous peoples in Australia and the United States, there has been a long history of the forcible removal of Canadian Aboriginal children from their families and communities. In Canada, children were placed in 'residential schools' that were modelled after British industrial schools. The Canadian Government established the first of these in 1883, however, schools were also

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<sup>239</sup> Bennett, Blackstock & De La Ronde (2005) above n27.

operated by 25 different religious orders.<sup>240</sup> Conditions at the schools were appalling. Abuse at schools included ‘strappings with nail-studded belts, sexual abuse, brutal physical beatings and deprivation of adequate nourishment.’<sup>241</sup> Children were required to spend a lot of their time on farm and housekeeping chores and often ran away. Instructors were incompetent and inadequately trained. By the late 1960s, the resulting poor academic achievement of resident children led to decisions to close most schools. As Bennett et al summarised, ‘Through residential schools and its deliberate assault on the Aboriginal family, First Nations were vulnerable to the next wave of interventions of “child abductions” sanctioned by provincial child welfare laws.’<sup>242</sup> The residential school system is now widely regarded as reflecting an assimilationist policy, which was intended to break down Canadian Aboriginal culture, and integrate Aboriginal people into white society. This policy dominated First Nations child welfare in Canada until the closure of the residential schools in the 1960s. On the closure of the schools, a policy of integrating Aboriginal and non-Aboriginal services was introduced. This led to a greatly increased incidence of removal of Aboriginal children. For example, by 1964, 34% of children in out-of-home care in British Columbia were Aboriginal, rising from less than 1% in 1955.<sup>243</sup> This pattern was repeated in other parts of Canada, and is often referred to as the ‘Sixties Scoop.’<sup>244</sup> Aboriginal leaders have characterised this phase as a period of cultural genocide.<sup>245</sup>

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<sup>240</sup> Morrisette PJ (1994), ‘The Holocaust of First Nation People: Residual Effects on Parenting and Treatment Implications,’ 16(5) *Contemporary Family Therapy* 381, 382.

<sup>241</sup> Ibid, 384.

<sup>242</sup> Bennett, Blackstock & De La Ronde (2005) above n27, 18. Bennett et al reference Fournier S & Crey E (1997), *Stolen from our embrace: The abduction of First Nations children and the restoration of aboriginal communities*. Vancouver: Douglas & McIntyre.

<sup>243</sup> Wharf B (1992), ‘First Nations Control of Child Welfare Services’ in Wharf B (ed), *Communities and Social Policy in Canada*. Toronto: McLelland and Stewart, 101-102.

<sup>244</sup> Johnston P (1983), *Native Children and the Child Welfare System*. Toronto: Canadian Council on Social Development.

<sup>245</sup> See, for example, Alston-O’Connor E (2010), ‘The Sixties Scoop: Implications for Social Workers and Social Work Education,’ 11(1) *Critical Social Work* 53, 55.



Integration of services persisted. By the 1970s, placement and adoption had replaced residential schools as the primary alternative care system for Aboriginal children. Many children placed in care or adopted by families were abused in these situations. In the late 1970s and early 1980s one in seven First Nation children were in substitute care at any given time, while one in four spent some part of their childhood in care.<sup>246</sup> In the early 1980s, five Canadian Aboriginal children were removed to every non-Aboriginal child, while Aboriginal people made up 6% of the population.<sup>247</sup> In the earlier assimilation period, numbers across Canada had been negligible. Children were removed without consideration of cultural difference, according to the ethnocentric assumptions of social workers regarding matters of perceived health, housing, diet and so forth. 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.<sup>248</sup> The trauma which this history visited upon children, families and communities is evident in the current over-representation of Aboriginal families in child welfare. As discussed in Chapter 7, Indigenous communities have developed healing programs to address transgenerational experiences of abuse and loss, however systemic problems across communities, as discussed with respect to Indigenous peoples in Australia, also require structural solutions.

### *Restoring Indigenous control*

Aboriginal peoples negotiated agreements with government as early as 1973, when the Blackfoot Band of Alberta entered into arrangements whereby the federal government would reimburse the Band for services to children while the provincial government designated a Band employee as a child protection

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<sup>246</sup> Armitage A (1993), 'Family and Child Welfare in First Nations Communities' in Wharf B (ed), *Rethinking Child Welfare in Canada*. Toronto: McClelland & Stewart, 147.

<sup>247</sup> Awasis Agency of Northern Manitoba (1997), *First Nations family justice: Mee-noo-stah-tan Mi-ni-si-win*. Manitoba: Thompson, 17.

<sup>248</sup> Armitage (1993) above n37.

worker.<sup>249</sup> After two provincial tripartite reviews of child welfare in 1978 and 1980, further agreements were increasingly made with other Indian Bands. The Spallumcheen Band of British Columbia passed a by-law in 1980 authorising the Band to operate its own child welfare service. This was permitted to stand by the Minister of Indian Affairs.<sup>250</sup> This by-law gives the Band exclusive jurisdiction over the custody of Band children, both on and off the Indian reserves, only permitting non-Aboriginal foster placements as a last resort. Further, it precludes non-Aboriginal people from seeking placement of a child in their home, from seeking access to a child, or from participating in any process to determine the best interests of a child.<sup>251</sup> In *S.(E.G.) v Spallumcheen Band Council* the constitutional validity of the by-law was challenged by the former non-Aboriginal foster parents of an Indian Band child whose application for custody of the child had been disallowed by the Band.<sup>252</sup> The British Columbia Provincial Court confirmed the validity of the by-law,<sup>253</sup> but were critical of the exclusion of non-Aboriginal parties from proceedings on the basis that this could deny an outcome which is in the best interests of the child.<sup>254</sup> The limitations of an essentialist approach, such as that evident in this by-law, are discussed above with respect to the United States' ICWA. Other Bands have attempted to pass similar by-laws but all have been disallowed by the federal government.<sup>255</sup> By the 1980s, broader policy began to favour some degree of community control under tripartite agreements between the federal government, provincial governments, and Indian Bands or Tribal Councils.<sup>256</sup> Pivotal work by Johnston<sup>257</sup> and moves by First

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<sup>249</sup> Durst D (1998), 'The Wellness of Canadian First Nations Children: Seeking Solutions Through Self-Government' in Hylton J (ed), *Aboriginal Self-Government in Canada* (2nd ed). Saskatoon: Purich.

<sup>250</sup> Ibid.

<sup>251</sup> The Indian child placement preferences are enumerated in provision 10 of the by-law.

<sup>252</sup> *S.(E.G.) v Spallumcheen Band Council* [1999] 2 CNLR 306.

<sup>253</sup> Ibid, 317.

<sup>254</sup> Ibid, 316.

<sup>255</sup> For a discussion of the Spallumcheen Band by-law and reasons for the disallowance of equivalent by-laws see McDonald JA (1983), 'The Spallumcheen Indian By-law and Its Potential Impact on Native Child Welfare Policy in British Columbia,' 1 *Canadian Journal of Family Law* 75, 91.

<sup>256</sup> Armitage (1993) above n37.

Nations leaders contributed to these first steps towards Aboriginal control over child protection services.<sup>258</sup>

In 1987-1988, a 1986 Department of Indian Affairs moratorium on new arrangements began to take effect. This moratorium was put in place pending a review of policy, which was released in 1989 as a discussion paper.<sup>259</sup> The review was carried out in response to a tripling of federal child welfare costs in an environment of allegedly unplanned growth. The paper established various limitations on further agreements:

- Minimum of 1000 children to be covered;
- Exclusion of child-care services;
- Provincial legislation and standards to be followed;
- New agreements only to be entered into 'as resources become available.'

The blow-out in federal costs was contributed to by the unexpected result of the 1980s era initiatives restoring Aboriginal control – an increase in the number of children entering care. It is generally thought that this increase was not the result of an increasing incidence of abuse and neglect, but due rather to higher rates of disclosure and reporting because of the greater trust fostered by Aboriginal-run services. Despite increased costs being related to past government policies and practices this does not appear to have been taken into account when the Department of Indian and Northern Affairs (DIANA) policy was formulated.

The Canadian Government, through Indian and Northern Affairs Canada (INAC) as at 2011 funds 108 First Nations Child and Family Services (CFS) across Canada. The Canadian Government has also entered into tripartite agreements with six provinces and the First Nations from those provinces to fund First Nations Child and Family Service

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<sup>257</sup> Johnston (1983) above n35.

<sup>258</sup> Durst (1998) above n40.

<sup>259</sup> Department of Indian and Northern Affairs (DIANA) 1989, cited in Armitage (1993) above n37.

Programs (FNCFS), which are intended to provide preventative services.<sup>260</sup> As discussed below, because there is no national legislation such as the ICWA in the US, a range of tripartite agreements between First Nations, provincial governments and the federal government have been entered into with respect to the delivery of child welfare services to First Nations children in Canada. While INAC claims that the aim of CFS is to 'support First Nations communities in providing culturally sensitive child welfare services comparable to those available to other provincial residents in similar circumstances',<sup>261</sup> there is considerable evidence which demonstrates the disparity in funding for child welfare for First Nations children on reserves compared with all children. The federal government's perpetuation of inequality is being tested with a discrimination case being brought by the First Nations Child and Family Caring Society of Canada (FNCFCSC) and Assembly of First Nations (AFN) against Canada (the Minister of Indian and Northern Affairs). The claim is based on the disparity in funding between First Nations children on reserves compared with children off reserves. Children living on reserves receive on average 22% less child welfare funding than other children in Canada.<sup>262</sup> In March 2011, The Canadian Human Rights Tribunal dismissed the complaint on technicalities. They upheld Canada's claim that discrimination can only be determined by comparing services provided by the same service provider and that First Nations children on reserves are the only group provided services by the federal government. FNCFCSC is appealing this decision on a number of grounds. These include that the *Canadian Human Rights Act* 1985 does not require a comparator group and that if one is required child welfare services are a statutory and public service available to all Canadian children and therefore children receiving child welfare services off reserve are a legitimate comparator group.<sup>263</sup> The case was initiated in 2007 and the

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<sup>260</sup> The Tripartite frameworks have, as at December 2011, been entered into in Manitoba, Nova Scotia, Prince Edward Island, Quebec, Saskatchewan and Alberta.

<sup>261</sup> Aboriginal Affairs and Northern Development Canada, 'Background - First Nations Child and Family Services' (National). Available at: <http://www.aadnc-aandc.gc.ca/aiarch/mr/nr/m-a2008/2-3071b-eng.asp>

<sup>262</sup> Horne L (Defence for Children International-Canada) (2011), 'Defence for Children International reflects on Tribunal Chair Chotalia's decision to dismiss the complaint,' 6 April 2011 (open letter). Available at: <http://www.fncfcs.com/sites/default/files/fnwitness/DCI-letter-2011.pdf>

<sup>263</sup> Nation (Independent Aboriginal publication serving Eeyou Istchee since 1993) (2011), 'Human rights tribunal dismisses complaint about the welfare of First Nations children,' *Nation*, 25 March 2011 (newspaper article).

Federal Court appeal decision was set down for hearing for three days in the Federal Court in February 2012. It is revealing that Canada is not arguing that First Nations children on reserves are not receiving unequal child welfare services compared with children off reserves. Rather they are arguing that technically they do not come under the jurisdiction of the *Canadian Human Rights Act* 1985 because Canada does not fund welfare services for any other group of children and because they fund rather than deliver services.

While provincial government child welfare systems remain in control of legislation, a number of First Nations and Aboriginal communities have developed proposals and negotiated agreements transferring departmental responsibility to Aboriginal agencies. These agencies have been developing culturally appropriate service models. In most jurisdictions Aboriginal communities have established child and family agencies that provide a range of services mandated under the provincial legislation. In some instances this encompasses the full range of services including protective responsibility, while in other instances services are provided in conjunction with departmental authorities. Aboriginal leaders have challenged the authority of provincial legislation and attempted to have child welfare treated as a federal issue. There have been calls for a national Act similar to the United States' ICWA, in order to provide an umbrella under which individual First Nations agencies could operate while allowing for regional cultural differences.<sup>264</sup> On the one hand, Canadian Aboriginal people are faced with the likely impracticality of 600 Bands each having their own Act, but on the other, the difficulty in finding consensus in a single federal Act. These issues remain moot as the Canadian Government has not indicated a willingness to contemplate national legislation. The overlap between federal and provincial responsibility for Aboriginal children's wellbeing has in some circumstances had dire consequences, with a failure on the part of any government to take responsibility. The story of Jordan River Anderson provides a

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<sup>264</sup> Durst (1998) above n40.

telling example of this: Jordan was a First Nations boy born with complex medical needs. He was in hospital for the first two years of his life before he was well enough to go to a family home. There was a dispute, however, between provincial and federal governments over which government was responsible for paying for his home care. Jordan was forced to unnecessarily wait in hospital for a further two years for the dispute to be resolved. Unfortunately, the dispute was not resolved in time, and he passed away in hospital at age 5.<sup>265</sup>

The retention of provincial legislation and standards is an ongoing source of contention. While all children should be afforded the protection of the law, the presumption that non-Indigenous legislation and standards are universally applicable defies recognition of the cultural differences founded in the traditions and histories which are part of Aboriginal cultures. However, as discussed in Chapters 2 and 3, while a presumption of universal values may be Eurocentric, this does not mean that Aboriginal models are inherently available or suitable. In many circumstances Aboriginal organisations and communities have, through colonial processes, been denied the experience of establishing and enforcing child protection or other laws. Aboriginal children, like other children, require safe and effective provision of child protection services. Therefore transference of responsibility for child protection, including the establishment of legislation and standards, may be part of a process of Aboriginal community capacity building and one which incorporates contemporary experiences including international human rights standards such as those established under the Convention on the

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<sup>265</sup> This has led First Nations and child welfare advocates to push for the implementation of 'Jordan's Principle' into legislation. This principle states that payment for services for an Aboriginal child must be made by the government of first contact. If there is a jurisdictional dispute about whether another level of government was responsible for this payment, this dispute can be subsequently resolved by the governments in question. This principle has been implemented in legislation in relation to complex medical needs but campaigns are still advocating for the principle to have broader effect. For more information see First Nations Child Family Caring Society in Canada, *Joint Declaration of Support for Jordan's Principle*. Available at: <http://www.fncaringsociety.com/jordans-principle/jordans-story>

Rights of the Child (CROC).<sup>266</sup> The initiatives on the part of Canadian Aboriginal peoples to take responsibility for their children's wellbeing have, like initiatives in other jurisdictions, been influenced by advocacy nationally and internationally for recognition of Indigenous peoples' right to self-determination.

## **Canadian legislative frameworks**

### *Manitoba case study*

The delivery of child welfare services in Manitoba, Canada has been reformed with a thorough and planned process for devolving responsibility for First Nations children to First Nations authorities across the Province.<sup>267</sup> The Manitoba model, like the United States *Indian Child Welfare Act* 1978 discussed above, serves as an inspiration and model for Indigenous communities who are seeking greater control over their children's wellbeing. In the early 1980s, Manitoba First Nations people developed the first Canadian Indian child welfare agreements with federal and provincial governments, providing for province-wide First Nations control under the same model. Tripartite agreements were negotiated between the Band, provincial government and federal government. All rural and reserve areas were covered by these agreements. Guiding principles for the agreements included:

- Acknowledgment of the special needs of Aboriginal people in respect of culture, geography and past experience;
- Importance of the preservation of Aboriginal cultural identity; and
- Provision of services must involve Aboriginal people and recognise their priorities.<sup>268</sup>

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<sup>266</sup> Canadian Aboriginal children's organisations have been actively involved in UN processes. For example, the First Nations Child and Family Caring Society initiated the establishment of the sub-group on Indigenous child rights which works with the UN Committee on the Rights of the Child.

<sup>267</sup> See the official website of the Aboriginal Justice Inquiry – Child Welfare Initiative. Available at: <http://www.aji-cwi.mb.ca/>. A more detailed review of this initiative is found in Libesman T (2005), *Aboriginal and Torres Strait Islander Child Protection Outcomes Project Report*. Victoria: Secretariat of National Aboriginal and Islander Child Care and Department of Human Services.

<sup>268</sup> Armitage (1993), above n37.

However, the Aboriginal Justice Inquiry Report released in 1991, which examined the relationship between the Aboriginal peoples of Manitoba and the justice system, found that Aboriginal peoples living off reserves were not being served well by the non-Aboriginal child welfare system.<sup>269</sup> Its recommendations included the establishment of a province-wide Métis agency and the expansion of existing First Nations agencies to enable them to serve Band members who live off reserves. A model for the devolution of power and responsibility for First Nations child and family services to First Nations people was developed by the First Nations Task Force in consultation with 15 Manitoba First Nations communities.<sup>270</sup> This model was to involve a three-stage process.

At the 'short-term' stage, the Task Force recommended that a 'First Nations Child and Family Services Directorate' be established parallel to, but independent from, the existing provincial Department with 'total jurisdiction' for services to all First Nations children. The Directorate would work within the existing legislative framework while a new legal framework was developed. Priority tasks for the Directorate included:

- decentralisation of services;
- development of the new model;
- development of new service standards;
- development of an 'Appeal/Dispute resolution' mechanism; and
- monitoring of agencies.

The 'intermediate' stage was to involve the drafting of a new 'First Nations Child and Family Services Act.' At the 'long-term' stage, First Nations child and family services were to be fully autonomous and the Directorate would disband.<sup>271</sup>

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<sup>269</sup> Aboriginal Justice Inquiry (1991), *Report of the Aboriginal Justice Inquiry to Manitoba*. Winnipeg: Queen's Printer.

<sup>270</sup> First Nations Child and Family Task Force (1993), *Children First, Our Responsibility: Report of the First Nation's Child and Family Task Force*. Winnipeg: The Task Force.

<sup>271</sup> Ibid.



The Aboriginal Justice Inquiry – Child Welfare Initiative, which took up the recommendations from the Aboriginal Justice Inquiry Report almost a decade later in 1999, was from the start a joint initiative between the Manitoba Métis Federation, the Assembly of Manitoba Chiefs and Manitoba Keewatinowí Okimakanak and the Province. The negotiations resulted in shared responsibility between Aboriginal peoples and the Province for child welfare services. This initiative has resulted in the expansion of Aboriginal child welfare services which had already been established to service Aboriginal children on reserves and the establishment of new Aboriginal agencies to service Aboriginal children throughout Manitoba. The restructuring of child welfare in Manitoba commenced with the signing of Memorandums of Understanding and then Service Protocol Agreements between the Province and the Manitoba Métis Federation, the Assembly of Manitoba Chiefs and the Manitoba Keewatinowí Okimakanak.<sup>272</sup> The Manitoba initiative is different to all previous reforms in that the policy-making process was jointly developed and the government, rather than being the primary policy-maker, was one of four policy-making partners. However a limitation with the process was the exclusion of the federal government which plays a significant role in funding Aboriginal child welfare on reserves.<sup>273</sup>

Under the *Child and Family Services Authorities Act* 2002 four umbrella child welfare authorities have been established.<sup>274</sup> It is the responsibility of each authority to develop policy and to fund local agencies to deliver culturally appropriate child support and protection services. The authorities are all working under the *Child and Family Services Act* 1985 and the *Adoption Act* 1997. Two of the authorities cater for First Nations children and families, one caters for Métis children and families and the fourth is a

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<sup>272</sup> Holnbeck C, DeJaegher S & Schumacher F (2003), Métis Child and Family Services, 'Developing Child Welfare Services from the Ground Up: A Multidisciplinary Approach,' 2(2) *Envision: The Manitoba Journal of Child Welfare* 1.

<sup>273</sup> Hudson P & McKenzie B (2003), 'Extending Aboriginal control over child welfare services – The Manitoba child welfare initiative,' 51 *Canadian Review of Social Policy* 49, 56.

<sup>274</sup> The First Nations of Northern Manitoba Child and Family Services Authority (Northern Authority), the First Nations of Southern Manitoba Child and Family Services Authority (Southern Authority), the Métis Child and Family Services Authority and the General Child and Family Services Authority.

general authority which caters primarily to 'non-Aboriginal' children and families. A Detailed Implementation Plan (DIP) was designed to provide a framework to implement the restructure. A key feature of this plan was that it was to be a 'rolling document' designed to accommodate changing circumstances. Caseloads, resources and assets were gradually transferred from the previous child welfare departments to the most culturally appropriate authority and their agencies over an extended period of time. Under the old system, non-Aboriginal agencies provided services to Aboriginal families. The transfer of case management took place on a region-by-region basis, with the aim that each authority and agency would have time to prepare to accept the responsibilities entrusted to them. This was particularly relevant to the Métis Authority because it had to be established from scratch unlike the mandated First Nations agencies which had already been set up in some form for over two decades.<sup>275</sup> With the reform process, the 'general authority' and their associated agencies were downsized as cases were transferred to the mandated First Nations and Métis authorities.<sup>276</sup>

The intake services are structured in such a way that the four authorities jointly manage the services but through designated agencies. In Winnipeg there is a joint intake response unit as the first point of contact and outside of Winnipeg a number of designated agencies are charged with the responsibility. There is a separate agency in Winnipeg to provide emergency services, identify the authority which holds records and refer clients to the ongoing services. Further, there is a common child abuse registry in Manitoba that registers child abuse claims and allows these various agencies to share information useful to determining whether someone should be entrusted with caring for the child.<sup>277</sup> In relation to funding, the Manitoba government provides funding to the authorities and this is then distributed to their agencies. During the implementation of these authorities, an additional one-off payment was also made to cover additional

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<sup>275</sup> Bennett, Blackstock & De La Ronde (2005) above n27.

<sup>276</sup> A complicated aspect of this transfer was the need to staff new Aboriginal agencies and the ways in which staff from downsized mainstream agencies would be supported in their transfer to alternative employment, see Hudson & McKenzie (2003) above n64, 58.

<sup>277</sup> For more information on the Manitoba Child Abuse Registry, see the official website. Available at:  
[http://www.gov.mb.ca/fs/childfam/child\\_abuse\\_registry.html](http://www.gov.mb.ca/fs/childfam/child_abuse_registry.html).

expenses for activities such as training, transitional costs, transfer of caseloads and other administrative costs. Hudson and McKenzie have noted that the province recognised that the funding was insufficient for preventative services but relied on the new authorities to shift resources from protection to community-building without significantly increasing funding.<sup>278</sup> The exclusion of the federal government from the Manitoba child welfare initiative negotiations and inadequate funding for prevention services has been partially addressed with the signing in 2010 of a tripartite agreement with respect to the funding of early intervention and prevention services for on reserve children.<sup>279</sup> This agreement was in part a response to the Canadian Auditor General's finding that Canada's funding of on reserve child welfare under Directive 20-1 is outmoded and insufficient, together with external reviews into the death of an Aboriginal child who was under the care of a First Nations authority, and ongoing advocacy with respect to unequal services provided to on reserve Aboriginal children and young people.<sup>280</sup>

The most appropriate authority for clients is determined by applying the following values:

- children, families and communities belong together;
- decisions must be in the best interests of children; and
- service arrangements should be culturally appropriate, stable and timely.

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<sup>278</sup> McKenzie also discusses possibilities for innovative funding such as block funding with an evaluation of varying communities needs over a number of years, see McKenzie B (2002), *Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review*.

Kahnawake Shakotii'a'takehnhas Community Services, Kahnawake First Nations, 69.

<sup>279</sup> See Aboriginal Affairs and Northern Development Canada (2010), *The Children and Families First: Manitoba First Nations Early Intervention and Prevention Services Enhancement Framework July 2010*. Available at:

<http://www.aadnc-aandc.gc.ca/eng/1326401146054>

<sup>280</sup> The following reports reviewed deaths of Aboriginal children under the care of Aboriginal child welfare agencies: Hardy M, Schibler B & Hamilton I (2006), *Strengthen the Commitment: An External Review of the Child Welfare System*. Manitoba: Office of the Ombudsman; Schibler B & Newton J (2006), *Honouring their Spirits: The Child Death Review*. Manitoba: The Office of the Children's Advocate.

The *Child and Family Services Act* 1985 acknowledges that, 'Indian bands are entitled to the provision of child and family services in a manner which respects their unique status as aboriginal peoples.'<sup>281</sup> Where child protection matters are brought to court by a non-Indian agency the Indian agency which serves the child's community must be given notice of the child protection proceedings.<sup>282</sup> This is in addition to the parents and other relevant parties who must also be notified of such proceedings.

The Manitoba restructure has been based on the right of First Nations and Métis peoples to culturally appropriate services. The concepts of collaboration, participation and righting the wrongs of the past are at the core of the initiative.<sup>283</sup> The restructure of the system was driven by First Nations and Métis peoples and it is unique in that regard. A striking feature is that the Manitoba Government was willing to share some aspects of its child welfare jurisdiction. The Manitoba initiative was developed as a phased plan that could be updated and amended so that the reform process could be flexible and was not necessarily compromised by artificial constraints. One of the benefits of this flexibility was that it could be structured around regional differences. Although some issues were missed at the conceptual stage, the flexible structure offered scope for adaptation both within Manitoba and in other contexts and countries. However, the delegation of powers rather than the transfer of full jurisdiction to First Nations child and family services has been criticised as transferring responsibility without sufficient resources or authority to substantively change child welfare.<sup>284</sup> The failure to resource child welfare services, in particular prevention services at an equal level for on reserve Aboriginal children compared with other Canadian children, is as referred to above partially addressed through the 2010 tripartite framework

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<sup>281</sup> *Manitoba Child and Family Services Act* 1984, Principle 11.

<sup>282</sup> *Ibid*, s30(1)(e).

<sup>283</sup> Blackstock & Trocme (2005) above n29.

<sup>284</sup> MacDonald F (2004), *Restructuring Rights: Exploring the Implications of Privatization for Minority-Rights Based Initiatives*, paper presented at the Annual Meeting of the Canadian Political Science Association, June 2004. Available at: <http://www.cpsa-acsp.ca/papers-2004/MacDonald,%20Fiona.pdf>

agreement and is also the subject of a claim under the *Human Rights Act* 1985. McDonald describes the transfer of service provision without legislative or judicial powers as a privatisation of responsibility, giving First Nations a ‘middle man’ role. This, she argues, makes First Nations services vulnerable to the charge of failure when they have not had a real opportunity to effect change. Further, the transference of service provision without changing the ‘modality’ of service provision or the underlying causes of over-representation of Aboriginal children in the child welfare system, risks a significant restructure with limited improvements.<sup>285</sup> While these risks are real, there are also opportunities for transformation of understandings and capacity with the transfer of service delivery functions to First Nations organisations, which as discussed in Chapters 2 and 4 offers the opportunity for pluralisation of understandings and through this increased respect for and willingness to transfer and extend child welfare jurisdiction to First Nations communities. However, to attain longer term outcomes the pluralisation of human rights needs to extend from child welfare to community development to encompass the structural inequalities which underlie the over-representation of Aboriginal children in child welfare systems.<sup>286</sup>

### *British Columbia*

In British Columbia, First Nations involvement in child welfare has evolved in an ad hoc manner. In the absence of treaties or compensation for dispossession (which have existed in other provinces), First Nations people have taken a more militant approach to asserting their rights. The 1980 Spallumcheen Band by-law, discussed above, authorising the Band to conduct its own child welfare program, was recognised by the Provincial Social Services Department only after a live-in protest at the home of the then Minister.<sup>287</sup> Negotiation of most agreements continues at the local level in an informal manner. Most children on reserves are

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<sup>285</sup> See Hudson & McKenzie (2003) above n64. Issues with respect to service delivery are discussed further in Chapter 7.

<sup>286</sup> This is referred to across the thesis but is considered in particular in Chapter 6.

<sup>287</sup> Armitage (1993) above n37; and Wharf (1992) above n34.

covered by these agreements, which grant effective control to Aboriginal people, but are not recognised under *Child, Family and Community Services Act* 1996. Practice, therefore, has changed before policy or legislation in British Columbia. A British Columbia Aboriginal Community Panel Report recommended:

Provincial legislation must explicitly acknowledge the jurisdiction and responsibility of Aboriginal Nations to make decisions, and resolve problems with respect to issues of Aboriginal families and children.<sup>288</sup>

In British Columbia, as in other parts of Canada, child welfare arrangements can be enmeshed within broader self-government agreements. For example, in 2000 the Indigenous people of the Nisga'a Nation entered into a treaty with the British Columbian Government and Canadian Government that empowered them to self-government on their land. This agreement included numerous provisions providing them with some level of autonomy over child welfare matters.<sup>289</sup> As Bennett et al details:

The agreement provides for negotiations to occur between the Nisga'a and the province over the children who do not live on treaty lands and is reflected in provincial legislation which calls for the notification of the Nisga'a Government on a basis similar to other "Aboriginal organizations." This means that ultimate decision making power regarding Nisga'a children living off treaty settlement lands remains with the province. The agreement contains provisions which recognize automatic standing of the Nisga'a Government in all child custody proceedings involving a Nisga'a child. The Nisga'a can also make laws for the adoption of their children however those laws only apply outside of the treaty settlement lands with the consent of the parent(s), or where a court has dispensed with the

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<sup>288</sup> Community Panel (1992), *Liberating our Children, Liberating our Nations: Report of the Aboriginal Committee*. Victoria: Community Panel, Family and Children's Services Legislation Review in British Columbia, 31.

<sup>289</sup> Bennett, Blackstock & De La Ronde (2005) above n27, 50.

requirement that parent(s) consent to the application of Nisga'a laws.<sup>290</sup>

Aboriginal children who are not covered by negotiated agreements fall under the jurisdiction of the *Child, Family and Community Services Act* 1996 which provides that an Aboriginal child's cultural identity must be considered when determining the best interests of an Aboriginal child. If a child is to be removed from a family, their community must be notified of the hearing and an Aboriginal child placement principle applies.<sup>291</sup> The Aboriginal Child and Family Services Branch, which is part of the Ministry of Children and Family Development, helps to build service provision capacity in communities and encourages formal agreements with communities to provide services. The agreements vary with some communities delegated full responsibility for all child protection services and others with authority to provide some services such as voluntary care services, voluntary care agreements, recruitment and support of foster carers.

#### *Yukon Territory*

The Yukon Territory, where Aboriginal people make up approximately 20% of the population, provides an example of the difficulties experienced by small and remote groups in gaining control over child welfare. Although Yukon's *Children's Act* was modified in 1984 to allow delegation of child welfare authority to Aboriginal groups, only one agreement has been made, with the Champagne/Aishihik Band in April 1989. More than half of the Yukon's 15 First Nations have self-government agreements which enable them to pass their own child welfare laws. Considerable advocacy surrounded the enactment of the *Children and Family Services Act* 2008 which replaced the *Children's Act*. While the new Act provides that the cultural identity of a First Nations child should be preserved,<sup>292</sup> that First Nations should be involved as early as practicable in decision making processes with regard to a First Nations child,<sup>293</sup> that First Nations

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<sup>290</sup> Ibid.

<sup>291</sup> *Child, Family and Community Services Act* 1996, s33.1.

<sup>292</sup> *Child and Family Services Act* 2008, s(2)(d).

<sup>293</sup> Ibid, s(2)(j).

should be involved in the planning and service delivery to their members;<sup>294</sup> that collaboration builds on the collective strengths and expertise of children, families, First Nations and Communities;<sup>295</sup> that a First Nations child's cultural identity should be considered in determining the best interests of the child;<sup>296</sup> and that the Act itself does not in anyway affect any provision of a self-government agreement.<sup>297</sup> First Nations leaders have expressed considerable dissatisfaction with the Act. It fails to transfer jurisdiction or real control to First Nations governments. Yukon First Nation, the Kwanlin Dun First Nation in Whitehorse, has banned Yukon Government social workers from its lands over frustrations about how children have been apprehended. They have not been notified or involved and social workers have arrived on their land and apprehended children with no notice. The efforts of First Nations to exercise jurisdiction as provided for under self-government agreements has been thwarted by the Yukon Provincial Government and the Canadian Government both refusing to fund First Nations child welfare, with each claiming that it is the responsibility of the other government. While the Carcross Tagish First Nation has passed its own Family Act, which establishes a framework to run its own social services, neither level of government will fund its implementation.

### *Ontario*

In Ontario a model of delegating child welfare services to Aboriginal agencies is the dominant manner in which child welfare services are delivered to Aboriginal families. Ontario was one of the first Canadian provinces to recognise Aboriginal identity and the importance of cultural care for Aboriginal children's welfare and wellbeing. The delegated model of child welfare was first implemented through an agreement between the Province and the federal government in 1965. Bennett et al report:

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<sup>294</sup> Ibid, s(3)(e).

<sup>295</sup> Ibid, s(3)(f).

<sup>296</sup> Ibid, s(4)(2).

<sup>297</sup> Ibid, s(5).



Native Child and Family Service agencies were mandated under the *Child and Family Services Act* 1984 to provide child protection services within defined geographic areas to Aboriginal children and families of designated First Nations Bands. The roots of the mandate lie in the 1965 Welfare Agreement between the federal and provincial governments and the First Nations. This agreement transferred responsibility for Aboriginal child welfare from the federal government to the provincial government. At that time, First Nations were assured of an opportunity to develop Aboriginal models and standards for their own child welfare services. As a first step towards fulfilling this promise, the Child & Family Services Agreement was amended in 1984 to recognize Aboriginal rights to culturally appropriate child welfare services. As well as being mandated by the provincial legislation, each of the Aboriginal agencies has a mandate from the First Nations which provides services in a manner that is sensitive to the unique needs of the Aboriginal child and family, Aboriginal culture and traditions, and the concept of extended family.<sup>298</sup>

Ontario's *Child and Family Services Act* 1990 recognises 'that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognises their culture, heritage and traditions and the concept of extended family.'<sup>299</sup> However, this and all other purposes of the Act are subject to the paramount purpose of promoting the best interests, protections and wellbeing of children.<sup>300</sup> The Minister may make agreements with a Band or Indian community for the provision of

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<sup>298</sup> Bennett, Blackstock & De La Ronde (2005), above n28, 54.

<sup>299</sup> *Child and Family Services Act* 1990, s1(2)-(5).

<sup>300</sup> *Ibid*, s1(2).

services.<sup>301</sup> A community may, with the consent of its representatives, be designated by the Minister as a native community for the purposes of the Act.<sup>302</sup> The Band or community chooses a body as an Indian or native family service authority.<sup>303</sup> The Minister must enter into negotiations for the provision of services by the community authority and may enter into agreements for the provision of services including any or all of the services which are provided by the mainstream child welfare department which is called a children's aid society.<sup>304</sup> When an Indian child is found to be in need of protection, before making an order for removal, the Court must consider the less disruptive alternatives to be inadequate to protect the child.<sup>305</sup> When ordering out-of-home care a child must be placed with a member of the child's extended family, a member of the child's Band or native community, or another Indian or native family unless there is substantial reason for placing the child elsewhere.<sup>306</sup>

There are five designated First Nations agencies in Ontario: Tikinagan, Payukotayno, Weechi-it-te-win, Abinoojii Family Services and Dilico. These agencies are required to consult regularly with their Band or Aboriginal communities with respect to matters affecting children including matters relating to placement of children, provision of family support services, preparation of care plans, temporary care and special needs agreements, amongst other matters. Many Aboriginal agencies, however, have inadequate funding and poorly trained staff with little experience. There is a lack of monitoring and evaluation of their services. Resources to support Aboriginal agencies needs to complement the recognition of cultural needs otherwise Aboriginal children will continue to be denied adequate child protection services.

### *Alberta*

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<sup>301</sup> Ibid, s210.

<sup>302</sup> Ibid, s209.

<sup>303</sup> Ibid, s211(1).

<sup>304</sup> Ibid, s211(2)(a)-(c).

<sup>305</sup> Ibid, s57(3).

<sup>306</sup> Ibid, s5(5).

Alberta delegates responsibility for child welfare to First Nations agencies for the provision of child welfare services for the majority of Aboriginal children living on reserves. The first agreement signed was the Blackfoot (Siksika)-Canada-Alberta Child Welfare agreement in 1973. This was subsequently followed by the signing of agreements with other First Nations for Aboriginal agencies to assume responsibility for the provision of some or all child intervention services to their member Bands' families. The Minister has delegated responsibility for child welfare services to 18 First Nations agencies.<sup>307</sup> The 'Blood Tribe/Kainaiwa and Canada Framework Agreement' provides an example of an agreement which sets out a process which the parties agreed to with respect to 'the exercise of jurisdiction over child welfare by the Blood Tribe/Kainaiwa.' This framework agreement was signed in April 2000.<sup>308</sup>

Article 3.1 of the Framework Agreement provides that:

The Blood Tribe considers children vital to the continued existence and integrity of the Blood Tribe and wishes to protect Blood Tribe children by exercising jurisdiction on child welfare matters which affect Blood Tribe children on the Blood Indian Reserve by establishing a child welfare system for the efficient administration of child welfare matters on the Blood Indian Reserve pursuant to the customs and traditions of the Blood Tribe, while providing child welfare services that are equal to, or which exceed, standards in Alberta. The Agreement negotiated by the Blood Tribe is limited to Indigenous children living on reserve, and requires that the Blood agree to meet provincial standards in delivering child welfare services.<sup>309</sup>

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<sup>307</sup> While Alberta's now repealed *Child Welfare Act* 1999 did not include specific provisions for agreements with First Nations children's agencies, the Minister did have the power to delegate duties and powers under s87(1).

<sup>308</sup> Bennett, Blackstock & De La Ronde (2005) above n28, 51.

<sup>309</sup> Ibid, 51.

Under s121 of the *Child, Youth and Family Enhancement Act* 1984 the Minister can delegate any of the duties or powers imposed on him or her under the Act except for the power to delegate or the power to make regulations. Under s122 of the Act, the Minister may enter into agreements with respect to the provision of intervention services under the Act. The First Nations agencies which provide child welfare services to children in Alberta living on reserves are funded by the federal government and, as discussed above, the disparity in funding for on reserve Aboriginal children compared with other Canadian children is currently being challenged as racially discriminatory under the *Canadian Human Rights Act* 1985. The *Child, Youth and Family Enhancement Act* 1984 also includes provisions with respect to consultation with a child's Band and provision of culturally appropriate services where a non-Aboriginal agency is providing services to an Aboriginal child and their family.<sup>310</sup> As Article 3.1 of the 'Blood Tribe/Kainaiwa and Canada Framework Agreement' above illustrates the mandate for Aboriginal communities to provide child welfare services in Alberta, unlike the domestic dependent nation status with limited inherent jurisdiction which grounds the *Indian Child Welfare Act* 1978 (US), relies on delegated powers.

#### *Nova Scotia*

Under the *Children and Family Services Act* 1990 (CFSA) the Mi'kmaq Family and Children's Services agency is mandated to provide the full range of child protection services to all First Nations people living in First Nations communities in Nova Scotia. The Mi'kmaq agency was established through a tripartite agreement between the Government of Canada, the Department of Community Services (Nova Scotia) and the First Nations communities through the 13 chiefs of the Nova Scotia Bands. Members of the tripartite committee meet quarterly to evaluate and monitor the agreement.

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<sup>310</sup> *Child, Youth and Family Enhancement Act* 2004, s107.

The Mi'kmaq agency also provides support and consultative advice with respect to First Nations people not living in First Nations communities. The CFSA provides that the Mi'kmaq agency will be notified, along with other parties to proceedings, where the child who is the subject of the proceedings is Indian. The Mi'kmaq agency with its consent may be substituted for the agency which commenced the proceedings.<sup>311</sup> The Act also provides that the Mi'kmaq agency must be involved with the voluntary placement or adoption of Aboriginal children.<sup>312</sup>

### *Saskatchewan*

Saskatchewan's *Child and Family Service Act* 1990 enables the Minister to enter into agreements for the provision of children's services including child protection to First Nations families living on reserves.<sup>313</sup> There are 18 First Nations Children and Family Services agencies established. These agencies are involved in First Nations children's cases, regardless of whether the child resides on or off a reserve. The Act provides for First Nations Bands to be notified with respect to placement hearings, for the appearance of Bands in court hearings, and for their involvement in cases from the point of initial contact with the Department.<sup>314</sup> One of the key recommendations made in a government commissioned report reviewing the Saskatchewan child welfare system in December 2010 was a measured transition of child welfare services to Aboriginal control.<sup>315</sup> As of May 2011, the Federation of Saskatchewan Indian Nations (the primary body that represents the interests of the Aboriginal communities in Saskatchewan) are working towards further discussions with provincial and federal officials to turn this recommendation into a reality.<sup>316</sup>

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<sup>311</sup> *Children and Family Services Act* 1990, s36 (3).

<sup>312</sup> *Ibid*, s68(11)-(12).

<sup>313</sup> *Ibid*, s61.

<sup>314</sup> *Ibid*, s37(10).

<sup>315</sup> Saskatchewan Child Welfare Review Panel (2010), *For the Good of our Children and Youth*, Saskatchewan: Child Welfare Review, Recommendation 2.

<sup>316</sup> Wood J (2011), 'Child welfare a must, FSIN says,' *The Star Phoenix*, 25 May 2011 (newspaper article).

### *Northwest Territories and Nunavut*

The Northwest Territories and Nunavut both have legislation which allows for extensive delegation of authority and responsibility for child welfare to Aboriginal corporations under community agreements.<sup>317</sup> As Gough explains, 'The provisions of these agreements vary, but may include the establishment of community standards for determining the level of care adequate to meet a child's needs and when a child needs protection.'<sup>318</sup> Further, the *Aboriginal Custom Adoption Recognition Act* 1994 allows for the adoption between two Aboriginal families to be privately arranged in a simple manner that respects cultural traditions without the involvement of social workers and lawyers.<sup>319</sup> The Northwest Territory and Nunavut are sparsely populated with 85% of Nunavut's population Inuit.<sup>320</sup> Because of the sparse and small population of the Territories there are few social workers who perform more diverse functions and specialist services are outsourced to other provinces. The *Child and Family Services Act* 2007 provides that the best interests of the child must include consideration of the child's cultural, linguistic, spiritual and/or religious ties and that if a child is Aboriginal their Aboriginal community must be notified with respect to any application for a protection order.<sup>321</sup> The legislation in Newfoundland and Labrador, Prince Edward Island and New Brunswick does not contain any statutory provisions specific to First Nations, however protocols and agreements require culturally appropriate delivery of services.

### *Overview*

The Aboriginal child placement principle, which is acknowledged in all provincial child welfare legislation, provides a focal point for illustrating the conflicting currents in recognition of Indigenous identity in Canadian child welfare law. Concerns about the failure of welfare departments and courts to take

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<sup>317</sup> *Child and Family Services Act* 1997 (Nunavut) and *Child and Family Services Act* 1997 (Northwest Territories).

<sup>318</sup> Gough P (2007), 'Nunavut's Child Welfare System,' *Centre of Excellence for Child Welfare*, Information Sheet 55E. Available at: [www.cecw-cepb.ca/publications/406](http://www.cecw-cepb.ca/publications/406)

<sup>319</sup> Ibid.

<sup>320</sup> Ibid, 1.

<sup>321</sup> Gough P (2007) 'Northwest Territories' Child Welfare System,' *Centre of Excellence for Child Welfare*, Information Sheet 53E. Available at: <http://www.cecw-cepb.ca/publications/403>

into account the specificity of Aboriginal children's identity and needs led to the reforms in the legislation discussed above. The importance of recognition of Indigenous cultural identity, and of the responsibility of non-Indigenous institutions for wrongful removals of Aboriginal children from their families and attempts to assimilate them, have led to some courts being extremely sensitive to and self conscious of non-Aboriginal out of home placements. In other instances, judges are acutely aware of the particular circumstances of the child before them and place great weight on factors such as psychological bonding with carers and continuity of care. This has resulted in dichotomised decisions with little guidance as to what weight ought to be placed on competing values. For example, in *AG (Re)*<sup>322</sup> a non-Indigenous social service agency placed two Aboriginal children with non-Aboriginal foster carers off the children's reserve. The Court found that the placement principle 'is part of a national process aimed at correcting the errors of the past when children's placement in foster care amounted to depriving them of their cultural heritage and Aboriginal identity.'<sup>323</sup> The Court found that the legislation created a legal procedure to follow, and not merely a moral duty to be sensitive, and that the placement of the children was in breach of the relevant legislation. In contrast, in *Racine v Woods*<sup>324</sup> the Court focussed on developmental and bonding issues with Madam Justice Wilson stating that 'the significance of cultural background and heritage as opposed to bonding abates over time. The closer the bond that develops with the respective adoptive parents, the less important the racial elements become.'<sup>325</sup>

The capacity to balance competing interests in a manner which accords sufficient weight and integrity to cultural identity issues will, as discussed in Chapter 3, remain illusive if Aboriginal peoples are not included in the decision making process. The expanded consciousness necessary to understand and balance in an inclusive manner these competing concerns, is limited within a judicial system

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<sup>322</sup> *AG (Re)* [2000] 2 CNLR 1.

<sup>323</sup> *Ibid*, [13].

<sup>324</sup> *Racine v Woods* [1983] 2 SCR 173.

<sup>325</sup> *Ibid*, 187.

which is adversarial and non-Aboriginal. The legislative inclusion of Aboriginal parties in proceedings, however, provides some opportunity for Aboriginal perspectives to be heard. It is interesting to note that in *Mississippi Band of Choctaw Indians v Holyfield*, discussed above with respect to the United States' ICWA, that after Chief Justice Brennan of the United States Supreme Court held that the Tribal Court had jurisdiction with respect to the custody of the Indian twins, the Tribal Court determined that they should remain with their non-Indian adoptive parents because of the bond established over the extensive period that the case was litigated. A placement standard and form of adjudication which recognises multiple identities and fluidity of identity, and which does not dichotomise competing interests, while illusive to date in Canadian Courts, can be aspired to within child welfare frameworks which are incrementally pluralising.

While child welfare for Aboriginal children in Canada is subject to provincial and territorial legislative frameworks, considerable change has taken place in terms of the level of recognition accorded to Aboriginal communities and organisations in terms of their participation in decision making with respect to their children's welfare and wellbeing. Within the delegated frameworks a shift in understanding by mainstream welfare departments is evident in the universal recognition of the cultural particularity of Canadian Aboriginal children and the need to include them in the care of their own children if good outcomes are to be attained. The Manitoba model provides a best practice model within Canadian jurisdictions, exemplifying a framework for inclusion of Indigenous peoples in the processes for transferring responsibility for child welfare to Aboriginal peoples which is flexible, practical and less inadequately funded than others. While there are shortfalls in the legislative and policy frameworks for addressing Aboriginal children's welfare and wellbeing in Canada, it is evident that the process of recognition has incrementally transformed Canadian understandings of how jurisdiction over Aboriginal children's welfare can be exercised with universal legislative recognition of the importance of cultural care and Aboriginal



participation in the child welfare processes now acknowledged and implemented, albeit to varying degrees, in all jurisdictions.

## **New Zealand**

New Zealand has national legislation which governs both child welfare and juvenile justice. The central feature of the New Zealand legislation is family group conferencing. The New Zealand family group conferencing model has been adapted and used in many parts of the world. While the *Children, Young Persons and their Families Act 1989* (like the United States' ICWA) requires consideration of how decisions impact on the individual and the group, the interests of the individual child are paramount and trump those of the group. This goes further than prioritising the individual over the group, which, as discussed in Chapter 2, is affirmed under CROC with the framing of the best interests as a primary rather than paramount consideration. CROC therefore scopes some space, in a manner which is not provided for under the New Zealand legislation, for adjustment between the group and the individual's interests. However, as discussed in Chapter 2, for many Indigenous children the best interests of the group and the individual child will coincide because of the significance of cultural connection for their wellbeing. The New Zealand legislation's family conferencing model provides opportunity for Indigenous perspectives to inform decisions with respect to Maori children and young people. However, as discussed below, there are shortfalls with this model, due to a lack of resources to ensure its effective implementation as well as a lack of adequate safeguards to protect vulnerable parties from abuse within the process.

### *History of indigenous child and family services*

While New Zealand had a policy of assimilation between 1847 and 1960, unlike in Australia, USA and Canada, this policy did not include a program of forced removals of Maori children from their families. Extensive contact with the child welfare system occurred from the 1960s onwards when mainstream child welfare legislation was applied to Maori children without regard to Maori culture and community. Up until this period Maori children's welfare needs were usually left to the whanua (Maori extended family).

After the 1960s there was a large movement of Maori peoples to urban centres. Pakeha (non-Maori) child protection services began what was to be an unsuccessful, and ever increasing, involvement with Maori children. The Maori extended family, which had played a significant role in Maori children's wellbeing, was not recognised or supported by the official child welfare system. Statistics of Maori children in need of care were only produced from 1981 onwards. In 1981, 49.2% of all children in need of care were Maori children. Pakeha child welfare was believed to be professional, modern and unquestionably a benefit for all children. In the 1980s and 1990s, Maori staff of the Department of Social Services and other activist groups accused the Department as well as the *Children and Young Persons Act* 1974 itself of being racist. Criticisms included the characterisation of the child and their needs individualistically rather than in the context of the whanau, the imbalance in staffing of social services by Pakeha staff rather than in a manner proportionate to the representation of client groups who have contact with the Department and the control of power and resources by Pakeha decision-makers. The Department of Social Welfare commissioned a Committee to inquire and report on planning and delivery of services to Maori communities. The Report of the Committee, entitled *Puao-te Ata-tu* (Daybreak), found that institutional racism pervaded the Department of Social Welfare.<sup>326</sup> The Report recommended recognition of biculturalism as a way of making institutions more culturally inclusive. Major recommendations included: the establishment of a Social Welfare Commission with two Maori representatives and two representatives of women to consult annually with tribal representatives and to advise the Minister, and legislative reform to make the legislation more culturally sensitive. In light of this report, a bill was drafted to amend the *Children and Young Persons Act* 1974 to better serve Maori child welfare needs. This bill was rejected but, instead, the *Children, Young Persons and Family Act* 1989 was created and implemented to replace the *Children and Young Persons Act* 1974.

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<sup>326</sup> The Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare (1986), *Puao-te Ata-tu*. Wellington: New Zealand Government. Available at:

<http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/archive/1988-puaoteatatu.pdf>

### *The Children, Young Persons and Their Families Act*

The *Children, Young Persons and Their Families Act* 1989 addresses child protection and juvenile justice in a single piece of legislation with the objective of focusing on the wellbeing of children and young persons in the context of their families, whanau (kin group), hapu (extended kin group with many whanau), iwi (descent group with many hapu) and family groups.<sup>327</sup> To achieve this, s5 outlines principles to be applied in the exercise of powers under the Act. These principles include:

- Wherever possible, the child's family, whanau, hapu, iwi or family groups should participate in decisions affecting the child.
- Wherever possible, family relations should be maintained and strengthened.
- Consideration must always be given to how decisions will affect both the child and the stability of the child's family, whanau, hapu, iwi and family group.
- Consideration should be given to the child or young person's wishes, and regard must be given to his or her age, maturity, and culture when considering the child's wishes.

These principles are subject to s6 which states that in all matters relating to the Act the welfare and interests of the child or young person shall be the first and paramount consideration having regard to the principles set out in ss5 and 13 of the Act.

Section 13 outlines principles applying to children in need of care and protection. These principles are subject to ss5 and 6 of the Act. These principles affirm that intervention in a child or young person's family life should be the minimum necessary to ensure their safety and protection. Wherever possible, assistance should be provided to the family to facilitate a child remaining within their family. A child or young person should only be removed from their family if there is a serious risk of harm to the child or young person. Where children have to live away from their family they should, wherever practical,

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<sup>327</sup> *Children, Young Persons and Their Families Act* 1989.

remain in the locality that they were previously living in and in a situation where their family ties can be maintained and strengthened. Where a child must be placed in out-of-home care, wherever practicable, the child should be placed with a member of the child or young person's hapu or iwi, preferably with hapu members or if this is not possible with a person who has the same tribal, racial, ethnic or cultural background as the child or young person and who lives in the same locality as the child or young person.

Under ss18 to 21, if a child is found to be in need of care or protection by the police or a social worker who has investigated the matter, they must report the matter to a care and protection co-ordinator who must convene a family group conference. The co-ordinator must consult with a Care and Protection Resource Panel and make every effort to consult with the family, whanau or family group before convening the family group conference. Where it is practicable and consistent with the principles of the Act, the co-ordinator must give effect to the child or young person's family, whanau or family group's wishes in relation to who attends the family group conference.

Under s22, the child, their guardian and members of the child's family, whanua or family group are entitled to attend the conference unless the care and protection co-ordinator is of the opinion that it would not be in the interests of the child or young person, or it would be otherwise undesirable for a person to attend. Other people entitled to attend the conference are the co-ordinator; the social worker or police officer that provided a report; a representative of the child welfare agency if they referred the case; the carer, if the conference is about a care agreement; a representative of the Court if the child is a guardian of the High Court; an advocate for the child; and any party whom the family, whanua or family group wish to attend. All agency personnel and non-family members listed above, however, are not entitled to attend the family group conference while discussion or deliberations are happening amongst family, whanua or family group members unless invited by the family group.

This Act attempts to give effect to principles of Maori self-determination by prioritising and emphasising the involvement of Maori family with decisions which affect Maori children. However this approach to child protection requires sufficient resourcing to address underlying problems. This has been a key criticism of the implementation and effectiveness of the Act.<sup>328</sup> Further, the Act privatises and strongly advocates the resolution of child protection issues within the confines of a family conference forum. The implementation of agreements is delegated to social and health workers. This privatisation, with the circuitous relationship between ss5, 6 and 13 of the Act, which outline principles of family involvement and maintenance and the best interests of the child, have the potential for making children and less powerful family members more vulnerable. The principles of family maintenance and the best interests of the child are subject to each other, and although the best interests of the child are paramount there is little guidance as to how to resolve the potential conflict of interest between these principles. This aspect of the Act has been criticised by commentators and within cases brought before the New Zealand High Court and Court of Appeal. Judge Walsh held that the principles in ss5 and 13 of the Act are subject to the ‘over-riding arch of the “welfare and interests of the child” as defined in s6.’<sup>329</sup> This view has been reiterated in a number of judicial decisions. In *B v DGSW* the High Court, while acknowledging the relevance of both the Treaty of Waitangi and the interests of the family or whanau, noted that:

... (t)he child’s interests will not be subordinated to the interests of any other member of the family or whanau, nor will the interests of the child be subordinated to those of the whanau as a whole.<sup>330</sup>

The potential for family group conferences to exacerbate the vulnerability of weaker family members has been noted by the Mason report<sup>331</sup> and subsequently in the Social

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<sup>328</sup> See, for example, Gilling M, Patterson L & Walker B (1995), *Family members experience of care and protection family group conference process*. Wellington: Social Policy Agency.

<sup>329</sup> *The Matter of an Application about the L Children*, FC Wanganui, CYPF 1/95, 7 April 1998, 10.

<sup>330</sup> *B v DGSW* (1997) 15 FRNZ 501, 512.

Policy Agency Study.<sup>332</sup> The Mason report, which was reviewing the *Children, Young Persons and Family Act* 1989, noted:

The idea of bringing the wider Whanau and other players under the umbrella of the Act has increased the number of competing interests, and in our view has rendered the child or young person increasingly vulnerable.<sup>333</sup>

The Mason report recommended that 'the Act be amended to make it clear that any Court or person who exercises any power conferred by the Act shall at all times treat the interest of the child or young person as the first and paramount consideration.'<sup>334</sup> This potential conflict of interests was also noted by the Commissioner for Children who observed the 'vast potential for family group conference decisions to be self-serving, unimaginative and constrained by intra family loyalties.'<sup>335</sup>

This raises similar issues to those which arise under the United States' ICWA in terms of the dual interest of the group and its maintenance and the individual rights of parents or the child. However the additional factor of privatising the decision making under the New Zealand legislation undermines the protection provided by judicial decision making under the ICWA. 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 and undefined child protection processes to serve neither processes of self-determination nor protection of vulnerable parties' needs is evident in the criticism which the New Zealand legislation has given rise to.

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<sup>331</sup> Mason K (1992), *The Report of the Ministerial Review Team to the Minister of Social Welfare the Hon Jenny Shipley (The Mason Report)*. Wellington: New Zealand Government.

<sup>332</sup> Gilling, Patterson & Walker (1995) above n119.

<sup>333</sup> Mason (1992) above n122, 12.

<sup>334</sup> Ibid.

<sup>335</sup> Tapp P (1990), 'Family group conferences and the *Children, Young Persons and their Families Act* 1989: an ineffective statute,' 2 *New Zealand Law Review* 82, 86.

It has been noted that the reality of family empowerment depends on resources and support. Many of the problems identified with the New Zealand family conferencing system by the 1995 Social Policy Agency Study can be attributed to a combination of inadequate resources and a lack of authoritative due process in family conferences.<sup>336</sup> The following problems with family group conferencing were identified by the Social Policy Agency Study:

- inadequate information for families about the type of situations which give rise to care or 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;
- 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 met the needs of the child and addressed the underlying issues;
- lack of adequate resourcing of family group decisions;
- unequal participation of attendees; and
- lack of effective monitoring of implementation, and failure to address non-implementation.

These criticisms give rise to concerns about the efficacy of the Act in terms of its dual goals of strengthening families and protecting children. However, it is not possible to evaluate the success of this method compared with traditional methods of child protection, without comparative information with respect to these issues under the previous legislation. The previous child protection system was criticised, as discussed

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<sup>336</sup> Gilling, Patterson & Walker (1995) above n119.

above, as a form of institutionalised racism.<sup>337</sup> Further consideration of the benefits and disadvantages of family group conferencing can be found in Chapter 7 which evaluates models of service delivery. While family group conferencing does offer great scope for participation this can be at the expense of procedures which protect those who are most vulnerable which is the core purpose of child protection legislation and processes.

## **Conclusion**

Legislative reforms have been influenced by Indigenous peoples' national and international advocacy and in many jurisdictions Indigenous peoples' right to self-determination has been incorporated, in more or less limited ways, in child welfare legislation. Claims by Indigenous peoples to participate in the processes for establishing and administering child welfare services and with respect to the substantive provisions of child welfare legislation have been made in the United States, Canada and New Zealand. The advocacy and reforms with respect to Indigenous peoples' child welfare in each jurisdiction reflects the strength of sustained Indigenous identities in each of these countries, the ways that a more pluralised international human rights framework and national reforms have influenced the sensibilities of mainstream child welfare and the impact of colonisation on Indigenous institutions and social life. The normative expectation that Indigenous peoples will exercise increasing aspects of jurisdiction over their children's wellbeing has been inspired and influenced by the globalisation of relations between Indigenous children's organisations. This has generated much of the imagination and impetus for the transformation of Indigenous child welfare services from abstract ideals into concrete legislative and administrative processes adopted by child welfare agencies and child protection services in the United States, Canada and New Zealand. Indigenous children's agencies have presented to each other and have adapted ideas from each other and have been able to use comparative experiences to demonstrate to their more insular national legislatures and non-Aboriginal child welfare departments that participation and inclusion of Indigenous peoples in their children's welfare and wellbeing has not, even where this extends to legislative and judicial

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<sup>337</sup> Rine MH (1998), *Te Mana Te Kawanatanga: The Politics of Maori Self Determination*. Auckland: Oxford University Press, 223.



decision making such as in the United States, endangered foundational democratic or child protection principles. In each jurisdiction a process of reclaiming and re-establishing Indigenous authority over their children's welfare and wellbeing is evident in the reforms to child welfare legislation.

The structures and process for reclaiming Indigenous control by Indigenous peoples over their children's welfare and wellbeing have been influenced by Indigenous peoples' traditions but also by their particular histories and experiences of colonisation. For example, it would not be easy, or perhaps even feasible, to develop a Tribal Court system outside of the United States, one of the most comprehensive structures for recognising Indigenous peoples' jurisdiction over their own children, and yet the origins of the Tribal Courts are colonial. However, while acknowledging the particularities both of Indigenous cultures and of the influence of different modes of colonisation on contemporary revitalisation of Indigenous child welfare, the experiences in comparative jurisdictions has offered ideas about how reforms can be made to improve the outcomes for Indigenous children and communities across jurisdictions. For example, the inclusion of an Aboriginal child placement principle, recognition of the relationship between cultural care and Aboriginal children's wellbeing and the inclusion of Indigenous peoples in child protection decision making has been adopted in the United States, Canada, New Zealand and in Australian jurisdictions, which will be discussed in the next chapter. The process and comprehensive scope of the transfer of delegated jurisdiction for Aboriginal children to Aboriginal agencies in Manitoba, Canada has been of particular interest to Indigenous communities and agencies which would like to develop their competencies in the process of assuming jurisdiction over Indigenous child welfare. The Family Group Conferencing model developed in New Zealand has been emulated, with local variations, across the globe. The comprehensive nature of child welfare jurisdiction, extending to the potential for legislative and judicial control in the US has served as an inspirational model, despite its particularity to the US context, for many Indigenous communities. The reform process in each jurisdiction is relatively recent and responding to massive trauma and upheaval. There inevitably will be, and has been, a process of experimentation and change. The opportunity exists for further

collaboration and adoption of what is best from both non-Aboriginal child welfare systems and the new Aboriginal frameworks which have been and are d

## **Chapter 6**

### **Australian Legal Child Welfare Frameworks**

#### **Introduction**

This chapter explores some of the ways in which international human rights law and Australian Indigenous children's organisations' engagement with Indigenous children's organisations in the United States, Canada and New Zealand has influenced law reform with respect to Indigenous children's welfare in Australia. It considers how the re-characterisation of international law within the United Nations (UN) human rights treaty system discussed in Chapter 2, from universal and transcendental to pluralising and inclusive, has been theoretically and practically relevant to Australian Indigenous children and young people's rights. Peak and local Australian children's organisations have been inspired by and interested in legislative models for the delivery of children's services to their communities which facilitate their participation in and responsibility for their children's welfare and wellbeing. While an overview of Australian child welfare systems is provided, these issues are explored through two Australian based case studies: the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) with particular reference to the state of Victoria; and the Northern Territory Emergency Response (NTER) in the Northern Territory. In the first the pluralised international human rights values and processes discussed in Chapter 2, and experiences in comparative international jurisdictions discussed in the previous chapter, have infused child welfare reform. While in the second we see a contrasting model which has developed adrift of comparative child welfare models and one which is paternalistic and consciously rejects human rights principles.

Australian advocates of Indigenous children's rights, in addition to national advocacy have engaged with human rights processes at an international level, and have been part of the process which has seen UN human rights committees attempt to establish

standards and monitoring mechanisms which respond in a culturally and historically sensitive manner to their experiences and aspirations. However as discussed in Chapter 2, the process of inclusion remains a process and many of the tensions and contradictions generated by the universal and bureaucratic aspects of the UN international human rights setting system, with its statist foundations, persist. This chapter explores some of the difficulties with attempts to establish culturally diverse standards in Australian child welfare legislation in the context of these tensions. The nub of the difficulty lies in the intricate and pervasive occidental frame of reference which continues to influence dominant ways of thinking and distributions of power in UN and Australian jurisprudence with respect to Aboriginal and Torres Strait Islander children and young people's welfare. This is not to suggest that either change cannot or has not occurred or that the objective of international human rights serving local minority Indigenous communities is doomed. To the contrary, this chapter suggests that international human rights law and international engagement with Indigenous children's organisations has contributed to Indigenous children's welfare and continues to do so. It suggests that the greater the reflective engagement with Indigenous peoples at both an international and national level, the more human rights frameworks are able to understand, transform and serve Indigenous children's wellbeing.

### **Australian Constitutional arrangements for Indigenous child welfare**

In Australia, State and Territory Governments are responsible for the provision of child welfare services. Peak Indigenous groups have called for national legislation, inspired by the United States' *Indian Child Welfare Act 1978* (ICWA), to provide a framework for the provision of child welfare services to Australian Indigenous communities for many years.<sup>338</sup> Indigenous peoples' experience of child welfare services is closely associated with experiences of forced separations of children from their families and colonial policies of dispossession. They have advocated for recognition of their cultural rights, within a self-determination framework, at a national and international level.<sup>339</sup> The

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<sup>338</sup> See discussion of the ICWA in Chapter 5.

<sup>339</sup> For a history of advocacy with respect to Aboriginal families' and organisations' experience of and responses to the removal of their children, with a focus on the formation of Aboriginal

context in which Indigenous communities have called for greater control over their children has also been impacted by two major national events over the last two decades: the recognition of Indigenous peoples' prior native title rights in *Mabo v Queensland (No 2)* (1992) (*Mabo No 2*)<sup>340</sup> and the highly publicised findings of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (NISATSIC).<sup>341</sup> In addition, the Commonwealth Government has from 2007, and was continuing in 2011, to intervene in Aboriginal communities in the Northern Territory with the Northern Territory Emergency Response (NTER) which is also known as 'the Intervention'.<sup>342</sup> The NTER commenced after more than a year of media coverage with respect to child sexual assault in Aboriginal communities and the release of the *Little Children are Sacred* report, which was commissioned by the Northern Territory Government to report on child sexual assault in Aboriginal communities in the Northern Territory.<sup>343</sup> The NTER is controversial and in contrast to the recommendations made by NISATSIC with respect to contemporary child welfare or the *Little Children are Sacred* report which purportedly catalysed it, it rejects child welfare responses based on human rights principles, in particular principles of self-determination. It is within this constitutional and political context that there have been reforms over the past decade to Australian legislation with respect to Aboriginal and Torres Strait Islander children's welfare.<sup>344</sup>

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children's organisations see Briskman L (2003), *The Black Grapevine – Aboriginal Activism and the Stolen Generations*. Sydney: Federation Press.

<sup>340</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>341</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC) (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Sydney: Human Rights and Equal Opportunity Commission.

<sup>342</sup> The intervention was enabled by a composite of five Acts which span 365 pages: *Northern Territory National Emergency Response Act 2007*; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*; *Appropriation (Northern Territory National Emergency Response) Act (No 1) 2007-2008*; *Appropriation (Northern Territory National Emergency Response) Act (No 2) 2007-2008*.

<sup>343</sup> Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007), *Little Children are Sacred*. Darwin: Northern Territory Government.

<sup>344</sup> The key statutes are: *Children and Young People Act 1999* (ACT); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Community Welfare Act 1983* (NT); *Child Protection Act 1999* (Qld); *Children's Protection Act 1993* (SA); *Children, Young Persons and Their Families Act*

### Continuity of Indigenous advocacy

Indigenous families and communities have exercised enormous imagination and innovation in negotiating colonial powers from the time of colonisation. When outranked in might they have exercised ingenuity in responding to injustice through the political and legal forums of colonisers and in some ways transforming these forums to incorporate a greater understanding of Indigenous claims to justice. When local political institutions failed them, they have looked for a more just response to their plight outside of national borders.<sup>345</sup>

William Cooper's petition to King George V is an example of early international engagement by Indigenous peoples and organisations.<sup>346</sup> Cooper, a Yorta Yorta man from Victoria who spent most of his life in the Cummeragunja community living under oppressive Victorian 'protection' legislation, launched the petition in 1933. It complained that the British terms of Commission had not been adhered to in that Aboriginal lands had been appropriated and Aboriginal peoples' legal status had been denied.<sup>347</sup> The petition which obtained over 1800 signatures also called for Aboriginal representation in Parliament and was reported in the *Melbourne Herald* in September 1933. In more recent times, engagement with Indigenous peoples in comparable situations in Canada, New Zealand and the United States, and with UN forums, has afforded the inspiration and opportunity to transform understandings of law and justice in ways which have incrementally incorporated or recognised Indigenous peoples' claims to justice, in the particular the right to self-determination with respect to child welfare. Australian Indigenous children's organisations such as the Secretariat of

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1997 (Tas); *Children, Youth and Families Act 2005* (Vic); *Children and Community Services Act 2004* (WA).

<sup>345</sup> Briskman (2003) above n2, Chapter 9.

<sup>346</sup> De Costa R & De Costa RNJ (2006), *A Higher Authority: Indigenous Transnationalism and Australia*. Sydney: UNSW Press.

<sup>347</sup> Attwood B and Markus A (2004), *Thinking Black: William Cooper and the Australian Aborigines' League*. Canberra: Aboriginal Studies Press.

National Aboriginal and Islander Child Care (SNAICC) have developed close relations with Canadian Indigenous children's organisations such as the First Nations Child and Family Caring Society of Canada (FNCFCS) and have participated in preparing information for non-government reports to UN committees such as the Committee on the Rights of the Child.<sup>348</sup>

The conceptualisation of and claim to pluralised legal recognition of Aboriginal peoples from within the Australian legal system also has a long history. The idea that Aboriginal and Torres Strait Islander peoples were too primitive to own land or have their own legal system, which is embedded in the legal concept of 'terra nullius,' was contested from as early as 1836 in Australia with cases such as *R v Jack Congo Murrell* (1836) (*Murrell*) and *R v Bon Jon* (1848) (*Bon Jon*).<sup>349</sup> In these criminal cases it was argued that the New South Wales Supreme Court had no jurisdiction to try Aboriginal defendants as they had their own laws and customs which remained operative post-colonisation. In *Bon Jon* (1848), Willis J reasoned that Australian Aborigines continued to exercise customary law and jurisdiction as domestic dependent nations. This decision relied upon the recognition of domestic dependent nation status with respect to American Indians by the United States Supreme Court.<sup>350</sup> However, *Murrell*, which had been decided before *Bon Jon*, found that Aborigines were subject to the jurisdiction of the Court and Willis's opinion in *Bon Jon* was rejected by the Crown Office on the basis of this precedent.<sup>351</sup> Belatedly in *Mabo No 2*, the Australian High Court recognised that Australian Indigenous peoples do have a legal system and that they have retained

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<sup>348</sup> For a review of comparative legislative policy frameworks see Chapter 5 and for an overview of Indigenous peoples' engagement with the United Nations human rights system with respect to their children's rights see Chapter 2.

<sup>349</sup> *R v Jack Congo Murrell* (1836) 1 Legge 72; and *R v Bon Jon* (1841) (unreported decision, Supreme Court of New South Wales, Port Phillip Gazette, 18 September 1841). Discussion of these cases can be found in Behrendt L, Cunneen C & Libesman T (2009), *Indigenous Legal Relations in Australia*. Melbourne: Oxford University Press, 13-17.

<sup>350</sup> *Johnson v McIntosh* 21 US 8 543 (1823); *Cherokee Nation* 30 US 5 1 (1831); *Worcester* 31 US 16 5115. See discussion of these cases in Chapter 5.

<sup>351</sup> While outside of the scope of this thesis, it is interesting to note the globalised composition of the early Australian judiciary, with for example judges such as Willis being moved as a renegade from his post in Canada to Australia by the British Colonial Office: see McLaren J (2011), *Dewigged, Bothered and Bewildered - British Colonial Judges on Trial 1800-1900*. Toronto: University of Toronto Press.

qualified rights to land in the form of native title. *Mabo No 2* reignited possibilities for pluralism within the Australian legal system but also the fear of difference and reassertion of a singular Anglo-Australian identity.<sup>352</sup> The NTER which is discussed below represents policy driven by values framed in terms of a singular Anglo-Australian identity.

Together with international and legal campaigns for recognition Aboriginal and Torres Strait Islander organisations campaigned locally. In the late 1920s and early 1930s the Australian Aborigines Progressive Association (AAPA) campaigned for an end to the forcible removal of Aboriginal children from their families. The effects of separation of children from their families and their adoption or fostering into non-Indigenous environments was also brought to general public attention at the first, second and third Australian Adoption Conferences in 1976, 1978, 1982 and at the First Aboriginal Child Survival Conference in 1979. The formation of national Indigenous organisations in Australia in the 1960s and 1970s led to political advocacy for greater cultural control over child welfare and the first Aboriginal and Torres Strait Islander Child Care Agencies (AICCAs) were established in the 1970s in the same period that Indigenous peoples were advocating for recognition in the United Nations. In New South Wales the Aboriginal Children's Service was formed in 1975 while delegates at the First Australian Adoption Conference in 1976 encouraged the formation of the Victorian Aboriginal Child Care Agency (VACCA).<sup>353</sup> With respect to VACCA, Jackson wrote in 1979:

The Agency is geared to service delivery and community development. It aims at ultimately providing an autonomous community centred service for children, based on the notion that there already exists within the

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<sup>352</sup> For discussion of these dichotomised responses to *Mabo (No 2)* see, for example, Attwood B (ed) (1996), *In the Age of Mabo: History, Aborigines and Australia*. Sydney: Allen and Unwin; and Stephenson MA & Ratnapala S (eds) (1993), *Mabo, A Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law*. St Lucia: University of Queensland Press.

<sup>353</sup> NISATSIC (1997) above n4, Chapter 21.



Aboriginal community, multiple and diverse resources which can be integrated into the Aboriginal Child Care Agency Program ... Because it is an Aboriginal community organisation, the Aboriginal Child Care Agency can be easily sensitised to and reflective of the needs of Aboriginal families and children. This is vital as a breakdown between State welfare delivery and the participation of Aboriginal people, suspicious of programs stigmatised by child removal, has paralysed welfare operations. The Aboriginal Child Care Agency then, bridges this gap and operates outside the fear of 'Welfare.'<sup>354</sup>

A peak agency to represent Aboriginal children's interests, the Secretariat of National Aboriginal and Islander Child Care (SNAICC) was born out of the state Aboriginal agencies with a statement of purpose developed in 1981 and initial Commonwealth funding attained in 1983.<sup>355</sup>

The importance of Indigenous agencies and cultural recognition has been an ongoing theme with incremental legislative and policy changes being made from the 1970s onwards.<sup>356</sup> In 1997, NISATSIC recommended in their report, *Bringing Them Home*, that a negotiated transfer of responsibility for child welfare from government agencies to Aboriginal and Torres Strait Islander organisations take place in accordance with their capacity and desire to assume this responsibility.<sup>357</sup> This recommendation drew on submissions from Australia's peak Indigenous children's organisation SNAICCC and other Indigenous organisations which referred to comparative international models where Indigenous organisations had

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<sup>354</sup> Jackson B (1979), *The First Aboriginal Child Survival Seminar*. Melbourne: VACCA (in association with the Office of Child Care), 3.

<sup>355</sup> Briskman (2003) above n2, Chapter 5; Although child welfare is a state and territory responsibility a mix of Federal and state and territory funding continues to be drawn upon to fund SNAICC and AICCA's.

<sup>356</sup> Libesman T (2008), 'Aboriginal and Torres Strait Islander Children and Contemporary Child Welfare' in Monahan G & Young L (eds), *Children and the Law in Australia*. Sydney: LexisNexis Butterworths, 330.

<sup>357</sup> NISATSIC (1997) above n4, Recommendation 43c.

greater responsibility for child welfare.<sup>358</sup> While this recommendation is yet to be fully implemented, legislative reform has taken place which facilitates greater control by Indigenous organisations over their children's wellbeing. For example, legislative recognition of ATSICPP which is discussed below, acknowledges the importance of cultural security and identity rights in a limited self-determination framework. Recommendations with respect to and reforms of Australian child welfare legislation reflect an interactive relationship between Indigenous advocacy for reform at a local level and advocacy and engagement in international forums where claims are made with respect to human rights principles, with particular reference to the right to self-determination.

To address Indigenous children's wellbeing requires responses which also address the structural and systemic inequality and poverty which is embedded in their communities. While there has been incremental, if at times tenuous, recognition of the principle of cultural safety as reflected in legislative reforms discussed below, there has been a failure to apply principles of self-determination or cultural recognition to reforms addressing structural poverty and inequality. This is most sharply illustrated with the paternalistic NTER which is also discussed below. The inconsistent partial recognition of cultural rights and principles of self-determination in child welfare legislation with its simultaneous exclusion from the NTER reflects both the depth of colonial understandings which pervades responses to Indigenous children's wellbeing and the tension between homogenous western ways of framing responses to Indigenous children's welfare and more inclusive pluralised understandings.

### **Colonial experiences of child welfare**

Contemporary issues pertaining to Aboriginal and Torres Strait Islander children's wellbeing are framed by past experiences. Many of the barriers to Aboriginal and Torres

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<sup>358</sup> See Cunneen C and Libesman T (2000), 'Postcolonial trauma: the contemporary removal of indigenous children and young people from their families in Australia,' 35(2) *Australian Journal of Social Issues* 99.

Strait Islander children's wellbeing are founded in historical injustices and associated social and economic inequities which weigh on their communities.<sup>359</sup> Indigenous peoples have higher levels of contact with child welfare systems in Australia than any other group. They are placed in out-of-home care at a rate nine times higher than all children.<sup>360</sup>

It is with great irony that the varied legislation, implemented from the early nineteenth century in each Australian state and territory except Tasmania, with respect to Aboriginal and Torres Strait Islanders is described as protective legislation.<sup>361</sup> By the end of the nineteenth century, this corpus of legislation had stripped Indigenous people of control over their lives, segregated them from non-Indigenous populations, subjected them to the arbitrary power of police officers and bureaucrats and prohibited the practice of their culture.<sup>362</sup> While Torres Strait Islanders were initially exempted from the *Aborigines Protection Act* 1897 (Qld) in 1904, they subsequently came under the control of the Chief Protector of Aborigines and they were subject to the same regulation as Aboriginal people living in Queensland. The exercise of control over Aboriginal and Torres Strait Islander peoples' lives, through protection legislation, while varying in each jurisdiction, extended to who they could associate with including who they could marry, whether they could receive medical treatment, where they could live and, if their children had not been removed, how they were to be raised. In a number of jurisdictions the Protector of Aborigines, whose powers were usually exercised by a police officer, was either made guardian of all Aboriginal children or could assume guardianship of Aboriginal children if he thought they were neglected or simply that it

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<sup>359</sup> The inequities between Indigenous and non-Indigenous Australians are evident in all spectrums of wellbeing: health, life expectancy, education, employment, income, and housing. See, for example, the Australian Bureau of Statistics (2010), *National Aboriginal and Torres Strait Islander Social Survey: Users' Guide 2008*. Canberra: Australian Bureau of Statistics.

<sup>360</sup> Australian Institute of Health and Welfare (2010), *Child Protection Australia 2008-2009: Child Welfare Series no 47*. Canberra: Australian Institute of Health and Welfare, 46.

<sup>361</sup> *Aborigines Protection Act* 1869 (Vic); *Queensland Aboriginal Protection and Restriction of the Sale of Opium Act* 1897 (Qld); *Aborigines Act* 1905 (WA); *Northern Territory Aborigines Act* 1910 (NT); *Aborigines Act* 1911 (SA); *Aborigines Protection Act* 1909 (NSW).

<sup>362</sup> For discussion of this protection legislation see for example NISATSIC (1997) above n4; Rowley C (1972), *The Destruction of Aboriginal Society*. Harmondsworth: Penguin; Markus A (1990), *Governing Savages*. Sydney: Allen and Unwin.

would be 'necessary or desirable in the interests of the aboriginal or half-caste for him to do so.'<sup>363</sup>

While the protection legislation is different in each jurisdiction the control, compulsion and cruelty in the New South Wales regime is illustrative of Protection legislation in other jurisdictions. A Protector of Aborigines was appointed in New South Wales in 1883 and the *Aborigines Protection Act* (NSW) was subsequently enacted in 1909. The Commissioner of Police was ex officio chair of the Board and all police officers were appointed as 'guardians' of Aborigines. The following are some of the functions that were fulfilled by police for the Board between 1914 and 1939:

1. The issue of rations;
2. Reduction of the ration list by investigating all applicants and issuing rations only to 'deserving' cases;
3. Forcing children to attend school by withholding rations if they did not comply;
4. Refusing rations to Aborigines to 'persuade' them to go to another locality or to move to an Aboriginal reserve or station;
5. Deciding if an Aborigine could see a doctor;
6. Patrolling and maintaining order on unsupervised reserves;
7. Making recommendations on the disposal of reserve land;
8. Expelling 'trouble makers' from Aboriginal reserves;
9. Removing children from their parents on the grounds that they were 'neglected' or that they were 14 years of age;
10. Instituting proceedings against parents who took their children away from Aboriginal reserves or from school in an attempt to escape the Board's decision that they should be removed from them and 'trained;'
11. Expelling light coloured people from reserves and stopping them from returning to their families still living on reserves; and
12. Instituting proceedings to remove whole Aboriginal communities from certain localities, under s14 of the Act.<sup>364</sup>

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<sup>363</sup> *Northern Territory Aborigines Ordinance* 1911 (Cth).

The *Aborigines Protection Amending Act* 1915 (NSW) expanded the powers of the Protection Board, enabling removal of Aboriginal children without the need to demonstrate neglect or other grounds for their removal. In 1940 the Protection Board was reconstituted as the Aborigines Welfare Board. While the Board now applied the *Child Welfare Act* 1939 (NSW) to Aboriginal children, the criteria for removal, and their application to Aboriginal families, facilitated ongoing unjustified removals. Once removed, Aboriginal and non-Aboriginal children remained segregated. Subsequently the Board used removals to implement what was from 1937 a national policy of assimilation. While the Board was abolished in 1969, and mainstream child welfare administration applied to Aboriginal children, racist attitudes with respect to contemporary child welfare continued to prevail.<sup>365</sup>

It was within this matrix of control that Indigenous children were separated from their families and abuse, including physical and sexual abuse, was experienced by an unaccounted number of Aboriginal people.<sup>366</sup> From the early 1940s and in particular after World War II, government policies changed from 'protection' to assimilation and integration. In 1961 the Native Welfare Conference defined assimilation in the following terms:

The policy of assimilation means that all Aborigines and part-Aborigines are expected to attain the same manner of living as other Australians and to live as members of a single Australian community, enjoying the same rights and privileges, accepting the same customs and influenced by the same beliefs as other Australians.<sup>367</sup>

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<sup>364</sup> Goodall H (1982), *A History of Aboriginal Communities, 1909-1939*. Sydney: University of Sydney (PhD thesis) in Cunneen C & Libesman T (1995), *Indigenous People and the Law in Australia*. Sydney: Butterworths, 33.

<sup>365</sup> NISATSIC (1997) above n4, Chapter 3.

<sup>366</sup> For a brief overview of experiences of forced and unjustified removals of Aboriginal children and young people in comparative jurisdictions see Chapter 5.

<sup>367</sup> Cited in Reynolds H (1972), *Aborigines and Settlers: The Australian Experience 1788-1939*. Sydney: Cassell Australia, 175.

Indigenous peoples' political campaigns and engagement with human rights bodies in the 1960s and 1970s led to government policies of self-management and self-determination from the 1970s to 1996 when John Howard, leader of Liberal party was elected into office. It is remarkable that NTER, which was initiated in 2007 by the Howard Government and is discussed below, with its paternalistic echoes of the Protection era, was implemented with apparently so little awareness of this history. The Protection era and the NTER are characterised by legislative compulsion, racial classification, characterisation of Aboriginal people as incompetent and requiring the guardianship or management of European managers and the use of rations or welfare to control and manage intimate aspects of Indigenous peoples lives including children's schooling and medical care. Both regimes are defined in paternalistic terms for the protection of Indigenous peoples, and incorporate some aspects of welfare, while simultaneously and unambiguously implementing European ideological and policy objectives, such as control and management of land and children.

### **NISATSIC findings with respect to current welfare issues**

The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families found that Indigenous children continue to be over-represented in their contact with child welfare agencies across the country. They are most over-represented in out-of-home care and while data was not adequately kept, a high percentage of Indigenous children in long term foster care lived with non-Indigenous carers. While information on foster and kin care placements remains inadequate, Indigenous communities across Australia gave evidence to NISATSIC of the need for programs and assistance to ensure the wellbeing of their children. Not a single submission to NISATSIC from Indigenous organisations saw interventions from welfare departments as an effective way of dealing with Indigenous child protection needs.<sup>368</sup> Fear and distrust of welfare agencies was pervasive. Evidence to NISATSIC confirmed that Indigenous families perceived contact with welfare departments as threatening the

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<sup>368</sup> See Cunneen and Libesman (2000) above n21.

removal of their children. Research into cultural care for Indigenous children in out-of-home care in 2011 found that the fear of welfare agencies and perception that contact with child welfare departments results in children being removed continues.<sup>369</sup> In evidence to NISATSIC all State and Territory Governments stressed the need for Indigenous communities to exercise control over their children. They all purported support for policies of self-management or self-determination with respect to Indigenous children's welfare. Many submissions from Indigenous organisations called for real control over child welfare services, some referring to Canadian and United States child welfare models, where degrees of transfer of decision making to Indigenous communities had taken place. NISATSIC concluded with respect to contemporary child protection services:

Departmental attempts to provide culturally appropriate welfare services to Indigenous communities have not overcome the weight of Indigenous peoples' historical experience of 'The Welfare' or the attitudes and structures entrenched in welfare departments ... For many Indigenous communities the welfare of children is inextricably tied to the wellbeing of the community and its control of its destiny. Their experience of 'The Welfare' has been overwhelmingly one of cultural domination and inappropriate servicing, despite attempts by departments to provide accessible services. Past and current legislative and 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 needs they need to be completely overhauled ... Ultimately child welfare appropriate to each community and region should be negotiated with those whose children, families and communities who are the subjects of the system. Negotiation clearly implies empowerment of Indigenous parties and recognition of their true partnership in the reform process.<sup>370</sup>

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<sup>369</sup> Libesman T (2011), *Culture Care for Aboriginal and Torres Strait Islander Children in Out of Home Care*. Melbourne: SNAICC.

<sup>370</sup> NISATSIC (1997) above n4, 458-459.

NISATSIC made recommendations which recognised the need to address the underlying social and economic causes of child abuse and neglect, and the need to address the underlying colonial practices which continue to impact on Indigenous families. NISATSIC addressed specific child welfare and juvenile justice legislative reform in the context of principles of self-determination. They recommended a two tiered approach in order to address longer term aspirations for self-determination, and the immediate need to establish minimum standards for services to Indigenous children whether delivered by Indigenous or non-Indigenous providers.

Recommendation 43a provides for a negotiation process between governments and Indigenous organisations to establish a new legislative framework. This recommendation recognises the need for the involvement of Indigenous peoples in the process of creating a new framework for their children's wellbeing as well as in the outcome. Recommendation 43b(2) recognises that different communities will have different needs, aspirations and requirements and recommendation 43c provides for the negotiation of a transfer of all levels of decision making in relation to Indigenous children to Indigenous communities. This includes administrative, legislative and judicial decision making. Recommendations 43b(4) and 43c(4) require adequate provision of funding for the negotiation process and for the provision of Indigenous services. Recommendation 43b(5) makes the general statement that the national framework legislation will recognise the human rights of Indigenous children. The application of human rights standards to all children's services provides a balance between recognising Indigenous peoples' rights to self-determination while maintaining a standard of care which all Australian children, whether Indigenous or non-Indigenous, should have a right to.<sup>371</sup>

Recommendation 44 provides for legislation to set minimum standards for child welfare and juvenile justice services. Recommendation 45b establishes a process which requires

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<sup>371</sup> For discussion with respect to the pluralisation of international human rights and the tension between universal rights and inclusive pluralised rights frameworks see Chapters 2 and 4.



accreditation standards for Indigenous organisations to be negotiated. Recommendation 49 requires decision makers to ascertain whether a child is Indigenous when the child first comes to the Department's attention and to consult thoroughly and in good faith with the appropriate accredited Indigenous organisation at each stage in the decision making process from notification onwards. Recommendation 50 provides that a child's Indigenous status must be recognised and considered in any children's court matter and that the child must be separately represented. Recommendation 51 establishes an Indigenous child placement principle with recommendation 51e providing that no placement of an Indigenous child is to be made without the advice of the appropriate accredited Indigenous organisation.

As discussed below, legislative reform of child welfare frameworks subsequent to *Bringing Them Home*, while not completely, has incrementally reformed child welfare legislation in the direction of these recommendations. There has not been a transfer of responsibility for Indigenous children to Indigenous organisations in any Australian jurisdiction, however inclusion of Indigenous organisations and families in decision making with respect to Indigenous children in contact with child welfare departments and provisions to protect the cultural identity and with respect to the care of Indigenous children who are placed in out-of-home care have been implemented in all jurisdictions. The ATSICPP has been reformed from a placement principle for children and young people in need of out-of-home care, to encompass a broader inclusion of Indigenous organisations and people in decision making with respect to the welfare and wellbeing of Indigenous children who have contact with child welfare systems, to varying degrees in all Australian jurisdictions.

### **Australian child welfare reform**

Since *Bringing Them Home* was released in 1997 all states and territories have reviewed their child welfare legislation. Some have done so more than once.<sup>372</sup> The reform processes have generally included a review of the child protection systems as they

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<sup>372</sup> See Chapter 1 for an overview of recommendations from reviews over the past decade.

relate specifically to Indigenous children and families.<sup>373</sup> The following provides an overview of child welfare legislation with respect to Indigenous children with an evaluation of how the reforms implemented compare with the recommendations from *Bringing Them Home* and more broadly a human rights perspective.

Many of the reforms discussed below are directed towards greater recognition of Aboriginal and Torres Strait Islander peoples' involvement in decision making affecting Indigenous children. They more broadly reflect recognition of the importance of culture and Indigenous identity for effective child protection and the wellbeing of Indigenous children. This is consistent with an international trend of capacity building within Aboriginal children's organisations and devolving responsibility for Indigenous children's wellbeing to Indigenous agencies and communities. Australian children's organisations such as the peak national Indigenous children's organisation SNAICC and the peak state organisation in Victoria, VACCA, have been impressed by their observations in comparative jurisdictions such as Manitoba Canada, where as discussed in the previous chapter, Indigenous representatives are not simply consulted by the child welfare department or treated as polite guests at the negotiating table but are partners defining and determining the reform agenda and delivering child welfare services.<sup>374</sup> The reforms to child welfare legislation in Australian states and territories reflect the influence of: the recommendations from *Bringing Them Home*; pluralised international human rights

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<sup>373</sup> The following is a list of recent reviews across Australia: Vardon C (Commissioner for Public Administration) (2004), *ACT Government Response to "The Territory as a Parent" Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management*. Canberra: Chief Minister's Department; Allen Consulting Group (2003), *Protecting Children: The Child Protection Outcomes Project (Final Report for the Victorian Department of Human Services)*. Melbourne: Allen Consulting Group; Crime and Misconduct Commission (2004), *Protecting Children: An inquiry into abuse of children in foster care*. Brisbane: Crime and Misconduct Commission; Gordon S, Hallahan K & Henry D (2002), *Putting the Picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*. Perth: State Law Publisher; Layton R (QC) (2003), *Our Best Investment: A State Plan to Protect and Advance the Interests of Children*. Adelaide: Government of South Australia; Board of Inquiry into the Child Protection System in the Northern Territory (2011), *Growing them Strong, Together*. Darwin: Northern Territory Government; Wood J (AO QC), *Special Commission of Inquiry into Child Protection Services in NSW*. Sydney: New South Wales Government.

<sup>374</sup> See discussion of the reform process in Manitoba in Chapter 5.

standards; the interchange between Indigenous children's organisations internationally; and the ongoing advocacy by Indigenous children's organisations nationally.

### **Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP)**

The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) has been one of the remarkable achievements of Aboriginal and Torres Strait Islander children's organisations.<sup>375</sup> The principle is an acknowledgment of the importance of culture and family connection for Indigenous children and young people and it is also recognition of the destructive impact the history of policies of assimilation and forced and unjustified removal of children has had on Indigenous peoples.<sup>376</sup> ATSICPP has developed from a principle applied when children need to live in out-of-home care to a foundation for legislative inclusion of Indigenous families and organisations in decisions with respect to a child or young person's wellbeing from the time they have contact with a child welfare system.<sup>377</sup> This reflects the growing recognition within the UN human rights framework of the centrality of the principle of self-determination, which at minimum encompasses the right to participation in decisions which impact on Indigenous peoples' lives and recognition of their cultural rights.<sup>378</sup>

In each jurisdiction ATSICPP has been embedded in legislation and has a similar descending order of placement for children who need to be in out-of-home care.<sup>379</sup> The first preference is with the child's extended family or kinship group,

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<sup>375</sup> See Appendix 1 for an outline of ATSICPP in each Australian jurisdiction.

<sup>376</sup> See NISATSIC (1997) above n4 ; Cunneen C & Libesman T (2002), 'Removed and Discarded: the Contemporary Legacy of the Stolen Generations,' 7(4) *Australian Indigenous Law Reporter* 1 for further discussion on the destructive impact of child removal and assimilationist government policies on contemporary child welfare.

<sup>377</sup> Libesman (2008) above n19.

<sup>378</sup> See Chapter 2 for further details.

<sup>379</sup> *Children and Young People Act 2008* (ACT), ss10, 513; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s13; *Care and Protection of Children Act 2007* (NT), s12(3); *Child Protection Act 1999* (Qld), s83; *Children's Protection Act 1993* (SA), s4(5) and *Children's Protection Regulations 2006* (SA), reg 4; *Children, Young Persons and their Families Act 1997* (Tas), s9; *Children, Youth and Families Act 2005* (Vic), s13; *Children and Community Services Act 2004* (WA), s12.

the second preference with their local community and the third preference with another Aboriginal or Torres Strait Islander family in the area. If these preferences are not practicable or in the best interests of the child, then they will be placed with a non-Aboriginal or Torres Strait Islander family. There is also a requirement in each jurisdiction that relevant Aboriginal or Torres Strait Islander organisations (and in some jurisdictions, the extended family) be consulted about the child's placement. In each jurisdiction children who are placed with non-Indigenous carers are to be assisted to keep in contact with their family, language and culture and in most jurisdictions the aim is to reunite children who are placed in non-Indigenous care with their families and communities.<sup>380</sup> The principle is established in a more or less rigorous form in legislation in all states and territories in Australia.<sup>381</sup>

In all states and territories the legislation requires that Indigenous organisations, and in some jurisdictions also family, must participate in all significant decisions which involve Aboriginal children and in some jurisdictions, such as Queensland they must be consulted about all other decisions.<sup>382</sup> In Tasmania submissions made by Indigenous organisations must be taken into account.<sup>383</sup> In South Australia there is a requirement that consultations take place in a manner that is as sympathetic to Aboriginal traditions as is possible.<sup>384</sup> In most other jurisdictions the terms and conditions of the consultation process are at the Minister's discretion.<sup>385</sup> In Victoria there is provision that decisions about Aboriginal children should involve a meeting convened by an Aboriginal convenor who has been appointed by an Aboriginal agency.<sup>386</sup> There is, however, little structural support or guidance across the legislation for ATSICPP's implementation.

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<sup>380</sup> The legislative provision of ATSICPP which is least implemented is that which requires ongoing support and cultural care for Aboriginal or Torres Strait Islander children placed in out-of-home care with non-Indigenous carers and looked after by non-Indigenous out-of-home care agencies. See Libesman (2011) above n32.

<sup>381</sup> See above n42, for a more detailed overview of ATSICPP in each Australian jurisdiction.

<sup>382</sup> *Child Protection Act 1999* (Qld), s6 (1).

<sup>383</sup> *Children, Young Persons and their Families Act 1997* (Tas), s9.

<sup>384</sup> *Child Protection Act 1993* (SA), s5.

<sup>385</sup> For example, see the *Children and Young Person's Care and Protection Act 1998* (NSW), s12.

<sup>386</sup> *Children Youth and Families Act 2005* (Vic), s12.

The placement principle is subject in most jurisdictions to the best interests of the child or similar guiding principles. This means that the effectiveness of the principle and its relevant application to Indigenous children is dependent on the full participation of Indigenous communities in the decision making so that the best interests, or other general principles, incorporate Aboriginal and Torres Strait Islander experience. A related matter is the process for participation and consultation with relevant family and Indigenous organisations. Most legislation provides for consultation but not all legislation provides guidance as to the weight which is to be given to these opinions and the process which is to guide the consultations.

In four Australian jurisdictions (Queensland, South Australia, Victoria and Western Australia) there is legislative provision for the gazetting or designating of Aboriginal and Torres Strait Islander organisations, which has formalised their role in decision making. Designated or gazetted organisations such as VACCA have developed into large organisations, which are highly respected by all stakeholders in child welfare, including government departments and non-Indigenous NGOs, and which have transformed non-Indigenous understandings of Indigenous children and young people's experience of child welfare and their broader needs. Indigenous children's organisations have also changed through the roles and responsibilities which they have assumed, many attaining capacities and skills related to assessing and addressing child welfare needs, providing out-of-home care services, training and educating non-Indigenous organisations in cultural care, providing cultural advice to governments and advocating and negotiating with government agencies, amongst other responsibilities.<sup>387</sup>

Legislation in some jurisdictions, such as New South Wales, include explicit reference to Indigenous organisations' participation in decisions with respect to Aboriginal and Torres Strait Islander children with as much 'self-determination' as is possible.<sup>388</sup> While

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<sup>387</sup> See case study with respect to VACCA below and VACCA's official website for the range of services which this organisation provides ([www.vacca.org](http://www.vacca.org)).

<sup>388</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s12.

this provision is a step towards recognising the types of principle outlined in Recommendation 43 from NISATSIC it has significant limitations. The provision is unclear and does not provide a definition of the term self-determination. Rather than involving Aboriginal and Torres Strait Islander organisations as partners, the involvement of Aboriginal and Torres Strait Islander organisations is at the discretion of the Minister, who can outsource programs and discuss strategies with Aboriginal and Torres Strait Islander communities. Further, the provision fails to provide legislative safeguards as to how, and by whom, resources and programs should be designed and implemented. This lack of safeguards can impact to the detriment of Indigenous children, Indigenous organisations and the Department as there is a lack of mandatory obligation with respect to all parties. While the wording in this legislation is inherently contradictory, providing that the extent of self-determination is constrained by the extent to which the Department of Family and Community Services (NSW) will exercise its discretion to allow it, it is reflective of changing normative values and understandings with respect to differences between Indigenous and non-Indigenous children and young people and how these differences are relevant in understanding the nature of abuse and neglect and what is required to address Indigenous children and young peoples' wellbeing.

Another matter which impacts on the placement of children in out-of-home care is the resurgence in a focus on stability and the early permanent placement of children who cannot live with their parents in out-of-home care.<sup>389</sup> Two countervailing trends are occurring nationally and internationally in child welfare. The first is about family reunion and support for capacity building within families and communities. The second is a trend towards early permanent placements in out-of-home care. This usually involves setting short time frames within which a permanent decision needs to be made as to whether the child could be placed back with a parent or if in the court's view there is no 'realistic possibility' of reunion. The trend to early permanent placements has caused considerable concern within Indigenous communities in many parts of the world including Australia. The peak Indigenous children's organisation, SNAICC, believes that Indigenous children should always retain the possibility of reuniting with their

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<sup>389</sup> See, for example, the *Children and Young Person's Care and Protection Act 1998* (NSW), s78A.

families.<sup>390</sup> While Indigenous and all children have a need for stability and security the impact of loss of culture and identity for children who are permanently placed away from their family is also significant. In Australia there have been different ways of accommodating Indigenous communities' concerns about permanently placing children in each jurisdiction. The *Children, Youth and Families Act 2005* (Vic) has dealt effectively with these two competing needs. Section 323 provides that where an Aboriginal child is to be placed solely with a non-Aboriginal person that an Aboriginal agency must recommend the placement.

### **Victorian case study**

In Victoria the legislation provides for more far-reaching involvement of Indigenous organisations in the provision and administration of care and protection services than other Australian jurisdictions. Section 18 of the *Children Youth and Families Act 2005* (Vic), mirroring the trend in Canadian child protection legislation to delegate comprehensive child welfare functions to Aboriginal agencies, provides for the delegation of most of the Secretary's functions to the principal officer of an Aboriginal agency.<sup>391</sup> This provides extensive opportunity for the involvement of Indigenous agencies in all spheres of Indigenous children's welfare and wellbeing up to and including guardianship responsibilities for children. However these are delegated powers and they are dependent on the Secretary exercising his or her discretion.

The lead Aboriginal children's organisation in Victoria, VACCA, advocates on behalf of vulnerable or at risk Indigenous children and families within a human rights framework with an emphasis on the principles of self-determination, cultural respect and safety. VACCA played a significant role in the law reform process in Victoria. The *Children, Youth and Families Act 2005* (Vic) has implemented provisions which are specifically concerned

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<sup>390</sup> SNAICC (2005), *Achieving stable and culturally strong out of home care for Aboriginal and Torres Strait Islander Children*. Melbourne: SNAICC.

<sup>391</sup> See discussion of Canadian child welfare legislation with respect to Aboriginal peoples in Chapter 5.

with the cultural care of Indigenous children who have contact with the child protection system. These include recognition of the principle of self-determination and self-management for Aboriginal communities as part of the decision making process regarding Aboriginal children;<sup>392</sup> the mandatory application of ATSICPP for children who require out-of-home care;<sup>393</sup> the capacity of the Secretary of the Department of Human Services to delegate functions and the exercise of powers under the legislation to the Principle Officer of an Aboriginal Agency;<sup>394</sup> the mandatory requirement of the preparation of cultural care plans for Indigenous children under guardianship orders;<sup>395</sup> and the requirement of cultural competence in service provision.<sup>396</sup> While the reform process has been largely successful VACCA continues to advocate for fuller implementation of the law reforms achieved in the *Children, Youth and Families Act* 2005 (Vic) and for increased resources for Aboriginal prevention and early intervention services. In particular VACCA would like to see fuller resourcing and implementation of cultural care plans for Indigenous children in out-of-home care, expansion of VACCA's role with respect to advocating for Indigenous children in court proceedings, and cultural competence training for all personnel involved with child welfare including magistrates, child protection workers and lawyers.<sup>397</sup>

A memorandum of understanding between VACCA and the Department of Human Services Victoria (in which the child protection service is located), has set a precedent for the kind of cultural understanding and respectful relationships between Indigenous children's organisations and government departments which can be aspired to in the Australian context.<sup>398</sup> The *Children, Youth and Families Act* 2005 (Vic) and memorandum of understanding establish VACCA's jurisdiction with respect to Aboriginal and Torres

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<sup>392</sup> *Children, Youth and Families Act* 2005, s12.

<sup>393</sup> *Ibid*, s13.

<sup>394</sup> *Ibid*, s18.

<sup>395</sup> *Ibid*, s176.

<sup>396</sup> *Ibid*, ss 59 and 60.

<sup>397</sup> VACCA submission to the Legislative.

<sup>398</sup> Department of Human Services (2002), *The Protocol between the Department of Human Services and the Victorian Aboriginal Child Care Agency*. Melbourne: Department of Human Services.



Strait Islander children and young people. This is a sphere of influence which has expanded as understandings and more subtle nuances with respect to cultural difference have been established. Lakidjeka Aboriginal Child Specialist Advice Support Service (ACSASS) is a service within VACCA which provides advice and contributes to the case planning and decision making for all Aboriginal and Torres Strait Islander children who have contact with child protection services in Victoria. ACSASS is involved from the point when the Department is notified about a child to involvement in compliance with ATSI CPP if the child needs to be placed in out-of-home care. ACSASS case workers are cultural consultants who provide an Indigenous perspective on risk and safety assessments and who work as partners with the Department of Human Services, involving family and community in the case management of Indigenous children who have contact with the Victorian child protection system.

VACCA and the Department of Human Services have assisted in developing the competence of each other. VACCA provides high level policy advice on all child wellbeing and welfare initiatives. For example VACCA had input into the development of Child First, Victoria's early intervention initiative and is one of a consortium of family support agencies to provide early intervention programs to the North East Melbourne catchment. VACCA initiated the Indigenous Innovation Case Coordination Panel (IIC) where cases can be discussed and planned for enabling greater cooperation between Indigenous and non-Indigenous agencies for service provision to Indigenous clients with complex problems; they run a residential restoration program for intensive family support within a communal residential setting, have established and support Aboriginal playgroups and link people over 18 with their families and communities who have experienced removal under past government laws and policies . ACSASS, referred to above, is the main avenue for VACCA's input into child protection processes. VACCA also runs two residential care facilities for Indigenous children in out-of-home care who cannot be appropriately placed with foster or kin carers, places children in out-of-home care and produces resources to support carers and organises activities to support Aboriginal children in out-of-home care.

However, despite enlarged consciousness within government departments and amongst non-government child welfare organisations, bureaucratic and conceptual barriers persist in preventing a more complete implementation of ATSICPP and, more broadly, cultural care for Indigenous children in out-of-home care. A participant in research with respect to the provision of cultural care to Indigenous children in out-of-home care commented with respect to the Victorian Department of Human Services Cultural Care Plans:

They just want to put it in a box, put a boomerang on it and call it culture. Cultural care is more complex than this.<sup>399</sup>

This statement encapsulates the contradictory attitude of the Department of Human Services; on the one hand Victoria is the only jurisdiction where cultural care plans are legislatively mandated for Aboriginal and Torres Strait Islander children on guardianship orders, while on the other the ongoing awareness and resources required to substantially implement these is lacking. Despite the large percentage of Indigenous children being looked after by non-Indigenous out-of-home care agencies and by non-Indigenous carers, as of 2010 there was still no specific funding allocated by Australian child welfare departments, except in South Australia, to support these children and young peoples' cultural care.<sup>400</sup> Research suggests that non-Indigenous out-of-home care agencies and carers would like to provide cultural care to Indigenous children in their care but they do not believe that they have the knowledge to do so adequately and are reliant on Indigenous organisations, which are not funded or inadequately funded, to provide this assistance. VACCA has developed a two day training program Nikara's Journey, for non-Indigenous foster carers who look after Indigenous children in out-of-home care in Victoria. The legacy of colonial policies, including the forced and unjustified separation of Indigenous children from their

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<sup>399</sup> Libesman (2011) above n32, 11.

<sup>400</sup> In NSW, 85% of Aboriginal and Torres Strait Islander children are placed in Aboriginal and Torres Strait Islander out-of-home care, in WA and SA around 75%, in Victoria and Queensland around 60%, in the ACT around 55%, in the NT around 45% and in Tasmania around 25%: Australian Institute of Health and Welfare (2010) above n23, 47.

families, continues to not only impact on the disproportionate rate of removal of Indigenous children from their families but also on the burden of kin care within Indigenous communities. In effect, government responsibility for reparation for past wrongs, including caring for children in out-of-home care who are often from families suffering intergenerational trauma as a result of prior government policies, is being borne by Indigenous communities with inadequate resourcing or support. An out-of-home care worker noted:

Building the capacity of Aboriginal agencies is an essential part of cultural care. It is really hard for a mainstream agency to provide cultural care – even if they have Aboriginal workers. They have a different background and way of relating to and understanding the world.<sup>401</sup>

The anomalous situation of support for cultural care but a lack of either resources or understanding to effectively implement this requirement is indicative of the transitional consciousness which greater influence and contact with Indigenous organisations such as VACCA creates. The pluralisation of child welfare is a process rather than something that can or has been implemented at a point in time.

Despite VACCA's expanded role and the shift in mainstream child welfare consciousness which engagement with VACCA has facilitated, the organisation looks after a relatively small number of children in out-of-home care and has not been able to impact on the systemic factors which result in the disproportionate contact which Indigenous children from Victoria have with the child welfare system. While VACCA through ACSASS and its other services and resources makes an enormous contribution to children's wellbeing, its impact is limited by the lack of culturally appropriate services for referral purposes, such as mental health services and measures to address the systemic disadvantage which Indigenous people in Victoria face.

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<sup>401</sup> Libesman (2011) above n32, 43.

The systemic factors which generate vulnerability and risk in Aboriginal families face require a culturally embedded approach to community development which redresses poverty, intergenerational trauma, racism and marginalisation from the services and opportunities which are available to other sections of the community. For this to occur there needs to be broader participation by and recognition of Indigenous organisations and communities across housing, education, employment, health and in all spheres of social inclusion. A structural approach to children's wellbeing however, as the Northern Territory Emergency Response (NTER) discussed below illustrates, must be founded on the same human rights principles which have transformed Indigenous peoples' engagement with international law over the past decades as discussed in Chapter 2 and which have provided the foundation for legislative reform to child protection legislation as discussed in Chapter 5 and this chapter. While reform to child protection legislation has been incremental and the process of legislative inclusion transforming bureaucratic and dominant Anglo-understandings is slow and ongoing, it none the less has brought about positive change. The culturally infused micro-experiences, which saturate difference between mainstream and Indigenous organisations and personal interactions, push against and challenge dominant language, resources and personal interactions and bring Indigenous understanding, albeit incrementally, to the jurisprudence of child welfare at a national and, as discussed in Chapters 2 and 5, an international level.

### **The Northern Territory Emergency Response (NTER)**

The Northern Territory has a history of neglect of Aboriginal and Torres Strait Islander children in the area of child welfare.<sup>402</sup> It is the most overt colonial frontier in contemporary Australia. While Aboriginal people have retained or

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<sup>402</sup> Pocock J (2010), *State of Denial: The Neglect and Abuse of Aboriginal and Torres Strait Islander Children in the Northern Territory*. Melbourne: SNAICC.

attained parts of their traditional lands<sup>403</sup>, in many communities speak their own language and practise ceremonies as a central part of their belief system, they have also been impacted by the worst of western culture with a loss of traditional food sources, the introduction of alcohol and other drugs, gambling and pornography and, related to this, high levels of violence, in particular against women and children. The trauma of past colonial policies is often compounded by current and repeated traumatic experiences.<sup>404</sup> Indigenous communities have faced an incursion of the worst of western culture with little support to address the problems related to this. They have advocated that supporting their culture serves to strengthen their communities and that culture provides a buffer against social breakdown. The research which has looked at the impact of culture on social breakdown, for example suicide rates amongst Indigenous youth and engagement in risky behavior, suggests that cultural strength does serve as a buffer against the social breakdown ushered in by colonialism.<sup>405</sup>

In the course of 2006 and 2007, considerable publicity focused on child sexual assault in Aboriginal communities in the Northern Territory, particularly after the revelation of horrific cases, by public prosecutor Nanette Rogers, on a current affairs program.<sup>406</sup> While these 'revelations' shocked many, the issues had been raised over decades with

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<sup>403</sup> This has been achieved via various pieces of legislation such as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

<sup>404</sup> Board of Inquiry into the Child Protection System in the Northern Territory (2011) above n36; Aboriginal Child Sexual Assault Taskforce (2006), *Breaking the Silence: creating the future; addressing child sexual assault in Aboriginal communities*. Sydney: Attorney General's Department; Robertson B (2000), *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*. Brisbane: Department of Aboriginal and Torres Strait Islander Development; Atkinson J (2002), *Trauma Trails: Recreating Song Lines*. Melbourne: Spinifex Press.

<sup>405</sup> For example, research suggests that Aboriginal and Torres Strait Islander youth in remote areas who speak an Indigenous language are less likely to engage in risky behaviour (for example, alcohol or substance abuse): Australian Bureau of Statistics (2011), *Aboriginal and Torres Strait Islander wellbeing: A focus on children and youth*. Canberra: Australian Bureau of Statistics. Also see Chandler M & Lalonde C (1998), 'Cultural continuity as a hedge against suicide in Canada's First nations,' 35(2) *Transcultural Psychiatry* 191; and Libesman (2011) above n32.

<sup>406</sup> Australian Broadcasting Corporation (2006), 'Prosecutor reveals sexual abuse and violence in NT Indigenous communities,' *Lateline*, television news program, 15 May 2006. The television broadcast transcript is available at: <http://www.abc.net.au/lateline/content/2006/s1639133.htm>.

few effective responses.<sup>407</sup> Just prior to the 2007 election, the Commonwealth Government, under Prime Minister John Howard, with no notice, consultation, forward planning or evidence base, made the astounding decision to use the Australian Army to seize prescribed Aboriginal communities in the Northern Territory, to suspend the *Race Discrimination Act 1975* (Cth) and 'roll out' a more than billion dollar project of 'measures' collectively called the Northern Territory Emergency Response (commonly referred to as 'The Intervention'). This affected at its peak over 500 Aboriginal settlements in the Northern Territory ranging from large towns to town camps and outstations.<sup>408</sup> The NTER was ostensibly a response to the *Little Children are Sacred* Report which was commissioned by the Chief Minister of the Northern Territory in response to the publicity surrounding child abuse in Aboriginal communities in the Northern Territory.<sup>409</sup> The NTER created enormous fear and disquiet in communities but with a veil of sanctity created through the proclaimed objective of child protection, attracted much attention but very little critical scrutiny from the media or the wider community.

The level of neglect experienced by Aboriginal communities in the Northern Territory warranted and continues to warrant urgent measures. Further, as discussed with respect to ATSICPP above, addressing identity and cultural concerns without changing the systemic and structural factors which corrode Indigenous children's wellbeing, and which make them susceptible to abuse and neglect, cannot fundamentally change children's life chances. However, it is not surprising that 4 years after the initiation of the NTER, as the government's monitoring reports attest, very little has been achieved.<sup>410</sup> It is remarkable that measures which were described as an emergency response are continuing despite a change of Federal Government from Liberal

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<sup>407</sup> This was made clear in Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n6.

<sup>408</sup> Northern Territory Emergency Response Review Board (2008), *Report of the NTER Review Board*. Canberra: Australian Government.

<sup>409</sup> Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) above n6.

<sup>410</sup> Department of Families, Housing, Community Services and Indigenous Affairs (2010), *Closing the Gap in the Northern Territory Monitoring Report January – June 2010*. Canberra: Australian Government.

(conservative) to Labor and despite, as discussed below, the NTER's assimilationist and neo-liberal ideological framework. While reforms to child protection legislation have adopted human rights principles of cultural recognition and participation by Aboriginal and Torres Strait Islander organisations, the NTER has adopted a paternalistic approach, which heavy-handedly attempts to impose Eurocentric and punitive measures to Aboriginal communities.

The NTER ushered in a regime of control which for many is reminiscent of the Protectionist era, when as discussed above all aspects of Aboriginal peoples' lives were regulated and controlled under 'Protection' legislation.<sup>411</sup> Reminiscent of the Protection era, the NTER saw the introduction of Mission Manager-style business managers who are responsible for co-coordinating all aspects of the Intervention, the requirement that traditional and other land owners sign mandatory five year and subsequently 40 year leases handing broad control over their land to the Government, the permit system which communities used to control who entered their land was removed, half of welfare income is quarantined to be spent on a 'basics card,' which requires the recipient to spend the money at designated stores on food and specified essential items, regardless of the recipients' conduct, and other benefits such as family payments are dependent on compliance with sending children to school even in communities where no functioning school existed. Punishing financially deprived families, in communities where malnutrition is already a significant problem, and where many people live chaotic lives marked by crisis, which makes compliance with rules often difficult, will inevitably bring about greater hardship and suffering for some of the most disadvantaged children.

These coercive measures contrast with programs such as those initiated by Dr Chris Sara, former principal of Cherbourg school, a former Aboriginal Reserve in Queensland, who turned non-attendance and poor achievement for Aboriginal children around with his 'Stronger and Smarter' program which made school attractive and relevant for

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<sup>411</sup> NISATSIC (1997) above n4, Chapter 2; and Markus A (1990), *Governing Savages*. Sydney: Allen and Unwin.

Aboriginal and Torres Strait Islander children.<sup>412</sup> The Commonwealth Development Employment Program (CDEP), which is the main source of employment in many Indigenous communities and supplements welfare payments, was abolished with no planning with respect to how the jobs fulfilled by CDEP workers, many of whom ironically were school aides and child care workers, would be fulfilled. CDEP was reinstated after the Federal Government changed in 2007. The NTER also brought in police officers to assist with law and order issues in communities, health workers to perform health checks on children, alcohol and pornography bans in communities and increased other services such as child welfare workers. These are services which have been abysmally lacking in Indigenous communities and which did not need the composite raft of legislation which enabled the Intervention to be given effect. Other aspects of the Intervention included the removal of customary law defences from the criminal code and new powers provided to the Australia Crime Commission allowing access to children and young people's medical records to investigate child abuse.<sup>413</sup>

With the change of Federal Government, a complaint to the United Nations and a report by the Special Rapporteur on Indigenous Affairs, some changes have been made to the legislation which enabled the NTER in order to technically comply with the *Race Discrimination Act 1975* (Cth). The major change is that welfare quarantining will now be extended to all welfare recipients, not just Indigenous people in the prescribed areas, and compensation will be paid for the acquisition of leases. However, these changes do not reform the fundamentally paternalistic values driving the Intervention. Values which fail to comply with international developmental standards and which are in diametrical opposition to the human rights framework; which as discussed above is emerging in child protection and international law with respect to Indigenous peoples. These

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<sup>412</sup> See the official website of the Stronger and Smarter Institute which has been established to replicate and develop Dr Sarra's work. Available at: <http://www.strongersmarter.qut.edu.au>

<sup>413</sup> This has been controversial as doctors have been concerned the breach of privacy will inhibit patients from seeking medical treatments which they need. For discussion on this point, see Sweet M (2010), 'The latest on the Australian Crime Commission's invasion of medical records and patient privacy,' *Crikey*, online political blog, 12 February 2010. Available at: <http://blogs.crikey.com.au/croakey/2010/02/12/the-latest-on-the-australian-crime-commissions-invasion-of-medical-records-and-patient-privacy>



developing frameworks are founded in human rights principles and are at least in principle committed to partnerships with local communities and incorporate the values of the community whom initiatives are intended to benefit.

Four years after the NTER was initiated the billion dollars plus spent appear to have made very little impact on Indigenous children's welfare.<sup>414</sup> Whilst debates in the international arena persist with respect to how to most effectively address developmental needs of communities which have been beset by conflict and poverty, there is a level of consensus with respect to the need for community development to be participatory.<sup>415</sup> The Intervention is founded on western economic values, which have no embedded significance within communities and which have in more dilute forms in comparative international contexts proven to be counter-productive and destructive of Indigenous peoples' culture and community.<sup>416</sup> The compulsory acquisition of land through leases, which under the original Intervention was not negotiated and did not attract compensation, was plainly a discriminatory derogation from Aboriginal peoples' property rights. The justification provided for compulsory acquisition of land is twofold. The Government claims that it needs to secure control of areas to facilitate major investments such as housing and then to implement market rents for housing which it provides. The idea of a market regulated economy within remote communities and town camps defies the reality of the situation – there is little commercial opportunity in these communities and the idea is in stark contradiction with the competing Indigenous value system in place that emphasises land as spiritual and interconnected with community relations.

Prior to the implementation of the Intervention, the Howard Government already had a long standing agenda of 'mainstreaming' Aboriginal affairs. In 2006, a year prior to the

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<sup>414</sup> Board of Inquiry into the Child Protection System in the Northern Territory (2011) above n36.

<sup>415</sup> Hunt J (2005), *Capacity Development in the International Development Context: Implications for Indigenous Australia*. Canberra: Centre for Aboriginal Economic Policy Research.

<sup>416</sup> See for example Hepburn S (2006), 'Transforming Customary Title to Individual Title: Revisiting the Cathedral,' 11(1) *Deakin Law Review* 64.

Intervention, the Commonwealth Government enacted controversial reforms following the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*,<sup>417</sup> including reforms which enabled the lease arrangements which underpin the Intervention's land reforms.<sup>418</sup> These reforms, together with others which were recommended by John Reeves QC, would break down Aboriginal decision making bodies, including the land councils in the Northern Territory, and dilute Aboriginal control over land.<sup>419</sup> There is no mention of child abuse in the Reeves Review. The Reeves reforms were opposed by Aboriginal groups because they facilitated loss of control by land owners and the capacity for basic citizenship rights such as housing or education to be used to compel Aboriginal land owners to enter into leases.<sup>420</sup> It is curious that Mr Reeves QC was one of the original eight members of the NTER taskforce appointed to oversee the Intervention. It is more curious that nowhere in the 365 pages of composite legislation which initially enabled the Intervention are children mentioned.<sup>421</sup>

The innovation of the NTER was the inclusion of a massive project of structural reform to address children's welfare. Its tragedy, in addition to leaving vulnerable people feeling further shamed and disempowered, is that the opportunity to harness structural reform to address systemic disadvantage in a manner which respects Aboriginal peoples' human rights has been squandered on an ideological experiment. It is doubtful whether the audacious implementation of the Intervention, which lacks an evidence base or precedent anywhere in the world, could have avoided the scrutiny which it did if it had not been implemented in the name of child protection. The robust element of

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<sup>417</sup> Reeves J (1998), *Building on the Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*. Canberra: Aboriginal and Torres Strait Islander Commission.

<sup>418</sup> The removal of the permit system was only given legislative effect in 2007 with the implementation of the Intervention, reforms to the permit system were previously rejected by the Senate in Parliament when the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* was amended a year earlier, in 2006.

<sup>419</sup> Reeves (1998) above n80.

<sup>420</sup> For an example of Aboriginal community criticism of the Reeves reforms, see Viner I (1999), 'Whither Land Rights in the Northern Territory? Whither Self-Determination? A Review of the Reeves Report,' 4(1) *Australian Indigenous Law Reporter* 1.

<sup>421</sup> See above n5 for a list of the original enabling legislation.

contest in media, amongst advocacy groups and more broadly in the community with respect to the former Howard Government's rejection of principles of self-determination and adoption of a 'One Australia' policy, largely evaporated in the less than transparent cloud of child protection which enveloped the Intervention.

## **Conclusion**

A human rights approach to Indigenous children and young people's welfare and wellbeing has at its core principles of self-determination and cultural recognition. Through engagement with and participation in child welfare systems the experiences of Indigenous peoples are being incorporated into measures to address their wellbeing whether it be at an individual family or at a community level. At the centre of national and international advocacy with respect to the recognition of Indigenous peoples' rights is the claim to participation in the decision making which impacts on their lives. The influence of this claim both from international human rights law and from law reform with respect to Indigenous child welfare in comparative jurisdictions is reflected in the advocacy and achievements in Australian child welfare systems.

At the centre of child welfare reform with respect to Indigenous peoples is the importance of cultural care and with this changing understandings about Indigenous cultures within the mainstream government and non-government child welfare sectors. These changes have augmented a shift in race relations between Indigenous and non-Indigenous peoples and organisations which have interactions with respect to child welfare. This is illustrated with the Victorian case study where racist attitudes and related presumptions about Indigenous peoples being in need of assistance, incompetent and universally in crises have changed towards a recognition of the strength of Indigenous culture, the complexity of Indigenous peoples' contemporary experience and the recognition that non-Indigenous peoples' and organisations require education and ongoing work to attain degrees of cultural competence. Organisations such as VACCA are recognised as providing best practice and are consulted and relied upon with respect to law and policy reform as well as in service provision. They have

incrementally assumed jurisdiction over their children and young peoples' welfare and wellbeing and with this brought a depth of understanding to the provision of services and ways in which underlying causes of abuse and neglect within Aboriginal and Torres Strait Islander communities is understood.

The NTER provides a stark contrast to the reforms in the area of child welfare. It is not surprising that it was initiated by a Federal Government which lacks experience of or responsibility for child welfare and with this the associated shifts in attitudes and understanding of vulnerable and at risk Indigenous families which have been augmented through reform of child protection frameworks. It is ironic that homogenous and paternalistic understandings lie at the core of the colonial violence which grounds current inequities and yet a commitment to this frame of reference is evident in the NTER. The opportunity exists to bring pluralised human rights understandings, which have incrementally developed in child protection through legislative reforms such as those discussed with respect to ATSI CPP, to projects with resources on the scale of the NTER. A human rights approach to the systemic issues which the NTER targets, offers the possibility of reform which address the ongoing, devastating and routine breaches of Australian Indigenous children's human rights which are associated with and o

## Chapter 7

### Comparative service delivery frameworks

#### Introduction

Together with legislative frameworks which recognise Indigenous communities' and organisations' role in addressing their children's wellbeing, resources are necessary to provide services in a manner which respects Indigenous children's culture and their human rights more broadly. While legislative frameworks which support human rights principles (in particular the right to self-determination) provide the scaffolding for

responding to Indigenous children's wellbeing, this has to then be built upon with resources and services. Because Indigenous peoples have historically been denied the exercise of jurisdiction with respect to their children's welfare and wellbeing, together with other destructive colonial experiences, many Indigenous organisations and communities need to build their organisational capacities and ontological understandings to be in a position to take responsibility for child welfare and, more broadly, their children's wellbeing. Effective collaboration between Indigenous organisation and mainstream agencies is therefore not only necessary where mainstream agencies retain control over and are responsible for service provision to Indigenous children. It is also necessary where principles of self-determination and structures for the transfer of responsibility for Indigenous children's wellbeing to Indigenous communities and organisations are being implemented.

To give effect to Aboriginal jurisdiction with respect to child welfare, which has to varying degrees been transferred to Indigenous communities or organisations (as discussed in Chapters 5 and 6), nuanced questions with respect to the relationships between Indigenous and non-Indigenous paradigms of understanding need to be addressed with respect to service delivery frameworks. The transfer of responsibility under delegated legislative models requires a hybridity of competencies encompassing Indigenous and non-Indigenous aspects of responsibility. The ways in which law reform with respect to Indigenous child welfare draws on international human rights law and then translates this into practice through service delivery frameworks is part of a process of recognition of Aboriginal peoples' distinct identities. While the process of reform of service delivery frameworks with respect to Indigenous children has not escaped the influence of power imbalance, it is bringing an enlarged and more inclusive understanding into child welfare. This chapter provides an analysis of the themes with respect to child welfare service provision to Indigenous families. It does not attempt to cover the field, which is extensive and beyond the scope of this thesis, but rather provides examples and addresses themes with respect to service provision which enhances community responsibility for Indigenous children's welfare and wellbeing.

## Cultural competence

For effective collaboration between government departments and Indigenous communities it is necessary for departments and individuals who work within them to have a meaningful understanding of the history and experiences which impact on these communities. This requires personal and institutional reflection on cultural values inherent in individuals' attitudes and presumptions as well as within service delivery models. This chapter attempts to identify culturally competent policy and ways in which this policy can be implemented in practice. Key features identified in much of the literature include an understanding of communal identity compared with the highly individualised understanding of identity in western child welfare frameworks, and related whole community, rather than individually focussed, responses to child protection and Indigenous children's wellbeing. Community development and whole community responses recognise that structural deficits, which are closely associated with Indigenous communities colonial experiences, impact significantly on Indigenous children's wellbeing.<sup>422</sup> Cross-cultural communication problems and cultural difference militate against collaborative planning, responsibility and accountability.

### *What is cultural competence?*

Cultural competence 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.'<sup>423</sup> A culturally competent program is one which appreciates and values diversity; understands the cultural forces which impact the program; understands the dynamics which result from cultural differences;

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<sup>422</sup> Blackstock C & Trocme N (2004), *Community Based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change*. Available at: [http://www.mcgill.ca/files/crcf/2005-Communiy-Based\\_Welfare\\_Aboriginals.pdf](http://www.mcgill.ca/files/crcf/2005-Communiy-Based_Welfare_Aboriginals.pdf)

<sup>423</sup> Tong C & Cross T (1991), *Cross Cultural Partnerships for Child Abuse Prevention with Native American Communities*. Portland: Northwest Indian Child Welfare Institute, 12.

institutionalizes cultural knowledge; and adapts its services to fit the cultural context of the clients it serves.<sup>424</sup>

The concept of cultural competence has gained increasing importance and focus among social service professions and agencies in recent years. It is a field of particularly acute relevance when working with Indigenous communities. Striving for cultural competence in social services in the United States, Canada, New Zealand and Australia is now widespread, and occurs partly in recognition of the ethnocentric history and values of social welfare services. The United States National Association of Social Workers (NASW) Code of Ethics dedicates a full section to cultural competence.<sup>425</sup> However there are few empirical models for cultural competence, and those tailored for Indigenous people are fewer.

While cultural competence requires knowledge about cultural groups, as discussed in Chapter 5 with respect to legislative frameworks, the diversity within those groups must also be recognised.<sup>426</sup> Many authors who discuss cultural competence emphasise the importance of practitioners' ability to reflect on their own cultural backgrounds and possible related biases and implications.<sup>427</sup> The values and world view inherent in models and theories need similar scrutiny.<sup>428</sup> Definitions of problems and their origins,

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<sup>424</sup> Ibid.

<sup>425</sup> Weaver HN (1999), 'Indigenous People and the Social Work Profession: Defining Culturally Competent Services,' 44(3) *Social Work* 217.

<sup>426</sup> See Chapter 2 with respect to an analysis of international human rights principles which do not substitute the domination of the majority for the domination of sectors within a minority group over vulnerable or less powerful members within that group, in particular women and children. See Chapter 3 with respect to the relationship between pluralised human rights and the exercise of judgement in a manner which includes those most marginalised.

<sup>427</sup> Chapters 2 and 4 discuss the enlarged understanding which can develop through a pluralised and inclusive human rights frameworks and how this can impact on understandings of child welfare, and individual and institutional morality and efficacy in decision making.

<sup>428</sup> Weaver HN (1998), 'Indigenous People in a Multicultural Society: Unique Issues for Human Services,' 43(3) *Social Work* 203; Voss R, Douville V, Little Soldier A & Twiss G (1999), 'Tribal and Shamanic-Based Social Work Practice: A Lakota Perspective,' 44 (3) *Social Work* 228; Briskman L (2007), *Social Work with Indigenous Communities*. Sydney: The Federation Press; McKenzie B & Morrisette V (2003), 'Social work practice with Canadians of Aboriginal background: Guidelines for respectful social work' in Al-Krenawi A & Graham J (eds),

and ideals for appropriate interventions and outcomes, are culturally determined. There is a need for social work policy to encourage flexibility and innovation in approaches to cultural difference.<sup>429</sup> There is a great and largely unfulfilled need for practitioners, policy-makers and other professionals to be aware of the cultural specificity of policy and practice.<sup>430</sup> Effects of the cultural incompatibility of social service models, particularly those relating to child and family services, have been overwhelmingly negative. The literature discussed below on Indigenous child and family services describes examples of this incompatibility.

### *Problems with conventional social work methods*

A number of authors and reviews suggest that social work methods often impose alien cultural values of individualism, materialism and empiricism on Indigenous peoples.<sup>431</sup> Voss et al point out that existing traditional Native American healing methods have largely been ignored in the literature on social work with American Indians.<sup>432</sup> This body of literature is very small, and this seems to reflect academic disinterest in Native Americans. This disinterest, combined with the common view of Indigenous people as a 'problem' group in social work, amounts to a form of 'intellectual colonialism and oppression' that 'perpetuates the invisibility of Aboriginal philosophy and thought in social work theory, policy, and practice and further imposes a therapeutic ideology emphasising culturally incompatible methods and ideals.'<sup>433</sup> The Awasis Agency in

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*Multicultural social work in Canada: Working with diverse ethno-racial communities.* Don Mills: Oxford.

<sup>429</sup> Ibid.

<sup>430</sup> Kalyanpur M (1998), 'The Challenge of Cultural Blindness: Implications for Family-Focused Service Delivery,' 7(3) *Journal of Child and Family Studies* 317.

<sup>431</sup> Briskman (2007) above n7; McKenzie & Morrisette (2003) above n7; Voss et al (1999) above n7; Weaver (1998) above n7; Kalyanpur (1998) above n9; Awasis Agency of Northern Manitoba (1997), *First Nations family justice : Mee-noo-stah-tan Mi-ni-si-win*. Manitoba: Thompson; Ricks F, Wharf B & Armitage A (1990), 'Evaluation of Indian Child Welfare: A Different Reality,' 24 *Canadian Review of Social Policy* 41.

<sup>432</sup> Voss et al (1999) above n7.

<sup>433</sup> Voss et al above n8, 230. The breath of life theory attempts to provide the beginnings of a holistic response to Aboriginal child welfare which rejects the presumptions which underlie a



Northern Manitoba offers a critique of the Cartesian paradigm underlying dominant social work theory, which they suggest leads to paternalism through imposition of the idea that there is one objective truth or reality to a situation, best understood by the 'expert.'<sup>434</sup> Voss et al observe that social work policy and practice often 'rigidly reinforce a kind of clinical colonialism.'<sup>435</sup>

Social work and a range of treatment services are usually founded on models involving intervention with individual clients.<sup>436</sup> Voss et al describe the 'self' as a more fluid, less defined entity in Lakota culture, which is reflected in the primacy of tribal family and kinship bonds.<sup>437</sup> Traditional Lakota values regard the individualistic values of Western culture as flawed. The Awasis Agency in Northern Manitoba also emphasises contrasting concepts of self compared with Anglo culture, in the context of child and family services delivery. All persons, things, actions and reactions are considered inextricably related and interdependent: 'There is no me or you... There is only me *and* you.'<sup>438</sup> Some central values common to First Nations of British Columbia are: consensus decision making (non-adversarial) as distinct from the approach of Western institutions (adversarial); a holistic approach to the care of children which sees child wellbeing as integrated into and inseparable from all other aspects of life; and a sense that each member of a nation holds responsibility for the wellbeing of all children.<sup>439</sup> An individualised focus not only results in cultural mismatch but also a framing of the individual as responsible for circumstances such as poverty-

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Cartesian response to social work: Blackstock C (2011), 'The emergence of the breath of life theory,' 8(1) *Journal of Social Work Values and Ethics*, White Hat Communications. Available at: <http://www.socialworker.com/jsww/spr11/spr11blackstock.pdf>.

<sup>434</sup> See Chapter 4 for a critique of the use of the 'expert' to legitimate decision making.

<sup>435</sup> Voss et al (1999) as above n7, 233.

<sup>436</sup> See Chapter 2 for a discussion of the ways in which inclusion of Indigenous peoples in the development of international human rights law, with respect to Indigenous children, is transforming the jurisprudence to include collective interests and understandings.

<sup>437</sup> Voss et al (1999) above n7.

<sup>438</sup> Awasis Agency (1997) above n10, 5; Community Panel (White L & Jacobs E) (1992), *Liberating our children, liberating our nations: report of the Aboriginal Committee, Community Panel, Family and Children's Services Legislation Review in British Columbia*. Victoria: The Committee.

<sup>439</sup> Community Panel (1992) *ibid*.

related neglect which may primarily be structurally determined and largely outside of the individual's control. This, however, does not mean that individuals cannot or should not be individually and personally responsible for aspects of their behaviour which are individually determined.<sup>440</sup>

Weaver notes that the high value placed on independence in the dominant culture has led to conditions such as 'enmeshment' and 'co-dependency' being regarded as dysfunctional.<sup>441</sup> However, such judgements are culturally relative, and can lead to misunderstanding and misdiagnosis. 'It is not unusual for non-Indian members of the formal child welfare system to misinterpret a parent's reliance upon extended family members for child care as a sign of neglect ... [yet this behaviour represents] normal and healthy interdependence among Native Americans.'<sup>442</sup>

In Native American culture (and many other Indigenous cultures), interdependence is highly valued. A number of works discuss the implications of cultural differences for service delivery in Indigenous communities. The conventional individually-focussed models applied by child and family service agencies and treatment services are often culturally inappropriate for use with Indigenous client groups due to cross-cultural differences in the nature of personal and communal identity. 'Personalistic psychologies,' which highlight pathologies as the basis for assessment and treatment, are not universally applicable.<sup>443</sup> Connors suggests that individually-focussed treatment

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<sup>440</sup> See discussion of Community Holistic Circle Healing (CHCH) in the Hollow Water community in Manitoba below. This program incorporates measures to address community and individual responsibility for child sexual abuse in the community.

<sup>441</sup> Weaver (1998) above n7.

<sup>442</sup> Ronnau J, Lloyd J, Sallee A & Shannon P (1990), 'Family Preservation Skills with Native Americans' in Mannes M (ed), *Family Preservation and Indian Child Welfare*. Albuquerque: American Indian Law Centre, 91. Also see the case study in Chapter 3 where the New South Wales child welfare department claimed neglect where an Aboriginal mother relied on non-Aboriginal women, whom she looked to as mothers, to provide shared care of her children.

<sup>443</sup> Mannes M (1993), 'Seeking the Balance between Child Protection and Family Preservation in Indian Child Welfare,' 72(2) *Child Welfare* 141.

models disregard the complexities of extended family networks in First Nations communities.<sup>444</sup> Many authors and community consultations report that a 'whole community' approach to child protection and other social service and treatment interventions is more appropriate and likely to lead to success. For example, the Awasis Agency, a regionalised peak body for the Indigenous-controlled child and family services of 18 Northern Manitoba Aboriginal communities, integrates child protection with other services, observing that this inclusive approach mirrors the Aboriginal concept of self in that region.<sup>445</sup> Connors, a Canadian Aboriginal psychotherapist, suggests that systems which continue to rely on individually-focused models will only be 'bandaid solutions.' He advocates the implementation of interventions directed towards the entire community.<sup>446</sup>

Professionals dealing with Indigenous families may be unaware of the potential effects of their 'cultural blindness.' Indigenous parents tend to be disempowered in relations with professionals, particularly where they have not developed strategies to increase 'levels of participation.'<sup>447</sup> In a qualitative study of social work professionals working with on-reservation Native American mothers, Kalyanpur found that although the workers were acting according to best practice, their assumptions with respect to the universal applicability of 'objective' theories was misplaced. Kalyanpur found that although the parents in the study had perceived parenting deficits according to professional criteria, they were raising their children 'to become competent adults within their culture' and therefore possessed appropriate parenting skills. In communities where problems exist and children are not being raised in a healthy way with respect to their own culture, a failure to apply culturally appropriate assistance may be masked by a focus on children's problems with little incentive to question mainstream presumptions with respect to children's welfare or wellbeing (see discussion in Chapter 4 with respect to presumptions about child welfare values being

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<sup>444</sup> Connors E (1993), 'Healing in First Nations: The Spirit of Family' in Rodway MR & Trute B (eds), *The Ecological Perspective in Family-Centered Therapy*. New York: Edwin Mellen Press, 51.

<sup>445</sup> Awasis Agency (1997) above n10.

<sup>446</sup> Connors (1993) above n23.

<sup>447</sup> Kalyanpur (1998) above n9.

founded in Anglo values which are assumed to be universal). Further, where there has been a significant breakdown of social norms, and child abuse and neglect are related to this breakdown, imposition of laws and rules which do not have internal meaning for the community are not likely to stem damaging and inappropriate conduct.<sup>448</sup>

### *Partnerships and collaboration*

Good partnerships and meaningful collaboration between government and Indigenous organisations are vital to the development of effective child welfare strategies which empower Indigenous communities. However, as outlined by the Awasis Agency:

The power structures that underlie traditional approaches to social work practice often work against collaborative decision-making with families. Even when social workers try to share decision-making power with families the power and authority attached to the role of social worker can erode this attempt.<sup>449</sup>

Collaboration is vital 'for both understanding the specific limitations and ineffectiveness of existing services and programs and for identifying the changes necessary to create culturally appropriate solutions.'<sup>450</sup> While building relationships across difference is necessary, Wharf and McKenzie note the huge gap in experience which often exists between policy makers and those whom they are making policy for.<sup>451</sup>

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<sup>448</sup> See discussion in Chapter 4 on the rule of law. In circumstances where children face violence, there is a clear need for criminal law intervention, victim support and reconstitution of cultural and physical security for individuals and the community. The call for greater support for victims by service providers and, at the same time, dissatisfaction with contemporary child welfare measures have been consistent themes across reviews into sexual and other abuse faced by Indigenous women and children. See discussion of these reviews in Chapter 1.

<sup>449</sup> Awasis Agency (1997) above n10, 24-25.

<sup>450</sup> Aboriginal Family Healing Joint Steering Committee (1993), *For Generations to Come: The Time is Now - A Strategy for Aboriginal Family Healing*. Ontario: Unpublished Final Report, ii.

<sup>451</sup> They note that most policy makers are usually economically and socially comfortable and may have little experience of, or sympathy for, the poverty and associated problems which those who will receive services based on this policy experience. McKenzie B & Wharf B (2004), *Connecting Policy to Practice in the Human Services*. (2nd. edition) Don Mills: Oxford, x1.

In describing a number of Native American child and family services entities considered exemplary, the Aboriginal Family Healing Joint Steering Committee identifies collaboration as the key feature to their success. They note that several of these organisations had complex partnerships between various combinations of state agencies, tribal organisations, and non-government organisations.<sup>452</sup>

Similarly, a report on a study of Aboriginal self-government and child welfare services in two remote Canadian communities found that a collaborative approach to relations with provincial authorities was the key factor in the greater success of one community.<sup>453</sup>

A project conducted by the American Humane Association examined sources of conflict and collaboration in areas of child welfare in which both tribes and government agencies have an interest.<sup>454</sup> The project was overseen by a national committee representing tribal, state, non-profit and federal child welfare agencies. Qualitative research methods were used: interviews, participant observation, and archival reviews. Project sites were in five reservations covering seven tribes in three states: Arizona, North Dakota and Washington. The research found North Dakota was an exemplary case for positive tribal-state relations. Some of the qualities which contributed to this status were:

- The long history of tribes and government working together;
- A mutual understanding of their history and cultural context;
- Recognition of the 'sovereignty nationhood' of tribes by government;
- The provision of training on means to obtain federal funds; and
- The collaborative approach adopted by all participants.

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<sup>452</sup> American Humane Association - National Resource Center on Child Abuse and Neglect (1997), *Tribal-State Relationships in Child Welfare: Ensuring High Quality Services to American Indian Children and Their Families*. Englewood: American Humane Association.

<sup>453</sup> Durst D, McDonald J & Rich C (1995), 'Aboriginal Government of Child Welfare Services: Hobson's Choice?' in Hudson J & Galaway B (eds), *Child Welfare in Canada. Research and Policy Implications*. Toronto: Thompson Educational Publishing.

<sup>454</sup> Ibid.

**The report identified that individual people involved were a key factor in tribal-state relations. People consulted for the project (individually and as representatives) discussed perceived personal skills and qualities important to good working relations between tribes and states. These were grouped and summarised, including:**

- Communication skills;
- Sensitivity to different values;
- Cultural broker skills;
- Teamwork skills; and
- Comfort in ambiguity.

‘Cultural brokers’ have the ability to ‘walk in two cultures’ with comfort in the different roles required. Many interviewees were cultural brokers between governments and Aboriginal agencies.

Tong and Cross of the United States National Indian Child Welfare Association produced a paper with the specific goal of providing strategies for the development of effective cross-cultural partnerships for child abuse prevention.<sup>455</sup> Some of their suggestions were as follows:

- Ensure that an effective needs assessment has been carried out. The appropriate method for conducting the needs assessment is itself dependent on the specific features of the individual community.
- Consult with the community.
- Have a clear goal of empowering the community, as distinct from simply providing services to the community.

They found two vital factors in successful strategies were to attain inclusiveness and empowerment. They suggest that involvement of, and consultation with, community members should take place throughout the project cycle, from design through to

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<sup>455</sup> Tong & Cross (1991) above n2.

evaluation.<sup>456</sup> Natural community support networks should be used and developed, while community-based helpers and prevention networks should be engaged. This, Tong and Cross suggest, can be achieved through attending formal and informal community gatherings, or by sponsoring joint training or public awareness events with Indigenous organisations. The history of disempowerment and attendant feelings of helplessness must be overcome by harnessing community strengths and resources. Historical mistrust is potentially destructive and also needs to be acknowledged and addressed. Strategies which have been used to engage Indigenous communities include using the influence of Indigenous leaders to disseminate information, and seeking information and advice from Indigenous organisations. Programs should be designed so that they are sustainably incorporated into the local Indigenous culture. An example in the Australian context of effective collaboration and engagement between an Indigenous community agency and a government department is the respect which the Victorian Aboriginal Child Care Agency (VACCA) is accorded by non-Aboriginal children's agencies and government departments. In addition to VACCA's statutory responsibilities with respect to providing cultural advice about all Indigenous children who are notified to the department and family support and out-of-home care services, VACCA provides law reform and policy advice and training such as Nikara's Journey, a two day training program for non-Aboriginal foster carers to assist them to support the best interests of Aboriginal children in their care. See discussion in Chapter 6 with respect to the legislative structure which supports the empowerment of VACCA and the symbiotic relationship between VACCA's increased powers and responsibilities and increased cultural competence within the Victorian Department of Human Services and other Victorian non-government children's services.

### *Factors which contribute to culturally competent work*

There are a number of key issues which practitioners need to be aware of for culturally competent work with Indigenous peoples. Weaver identifies a number of themes for practitioners to be aware of when working with Native

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<sup>456</sup> See discussion of Manitoba child welfare model in Chapter 5 which includes extensive involvement of all parties from the planning stages onwards.

Americans.<sup>457</sup> These are issues which appear to also have relevance for practitioners working with other Indigenous peoples. Weaver states that interventions addressing trauma are often best approached through a group method, as much trauma has been perpetrated on Indigenous peoples as a group, and Native American identity is focussed on groups. She notes that community healing projects are becoming more common and that validation of historical grief is an important element in assessment and healing processes. Colonial processes impact on identity in a number of ways. These include impacts on self-esteem and identity through a lack of recognition of Aboriginal Nations by the state and some Aboriginal individuals by Aboriginal groups. McKenzie and Morrisette note the value of cultural knowledge and reviving cultural practices for securing identity, healing and wellbeing and that Aboriginal values may serve as a buffer against the impacts of destructive colonial practices.<sup>458</sup>

In their work on cross-cultural partnerships for child abuse prevention, Tong and Cross articulate a series of definitions and indicators for a range of levels of organisational cultural competence.<sup>459</sup> Tong and Cross declare agencies to be at a stage of 'cultural pre-competence' when they have acknowledged their failure to adequately meet the needs of the Indigenous community, and respond by implementing outreach programs, or by recruiting Indigenous people who are:

... trained to provide services in a standard fashion. Although an effort is made, the effort falls short because it is not culturally tailored. These efforts may give service providers a false sense of security ... Agencies work seriously on the issues yet ineffectively.<sup>460</sup>

In contrast with the above, culturally competent agencies will adapt service models to better suit Indigenous people, in consultation with the community. Tong and Cross term

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<sup>457</sup> Weaver (1998) above n7.

<sup>458</sup> McKenzie & Morrisette (2003) above n7, 264.

<sup>459</sup> Tong & Cross (1991) above n2, 13.

<sup>460</sup> Ibid, 14.



the highest level of competence ‘cultural proficiency.’ This is characterised by agencies which ‘seek to add to the knowledge base of culturally competent practice by conducting research or developing new therapeutic approaches based on culture.’ Culturally competent service providers will sanction or mandate the ‘incorporation of cultural knowledge into the service delivery framework.’

In order to achieve cultural competence, individuals and institutions need more than awareness and commitment; they must be appropriately skilled and informed. Unfortunately, little attention has been paid to identifying the skills and knowledge most important to the culturally competent provision of social services to Indigenous people. Weaver has conducted some of the limited field research in this area. Weaver surveyed 62 Native American social workers and social work students about their beliefs regarding cultural competence and Native American clients.<sup>461</sup> Respondents came from a range of tribal backgrounds, representing 36 Native American nations. Weaver’s survey asked respondents what they felt were appropriate knowledge, skills and values to work culturally competently with Native American clients.<sup>462</sup> Her findings are consistent with the findings of practitioners and researchers referred to above. She identified the following values and skills to be important:

- The recognition of diversity between and amongst tribes and communities;
- The importance of treaties, recognition of the sovereign status of nations, and understanding of the impacts of contemporary and past government policies in particular the effects of atrocities perpetrated against Indigenous peoples;
- Understanding of Native American culture including systems of communication, belief, values, and their world view. Common core

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<sup>461</sup> Weaver (1999) above n4.

<sup>462</sup> These three categories are those broadly considered to be necessary to culturally competent social work practice in relevant literature.

cultural values which she identified include importance of family, tradition, spirituality, respect for elders, matriarchal structures, and issues of death and mourning;

- Understanding of contemporary realities including tribal politics, Indigenous organisations, structure of reservations and urban Native American communities, Federal agencies and laws, and issues of loss and post-traumatic stress;
- The ability to define problems and solutions from a Native American perspective, and to empathise with Native American clients; and
- The ability for patience, to listen actively, to tolerate silence, and to refrain from speaking at times when they otherwise might when with Native American clients.
- She also noted the importance of practitioner wellness and self-awareness, their willingness to show humility and to learn from clients, and to respect and appreciate differences.

A study of placement prevention and reunification projects in Native American communities reviewed six projects in a wide range of settings.<sup>463</sup> The communities included a variety of cultural environments ranging from those with strong tribal identities and cultural ties to those with few bonds to tradition and cultural history. The study identified a number of implications of these contextual differences, including the greater opportunity to design services tailored to specific cultural issues, the increased need for confidentiality procedures and the higher dependence on the support of tribal leaders for successful implementation in communities which are more 'traditional.' In more urbanised communities or those which are more enmeshed in the dominant culture they found a greater need to provide services designed to enhance Native American cultural identity and that initiatives were more likely to address

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<sup>463</sup> Smollar J & French R (1990), *A Study of Six Native American Placement Prevention and Reunification Projects*, prepared by CSR Incorporated and Three Feathers Associates. The projects were conducted in urban, rural and remote communities in five different states: Mississippi, Oklahoma, Washington, Oregon, and Alaska.

disempowerment and conflict with the dominant culture. These differences illustrate the need to consider social, cultural, economic and political contextual differences and similarities when attempting to replicate projects.

Culturally competent agencies will consider factors in the lives and histories of their Indigenous clients which will influence client-agency relationships. Horejsi et al have produced a useful guide to factors contributing to what may be considered negative responses of Native American parents to child protection services.<sup>464</sup> These factors include poverty-induced feelings of helplessness which may be exacerbated by welfare intervention, racism and discrimination which can lead to fear and distrust of welfare workers, fear due to past experiences of removals of children that intervention by welfare agencies may lead to permanent removal and loss of children, and concerns that internal community politics may lead to limited access to resources and treatment by Indigenous agencies.<sup>465</sup> McKenzie and Wharf discuss the loss of citizenship attributes by many who are disaffected with an important aspect of this loss being the exclusion or marginalisation from participating in the decisions and events which affect their lives or the life of the community more generally.<sup>466</sup> It is vitally important that child and family service providers are able to integrate knowledge and reflection with practice skills.<sup>467</sup> Legislation which facilitates participation and collaboration will be of little use without effective implementation. Wide gaps often exist between legislative and policy frameworks, and their implementation in practice.<sup>468</sup>

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<sup>464</sup> Horejsi C, Heavy Runner Craig B & Pablo J (1992), 'Reactions Of Native American Parents To Child Protection Agencies: Cultural And Community Factors,' 71(4) *Child Welfare* 329.

<sup>465</sup> Ibid. These concerns were also reflected by Indigenous participants in a study of cultural care for Aboriginal and Torres Strait Islander children in out-of-home care: Libesman T (2011), *Culture Care for Aboriginal and Torres Strait Islander Children in Out of Home Care*. Melbourne: SNAICC.

<sup>466</sup> McKenzie & Wharf (2004) above n30.

<sup>467</sup> Weaver (1998) above n8.

<sup>468</sup> For a useful outline of features of culturally competent policy, and some practices recommended to implement them, see Hart R (1997), *Beginning a Long Journey: a Review of Projects Funded by the Family Violence Prevention Division, Health Canada, Regarding Violence in Aboriginal Families*. Ottawa: Health Canada, 14-15.

### *The legacy of historical removals*

An understanding of the impacts of trauma resulting from a history of forced and unjustified removals of children and culturally inappropriate service provision is necessary for effective social services policy analysis and development and child welfare program implementation with Indigenous communities.<sup>469</sup> As discussed in Chapters 5 and 6, Indigenous children and their communities have suffered enormously from practices involving the removal of children and their placement in residential schools or non-Indigenous adoptive families in different but parallel ways in Australia, Canada, the United States and New Zealand.

However, the impacts of this history, as illustrated in the case study in Chapter 3, are seldom considered by non-Indigenous agencies in practice. The Awasis Agency of Manitoba points out that:

Social work cases are not looked at within the larger context of social, economic, historical, political, and cultural realities. Blame rests with the individual ... Child and Family Services within a First Nations context must adopt a contextual perspective for service delivery to be effective.<sup>470</sup>

An atmosphere of taboo and shame still exists around the history of maltreatment of Indigenous children in a number of countries. According to Morrisette, the residential school experience of Native people throughout North America is still suppressed and some regard it as attempted cultural genocide. Yet, '(b)y better understanding client

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<sup>469</sup> McKenzie B (1997), 'Connecting Policy and Practice in First Nations Child and Family Services: A Manitoba Case Study,' in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.

<sup>470</sup> Awasis Agency (1997) above n10, 24. Part of this quote appears in upper case in the original.

cognitions and behaviours that stem from this experience, treatment plans can be designed to overcome problematic parenting patterns.’<sup>471</sup>

Strategies such as culturally appropriate placement may not resolve underlying problems. Evidence suggests that parents who themselves spent lengthy periods in adoptive placement or residential schools as children have a higher chance of experiencing parenting or substance abuse problems which lead to the removal of their children, establishing an intergenerational pattern of family breakdown and removal.<sup>472</sup> Factors which contribute to lack of parenting skills include: the absence of positive parental role models; destroyed transmission of parenting knowledge and behaviours; absence of experience of family life; and sexual abuse.<sup>473</sup> Parents who spent time in residential schools as children tend to associate discipline with non-caring, and can become over-protective of their own children, which can lead to ‘enmeshed relationships and blurred intergenerational boundaries.’<sup>474</sup>

Some program models aim to raise awareness of and educate Indigenous people about how the effects of historical factors have contributed to their contemporary realities, experiences and circumstances. In so doing, these innovative models attempt to change behaviour through education about some of the root causes of child abuse and neglect in Indigenous communities. Some of these programs are described and discussed below.

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<sup>471</sup> Morrisette P (1994), ‘The Holocaust of First Nation People: Residual effects in Parenting and Treatment Implications,’ 16(5) *Contemporary Family Therapy an International Journal* 381, 386.

<sup>472</sup> Ibid; Mannes (1993) above n22; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC) (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Sydney: Human Rights and Equal Opportunity Commission, Chapter 11.

<sup>473</sup> Morrisette (1994) above n50; Horejsi et al (1992) above n43; NISATSIC (1997) above n51; Cunneen C & Libesman T (2000), ‘Postcolonial trauma: the contemporary removal of indigenous children and young people from their families in Australia,’ 35(2) *Australian Journal of Social Issues* 99.

<sup>474</sup> Morrisette (1994) above n50, 386. Also, as referred to above, sometimes there can be a blurring between cultural expectations and understandings and framing parenting as problematic, see discussion above with respect to defining some culturally valued parenting as enmeshed and problematic.

### *Collaborative evaluation of programs*

Conventional evaluation criteria and frameworks are 'severely tested' in the context of Native child welfare. Beliefs and values underlying conventional approaches are usually those of the mainstream. Different belief systems can mean differences in objectives, indicators, understanding about the appropriateness of who does the evaluation and how the information is used.<sup>475</sup> It has been noted that, 'Too often an evaluator's desire to have a clean evaluation ignores the differences in values and belief systems.'<sup>476</sup> There is a need to render values underlying evaluation processes explicit as part of the evaluation process.

### *Standards*

The levels of cultural appropriateness and relevance of child welfare-related standards to Indigenous groups is a major issue. Culturally inappropriate standards used for determining a child's need for substitute care have been a contributor to disproportionate rates of removal in Indigenous populations.<sup>477</sup> In many places, culturally inappropriate alternate care standards lead to the placement of Indigenous children with non-Indigenous carers.<sup>478</sup> Expanding on this point, the report of a Manitoba community consultation notes:

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<sup>475</sup> For an example of a collaborative evaluation see Ricks F, Wharf B & Armitage A (1990), 'Evaluation of Indian Child Welfare: A Different Reality,' 24 *Canadian Review of Social Policy* 41, a collaborative evaluation with the Champagne/Aishihik child welfare pilot project. The evaluation team worked with a committee comprising representatives from government and band. Evaluation questions were devised by the committee, who also reviewed information and made recommendations. The process was designed to lead to ongoing joint decision-making and better understanding between government and band. The evaluation report was produced by all parties – evaluation team, government and band.

<sup>476</sup> Ibid, 45.

<sup>477</sup> First Nation's Child and Family Task Force (1993), *Children First, Our Responsibility: Report of the First Nation's Child and Family Task Force*. Manitoba: The Task Force; Mannes (1993) above n22; Community Panel (1992) above n17.

<sup>478</sup> Ibid.

The standard and procedures followed by First Nations agencies for apprehensions, placements and adoptions are provincially defined. The standards relating to foster homes on reserves are viewed from the mainstream society perspective. Most First Nations homes are unable to meet these standards ... It is not always possible to find foster or adoption homes that will pass the provincial test in the communities.<sup>479</sup>

Both the above report and policy discussion from a Manitoba regional agency consider that conventional child welfare standards are not always appropriate, and both recommend that standards should be based on holistic community-defined standards generated at the local level.<sup>480</sup> In the converse, it could be argued that appropriate standards with respect to all agencies providing culturally appropriate services and incorporating cultural care planning within case planning and out-of-home care assessments are factors which should be considered when accrediting welfare agencies and out-of-home care providers.<sup>481</sup>

### *Staffing and training issues*

A factor inhibiting increased Indigenous control of child and family services, is the shortage of trained and available Indigenous workers.<sup>482</sup> This shortfall is closely tied to the exclusion and marginalisation of Indigenous people from educational opportunities

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<sup>479</sup> First Nation's Task Force (1993) above 56, 51.

<sup>480</sup> Ibid; Awasis Agency (1997) above n10.

<sup>481</sup> Libesman T and Avgoustinos C (forthcoming), *The cultural appropriateness of LAC Assessment and Action Records for Aboriginal and Torres Strait Islander children and young people in out of home care*. Victoria: SNAICC; in the Canadian context see McKenzie B, Bennett M, Kennedy B, Balla S & Lamirande L (2009), 'Exploratory Regional Study on Child Welfare Outcomes in Aboriginal Communities.' Ontario: Association of Native Child and Family Services Agencies of Ontario. Available at:

<http://www.fncaringsociety.com/sites/default/files/docs/ANCFSAO-Final-Report-Nov2009.pdf>

<sup>482</sup> Durst D (1998), 'The Wellness of Canadian First Nations Children: Seeking Solutions Through Self-Government' in Hylton J (ed), *Aboriginal Self-Government in Canada* (2nd edition). Saskatoon: Purich; Armitage A (1993), 'Family and Child Welfare in First Nation Communities' in Wharf B (ed) (1993), *Rethinking Child Welfare in Canada*. Toronto: McClelland & Stewart, 131.

and more broadly the impacts of colonialism. Redressing capacity within communities is part of a broader need for reparation and redress for past wrongs.

Consultations with Aboriginal peoples in British Columbia found that culturally inappropriate standards for health care and social worker education have contributed to the 'gross under-representation' of Aboriginal people in these fields.<sup>483</sup> Contributors to a community consultation, in Manitoba, argued that academic qualifications were not the most important criteria for workers, as they believed that mainstream social work curricula do not meet the needs of First Nations people.<sup>484</sup> The Manitoba consultation also noted that senior management positions at First Nations agencies were usually held by non-Aboriginal staff; however, the consultation also found that family-based nepotism influenced appointments at First Nations agencies, when better qualified staff were available.<sup>485</sup> Many social work departments in universities have attempted to respond to this issue by including Indigenous content in their curricula and establishing special entry programs for Indigenous students.<sup>486</sup> In the name of increased accountability and improved standards, the Gove Report<sup>487</sup> proposed a social worker regulation scheme. Some First Nation social workers viewed this as a means of exerting control over emerging First Nations child and family services practice.<sup>488</sup> A human rights framework for regulating legislative and practice standards, as discussed in Chapters 2 and 4, could assist in overcoming cultural

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<sup>483</sup> Community Panel (1992) above n17.

<sup>484</sup> First Nation's Task Force (1993) above n56.

<sup>485</sup> Ibid.

<sup>486</sup> A particularly robust example of this, with a program established for Aboriginal students and support services in place, is the social work program at Manitoba University.

<sup>487</sup> Gove TJ (1995), *Report of the Gove inquiry into child protection in British Columbia*. British Columbia: Queens Printer. The Gove Report examined the neglect, abuse and death of a six year old boy, Matthew John Vaudreil, while under the attention of child protection system in British Columbia. See below ('Family preservation vs child protection') for further detail with respect to this report.

<sup>488</sup> Schmidt G (1997), 'The Gove Report and First Nations Child Welfare' in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.



domination and provide a bridge between mainstream and Indigenous understandings and standards.

A British Columbia consultation found that the under-representation of Indigenous staff in Indigenous child and family services has led to culturally inappropriate service delivery, and the devaluing of traditional Aboriginal healing practices.<sup>489</sup> A Manitoba consultation recommended that, except where locally sanctioned, workers should be First Nations people, and development of training programs should be based on First Nations criteria.<sup>490</sup> Where non-Indigenous workers are employed, the importance of cross-cultural training is emphasised. The Manitoba consultation stated that, ‘(c)ultural differences created chasms between non-First Nations workers and their clients.’<sup>491</sup> Stereotypical views might lead to the belief that these issues and differences might not be so relevant to Indigenous people living apparently acculturated lives in cities. However, the consultation also found that the ‘same concerns were expressed in urban areas as well as in First Nations communities.’<sup>492</sup> In addition to the shortage of Indigenous workers, a lack of supervision and administrative support is another impediment to the development and success of First Nation agencies.<sup>493</sup>

### Indigenous community control

Around the world, child welfare systems and agencies are struggling to protect their reputation and carry out their responsibilities in an environment of ever-increasing reports of abuse and neglect. There is a growing consensus among professionals and the public that there is a need for fundamental change in how child protection services

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<sup>489</sup> Community Panel (1992) above n17.

<sup>490</sup> First Nation’s Task Force (1993) above n56.

<sup>491</sup> Ibid, 56.

<sup>492</sup> Ibid. Similar concerns with respect to cultural difference between departmental officers and Aboriginal clients were expressed by Aboriginal participants in a cultural care study in Australia see Libesman (2011) above n44.

<sup>493</sup> Durst (1998) above n61.

should be conceptualised and delivered, for mainstream populations as well as Indigenous children and young people.<sup>494</sup>

The United States' 'Executive Session on Child Protection,' a three-year series of intensive three-day meetings of professionals, academics and advocates, concluded that a more collaborative, community-based approach to child protection was required.<sup>495</sup> The Session proposed that rather than child protection agencies bearing sole responsibility for protecting children, other agencies, parents and the public should jointly share responsibility in 'community partnerships for child protection.'<sup>496</sup> The Session envisaged the development of comprehensive neighbourhood-based supports and services, which draw on family networks and other informal resources. These networks are closer to, and more trusted by, families in need than traditional services. Partnerships build accountability, trust and knowledge between community and service providers. It was suggested that child protection service agencies must engage with families and natural networks of support. The Session expressed the need for 'instituting community governance and accountability for protecting children.' The Session could also envisage the development of formal community boards responsible for child protection as a viable alternative.

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<sup>494</sup> See Chapter 1 with respect to the public health care model. The extent to which a public health model will enhance a human rights framework for Indigenous children and young people's wellbeing depends on how risk factors are identified, how culture and the suppression of it are understood and, more broadly, the ways in which colonial experience is responded to at a primary level. If it is characterised as the sum of empirical manifestations of risk, such as poverty, unemployment and poor education, and at an individual level truancy, low birth weights, high rates of STDs etc then the response could miss the underlying connecting factors which result in the sum of these empirical signs of risk manifesting in many Indigenous communities. If responses to these risks contextualise them and respond both with individual and broader social and political redress then a public health models should harness and promote better outcomes for Indigenous children and young people within a human rights framework.

<sup>495</sup> Farrow F and the Executive Session on Child Protection (1998), *Child Protection: Building Community Partnerships*. Cambridge: Harvard University.

<sup>496</sup> A collaborative and interagency response for child protection has been recommended by a number of reviews into child protection services in Australia with reference to Indigenous children's needs. See discussion in Chapter 1.

Wharf and McKenzie point out, in making a general case for local community control of community services that people respect, identify with, and perform better in projects and programs when they have been involved in planning and implementation.<sup>497</sup> Given the parallel histories of dispossession and wholesale removal of children from Indigenous peoples in a number of colonised countries, the issue of community control is particularly important for Indigenous peoples. A report based on a review of 15 Health Canada-funded Family Violence Prevention projects planned and implemented by Aboriginal people made the following observation with respect to Indigenous control of child welfare services:

As ownership of family-related services has increasingly passed to Aboriginal control, it has become evident that simply staffing those services with Aboriginal people is only part of the answer. The services themselves need to be designed by Aboriginal people to make them work as a reflection of the host community and the belief system found there.<sup>498</sup>

The transfer of agency responsibility from mainstream to Indigenous agencies has illustrated the importance of collaboration between mainstream and Indigenous agencies in processes of change and the importance of capacity building within Indigenous agencies for effective Indigenous agency service provision.<sup>499</sup> Transfer of agency responsibility needs to be matched with adequate funding and capacity building both within agencies and within the broader community which is being served.<sup>500</sup>

In 1993, an Ontario Aboriginal committee produced an Aboriginal family healing strategy, developed through a community consultation process involving 6000 Aboriginal people throughout the Province. The strategy 'sees the empowerment

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<sup>497</sup> Wharf B & McKenzie B (1998), *Connecting Policy to Practice in the Human Services*. Ontario: Oxford University Press.

<sup>498</sup> Hart (1997) above n47, 12.

<sup>499</sup> See discussion in Chapters 5 and 6 (in particular the Manitoba case study in Chapter 5).

<sup>500</sup> Hudson P & McKenzie B (2003), 'Extending Aboriginal control over child welfare services: The Manitoba Child Welfare Initiative,' 51 *Canadian Review of Social Policy* 56, 63 -65.

of Aboriginal people as being a central component in the healing of individuals, families, communities, and Aboriginal Nations.’<sup>501</sup> The strategy required Aboriginal community control and funding for its design and implementation. This process would depend on a provincial government commitment to devolving authority to the Aboriginal community. The strategy also outlined a suggested scheme for the phased devolution of authority for child protection to Aboriginal people. The phased handover of authority proposed in the Ontario Strategy involved the establishment of a joint management committee, with provincial government and Aboriginal community members. In the first phase, programming would continue under provincial Ministry mandates while beginning to share control over family healing programs. In the medium to long term, full control would be devolved to Aboriginal communities.

The phasing aspect of the scheme was designed to accommodate differing levels of community readiness. This aspect of the scheme may be adaptable, as the levels of social, physical, economic and political resources and infrastructure are likely to vary considerably between communities. A relative resource deficit is not necessarily a good reason to postpone a phased transfer of responsibility for child welfare to Aboriginal communities. Such a process, if planned and supported, can be part of a capacity building process within such communities. Many existing Indigenous-controlled child and family services appear to have a good record for improving child welfare outcomes in their communities. Below are two examples of successful Canadian services.

Weechi-it-te-win Family Services (WFS) is a regional tribal agency responsible for delivery of child and family services, including child protection, to ten Ontario First Nations reserves. WFS was the first Aboriginal agency in Ontario. It is funded by the Ministry of Community and Social Services, Ontario and the Department of Indian

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<sup>501</sup> Aboriginal Family Healing Joint Steering Committee (1993) above n29, 3.

Affairs. The following discussion is drawn from the report of an operational review of the WFS service.<sup>502</sup>

Some funding was transferred from the mainstream Provincial service to WFS in 1986, and full responsibility for child welfare was assumed by the agency in 1987. A new approach to child protection was implemented, using a cooperative system of Aboriginal child placement and applying an Aboriginal child placement principle which mirrors that of the New South Wales legislation.<sup>503</sup> WFS's service model emphasises family preservation and community development work to assist in the healing of the whole community, with minimal formal intervention and substitute care. A consensual system of 'customary care' was established, with a local Tribal worker, a WFS worker and the family and/or other community members drawing up a 'Care and Supervision Agreement' together for each case. The Agreement is formally sanctioned by a resolution of the Chief and Council of the First Nation. Under the WFS system, consensus may be achieved by: a) agreement between the family and the family services worker; b) agreement between the committee and the family; and c) referral to the First Nation's council. Between 1988 and 1995, at least 85% of placements were arranged through Agreements rather than through mandatory mainstream methods. Where agreement is not reached, WFS applies for a hearing in a family court.

The WFS Community Care Program offers family support and child care services as well as child protection. Its principles include a focus on tradition, family and extended family, and community control and orientation. The family services committee at each First Nation community is responsible for assessment, placement and support services. WFS operates under the provincial Ontario *Child and Family Services Act*. They would however prefer legislation which recognises their jurisdiction and which validates their Indigenous frame of reference. However, their delegated authority, which accords them

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<sup>502</sup> Weechi-it-te-win Family Services (2005), *Building Healthier Communities: A Report of the Operational Review of Weechi-it-te-win Family Services*, unpublished report, Ministry of Community and Social Services, Ontario.

<sup>503</sup> See the 'Aboriginal placement principle' in NSW legislation discussed in Chapter 6.

increased control over child protection, has afforded a good deal of flexibility with respect to how they look after Indigenous children's welfare and wellbeing.

The West Region Child and Family Services (WRCFS), a child welfare agency which serves nine Manitoba First Nation communities, is another example of a successful Indigenous-controlled agency. McKenzie's case study of the service was drawn from results of a 1994 WRCFS program evaluation conducted by the same author, and a participatory research project funded by the agency.<sup>504</sup> In the 1994 evaluation, the average score out of five for agency success granted by community respondents was 3.9; which is very high for a service with such a difficult mandate as child protection. One of the two most important agency goals nominated by community respondents was 'to deliver community-based culturally appropriate services.'<sup>505</sup> Stated agency goals are closely in line with community feeling on these issues, as three important agency principles, which were also used as evaluation criteria, are:

- Aboriginal control;
- Cultural relevance; and
- Community-based services.

Overall, the evaluation concludes that WRCFS's holistic approach to service-delivery was effective. Important factors considered to contribute to agency success were:

- Autonomy and control over services and policies, flexibility and creativity;
- Sound, supportive, progressive leadership; and
- Collaborative approach involving the community and which is empowering.<sup>506</sup>

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<sup>504</sup> McKenzie (1997) above n48.

<sup>505</sup> Ibid, 12.

<sup>506</sup> McKenzie (1997) above n48.

### *Accountability*

A number of accountability-related issues arise in the international literature on Indigenous child welfare. This chapter will focus primarily on the one which arises most frequently, and causes the greatest concern: political or personal interference with, and influence over, Indigenous-controlled child and family services. This is a serious issue, which compromises the probity and effectiveness of some Indigenous agencies, and leaves Indigenous women and children the greatest losers. Other issues associated with devolved authority which will be addressed include: the problem of determining specific responsibilities where divided authority creates multiple accountability; and the capacity of local services to provide assured child protection; and confidentiality. Consideration is then given to responses to these accountability issues.

The issue of political interference arose most frequently in the Canadian, Australian, and New Zealand literature, and there was only limited reference to this issue in the United States material reviewed. This may reflect differences in research or differing practices. The most critical reference to political interference found in this review was in the report of a Manitoba Indigenous community consultation. Many of those consulted stated that Chiefs, councillors, directors, staff and other influential community members interfered improperly in child welfare cases. Presenters 'said that abusers pursue and perpetrate atrocities with impunity. Among them are influential members of communities. Presenters described them as "untouchables" and refuse to identify them for fear of reprisal.'<sup>507</sup> The consultation task force heard of widespread physical and sexual abuse, existing within a culture of silence. Sometimes placement was selective, with children being placed in the homes of those favoured by an agency, worker or Chief.<sup>508</sup>

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<sup>507</sup> First Nation's Task Force (1993) above n56, 37.

<sup>508</sup> The issue of reformed governance practices to make it safer to report and have response to allegations of child sexual assault in communities is also discussed in the context of Australian reviews see Chapter 1.

Allegations of abuse cover-ups and the protection of relatives were also made in the Giesbrecht report which followed the suicide of an adolescent in the care of a First Nations agency, Dakota Ojibway Child and Family Services.<sup>509</sup> The Giesbrecht report and the external reviews of the Manitoba child welfare system specifically cited political interference by powerful community members as an impediment to the development of First Nation child and family services agencies.<sup>510</sup> Gray-Withers states that First Nation women's groups accused Chiefs of 'complicity and political self-serving interference' following the suicide referred to above, other deaths in care and the leaving of other children in abusive homes.<sup>511</sup> Other works claim that urban-based Aboriginal women's groups were the first to publicly raise concerns about the impact of political interference by First Nation's community leaders on child and family services.<sup>512</sup>

The apparent political interference in some Canadian Indigenous child welfare matters is closely linked to the small size of many First Nations communities. Health or social workers and police are likely to know, or be related to, the victim or the perpetrator. The close proximity of these various parties involved in child protection matters is likely to engender bias.<sup>513</sup> Although women had a powerful place in traditional First Nation's culture, men dominate today. The colonising culture is a factor which has impacted on

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<sup>509</sup> Giesbrecht B (1992), *The Fatality Inquiries Act: Report by Provincial Judge on Inquest Respecting the Death of Lester Norman Desjarlais*. Manitoba: Department of Justice; The following reports reviewed deaths of Aboriginal children under the care of Aboriginal child welfare agencies: Hardy M, Schibler B & Hamilton I (2006), *Strengthen the Commitment: An External Review of the Child Welfare System*. Manitoba: Office of the Ombudsman; Schibler B & Newton J (2006), *Honouring their Spirits: The Child Death Review*. Manitoba: The Office of the Children's Advocate.

<sup>510</sup> Durst (1998) above n61.

<sup>511</sup> Gray-Withers D (1997), 'Decentralised Social Services and Self-Government: Challenges for First Nations' in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.

<sup>512</sup> McKenzie (1997) above n48; McKenzie B, Seidl E & Bone N (1995), 'Child Welfare Standards in First Nations: A Community-Based Study' in Hudson J & Galaway B (eds), *Child Welfare in Canada: Research and Policy Implications*. Toronto: Thompson Educational Publishing.

<sup>513</sup> Dumont-Smith C (1995), 'Aboriginal Canadian Children who Witness and Live with Violence' in Peled E, Jaffe PG & Edleson JL (eds), *Ending the Cycle of Violence: Community Responses to Children of Battered Women*. Thousand Oaks: Sage Publications, 275.



the adoption by many First Nation's men of negative attitudes and behaviour towards women.<sup>514</sup> One source estimates that 80% of Canadian Aboriginal women suffer physical, psychological, sexual and other forms of abuse.<sup>515</sup> This abuse is often seen as a private family matter in Aboriginal communities. As a result, little intervention from relatives or others occurs. Support services are often unavailable, and Chiefs or council members are unlikely to be charged over domestic violence matters.<sup>516</sup>

These problems can be exacerbated by processes instituting self-government and First Nation's control of child and family services. In reporting on a series of interviews with First Nation's women, Gray-Withers stated:

(T)here has been little credence or academic attention paid to First Nations women's control over social services or input into self-government initiatives. Native women's groups have been vocal in their criticism of self-government where it entails the further domination of First Nations men over the lives of women and children.<sup>517</sup>

Gray-Withers also contends that this gender-based power imbalance undermines child protection:

In many communities, the male-dominated Native leadership has hidden and perpetuated problems of child abuse ... A process of empowerment for women and their communities will need to occur to allow for true community development and the acceptance of responsibility for current problems.<sup>518</sup>

Some First Nation's women fear that the achievement of self-government would cement power in the hands of the generally male Chiefs and in response have favoured regional control of child welfare, in the hope that Chiefs would have less

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<sup>514</sup> Gray-Withers (1997) above n90; First Nation's Task Force (1993) above n56.

<sup>515</sup> Dumont-Smith (1995) above n92.

<sup>516</sup> Ibid.

<sup>517</sup> Gray-Withers (1997) above n90, 86.

<sup>518</sup> Ibid, 89.

influence over child welfare outcomes in the absence local control.<sup>519</sup> Male violence and a breakdown of order within Indigenous communities has also been recognised as a significant problem in many communities in Australia, the United States and Canada.<sup>520</sup>

When authority for child and family services is handed over to Indigenous agencies, accountability can become more fragmented. Armitage highlights the co-ordination problems which often ensue between organisations and jurisdictions:

The establishment of independent First Nation family and child welfare organisations has the effect of dividing authority between mainstream provincial agencies and independent First Nation organisations. The result is diminished accountability in the child welfare system as a whole. At a practical level single accountability for the welfare of children and advocacy for them as individuals is lost because of the fragmentation of authority.<sup>521</sup>

It is important to stress that this ‘diminished accountability’ is not a specific result of the involvement of Indigenous organisations, but simply a result of adding to the number of stakeholder organisations responsible for the child. First Nation’s agencies may be accountable to provincial and federal governments, as well as to their people.<sup>522</sup>

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<sup>519</sup> Ibid; Durst (1998) above n61.

<sup>520</sup> See Chapter 1 with reference to reviews into sexual abuse of children in Indigenous communities and Chapter 4 for an analysis of the rule of law and establishing peace and order within Indigenous communities.

<sup>521</sup> Armitage (1993) above n61, 169.

<sup>522</sup> Hudson P & McKenzie B (1987), *Evaluation of the Dakota Ojibway child and Family services*. Winnipeg: Department of Northern and Indian Affairs; Hudson P & Taylor-Henley S (1987), *Agreement and Disagreement: An Evaluation of the Canada-Manitoba Northern Indian Welfare Agreement*. Winnipeg: University of Manitoba as cited in Armitage (1993) above n61.

Where regionalised First Nation's agencies exist, there often appears to be a struggle between them and their member organisations. The regional body wishes to assert a certain level of control in order to ensure that it meets its accountability obligations to government, both with respect to policy implementation and financial responsibility. Local groups feel that they know the needs of their communities best, and also seek greater control.<sup>523</sup> All of the 22 First Nation women interviewees consulted in one research project confirmed that there was conflict between regional offices and local Chiefs.<sup>524</sup> This issue is also touched on in the operational review of an Ontario regional tribal agency. Weechi-it-te-win Family Services (WFS) is responsible for delivery of child and family services, including child protection, to ten First Nation's reserves. Service agreements establish each First Nation as a service provider accountable to WFS for services provided to community members. WFS is itself in turn accountable to the (provincial) Minister of Community and Social Services, and also to the Chiefs and their First Nations for implementing its stated program. The review states that accountability has been an ongoing 'bone of contention' between WFS and the individual reserves, but does not furnish further detail.<sup>525</sup>

Some researchers have called for local communities to exercise caution in seeking a child protection mandate. In 1997, McKenzie conducted an evaluation-oriented case study of the West Region Child and Family Services (WRCFS), a child welfare agency which serves nine Manitoba First Nation communities. In the report, he noted that 'in some Manitoba communities the goal of local autonomy has been pursued without adequate assurance of the community's capacity to respond to the complexity of needs within families and to guarantee children a basic right to protection.'<sup>526</sup> This concern was more recently reiterated in the external review reports into Manitoba's child and family services system which followed the death of a five year old child. The external reviews found that the Manitoba initiative to transfer responsibility for child welfare to Aboriginal

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<sup>523</sup> Gray-Withers (1997) above n90.

<sup>524</sup> Ibid.

<sup>525</sup> Weechi-it-te-win Family Services (1995) above n81.

<sup>526</sup> McKenzie (1997) above n48, 103.

agencies was a 'major step forward' that the problems which were identified with the child welfare system predated the transfer and that reforms should be made in the spirit of the Manitoba child welfare initiative. The response to these reviews has been a reform program which attempts to address the underlying causes of family breakdown through early intervention and prevention, strengthening support services for out-of-home care, increasing support for case workers and governance of the service delivery agencies and increasing funding for the services.<sup>527</sup>

The last accountability issue to be dealt with in this chapter is confidentiality. Two issues which arise are the difficulty in maintaining confidentiality in small communities,<sup>528</sup> and the related problem of child welfare workers not always managing to keep information classified. Confidentiality is difficult to maintain in small communities and this may inhibit the use of some service models.<sup>529</sup> A paper reporting on domestic violence programs involving Native American women notes that some women did not participate in traditionally-oriented group work due to fears about confidentiality. This is an issue in both reservation and urban communities.<sup>530</sup>

It is important to recognise that current mainstream child welfare systems also have unresolved accountability gaps and significant problems. The complex accountability maze which Indigenous agencies are presented with under partial or interim authority arrangements makes them susceptible to accountability concerns. Although, as discussed above, the establishment of regional peak agencies may result in disputes between these bodies and their constituent community groups, regionalised models do

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<sup>527</sup> See discussion in Chapter 5. Child and Family Services Standing Committee (2010), *Progress on the Changing for Children Initiative*. Available at:

[http://www.changesforchildren.mb.ca/reports/progess\\_report\\_2010.pdf](http://www.changesforchildren.mb.ca/reports/progess_report_2010.pdf)

<sup>528</sup> Carr J & Peters M (1997), *Assessment of Multi-Disciplinary Child Protective Teams in Five Western Washington Communities: Chehalis, Nisqually, Shoalwater Bay, Skokomish, Squaxin Island*. Thesis (MPA), The Evergreen State College, Washington, 98.

<sup>529</sup> Ibid.

<sup>530</sup> Norton IM & Manson SM (1997), 'Domestic Violence Intervention in an Urban Indian Health Centre,' 33(4) *Community Mental Health Journal* 331.

appear to offer better accountability than fully localised ones.<sup>531</sup> WRCFS, the agency evaluated in McKenzie's above-mentioned report, is a good example of a regionalised service. WRCFS has a regional abuse unit which initially investigates notifications, and assists local workers who then take responsibility for follow-up services and case management. McKenzie states:

This model is quite effective in assuring required expertise in investigations, while protecting local community staff from some of the conflicts that can occur around initial abuse referrals in small communities.<sup>532</sup>

The establishment of regional agencies is one possible response to some of the accountability issues facing Indigenous child and family services. Below are a range of other strategies and initiatives:

- A system of accountability to an authority outside the community political leadership;<sup>533</sup>
- Agency adoption of a political interference/conflict of interest protocol which involves sanctions for non-compliance;<sup>534</sup>
- The creation of suitable forums for disputes and grievances to ensure fair and just process;<sup>535</sup>
- The establishment of inter-community child protection teams with members from each community in a given area 'could help protect abused children caught in a political battle within a tribe';<sup>536</sup>
- The creation of a national Indigenous child welfare commission;<sup>537</sup>
- The substitution of state or provincial legislation with comprehensive federal legislation, in order to simplify the accountability maze;<sup>538</sup> and

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<sup>531</sup> Gray-Withers (1997) above n90; McKenzie et al (1995) above n91.

<sup>532</sup> McKenzie (1997) above n48.

<sup>533</sup> Gray-Withers (1997) above n90; McKenzie (1997) above n48.

<sup>534</sup> First Nation's Task Force (1993) above n56.

<sup>535</sup> Ibid.

<sup>536</sup> Carr & Peters (1997) above n107, 99.

<sup>537</sup> Durst (1998) above n61.

<sup>538</sup> Ibid.

- Formal confidentiality agreements should be signed by child protection team members.<sup>539</sup>

A number of these strategies could be used in conjunction with each other, within a human rights legislative framework which prioritises the security and wellbeing of the child and provides redress for internal abuse or corruption.<sup>540</sup>

Any child welfare framework, whether it be Indigenous or mainstream, must provide protection for the most vulnerable members of the community. In Chapters 2 and 4 the legal and moral foundations for inclusion of Aboriginal organisations within a human rights framework for child welfare were outlined. Legal and service delivery for child welfare within a human rights framework must have the capacity to challenge and check governance which facilitates violence and intimidation. It also must have adequate resources to respond to children and young people's needs. The problem with a transfer of responsibility with inadequate resourcing is evident in the findings of the external reviews into the Manitoba child welfare system referred to above and is being contested more broadly in the claim by the First Nations Caring Society under the *Canadian Human Rights Act* against Canada.<sup>541</sup> Accountability where responsibility for child welfare has been transferred to Aboriginal agencies depends on both internal community governance structures and governments being accountable for adequately resourcing the transfer and ongoing service provision by Aboriginal agencies.

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<sup>539</sup> Carr & Peters (1997) above n107.

<sup>540</sup> See Chapters 2 and 4 with respect to human rights and the protection of vulnerable minorities from intra community abuse and the exercise of judgement within a human rights framework with respect to Indigenous child welfare.

<sup>541</sup> See discussion of this claim in Chapter 5.

### *Traditional healing and cultural revival*

A number of authors and reports emphasise that for many Indigenous peoples, mental, emotional, spiritual and physical health are interdependent and inseparable.<sup>542</sup> The efficacy of spiritual remedies is often not respected in conventional social work practice.<sup>543</sup> A report by the Awasis Agency of Manitoba notes that: 'Innovative approaches to dealing with families are seldom examined ... First Nations practice requires the adoption of an integrative approach, addressing cognitive, emotional, physical and spiritual development.'<sup>544</sup> Horejsi et al contend that: 'The most effective parent training programs are those that blend principles derived from modern child development with the spirituality, customs, traditions and other cultural ways of their tribe.'<sup>545</sup> A number of studies have called for collaborative traditional and western ways of assessing abuse and neglect and then when necessary looking after children and young people in out-of-home care.<sup>546</sup> Interviews with urban clients of a Toronto Aboriginal service revealed the significance for clients of a link to Aboriginal culture and community, and use of Aboriginal approaches in the healing process.<sup>547</sup> Parallel findings

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<sup>542</sup> See, for example, Blackstock (2011) above n12; Voss et al (1999) above n7; Barlow A & Walkup J T (1998), 'Developing Mental Health Services for Native American Children,' 7(3) *Child and Adolescent Psychiatric Clinics of North America* 555; Awasis Agency (1997) above n10; Connors (1993) above n23.

<sup>543</sup> Blackstock (2011) above n12; Voss et al (1999) above n7.

<sup>544</sup> Awasis Agency (1997) above n10, 25.

<sup>545</sup> Horejsi et al (1992) above n43, 335.

<sup>546</sup> The following Indigenous social welfare programs either focus on traditional healing methods, or use a combination of traditional Indigenous and conventional western methods. The Cheyenne River Sioux tribe introduced programs and a facility which draws on tribal practices. These include treatment and delinquency prevention programs employing 'inipi' or sweat lodge and 'hanbleceya' or pipe fast. See Voss et al (1999) above n7. In New Zealand the 'Mana Kainga Programme: Model of Family Empowerment' emphasises Maori spirituality and the involvement and importance of extended family, and inclusion of tribal links and genealogy in the programme. See Herbert A & Te Kanawa D (1998), 'The Mana Kainga Programme: Practice and Research Perspectives – A Manaipoto Model of Family Empowerment,' unpublished paper presented at the 12<sup>th</sup> *ISPCAN International Congress*, Auckland, September 1998. On the Lac du Flambeau Indian Reservation in Wisconsin, a Native American program targeting substance abuse among high-risk youth adopted a 'family systems' approach. The program integrated traditional Ojibwe values, beliefs and traditions into the local contemporary lifestyle, in an attempt to facilitate healthy family functioning. See Connors (1993) above n23.

<sup>547</sup> Anderson K (1998), 'A Canadian Child Welfare Agency for Urban Natives: The Clients Speak,' 77(4) *Child Welfare* 441.

were made with respect to cultural care for Aboriginal and Torres Strait Islander children and young people in out-of-home care in Australia.<sup>548</sup>

McKenzie notes that holistic healing is important 'because it transcends the notion of helping in the narrow therapeutic sense. Instead, it emphasises the resilience of First Nation people, and their ability to utilize self-help and cultural traditions as a framework both for addressing problems and supporting future social development at the community level.'<sup>549</sup> Barlow and Walkup describe Native American concepts of health as flowing from a relational world view, in which health or wellbeing 'focus on bringing the individual back into harmony by balancing cognitive, spiritual, physical, emotional and environmental forces. Indigenous remedies may appear to be illogical by Western thought, because they are working on multiple factors rather than on a single diagnosed cause.'<sup>550</sup> This view contrasts with the linear Western model predicated on cause and effect. Traditional Canadian and US Indigenous philosophy is often symbolised using the 'Sacred Circle' or 'Medicine Wheel,' which emphasise the interrelatedness of all things. This philosophy informs an Indigenous understanding of healing processes as involving the whole community, rather than just the individual(s) or family concerned.<sup>551</sup> (See also discussion below with respect to the Community Holistic Circle Healing Project (CHCH) as a response to sexual abuse within Aboriginal communities below.)

### *Strengths vs deficits*

Conventional social work practice generally operates using a 'deficit reduction' model of intervention, which attempts to respond to perceived weaknesses in the individual.<sup>552</sup> Research also tends to approach Aboriginal families with a deficit model, rather than looking for strength, yet using Western clinical notions this

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<sup>548</sup> Libesman (2011) above n44.

<sup>549</sup> McKenzie (1997) above n48, 108.

<sup>550</sup> Barlow & Walkup (1998) above n124, 561.

<sup>551</sup> Connors (1993) above n23. See also discussion below with respect to the Community Holistic Circle Healing Project (CHCH) as a response to sexual abuse within Aboriginal communities.

<sup>552</sup> Voss et al (1999) above n7; Awasis Agency (1997) above n10.



may itself be iatrogenic.<sup>553</sup> This view is supported by research conducted by Kalyanpur.<sup>554</sup> The author conducted qualitative interviews with on-reservation Native American mothers and participant observations of a parent support group. The research aimed to investigate the implications of cultural blindness on the part of outside social services professionals. The professionals were a psychologist and a teacher, both Anglo-American, and a Native American home-school liaison officer. These workers concluded that the mothers' reticence to use outside services resulted from stubbornness or defiance, while Kalyanpur found that these responses were based on historical trauma and an orientation towards 'looking after their own.'

The 'strengths perspective'<sup>555</sup> in social work embraces concepts of empowerment, collaboration, healing from within and suspension of disbelief.<sup>556</sup> Aboriginal children's agencies find that a strengths perspective is more compatible with their communities than prevailing social work pedagogy and practice, which is generally Eurocentric and this view is also supported by research which suggests that Indigenous child and family services will be enhanced by harnessing cultural strengths.<sup>557</sup> Voss et al call for a 'multigenerational family-centred strengths perspective' social work model for Lakota communities, in place of the 'individual deficit intervention' model.<sup>558</sup> The strengths perspective is compatible with many Indigenous communities' values, which emphasise participation of the family, extended family and community in the healing process.<sup>559</sup>

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<sup>553</sup> Red-Horse J (1997), 'Traditional American Indian Family Systems Families,' 15(3) *Systems and Health* 243.

<sup>554</sup> Kalyanpur (1998) above n9.

<sup>555</sup> Saleebey D (1992), *The Strengths Perspective in Social Work Practice*. New York: Longman.

<sup>556</sup> Voss et al (1999) above n7.

<sup>557</sup> Tong & Cross (1991) above n2; Voss et al (1999) above n7; Awasis Agency (1997) above n10; Bamblett M (2007), 'Ten years of truth telling: what *Bringing Them Home* means to us all' in Secretariat of National Aboriginal and Islander Child Care (ed), *Remember Me – Commemorating the Tenth Anniversary of the Bringing Them Home report*. Melbourne: SNAICC, 8-12.

<sup>558</sup> Voss et al (1999) above n7.

<sup>559</sup> Libesman (2011) above n44.

### *Healing through education and decolonisation*

Indigenous groups involved with child welfare agree that child abuse and neglect problems in their communities result to a large extent from the effects of colonisation.

A Canadian service puts it this way:

Within the Native community, the child welfare system is a system that deals with the symptoms of larger social problems – racism, poverty, underdevelopment, unemployment, etc. [We regard] child welfare problems as the result of the colonial nature of relations between the aboriginal people and the Euro-Canadian majority.<sup>560</sup>

Duran et al describe the ‘American Indian soul wound’ as the effect of history of trauma and genocide of Native American people – an intergenerational post-traumatic stress disorder, with symptoms including ‘depression, alcoholism, domestic violence, and suicide.’<sup>561</sup> ‘Acculturative stress’ is also part of the wound. Symptoms include anxiety, depression, feelings of marginality and alienation, and identity confusion. The authors outline a ‘survivor syndrome’ where intergenerational unresolved collective grief causes ongoing emotional repression, and compare this with that experienced by Jewish holocaust survivors.

However, few child welfare service models developed for or by Indigenous people respond directly to the colonial causes of these problems, and little of the theoretical commentary engages with them. Connors notes that the increasing training and involvement of First Nations people in their own healing is accompanied by the acknowledgement that ‘true healing in First Nations requires that social, gender,

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<sup>560</sup> Ma Mawi Wi Chi Itata (1985), *First Annual Meeting Report*. Winnipeg: Ma Mawi Wi Chi Itata Centre, cited in Armitage (1993) above n61, 159.

<sup>561</sup> Duran E, Duran B, Brave Heart MYH & Horse-Davis SY (1998), ‘Healing the American Indian Soul Wound in Danieli’ in Danieli Y (ed), *International Handbook of Multigenerational Legacies of Trauma*. New York: Plenum Press, 341.

cultural and political issues must be addressed in the healing process.<sup>562</sup> The complexity of contemporary social issues experienced by many Indigenous children and young people are particular to their history and contemporary colonial experiences. These transcend the boundaries and experiences of traditional cultural responses but are not effectively addressed by contemporary western child welfare approaches, as the Chapter 3 case study demonstrates. The serious nature of social breakdown and abuse experienced by many Indigenous children requires a responsiveness to contemporary problems which is innovative and neither romanticises the past nor patronises or fails to harness the strength of culturally founded responses. Drawing on the strengths of western and Indigenous practices, within a dynamic conceptualisation and practice of culture and tradition, is modelled in contemporary Indigenous children's agencies, such as the Victorian Aboriginal Children's Agency (VACCA) in Australia. (See discussion with respect to VACCA in Chapter 6.)

Research by Brave Heart-Jordan<sup>563</sup> found that Lakota clients who engaged with traditional healing found workshops 'made their lives more meaningful and helped to liberate them to address the symptoms of ongoing neo-colonialism that other health systems were not aware of.'<sup>564</sup> Other findings include:

- Educating people about historical trauma leads to increased awareness of its impact and symptoms;
- The process of sharing experiences with others of similar background leads to a cathartic sense of relief;
- The healing and mourning process resulted in an increased commitment to ongoing healing work at an individual and community level.<sup>565</sup>

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<sup>562</sup> Connors (1993) above n23, 55.

<sup>563</sup> Brave Heart-Jordan MYH (1995), *The return to the sacred path: Healing from historical trauma and historical unresolved grief among the Lakota*. Northampton: Smith College School for Social Work (thesis) cited in Duran et al (1998) above n140, 349.

<sup>564</sup> Duran et al (1998) above n140, 352.

<sup>565</sup> Ibid, 351.

Very high proportions of respondents were favourable about traditional healing in terms of grief resolution, feeling better about themselves and improved parenting.<sup>566</sup>

Rokx and colleagues in New Zealand have developed a parenting model which takes the effects of colonisation on Maori child-rearing practices into consideration.<sup>567</sup> The *Atawhaingia Te Pā Harakeke* model is delivered to male Maori clients in two New Zealand prisons. The model's 'decolonisation' process is intended to educate participants about contemporary Maori socio-political contexts, and the role of colonial history and ongoing neo-colonial factors in contemporary society. Examples of the high status of women in traditional Maori society are discussed with references to classical text and verse, and participants are asked to consider the relationship dynamics that were modelled by their own parents. These dynamics are usually negative, and mirror the types of relationships they have with their own partners. Participants are taught about the initial and ongoing breakdown of traditional systems, values, beliefs and practices around caring for children, and traditional family structures, which occurred as a result of white settlement. The training addresses issues of power and control, in general terms and then personally. Participants are encouraged to position their own family backgrounds into the social history of New Zealand, and then to focus on the specific circumstances of their upbringing. Participants set parenting goals, with a view to improved parenting through connecting with traditional values. The *Atawhaingia Te Pā Harakeke* model has been extended into other educational spheres for Maori families across New Zealand.<sup>568</sup>

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<sup>566</sup> Brave Heart-Jordan (1995) above n142.

<sup>567</sup> Rokx H (1998), *Atawhaingia Te Pā Harakeke: Nurture the Family*, unpublished paper presented at the International Society for the Prevention of Child Abuse and Neglect's Twelfth International Congress on Child Abuse and Neglect, Auckland New Zealand, September 1998.

<sup>568</sup> Many variations of *Atawhaingia Te Pā Harakeke* have developed across New Zealand, as have related children's programs called *He Taonga Te Mokopuna*, which again draws on traditional approaches to supporting Maori children, weaving these with the most recent theory and best practice, particularly for children in difficult and at risk situations. More information available here:

### *Community awareness raising/education*

Some child abuse and neglect intervention projects attempt to bring about change through strategies involving community-wide awareness raising. A number of reviews into child sexual abuse in Indigenous communities in Australia have recommended community education together with other individual child protection responses for victims and criminal law responses with respect to perpetrators.<sup>569</sup> Cross and LaPlante argue that a great constraint to child abuse and neglect interventions in Native American communities is denial, and that grassroots community involvement can assist to address this.<sup>570</sup> They point out that prevention can be grounded in traditional values and principles. Although acknowledging the substantial breakdown of tradition in some communities, what remains can be drawn upon.<sup>571</sup>

Lajeunesse reports that the Hollow Water community of Manitoba began a program of community awareness and education in 1987.<sup>572</sup> The environment of greater trust which followed saw a dramatic increase in the number of sexual abuse disclosures (see discussion of responses to sexual abuse and the Hollow Water program below). Cross and McGregor's 1995 report documents the evaluation of a project whose goals included raising public awareness in Native American communities about the links between child abuse and neglect and

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[http://www.minedu.govt.nz/NZEducation/EducationPolicies/MaoriEducation/AboutMaoriEducation/WhoWeAre/EngagementWithMaori/HuiTaumataMatauranga/HuiTaumataMataurangaSeptember2004QA/Whanau\\_Involvement.aspx](http://www.minedu.govt.nz/NZEducation/EducationPolicies/MaoriEducation/AboutMaoriEducation/WhoWeAre/EngagementWithMaori/HuiTaumataMatauranga/HuiTaumataMataurangaSeptember2004QA/Whanau_Involvement.aspx)

<sup>569</sup> See Chapter 1 for an overview of Australian reviews.

<sup>570</sup> Cross T & La Plante J (1995), *Grassroots Prevention of Child Abuse and Neglect in Indian Communities: A Guide for the Community Organizer*. Portland: National Indian Child Welfare Association.

<sup>571</sup> Ibid, 27.

<sup>572</sup> Lajeunesse T (1993), *Community Holistic Circle Healing: Hollow Water First Nation*. Ottawa: Minister of Supply and Services. This program was the first stage to the CHCH model elaborated on in the FGC section.

substance abuse.<sup>573</sup> Radio and newspaper announcements were used; posters, pamphlets and a periodical newsletter were produced. This was a large-scale project – all tribes in the United States with a child welfare program received promotional and planning information. A range of substance abuse organisations were engaged to ‘raise awareness about and enhance their capacity to prevent abuse and neglect of Indian children by substance abusing parents and caregivers.’ An evaluation of the project was conducted through surveys, phone interviews and focus groups, ‘to assess the materials developed and their impact on Native American communities.’ Responses were consistently positive, and indicated significant knowledge was imparted in culturally appropriate ways. Survey materials were prepared in language appropriate to the culture and educational background of the target groups. The authors state that the project considerably exceeded its goals and the federal funding agency (NCCAN) subsequently extended it.

Cross and LaPlante contend that grass roots approaches are valuable because communities are full of under-utilised resources – people such as ‘natural helpers’ and past victims, whose first-hand experience is invaluable. The authors cite the example of a grassroots child abuse and neglect prevention campaign developed by the Siletz Tribe in Siletz, Oregon, where there was a high rate of abuse and neglect.

The program began with the local Indian Child Welfare office holding a community meeting in order to form a committee of concerned community members. The committee surveyed the community to obtain a local definition of child abuse and neglect. They then planned events such as awareness activity where community members were sent a blue ribbon with instructions to affix it to their cars at a designated time, to show support for child abuse and neglect prevention. Another activity was a ‘Family Fun Fair,’ with a focus on children’s

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<sup>573</sup> Cross TL & McGregor K (1995), *Linking Child Abuse and Neglect with Substance Abuse in Native American Communities*. Portland: National Indian Child Welfare Association.

activities, but also an outside speaker who related her own experience with child abuse and neglect. The authors make a range of suggestions for other communities considering similar interventions. These include:

- Involvement of ‘key participants’ such as teachers, spiritual leaders, elders, community health workers;
- Assessment of the communities strengths, weaknesses and needs and the extent of child abuse and neglect; and
- Formulation of definitions of child abuse and neglect.

The authors stress the importance of community involvement in such initiatives and networking through local agencies, institutions, media, programs, parents and elders.

#### *Sexual abuse: Traditional healing and offender treatment*

Rates of child abuse and neglect are almost universally higher in Indigenous populations, compared to non-Indigenous populations, in colonised countries. The following factors contribute to the high rates of sexual abuse:<sup>574</sup>

- A disconnection from and breakdown of Aboriginal community values, thinking and behaviour;
- A breakdown of traditional values and practices of sexuality;
- The experience of sexual abuse and denial of sexual identity role models in residential schools and foster homes;
- The disinhibiting effects of alcohol and other drugs;
- crowded, blended family environments where sexual abuse often occurs between stepfathers and teenage daughters; and

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<sup>574</sup> Connors E & Oates M (1997), ‘The Emergence of Sexual Abuse Treatment Models Within First Nations Communities’ in Wolfe D, McMahon R & Peters R (eds), *Child Abuse: New Directions in Treatment and Prevention Across the Lifespan*. Thousand Oaks, London, Dehli: Sage.

- objectification and dominance of women and children sanctioned by values and structures of the colonising culture.

The histories of trauma and injustice suffered by Indigenous peoples under colonial powers are clearly associated with the disproportionately high rates of sexual abuse in their communities today. These circumstances require consideration in health and welfare responses. For this reason, mainstream responses to sexual abuse are unlikely to be suitable or effective. Conventional approaches are, in any case, unlikely to be culturally appropriate. Many Aboriginal communities are looking to more holistic methods for dealing with sexual abuse.

A British Columbia community consultation recommended that courts should be empowered to offer first-time sexual abuse offenders ‘extensive treatment’ as an alternative to incarceration, and that culturally appropriate treatment should be available to sexual abuse offenders.<sup>575</sup> A participatory research project involving community consultations with eight Manitoba First Nation communities made similar findings. Sexual abuse offenders were regarded as needing healing and contributors emphasised that the healing should take place within the community. The need for more services which focused on offenders, as well as victims, was also raised.<sup>576</sup> However, concerns have also been expressed about the failure to respond to sexual abuse of Indigenous children with the gravity which the crime requires and the inadequate protection and support provided to victims.<sup>577</sup>

A number of Canadian First Nations communities have adopted alternative strategies for dealing with sexual abuse. Many of these strategies have evolved from a 1992 sexual abuse treatment program developed by Connors and Oates for use in northern British Columbia communities. Connors and Oates’ model is based on an 18 step consensual

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<sup>575</sup> Community Panel (1992) above n17.

<sup>576</sup> McKenzie et al (1995) above n91.

<sup>577</sup> See, for example, Cripps K & McGlade H (2008), ‘Indigenous family violence and sexual abuse: Considering pathways forward,’ 14 *Journal of Family Studies* 420.



'traditional process' which involves extended family gatherings.<sup>578</sup> Connors and Oates suggest that community-based responses to sexual abuse should involve the following basic elements:

- Some esteem-enhancing form of punishment;
- Victim protection; and
- Treatment for all members of the family.

Responses may also include:

- Community service;
- Restricted access to children;
- Native-oriented treatment program; and
- Attendance at community support groups.

This model was the basis for the Hollow Water program in Manitoba which is often cited as a successful program to address child sexual assault in Aboriginal communities.<sup>579</sup> It is the best known and emulated amongst a number of holistic tribal healing programs which have been established over the past 15 years.<sup>580</sup> As a first step towards implementing a sexual abuse intervention program, the Hollow Water community began a program of community awareness and education in 1987. A two year training program was initiated to bring trainers to the community to teach topics such as cultural awareness, team building, family counselling, communication skills, nutrition and sexuality. Community graduates from the program either became full-time family violence workers or sexual

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<sup>578</sup> Connors & Oates (1997) above n153. The process is essentially a tailored version of family group conferencing.

<sup>579</sup> Ibid; Awasis Agency (1997) above n10; Lajeunesse (1993) above n151; Dickie BE (1994), *A Question of Justice: Feature Length Film Commentary*. Winnipeg: National Film Board.

<sup>580</sup> See overview in Cripps & McGlade (2008) above n156; Connors & Oates (1997) above n153. Other tribal healing programs include: Biidaaban Sexual Abuse Healing Program (1996); Circle Of Harmony Healing Society (Oates 1992); Gwa'sala-'Nakwaxda'xw Family Violence And Sexual Abuse Intervention Program (1993); and Prince George Native Friendship Centre Sexual Abuse Treatment Services (1992).

abuse assessment team members.<sup>581</sup> The training led to the development of the Community Holistic Circle Healing (CHCH), a 'unique' approach which the developers claim is based on traditional values. CHCH 'aims to restore balance by empowering individuals, families and the community to deal productively, and in a healing way, with the problem of sexual abuse.'<sup>582</sup>

CHCH has an Assessment Team and a Management Team. The Assessment Team provides prevention and intervention support, develops support systems, and provides assessment and liaison with lawyers and institutions. The team consists of various professionals such as family violence workers and nurses, volunteers and Tribal Council representatives. The Management Team reports to the Assessment Team, and is responsible for administration. The participating communities have formally acknowledged the program through Council resolutions. The CHCH process follows a 13-step process based on the process outlined in Connors and Oates above.<sup>583</sup> The assessment team assigns an individual (trained) worker to each of the victim(s), the victimiser and their families. Up to eight workers may be involved with a single case in this way. A case manager is also appointed, who is responsible for conducting case conferences attended by all workers and, frequently, victims and family members. Children are removed to a safe home 'if necessary,' and the laying of charges is encouraged. Where the victimiser pleads guilty in court, CHCH prepares and presents a report outlining the tailored CHCH alternative plan for that individual. A formal protocol has been developed with Crown prosecutors in the Manitoba Department of Justice and the judiciary supports CHCH. Victimisers pleading guilty are put on three years probation and very few plead not guilty.

Another aspect of the CHCH program is the 'Self-Awareness For Everyone' (SAFE) program, a personal growth training program implemented in the communities. At one community, 60% of adults and youth participated in the program, which 'had a

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<sup>581</sup> Lajeunesse (1993) above n151.

<sup>582</sup> Ibid, 1.

<sup>583</sup> Connors & Oates (1997) above n153.

profound and positive effect on general levels of self-awareness, alcohol consumption, family communication, and the healing process of many people, including the victims of sexual abuse.<sup>584</sup> Treatment combines contemporary and traditional methods in 'healing contracts.' A psychologist provides assessment and counselling services for all referrals. A male psychologist facilitates an 'Adult Male Sex Offenders Group,' while various other groups for survivors and families are facilitated by workers. Traditional 'sharing circles' are used in group sessions. The emphasis is on people feeling safe, a non-judgemental approach, and acknowledging and accepting the problem. 'CHCH offers balance rather than the punishment that is offered by the court system.'<sup>585</sup>

While the CHCH approach to child sexual assault in Aboriginal communities does seem to provide better outcomes than the conventional adversarial approach which has failed Indigenous children, evaluations suggest perpetrators are more satisfied with outcomes than victims. Significant concerns include that victims feel that they received less support than perpetrators and less help than they needed, that the approach is too lenient towards violent offenders, and that the process did not take sufficient cognisance of unequal power relations within the community and could prioritise powerful interests over those of victims.<sup>586</sup> The concern with safeguards for those less powerful or victimised within alternative dispute resolution processes is discussed with respect to accountability above, in Chapter 5 with respect to Family Group Conferencing in New Zealand, and more generally with respect to family group conferencing below. The need for a system which protects the interests of minorities and those less powerful within minority groups is a fundamental issue with respect to Indigenous women and children's wellbeing. Conceptualising a human rights framework which avoids sycophantic deference to Indigenous governance where it breaches the rights of those less powerful in the community and more broadly providing safeguards within a pluralised framework for Indigenous child welfare is considered in Chapters 2 and 4.

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<sup>584</sup> Lajeunesse (1993) above n151, Appendix C.

<sup>585</sup> Lajeunesse (1993) above n151, 9.

<sup>586</sup> See for example La Rocque E (1997), 'Re-examining culturally appropriate models in criminal justice applications' in Ash M (ed), *Aboriginal and Treaty Rights in Canada*. Vancouver: University of British Columbia Press, 75.

Within these chapters a human rights approach for Indigenous children's wellbeing which can provide an authoritative voice to those most marginalised within minority Indigenous communities internally and a process for input with respect to compliance with human rights principles from the broader external Indigenous and non-Indigenous communities is considered.

### Family preservation vs child protection

Despite legislative and policy shifts towards early intervention and family preservation, contemporary child welfare in practice continues in budget and emphasis, in most jurisdictions, to retain a protection focus. Aboriginal culture is supported through an Indigenous child placement principle rather than family preservation in most jurisdictions. However, family preservation, where suitable, is likely to be a better means to cultural support than culturally appropriate placement. The suitability of home-based family preservation initiatives in many Indigenous communities is underlined by the high value placed on family and extended family in Indigenous cultures.<sup>587</sup> Consultations with Indigenous communities have found that support for family preservation is unambiguous. An example of this support is provided by the recommendations of a legislative review which consulted extensively and directly with the British Columbia Aboriginal population.<sup>588</sup> The review describes the two most frequent criticisms of child and family services policy and practice voiced by those consulted as:

- 1) the inappropriate apprehension of children and the removal of those children from their communities; and 2) the lack of preventative services aimed at resolving family problems rather than at separating families.<sup>589</sup>

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<sup>587</sup> Ronnau et al (1990) above n21; Tafoya N (1990), 'Home-Based Family Therapy: A Model for Native American Communities' in Mannes M (eds), *Family Preservation and Indian Child Welfare*. Albuquerque: American Indian Law Centre, 59.

<sup>588</sup> First Nation's Child and Family Task Force (1993) above n56, is another review involving Indigenous community consultations which also recommended a new emphasis on family preservation and home-based prevention.

<sup>589</sup> Community Panel (1992) above n17, 46.

Similar observations were made by participants in the Australian Cultural Care research project: 'Two themes reoccurred. The first related to the lack of early intervention to prevent removal and then the lack of services to support the family to get back on track so that they can safely look after their children.'<sup>590</sup>

The report of a Manitoba community consultation articulates a simple, clear argument for family support services:

It is difficult to understand why children are taken out of homes, then, perhaps some time later, placed back in the home where the problems began. The problems do not go away. Why not fix the home, [First Nations people] wonder, but there is little or no funding allocated to services for families ... [the community] perception is that government will pay astronomical costs for someone else to give custodial care to their children while they stand by in helpless poverty because someone else controls the money and has the power to make decisions about their children.<sup>591</sup>

Anderson's research also found that urban Canadian Aboriginal clients of Native Child and Family Services of Toronto (NCFST) felt that parents' needs were ignored by non-Native child protection agencies, whom they perceived as not caring about them and dishonest. In contrast, clients liked how NCFST treated the whole family as a unit in programs and therapy. Through its focus on families, NCFST was seen as strengthening Aboriginal culture, with interviewees stating that they had 'discovered elements of their culture' through NCFST. In various programs, such as parenting, the agency uses women's circles, Aboriginal medicines, and other culturally-based teachings. Clients referred to NCFST program outcomes as including: better parenting, less violent children, and increased openness and sharing for both parents and children. An important recommendation was that child protection agencies needed to be supportive of parents as well as children. The Cultural Care Report in Australia made similar findings

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<sup>590</sup> Libesman (2011) above n44, 21.

<sup>591</sup> First Nation's Task Force (1993) above n56, 49.

with one of the most frequent concerns being the lack of support for families, in particular single mothers, to address the problems which led to removal of their child or children.<sup>592</sup>

The Awasis Agency, a First Nations-controlled service serving 18 Manitoba communities, is an example of an Indigenous agency which practices family preservation. The Agency cites the following benefits of a family preservation approach:

- Retention of parental responsibilities;
- Self esteem and confidence on the part of child and family are less affected;
- Feelings of fault on the parts of the family and child are diminished;
- Disempowerment of parents is reduced; and
- Family-focussed interventions promote new patterns of behaviour and attitudes.<sup>593</sup>

To substantively implement family preservation policy and programming requires a paradigm shift in child welfare, from a model based on child rescue and placement to one of family support. Family preservation models create a 'service continuum,' by delivering services that support and strengthen families in normalised environments such as the home, and focus on basic life skills and environmental problems.<sup>594</sup> Within Indigenous communities which have more pervasive problems community development needs to parallel family support. Research, evaluations and community consultations highlight a number of important features and orientations for family preservation programs:<sup>595</sup>

- Building on existing family strengths;

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<sup>592</sup> Libesman (2011) above n44, 60.

<sup>593</sup> Awasis Agency (1997) above n10.

<sup>594</sup> Mannes (1993) above n22.

<sup>595</sup> This list was compiled using information derived from the following texts: Mannes (1993) above n22; Mannes M (1990), *Family preservation and Indian child welfare*. Albuquerque: American Indian Law Centre; Community Panel (1992) above n17; Smollar & French (1990) above n42.

- Intensive home-based support services;
- Community education to engender support for family preservation;
- Recruitment and training of Indigenous staff;
- Fostering cooperation among multiple service providers;
- Effective coordination between various agencies at a given site;
- Secure long-term funding;
- Longer program time-frames;<sup>596</sup>
- Reunification work;
- Attempts to minimise the impact of placements, where placements are unavoidable; and
- Developing problem -solving skills.

The above-mentioned British Columbia community consultation reported that Aboriginal communities lacked a range of basic social services which are available to non-Aboriginal communities. The same is true of many other Canadian, Australian, United States and New Zealand Aboriginal communities.<sup>597</sup> In order to enhance child abuse and neglect prevention, and therefore family preservation, services such as the following must be provided to Aboriginal communities:

- Respite and homemaker services, particularly for single-parent families;
- Day care;
- Family support;
- Counselling;
- Drug and alcohol treatment programs;
- Suicide prevention services; and

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<sup>596</sup> Community Panel (1992) above n17. The Inter-Tribal Council of Michigan found that the usual four to six week duration of most family preservation programs was insufficient. They suggested longer time-frames.

<sup>597</sup> In 2007 the Aboriginal Caring Society brought a complaint to the Canadian Human Rights Commission with respect to discriminatory funding of child welfare services for First Nations children on reserves. In February 2012 an appeal against dismissal of the complaint, on technicalities, was heard by in the Federal Court. See Chapter 5 for discussion of this complaint.

- Educational and recreational facilities and resources.<sup>598</sup>

While Indigenous communities who have control over child and family services are overwhelmingly in favour of family preservation, devolution of authority for provision of child protection to Indigenous communities does not necessarily result in lower placement rates, at least in the short term. For example, after the introduction of the *Indian Child Welfare Act* in the United States in 1977, Indigenous out-of-home care placements increased. The number of Native American children in substitute care grew by 25% over the 1980s.<sup>599</sup> Surprisingly, tribally-run programs were the primary contributors to this post-ICWA increase. However, it is important to recognise that trends in placement numbers are not always a reliable indicator of service effectiveness as a wide range of factors influence these trends.<sup>600</sup> Mannes attributes the increase in out-of-home care post-ICWA to caseload and budget pressures. Placement prevention was not possible in an environment of stop-gap measures and makeshift systems resulting from the absence of reliable and sufficient funding.<sup>601</sup>

Placement rates may also increase after the handover of authority for child protection because Indigenous agencies elicit more trust. In the case of Weechi-it-te-win Family Services, an Ontario tribal agency responsible for child and family services to ten First Nations reserves, disclosures of abuse rapidly increased after they took over responsibility for child protection. The number of children in care increased seven-fold between 1987 (when WFS gained a child protection mandate) and 1995. This does not necessarily reflect higher rates of child abuse and neglect, but rather perhaps the high level of trust which the agency established with the communities which it served.<sup>602</sup> When the Hollow Water community of Manitoba began implementing a tribal-run

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<sup>598</sup> Community Panel (1992) above n17. Together with infrastructure support, such as housing, these are the kinds of services that one would have anticipated a large scale program, such as the Northern Territory Emergency Response (NTER, also known as the NT Intervention), would have resourced if child welfare and wellbeing were in fact the primary objective of the measures implemented. See Chapter 6 for discussion of the NTER.

<sup>599</sup> Mannes (1990) above n174, 11.

<sup>600</sup> McKenzie (1997) above n48, 110.

<sup>601</sup> Mannes (1990) above n174.

<sup>602</sup> Weechi-it-te-win Family Services (1995) above n81.



sexual abuse intervention program in 1987, the environment of greater trust which followed saw a dramatic increase in the number of sexual abuse disclosures.<sup>603</sup> Between 1987 and 1990, a 30% increase in the number of children in care was reported. This has been attributed to a previous lack of recognition of the extent of child welfare problems in First Nation communities, in an environment of absent or poor child welfare services.<sup>604</sup>

A number of obstacles to the implementation of family preservation initiatives have been recorded in the literature. For example, 'organizational and administrative structures and state and local financing practices appear to be barriers in shifting service provision from child placement focused to family-centred services.'<sup>605</sup> Canadian provincial child welfare agencies primarily provide services to families in crisis, so perpetuate high removal rates by not providing services to families at risk: children are removed from situations where early intervention could have preserved the family. Financial support for a child is usually primarily available once the child is removed.<sup>606</sup> United States Federal discretionary funding announcements have also favoured placement over preservation.<sup>607</sup> However, there is recognition that early intervention is more effective than crises intervention in all jurisdictions and, with this, the implementation of early childhood programs (see below) and, more broadly, programs and services focussed on prevention. However, these programs have not been comprehensive. Further as referred to in previous chapters a public health model for

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<sup>603</sup> Lajeunesse (1993) above n151.

<sup>604</sup> McKenzie (1997) above n48. Parallel issues of a failure to service Indigenous communities has occurred in the Northern Territory in Australia see Pocock J (2003), *State of Denial: The Neglect and Abuse of Aboriginal and Torres Strait Islander Children in the Northern Territory*. The Secretariat of National Aboriginal and Islander Child Care (SNAICC); Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Anderson P & Wild R) (2007), *Little Children are Sacred*. Darwin: Northern Territory Government; Board of Inquiry into the Child Protection System in the Northern Territory (2011), *Growing them Strong, Together*. Darwin: Northern Territory Government. In late 2011 a peak Indigenous agency was established for the first time in the Northern Territory. It is likely that engagement of Indigenous agencies in child welfare issues together with increased resources will result in increases in substantiated neglect and abuse amongst Indigenous families in the Northern Territory.

<sup>605</sup> Mannes (1990) above n174, 21.

<sup>606</sup> Community Panel (1992) above n17.

<sup>607</sup> Mannes (1993) above n22.

child welfare would see a realignment of funds towards prevention rather than crises interventions.

Ultimately, family preservation also depends on factors outside the scope of most social welfare programs. Most family preservation initiatives focus on psychological therapeutic interventions, while the factors contributing to family crisis include wider social, political and economic issues such as poverty, unemployment, isolation, disempowerment, the legacy of separations and other colonial interventions. Responses which do not also address these factors will not have meaningful long-term impact. Although there is overwhelming support for a switch to family preservation in both mainstream services and Indigenous agencies, it is not unanimous.<sup>608</sup>

### **Family Group Conferencing and other similar models**

There are many models and programs in place which could appear under the broad heading of Family Group Conferencing, but which do not have similar titles or refer to Family Group Conferencing. Within the field of restorative justice a number of conferencing programs which have been applied in criminal justice systems have parallels with family group conferencing in the context of child welfare. While some of the critical issues pertaining to the framing of issues within family group conferences and restorative justice programs are related, and may be grounded in similar conceptual and practical foundations, the literature on restorative justice is beyond the scope of this chapter.<sup>609</sup> However, the Hollow Water Community Holistic Circle Healing program was discussed above because it is one of the most influential of restorative justice programs initiated by an Indigenous community and its focus on child sexual abuse has great significance for Indigenous children's welfare and wellbeing. A critical review of family group conferencing in the context of the New Zealand legislation is provided in Chapter 5. These issues will not be reiterated. However, a brief description and

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<sup>608</sup> See, for example, Giesbrecht (1992) above n88 where concerns were expressed that the focus on parents and family was at the expense of the fundamental rights of children.

<sup>609</sup> For a critique on the benefits and disadvantages of restorative justice programs see Cunneen C & Hoyle C (2010), *Debating restorative justice*. Oxford and Portland: Hart.

discussion of the Canadian Family Group Conferencing pilot, which is based on the New Zealand model, together with discussion of some of the advantages and disadvantages family group conferencing in the context of Indigenous child welfare are considered below.

### *Family Group Decision Making Project – Canada*

The Family Group Decision Making (FGDM) project was modelled on the New Zealand Family Group Conferencing model. The model was trialled in three areas of Newfoundland and Labrador, including the Nain region, which is populated mainly with Inuit people. Workers were trained by trainers from New Zealand, one Maori and one non-Indigenous.

The three main stages to the process are:

- Preparing for the conference – family members are contacted but not compelled to take part. Consultations with the family take place. Abused young people usually select a support person.
- Holding the conference – the meeting is opened in a culturally appropriate manner. The coordinator presents necessary information to the group, followed by private deliberations amongst the family group (and chosen support people) to develop a plan. The plan is finalised with the coordinator. The plan must contain contingency plans, and monitoring and review processes.
- The plan is approved by a field worker and supervisor.

Research and evaluation was conducted during the pilot, in order to a) determine the cultural adaptability of the model, and b) its capacity for building partnerships and participation.<sup>610</sup>

### *Negative critique of family group conferencing*

The 1995 Gove Report into child welfare in British Columbia suggested that Family Group Conferencing (FGC) interventions neglected monitoring and evaluation, and disregarded the family dynamics of sexual abuse.<sup>611</sup>

Family Group Conferencing lacks the safeguards of due process and legal representation which are available through formal legal processes. The balance between child protection and family preservation is a difficult issue and this can be more problematic in the context of Family Group Conferencing without the above mentioned checks and balances. Where the child is not removed, or the couple stays together, child abuse may continue.<sup>612</sup> For example, 'Pre-Sentence Reports' attached to a report on the Community Holistic Circle Healing (CHCH) model discussed above include a case where a father continued to sexually abuse his adopted daughter after treatment using the CHCH system. After a second cycle through the program, the Assessment Team deemed it appropriate to leave the father living in the family household, where another of his children still resided.<sup>613</sup> Burford and Pennell suggest that some family members may privately see the Family Group Conferencing process as unfair, preferring formal action and that a family 'conspiracy of silence' may continue under FGC.<sup>614</sup> Burford and Pennell also note that resources must be made available for the model to work, and that there

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<sup>610</sup> Burford G & Pennell J (1995), *Family group decision making project: Implementation report summary*. Newfoundland: Family Group Decision Making Project, School of Social Work, Memorial University of Newfoundland.

<sup>611</sup> Gove (1995) above n66.

<sup>612</sup> Burford & Pennell (1995) above n189.

<sup>613</sup> Lajeunesse (1993) above n151.

<sup>614</sup> Burford & Pennell (1995) above n189.

is a risk that authorities may try to apportion all or too much responsibility to the family, where there is still a vital role for protective services.

Power imbalances between child and family services agencies, legal staff, and families can undermine the effectiveness of Family Group Conferencing for vulnerable participants in the conference. Gender and age inequities are not easily addressed by Family Group Conferencing approaches. Family Group Conferencing, particularly when used in small communities, may inhibit disclosure by victims or result in coercion by the offender to not disclose.<sup>615</sup> Burford and Pennell suggest that some family members may be too intimidated to make disclosures at conferences due to the presence of the perpetrator or others.<sup>616</sup> This is exacerbated by problems of ongoing proximity between victims and victimisers in communities. Confidentiality problems which are more prevalent in small communities may also impact on the family group conferencing process.<sup>617</sup> This issue is discussed under ‘Accountability’ above.

#### *Positive critique of family group conferencing*

Schmidt claims that FGC approaches ‘emphasize community responsibility in protecting the child through the offender’s accountability to the group. Discounting [the FGC] approach will serve to perpetuate the present system which mitigates against the possibility of reconciliation and holistic healing.’<sup>618</sup> Burford and Pennell argue that family and extended family are marginalised by justice, health, education and social service systems, and the assumption is that families are not part of the solution.<sup>619</sup> In contrast to the views above, they see the FGC processes as a means to overcome the ‘conspiracy of silence’ surrounding abuse of both children and adults. The method does not attempt to keep families

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<sup>615</sup> Lajeunesse (1993) above n151.

<sup>616</sup> Burford & Pennell (1995) above n189, 46.

<sup>617</sup> See also Tafoya (1990) above n166.

<sup>618</sup> Schmidt (1997) above n67, 81.

<sup>619</sup> Burford & Pennell (1995) above n189.

together ‘at all costs,’ and the authors acknowledge that the system will not always work, and that involvement of abusers is not always appropriate. They argue that the majority of family conference participants participate responsibly and devise useful plans. They claim that the model is highly adaptable across cultures, so long as local people are involved in the adaptation process. They say that the family is empowered, and family ties are renewed, re-established and strengthened.

Consideration could be given to including external check and balances within family group conferencing processes to reduce the risk of coercion, intimidation or replication of power imbalances within the family group conference which often underlie the issues which are being addressed in the conference.

#### Early intervention

The recognition of the importance of early childhood for longer term brain development together with greater acknowledgment of the importance of early intervention and prevention in the United States, Canada, Australia and New Zealand has led to the development of early childhood programs including specialist programs for Indigenous children.<sup>620</sup> Numerous studies show that the United States’ Head Start program, an early intervention initiative targeting at-risk children of pre-school age, has achieved great success over a 30 year period. The Canadian ‘Aboriginal Head Start Initiative’ is an early intervention program for Canadian Aboriginal children, in both urban and remote communities. The program was launched in 1995. Around 100 projects were implemented in the initial four year pilot phase, at a cost of \$83.7M. Extensive consultations were held with Aboriginal people from 25 urban and remote centres during the design stage. The program involved parents and community in design and implementation of projects, which include promotion of culture and language, education, health and improved social supports. Head Start does not specifically

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<sup>620</sup> For research on early brain development which has had a significant impact on policy with respect to early childhood in Canada and Australia, see McCain MN & Mustard F (1999), *Reversing the brain drain: Early study: Final report*. Toronto: Ontario Children’s Secretariat.

target child abuse and neglect. However, research into the effects of early intervention programs indicates many benefits including some linked to child abuse and neglect issues, including:

- Better relationships between parents and children;
- Improved social and emotional stability in participating children; and
- Enhanced community capacities.<sup>621</sup>

Evaluation of a pilot Aboriginal Head Start program in Canada found that it was successful, enhancing life for children and families. The project was piloted in seven urban Ontario communities, targeting high risk Aboriginal three to five year olds.<sup>622</sup> Children involved demonstrated improved confidence, better behaviour, improved language skills, and better communication and expressiveness. While the literature with respect to early intervention, and universal support for early childhood programs appears to be consensually supported, this has only translated into partial funding and a lack of consistency with respect to complimentary early childhood support systems such as intensive support for families at risk or infrastructure support for communities in need. In Australia, the National framework for Protecting Australia's children includes initiatives to expand early childhood centres, and 35 children and family centres will be established in areas with high Aboriginal populations.<sup>623</sup> While such initiatives are valuable, their impacts are limited when they are not integrated into a broader structural response to reform and operate within a framework which has the limitations and inconsistencies of bureaucratic child welfare framework discussed in Chapters 2, 3 and 4.

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<sup>621</sup> Health Canada (1998), *Aboriginal Head Start Initiative: Principles and Guidelines*. Canada: Health Canada.

<sup>622</sup> Becker J & Galley V (1996), *Aboriginal Head Start Summer Pilot Program: Evaluation and Final Report*. Unpublished report.

<sup>623</sup> Council of Australian Governments (2009), *Protection children is everyone's business – National Framework for Protecting Australia's Children 2009-2020*. Canberra: Commonwealth of Australia, 28. Available at: [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-04-30/docs/child\\_protection\\_framework.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf)

## Conclusion

The extremely high rates of neglect as well as intergenerational sexual and physical abuse found in some Indigenous communities present a major challenge to intervention programs. These high rates reflect poverty and the depth of dysfunction in some communities, both legacies of colonial experiences. Conventional models of intervention and the level of funding that supports them are not sufficient to deal with the scale of problems.<sup>624</sup> Innovative programs which are responsive to Indigenous experiences and understandings assist to create an institutional context for receptiveness to difference. While pluralised legislative and policy frameworks for decision making create a structure for inclusiveness and improved outcomes for vulnerable Indigenous children, these values become embedded and part of the experience of child welfare through Indigenous modes of service delivery. Successful Indigenous programs and service delivery in turn assist to generate respect for Indigenous ways of understanding and responding to Indigenous children's welfare and wellbeing.

As argued in previous chapters a systemic response to abuse and neglect within Aboriginal communities requires that programs must be integrated within a child welfare/wellbeing framework which addresses the underlying causes of abuse and neglect in post-colonial Indigenous communities.<sup>625</sup> Shifts in attitudes towards Indigenous programs and service delivery need to be accompanied by significant resourcing and responses which address underlying structural causes of breakdown of normative order, poverty and poor access to goods and services such as education, health care and, more generally, opportunities for participating in society. It has been argued in Chapters 2 and 4 that a pluralised human rights framework, with the principle of self-determination being central, can provide the foundation for more effective responses to Indigenous children's wellbeing.

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<sup>624</sup> Armitage (1993) above n61.

<sup>625</sup> See, in particular, Chapter 2 with respect to international human rights and a framework for pluralising Indigenous child welfare and Chapter 4 with respect to why a human rights framework responds to concerns regarding child welfare issues addressed within the dominant bureaucratised child welfare systems.



While a range of programs, some of which are referred to above, offer innovative responses and strategies to address Indigenous children's welfare, these are often implemented in isolation from the broader issues and in a context which does not embrace holistic reform. This impedes the impact which they are able to make. However, implemented in the context of a human rights framework for Indigenous child welfare, with adequate structural support and resourcing, innovations in service delivery offer the opportunity for fundamental and enduring reform.

## Chapter 7

### Comparative service delivery frameworks

#### Introduction

Together with legislative frameworks which recognise Indigenous communities' and organisations' role in addressing their children's wellbeing, resources are necessary to provide services in a manner which respects Indigenous children's culture and their human rights more broadly. While legislative frameworks which support human rights principles (in particular the right to self-determination) provide the scaffolding for responding to Indigenous children's wellbeing, this has to then be built upon with resources and services. Because Indigenous peoples have historically been denied the exercise of jurisdiction with respect to their children's welfare and wellbeing, together with other destructive colonial experiences, many Indigenous organisations and communities need to build their organisational capacities and ontological understandings to be in a position to take responsibility for child welfare and, more broadly, their children's wellbeing. Effective collaboration between Indigenous organisation and mainstream agencies is therefore not only necessary where mainstream agencies retain control over and are responsible for service provision to Indigenous children. It is also necessary where principles of self-determination and structures for the transfer of responsibility for Indigenous children's wellbeing to Indigenous communities and organisations are being implemented.

To give effect to Aboriginal jurisdiction with respect to child welfare, which has to varying degrees been transferred to Indigenous communities or organisations (as discussed in Chapters 5 and 6), nuanced questions with respect to the relationships between Indigenous and non-Indigenous paradigms of understanding need to be addressed with respect to service delivery frameworks. The transfer of responsibility under delegated legislative models requires a hybridity of competencies encompassing Indigenous and non-Indigenous aspects of responsibility. The ways in which law reform with respect to Indigenous child welfare draws on international human rights law and then translates this into practice through service delivery frameworks is part of a process of recognition of Aboriginal peoples' distinct identities. While the process of reform of service delivery frameworks with respect to Indigenous children has not escaped the influence of power imbalance, it is bringing an enlarged and more inclusive understanding into child welfare. This chapter provides an analysis of the themes with respect to child welfare service provision to Indigenous families. It does not attempt to cover the field, which is extensive and beyond the scope of this thesis, but rather provides examples and addresses themes with respect to service provision which enhances community responsibility for Indigenous children's welfare and wellbeing.

### Cultural competence

For effective collaboration between government departments and Indigenous communities it is necessary for departments and individuals who work within them to have a meaningful understanding of the history and experiences which impact on these communities. This requires personal and institutional reflection on cultural values inherent in individuals' attitudes and presumptions as well as within service delivery models. This chapter attempts to identify culturally competent policy and ways in which this policy can be implemented in practice. Key features identified in much of the literature include an understanding of communal identity compared with the highly individualised understanding of identity in western child welfare frameworks, and related whole community, rather than individually focussed, responses to child

protection and Indigenous children's wellbeing. Community development and whole community responses recognise that structural deficits, which are closely associated with Indigenous communities colonial experiences, impact significantly on Indigenous children's wellbeing.<sup>626</sup> Cross-cultural communication problems and cultural difference militate against collaborative planning, responsibility and accountability.

### *What is cultural competence?*

Cultural competence 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.'<sup>627</sup> A culturally competent program is one which appreciates and values diversity; understands the cultural forces which impact the program; understands the dynamics which result from cultural differences; institutionalizes cultural knowledge; and adapts its services to fit the cultural context of the clients it serves.<sup>628</sup>

The concept of cultural competence has gained increasing importance and focus among social service professions and agencies in recent years. It is a field of particularly acute relevance when working with Indigenous communities. Striving for cultural competence in social services in the United States, Canada, New Zealand and Australia is now widespread, and occurs partly in recognition of the ethnocentric history and values of social welfare services. The United States National Association of Social Workers (NASW) Code of Ethics dedicates a full

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<sup>626</sup> Blackstock C & Trocme N (2004), *Community Based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change*. Available at: [http://www.mcgill.ca/files/crcf/2005-Communiy-Based\\_Welfare\\_Aboriginals.pdf](http://www.mcgill.ca/files/crcf/2005-Communiy-Based_Welfare_Aboriginals.pdf)

<sup>627</sup> Tong C & Cross T (1991), *Cross Cultural Partnerships for Child Abuse Prevention with Native American Communities*. Portland: Northwest Indian Child Welfare Institute, 12.

<sup>628</sup> Ibid.

section to cultural competence.<sup>629</sup> However there are few empirical models for cultural competence, and those tailored for Indigenous people are fewer.

While cultural competence requires knowledge about cultural groups, as discussed in Chapter 5 with respect to legislative frameworks, the diversity within those groups must also be recognised.<sup>630</sup> Many authors who discuss cultural competence emphasise the importance of practitioners' ability to reflect on their own cultural backgrounds and possible related biases and implications.<sup>631</sup> The values and world view inherent in models and theories need similar scrutiny.<sup>632</sup> Definitions of problems and their origins, and ideals for appropriate interventions and outcomes, are culturally determined. There is a need for social work policy to encourage flexibility and innovation in approaches to cultural difference.<sup>633</sup> There is a great and largely unfulfilled need for practitioners, policy-makers and other professionals to be aware of the cultural specificity of policy and practice.<sup>634</sup> Effects of the cultural incompatibility of social service models, particularly those relating to child and family services, have been overwhelmingly negative. The literature discussed below on Indigenous child and family services describes examples of this incompatibility.

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<sup>629</sup> Weaver HN (1999), 'Indigenous People and the Social Work Profession: Defining Culturally Competent Services,' 44(3) *Social Work* 217.

<sup>630</sup> See Chapter 2 with respect to an analysis of international human rights principles which do not substitute the domination of the majority for the domination of sectors within a minority group over vulnerable or less powerful members within that group, in particular women and children. See Chapter 3 with respect to the relationship between pluralised human rights and the exercise of judgement in a manner which includes those most marginalised.

<sup>631</sup> Chapters 2 and 4 discuss the enlarged understanding which can develop through a pluralised and inclusive human rights frameworks and how this can impact on understandings of child welfare, and individual and institutional morality and efficacy in decision making.

<sup>632</sup> Weaver HN (1998), 'Indigenous People in a Multicultural Society: Unique Issues for Human Services,' 43(3) *Social Work* 203; Voss R, Douville V, Little Soldier A & Twiss G (1999), 'Tribal and Shamanic-Based Social Work Practice: A Lakota Perspective,' 44 (3) *Social Work* 228; Briskman L (2007), *Social Work with Indigenous Communities*. Sydney: The Federation Press; McKenzie B & Morrisette V (2003), 'Social work practice with Canadians of Aboriginal background: Guidelines for respectful social work' in Al-Krenawi A & Graham J (eds), *Multicultural social work in Canada: Working with diverse ethno-racial communities*. Don Mills: Oxford.

<sup>633</sup> Ibid.

<sup>634</sup> Kalyanpur M (1998), 'The Challenge of Cultural Blindness: Implications for Family-Focused Service Delivery,' 7(3) *Journal of Child and Family Studies* 317.

### *Problems with conventional social work methods*

A number of authors and reviews suggest that social work methods often impose alien cultural values of individualism, materialism and empiricism on Indigenous peoples.<sup>635</sup> Voss et al point out that existing traditional Native American healing methods have largely been ignored in the literature on social work with American Indians.<sup>636</sup> This body of literature is very small, and this seems to reflect academic disinterest in Native Americans. This disinterest, combined with the common view of Indigenous people as a 'problem' group in social work, amounts to a form of 'intellectual colonialism and oppression' that 'perpetuates the invisibility of Aboriginal philosophy and thought in social work theory, policy, and practice and further imposes a therapeutic ideology emphasising culturally incompatible methods and ideals.'<sup>637</sup> The Awasis Agency in Northern Manitoba offers a critique of the Cartesian paradigm underlying dominant social work theory, which they suggest leads to paternalism through imposition of the idea that there is one objective truth or reality to a situation, best understood by the 'expert.'<sup>638</sup> Voss et al observe that social work policy and practice often 'rigidly reinforce a kind of clinical colonialism.'<sup>639</sup>

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<sup>635</sup> Briskman (2007) above n7; McKenzie & Morrisette (2003) above n7; Voss et al (1999) above n7; Weaver (1998) above n7; Kalyanpur (1998) above n9; Awasis Agency of Northern Manitoba (1997), *First Nations family justice : Mee-noo-stah-tan Mi-ni-si-win*. Manitoba: Thompson; Ricks F, Wharf B & Armitage A (1990), 'Evaluation of Indian Child Welfare: A Different Reality,' 24 *Canadian Review of Social Policy* 41.

<sup>636</sup> Voss et al (1999) above n7.

<sup>637</sup> Voss et al above n8, 230. The breath of life theory attempts to provide the beginnings of a holistic response to Aboriginal child welfare which rejects the presumptions which underlie a Cartesian response to social work: Blackstock C (2011), 'The emergence of the breath of life theory,' 8(1) *Journal of Social Work Values and Ethics*, White Hat Communications. Available at: <http://www.socialworker.com/jsww/spr11/spr11blackstock.pdf>.

<sup>638</sup> See Chapter 4 for a critique of the use of the 'expert' to legitimate decision making.

<sup>639</sup> Voss et al (1999) as above n7, 233.

Social work and a range of treatment services are usually founded on models involving intervention with individual clients.<sup>640</sup> Voss et al describe the ‘self’ as a more fluid, less defined entity in Lakota culture, which is reflected in the primacy of tribal family and kinship bonds.<sup>641</sup> Traditional Lakota values regard the individualistic values of Western culture as flawed. The Awasis Agency in Northern Manitoba also emphasises contrasting concepts of self compared with Anglo culture, in the context of child and family services delivery. All persons, things, actions and reactions are considered inextricably related and interdependent: ‘There is no me or you... There is only me *and* you.’<sup>642</sup> Some central values common to First Nations of British Columbia are: consensus decision making (non-adversarial) as distinct from the approach of Western institutions (adversarial); a holistic approach to the care of children which sees child wellbeing as integrated into and inseparable from all other aspects of life; and a sense that each member of a nation holds responsibility for the wellbeing of all children.<sup>643</sup> An individualised focus not only results in cultural mismatch but also a framing of the individual as responsible for circumstances such as poverty-related neglect which may primarily be structurally determined and largely outside of the individual’s control. This, however, does not mean that individuals cannot or should not be individually and personally responsible for aspects of their behaviour which are individually determined.<sup>644</sup>

Weaver notes that the high value placed on independence in the dominant culture has led to conditions such as ‘enmeshment’ and ‘co-dependency’ being regarded as

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<sup>640</sup> See Chapter 2 for a discussion of the ways in which inclusion of Indigenous peoples in the development of international human rights law, with respect to Indigenous children, is transforming the jurisprudence to include collective interests and understandings.

<sup>641</sup> Voss et al (1999) above n7.

<sup>642</sup> Awasis Agency (1997) above n10, 5; Community Panel (White L & Jacobs E) (1992), *Liberating our children, liberating our nations: report of the Aboriginal Committee, Community Panel, Family and Children’s Services Legislation Review in British Columbia*. Victoria: The Committee.

<sup>643</sup> Community Panel (1992) *ibid*.

<sup>644</sup> See discussion of Community Holistic Circle Healing (CHCH) in the Hollow Water community in Manitoba below. This program incorporates measures to address community and individual responsibility for child sexual abuse in the community.

dysfunctional.<sup>645</sup> However, such judgements are culturally relative, and can lead to misunderstanding and misdiagnosis. 'It is not unusual for non-Indian members of the formal child welfare system to misinterpret a parent's reliance upon extended family members for child care as a sign of neglect ... [yet this behaviour represents] normal and healthy interdependence among Native Americans.'<sup>646</sup>

In Native American culture (and many other Indigenous cultures), interdependence is highly valued. A number of works discuss the implications of cultural differences for service delivery in Indigenous communities. The conventional individually-focussed models applied by child and family service agencies and treatment services are often culturally inappropriate for use with Indigenous client groups due to cross-cultural differences in the nature of personal and communal identity. 'Personalistic psychologies,' which highlight pathologies as the basis for assessment and treatment, are not universally applicable.<sup>647</sup> Connors suggests that individually-focussed treatment models disregard the complexities of extended family networks in First Nations communities.<sup>648</sup> Many authors and community consultations report that a 'whole community' approach to child protection and other social service and treatment interventions is more appropriate and likely to lead to success. For example, the Awasis Agency, a regionalised peak body for the Indigenous-controlled child and family services of 18 Northern Manitoba Aboriginal communities, integrates child protection with other services, observing that this inclusive approach mirrors the Aboriginal concept of self in

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<sup>645</sup> Weaver (1998) above n7.

<sup>646</sup> Ronnau J, Lloyd J, Sallee A & Shannon P (1990), 'Family Preservation Skills with Native Americans' in Mannes M (ed), *Family Preservation and Indian Child Welfare*. Albuquerque: American Indian Law Centre, 91. Also see the case study in Chapter 3 where the New South Wales child welfare department claimed neglect where an Aboriginal mother relied on non-Aboriginal women, whom she looked to as mothers, to provide shared care of her children.

<sup>647</sup> Mannes M (1993), 'Seeking the Balance between Child Protection and Family Preservation in Indian Child Welfare,' 72(2) *Child Welfare* 141.

<sup>648</sup> Connors E (1993), 'Healing in First Nations: The Spirit of Family' in Rodway MR & Trute B (eds), *The Ecological Perspective in Family-Centered Therapy*. New York: Edwin Mellen Press, 51.

that region.<sup>649</sup> Connors, a Canadian Aboriginal psychotherapist, suggests that systems which continue to rely on individually-focused models will only be 'bandaid solutions.' He advocates the implementation of interventions directed towards the entire community.<sup>650</sup>

Professionals dealing with Indigenous families may be unaware of the potential effects of their 'cultural blindness.' Indigenous parents tend to be disempowered in relations with professionals, particularly where they have not developed strategies to increase 'levels of participation.'<sup>651</sup> In a qualitative study of social work professionals working with on-reservation Native American mothers, Kalyanpur found that although the workers were acting according to best practice, their assumptions with respect to the universal applicability of 'objective' theories was misplaced. Kalyanpur found that although the parents in the study had perceived parenting deficits according to professional criteria, they were raising their children 'to become competent adults within their culture' and therefore possessed appropriate parenting skills. In communities where problems exist and children are not being raised in a healthy way with respect to their own culture, a failure to apply culturally appropriate assistance may be masked by a focus on children's problems with little incentive to question mainstream presumptions with respect to children's welfare or wellbeing (see discussion in Chapter 4 with respect to presumptions about child welfare values being founded in Anglo values which are assumed to be universal). Further, where there has been a significant breakdown of social norms, and child abuse and neglect are related to this breakdown, imposition of laws and rules which do not have internal meaning for the community are not likely to stem damaging and inappropriate conduct.<sup>652</sup>

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<sup>649</sup> Awasis Agency (1997) above n10.

<sup>650</sup> Connors (1993) above n23.

<sup>651</sup> Kalyanpur (1998) above n9.

<sup>652</sup> See discussion in Chapter 4 on the rule of law. In circumstances where children face violence, there is a clear need for criminal law intervention, victim support and reconstitution of cultural and physical security for individuals and the community. The call for greater support for victims by service providers and, at the same time, dissatisfaction with contemporary child welfare measures have been consistent themes across reviews into sexual and other abuse faced by Indigenous women and children. See discussion of these reviews in Chapter 1.



### *Partnerships and collaboration*

Good partnerships and meaningful collaboration between government and Indigenous organisations are vital to the development of effective child welfare strategies which empower Indigenous communities. However, as outlined by the Awasis Agency:

The power structures that underlie traditional approaches to social work practice often work against collaborative decision-making with families. Even when social workers try to share decision-making power with families the power and authority attached to the role of social worker can erode this attempt.<sup>653</sup>

Collaboration is vital 'for both understanding the specific limitations and ineffectiveness of existing services and programs and for identifying the changes necessary to create culturally appropriate solutions.'<sup>654</sup> While building relationships across difference is necessary, Wharf and McKenzie note the huge gap in experience which often exists between policy makers and those whom they are making policy for.<sup>655</sup>

In describing a number of Native American child and family services entities considered exemplary, the Aboriginal Family Healing Joint Steering Committee identifies collaboration as the key feature to their success. They note that several of these organisations had complex partnerships between various combinations of state agencies, tribal organisations, and non-government organisations.<sup>656</sup>

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<sup>653</sup> Awasis Agency (1997) above n10, 24-25.

<sup>654</sup> Aboriginal Family Healing Joint Steering Committee (1993), *For Generations to Come: The Time is Now - A Strategy for Aboriginal Family Healing*. Ontario: Unpublished Final Report, ii.

<sup>655</sup> They note that most policy makers are usually economically and socially comfortable and may have little experience of, or sympathy for, the poverty and associated problems which those who will receive services based on this policy experience. McKenzie B & Wharf B (2004), *Connecting Policy to Practice in the Human Services*. (2nd. edition) Don Mills: Oxford, x1.

<sup>656</sup> American Humane Association - National Resource Center on Child Abuse and Neglect (1997), *Tribal-State Relationships in Child Welfare: Ensuring High Quality Services to American Indian Children and Their Families*. Englewood: American Humane Association.

Similarly, a report on a study of Aboriginal self-government and child welfare services in two remote Canadian communities found that a collaborative approach to relations with provincial authorities was the key factor in the greater success of one community.<sup>657</sup>

A project conducted by the American Humane Association examined sources of conflict and collaboration in areas of child welfare in which both tribes and government agencies have an interest.<sup>658</sup> The project was overseen by a national committee representing tribal, state, non-profit and federal child welfare agencies. Qualitative research methods were used: interviews, participant observation, and archival reviews. Project sites were in five reservations covering seven tribes in three states: Arizona, North Dakota and Washington. The research found North Dakota was an exemplary case for positive tribal-state relations. Some of the qualities which contributed to this status were:

- The long history of tribes and government working together;
- A mutual understanding of their history and cultural context;
- Recognition of the 'sovereignty nationhood' of tribes by government;
- The provision of training on means to obtain federal funds; and
- The collaborative approach adopted by all participants.

**The report identified that individual people involved were a key factor in tribal-state relations. People consulted for the project (individually and as representatives) discussed perceived personal skills and qualities important to good working relations between tribes and states. These were grouped and summarised, including:**

- Communication skills;

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<sup>657</sup> Durst D, McDonald J & Rich C (1995), 'Aboriginal Government of Child Welfare Services: Hobson's Choice?' in Hudson J & Galaway B (eds), *Child Welfare in Canada. Research and Policy Implications*. Toronto: Thompson Educational Publishing.

<sup>658</sup> Ibid.

- Sensitivity to different values;
- Cultural broker skills;
- Teamwork skills; and
- Comfort in ambiguity.

‘Cultural brokers’ have the ability to ‘walk in two cultures’ with comfort in the different roles required. Many interviewees were cultural brokers between governments and Aboriginal agencies.

Tong and Cross of the United States National Indian Child Welfare Association produced a paper with the specific goal of providing strategies for the development of effective cross-cultural partnerships for child abuse prevention.<sup>659</sup>

Some of their suggestions were as follows:

- Ensure that an effective needs assessment has been carried out. The appropriate method for conducting the needs assessment is itself dependent on the specific features of the individual community.
- Consult with the community.
- Have a clear goal of empowering the community, as distinct from simply providing services to the community.

They found two vital factors in successful strategies were to attain inclusiveness and empowerment. They suggest that involvement of, and consultation with, community members should take place throughout the project cycle, from design through to evaluation.<sup>660</sup> Natural community support networks should be used and developed, while community-based helpers and prevention networks should be engaged. This, Tong and Cross suggest, can be achieved through attending formal and informal community gatherings, or by sponsoring joint training or public awareness events with Indigenous organisations. The history of disempowerment and attendant feelings of helplessness must be overcome by harnessing community strengths and resources. Historical

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<sup>659</sup> Tong & Cross (1991) above n2.

<sup>660</sup> See discussion of Manitoba child welfare model in Chapter 5 which includes extensive involvement of all parties from the planning stages onwards.

mistrust is potentially destructive and also needs to be acknowledged and addressed. Strategies which have been used to engage Indigenous communities include using the influence of Indigenous leaders to disseminate information, and seeking information and advice from Indigenous organisations. Programs should be designed so that they are sustainably incorporated into the local Indigenous culture. An example in the Australian context of effective collaboration and engagement between an Indigenous community agency and a government department is the respect which the Victorian Aboriginal Child Care Agency (VACCA) is accorded by non-Aboriginal children's agencies and government departments. In addition to VACCA's statutory responsibilities with respect to providing cultural advice about all Indigenous children who are notified to the department and family support and out-of-home care services, VACCA provides law reform and policy advice and training such as Nikara's Journey, a two day training program for non-Aboriginal foster carers to assist them to support the best interests of Aboriginal children in their care. See discussion in Chapter 6 with respect to the legislative structure which supports the empowerment of VACCA and the symbiotic relationship between VACCA's increased powers and responsibilities and increased cultural competence within the Victorian Department of Human Services and other Victorian non-government children's services.

#### *Factors which contribute to culturally competent work*

There are a number of key issues which practitioners need to be aware of for culturally competent work with Indigenous peoples. Weaver identifies a number of themes for practitioners to be aware of when working with Native Americans.<sup>661</sup> These are issues which appear to also have relevance for practitioners working with other Indigenous peoples. Weaver states that interventions addressing trauma are often best approached through a group method, as much trauma has been perpetrated on Indigenous peoples as a group, and Native American identity is focussed on groups. She notes that community healing projects are becoming more common and that validation of historical grief

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<sup>661</sup> Weaver (1998) above n7.

is an important element in assessment and healing processes. Colonial processes impact on identity in a number of ways. These include impacts on self-esteem and identity through a lack of recognition of Aboriginal Nations by the state and some Aboriginal individuals by Aboriginal groups. McKenzie and Morrisette note the value of cultural knowledge and reviving cultural practices for securing identity, healing and wellbeing and that Aboriginal values may serve as a buffer against the impacts of destructive colonial practices.<sup>662</sup>

In their work on cross-cultural partnerships for child abuse prevention, Tong and Cross articulate a series of definitions and indicators for a range of levels of organisational cultural competence.<sup>663</sup> Tong and Cross declare agencies to be at a stage of 'cultural pre-competence' when they have acknowledged their failure to adequately meet the needs of the Indigenous community, and respond by implementing outreach programs, or by recruiting Indigenous people who are:

... trained to provide services in a standard fashion. Although an effort is made, the effort falls short because it is not culturally tailored. These efforts may give service providers a false sense of security ... Agencies work seriously on the issues yet ineffectively.<sup>664</sup>

In contrast with the above, culturally competent agencies will adapt service models to better suit Indigenous people, in consultation with the community. Tong and Cross term the highest level of competence 'cultural proficiency.' This is characterised by agencies which 'seek to add to the knowledge base of culturally competent practice by conducting research or developing new therapeutic approaches based on culture.' Culturally competent service providers will sanction or mandate the 'incorporation of cultural knowledge into the service delivery framework.'

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<sup>662</sup> McKenzie & Morrisette (2003) above n7, 264.

<sup>663</sup> Tong & Cross (1991) above n2, 13.

<sup>664</sup> Ibid, 14.

In order to achieve cultural competence, individuals and institutions need more than awareness and commitment; they must be appropriately skilled and informed. Unfortunately, little attention has been paid to identifying the skills and knowledge most important to the culturally competent provision of social services to Indigenous people. Weaver has conducted some of the limited field research in this area. Weaver surveyed 62 Native American social workers and social work students about their beliefs regarding cultural competence and Native American clients.<sup>665</sup> Respondents came from a range of tribal backgrounds, representing 36 Native American nations. Weaver's survey asked respondents what they felt were appropriate knowledge, skills and values to work culturally competently with Native American clients.<sup>666</sup> Her findings are consistent with the findings of practitioners and researchers referred to above. She identified the following values and skills to be important:

- The recognition of diversity between and amongst tribes and communities;
- The importance of treaties, recognition of the sovereign status of nations, and understanding of the impacts of contemporary and past government policies in particular the effects of atrocities perpetrated against Indigenous peoples;
- Understanding of Native American culture including systems of communication, belief, values, and their world view. Common core cultural values which she identified include importance of family, tradition, spirituality, respect for elders, matriarchal structures, and issues of death and mourning;
- Understanding of contemporary realities including tribal politics, Indigenous organisations, structure of reservations and urban Native American communities, Federal agencies and laws, and issues of loss and post-traumatic stress;

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<sup>665</sup> Weaver (1999) above n4.

<sup>666</sup> These three categories are those broadly considered to be necessary to culturally competent social work practice in relevant literature.

- The ability to define problems and solutions from a Native American perspective, and to empathise with Native American clients; and
- The ability for patience, to listen actively, to tolerate silence, and to refrain from speaking at times when they otherwise might when with Native American clients.
- She also noted the importance of practitioner wellness and self-awareness, their willingness to show humility and to learn from clients, and to respect and appreciate differences.

A study of placement prevention and reunification projects in Native American communities reviewed six projects in a wide range of settings.<sup>667</sup> The communities included a variety of cultural environments ranging from those with strong tribal identities and cultural ties to those with few bonds to tradition and cultural history. The study identified a number of implications of these contextual differences, including the greater opportunity to design services tailored to specific cultural issues, the increased need for confidentiality procedures and the higher dependence on the support of tribal leaders for successful implementation in communities which are more 'traditional.' In more urbanised communities or those which are more enmeshed in the dominant culture they found a greater need to provide services designed to enhance Native American cultural identity and that initiatives were more likely to address disempowerment and conflict with the dominant culture. These differences illustrate the need to consider social, cultural, economic and political contextual differences and similarities when attempting to replicate projects.

Culturally competent agencies will consider factors in the lives and histories of their Indigenous clients which will influence client-agency relationships. Horejsi et al have

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<sup>667</sup> Smollar J & French R (1990), *A Study of Six Native American Placement Prevention and Reunification Projects*, prepared by CSR Incorporated and Three Feathers Associates. The projects were conducted in urban, rural and remote communities in five different states: Mississippi, Oklahoma, Washington, Oregon, and Alaska.

produced a useful guide to factors contributing to what may be considered negative responses of Native American parents to child protection services.<sup>668</sup> These factors include poverty-induced feelings of helplessness which may be exacerbated by welfare intervention, racism and discrimination which can lead to fear and distrust of welfare workers, fear due to past experiences of removals of children that intervention by welfare agencies may lead to permanent removal and loss of children, and concerns that internal community politics may lead to limited access to resources and treatment by Indigenous agencies.<sup>669</sup> McKenzie and Wharf discuss the loss of citizenship attributes by many who are disaffected with an important aspect of this loss being the exclusion or marginalisation from participating in the decisions and events which affect their lives or the life of the community more generally.<sup>670</sup> It is vitally important that child and family service providers are able to integrate knowledge and reflection with practice skills.<sup>671</sup> Legislation which facilitates participation and collaboration will be of little use without effective implementation. Wide gaps often exist between legislative and policy frameworks, and their implementation in practice.<sup>672</sup>

### *The legacy of historical removals*

An understanding of the impacts of trauma resulting from a history of forced and unjustified removals of children and culturally inappropriate service provision is necessary for effective social services policy analysis and development and child welfare

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<sup>668</sup> Horejsi C, Heavy Runner Craig B & Pablo J (1992), 'Reactions Of Native American Parents To Child Protection Agencies: Cultural And Community Factors,' 71(4) *Child Welfare* 329.

<sup>669</sup> Ibid. These concerns were also reflected by Indigenous participants in a study of cultural care for Aboriginal and Torres Strait Islander children in out-of-home care: Libesman T (2011), *Culture Care for Aboriginal and Torres Strait Islander Children in Out of Home Care*. Melbourne: SNAICC.

<sup>670</sup> McKenzie & Wharf (2004) above n30.

<sup>671</sup> Weaver (1998) above n8.

<sup>672</sup> For a useful outline of features of culturally competent policy, and some practices

recommended to implement them, see Hart R (1997), *Beginning a Long Journey: a Review of Projects Funded by the Family Violence Prevention Division, Health Canada, Regarding Violence in Aboriginal Families*. Ottawa: Health Canada, 14-15.



program implementation with Indigenous communities.<sup>673</sup> As discussed in Chapters 5 and 6, Indigenous children and their communities have suffered enormously from practices involving the removal of children and their placement in residential schools or non-Indigenous adoptive families in different but parallel ways in Australia, Canada, the United States and New Zealand.

However, the impacts of this history, as illustrated in the case study in Chapter 3, are seldom considered by non-Indigenous agencies in practice. The Awasis Agency of Manitoba points out that:

Social work cases are not looked at within the larger context of social, economic, historical, political, and cultural realities. Blame rests with the individual ... Child and Family Services within a First Nations context must adopt a contextual perspective for service delivery to be effective.<sup>674</sup>

An atmosphere of taboo and shame still exists around the history of maltreatment of Indigenous children in a number of countries. According to Morrisette, the residential school experience of Native people throughout North America is still suppressed and some regard it as attempted cultural genocide. Yet, '(b)y better understanding client cognitions and behaviours that stem from this experience, treatment plans can be designed to overcome problematic parenting patterns.'<sup>675</sup>

Strategies such as culturally appropriate placement may not resolve underlying problems. Evidence suggests that parents who themselves spent lengthy periods in

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<sup>673</sup> McKenzie B (1997), 'Connecting Policy and Practice in First Nations Child and Family Services: A Manitoba Case Study,' in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.

<sup>674</sup> Awasis Agency (1997) above n10, 24. Part of this quote appears in upper case in the original.

<sup>675</sup> Morrisette P (1994), 'The Holocaust of First Nation People: Residual effects in Parenting and Treatment Implications,' 16(5) *Contemporary Family Therapy an International Journal* 381, 386.

adoptive placement or residential schools as children have a higher chance of experiencing parenting or substance abuse problems which lead to the removal of their children, establishing an intergenerational pattern of family breakdown and removal.<sup>676</sup> Factors which contribute to lack of parenting skills include: the absence of positive parental role models; destroyed transmission of parenting knowledge and behaviours; absence of experience of family life; and sexual abuse.<sup>677</sup> Parents who spent time in residential schools as children tend to associate discipline with non-caring, and can become over-protective of their own children, which can lead to 'enmeshed relationships and blurred intergenerational boundaries.'<sup>678</sup>

Some program models aim to raise awareness of and educate Indigenous people about how the effects of historical factors have contributed to their contemporary realities, experiences and circumstances. In so doing, these innovative models attempt to change behaviour through education about some of the root causes of child abuse and neglect in Indigenous communities. Some of these programs are described and discussed below.

### *Collaborative evaluation of programs*

Conventional evaluation criteria and frameworks are 'severely tested' in the context of Native child welfare. Beliefs and values underlying conventional approaches are usually those of the mainstream. Different belief systems can mean differences in objectives, indicators, understanding about the appropriateness of who does the evaluation and

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<sup>676</sup> Ibid; Mannes (1993) above n22; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC) (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Sydney: Human Rights and Equal Opportunity Commission, Chapter 11.

<sup>677</sup> Morrisette (1994) above n50; Horejsi et al (1992) above n43; NISATSIC (1997) above n51; Cunneen C & Libesman T (2000), 'Postcolonial trauma: the contemporary removal of indigenous children and young people from their families in Australia,' 35(2) *Australian Journal of Social Issues* 99.

<sup>678</sup> Morrisette (1994) above n50, 386. Also, as referred to above, sometimes there can be a blurring between cultural expectations and understandings and framing parenting as problematic, see discussion above with respect to defining some culturally valued parenting as enmeshed and problematic.

how the information is used.<sup>679</sup> It has been noted that, 'Too often an evaluator's desire to have a clean evaluation ignores the differences in values and belief systems.'<sup>680</sup> There is a need to render values underlying evaluation processes explicit as part of the evaluation process.

### *Standards*

The levels of cultural appropriateness and relevance of child welfare-related standards to Indigenous groups is a major issue. Culturally inappropriate standards used for determining a child's need for substitute care have been a contributor to disproportionate rates of removal in Indigenous populations.<sup>681</sup> In many places, culturally inappropriate alternate care standards lead to the placement of Indigenous children with non-Indigenous carers.<sup>682</sup> Expanding on this point, the report of a Manitoba community consultation notes:

The standard and procedures followed by First Nations agencies for apprehensions, placements and adoptions are provincially defined. The standards relating to foster homes on reserves are viewed from the mainstream society perspective. Most First Nations homes are unable to meet these standards ... It is not always possible to find foster or adoption homes that will pass the provincial test in the communities.<sup>683</sup>

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<sup>679</sup> For an example of a collaborative evaluation see Ricks F, Wharf B & Armitage A (1990), 'Evaluation of Indian Child Welfare: A Different Reality,' 24 *Canadian Review of Social Policy* 41, a collaborative evaluation with the Champagne/Aishihik child welfare pilot project. The evaluation team worked with a committee comprising representatives from government and band. Evaluation questions were devised by the committee, who also reviewed information and made recommendations. The process was designed to lead to ongoing joint decision-making and better understanding between government and band. The evaluation report was produced by all parties – evaluation team, government and band.

<sup>680</sup> Ibid, 45.

<sup>681</sup> First Nation's Child and Family Task Force (1993), *Children First, Our Responsibility: Report of the First Nation's Child and Family Task Force*. Manitoba: The Task Force; Mannes (1993) above n22; Community Panel (1992) above n17.

<sup>682</sup> Ibid.

<sup>683</sup> First Nation's Task Force (1993) above 56, 51.

Both the above report and policy discussion from a Manitoba regional agency consider that conventional child welfare standards are not always appropriate, and both recommend that standards should be based on holistic community-defined standards generated at the local level.<sup>684</sup> In the converse, it could be argued that appropriate standards with respect to all agencies providing culturally appropriate services and incorporating cultural care planning within case planning and out-of-home care assessments are factors which should be considered when accrediting welfare agencies and out-of-home care providers.<sup>685</sup>

### *Staffing and training issues*

A factor inhibiting increased Indigenous control of child and family services, is the shortage of trained and available Indigenous workers.<sup>686</sup> This shortfall is closely tied to the exclusion and marginalisation of Indigenous people from educational opportunities and more broadly the impacts of colonialism. Redressing capacity within communities is part of a broader need for reparation and redress for past wrongs.

Consultations with Aboriginal peoples in British Columbia found that culturally inappropriate standards for health care and social worker education have contributed to the ‘gross under-representation’ of Aboriginal people in these fields.<sup>687</sup> Contributors to a community consultation, in Manitoba, argued that academic qualifications were not the most important criteria for workers, as they

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<sup>684</sup> Ibid; Awasis Agency (1997) above n10.

<sup>685</sup> Libesman T and Avgoustinos C (forthcoming), *The cultural appropriateness of LAC Assessment and Action Records for Aboriginal and Torres Strait Islander children and young people in out of home care*. Victoria: SNAICC; in the Canadian context see McKenzie B, Bennett M, Kennedy B, Balla S & Lamirande L (2009), ‘Exploratory Regional Study on Child Welfare Outcomes in Aboriginal Communities.’ Ontario: Association of Native Child and Family Services Agencies of Ontario. Available at: <http://www.fncaringociety.com/sites/default/files/docs/ANCFSAO-Final-Report-Nov2009.pdf>

<sup>686</sup> Durst D (1998), ‘The Wellness of Canadian First Nations Children: Seeking Solutions Through Self-Government’ in Hylton J (ed), *Aboriginal Self-Government in Canada* (2nd edition). Saskatoon: Purich; Armitage A (1993), ‘Family and Child Welfare in First Nation Communities’ in Wharf B (ed) (1993), *Rethinking Child Welfare in Canada*. Toronto: McClelland & Stewart, 131.

<sup>687</sup> Community Panel (1992) above n17.

believed that mainstream social work curricula do not meet the needs of First Nations people.<sup>688</sup> The Manitoba consultation also noted that senior management positions at First Nations agencies were usually held by non-Aboriginal staff; however, the consultation also found that family-based nepotism influenced appointments at First Nations agencies, when better qualified staff were available.<sup>689</sup> Many social work departments in universities have attempted to respond to this issue by including Indigenous content in their curricula and establishing special entry programs for Indigenous students.<sup>690</sup> In the name of increased accountability and improved standards, the Gove Report<sup>691</sup> proposed a social worker regulation scheme. Some First Nation social workers viewed this as a means of exerting control over emerging First Nations child and family services practice.<sup>692</sup> A human rights framework for regulating legislative and practice standards, as discussed in Chapters 2 and 4, could assist in overcoming cultural domination and provide a bridge between mainstream and Indigenous understandings and standards.

A British Columbia consultation found that the under-representation of Indigenous staff in Indigenous child and family services has led to culturally inappropriate service delivery, and the devaluing of traditional Aboriginal healing practices.<sup>693</sup> A Manitoba consultation recommended that, except where locally sanctioned, workers should be First Nations people, and development of training

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<sup>688</sup> First Nation's Task Force (1993) above n56.

<sup>689</sup> Ibid.

<sup>690</sup> A particularly robust example of this, with a program established for Aboriginal students and support services in place, is the social work program at Manitoba University.

<sup>691</sup> Gove TJ (1995), *Report of the Gove inquiry into child protection in British Columbia*. British Columbia: Queens Printer. The Gove Report examined the neglect, abuse and death of a six year old boy, Matthew John Vaudreil, while under the attention of child protection system in British Columbia. See below ('Family preservation vs child protection') for further detail with respect to this report.

<sup>692</sup> Schmidt G (1997), 'The Gove Report and First Nations Child Welfare' in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.

<sup>693</sup> Community Panel (1992) above n17.

programs should be based on First Nations criteria.<sup>694</sup> Where non-Indigenous workers are employed, the importance of cross-cultural training is emphasised. The Manitoba consultation stated that, '(c)ultural differences created chasms between non-First Nations workers and their clients.'<sup>695</sup> Stereotypical views might lead to the belief that these issues and differences might not be so relevant to Indigenous people living apparently acculturated lives in cities. However, the consultation also found that the 'same concerns were expressed in urban areas as well as in First Nations communities.'<sup>696</sup> In addition to the shortage of Indigenous workers, a lack of supervision and administrative support is another impediment to the development and success of First Nation agencies.<sup>697</sup>

### Indigenous community control

Around the world, child welfare systems and agencies are struggling to protect their reputation and carry out their responsibilities in an environment of ever-increasing reports of abuse and neglect. There is a growing consensus among professionals and the public that there is a need for fundamental change in how child protection services should be conceptualised and delivered, for mainstream populations as well as Indigenous children and young people.<sup>698</sup>

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<sup>694</sup> First Nation's Task Force (1993) above n56.

<sup>695</sup> Ibid, 56.

<sup>696</sup> Ibid. Similar concerns with respect to cultural difference between departmental officers and Aboriginal clients were expressed by Aboriginal participants in a cultural care study in Australia see Libesman (2011) above n44.

<sup>697</sup> Durst (1998) above n61.

<sup>698</sup> See Chapter 1 with respect to the public health care model. The extent to which a public health model will enhance a human rights framework for Indigenous children and young people's wellbeing depends on how risk factors are identified, how culture and the suppression of it are understood and, more broadly, the ways in which colonial experience is responded to at a primary level. If it is characterised as the sum of empirical manifestations of risk, such as poverty, unemployment and poor education, and at an individual level truancy, low birth weights, high rates of STDs etc then the response could miss the underlying connecting factors which result in the sum of these empirical signs of risk manifesting in many Indigenous communities. If responses to these risks contextualise them and respond both with individual and broader social and political redress then a public health models should harness and promote better outcomes for Indigenous children and young people within a human rights framework.

The United States' 'Executive Session on Child Protection,' a three-year series of intensive three-day meetings of professionals, academics and advocates, concluded that a more collaborative, community-based approach to child protection was required.<sup>699</sup> The Session proposed that rather than child protection agencies bearing sole responsibility for protecting children, other agencies, parents and the public should jointly share responsibility in 'community partnerships for child protection.'<sup>700</sup> The Session envisaged the development of comprehensive neighbourhood-based supports and services, which draw on family networks and other informal resources. These networks are closer to, and more trusted by, families in need than traditional services. Partnerships build accountability, trust and knowledge between community and service providers. It was suggested that child protection service agencies must engage with families and natural networks of support. The Session expressed the need for 'instituting community governance and accountability for protecting children.' The Session could also envisage the development of formal community boards responsible for child protection as a viable alternative.

Wharf and McKenzie point out, in making a general case for local community control of community services that people respect, identify with, and perform better in projects and programs when they have been involved in planning and implementation.<sup>701</sup> Given the parallel histories of dispossession and wholesale removal of children from Indigenous peoples in a number of colonised countries, the issue of community control is particularly important for Indigenous peoples. A report based on a review of 15 Health Canada-funded Family Violence Prevention projects planned and implemented by Aboriginal people made the following observation with respect to Indigenous control of child welfare services:

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<sup>699</sup> Farrow F and the Executive Session on Child Protection (1998), *Child Protection: Building Community Partnerships*. Cambridge: Harvard University.

<sup>700</sup> A collaborative and interagency response for child protection has been recommended by a number of reviews into child protection services in Australia with reference to Indigenous children's needs. See discussion in Chapter 1.

<sup>701</sup> Wharf B & McKenzie B (1998), *Connecting Policy to Practice in the Human Services*. Ontario: Oxford University Press.

As ownership of family-related services has increasingly passed to Aboriginal control, it has become evident that simply staffing those services with Aboriginal people is only part of the answer. The services themselves need to be designed by Aboriginal people to make them work as a reflection of the host community and the belief system found there.<sup>702</sup>

The transfer of agency responsibility from mainstream to Indigenous agencies has illustrated the importance of collaboration between mainstream and Indigenous agencies in processes of change and the importance of capacity building within Indigenous agencies for effective Indigenous agency service provision.<sup>703</sup> Transfer of agency responsibility needs to be matched with adequate funding and capacity building both within agencies and within the broader community which is being served.<sup>704</sup>

In 1993, an Ontario Aboriginal committee produced an Aboriginal family healing strategy, developed through a community consultation process involving 6000 Aboriginal people throughout the Province. The strategy 'sees the empowerment of Aboriginal people as being a central component in the healing of individuals, families, communities, and Aboriginal Nations.'<sup>705</sup> The strategy required Aboriginal community control and funding for its design and implementation. This process would depend on a provincial government commitment to devolving authority to the Aboriginal community. The strategy also outlined a suggested scheme for the phased devolution of authority for child protection to Aboriginal people. The phased handover of authority proposed in the Ontario Strategy involved the establishment of a joint management committee, with provincial government and Aboriginal community members. In the first phase, programming would continue under provincial Ministry mandates while beginning to share

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<sup>702</sup> Hart (1997) above n47, 12.

<sup>703</sup> See discussion in Chapters 5 and 6 (in particular the Manitoba case study in Chapter 5).

<sup>704</sup> Hudson P & McKenzie B (2003), 'Extending Aboriginal control over child welfare services: The Manitoba Child Welfare Initiative,' 51 *Canadian Review of Social Policy* 56, 63 -65.

<sup>705</sup> Aboriginal Family Healing Joint Steering Committee (1993) above n29, 3.



control over family healing programs. In the medium to long term, full control would be devolved to Aboriginal communities.

The phasing aspect of the scheme was designed to accommodate differing levels of community readiness. This aspect of the scheme may be adaptable, as the levels of social, physical, economic and political resources and infrastructure are likely to vary considerably between communities. A relative resource deficit is not necessarily a good reason to postpone a phased transfer of responsibility for child welfare to Aboriginal communities. Such a process, if planned and supported, can be part of a capacity building process within such communities. Many existing Indigenous-controlled child and family services appear to have a good record for improving child welfare outcomes in their communities. Below are two examples of successful Canadian services.

Weechi-it-te-win Family Services (WFS) is a regional tribal agency responsible for delivery of child and family services, including child protection, to ten Ontario First Nations reserves. WFS was the first Aboriginal agency in Ontario. It is funded by the Ministry of Community and Social Services, Ontario and the Department of Indian Affairs. The following discussion is drawn from the report of an operational review of the WFS service.<sup>706</sup>

Some funding was transferred from the mainstream Provincial service to WFS in 1986, and full responsibility for child welfare was assumed by the agency in 1987. A new approach to child protection was implemented, using a cooperative system of Aboriginal child placement and applying an Aboriginal child placement principle which mirrors that of the New South Wales legislation.<sup>707</sup> WFS's service model emphasises family preservation and community development work to assist in the healing of the whole

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<sup>706</sup> Weechi-it-te-win Family Services (2005), *Building Healthier Communities: A Report of the Operational Review of Weechi-it-te-win Family Services*, unpublished report, Ministry of Community and Social Services, Ontario.

<sup>707</sup> See the 'Aboriginal placement principle' in NSW legislation discussed in Chapter 6.

community, with minimal formal intervention and substitute care. A consensual system of 'customary care' was established, with a local Tribal worker, a WFS worker and the family and/or other community members drawing up a 'Care and Supervision Agreement' together for each case. The Agreement is formally sanctioned by a resolution of the Chief and Council of the First Nation. Under the WFS system, consensus may be achieved by: a) agreement between the family and the family services worker; b) agreement between the committee and the family; and c) referral to the First Nation's council. Between 1988 and 1995, at least 85% of placements were arranged through Agreements rather than through mandatory mainstream methods. Where agreement is not reached, WFS applies for a hearing in a family court.

The WFS Community Care Program offers family support and child care services as well as child protection. Its principles include a focus on tradition, family and extended family, and community control and orientation. The family services committee at each First Nation community is responsible for assessment, placement and support services. WFS operates under the provincial Ontario *Child and Family Services Act*. They would however prefer legislation which recognises their jurisdiction and which validates their Indigenous frame of reference. However, their delegated authority, which accords them increased control over child protection, has afforded a good deal of flexibility with respect to how they look after Indigenous children's welfare and wellbeing.

The West Region Child and Family Services (WRCFS), a child welfare agency which serves nine Manitoba First Nation communities, is another example of a successful Indigenous-controlled agency. McKenzie's case study of the service was drawn from results of a 1994 WRCFS program evaluation conducted by the same author, and a participatory research project funded by the agency.<sup>708</sup> In the 1994 evaluation, the average score out of five for agency success granted by community respondents was 3.9; which is very high for a service with such a difficult mandate as child protection. One of the two most

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<sup>708</sup> McKenzie (1997) above n48.

important agency goals nominated by community respondents was 'to deliver community-based culturally appropriate services.'<sup>709</sup> Stated agency goals are closely in line with community feeling on these issues, as three important agency principles, which were also used as evaluation criteria, are:

- Aboriginal control;
- Cultural relevance; and
- Community-based services.

Overall, the evaluation concludes that WRCFS's holistic approach to service-delivery was effective. Important factors considered to contribute to agency success were:

- Autonomy and control over services and policies, flexibility and creativity;
- Sound, supportive, progressive leadership; and
- Collaborative approach involving the community and which is empowering.<sup>710</sup>

### *Accountability*

A number of accountability-related issues arise in the international literature on Indigenous child welfare. This chapter will focus primarily on the one which arises most frequently, and causes the greatest concern: political or personal interference with, and influence over, Indigenous-controlled child and family services. This is a serious issue, which compromises the probity and effectiveness of some Indigenous agencies, and leaves Indigenous women and children the greatest losers. Other issues associated with devolved authority which will be addressed include: the problem of determining specific responsibilities where divided authority creates multiple accountability; and the capacity of local services to provide assured child protection; and confidentiality. Consideration is then given to responses to these accountability issues.

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<sup>709</sup> Ibid, 12.

<sup>710</sup> McKenzie (1997) above n48.

The issue of political interference arose most frequently in the Canadian, Australian, and New Zealand literature, and there was only limited reference to this issue in the United States material reviewed. This may reflect differences in research or differing practices. The most critical reference to political interference found in this review was in the report of a Manitoba Indigenous community consultation. Many of those consulted stated that Chiefs, councillors, directors, staff and other influential community members interfered improperly in child welfare cases. Presenters 'said that abusers pursue and perpetrate atrocities with impunity. Among them are influential members of communities. Presenters described them as "untouchables" and refuse to identify them for fear of reprisal.'<sup>711</sup> The consultation task force heard of widespread physical and sexual abuse, existing within a culture of silence. Sometimes placement was selective, with children being placed in the homes of those favoured by an agency, worker or Chief.<sup>712</sup>

Allegations of abuse cover-ups and the protection of relatives were also made in the Giesbrecht report which followed the suicide of an adolescent in the care of a First Nations agency, Dakota Ojibway Child and Family Services.<sup>713</sup> The Giesbrecht report and the external reviews of the Manitoba child welfare system specifically cited political interference by powerful community members as an impediment to the development of First Nation child and family services agencies.<sup>714</sup> Gray-Withers states that First Nation women's groups accused Chiefs

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<sup>711</sup> First Nation's Task Force (1993) above n56, 37.

<sup>712</sup> The issue of reformed governance practices to make it safer to report and have response to allegations of child sexual assault in communities is also discussed in the context of Australian reviews see Chapter 1.

<sup>713</sup> Giesbrecht B (1992), *The Fatality Inquiries Act: Report by Provincial Judge on Inquest Respecting the Death of Lester Norman Desjarlais*. Manitoba: Department of Justice; The following reports reviewed deaths of Aboriginal children under the care of Aboriginal child welfare agencies: Hardy M, Schibler B & Hamilton I (2006), *Strengthen the Commitment: An External Review of the Child Welfare System*. Manitoba: Office of the Ombudsman; Schibler B & Newton J (2006), *Honouring their Spirits: The Child Death Review*. Manitoba: The Office of the Children's Advocate.

<sup>714</sup> Durst (1998) above n61.

of ‘complicity and political self-serving interference’ following the suicide referred to above, other deaths in care and the leaving of other children in abusive homes.<sup>715</sup> Other works claim that urban-based Aboriginal women’s groups were the first to publicly raise concerns about the impact of political interference by First Nation’s community leaders on child and family services.<sup>716</sup>

The apparent political interference in some Canadian Indigenous child welfare matters is closely linked to the small size of many First Nations communities. Health or social workers and police are likely to know, or be related to, the victim or the perpetrator. The close proximity of these various parties involved in child protection matters is likely to engender bias.<sup>717</sup> Although women had a powerful place in traditional First Nation’s culture, men dominate today. The colonising culture is a factor which has impacted on the adoption by many First Nation’s men of negative attitudes and behaviour towards women.<sup>718</sup> One source estimates that 80% of Canadian Aboriginal women suffer physical, psychological, sexual and other forms of abuse.<sup>719</sup> This abuse is often seen as a private family matter in Aboriginal communities. As a result, little intervention from relatives or others occurs. Support services are often unavailable, and Chiefs or council members are unlikely to be charged over domestic violence matters.<sup>720</sup>

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<sup>715</sup> Gray-Withers D (1997), ‘Decentralised Social Services and Self-Government: Challenges for First Nations’ in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.

<sup>716</sup> McKenzie (1997) above n48; McKenzie B, Seidl E & Bone N (1995), ‘Child Welfare Standards in First Nations: A Community-Based Study’ in Hudson J & Galaway B (eds), *Child Welfare in Canada: Research and Policy Implications*. Toronto: Thompson Educational Publishing.

<sup>717</sup> Dumont-Smith C (1995), ‘Aboriginal Canadian Children who Witness and Live with Violence’ in Peled E, Jaffe PG & Edleson JL (eds), *Ending the Cycle of Violence: Community Responses to Children of Battered Women*. Thousand Oaks: Sage Publications, 275.

<sup>718</sup> Gray-Withers (1997) above n90; First Nation’s Task Force (1993) above n56.

<sup>719</sup> Dumont-Smith (1995) above n92.

<sup>720</sup> Ibid.

These problems can be exacerbated by processes instituting self-government and First Nation's control of child and family services. In reporting on a series of interviews with First Nation's women, Gray-Withers stated:

(T)here has been little credence or academic attention paid to First Nations women's control over social services or input into self-government initiatives. Native women's groups have been vocal in their criticism of self-government where it entails the further domination of First Nations men over the lives of women and children.<sup>721</sup>

Gray-Withers also contends that this gender-based power imbalance undermines child protection:

In many communities, the male-dominated Native leadership has hidden and perpetuated problems of child abuse ... A process of empowerment for women and their communities will need to occur to allow for true community development and the acceptance of responsibility for current problems.<sup>722</sup>

Some First Nation's women fear that the achievement of self-government would cement power in the hands of the generally male Chiefs and in response have favoured regional control of child welfare, in the hope that Chiefs would have less influence over child welfare outcomes in the absence local control.<sup>723</sup> Male violence and a breakdown of order within Indigenous communities has also been recognised as a significant problem in many communities in Australia, the United States and Canada.<sup>724</sup>

When authority for child and family services is handed over to Indigenous agencies, accountability can become more fragmented. Armitage highlights the

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<sup>721</sup> Gray-Withers (1997) above n90, 86.

<sup>722</sup> Ibid, 89.

<sup>723</sup> Ibid; Durst (1998) above n61.

<sup>724</sup> See Chapter 1 with reference to reviews into sexual abuse of children in Indigenous communities and Chapter 4 for an analysis of the rule of law and establishing peace and order within Indigenous communities.

co-ordination problems which often ensue between organisations and jurisdictions:

The establishment of independent First Nation family and child welfare organisations has the effect of dividing authority between mainstream provincial agencies and independent First Nation organisations. The result is diminished accountability in the child welfare system as a whole. At a practical level single accountability for the welfare of children and advocacy for them as individuals is lost because of the fragmentation of authority.<sup>725</sup>

It is important to stress that this ‘diminished accountability’ is not a specific result of the involvement of Indigenous organisations, but simply a result of adding to the number of stakeholder organisations responsible for the child. First Nation’s agencies may be accountable to provincial and federal governments, as well as to their people.<sup>726</sup>

Where regionalised First Nation’s agencies exist, there often appears to be a struggle between them and their member organisations. The regional body wishes to assert a certain level of control in order to ensure that it meets its accountability obligations to government, both with respect to policy implementation and financial responsibility. Local groups feel that they know the needs of their communities best, and also seek greater control.<sup>727</sup> All of the 22 First Nation women interviewees consulted in one research project confirmed that there was conflict between regional offices and local Chiefs.<sup>728</sup> This issue is also touched on in the operational review of an Ontario regional tribal agency. Weechi-it-te-win Family Services (WFS) is responsible for delivery of child

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<sup>725</sup> Armitage (1993) above n61, 169.

<sup>726</sup> Hudson P & McKenzie B (1987), *Evaluation of the Dakota Ojibway child and Family services*.

Winnipeg: Department of Northern and Indian Affairs; Hudson P & Taylor-Henley S (1987), *Agreement and Disagreement: An Evaluation of the Canada-Manitoba Northern Indian Welfare Agreement*. Winnipeg: University of Manitoba as cited in Armitage (1993) above n61.

<sup>727</sup> Gray-Withers (1997) above n90.

<sup>728</sup> Ibid.

and family services, including child protection, to ten First Nation's reserves. Service agreements establish each First Nation as a service provider accountable to WFS for services provided to community members. WFS is itself in turn accountable to the (provincial) Minister of Community and Social Services, and also to the Chiefs and their First Nations for implementing its stated program. The review states that accountability has been an ongoing 'bone of contention' between WFS and the individual reserves, but does not furnish further detail.<sup>729</sup>

Some researchers have called for local communities to exercise caution in seeking a child protection mandate. In 1997, McKenzie conducted an evaluation-oriented case study of the West Region Child and Family Services (WRCFS), a child welfare agency which serves nine Manitoba First Nation communities. In the report, he noted that 'in some Manitoba communities the goal of local autonomy has been pursued without adequate assurance of the community's capacity to respond to the complexity of needs within families and to guarantee children a basic right to protection.'<sup>730</sup> This concern was more recently reiterated in the external review reports into Manitoba's child and family services system which followed the death of a five year old child. The external reviews found that the Manitoba initiative to transfer responsibility for child welfare to Aboriginal agencies was a 'major step forward' that the problems which were identified with the child welfare system predated the transfer and that reforms should be made in the spirit of the Manitoba child welfare initiative. The response to these reviews has been a reform program which attempts to address the underlying causes of family breakdown through early intervention and prevention, strengthening support services for out-of-home care, increasing support for case workers and governance of the service delivery agencies and increasing funding for the services.<sup>731</sup>

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<sup>729</sup> Weechi-it-te-win Family Services (1995) above n81.

<sup>730</sup> McKenzie (1997) above n48, 103.

<sup>731</sup> See discussion in Chapter 5. Child and Family Services Standing Committee (2010), *Progress on the Changing for Children Initiative*. Available at: [http://www.changesforchildren.mb.ca/reports/progress\\_report\\_2010.pdf](http://www.changesforchildren.mb.ca/reports/progress_report_2010.pdf)



The last accountability issue to be dealt with in this chapter is confidentiality. Two issues which arise are the difficulty in maintaining confidentiality in small communities,<sup>732</sup> and the related problem of child welfare workers not always managing to keep information classified. Confidentiality is difficult to maintain in small communities and this may inhibit the use of some service models.<sup>733</sup> A paper reporting on domestic violence programs involving Native American women notes that some women did not participate in traditionally-oriented group work due to fears about confidentiality. This is an issue in both reservation and urban communities.<sup>734</sup>

It is important to recognise that current mainstream child welfare systems also have unresolved accountability gaps and significant problems. The complex accountability maze which Indigenous agencies are presented with under partial or interim authority arrangements makes them susceptible to accountability concerns. Although, as discussed above, the establishment of regional peak agencies may result in disputes between these bodies and their constituent community groups, regionalised models do appear to offer better accountability than fully localised ones.<sup>735</sup> WRCFS, the agency evaluated in McKenzie's above-mentioned report, is a good example of a regionalised service. WRCFS has a regional abuse unit which initially investigates notifications, and assists local workers who then take responsibility for follow-up services and case management. McKenzie states:

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<sup>732</sup> Carr J & Peters M (1997), *Assessment of Multi-Disciplinary Child Protective Teams in Five Western Washington Communities: Chehalis, Nisqually, Shoalwater Bay, Skokomish, Squaxin Island*. Thesis (MPA), The Evergreen State College, Washington, 98.

<sup>733</sup> Ibid.

<sup>734</sup> Norton IM & Manson SM (1997), 'Domestic Violence Intervention in an Urban Indian Health Centre,' 33(4) *Community Mental Health Journal* 331.

<sup>735</sup> Gray-Withers (1997) above n90; McKenzie et al (1995) above n91.

This model is quite effective in assuring required expertise in investigations, while protecting local community staff from some of the conflicts that can occur around initial abuse referrals in small communities.<sup>736</sup>

The establishment of regional agencies is one possible response to some of the accountability issues facing Indigenous child and family services. Below are a range of other strategies and initiatives:

- A system of accountability to an authority outside the community political leadership;<sup>737</sup>
- Agency adoption of a political interference/conflict of interest protocol which involves sanctions for non-compliance;<sup>738</sup>
- The creation of suitable forums for disputes and grievances to ensure fair and just process;<sup>739</sup>
- The establishment of inter-community child protection teams with members from each community in a given area ‘could help protect abused children caught in a political battle within a tribe,’<sup>740</sup>
- The creation of a national Indigenous child welfare commission;<sup>741</sup>
- The substitution of state or provincial legislation with comprehensive federal legislation, in order to simplify the accountability maze;<sup>742</sup> and
- Formal confidentiality agreements should be signed by child protection team members.<sup>743</sup>

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<sup>736</sup> McKenzie (1997) above n48.

<sup>737</sup> Gray-Withers (1997) above n90; McKenzie (1997) above n48.

<sup>738</sup> First Nation’s Task Force (1993) above n56.

<sup>739</sup> Ibid.

<sup>740</sup> Carr & Peters (1997) above n107, 99.

<sup>741</sup> Durst (1998) above n61.

<sup>742</sup> Ibid.

<sup>743</sup> Carr & Peters (1997) above n107.

A number of these strategies could be used in conjunction with each other, within a human rights legislative framework which prioritises the security and wellbeing of the child and provides redress for internal abuse or corruption.<sup>744</sup>

Any child welfare framework, whether it be Indigenous or mainstream, must provide protection for the most vulnerable members of the community. In Chapters 2 and 4 the legal and moral foundations for inclusion of Aboriginal organisations within a human rights framework for child welfare were outlined. Legal and service delivery for child welfare within a human rights framework must have the capacity to challenge and check governance which facilitates violence and intimidation. It also must have adequate resources to respond to children and young people's needs. The problem with a transfer of responsibility with inadequate resourcing is evident in the findings of the external reviews into the Manitoba child welfare system referred to above and is being contested more broadly in the claim by the First Nations Caring Society under the *Canadian Human Rights Act* against Canada.<sup>745</sup> Accountability where responsibility for child welfare has been transferred to Aboriginal agencies depends on both internal community governance structures and governments being accountable for adequately resourcing the transfer and ongoing service provision by Aboriginal agencies.

### *Traditional healing and cultural revival*

A number of authors and reports emphasise that for many Indigenous peoples, mental, emotional, spiritual and physical health are interdependent and inseparable.<sup>746</sup> The efficacy of spiritual remedies is often not respected in conventional social work

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<sup>744</sup> See Chapters 2 and 4 with respect to human rights and the protection of vulnerable minorities from intra community abuse and the exercise of judgement within a human rights framework with respect to Indigenous child welfare.

<sup>745</sup> See discussion of this claim in Chapter 5.

<sup>746</sup> See, for example, Blackstock (2011) above n12; Voss et al (1999) above n7; Barlow A & Walkup J T (1998), 'Developing Mental Health Services for Native American Children,' 7(3) *Child and Adolescent Psychiatric Clinics of North America* 555; Awasis Agency (1997) above n10; Connors (1993) above n23.

practice.<sup>747</sup> A report by the Awasis Agency of Manitoba notes that: 'Innovative approaches to dealing with families are seldom examined ... First Nations practice requires the adoption of an integrative approach, addressing cognitive, emotional, physical and spiritual development.'<sup>748</sup> Horejsi et al contend that: 'The most effective parent training programs are those that blend principles derived from modern child development with the spirituality, customs, traditions and other cultural ways of their tribe.'<sup>749</sup> A number of studies have called for collaborative traditional and western ways of assessing abuse and neglect and then when necessary looking after children and young people in out-of-home care.<sup>750</sup> Interviews with urban clients of a Toronto Aboriginal service revealed the significance for clients of a link to Aboriginal culture and community, and use of Aboriginal approaches in the healing process.<sup>751</sup> Parallel findings were made with respect to cultural care for Aboriginal and Torres Strait Islander children and young people in out-of-home care in Australia.<sup>752</sup>

McKenzie notes that holistic healing is important 'because it transcends the notion of helping in the narrow therapeutic sense. Instead, it emphasises the resilience of First Nation people, and their ability to utilize self-help and cultural traditions as a framework both for addressing problems and supporting future social development at the

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<sup>747</sup> Blackstock (2011) above n12; Voss et al (1999) above n7.

<sup>748</sup> Awasis Agency (1997) above n10, 25.

<sup>749</sup> Horejsi et al (1992) above n43, 335.

<sup>750</sup> The following Indigenous social welfare programs either focus on traditional healing methods, or use a combination of traditional Indigenous and conventional western methods. The Cheyenne River Sioux tribe introduced programs and a facility which draws on tribal practices. These include treatment and delinquency prevention programs employing 'inipi' or sweat lodge and 'hanbleceya' or pipe fast. See Voss et al (1999) above n7. In New Zealand the 'Mana Kainga Programme: Model of Family Empowerment' emphasises Maori spirituality and the involvement and importance of extended family, and inclusion of tribal links and genealogy in the programme. See Herbert A & Te Kanawa D (1998), 'The Mana Kainga Programme: Practice and Research Perspectives – A Manaipoto Model of Family Empowerment,' unpublished paper presented at the 12<sup>th</sup> *ISPCAN International Congress*, Auckland, September 1998. On the Lac du Flambeau Indian Reservation in Wisconsin, a Native American program targeting substance abuse among high-risk youth adopted a 'family systems' approach. The program integrated traditional Ojibwe values, beliefs and traditions into the local contemporary lifestyle, in an attempt to facilitate healthy family functioning. See Connors (1993) above n23.

<sup>751</sup> Anderson K (1998), 'A Canadian Child Welfare Agency for Urban Natives: The Clients Speak,' 77(4) *Child Welfare* 441.

<sup>752</sup> Libesman (2011) above n44.

community level.<sup>753</sup> Barlow and Walkup describe Native American concepts of health as flowing from a relational world view, in which health or wellbeing 'focus on bringing the individual back into harmony by balancing cognitive, spiritual, physical, emotional and environmental forces. Indigenous remedies may appear to be illogical by Western thought, because they are working on multiple factors rather than on a single diagnosed cause.'<sup>754</sup> This view contrasts with the linear Western model predicated on cause and effect. Traditional Canadian and US Indigenous philosophy is often symbolised using the 'Sacred Circle' or 'Medicine Wheel,' which emphasise the interrelatedness of all things. This philosophy informs an Indigenous understanding of healing processes as involving the whole community, rather than just the individual(s) or family concerned.<sup>755</sup> (See also discussion below with respect to the Community Holistic Circle Healing Project (CHCH) as a response to sexual abuse within Aboriginal communities below.)

### *Strengths vs deficits*

Conventional social work practice generally operates using a 'deficit reduction' model of intervention, which attempts to respond to perceived weaknesses in the individual.<sup>756</sup> Research also tends to approach Aboriginal families with a deficit model, rather than looking for strength, yet using Western clinical notions this may itself be iatrogenic.<sup>757</sup> This view is supported by research conducted by Kalyanpur.<sup>758</sup> The author conducted qualitative interviews with on-reservation Native American mothers and participant observations of a parent support group. The research aimed to investigate the implications of cultural blindness on the part of outside social services professionals. The professionals were a psychologist and a teacher, both Anglo-American, and a Native American home-

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<sup>753</sup> McKenzie (1997) above n48, 108.

<sup>754</sup> Barlow & Walkup (1998) above n124, 561.

<sup>755</sup> Connors (1993) above n23. See also discussion below with respect to the Community Holistic Circle Healing Project (CHCH) as a response to sexual abuse within Aboriginal communities.

<sup>756</sup> Voss et al (1999) above n7; Awasis Agency (1997) above n10.

<sup>757</sup> Red-Horse J (1997), 'Traditional American Indian Family Systems Families,' 15(3) *Systems and Health* 243.

<sup>758</sup> Kalyanpur (1998) above n9.

school liaison officer. These workers concluded that the mothers' reticence to use outside services resulted from stubbornness or defiance, while Kalyanpur found that these responses were based on historical trauma and an orientation towards 'looking after their own.'

The 'strengths perspective'<sup>759</sup> in social work embraces concepts of empowerment, collaboration, healing from within and suspension of disbelief.<sup>760</sup> Aboriginal children's agencies find that a strengths perspective is more compatible with their communities than prevailing social work pedagogy and practice, which is generally Eurocentric and this view is also supported by research which suggests that Indigenous child and family services will be enhanced by harnessing cultural strengths.<sup>761</sup> Voss et al call for a 'multigenerational family-centred strengths perspective' social work model for Lakota communities, in place of the 'individual deficit intervention' model.<sup>762</sup> The strengths perspective is compatible with many Indigenous communities' values, which emphasise participation of the family, extended family and community in the healing process.<sup>763</sup>

### *Healing through education and decolonisation*

Indigenous groups involved with child welfare agree that child abuse and neglect problems in their communities result to a large extent from the effects of colonisation. A Canadian service puts it this way:

Within the Native community, the child welfare system is a system that deals with the symptoms of larger social problems – racism, poverty, underdevelopment, unemployment, etc. [We regard] child welfare problems as

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<sup>759</sup> Saleebey D (1992), *The Strengths Perspective in Social Work Practice*. New York: Longman.

<sup>760</sup> Voss et al (1999) above n7.

<sup>761</sup> Tong & Cross (1991) above n2; Voss et al (1999) above n7; Awasis Agency (1997) above n10; Bamblett M (2007), 'Ten years of truth telling: what *Bringing Them Home* means to us all' in Secretariat of National Aboriginal and Islander Child Care (ed), *Remember Me – Commemorating the Tenth Anniversary of the Bringing Them Home report*. Melbourne: SNAICC, 8-12.

<sup>762</sup> Voss et al (1999) above n7.

<sup>763</sup> Libesman (2011) above n44.

the result of the colonial nature of relations between the aboriginal people and the Euro-Canadian majority.<sup>764</sup>

Duran et al describe the 'American Indian soul wound' as the effect of history of trauma and genocide of Native American people – an intergenerational post-traumatic stress disorder, with symptoms including 'depression, alcoholism, domestic violence, and suicide.'<sup>765</sup> 'Acculturative stress' is also part of the wound. Symptoms include anxiety, depression, feelings of marginality and alienation, and identity confusion. The authors outline a 'survivor syndrome' where intergenerational unresolved collective grief causes ongoing emotional repression, and compare this with that experienced by Jewish holocaust survivors.

However, few child welfare service models developed for or by Indigenous people respond directly to the colonial causes of these problems, and little of the theoretical commentary engages with them. Connors notes that the increasing training and involvement of First Nations people in their own healing is accompanied by the acknowledgement that 'true healing in First Nations requires that social, gender, cultural and political issues must be addressed in the healing process.'<sup>766</sup> The complexity of contemporary social issues experienced by many Indigenous children and young people are particular to their history and contemporary colonial experiences. These transcend the boundaries and experiences of traditional cultural responses but are not effectively addressed by contemporary western child welfare approaches, as the Chapter 3 case study demonstrates. The serious nature of social breakdown and abuse experienced by many Indigenous children requires a responsiveness to contemporary

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<sup>764</sup> Ma Mawi Wi Chi Itata (1985), *First Annual Meeting Report*. Winnipeg: Ma Mawi Wi Chi Itata Centre, cited in Armitage (1993) above n61, 159.

<sup>765</sup> Duran E, Duran B, Brave Heart MYH & Horse-Davis SY (1998), 'Healing the American Indian Soul Wound in Danieli' in Danieli Y (ed), *International Handbook of Multigenerational Legacies of Trauma*. New York: Plenum Press, 341.

<sup>766</sup> Connors (1993) above n23, 55.

problems which is innovative and neither romanticises the past nor patronises or fails to harness the strength of culturally founded responses. Drawing on the strengths of western and Indigenous practices, within a dynamic conceptualisation and practice of culture and tradition, is modelled in contemporary Indigenous children's agencies, such as the Victorian Aboriginal Children's Agency (VACCA) in Australia. (See discussion with respect to VACCA in Chapter 6.)

Research by Brave Heart-Jordan<sup>767</sup> found that Lakota clients who engaged with traditional healing found workshops 'made their lives more meaningful and helped to liberate them to address the symptoms of ongoing neo-colonialism that other health systems were not aware of.'<sup>768</sup> Other findings include:

- Educating people about historical trauma leads to increased awareness of its impact and symptoms;
- The process of sharing experiences with others of similar background leads to a cathartic sense of relief;
- The healing and mourning process resulted in an increased commitment to ongoing healing work at an individual and community level.<sup>769</sup>

Very high proportions of respondents were favourable about traditional healing in terms of grief resolution, feeling better about themselves and improved parenting.<sup>770</sup>

Rokx and colleagues in New Zealand have developed a parenting model which takes the effects of colonisation on Maori child-rearing practices into

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<sup>767</sup> Brave Heart-Jordan MYH (1995), *The return to the sacred path: Healing from historical trauma and historical unresolved grief among the Lakota*. Northampton: Smith College School for Social Work (thesis) cited in Duran et al (1998) above n140, 349.

<sup>768</sup> Duran et al (1998) above n140, 352.

<sup>769</sup> Ibid, 351.

<sup>770</sup> Brave Heart-Jordan (1995) above n142.



consideration.<sup>771</sup> The *Atawhaingia Te Pā Harakeke* model is delivered to male Maori clients in two New Zealand prisons. The model's 'decolonisation' process is intended to educate participants about contemporary Maori socio-political contexts, and the role of colonial history and ongoing neo-colonial factors in contemporary society. Examples of the high status of women in traditional Maori society are discussed with references to classical text and verse, and participants are asked to consider the relationship dynamics that were modelled by their own parents. These dynamics are usually negative, and mirror the types of relationships they have with their own partners. Participants are taught about the initial and ongoing breakdown of traditional systems, values, beliefs and practices around caring for children, and traditional family structures, which occurred as a result of white settlement. The training addresses issues of power and control, in general terms and then personally. Participants are encouraged to position their own family backgrounds into the social history of New Zealand, and then to focus on the specific circumstances of their upbringing. Participants set parenting goals, with a view to improved parenting through connecting with traditional values. The *Atawhaingia Te Pā Harakeke* model has been extended into other educational spheres for Maori families across New Zealand.<sup>772</sup>

#### *Community awareness raising/education*

Some child abuse and neglect intervention projects attempt to bring about change through strategies involving community-wide awareness raising. A number of reviews into child sexual abuse in Indigenous communities in Australia have

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<sup>771</sup> Rokx H (1998), *Atawhaingia Te Pā Harakeke: Nurture the Family*, unpublished paper presented at the International Society for the Prevention of Child Abuse and Neglect's Twelfth International Congress on Child Abuse and Neglect, Auckland New Zealand, September 1998.

<sup>772</sup> Many variations of *Atawhaingia Te Pā Harakeke* have developed across New Zealand, as have related children's programs called *He Taonga Te Mokopuna*, which again draws on traditional approaches to supporting Maori children, weaving these with the most recent theory and best practice, particularly for children in difficult and at risk situations. More information available here:  
[http://www.minedu.govt.nz/NZEducation/EducationPolicies/MaoriEducation/AboutMaoriEducation/WhoWeAre/EngagementWithMaori/HuiTaumataMatauranga/HuiTaumataMataurangaSeptember2004QA/Whanau\\_Involvement.aspx](http://www.minedu.govt.nz/NZEducation/EducationPolicies/MaoriEducation/AboutMaoriEducation/WhoWeAre/EngagementWithMaori/HuiTaumataMatauranga/HuiTaumataMataurangaSeptember2004QA/Whanau_Involvement.aspx)

recommended community education together with other individual child protection responses for victims and criminal law responses with respect to perpetrators.<sup>773</sup> Cross and LaPlante argue that a great constraint to child abuse and neglect interventions in Native American communities is denial, and that grassroots community involvement can assist to address this.<sup>774</sup> They point out that prevention can be grounded in traditional values and principles. Although acknowledging the substantial breakdown of tradition in some communities, what remains can be drawn upon.<sup>775</sup>

Lajeunesse reports that the Hollow Water community of Manitoba began a program of community awareness and education in 1987.<sup>776</sup> The environment of greater trust which followed saw a dramatic increase in the number of sexual abuse disclosures (see discussion of responses to sexual abuse and the Hollow Water program below). Cross and McGregor's 1995 report documents the evaluation of a project whose goals included raising public awareness in Native American communities about the links between child abuse and neglect and substance abuse.<sup>777</sup> Radio and newspaper announcements were used; posters, pamphlets and a periodical newsletter were produced. This was a large-scale project – all tribes in the United States with a child welfare program received promotional and planning information. A range of substance abuse organisations were engaged to 'raise awareness about and enhance their capacity to prevent abuse and neglect of Indian children by substance abusing parents and

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<sup>773</sup> See Chapter 1 for an overview of Australian reviews.

<sup>774</sup> Cross T & La Plante J (1995), *Grassroots Prevention of Child Abuse and Neglect in Indian Communities: A Guide for the Community Organizer*. Portland: National Indian Child Welfare Association.

<sup>775</sup> Ibid, 27.

<sup>776</sup> Lajeunesse T (1993), *Community Holistic Circle Healing: Hollow Water First Nation*. Ottawa: Minister of Supply and Services. This program was the first stage to the CHCH model elaborated on in the FGC section.

<sup>777</sup> Cross TL & McGregor K (1995), *Linking Child Abuse and Neglect with Substance Abuse in Native American Communities*. Portland: National Indian Child Welfare Association.

caregivers.’ An evaluation of the project was conducted through surveys, phone interviews and focus groups, ‘to assess the materials developed and their impact on Native American communities.’ Responses were consistently positive, and indicated significant knowledge was imparted in culturally appropriate ways. Survey materials were prepared in language appropriate to the culture and educational background of the target groups. The authors state that the project considerably exceeded its goals and the federal funding agency (NCCAN) subsequently extended it.

Cross and LaPlante contend that grass roots approaches are valuable because communities are full of under-utilised resources – people such as ‘natural helpers’ and past victims, whose first-hand experience is invaluable. The authors cite the example of a grassroots child abuse and neglect prevention campaign developed by the Siletz Tribe in Siletz, Oregon, where there was a high rate of abuse and neglect.

The program began with the local Indian Child Welfare office holding a community meeting in order to form a committee of concerned community members. The committee surveyed the community to obtain a local definition of child abuse and neglect. They then planned events such as awareness activity where community members were sent a blue ribbon with instructions to affix it to their cars at a designated time, to show support for child abuse and neglect prevention. Another activity was a ‘Family Fun Fair,’ with a focus on children’s activities, but also an outside speaker who related her own experience with child abuse and neglect. The authors make a range of suggestions for other communities considering similar interventions. These include:

- Involvement of ‘key participants’ such as teachers, spiritual leaders, elders, community health workers;
- Assessment of the communities strengths, weaknesses and needs and the extent of child abuse and neglect; and
- Formulation of definitions of child abuse and neglect.

The authors stress the importance of community involvement in such initiatives and networking through local agencies, institutions, media, programs, parents and elders.

*Sexual abuse: Traditional healing and offender treatment*

Rates of child abuse and neglect are almost universally higher in Indigenous populations, compared to non-Indigenous populations, in colonised countries. The following factors contribute to the high rates of sexual abuse:<sup>778</sup>

- A disconnection from and breakdown of Aboriginal community values, thinking and behaviour;
- A breakdown of traditional values and practices of sexuality;
- The experience of sexual abuse and denial of sexual identity role models in residential schools and foster homes;
- The disinhibiting effects of alcohol and other drugs;
- crowded, blended family environments where sexual abuse often occurs between stepfathers and teenage daughters; and
- objectification and dominance of women and children sanctioned by values and structures of the colonising culture.

The histories of trauma and injustice suffered by Indigenous peoples under colonial powers are clearly associated with the disproportionately high rates of sexual abuse in their communities today. These circumstances require consideration in health and welfare responses. For this reason, mainstream responses to sexual abuse are unlikely to be suitable or effective. Conventional approaches are, in any case, unlikely to be culturally appropriate. Many

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<sup>778</sup> Connors E & Oates M (1997), 'The Emergence of Sexual Abuse Treatment Models Within First Nations Communities' in Wolfe D, McMahon R & Peters R (eds), *Child Abuse: New Directions in Treatment and Prevention Across the Lifespan*. Thousand Oaks, London, Delhi: Sage.

Aboriginal communities are looking to more holistic methods for dealing with sexual abuse.

A British Columbia community consultation recommended that courts should be empowered to offer first-time sexual abuse offenders 'extensive treatment' as an alternative to incarceration, and that culturally appropriate treatment should be available to sexual abuse offenders.<sup>779</sup> A participatory research project involving community consultations with eight Manitoba First Nation communities made similar findings. Sexual abuse offenders were regarded as needing healing and contributors emphasised that the healing should take place within the community. The need for more services which focused on offenders, as well as victims, was also raised.<sup>780</sup> However, concerns have also been expressed about the failure to respond to sexual abuse of Indigenous children with the gravity which the crime requires and the inadequate protection and support provided to victims.<sup>781</sup>

A number of Canadian First Nations communities have adopted alternative strategies for dealing with sexual abuse. Many of these strategies have evolved from a 1992 sexual abuse treatment program developed by Connors and Oates for use in northern British Columbia communities. Connors and Oates' model is based on an 18 step consensual 'traditional process' which involves extended family gatherings.<sup>782</sup> Connors and Oates suggest that community-based responses to sexual abuse should involve the following basic elements:

- Some esteem-enhancing form of punishment;
- Victim protection; and
- Treatment for all members of the family.

Responses may also include:

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<sup>779</sup> Community Panel (1992) above n17.

<sup>780</sup> McKenzie et al (1995) above n91.

<sup>781</sup> See, for example, Cripps K & McGlade H (2008), 'Indigenous family violence and sexual abuse: Considering pathways forward,' 14 *Journal of Family Studies* 420.

<sup>782</sup> Connors & Oates (1997) above n153. The process is essentially a tailored version of family group conferencing.

- Community service;
- Restricted access to children;
- Native-oriented treatment program; and
- Attendance at community support groups.

This model was the basis for the Hollow Water program in Manitoba which is often cited as a successful program to address child sexual assault in Aboriginal communities.<sup>783</sup> It is the best known and emulated amongst a number of holistic tribal healing programs which have been established over the past 15 years.<sup>784</sup> As a first step towards implementing a sexual abuse intervention program, the Hollow Water community began a program of community awareness and education in 1987. A two year training program was initiated to bring trainers to the community to teach topics such as cultural awareness, team building, family counselling, communication skills, nutrition and sexuality. Community graduates from the program either became full-time family violence workers or sexual abuse assessment team members.<sup>785</sup> The training led to the development of the Community Holistic Circle Healing (CHCH), a ‘unique’ approach which the developers claim is based on traditional values. CHCH ‘aims to restore balance by empowering individuals, families and the community to deal productively, and in a healing way, with the problem of sexual abuse.’<sup>786</sup>

CHCH has an Assessment Team and a Management Team. The Assessment Team provides prevention and intervention support, develops support systems, and provides assessment and liaison with lawyers and institutions. The team consists of various

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<sup>783</sup> Ibid; Awasis Agency (1997) above n10; Lajeunesse (1993) above n151; Dickie BE (1994), *A Question of Justice: Feature Length Film Commentary*. Winnipeg: National Film Board.

<sup>784</sup> See overview in Cripps & McGlade (2008) above n156; Connors & Oates (1997) above n153. Other tribal healing programs include: Biidaaban Sexual Abuse Healing Program (1996); Circle Of Harmony Healing Society (Oates 1992); Gwa’sala-’Nakwaxda’xw Family Violence And Sexual Abuse Intervention Program (1993); and Prince George Native Friendship Centre Sexual Abuse Treatment Services (1992).

<sup>785</sup> Lajeunesse (1993) above n151.

<sup>786</sup> Ibid, 1.

professionals such as family violence workers and nurses, volunteers and Tribal Council representatives. The Management Team reports to the Assessment Team, and is responsible for administration. The participating communities have formally acknowledged the program through Council resolutions. The CHCH process follows a 13-step process based on the process outlined in Connors and Oates above.<sup>787</sup> The assessment team assigns an individual (trained) worker to each of the victim(s), the victimiser and their families. Up to eight workers may be involved with a single case in this way. A case manager is also appointed, who is responsible for conducting case conferences attended by all workers and, frequently, victims and family members. Children are removed to a safe home 'if necessary,' and the laying of charges is encouraged. Where the victimiser pleads guilty in court, CHCH prepares and presents a report outlining the tailored CHCH alternative plan for that individual. A formal protocol has been developed with Crown prosecutors in the Manitoba Department of Justice and the judiciary supports CHCH. Victimisers pleading guilty are put on three years probation and very few plead not guilty.

Another aspect of the CHCH program is the 'Self-Awareness For Everyone' (SAFE) program, a personal growth training program implemented in the communities. At one community, 60% of adults and youth participated in the program, which 'had a profound and positive effect on general levels of self-awareness, alcohol consumption, family communication, and the healing process of many people, including the victims of sexual abuse.'<sup>788</sup> Treatment combines contemporary and traditional methods in 'healing contracts.' A psychologist provides assessment and counselling services for all referrals. A male psychologist facilitates an 'Adult Male Sex Offenders Group,' while various other groups for survivors and families are facilitated by workers. Traditional 'sharing circles' are used in group sessions. The emphasis is on people feeling safe, a non-judgemental approach, and acknowledging and accepting the problem. 'CHCH offers balance rather than the punishment that is offered by the court system.'<sup>789</sup>

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<sup>787</sup> Connors & Oates (1997) above n153.

<sup>788</sup> Lajeunesse (1993) above n151, Appendix C.

<sup>789</sup> Lajeunesse (1993) above n151, 9.

While the CHCH approach to child sexual assault in Aboriginal communities does seem to provide better outcomes than the conventional adversarial approach which has failed Indigenous children, evaluations suggest perpetrators are more satisfied with outcomes than victims. Significant concerns include that victims feel that they received less support than perpetrators and less help than they needed, that the approach is too lenient towards violent offenders, and that the process did not take sufficient cognisance of unequal power relations within the community and could prioritise powerful interests over those of victims.<sup>790</sup> The concern with safeguards for those less powerful or victimised within alternative dispute resolution processes is discussed with respect to accountability above, in Chapter 5 with respect to Family Group Conferencing in New Zealand, and more generally with respect to family group conferencing below. The need for a system which protects the interests of minorities and those less powerful within minority groups is a fundamental issue with respect to Indigenous women and children's wellbeing. Conceptualising a human rights framework which avoids sycophantic deference to Indigenous governance where it breaches the rights of those less powerful in the community and more broadly providing safeguards within a pluralised framework for Indigenous child welfare is considered in Chapters 2 and 4. Within these chapters a human rights approach for Indigenous children's wellbeing which can provide an authoritative voice to those most marginalised within minority Indigenous communities internally and a process for input with respect to compliance with human rights principles from the broader external Indigenous and non-Indigenous communities is considered.

### Family preservation vs child protection

Despite legislative and policy shifts towards early intervention and family preservation, contemporary child welfare in practice continues in budget and emphasis, in most jurisdictions, to retain a protection focus. Aboriginal culture is supported through an

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<sup>790</sup> See for example La Rocque E (1997), 'Re-examining culturally appropriate models in criminal justice applications' in Ash M (ed), *Aboriginal and Treaty Rights in Canada*. Vancouver: University of British Columbia Press, 75.



Indigenous child placement principle rather than family preservation in most jurisdictions. However, family preservation, where suitable, is likely to be a better means to cultural support than culturally appropriate placement. The suitability of home-based family preservation initiatives in many Indigenous communities is underlined by the high value placed on family and extended family in Indigenous cultures.<sup>791</sup> Consultations with Indigenous communities have found that support for family preservation is unambiguous. An example of this support is provided by the recommendations of a legislative review which consulted extensively and directly with the British Columbia Aboriginal population.<sup>792</sup> The review describes the two most frequent criticisms of child and family services policy and practice voiced by those consulted as:

1) the inappropriate apprehension of children and the removal of those children from their communities; and 2) the lack of preventative services aimed at resolving family problems rather than at separating families.<sup>793</sup>

Similar observations were made by participants in the Australian Cultural Care research project: 'Two themes reoccurred. The first related to the lack of early intervention to prevent removal and then the lack of services to support the family to get back on track so that they can safely look after their children.'<sup>794</sup>

The report of a Manitoba community consultation articulates a simple, clear argument for family support services:

It is difficult to understand why children are taken out of homes, then, perhaps some time later, placed back in the home where the problems began. The problems do not go away. Why not fix the home, [First

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<sup>791</sup> Ronnau et al (1990) above n21; Tafoya N (1990), 'Home-Based Family Therapy: A Model for Native American Communities' in Mannes M (eds), *Family Preservation and Indian Child Welfare*. Albuquerque: American Indian Law Centre, 59.

<sup>792</sup> First Nation's Child and Family Task Force (1993) above n56, is another review involving Indigenous community consultations which also recommended a new emphasis on family preservation and home-based prevention.

<sup>793</sup> Community Panel (1992) above n17, 46.

<sup>794</sup> Libesman (2011) above n44, 21.

Nations people] wonder, but there is little or no funding allocated to services for families ... [the community] perception is that government will pay astronomical costs for someone else to give custodial care to their children while they stand by in helpless poverty because someone else controls the money and has the power to make decisions about their children.<sup>795</sup>

Anderson's research also found that urban Canadian Aboriginal clients of Native Child and Family Services of Toronto (NCFST) felt that parents' needs were ignored by non-Native child protection agencies, whom they perceived as not caring about them and dishonest. In contrast, clients liked how NCFST treated the whole family as a unit in programs and therapy. Through its focus on families, NCFST was seen as strengthening Aboriginal culture, with interviewees stating that they had 'discovered elements of their culture' through NCFST. In various programs, such as parenting, the agency uses women's circles, Aboriginal medicines, and other culturally-based teachings. Clients referred to NCFST program outcomes as including: better parenting, less violent children, and increased openness and sharing for both parents and children. An important recommendation was that child protection agencies needed to be supportive of parents as well as children. The Cultural Care Report in Australia made similar findings with one of the most frequent concerns being the lack of support for families, in particular single mothers, to address the problems which led to removal of their child or children.<sup>796</sup>

The Awasis Agency, a First Nations-controlled service serving 18 Manitoba communities, is an example of an Indigenous agency which practices family preservation. The Agency cites the following benefits of a family preservation approach:

- Retention of parental responsibilities;

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<sup>795</sup> First Nation's Task Force (1993) above n56, 49.

<sup>796</sup> Libesman (2011) above n44, 60.

- Self esteem and confidence on the part of child and family are less affected;
- Feelings of fault on the parts of the family and child are diminished;
- Disempowerment of parents is reduced; and
- Family-focussed interventions promote new patterns of behaviour and attitudes.<sup>797</sup>

To substantively implement family preservation policy and programming requires a paradigm shift in child welfare, from a model based on child rescue and placement to one of family support. Family preservation models create a 'service continuum,' by delivering services that support and strengthen families in normalised environments such as the home, and focus on basic life skills and environmental problems.<sup>798</sup> Within Indigenous communities which have more pervasive problems community development needs to parallel family support. Research, evaluations and community consultations highlight a number of important features and orientations for family preservation programs:<sup>799</sup>

- Building on existing family strengths;
- Intensive home-based support services;
- Community education to engender support for family preservation;
- Recruitment and training of Indigenous staff;
- Fostering cooperation among multiple service providers;
- Effective coordination between various agencies at a given site;
- Secure long-term funding;
- Longer program time-frames;<sup>800</sup>
- Reunification work;

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<sup>797</sup> Awasis Agency (1997) above n10.

<sup>798</sup> Mannes (1993) above n22.

<sup>799</sup> This list was compiled using information derived from the following texts: Mannes (1993) above n22; Mannes M (1990), *Family preservation and Indian child welfare*. Albuquerque: American Indian Law Centre; Community Panel (1992) above n17; Smollar & French (1990) above n42.

<sup>800</sup> Community Panel (1992) above n17. The Inter-Tribal Council of Michigan found that the usual four to six week duration of most family preservation programs was insufficient. They suggested longer time-frames.

- Attempts to minimise the impact of placements, where placements are unavoidable; and
- Developing problem -solving skills.

The above-mentioned British Columbia community consultation reported that Aboriginal communities lacked a range of basic social services which are available to non-Aboriginal communities. The same is true of many other Canadian, Australian, United States and New Zealand Aboriginal communities.<sup>801</sup> In order to enhance child abuse and neglect prevention, and therefore family preservation, services such as the following must be provided to Aboriginal communities:

- Respite and homemaker services, particularly for single-parent families;
- Day care;
- Family support;
- Counselling;
- Drug and alcohol treatment programs;
- Suicide prevention services; and
- Educational and recreational facilities and resources.<sup>802</sup>

While Indigenous communities who have control over child and family services are overwhelmingly in favour of family preservation, devolution of authority for provision of child protection to Indigenous communities does not necessarily result in lower placement rates, at least in the short term. For example, after the introduction of the *Indian Child Welfare Act* in the United States in 1977, Indigenous out-of-home care placements increased. The number of Native American children in substitute care grew

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<sup>801</sup> In 2007 the Aboriginal Caring Society brought a complaint to the Canadian Human Rights Commission with respect to discriminatory funding of child welfare services for First Nations children on reserves. In February 2012 an appeal against dismissal of the complaint, on technicalities, was heard by in the Federal Court. See Chapter 5 for discussion of this complaint.

<sup>802</sup> Community Panel (1992) above n17. Together with infrastructure support, such as housing, these are the kinds of services that one would have anticipated a large scale program, such as the Northern Territory Emergency Response (NTER, also known as the NT Intervention), would have resourced if child welfare and wellbeing were in fact the primary objective of the measures implemented. See Chapter 6 for discussion of the NTER.

by 25% over the 1980s.<sup>803</sup> Surprisingly, tribally-run programs were the primary contributors to this post-ICWA increase. However, it is important to recognise that trends in placement numbers are not always a reliable indicator of service effectiveness as a wide range of factors influence these trends.<sup>804</sup> Mannes attributes the increase in out-of-home care post-ICWA to caseload and budget pressures. Placement prevention was not possible in an environment of stop-gap measures and makeshift systems resulting from the absence of reliable and sufficient funding.<sup>805</sup>

Placement rates may also increase after the handover of authority for child protection because Indigenous agencies elicit more trust. In the case of Weechi-it-te-win Family Services, an Ontario tribal agency responsible for child and family services to ten First Nations reserves, disclosures of abuse rapidly increased after they took over responsibility for child protection. The number of children in care increased seven-fold between 1987 (when WFS gained a child protection mandate) and 1995. This does not necessarily reflect higher rates of child abuse and neglect, but rather perhaps the high level of trust which the agency established with the communities which it served.<sup>806</sup> When the Hollow Water community of Manitoba began implementing a tribal-run sexual abuse intervention program in 1987, the environment of greater trust which followed saw a dramatic increase in the number of sexual abuse disclosures.<sup>807</sup> Between 1987 and 1990, a 30% increase in the number of children in care was reported. This has been attributed to a previous lack of recognition of the extent of child welfare problems in First Nation communities, in an environment of absent or poor child welfare services.<sup>808</sup>

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<sup>803</sup> Mannes (1990) above n174, 11.

<sup>804</sup> McKenzie (1997) above n48, 110.

<sup>805</sup> Mannes (1990) above n174.

<sup>806</sup> Weechi-it-te-win Family Services (1995) above n81.

<sup>807</sup> Lajeunesse (1993) above n151.

<sup>808</sup> McKenzie (1997) above n48. Parallel issues of a failure to service Indigenous communities has occurred in the Northern Territory in Australia see Pocock J (2003), *State of Denial: The Neglect and Abuse of Aboriginal and Torres Strait Islander Children in the Northern Territory*. The Secretariat of National Aboriginal and Islander Child Care (SNAICC); Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Anderson P & Wild R) (2007), *Little Children are Sacred*. Darwin: Northern Territory Government; Board of Inquiry into the Child Protection

A number of obstacles to the implementation of family preservation initiatives have been recorded in the literature. For example, 'organizational and administrative structures and state and local financing practices appear to be barriers in shifting service provision from child placement focused to family-centred services.'<sup>809</sup> Canadian provincial child welfare agencies primarily provide services to families in crisis, so perpetuate high removal rates by not providing services to families at risk: children are removed from situations where early intervention could have preserved the family. Financial support for a child is usually primarily available once the child is removed.<sup>810</sup> United States Federal discretionary funding announcements have also favoured placement over preservation.<sup>811</sup> However, there is recognition that early intervention is more effective than crises intervention in all jurisdictions and, with this, the implementation of early childhood programs (see below) and, more broadly, programs and services focussed on prevention. However, these programs have not been comprehensive. Further as referred to in previous chapters a public health model for child welfare would see a realignment of funds towards prevention rather than crises interventions.

Ultimately, family preservation also depends on factors outside the scope of most social welfare programs. Most family preservation initiatives focus on psychological therapeutic interventions, while the factors contributing to family crisis include wider social, political and economic issues such as poverty, unemployment, isolation, disempowerment, the legacy of separations and other colonial interventions. Responses which do not also address these factors will not have meaningful long-term impact. Although there is overwhelming support for a

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System in the Northern Territory (2011), *Growing them Strong, Together*. Darwin: Northern Territory Government. In late 2011 a peak Indigenous agency was established for the first time in the Northern Territory. It is likely that engagement of Indigenous agencies in child welfare issues together with increased resources will result in increases in substantiated neglect and abuse amongst Indigenous families in the Northern Territory.

<sup>809</sup> Mannes (1990) above n174, 21.

<sup>810</sup> Community Panel (1992) above n17.

<sup>811</sup> Mannes (1993) above n22.

switch to family preservation in both mainstream services and Indigenous agencies, it is not unanimous.<sup>812</sup>

### **Family Group Conferencing and other similar models**

There are many models and programs in place which could appear under the broad heading of Family Group Conferencing, but which do not have similar titles or refer to Family Group Conferencing. Within the field of restorative justice a number of conferencing programs which have been applied in criminal justice systems have parallels with family group conferencing in the context of child welfare. While some of the critical issues pertaining to the framing of issues within family group conferences and restorative justice programs are related, and may be grounded in similar conceptual and practical foundations, the literature on restorative justice is beyond the scope of this chapter.<sup>813</sup> However, the Hollow Water Community Holistic Circle Healing program was discussed above because it is one of the most influential of restorative justice programs initiated by an Indigenous community and its focus on child sexual abuse has great significance for Indigenous children's welfare and wellbeing. A critical review of family group conferencing in the context of the New Zealand legislation is provided in Chapter 5. These issues will not be reiterated. However, a brief description and discussion of the Canadian Family Group Conferencing pilot, which is based on the New Zealand model, together with discussion of some of the advantages and disadvantages family group conferencing in the context of Indigenous child welfare are considered below.

#### *Family Group Decision Making Project – Canada*

The Family Group Decision Making (FGDM) project was modelled on the New Zealand Family Group Conferencing model. The model was trialled in three areas of Newfoundland and Labrador, including the Nain region, which is populated mainly with

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<sup>812</sup> See, for example, Giesbrecht (1992) above n88 where concerns were expressed that the focus on parents and family was at the expense of the fundamental rights of children.

<sup>813</sup> For a critique on the benefits and disadvantages of restorative justice programs see Cunneen C & Hoyle C (2010), *Debating restorative justice*. Oxford and Portland: Hart.

Inuit people. Workers were trained by trainers from New Zealand, one Maori and one non-Indigenous.

The three main stages to the process are:

- Preparing for the conference – family members are contacted but not compelled to take part. Consultations with the family take place. Abused young people usually select a support person.
- Holding the conference – the meeting is opened in a culturally appropriate manner. The coordinator presents necessary information to the group, followed by private deliberations amongst the family group (and chosen support people) to develop a plan. The plan is finalised with the coordinator. The plan must contain contingency plans, and monitoring and review processes.
- The plan is approved by a field worker and supervisor.

Research and evaluation was conducted during the pilot, in order to a) determine the cultural adaptability of the model, and b) its capacity for building partnerships and participation.<sup>814</sup>

### *Negative critique of family group conferencing*

The 1995 Gove Report into child welfare in British Columbia suggested that Family Group Conferencing (FGC) interventions neglected monitoring and evaluation, and disregarded the family dynamics of sexual abuse.<sup>815</sup>

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<sup>814</sup> Burford G & Pennell J (1995), *Family group decision making project: Implementation report summary*. Newfoundland: Family Group Decision Making Project, School of Social Work, Memorial University of Newfoundland.

<sup>815</sup> Gove (1995) above n66.



Family Group Conferencing lacks the safeguards of due process and legal representation which are available through formal legal processes. The balance between child protection and family preservation is a difficult issue and this can be more problematic in the context of Family Group Conferencing without the above mentioned checks and balances. Where the child is not removed, or the couple stays together, child abuse may continue.<sup>816</sup> For example, 'Pre-Sentence Reports' attached to a report on the Community Holistic Circle Healing (CHCH) model discussed above include a case where a father continued to sexually abuse his adopted daughter after treatment using the CHCH system. After a second cycle through the program, the Assessment Team deemed it appropriate to leave the father living in the family household, where another of his children still resided.<sup>817</sup> Burford and Pennell suggest that some family members may privately see the Family Group Conferencing process as unfair, preferring formal action and that a family 'conspiracy of silence' may continue under FGC.<sup>818</sup> Burford and Pennell also note that resources must be made available for the model to work, and that there is a risk that authorities may try to apportion all or too much responsibility to the family, where there is still a vital role for protective services.

Power imbalances between child and family services agencies, legal staff, and families can undermine the effectiveness of Family Group Conferencing for vulnerable participants in the conference. Gender and age inequities are not easily addressed by Family Group Conferencing approaches. Family Group Conferencing, particularly when used in small communities, may inhibit disclosure by victims or result in coercion by the offender to not disclose.<sup>819</sup> Burford and Pennell suggest that some family members may be too intimidated to make disclosures at conferences due to the presence of the perpetrator or others.<sup>820</sup> This is exacerbated by problems of ongoing proximity between victims and victimisers in communities. Confidentiality problems which are more

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<sup>816</sup> Burford & Pennell (1995) above n189.

<sup>817</sup> Lajeunesse (1993) above n151.

<sup>818</sup> Burford & Pennell (1995) above n189.

<sup>819</sup> Lajeunesse (1993) above n151.

<sup>820</sup> Burford & Pennell (1995) above n189, 46.

prevalent in small communities may also impact on the family group conferencing process.<sup>821</sup> This issue is discussed under ‘Accountability’ above.

### *Positive critique of family group conferencing*

Schmidt claims that FGC approaches ‘emphasize community responsibility in protecting the child through the offender’s accountability to the group. Discounting [the FGC] approach will serve to perpetuate the present system which mitigates against the possibility of reconciliation and holistic healing.’<sup>822</sup> Burford and Pennell argue that family and extended family are marginalised by justice, health, education and social service systems, and the assumption is that families are not part of the solution.<sup>823</sup> In contrast to the views above, they see the FGC processes as a means to overcome the ‘conspiracy of silence’ surrounding abuse of both children and adults. The method does not attempt to keep families together ‘at all costs,’ and the authors acknowledge that the system will not always work, and that involvement of abusers is not always appropriate. They argue that the majority of family conference participants participate responsibly and devise useful plans. They claim that the model is highly adaptable across cultures, so long as local people are involved in the adaptation process. They say that the family is empowered, and family ties are renewed, re-established and strengthened.

Consideration could be given to including external check and balances within family group conferencing processes to reduce the risk of coercion, intimidation or replication of power imbalances within the family group conference which often underlie the issues which are being addressed in the conference.

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<sup>821</sup> See also Tafoya (1990) above n166.

<sup>822</sup> Schmidt (1997) above n67, 81.

<sup>823</sup> Burford & Pennell (1995) above n189.

## Early intervention

The recognition of the importance of early childhood for longer term brain development together with greater acknowledgment of the importance of early intervention and prevention in the United States, Canada, Australia and New Zealand has led to the development of early childhood programs including specialist programs for Indigenous children.<sup>824</sup> Numerous studies show that the United States' Head Start program, an early intervention initiative targeting at-risk children of pre-school age, has achieved great success over a 30 year period. The Canadian 'Aboriginal Head Start Initiative' is an early intervention program for Canadian Aboriginal children, in both urban and remote communities. The program was launched in 1995. Around 100 projects were implemented in the initial four year pilot phase, at a cost of \$83.7M. Extensive consultations were held with Aboriginal people from 25 urban and remote centres during the design stage. The program involved parents and community in design and implementation of projects, which include promotion of culture and language, education, health and improved social supports. Head Start does not specifically target child abuse and neglect. However, research into the effects of early intervention programs indicates many benefits including some linked to child abuse and neglect issues, including:

- Better relationships between parents and children;
- Improved social and emotional stability in participating children; and
- Enhanced community capacities.<sup>825</sup>

Evaluation of a pilot Aboriginal Head Start program in Canada found that it was successful, enhancing life for children and families. The project was piloted in seven

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<sup>824</sup> For research on early brain development which has had a significant impact on policy with respect to early childhood in Canada and Australia, see McCain MN & Mustard F (1999), *Reversing the brain drain: Early study: Final report*. Toronto: Ontario Children's Secretariat.

<sup>825</sup> Health Canada (1998), *Aboriginal Head Start Initiative: Principles and Guidelines*. Canada: Health Canada.

urban Ontario communities, targeting high risk Aboriginal three to five year olds.<sup>826</sup> Children involved demonstrated improved confidence, better behaviour, improved language skills, and better communication and expressiveness. While the literature with respect to early intervention, and universal support for early childhood programs appears to be consensually supported, this has only translated into partial funding and a lack of consistency with respect to complimentary early childhood support systems such as intensive support for families at risk or infrastructure support for communities in need. In Australia, the National framework for Protecting Australia's children includes initiatives to expand early childhood centres, and 35 children and family centres will be established in areas with high Aboriginal populations.<sup>827</sup> While such initiatives are valuable, their impacts are limited when they are not integrated into a broader structural response to reform and operate within a framework which has the limitations and inconsistencies of bureaucratic child welfare framework discussed in Chapters 2, 3 and 4.

## Conclusion

The extremely high rates of neglect as well as intergenerational sexual and physical abuse found in some Indigenous communities present a major challenge to intervention programs. These high rates reflect poverty and the depth of dysfunction in some communities, both legacies of colonial experiences. Conventional models of intervention and the level of funding that supports them are not sufficient to deal with the scale of problems.<sup>828</sup> Innovative programs which are responsive to Indigenous experiences and understandings assist to create an institutional context for receptiveness to difference. While pluralised

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<sup>826</sup> Becker J & Galley V (1996), *Aboriginal Head Start Summer Pilot Program: Evaluation and Final Report*. Unpublished report.

<sup>827</sup> Council of Australian Governments (2009), *Protection children is everyone's business – National Framework for Protecting Australia's Children 2009-2020*. Canberra: Commonwealth of Australia, 28. Available at: [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-04-30/docs/child\\_protection\\_framework.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf)

<sup>828</sup> Armitage (1993) above n61.

legislative and policy frameworks for decision making create a structure for inclusiveness and improved outcomes for vulnerable Indigenous children, these values become embedded and part of the experience of child welfare through Indigenous modes of service delivery. Successful Indigenous programs and service delivery in turn assist to generate respect for Indigenous ways of understanding and responding to Indigenous children's welfare and wellbeing.

As argued in previous chapters a systemic response to abuse and neglect within Aboriginal communities requires that programs must be integrated within a child welfare/wellbeing framework which addresses the underlying causes of abuse and neglect in post-colonial Indigenous communities.<sup>829</sup> Shifts in attitudes towards Indigenous programs and service delivery need to be accompanied by significant resourcing and responses which address underlying structural causes of breakdown of normative order, poverty and poor access to goods and services such as education, health care and, more generally, opportunities for participating in society. It has been argued in Chapters 2 and 4 that a pluralised human rights framework, with the principle of self-determination being central, can provide the foundation for more effective responses to Indigenous children's wellbeing. While a range of programs, some of which are referred to above, offer innovative responses and strategies to address Indigenous children's welfare, these are often implemented in isolation from the broader issues and in a context which does not embrace holistic reform. This impedes the impact which they are able to make. However, implemented in the context of a human rights framework for Indigenous child welfare, with adequate structural support and resourcing, innovations in service delivery offer the opportunity for fundamental and enduring reform.

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<sup>829</sup> See, in particular, Chapter 2 with respect to international human rights and a framework for pluralising Indigenous child welfare and Chapter 4 with respect to why a human rights framework responds to concerns regarding child welfare issues addressed within the dominant bureaucratised child welfare systems.

## Chapter 7

### Comparative service delivery frameworks

#### Introduction

Together with legislative frameworks which recognise Indigenous communities' and organisations' role in addressing their children's wellbeing, resources are necessary to provide services in a manner which respects Indigenous children's culture and their human rights more broadly. While legislative frameworks which support human rights principles (in particular the right to self-determination) provide the scaffolding for responding to Indigenous children's wellbeing, this has to then be built upon with resources and services. Because Indigenous peoples have historically been denied the exercise of jurisdiction with respect to their children's welfare and wellbeing, together with other destructive colonial experiences, many Indigenous organisations and communities need to build their organisational capacities and ontological understandings to be in a position to take responsibility for child welfare and, more broadly, their children's wellbeing. Effective collaboration between Indigenous organisation and mainstream agencies is therefore not only necessary where mainstream agencies retain control over and are responsible for service provision to Indigenous children. It is also necessary where principles of self-determination and structures for the transfer of responsibility for Indigenous children's wellbeing to Indigenous communities and organisations are being implemented.

To give effect to Aboriginal jurisdiction with respect to child welfare, which has to varying degrees been transferred to Indigenous communities or organisations (as discussed in Chapters 5 and 6), nuanced questions with respect to the relationships between Indigenous and non-Indigenous paradigms of understanding need to be addressed with respect to service delivery frameworks. The transfer of responsibility under delegated legislative models requires a hybridity of competencies encompassing Indigenous and non-Indigenous aspects of responsibility. The ways in which law reform with respect to Indigenous child welfare draws on international human rights law and

then translates this into practice through service delivery frameworks is part of a process of recognition of Aboriginal peoples' distinct identities. While the process of reform of service delivery frameworks with respect to Indigenous children has not escaped the influence of power imbalance, it is bringing an enlarged and more inclusive understanding into child welfare. This chapter provides an analysis of the themes with respect to child welfare service provision to Indigenous families. It does not attempt to cover the field, which is extensive and beyond the scope of this thesis, but rather provides examples and addresses themes with respect to service provision which enhances community responsibility for Indigenous children's welfare and wellbeing.

### Cultural competence

For effective collaboration between government departments and Indigenous communities it is necessary for departments and individuals who work within them to have a meaningful understanding of the history and experiences which impact on these communities. This requires personal and institutional reflection on cultural values inherent in individuals' attitudes and presumptions as well as within service delivery models. This chapter attempts to identify culturally competent policy and ways in which this policy can be implemented in practice. Key features identified in much of the literature include an understanding of communal identity compared with the highly individualised understanding of identity in western child welfare frameworks, and related whole community, rather than individually focussed, responses to child protection and Indigenous children's wellbeing. Community development and whole community responses recognise that structural deficits, which are closely associated with Indigenous communities colonial experiences, impact significantly on Indigenous children's wellbeing.<sup>830</sup> Cross-cultural communication problems and cultural difference militate against collaborative planning, responsibility and accountability.

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<sup>830</sup> Blackstock C & Trocme N (2004), *Community Based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change*. Available at: [http://www.mcgill.ca/files/crcf/2005-Communiy-Based\\_Welfare\\_Aboriginals.pdf](http://www.mcgill.ca/files/crcf/2005-Communiy-Based_Welfare_Aboriginals.pdf)

### *What is cultural competence?*

Cultural competence 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.'<sup>831</sup> A culturally competent program is one which appreciates and values diversity; understands the cultural forces which impact the program; understands the dynamics which result from cultural differences; institutionalizes cultural knowledge; and adapts its services to fit the cultural context of the clients it serves.<sup>832</sup>

The concept of cultural competence has gained increasing importance and focus among social service professions and agencies in recent years. It is a field of particularly acute relevance when working with Indigenous communities. Striving for cultural competence in social services in the United States, Canada, New Zealand and Australia is now widespread, and occurs partly in recognition of the ethnocentric history and values of social welfare services. The United States National Association of Social Workers (NASW) Code of Ethics dedicates a full section to cultural competence.<sup>833</sup> However there are few empirical models for cultural competence, and those tailored for Indigenous people are fewer.

While cultural competence requires knowledge about cultural groups, as discussed in Chapter 5 with respect to legislative frameworks, the diversity within those groups must also be recognised.<sup>834</sup> Many authors who discuss cultural competence emphasise the

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<sup>831</sup> Tong C & Cross T (1991), *Cross Cultural Partnerships for Child Abuse Prevention with Native American Communities*. Portland: Northwest Indian Child Welfare Institute, 12.

<sup>832</sup> Ibid.

<sup>833</sup> Weaver HN (1999), 'Indigenous People and the Social Work Profession: Defining Culturally Competent Services,' 44(3) *Social Work* 217.

<sup>834</sup> See Chapter 2 with respect to an analysis of international human rights principles which do not substitute the domination of the majority for the domination of sectors within a minority group over vulnerable or less powerful members within that group, in particular women and children. See Chapter 3 with respect to the relationship between pluralised human rights and the exercise of judgement in a manner which includes those most marginalised.



importance of practitioners' ability to reflect on their own cultural backgrounds and possible related biases and implications.<sup>835</sup> The values and world view inherent in models and theories need similar scrutiny.<sup>836</sup> Definitions of problems and their origins, and ideals for appropriate interventions and outcomes, are culturally determined. There is a need for social work policy to encourage flexibility and innovation in approaches to cultural difference.<sup>837</sup> There is a great and largely unfulfilled need for practitioners, policy-makers and other professionals to be aware of the cultural specificity of policy and practice.<sup>838</sup> Effects of the cultural incompatibility of social service models, particularly those relating to child and family services, have been overwhelmingly negative. The literature discussed below on Indigenous child and family services describes examples of this incompatibility.

### *Problems with conventional social work methods*

A number of authors and reviews suggest that social work methods often impose alien cultural values of individualism, materialism and empiricism on Indigenous peoples.<sup>839</sup> Voss et al point out that existing traditional Native American healing methods have

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<sup>835</sup> Chapters 2 and 4 discuss the enlarged understanding which can develop through a pluralised and inclusive human rights frameworks and how this can impact on understandings of child welfare, and individual and institutional morality and efficacy in decision making.

<sup>836</sup> Weaver HN (1998), 'Indigenous People in a Multicultural Society: Unique Issues for Human Services,' 43(3) *Social Work* 203; Voss R, Douville V, Little Soldier A & Twiss G (1999), 'Tribal and Shamanic-Based Social Work Practice: A Lakota Perspective,' 44 (3) *Social Work* 228; Briskman L (2007), *Social Work with Indigenous Communities*. Sydney: The Federation Press; McKenzie B & Morrisette V (2003), 'Social work practice with Canadians of Aboriginal background: Guidelines for respectful social work' in Al-Krenawi A & Graham J (eds), *Multicultural social work in Canada: Working with diverse ethno-racial communities*. Don Mills: Oxford.

<sup>837</sup> Ibid.

<sup>838</sup> Kalyanpur M (1998), 'The Challenge of Cultural Blindness: Implications for Family-Focused Service Delivery,' 7(3) *Journal of Child and Family Studies* 317.

<sup>839</sup> Briskman (2007) above n7; McKenzie & Morrisette (2003) above n7; Voss et al (1999) above n7; Weaver (1998) above n7; Kalyanpur (1998) above n9; Awasis Agency of Northern Manitoba (1997), *First Nations family justice : Mee-noo-stah-tan Mi-ni-si-win*. Manitoba: Thompson; Ricks F, Wharf B & Armitage A (1990), 'Evaluation of Indian Child Welfare: A Different Reality,' 24 *Canadian Review of Social Policy* 41.

largely been ignored in the literature on social work with American Indians.<sup>840</sup> This body of literature is very small, and this seems to reflect academic disinterest in Native Americans. This disinterest, combined with the common view of Indigenous people as a 'problem' group in social work, amounts to a form of 'intellectual colonialism and oppression' that 'perpetuates the invisibility of Aboriginal philosophy and thought in social work theory, policy, and practice and further imposes a therapeutic ideology emphasising culturally incompatible methods and ideals.'<sup>841</sup> The Awasis Agency in Northern Manitoba offers a critique of the Cartesian paradigm underlying dominant social work theory, which they suggest leads to paternalism through imposition of the idea that there is one objective truth or reality to a situation, best understood by the 'expert.'<sup>842</sup> Voss et al observe that social work policy and practice often 'rigidly reinforce a kind of clinical colonialism.'<sup>843</sup>

Social work and a range of treatment services are usually founded on models involving intervention with individual clients.<sup>844</sup> Voss et al describe the 'self' as a more fluid, less defined entity in Lakota culture, which is reflected in the primacy of tribal family and kinship bonds.<sup>845</sup> Traditional Lakota values regard the individualistic values of Western culture as flawed. The Awasis Agency in Northern Manitoba also emphasises contrasting concepts of self compared with Anglo culture, in the context of child and family services delivery. All persons, things, actions and reactions are considered inextricably related and

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<sup>840</sup> Voss et al (1999) above n7.

<sup>841</sup> Voss et al above n8, 230. The breath of life theory attempts to provide the beginnings of a holistic response to Aboriginal child welfare which rejects the presumptions which underlie a Cartesian response to social work: Blackstock C (2011), 'The emergence of the breath of life theory,' 8(1) *Journal of Social Work Values and Ethics*, White Hat Communications. Available at: <http://www.socialworker.com/jsww/spr11/spr11blackstock.pdf>.

<sup>842</sup> See Chapter 4 for a critique of the use of the 'expert' to legitimate decision making.

<sup>843</sup> Voss et al (1999) as above n7, 233.

<sup>844</sup> See Chapter 2 for a discussion of the ways in which inclusion of Indigenous peoples in the development of international human rights law, with respect to Indigenous children, is transforming the jurisprudence to include collective interests and understandings.

<sup>845</sup> Voss et al (1999) above n7.

interdependent: ‘There is no me or you... There is only me *and* you.’<sup>846</sup> Some central values common to First Nations of British Columbia are: consensus decision making (non-adversarial) as distinct from the approach of Western institutions (adversarial); a holistic approach to the care of children which sees child wellbeing as integrated into and inseparable from all other aspects of life; and a sense that each member of a nation holds responsibility for the wellbeing of all children.<sup>847</sup> An individualised focus not only results in cultural mismatch but also a framing of the individual as responsible for circumstances such as poverty-related neglect which may primarily be structurally determined and largely outside of the individual’s control. This, however, does not mean that individuals cannot or should not be individually and personally responsible for aspects of their behaviour which are individually determined.<sup>848</sup>

Weaver notes that the high value placed on independence in the dominant culture has led to conditions such as ‘enmeshment’ and ‘co-dependency’ being regarded as dysfunctional.<sup>849</sup> However, such judgements are culturally relative, and can lead to misunderstanding and misdiagnosis. ‘It is not unusual for non-Indian members of the formal child welfare system to misinterpret a parent’s reliance upon extended family members for child care as a sign of neglect ... [yet this behaviour represents] normal and healthy interdependence among Native Americans.’<sup>850</sup>

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<sup>846</sup> Awasis Agency (1997) above n10, 5; Community Panel (White L & Jacobs E) (1992), *Liberating our children, liberating our nations: report of the Aboriginal Committee, Community Panel, Family and Children’s Services Legislation Review in British Columbia*. Victoria: The Committee.

<sup>847</sup> Community Panel (1992) *ibid*.

<sup>848</sup> See discussion of Community Holistic Circle Healing (CHCH) in the Hollow Water community in Manitoba below. This program incorporates measures to address community and individual responsibility for child sexual abuse in the community.

<sup>849</sup> Weaver (1998) above n7.

<sup>850</sup> Ronnau J, Lloyd J, Sallee A & Shannon P (1990), ‘Family Preservation Skills with Native Americans’ in Mannes M (ed), *Family Preservation and Indian Child Welfare*. Albuquerque: American Indian Law Centre, 91. Also see the case study in Chapter 3 where the New South Wales child welfare department claimed neglect where an Aboriginal mother relied on non-Aboriginal women, whom she looked to as mothers, to provide shared care of her children.

In Native American culture (and many other Indigenous cultures), interdependence is highly valued. A number of works discuss the implications of cultural differences for service delivery in Indigenous communities. The conventional individually-focussed models applied by child and family service agencies and treatment services are often culturally inappropriate for use with Indigenous client groups due to cross-cultural differences in the nature of personal and communal identity. 'Personalistic psychologies,' which highlight pathologies as the basis for assessment and treatment, are not universally applicable.<sup>851</sup> Connors suggests that individually-focussed treatment models disregard the complexities of extended family networks in First Nations communities.<sup>852</sup> Many authors and community consultations report that a 'whole community' approach to child protection and other social service and treatment interventions is more appropriate and likely to lead to success. For example, the Awasis Agency, a regionalised peak body for the Indigenous-controlled child and family services of 18 Northern Manitoba Aboriginal communities, integrates child protection with other services, observing that this inclusive approach mirrors the Aboriginal concept of self in that region.<sup>853</sup> Connors, a Canadian Aboriginal psychotherapist, suggests that systems which continue to rely on individually-focused models will only be 'bandaid solutions.' He advocates the implementation of interventions directed towards the entire community.<sup>854</sup>

Professionals dealing with Indigenous families may be unaware of the potential effects of their 'cultural blindness.' Indigenous parents tend to be disempowered in relations with professionals, particularly where they have not developed strategies to increase 'levels of participation.'<sup>855</sup> In a qualitative study of social work professionals working with on-reservation Native American mothers, Kalyanpur found that although the

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<sup>851</sup> Mannes M (1993), 'Seeking the Balance between Child Protection and Family Preservation in Indian Child Welfare,' 72(2) *Child Welfare* 141.

<sup>852</sup> Connors E (1993), 'Healing in First Nations: The Spirit of Family' in Rodway MR & Trute B (eds), *The Ecological Perspective in Family-Centered Therapy*. New York: Edwin Mellen Press, 51.

<sup>853</sup> Awasis Agency (1997) above n10.

<sup>854</sup> Connors (1993) above n23.

<sup>855</sup> Kalyanpur (1998) above n9.

workers were acting according to best practice, their assumptions with respect to the universal applicability of 'objective' theories was misplaced. Kalyanpur found that although the parents in the study had perceived parenting deficits according to professional criteria, they were raising their children 'to become competent adults within their culture' and therefore possessed appropriate parenting skills. In communities where problems exist and children are not being raised in a healthy way with respect to their own culture, a failure to apply culturally appropriate assistance may be masked by a focus on children's problems with little incentive to question mainstream presumptions with respect to children's welfare or wellbeing (see discussion in Chapter 4 with respect to presumptions about child welfare values being founded in Anglo values which are assumed to be universal). Further, where there has been a significant breakdown of social norms, and child abuse and neglect are related to this breakdown, imposition of laws and rules which do not have internal meaning for the community are not likely to stem damaging and inappropriate conduct.<sup>856</sup>

### *Partnerships and collaboration*

Good partnerships and meaningful collaboration between government and Indigenous organisations are vital to the development of effective child welfare strategies which empower Indigenous communities. However, as outlined by the Awasis Agency:

The power structures that underlie traditional approaches to social work practice often work against collaborative decision-making with families. Even when social workers try to share decision-making power with families the power and authority attached to the role of social worker can erode this attempt.<sup>857</sup>

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<sup>856</sup> See discussion in Chapter 4 on the rule of law. In circumstances where children face violence, there is a clear need for criminal law intervention, victim support and reconstitution of cultural and physical security for individuals and the community. The call for greater support for victims by service providers and, at the same time, dissatisfaction with contemporary child welfare measures have been consistent themes across reviews into sexual and other abuse faced by Indigenous women and children. See discussion of these reviews in Chapter 1.

<sup>857</sup> Awasis Agency (1997) above n10, 24-25.

Collaboration is vital 'for both understanding the specific limitations and ineffectiveness of existing services and programs and for identifying the changes necessary to create culturally appropriate solutions.'<sup>858</sup> While building relationships across difference is necessary, Wharf and McKenzie note the huge gap in experience which often exists between policy makers and those whom they are making policy for.<sup>859</sup>

In describing a number of Native American child and family services entities considered exemplary, the Aboriginal Family Healing Joint Steering Committee identifies collaboration as the key feature to their success. They note that several of these organisations had complex partnerships between various combinations of state agencies, tribal organisations, and non-government organisations.<sup>860</sup> Similarly, a report on a study of Aboriginal self-government and child welfare services in two remote Canadian communities found that a collaborative approach to relations with provincial authorities was the key factor in the greater success of one community.<sup>861</sup>

A project conducted by the American Humane Association examined sources of conflict and collaboration in areas of child welfare in which both tribes and government agencies have an interest.<sup>862</sup> The project was overseen by a national committee representing tribal, state, non-profit and federal child welfare agencies. Qualitative research methods were used: interviews, participant observation, and

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<sup>858</sup> Aboriginal Family Healing Joint Steering Committee (1993), *For Generations to Come: The Time is Now - A Strategy for Aboriginal Family Healing*. Ontario: Unpublished Final Report, ii.

<sup>859</sup> They note that most policy makers are usually economically and socially comfortable and may have little experience of, or sympathy for, the poverty and associated problems which those who will receive services based on this policy experience. McKenzie B & Wharf B (2004), *Connecting Policy to Practice in the Human Services*. (2nd. edition) Don Mills: Oxford, x1.

<sup>860</sup> American Humane Association - National Resource Center on Child Abuse and Neglect (1997), *Tribal-State Relationships in Child Welfare: Ensuring High Quality Services to American Indian Children and Their Families*. Englewood: American Humane Association.

<sup>861</sup> Durst D, McDonald J & Rich C (1995), 'Aboriginal Government of Child Welfare Services: Hobson's Choice?' in Hudson J & Galaway B (eds), *Child Welfare in Canada. Research and Policy Implications*. Toronto: Thompson Educational Publishing.

<sup>862</sup> Ibid.

archival reviews. Project sites were in five reservations covering seven tribes in three states: Arizona, North Dakota and Washington. The research found North Dakota was an exemplary case for positive tribal-state relations. Some of the qualities which contributed to this status were:

- The long history of tribes and government working together;
- A mutual understanding of their history and cultural context;
- Recognition of the 'sovereignty nationhood' of tribes by government;
- The provision of training on means to obtain federal funds; and
- The collaborative approach adopted by all participants.

**The report identified that individual people involved were a key factor in tribal-state relations. People consulted for the project (individually and as representatives) discussed perceived personal skills and qualities important to good working relations between tribes and states. These were grouped and summarised, including:**

- Communication skills;
- Sensitivity to different values;
- Cultural broker skills;
- Teamwork skills; and
- Comfort in ambiguity.

'Cultural brokers' have the ability to 'walk in two cultures' with comfort in the different roles required. Many interviewees were cultural brokers between governments and Aboriginal agencies.

Tong and Cross of the United States National Indian Child Welfare Association produced a paper with the specific goal of providing strategies for the development of effective cross-cultural partnerships for child abuse prevention.<sup>863</sup> Some of their suggestions were as follows:

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<sup>863</sup> Tong & Cross (1991) above n2.

- Ensure that an effective needs assessment has been carried out. The appropriate method for conducting the needs assessment is itself dependent on the specific features of the individual community.
- Consult with the community.
- Have a clear goal of empowering the community, as distinct from simply providing services to the community.

They found two vital factors in successful strategies were to attain inclusiveness and empowerment. They suggest that involvement of, and consultation with, community members should take place throughout the project cycle, from design through to evaluation.<sup>864</sup> Natural community support networks should be used and developed, while community-based helpers and prevention networks should be engaged. This, Tong and Cross suggest, can be achieved through attending formal and informal community gatherings, or by sponsoring joint training or public awareness events with Indigenous organisations. The history of disempowerment and attendant feelings of helplessness must be overcome by harnessing community strengths and resources. Historical mistrust is potentially destructive and also needs to be acknowledged and addressed. Strategies which have been used to engage Indigenous communities include using the influence of Indigenous leaders to disseminate information, and seeking information and advice from Indigenous organisations. Programs should be designed so that they are sustainably incorporated into the local Indigenous culture. An example in the Australian context of effective collaboration and engagement between an Indigenous community agency and a government department is the respect which the Victorian Aboriginal Child Care Agency (VACCA) is accorded by non-Aboriginal children's agencies and government departments. In addition to VACCA's statutory responsibilities with respect to providing cultural advice about all Indigenous children who are notified to the department and family support and out-of-home care services, VACCA provides law reform and policy advice and training such as Nikara's Journey, a two day training program for non-Aboriginal foster carers to assist them to support the best interests of Aboriginal children in their care. See discussion in Chapter 6 with respect to the

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<sup>864</sup> See discussion of Manitoba child welfare model in Chapter 5 which includes extensive involvement of all parties from the planning stages onwards.



legislative structure which supports the empowerment of VACCA and the symbiotic relationship between VACCA's increased powers and responsibilities and increased cultural competence within the Victorian Department of Human Services and other Victorian non-government children's services.

*Factors which contribute to culturally competent work*

There are a number of key issues which practitioners need to be aware of for culturally competent work with Indigenous peoples. Weaver identifies a number of themes for practitioners to be aware of when working with Native Americans.<sup>865</sup> These are issues which appear to also have relevance for practitioners working with other Indigenous peoples. Weaver states that interventions addressing trauma are often best approached through a group method, as much trauma has been perpetrated on Indigenous peoples as a group, and Native American identity is focussed on groups. She notes that community healing projects are becoming more common and that validation of historical grief is an important element in assessment and healing processes. Colonial processes impact on identity in a number of ways. These include impacts on self-esteem and identity through a lack of recognition of Aboriginal Nations by the state and some Aboriginal individuals by Aboriginal groups. McKenzie and Morrisette note the value of cultural knowledge and reviving cultural practices for securing identity, healing and wellbeing and that Aboriginal values may serve as a buffer against the impacts of destructive colonial practices.<sup>866</sup>

In their work on cross-cultural partnerships for child abuse prevention, Tong and Cross articulate a series of definitions and indicators for a range of levels of organisational cultural competence.<sup>867</sup> Tong and Cross declare agencies to be at a stage of 'cultural pre-competence' when they have acknowledged their failure to adequately meet the needs

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<sup>865</sup> Weaver (1998) above n7.

<sup>866</sup> McKenzie & Morrisette (2003) above n7, 264.

<sup>867</sup> Tong & Cross (1991) above n2, 13.

of the Indigenous community, and respond by implementing outreach programs, or by recruiting Indigenous people who are:

... trained to provide services in a standard fashion. Although an effort is made, the effort falls short because it is not culturally tailored. These efforts may give service providers a false sense of security ... Agencies work seriously on the issues yet ineffectively.<sup>868</sup>

In contrast with the above, culturally competent agencies will adapt service models to better suit Indigenous people, in consultation with the community. Tong and Cross term the highest level of competence 'cultural proficiency.' This is characterised by agencies which 'seek to add to the knowledge base of culturally competent practice by conducting research or developing new therapeutic approaches based on culture.' Culturally competent service providers will sanction or mandate the 'incorporation of cultural knowledge into the service delivery framework.'

In order to achieve cultural competence, individuals and institutions need more than awareness and commitment; they must be appropriately skilled and informed. Unfortunately, little attention has been paid to identifying the skills and knowledge most important to the culturally competent provision of social services to Indigenous people. Weaver has conducted some of the limited field research in this area. Weaver surveyed 62 Native American social workers and social work students about their beliefs regarding cultural competence and Native American clients.<sup>869</sup> Respondents came from a range of tribal backgrounds, representing 36 Native American nations. Weaver's survey asked respondents what they felt were appropriate knowledge, skills and values to work culturally competently with Native American clients.<sup>870</sup> Her findings are

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<sup>868</sup> Ibid, 14.

<sup>869</sup> Weaver (1999) above n4.

<sup>870</sup> These three categories are those broadly considered to be necessary to culturally competent social work practice in relevant literature.

consistent with the findings of practitioners and researchers referred to above. She identified the following values and skills to be important:

- The recognition of diversity between and amongst tribes and communities;
- The importance of treaties, recognition of the sovereign status of nations, and understanding of the impacts of contemporary and past government policies in particular the effects of atrocities perpetrated against Indigenous peoples;
- Understanding of Native American culture including systems of communication, belief, values, and their world view. Common core cultural values which she identified include importance of family, tradition, spirituality, respect for elders, matriarchal structures, and issues of death and mourning;
- Understanding of contemporary realities including tribal politics, Indigenous organisations, structure of reservations and urban Native American communities, Federal agencies and laws, and issues of loss and post-traumatic stress;
- The ability to define problems and solutions from a Native American perspective, and to empathise with Native American clients; and
- The ability for patience, to listen actively, to tolerate silence, and to refrain from speaking at times when they otherwise might when with Native American clients.
- She also noted the importance of practitioner wellness and self-awareness, their willingness to show humility and to learn from clients, and to respect and appreciate differences.

A study of placement prevention and reunification projects in Native American communities reviewed six projects in a wide range of settings.<sup>871</sup> The communities included a variety of cultural environments ranging from those with strong tribal identities and cultural ties to those with few bonds to tradition and cultural history. The study identified a number of implications of these contextual differences, including the greater opportunity to design services tailored to specific cultural issues, the increased need for confidentiality procedures and the higher dependence on the support of tribal leaders for successful implementation in communities which are more 'traditional.' In more urbanised communities or those which are more enmeshed in the dominant culture they found a greater need to provide services designed to enhance Native American cultural identity and that initiatives were more likely to address disempowerment and conflict with the dominant culture. These differences illustrate the need to consider social, cultural, economic and political contextual differences and similarities when attempting to replicate projects.

Culturally competent agencies will consider factors in the lives and histories of their Indigenous clients which will influence client-agency relationships. Horejsi et al have produced a useful guide to factors contributing to what may be considered negative responses of Native American parents to child protection services.<sup>872</sup> These factors include poverty-induced feelings of helplessness which may be exacerbated by welfare intervention, racism and discrimination which can lead to fear and distrust of welfare workers, fear due to past experiences of removals of children that intervention by welfare agencies may lead to permanent removal and loss of children, and concerns that internal community politics may lead to limited access to resources and treatment

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<sup>871</sup> Smollar J & French R (1990), *A Study of Six Native American Placement Prevention and Reunification Projects*, prepared by CSR Incorporated and Three Feathers Associates. The projects were conducted in urban, rural and remote communities in five different states: Mississippi, Oklahoma, Washington, Oregon, and Alaska.

<sup>872</sup> Horejsi C, Heavy Runner Craig B & Pablo J (1992), 'Reactions Of Native American Parents To Child Protection Agencies: Cultural And Community Factors,' 71(4) *Child Welfare* 329.

by Indigenous agencies.<sup>873</sup> McKenzie and Wharf discuss the loss of citizenship attributes by many who are disaffected with an important aspect of this loss being the exclusion or marginalisation from participating in the decisions and events which affect their lives or the life of the community more generally.<sup>874</sup> It is vitally important that child and family service providers are able to integrate knowledge and reflection with practice skills.<sup>875</sup> Legislation which facilitates participation and collaboration will be of little use without effective implementation. Wide gaps often exist between legislative and policy frameworks, and their implementation in practice.<sup>876</sup>

### *The legacy of historical removals*

An understanding of the impacts of trauma resulting from a history of forced and unjustified removals of children and culturally inappropriate service provision is necessary for effective social services policy analysis and development and child welfare program implementation with Indigenous communities.<sup>877</sup> As discussed in Chapters 5 and 6, Indigenous children and their communities have suffered enormously from practices involving the removal of children and their placement in residential schools or non-Indigenous adoptive families in different but parallel ways in Australia, Canada, the United States and New Zealand.

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<sup>873</sup> Ibid. These concerns were also reflected by Indigenous participants in a study of cultural care for Aboriginal and Torres Strait Islander children in out-of-home care: Libesman T (2011), *Culture Care for Aboriginal and Torres Strait Islander Children in Out of Home Care*. Melbourne: SNAICC.

<sup>874</sup> McKenzie & Wharf (2004) above n30.

<sup>875</sup> Weaver (1998) above n8.

<sup>876</sup> For a useful outline of features of culturally competent policy, and some practices recommended to implement them, see Hart R (1997), *Beginning a Long Journey: a Review of Projects Funded by the Family Violence Prevention Division, Health Canada, Regarding Violence in Aboriginal Families*. Ottawa: Health Canada, 14-15.

<sup>877</sup> McKenzie B (1997), 'Connecting Policy and Practice in First Nations Child and Family Services: A Manitoba Case Study,' in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.

However, the impacts of this history, as illustrated in the case study in Chapter 3, are seldom considered by non-Indigenous agencies in practice. The Awasis Agency of Manitoba points out that:

Social work cases are not looked at within the larger context of social, economic, historical, political, and cultural realities. Blame rests with the individual ... Child and Family Services within a First Nations context must adopt a contextual perspective for service delivery to be effective.<sup>878</sup>

An atmosphere of taboo and shame still exists around the history of maltreatment of Indigenous children in a number of countries. According to Morrisette, the residential school experience of Native people throughout North America is still suppressed and some regard it as attempted cultural genocide. Yet, '(b)y better understanding client cognitions and behaviours that stem from this experience, treatment plans can be designed to overcome problematic parenting patterns.'<sup>879</sup>

Strategies such as culturally appropriate placement may not resolve underlying problems. Evidence suggests that parents who themselves spent lengthy periods in adoptive placement or residential schools as children have a higher chance of experiencing parenting or substance abuse problems which lead to the removal of their children, establishing an intergenerational pattern of family breakdown and removal.<sup>880</sup> Factors which contribute to lack of parenting skills include: the absence of positive parental role models; destroyed transmission of parenting knowledge and behaviours;

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<sup>878</sup> Awasis Agency (1997) above n10, 24. Part of this quote appears in upper case in the original.

<sup>879</sup> Morrisette P (1994), 'The Holocaust of First Nation People: Residual effects in Parenting and Treatment Implications,' 16(5) *Contemporary Family Therapy an International Journal* 381, 386.

<sup>880</sup> Ibid; Mannes (1993) above n22; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC) (1997), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Sydney: Human Rights and Equal Opportunity Commission, Chapter 11.

absence of experience of family life; and sexual abuse.<sup>881</sup> Parents who spent time in residential schools as children tend to associate discipline with non-caring, and can become over-protective of their own children, which can lead to 'enmeshed relationships and blurred intergenerational boundaries.'<sup>882</sup>

Some program models aim to raise awareness of and educate Indigenous people about how the effects of historical factors have contributed to their contemporary realities, experiences and circumstances. In so doing, these innovative models attempt to change behaviour through education about some of the root causes of child abuse and neglect in Indigenous communities. Some of these programs are described and discussed below.

### *Collaborative evaluation of programs*

Conventional evaluation criteria and frameworks are 'severely tested' in the context of Native child welfare. Beliefs and values underlying conventional approaches are usually those of the mainstream. Different belief systems can mean differences in objectives, indicators, understanding about the appropriateness of who does the evaluation and how the information is used.<sup>883</sup> It has been noted that, 'Too often an evaluator's desire to have a clean evaluation ignores the differences in values and belief systems.'<sup>884</sup> There

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<sup>881</sup> Morrisette (1994) above n50; Horejsi et al (1992) above n43; NISATSI (1997) above n51; Cunneen C & Libesman T (2000), 'Postcolonial trauma: the contemporary removal of indigenous children and young people from their families in Australia,' 35(2) *Australian Journal of Social Issues* 99.

<sup>882</sup> Morrisette (1994) above n50, 386. Also, as referred to above, sometimes there can be a blurring between cultural expectations and understandings and framing parenting as problematic, see discussion above with respect to defining some culturally valued parenting as enmeshed and problematic.

<sup>883</sup> For an example of a collaborative evaluation see Ricks F, Wharf B & Armitage A (1990), 'Evaluation of Indian Child Welfare: A Different Reality,' 24 *Canadian Review of Social Policy* 41, a collaborative evaluation with the Champagne/Aishihik child welfare pilot project. The evaluation team worked with a committee comprising representatives from government and band. Evaluation questions were devised by the committee, who also reviewed information and made recommendations. The process was designed to lead to ongoing joint decision-making and better understanding between government and band. The evaluation report was produced by all parties – evaluation team, government and band.

<sup>884</sup> Ibid, 45.

is a need to render values underlying evaluation processes explicit as part of the evaluation process.

### *Standards*

The levels of cultural appropriateness and relevance of child welfare-related standards to Indigenous groups is a major issue. Culturally inappropriate standards used for determining a child's need for substitute care have been a contributor to disproportionate rates of removal in Indigenous populations.<sup>885</sup> In many places, culturally inappropriate alternate care standards lead to the placement of Indigenous children with non-Indigenous carers.<sup>886</sup> Expanding on this point, the report of a Manitoba community consultation notes:

The standard and procedures followed by First Nations agencies for apprehensions, placements and adoptions are provincially defined. The standards relating to foster homes on reserves are viewed from the mainstream society perspective. Most First Nations homes are unable to meet these standards ... It is not always possible to find foster or adoption homes that will pass the provincial test in the communities.<sup>887</sup>

Both the above report and policy discussion from a Manitoba regional agency consider that conventional child welfare standards are not always appropriate, and both recommend that standards should be based on holistic community-defined standards generated at the local level.<sup>888</sup> In the converse, it could be argued that appropriate standards with respect to all agencies providing culturally appropriate services and incorporating cultural care planning within case planning and out-of-home care

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<sup>885</sup> First Nation's Child and Family Task Force (1993), *Children First, Our Responsibility: Report of the First Nation's Child and Family Task Force*. Manitoba: The Task Force; Mannes (1993) above n22; Community Panel (1992) above n17.

<sup>886</sup> Ibid.

<sup>887</sup> First Nation's Task Force (1993) above 56, 51.

<sup>888</sup> Ibid; Awasis Agency (1997) above n10.



assessments are factors which should be considered when accrediting welfare agencies and out-of-home care providers.<sup>889</sup>

### *Staffing and training issues*

A factor inhibiting increased Indigenous control of child and family services, is the shortage of trained and available Indigenous workers.<sup>890</sup> This shortfall is closely tied to the exclusion and marginalisation of Indigenous people from educational opportunities and more broadly the impacts of colonialism. Redressing capacity within communities is part of a broader need for reparation and redress for past wrongs.

Consultations with Aboriginal peoples in British Columbia found that culturally inappropriate standards for health care and social worker education have contributed to the 'gross under-representation' of Aboriginal people in these fields.<sup>891</sup> Contributors to a community consultation, in Manitoba, argued that academic qualifications were not the most important criteria for workers, as they believed that mainstream social work curricula do not meet the needs of First Nations people.<sup>892</sup> The Manitoba consultation also noted that senior management positions at First Nations agencies were usually held by non-Aboriginal staff; however, the consultation also found that family-based nepotism influenced appointments at First Nations agencies, when better qualified staff were

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<sup>889</sup> Libesman T and Avgoustinos C (forthcoming), *The cultural appropriateness of LAC Assessment and Action Records for Aboriginal and Torres Strait Islander children and young people in out of home care*. Victoria: SNAICC; in the Canadian context see McKenzie B, Bennett M, Kennedy B, Balla S & Lamirande L (2009), 'Exploratory Regional Study on Child Welfare Outcomes in Aboriginal Communities.' Ontario: Association of Native Child and Family Services Agencies of Ontario. Available at:

<http://www.fncaringociety.com/sites/default/files/docs/ANCFSAO-Final-Report-Nov2009.pdf>

<sup>890</sup> Durst D (1998), 'The Wellness of Canadian First Nations Children: Seeking Solutions Through Self-Government' in Hylton J (ed), *Aboriginal Self-Government in Canada* (2nd edition). Saskatoon: Purich; Armitage A (1993), 'Family and Child Welfare in First Nation Communities' in Wharf B (ed) (1993), *Rethinking Child Welfare in Canada*. Toronto: McClelland & Stewart, 131.

<sup>891</sup> Community Panel (1992) above n17.

<sup>892</sup> First Nation's Task Force (1993) above n56.

available.<sup>893</sup> Many social work departments in universities have attempted to respond to this issue by including Indigenous content in their curricula and establishing special entry programs for Indigenous students.<sup>894</sup> In the name of increased accountability and improved standards, the Gove Report<sup>895</sup> proposed a social worker regulation scheme. Some First Nation social workers viewed this as a means of exerting control over emerging First Nations child and family services practice.<sup>896</sup> A human rights framework for regulating legislative and practice standards, as discussed in Chapters 2 and 4, could assist in overcoming cultural domination and provide a bridge between mainstream and Indigenous understandings and standards.

A British Columbia consultation found that the under-representation of Indigenous staff in Indigenous child and family services has led to culturally inappropriate service delivery, and the devaluing of traditional Aboriginal healing practices.<sup>897</sup> A Manitoba consultation recommended that, except where locally sanctioned, workers should be First Nations people, and development of training programs should be based on First Nations criteria.<sup>898</sup> Where non-Indigenous workers are employed, the importance of cross-cultural training is emphasised. The Manitoba consultation stated that, '(c)ultural differences created chasms between non-First Nations workers and their clients.'<sup>899</sup> Stereotypical views might lead to the belief that these issues and differences might not be so relevant to Indigenous people living apparently acculturated lives in cities. However, the

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<sup>893</sup> Ibid.

<sup>894</sup> A particularly robust example of this, with a program established for Aboriginal students and support services in place, is the social work program at Manitoba University.

<sup>895</sup> Gove TJ (1995), *Report of the Gove inquiry into child protection in British Columbia*. British Columbia: Queens Printer. The Gove Report examined the neglect, abuse and death of a six year old boy, Matthew John Vaudreil, while under the attention of child protection system in British Columbia. See below ('Family preservation vs child protection') for further detail with respect to this report.

<sup>896</sup> Schmidt G (1997), 'The Gove Report and First Nations Child Welfare' in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.

<sup>897</sup> Community Panel (1992) above n17.

<sup>898</sup> First Nation's Task Force (1993) above n56.

<sup>899</sup> Ibid, 56.

consultation also found that the ‘same concerns were expressed in urban areas as well as in First Nations communities.’<sup>900</sup> In addition to the shortage of Indigenous workers, a lack of supervision and administrative support is another impediment to the development and success of First Nation agencies.<sup>901</sup>

### Indigenous community control

Around the world, child welfare systems and agencies are struggling to protect their reputation and carry out their responsibilities in an environment of ever-increasing reports of abuse and neglect. There is a growing consensus among professionals and the public that there is a need for fundamental change in how child protection services should be conceptualised and delivered, for mainstream populations as well as Indigenous children and young people.<sup>902</sup>

The United States’ ‘Executive Session on Child Protection,’ a three-year series of intensive three-day meetings of professionals, academics and advocates, concluded that a more collaborative, community-based approach to child protection was required.<sup>903</sup> The Session proposed that rather than child protection agencies bearing sole responsibility for protecting children, other agencies, parents and the public should

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<sup>900</sup> Ibid. Similar concerns with respect to cultural difference between departmental officers and Aboriginal clients were expressed by Aboriginal participants in a cultural care study in Australia see Libesman (2011) above n44.

<sup>901</sup> Durst (1998) above n61.

<sup>902</sup> See Chapter 1 with respect to the public health care model. The extent to which a public health model will enhance a human rights framework for Indigenous children and young people’s wellbeing depends on how risk factors are identified, how culture and the suppression of it are understood and, more broadly, the ways in which colonial experience is responded to at a primary level. If it is characterised as the sum of empirical manifestations of risk, such as poverty, unemployment and poor education, and at an individual level truancy, low birth weights, high rates of STDs etc then the response could miss the underlying connecting factors which result in the sum of these empirical signs of risk manifesting in many Indigenous communities. If responses to these risks contextualise them and respond both with individual and broader social and political redress then a public health models should harness and promote better outcomes for Indigenous children and young people within a human rights framework.

<sup>903</sup> Farrow F and the Executive Session on Child Protection (1998), *Child Protection: Building Community Partnerships*. Cambridge: Harvard University.

jointly share responsibility in 'community partnerships for child protection.'<sup>904</sup> The Session envisaged the development of comprehensive neighbourhood-based supports and services, which draw on family networks and other informal resources. These networks are closer to, and more trusted by, families in need than traditional services. Partnerships build accountability, trust and knowledge between community and service providers. It was suggested that child protection service agencies must engage with families and natural networks of support. The Session expressed the need for 'instituting community governance and accountability for protecting children.' The Session could also envisage the development of formal community boards responsible for child protection as a viable alternative.

Wharf and McKenzie point out, in making a general case for local community control of community services that people respect, identify with, and perform better in projects and programs when they have been involved in planning and implementation.<sup>905</sup> Given the parallel histories of dispossession and wholesale removal of children from Indigenous peoples in a number of colonised countries, the issue of community control is particularly important for Indigenous peoples. A report based on a review of 15 Health Canada-funded Family Violence Prevention projects planned and implemented by Aboriginal people made the following observation with respect to Indigenous control of child welfare services:

As ownership of family-related services has increasingly passed to Aboriginal control, it has become evident that simply staffing those services with Aboriginal people is only part of the answer. The services themselves need to be designed by Aboriginal people to make them work as a reflection of the host community and the belief system found there.<sup>906</sup>

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<sup>904</sup> A collaborative and interagency response for child protection has been recommended by a number of reviews into child protection services in Australia with reference to Indigenous children's needs. See discussion in Chapter 1.

<sup>905</sup> Wharf B & McKenzie B (1998), *Connecting Policy to Practice in the Human Services*. Ontario: Oxford University Press.

<sup>906</sup> Hart (1997) above n47, 12.

The transfer of agency responsibility from mainstream to Indigenous agencies has illustrated the importance of collaboration between mainstream and Indigenous agencies in processes of change and the importance of capacity building within Indigenous agencies for effective Indigenous agency service provision.<sup>907</sup> Transfer of agency responsibility needs to be matched with adequate funding and capacity building both within agencies and within the broader community which is being served.<sup>908</sup>

In 1993, an Ontario Aboriginal committee produced an Aboriginal family healing strategy, developed through a community consultation process involving 6000 Aboriginal people throughout the Province. The strategy 'sees the empowerment of Aboriginal people as being a central component in the healing of individuals, families, communities, and Aboriginal Nations.'<sup>909</sup> The strategy required Aboriginal community control and funding for its design and implementation. This process would depend on a provincial government commitment to devolving authority to the Aboriginal community. The strategy also outlined a suggested scheme for the phased devolution of authority for child protection to Aboriginal people. The phased handover of authority proposed in the Ontario Strategy involved the establishment of a joint management committee, with provincial government and Aboriginal community members. In the first phase, programming would continue under provincial Ministry mandates while beginning to share control over family healing programs. In the medium to long term, full control would be devolved to Aboriginal communities.

The phasing aspect of the scheme was designed to accommodate differing levels of community readiness. This aspect of the scheme may be adaptable, as the levels of social, physical, economic and political resources and infrastructure are

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<sup>907</sup> See discussion in Chapters 5 and 6 (in particular the Manitoba case study in Chapter 5).

<sup>908</sup> Hudson P & McKenzie B (2003), 'Extending Aboriginal control over child welfare services: The Manitoba Child Welfare Initiative,' 51 *Canadian Review of Social Policy* 56, 63 -65.

<sup>909</sup> Aboriginal Family Healing Joint Steering Committee (1993) above n29, 3.

likely to vary considerably between communities. A relative resource deficit is not necessarily a good reason to postpone a phased transfer of responsibility for child welfare to Aboriginal communities. Such a process, if planned and supported, can be part of a capacity building process within such communities. Many existing Indigenous-controlled child and family services appear to have a good record for improving child welfare outcomes in their communities. Below are two examples of successful Canadian services.

Weechi-it-te-win Family Services (WFS) is a regional tribal agency responsible for delivery of child and family services, including child protection, to ten Ontario First Nations reserves. WFS was the first Aboriginal agency in Ontario. It is funded by the Ministry of Community and Social Services, Ontario and the Department of Indian Affairs. The following discussion is drawn from the report of an operational review of the WFS service.<sup>910</sup>

Some funding was transferred from the mainstream Provincial service to WFS in 1986, and full responsibility for child welfare was assumed by the agency in 1987. A new approach to child protection was implemented, using a cooperative system of Aboriginal child placement and applying an Aboriginal child placement principle which mirrors that of the New South Wales legislation.<sup>911</sup> WFS's service model emphasises family preservation and community development work to assist in the healing of the whole community, with minimal formal intervention and substitute care. A consensual system of 'customary care' was established, with a local Tribal worker, a WFS worker and the family and/or other community members drawing up a 'Care and Supervision Agreement' together for each case. The Agreement is formally sanctioned by a resolution of the Chief and Council of the First Nation. Under the WFS system, consensus may be achieved by: a) agreement between the family and the family

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<sup>910</sup> Weechi-it-te-win Family Services (2005), *Building Healthier Communities: A Report of the Operational Review of Weechi-it-te-win Family Services*, unpublished report, Ministry of Community and Social Services, Ontario.

<sup>911</sup> See the 'Aboriginal placement principle' in NSW legislation discussed in Chapter 6.

services worker; b) agreement between the committee and the family; and c) referral to the First Nation's council. Between 1988 and 1995, at least 85% of placements were arranged through Agreements rather than through mandatory mainstream methods. Where agreement is not reached, WFS applies for a hearing in a family court.

The WFS Community Care Program offers family support and child care services as well as child protection. Its principles include a focus on tradition, family and extended family, and community control and orientation. The family services committee at each First Nation community is responsible for assessment, placement and support services. WFS operates under the provincial Ontario *Child and Family Services Act*. They would however prefer legislation which recognises their jurisdiction and which validates their Indigenous frame of reference. However, their delegated authority, which accords them increased control over child protection, has afforded a good deal of flexibility with respect to how they look after Indigenous children's welfare and wellbeing.

The West Region Child and Family Services (WRCFS), a child welfare agency which serves nine Manitoba First Nation communities, is another example of a successful Indigenous-controlled agency. McKenzie's case study of the service was drawn from results of a 1994 WRCFS program evaluation conducted by the same author, and a participatory research project funded by the agency.<sup>912</sup> In the 1994 evaluation, the average score out of five for agency success granted by community respondents was 3.9; which is very high for a service with such a difficult mandate as child protection. One of the two most important agency goals nominated by community respondents was 'to deliver community-based culturally appropriate services.'<sup>913</sup> Stated agency goals are closely in line with community feeling on these issues, as three important agency principles, which were also used as evaluation criteria, are:

- Aboriginal control;

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<sup>912</sup> McKenzie (1997) above n48.

<sup>913</sup> Ibid, 12.

- Cultural relevance; and
- Community-based services.

Overall, the evaluation concludes that WRCFS's holistic approach to service-delivery was effective. Important factors considered to contribute to agency success were:

- Autonomy and control over services and policies, flexibility and creativity;
- Sound, supportive, progressive leadership; and
- Collaborative approach involving the community and which is empowering.<sup>914</sup>

### *Accountability*

A number of accountability-related issues arise in the international literature on Indigenous child welfare. This chapter will focus primarily on the one which arises most frequently, and causes the greatest concern: political or personal interference with, and influence over, Indigenous-controlled child and family services. This is a serious issue, which compromises the probity and effectiveness of some Indigenous agencies, and leaves Indigenous women and children the greatest losers. Other issues associated with devolved authority which will be addressed include: the problem of determining specific responsibilities where divided authority creates multiple accountability; and the capacity of local services to provide assured child protection; and confidentiality. Consideration is then given to responses to these accountability issues.

The issue of political interference arose most frequently in the Canadian, Australian, and New Zealand literature, and there was only limited reference to this issue in the United States material reviewed. This may reflect differences in research or differing practices. The most critical reference to political interference found in this review was in the

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<sup>914</sup> McKenzie (1997) above n48.



report of a Manitoba Indigenous community consultation. Many of those consulted stated that Chiefs, councillors, directors, staff and other influential community members interfered improperly in child welfare cases. Presenters 'said that abusers pursue and perpetrate atrocities with impunity. Among them are influential members of communities. Presenters described them as "untouchables" and refuse to identify them for fear of reprisal.'<sup>915</sup> The consultation task force heard of widespread physical and sexual abuse, existing within a culture of silence. Sometimes placement was selective, with children being placed in the homes of those favoured by an agency, worker or Chief.<sup>916</sup>

Allegations of abuse cover-ups and the protection of relatives were also made in the Giesbrecht report which followed the suicide of an adolescent in the care of a First Nations agency, Dakota Ojibway Child and Family Services.<sup>917</sup> The Giesbrecht report and the external reviews of the Manitoba child welfare system specifically cited political interference by powerful community members as an impediment to the development of First Nation child and family services agencies.<sup>918</sup> Gray-Withers states that First Nation women's groups accused Chiefs of 'complicity and political self-serving interference' following the suicide referred to above, other deaths in care and the leaving of other children in abusive homes.<sup>919</sup> Other works claim that urban-based Aboriginal women's groups were

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<sup>915</sup> First Nation's Task Force (1993) above n56, 37.

<sup>916</sup> The issue of reformed governance practices to make it safer to report and have response to allegations of child sexual assault in communities is also discussed in the context of Australian reviews see Chapter 1.

<sup>917</sup> Giesbrecht B (1992), *The Fatality Inquiries Act: Report by Provincial Judge on Inquest Respecting the Death of Lester Norman Desjarlais*. Manitoba: Department of Justice; The following reports reviewed deaths of Aboriginal children under the care of Aboriginal child welfare agencies: Hardy M, Schibler B & Hamilton I (2006), *Strengthen the Commitment: An External Review of the Child Welfare System*. Manitoba: Office of the Ombudsman; Schibler B & Newton J (2006), *Honouring their Spirits: The Child Death Review*. Manitoba: The Office of the Children's Advocate.

<sup>918</sup> Durst (1998) above n61.

<sup>919</sup> Gray-Withers D (1997), 'Decentralised Social Services and Self-Government: Challenges for First Nations' in Pulkingham J & Ternowetsky G (eds) (1997), *Child and Family Policies, Struggles, Strategies and Options*. Halifax: Fernwood.

the first to publicly raise concerns about the impact of political interference by First Nation's community leaders on child and family services.<sup>920</sup>

The apparent political interference in some Canadian Indigenous child welfare matters is closely linked to the small size of many First Nations communities. Health or social workers and police are likely to know, or be related to, the victim or the perpetrator. The close proximity of these various parties involved in child protection matters is likely to engender bias.<sup>921</sup> Although women had a powerful place in traditional First Nation's culture, men dominate today. The colonising culture is a factor which has impacted on the adoption by many First Nation's men of negative attitudes and behaviour towards women.<sup>922</sup> One source estimates that 80% of Canadian Aboriginal women suffer physical, psychological, sexual and other forms of abuse.<sup>923</sup> This abuse is often seen as a private family matter in Aboriginal communities. As a result, little intervention from relatives or others occurs. Support services are often unavailable, and Chiefs or council members are unlikely to be charged over domestic violence matters.<sup>924</sup>

These problems can be exacerbated by processes instituting self-government and First Nation's control of child and family services. In reporting on a series of interviews with First Nation's women, Gray-Withers stated:

(T)here has been little credence or academic attention paid to First Nations women's control over social services or input into self-government initiatives. Native women's groups have been vocal in their criticism of

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<sup>920</sup> McKenzie (1997) above n48; McKenzie B, Seidl E & Bone N (1995), 'Child Welfare Standards in First Nations: A Community-Based Study' in Hudson J & Galaway B (eds), *Child Welfare in Canada: Research and Policy Implications*. Toronto: Thompson Educational Publishing.

<sup>921</sup> Dumont-Smith C (1995), 'Aboriginal Canadian Children who Witness and Live with Violence' in Peled E, Jaffe PG & Edleson JL (eds), *Ending the Cycle of Violence: Community Responses to Children of Battered Women*. Thousand Oaks: Sage Publications, 275.

<sup>922</sup> Gray-Withers (1997) above n90; First Nation's Task Force (1993) above n56.

<sup>923</sup> Dumont-Smith (1995) above n92.

<sup>924</sup> Ibid.

self-government where it entails the further domination of First Nations men over the lives of women and children.<sup>925</sup>

Gray-Withers also contends that this gender-based power imbalance undermines child protection:

In many communities, the male-dominated Native leadership has hidden and perpetuated problems of child abuse ... A process of empowerment for women and their communities will need to occur to allow for true community development and the acceptance of responsibility for current problems.<sup>926</sup>

Some First Nation's women fear that the achievement of self-government would cement power in the hands of the generally male Chiefs and in response have favoured regional control of child welfare, in the hope that Chiefs would have less influence over child welfare outcomes in the absence local control.<sup>927</sup> Male violence and a breakdown of order within Indigenous communities has also been recognised as a significant problem in many communities in Australia, the United States and Canada.<sup>928</sup>

When authority for child and family services is handed over to Indigenous agencies, accountability can become more fragmented. Armitage highlights the co-ordination problems which often ensue between organisations and jurisdictions:

The establishment of independent First Nation family and child welfare organisations has the effect of dividing authority between mainstream provincial agencies and independent First Nation organisations. The result is diminished accountability in the child welfare system as a whole. At a

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<sup>925</sup> Gray-Withers (1997) above n90, 86.

<sup>926</sup> Ibid, 89.

<sup>927</sup> Ibid; Durst (1998) above n61.

<sup>928</sup> See Chapter 1 with reference to reviews into sexual abuse of children in Indigenous communities and Chapter 4 for an analysis of the rule of law and establishing peace and order within Indigenous communities.

practical level single accountability for the welfare of children and advocacy for them as individuals is lost because of the fragmentation of authority.<sup>929</sup>

It is important to stress that this ‘diminished accountability’ is not a specific result of the involvement of Indigenous organisations, but simply a result of adding to the number of stakeholder organisations responsible for the child. First Nation’s agencies may be accountable to provincial and federal governments, as well as to their people.<sup>930</sup>

Where regionalised First Nation’s agencies exist, there often appears to be a struggle between them and their member organisations. The regional body wishes to assert a certain level of control in order to ensure that it meets its accountability obligations to government, both with respect to policy implementation and financial responsibility. Local groups feel that they know the needs of their communities best, and also seek greater control.<sup>931</sup> All of the 22 First Nation women interviewees consulted in one research project confirmed that there was conflict between regional offices and local Chiefs.<sup>932</sup> This issue is also touched on in the operational review of an Ontario regional tribal agency. Weechi-it-te-win Family Services (WFS) is responsible for delivery of child and family services, including child protection, to ten First Nation’s reserves. Service agreements establish each First Nation as a service provider accountable to WFS for services provided to community members. WFS is itself in turn accountable to the (provincial) Minister of Community and Social Services, and also to the Chiefs and their First Nations for implementing its stated program. The review states that accountability

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<sup>929</sup> Armitage (1993) above n61, 169.

<sup>930</sup> Hudson P & McKenzie B (1987), *Evaluation of the Dakota Ojibway child and Family services*. Winnipeg: Department of Northern and Indian Affairs; Hudson P & Taylor-Henley S (1987), *Agreement and Disagreement: An Evaluation of the Canada-Manitoba Northern Indian Welfare Agreement*. Winnipeg: University of Manitoba as cited in Armitage (1993) above n61.

<sup>931</sup> Gray-Withers (1997) above n90.

<sup>932</sup> Ibid.

has been an ongoing 'bone of contention' between WFS and the individual reserves, but does not furnish further detail.<sup>933</sup>

Some researchers have called for local communities to exercise caution in seeking a child protection mandate. In 1997, McKenzie conducted an evaluation-oriented case study of the West Region Child and Family Services (WRCFS), a child welfare agency which serves nine Manitoba First Nation communities. In the report, he noted that 'in some Manitoba communities the goal of local autonomy has been pursued without adequate assurance of the community's capacity to respond to the complexity of needs within families and to guarantee children a basic right to protection.'<sup>934</sup> This concern was more recently reiterated in the external review reports into Manitoba's child and family services system which followed the death of a five year old child. The external reviews found that the Manitoba initiative to transfer responsibility for child welfare to Aboriginal agencies was a 'major step forward' that the problems which were identified with the child welfare system predated the transfer and that reforms should be made in the spirit of the Manitoba child welfare initiative. The response to these reviews has been a reform program which attempts to address the underlying causes of family breakdown through early intervention and prevention, strengthening support services for out-of-home care, increasing support for case workers and governance of the service delivery agencies and increasing funding for the services.<sup>935</sup>

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<sup>933</sup> Weechi-it-te-win Family Services (1995) above n81.

<sup>934</sup> McKenzie (1997) above n48, 103.

<sup>935</sup> See discussion in Chapter 5. Child and Family Services Standing Committee (2010), *Progress on the Changing for Children Initiative*. Available at:  
[http://www.changesforchildren.mb.ca/reports/progess\\_report\\_2010.pdf](http://www.changesforchildren.mb.ca/reports/progess_report_2010.pdf)

The last accountability issue to be dealt with in this chapter is confidentiality. Two issues which arise are the difficulty in maintaining confidentiality in small communities,<sup>936</sup> and the related problem of child welfare workers not always managing to keep information classified. Confidentiality is difficult to maintain in small communities and this may inhibit the use of some service models.<sup>937</sup> A paper reporting on domestic violence programs involving Native American women notes that some women did not participate in traditionally-oriented group work due to fears about confidentiality. This is an issue in both reservation and urban communities.<sup>938</sup>

It is important to recognise that current mainstream child welfare systems also have unresolved accountability gaps and significant problems. The complex accountability maze which Indigenous agencies are presented with under partial or interim authority arrangements makes them susceptible to accountability concerns. Although, as discussed above, the establishment of regional peak agencies may result in disputes between these bodies and their constituent community groups, regionalised models do appear to offer better accountability than fully localised ones.<sup>939</sup> WRCFS, the agency evaluated in McKenzie's above-mentioned report, is a good example of a regionalised service. WRCFS has a regional abuse unit which initially investigates notifications, and assists local workers who then take responsibility for follow-up services and case management. McKenzie states:

This model is quite effective in assuring required expertise in investigations, while protecting local community staff from some of the conflicts that can occur around initial abuse referrals in small communities.<sup>940</sup>

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<sup>936</sup> Carr J & Peters M (1997), *Assessment of Multi-Disciplinary Child Protective Teams in Five Western Washington Communities: Chehalis, Nisqually, Shoalwater Bay, Skokomish, Squaxin Island*. Thesis (MPA), The Evergreen State College, Washington, 98.

<sup>937</sup> Ibid.

<sup>938</sup> Norton IM & Manson SM (1997), 'Domestic Violence Intervention in an Urban Indian Health Centre,' 33(4) *Community Mental Health Journal* 331.

<sup>939</sup> Gray-Withers (1997) above n90; McKenzie et al (1995) above n91.

<sup>940</sup> McKenzie (1997) above n48.

The establishment of regional agencies is one possible response to some of the accountability issues facing Indigenous child and family services. Below are a range of other strategies and initiatives:

- A system of accountability to an authority outside the community political leadership;<sup>941</sup>
- Agency adoption of a political interference/conflict of interest protocol which involves sanctions for non-compliance;<sup>942</sup>
- The creation of suitable forums for disputes and grievances to ensure fair and just process;<sup>943</sup>
- The establishment of inter-community child protection teams with members from each community in a given area ‘could help protect abused children caught in a political battle within a tribe,’<sup>944</sup>
- The creation of a national Indigenous child welfare commission;<sup>945</sup>
- The substitution of state or provincial legislation with comprehensive federal legislation, in order to simplify the accountability maze;<sup>946</sup> and
- Formal confidentiality agreements should be signed by child protection team members.<sup>947</sup>

A number of these strategies could be used in conjunction with each other, within a human rights legislative framework which prioritises the security and wellbeing of the child and provides redress for internal abuse or corruption.<sup>948</sup>

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<sup>941</sup> Gray-Withers (1997) above n90; McKenzie (1997) above n48.

<sup>942</sup> First Nation’s Task Force (1993) above n56.

<sup>943</sup> Ibid.

<sup>944</sup> Carr & Peters (1997) above n107, 99.

<sup>945</sup> Durst (1998) above n61.

<sup>946</sup> Ibid.

<sup>947</sup> Carr & Peters (1997) above n107.

<sup>948</sup> See Chapters 2 and 4 with respect to human rights and the protection of vulnerable minorities from intra community abuse and the exercise of judgement within a human rights framework with respect to Indigenous child welfare.

Any child welfare framework, whether it be Indigenous or mainstream, must provide protection for the most vulnerable members of the community. In Chapters 2 and 4 the legal and moral foundations for inclusion of Aboriginal organisations within a human rights framework for child welfare were outlined. Legal and service delivery for child welfare within a human rights framework must have the capacity to challenge and check governance which facilitates violence and intimidation. It also must have adequate resources to respond to children and young people's needs. The problem with a transfer of responsibility with inadequate resourcing is evident in the findings of the external reviews into the Manitoba child welfare system referred to above and is being contested more broadly in the claim by the First Nations Caring Society under the *Canadian Human Rights Act* against Canada.<sup>949</sup> Accountability where responsibility for child welfare has been transferred to Aboriginal agencies depends on both internal community governance structures and governments being accountable for adequately resourcing the transfer and ongoing service provision by Aboriginal agencies.

### *Traditional healing and cultural revival*

A number of authors and reports emphasise that for many Indigenous peoples, mental, emotional, spiritual and physical health are interdependent and inseparable.<sup>950</sup> The efficacy of spiritual remedies is often not respected in conventional social work practice.<sup>951</sup> A report by the Awasis Agency of Manitoba notes that: 'Innovative approaches to dealing with families are seldom examined ... First Nations practice requires the adoption of an integrative approach, addressing cognitive, emotional, physical and spiritual development.'<sup>952</sup> Horejsi et al contend that: 'The most effective parent training programs are those that blend principles derived from modern child development with the spirituality, customs, traditions and other cultural ways of their

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<sup>949</sup> See discussion of this claim in Chapter 5.

<sup>950</sup> See, for example, Blackstock (2011) above n12; Voss et al (1999) above n7; Barlow A & Walkup J T (1998), 'Developing Mental Health Services for Native American Children,' 7(3) *Child and Adolescent Psychiatric Clinics of North America* 555; Awasis Agency (1997) above n10; Connors (1993) above n23.

<sup>951</sup> Blackstock (2011) above n12; Voss et al (1999) above n7.

<sup>952</sup> Awasis Agency (1997) above n10, 25.



tribe.<sup>953</sup> A number of studies have called for collaborative traditional and western ways of assessing abuse and neglect and then when necessary looking after children and young people in out-of-home care.<sup>954</sup> Interviews with urban clients of a Toronto Aboriginal service revealed the significance for clients of a link to Aboriginal culture and community, and use of Aboriginal approaches in the healing process.<sup>955</sup> Parallel findings were made with respect to cultural care for Aboriginal and Torres Strait Islander children and young people in out-of-home care in Australia.<sup>956</sup>

McKenzie notes that holistic healing is important 'because it transcends the notion of helping in the narrow therapeutic sense. Instead, it emphasises the resilience of First Nation people, and their ability to utilize self-help and cultural traditions as a framework both for addressing problems and supporting future social development at the community level.'<sup>957</sup> Barlow and Walkup describe Native American concepts of health as flowing from a relational world view, in which health or wellbeing 'focus on bringing the individual back into harmony by balancing cognitive, spiritual, physical, emotional and environmental forces. Indigenous remedies may appear to be illogical by Western thought, because they are working on multiple factors rather than on a single diagnosed cause.'<sup>958</sup> This view contrasts with the linear Western model predicated on cause and

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<sup>953</sup> Horejsi et al (1992) above n43, 335.

<sup>954</sup> The following Indigenous social welfare programs either focus on traditional healing methods, or use a combination of traditional Indigenous and conventional western methods. The Cheyenne River Sioux tribe introduced programs and a facility which draws on tribal practices. These include treatment and delinquency prevention programs employing 'inipi' or sweat lodge and 'hanbleceya' or pipe fast. See Voss et al (1999) above n7. In New Zealand the 'Mana Kainga Programme: Model of Family Empowerment' emphasises Maori spirituality and the involvement and importance of extended family, and inclusion of tribal links and genealogy in the programme. See Herbert A & Te Kanawa D (1998), 'The Mana Kainga Programme: Practice and Research Perspectives – A Manaipoto Model of Family Empowerment,' unpublished paper presented at the 12<sup>th</sup> *ISPCAN International Congress*, Auckland, September 1998. On the Lac du Flambeau Indian Reservation in Wisconsin, a Native American program targeting substance abuse among high-risk youth adopted a 'family systems' approach. The program integrated traditional Ojibwe values, beliefs and traditions into the local contemporary lifestyle, in an attempt to facilitate healthy family functioning. See Connors (1993) above n23.

<sup>955</sup> Anderson K (1998), 'A Canadian Child Welfare Agency for Urban Natives: The Clients Speak,' 77(4) *Child Welfare* 441.

<sup>956</sup> Libesman (2011) above n44.

<sup>957</sup> McKenzie (1997) above n48, 108.

<sup>958</sup> Barlow & Walkup (1998) above n124, 561.

effect. Traditional Canadian and US Indigenous philosophy is often symbolised using the ‘Sacred Circle’ or ‘Medicine Wheel,’ which emphasise the interrelatedness of all things. This philosophy informs an Indigenous understanding of healing processes as involving the whole community, rather than just the individual(s) or family concerned.<sup>959</sup> (See also discussion below with respect to the Community Holistic Circle Healing Project (CHCH) as a response to sexual abuse within Aboriginal communities below.)

### *Strengths vs deficits*

Conventional social work practice generally operates using a ‘deficit reduction’ model of intervention, which attempts to respond to perceived weaknesses in the individual.<sup>960</sup> Research also tends to approach Aboriginal families with a deficit model, rather than looking for strength, yet using Western clinical notions this may itself be iatrogenic.<sup>961</sup> This view is supported by research conducted by Kalyanpur.<sup>962</sup> The author conducted qualitative interviews with on-reservation Native American mothers and participant observations of a parent support group. The research aimed to investigate the implications of cultural blindness on the part of outside social services professionals. The professionals were a psychologist and a teacher, both Anglo-American, and a Native American home-school liaison officer. These workers concluded that the mothers’ reticence to use outside services resulted from stubbornness or defiance, while Kalyanpur found that these responses were based on historical trauma and an orientation towards ‘looking after their own.’

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<sup>959</sup> Connors (1993) above n23. See also discussion below with respect to the Community Holistic Circle Healing Project (CHCH) as a response to sexual abuse within Aboriginal communities.

<sup>960</sup> Voss et al (1999) above n7; Awasis Agency (1997) above n10.

<sup>961</sup> Red-Horse J (1997), ‘Traditional American Indian Family Systems Families,’ 15(3) *Systems and Health* 243.

<sup>962</sup> Kalyanpur (1998) above n9.

The ‘strengths perspective’<sup>963</sup> in social work embraces concepts of empowerment, collaboration, healing from within and suspension of disbelief.<sup>964</sup> Aboriginal children’s agencies find that a strengths perspective is more compatible with their communities than prevailing social work pedagogy and practice, which is generally Eurocentric and this view is also supported by research which suggests that Indigenous child and family services will be enhanced by harnessing cultural strengths.<sup>965</sup> Voss et al call for a ‘multigenerational family-centred strengths perspective’ social work model for Lakota communities, in place of the ‘individual deficit intervention’ model.<sup>966</sup> The strengths perspective is compatible with many Indigenous communities’ values, which emphasise participation of the family, extended family and community in the healing process.<sup>967</sup>

### *Healing through education and decolonisation*

Indigenous groups involved with child welfare agree that child abuse and neglect problems in their communities result to a large extent from the effects of colonisation. A Canadian service puts it this way:

Within the Native community, the child welfare system is a system that deals with the symptoms of larger social problems – racism, poverty, underdevelopment, unemployment, etc. [We regard] child welfare problems as the result of the colonial nature of relations between the aboriginal people and the Euro-Canadian majority.<sup>968</sup>

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<sup>963</sup> Saleebey D (1992), *The Strengths Perspective in Social Work Practice*. New York: Longman.

<sup>964</sup> Voss et al (1999) above n7.

<sup>965</sup> Tong & Cross (1991) above n2; Voss et al (1999) above n7; Awasis Agency (1997) above n10; Bamblett M (2007), ‘Ten years of truth telling: what *Bringing Them Home* means to us all’ in Secretariat of National Aboriginal and Islander Child Care (ed), *Remember Me – Commemorating the Tenth Anniversary of the Bringing Them Home report*. Melbourne: SNAICC, 8-12.

<sup>966</sup> Voss et al (1999) above n7.

<sup>967</sup> Libesman (2011) above n44.

<sup>968</sup> Ma Mawi Wi Chi Itata (1985), *First Annual Meeting Report*. Winnipeg: Ma Mawi Wi Chi Itata Centre, cited in Armitage (1993) above n61, 159.

Duran et al describe the 'American Indian soul wound' as the effect of history of trauma and genocide of Native American people – an intergenerational post-traumatic stress disorder, with symptoms including 'depression, alcoholism, domestic violence, and suicide.'<sup>969</sup> 'Acculturative stress' is also part of the wound. Symptoms include anxiety, depression, feelings of marginality and alienation, and identity confusion. The authors outline a 'survivor syndrome' where intergenerational unresolved collective grief causes ongoing emotional repression, and compare this with that experienced by Jewish holocaust survivors.

However, few child welfare service models developed for or by Indigenous people respond directly to the colonial causes of these problems, and little of the theoretical commentary engages with them. Connors notes that the increasing training and involvement of First Nations people in their own healing is accompanied by the acknowledgement that 'true healing in First Nations requires that social, gender, cultural and political issues must be addressed in the healing process.'<sup>970</sup> The complexity of contemporary social issues experienced by many Indigenous children and young people are particular to their history and contemporary colonial experiences. These transcend the boundaries and experiences of traditional cultural responses but are not effectively addressed by contemporary western child welfare approaches, as the Chapter 3 case study demonstrates. The serious nature of social breakdown and abuse experienced by many Indigenous children requires a responsiveness to contemporary problems which is innovative and neither romanticises the past nor patronises or fails to harness the strength of culturally founded responses. Drawing on the strengths of western and Indigenous practices, within a dynamic conceptualisation and practice of culture and tradition, is modelled in contemporary Indigenous children's agencies, such as the Victorian Aboriginal Children's Agency (VACCA) in Australia. (See discussion with respect to VACCA in Chapter 6.)

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<sup>969</sup> Duran E, Duran B, Brave Heart MYH & Horse-Davis SY (1998), 'Healing the American Indian Soul Wound in Danieli' in Danieli Y (ed), *International Handbook of Multigenerational Legacies of Trauma*. New York: Plenum Press, 341.

<sup>970</sup> Connors (1993) above n23, 55.

Research by Brave Heart-Jordan<sup>971</sup> found that Lakota clients who engaged with traditional healing found workshops 'made their lives more meaningful and helped to liberate them to address the symptoms of ongoing neo-colonialism that other health systems were not aware of.'<sup>972</sup> Other findings include:

- Educating people about historical trauma leads to increased awareness of its impact and symptoms;
- The process of sharing experiences with others of similar background leads to a cathartic sense of relief;
- The healing and mourning process resulted in an increased commitment to ongoing healing work at an individual and community level.<sup>973</sup>

Very high proportions of respondents were favourable about traditional healing in terms of grief resolution, feeling better about themselves and improved parenting.<sup>974</sup>

Rokx and colleagues in New Zealand have developed a parenting model which takes the effects of colonisation on Maori child-rearing practices into consideration.<sup>975</sup> The *Atawhaingia Te Pā Harakeke* model is delivered to male Maori clients in two New Zealand prisons. The model's 'decolonisation' process is intended to educate participants about contemporary Maori socio-political contexts, and the role of colonial history and ongoing neo-colonial factors in

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<sup>971</sup> Brave Heart-Jordan MYH (1995), *The return to the sacred path: Healing from historical trauma and historical unresolved grief among the Lakota*. Northampton: Smith College School for Social Work (thesis) cited in Duran et al (1998) above n140, 349.

<sup>972</sup> Duran et al (1998) above n140, 352.

<sup>973</sup> Ibid, 351.

<sup>974</sup> Brave Heart-Jordan (1995) above n142.

<sup>975</sup> Rokx H (1998), *Atawhaingia Te Pā Harakeke: Nurture the Family*, unpublished paper presented at the International Society for the Prevention of Child Abuse and Neglect's Twelfth International Congress on Child Abuse and Neglect, Auckland New Zealand, September 1998.

contemporary society. Examples of the high status of women in traditional Maori society are discussed with references to classical text and verse, and participants are asked to consider the relationship dynamics that were modelled by their own parents. These dynamics are usually negative, and mirror the types of relationships they have with their own partners. Participants are taught about the initial and ongoing breakdown of traditional systems, values, beliefs and practices around caring for children, and traditional family structures, which occurred as a result of white settlement. The training addresses issues of power and control, in general terms and then personally. Participants are encouraged to position their own family backgrounds into the social history of New Zealand, and then to focus on the specific circumstances of their upbringing. Participants set parenting goals, with a view to improved parenting through connecting with traditional values. The *Atawhaingia Te Pā Harakeke* model has been extended into other educational spheres for Maori families across New Zealand.<sup>976</sup>

#### *Community awareness raising/education*

Some child abuse and neglect intervention projects attempt to bring about change through strategies involving community-wide awareness raising. A number of reviews into child sexual abuse in Indigenous communities in Australia have recommended community education together with other individual child protection responses for victims and criminal law responses with respect to perpetrators.<sup>977</sup> Cross and LaPlante argue that a great constraint to child abuse and neglect interventions in Native American communities is denial, and that

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<sup>976</sup> Many variation of *Atawhaingia Te Pā Harakeke* have developed across New Zealand, as have related children's programs called *He Taonga Te Mokopuna*, which again draws on traditional approaches to supporting Maori children, weaving these with the most recent theory and best practice, particularly for children in difficult and at risk situations. More information available here:  
[http://www.minedu.govt.nz/NZEducation/EducationPolicies/MaoriEducation/AboutMaoriEducation/WhoWeAre/EngagementWithMaori/HuiTaumataMatauranga/HuiTaumataMataurangaSeptember2004QA/Whanau\\_Involvement.aspx](http://www.minedu.govt.nz/NZEducation/EducationPolicies/MaoriEducation/AboutMaoriEducation/WhoWeAre/EngagementWithMaori/HuiTaumataMatauranga/HuiTaumataMataurangaSeptember2004QA/Whanau_Involvement.aspx)

<sup>977</sup> See Chapter 1 for an overview of Australian reviews.

grassroots community involvement can assist to address this.<sup>978</sup> They point out that prevention can be grounded in traditional values and principles. Although acknowledging the substantial breakdown of tradition in some communities, what remains can be drawn upon.<sup>979</sup>

Lajeunesse reports that the Hollow Water community of Manitoba began a program of community awareness and education in 1987.<sup>980</sup> The environment of greater trust which followed saw a dramatic increase in the number of sexual abuse disclosures (see discussion of responses to sexual abuse and the Hollow Water program below). Cross and McGregor's 1995 report documents the evaluation of a project whose goals included raising public awareness in Native American communities about the links between child abuse and neglect and substance abuse.<sup>981</sup> Radio and newspaper announcements were used; posters, pamphlets and a periodical newsletter were produced. This was a large-scale project – all tribes in the United States with a child welfare program received promotional and planning information. A range of substance abuse organisations were engaged to 'raise awareness about and enhance their capacity to prevent abuse and neglect of Indian children by substance abusing parents and caregivers.' An evaluation of the project was conducted through surveys, phone interviews and focus groups, 'to assess the materials developed and their impact on Native American communities.' Responses were consistently positive, and indicated significant knowledge was imparted in culturally appropriate ways. Survey materials were prepared in language appropriate to the culture and

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<sup>978</sup> Cross T & La Plante J (1995), *Grassroots Prevention of Child Abuse and Neglect in Indian Communities: A Guide for the Community Organizer*. Portland: National Indian Child Welfare Association.

<sup>979</sup> Ibid, 27.

<sup>980</sup> Lajeunesse T (1993), *Community Holistic Circle Healing: Hollow Water First Nation*. Ottawa: Minister of Supply and Services. This program was the first stage to the CHCH model elaborated on in the FGC section.

<sup>981</sup> Cross TL & McGregor K (1995), *Linking Child Abuse and Neglect with Substance Abuse in Native American Communities*. Portland: National Indian Child Welfare Association.

educational background of the target groups. The authors state that the project considerably exceeded its goals and the federal funding agency (NCCAN) subsequently extended it.

Cross and LaPlante contend that grass roots approaches are valuable because communities are full of under-utilised resources – people such as ‘natural helpers’ and past victims, whose first-hand experience is invaluable. The authors cite the example of a grassroots child abuse and neglect prevention campaign developed by the Siletz Tribe in Siletz, Oregon, where there was a high rate of abuse and neglect.

The program began with the local Indian Child Welfare office holding a community meeting in order to form a committee of concerned community members. The committee surveyed the community to obtain a local definition of child abuse and neglect. They then planned events such as awareness activity where community members were sent a blue ribbon with instructions to affix it to their cars at a designated time, to show support for child abuse and neglect prevention. Another activity was a ‘Family Fun Fair,’ with a focus on children’s activities, but also an outside speaker who related her own experience with child abuse and neglect. The authors make a range of suggestions for other communities considering similar interventions. These include:

- Involvement of ‘key participants’ such as teachers, spiritual leaders, elders, community health workers;
- Assessment of the communities strengths, weaknesses and needs and the extent of child abuse and neglect; and
- Formulation of definitions of child abuse and neglect.

The authors stress the importance of community involvement in such initiatives and networking through local agencies, institutions, media, programs, parents and elders.



*Sexual abuse: Traditional healing and offender treatment*

Rates of child abuse and neglect are almost universally higher in Indigenous populations, compared to non-Indigenous populations, in colonised countries. The following factors contribute to the high rates of sexual abuse:<sup>982</sup>

- A disconnection from and breakdown of Aboriginal community values, thinking and behaviour;
- A breakdown of traditional values and practices of sexuality;
- The experience of sexual abuse and denial of sexual identity role models in residential schools and foster homes;
- The disinhibiting effects of alcohol and other drugs;
- crowded, blended family environments where sexual abuse often occurs between stepfathers and teenage daughters; and
- objectification and dominance of women and children sanctioned by values and structures of the colonising culture.

The histories of trauma and injustice suffered by Indigenous peoples under colonial powers are clearly associated with the disproportionately high rates of sexual abuse in their communities today. These circumstances require consideration in health and welfare responses. For this reason, mainstream responses to sexual abuse are unlikely to be suitable or effective. Conventional approaches are, in any case, unlikely to be culturally appropriate. Many Aboriginal communities are looking to more holistic methods for dealing with sexual abuse.

A British Columbia community consultation recommended that courts should be empowered to offer first-time sexual abuse offenders ‘extensive treatment’ as an alternative to incarceration, and that culturally appropriate treatment should be

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<sup>982</sup> Connors E & Oates M (1997), ‘The Emergence of Sexual Abuse Treatment Models Within First Nations Communities’ in Wolfe D, McMahon R & Peters R (eds), *Child Abuse: New Directions in Treatment and Prevention Across the Lifespan*. Thousand Oaks, London, Delhi: Sage.

available to sexual abuse offenders.<sup>983</sup> A participatory research project involving community consultations with eight Manitoba First Nation communities made similar findings. Sexual abuse offenders were regarded as needing healing and contributors emphasised that the healing should take place within the community. The need for more services which focused on offenders, as well as victims, was also raised.<sup>984</sup> However, concerns have also been expressed about the failure to respond to sexual abuse of Indigenous children with the gravity which the crime requires and the inadequate protection and support provided to victims.<sup>985</sup>

A number of Canadian First Nations communities have adopted alternative strategies for dealing with sexual abuse. Many of these strategies have evolved from a 1992 sexual abuse treatment program developed by Connors and Oates for use in northern British Columbia communities. Connors and Oates' model is based on an 18 step consensual 'traditional process' which involves extended family gatherings.<sup>986</sup> Connors and Oates suggest that community-based responses to sexual abuse should involve the following basic elements:

- Some esteem-enhancing form of punishment;
- Victim protection; and
- Treatment for all members of the family.

Responses may also include:

- Community service;
- Restricted access to children;
- Native-oriented treatment program; and
- Attendance at community support groups.

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<sup>983</sup> Community Panel (1992) above n17.

<sup>984</sup> McKenzie et al (1995) above n91.

<sup>985</sup> See, for example, Cripps K & McGlade H (2008), 'Indigenous family violence and sexual abuse: Considering pathways forward,' 14 *Journal of Family Studies* 420.

<sup>986</sup> Connors & Oates (1997) above n153. The process is essentially a tailored version of family group conferencing.

This model was the basis for the Hollow Water program in Manitoba which is often cited as a successful program to address child sexual assault in Aboriginal communities.<sup>987</sup> It is the best known and emulated amongst a number of holistic tribal healing programs which have been established over the past 15 years.<sup>988</sup> As a first step towards implementing a sexual abuse intervention program, the Hollow Water community began a program of community awareness and education in 1987. A two year training program was initiated to bring trainers to the community to teach topics such as cultural awareness, team building, family counselling, communication skills, nutrition and sexuality. Community graduates from the program either became full-time family violence workers or sexual abuse assessment team members.<sup>989</sup> The training led to the development of the Community Holistic Circle Healing (CHCH), a 'unique' approach which the developers claim is based on traditional values. CHCH 'aims to restore balance by empowering individuals, families and the community to deal productively, and in a healing way, with the problem of sexual abuse.'<sup>990</sup>

CHCH has an Assessment Team and a Management Team. The Assessment Team provides prevention and intervention support, develops support systems, and provides assessment and liaison with lawyers and institutions. The team consists of various professionals such as family violence workers and nurses, volunteers and Tribal Council representatives. The Management Team reports to the Assessment Team, and is responsible for administration. The participating communities have formally acknowledged the program through Council resolutions. The CHCH process follows a 13-step process based on the process outlined in Connors and Oates above.<sup>991</sup> The

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<sup>987</sup> Ibid; Awasis Agency (1997) above n10; Lajeunesse (1993) above n151; Dickie BE (1994), *A Question of Justice: Feature Length Film Commentary*. Winnipeg: National Film Board.

<sup>988</sup> See overview in Cripps & McGlade (2008) above n156; Connors & Oates (1997) above n153. Other tribal healing programs include: Biidaaban Sexual Abuse Healing Program (1996); Circle Of Harmony Healing Society (Oates 1992); Gwa'sala-'Nakwaxda'xw Family Violence And Sexual Abuse Intervention Program (1993); and Prince George Native Friendship Centre Sexual Abuse Treatment Services (1992).

<sup>989</sup> Lajeunesse (1993) above n151.

<sup>990</sup> Ibid, 1.

<sup>991</sup> Connors & Oates (1997) above n153.

assessment team assigns an individual (trained) worker to each of the victim(s), the victimiser and their families. Up to eight workers may be involved with a single case in this way. A case manager is also appointed, who is responsible for conducting case conferences attended by all workers and, frequently, victims and family members. Children are removed to a safe home 'if necessary,' and the laying of charges is encouraged. Where the victimiser pleads guilty in court, CHCH prepares and presents a report outlining the tailored CHCH alternative plan for that individual. A formal protocol has been developed with Crown prosecutors in the Manitoba Department of Justice and the judiciary supports CHCH. Victimisers pleading guilty are put on three years probation and very few plead not guilty.

Another aspect of the CHCH program is the 'Self-Awareness For Everyone' (SAFE) program, a personal growth training program implemented in the communities. At one community, 60% of adults and youth participated in the program, which 'had a profound and positive effect on general levels of self-awareness, alcohol consumption, family communication, and the healing process of many people, including the victims of sexual abuse.'<sup>992</sup> Treatment combines contemporary and traditional methods in 'healing contracts.' A psychologist provides assessment and counselling services for all referrals. A male psychologist facilitates an 'Adult Male Sex Offenders Group,' while various other groups for survivors and families are facilitated by workers. Traditional 'sharing circles' are used in group sessions. The emphasis is on people feeling safe, a non-judgemental approach, and acknowledging and accepting the problem. 'CHCH offers balance rather than the punishment that is offered by the court system.'<sup>993</sup>

While the CHCH approach to child sexual assault in Aboriginal communities does seem to provide better outcomes than the conventional adversarial approach which has failed Indigenous children, evaluations suggest perpetrators are more satisfied with outcomes than victims. Significant concerns include that victims feel that they received less

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<sup>992</sup> Lajeunesse (1993) above n151, Appendix C.

<sup>993</sup> Lajeunesse (1993) above n151, 9.

support than perpetrators and less help than they needed, that the approach is too lenient towards violent offenders, and that the process did not take sufficient cognisance of unequal power relations within the community and could prioritise powerful interests over those of victims.<sup>994</sup> The concern with safeguards for those less powerful or victimised within alternative dispute resolution processes is discussed with respect to accountability above, in Chapter 5 with respect to Family Group Conferencing in New Zealand, and more generally with respect to family group conferencing below. The need for a system which protects the interests of minorities and those less powerful within minority groups is a fundamental issue with respect to Indigenous women and children's wellbeing. Conceptualising a human rights framework which avoids sycophantic deference to Indigenous governance where it breaches the rights of those less powerful in the community and more broadly providing safeguards within a pluralised framework for Indigenous child welfare is considered in Chapters 2 and 4. Within these chapters a human rights approach for Indigenous children's wellbeing which can provide an authoritative voice to those most marginalised within minority Indigenous communities internally and a process for input with respect to compliance with human rights principles from the broader external Indigenous and non-Indigenous communities is considered.

### Family preservation vs child protection

Despite legislative and policy shifts towards early intervention and family preservation, contemporary child welfare in practice continues in budget and emphasis, in most jurisdictions, to retain a protection focus. Aboriginal culture is supported through an Indigenous child placement principle rather than family preservation in most jurisdictions. However, family preservation, where suitable, is likely to be a better means to cultural support than culturally appropriate placement. The suitability of home-based family preservation initiatives in many Indigenous communities is underlined by the high value placed on family and extended family in Indigenous

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<sup>994</sup> See for example La Rocque E (1997), 'Re-examining culturally appropriate models in criminal justice applications' in Ash M (ed), *Aboriginal and Treaty Rights in Canada*. Vancouver: University of British Columbia Press, 75.

cultures.<sup>995</sup> Consultations with Indigenous communities have found that support for family preservation is unambiguous. An example of this support is provided by the recommendations of a legislative review which consulted extensively and directly with the British Columbia Aboriginal population.<sup>996</sup> The review describes the two most frequent criticisms of child and family services policy and practice voiced by those consulted as:

1) the inappropriate apprehension of children and the removal of those children from their communities; and 2) the lack of preventative services aimed at resolving family problems rather than at separating families.<sup>997</sup>

Similar observations were made by participants in the Australian Cultural Care research project: 'Two themes reoccurred. The first related to the lack of early intervention to prevent removal and then the lack of services to support the family to get back on track so that they can safely look after their children.'<sup>998</sup>

The report of a Manitoba community consultation articulates a simple, clear argument for family support services:

It is difficult to understand why children are taken out of homes, then, perhaps some time later, placed back in the home where the problems began. The problems do not go away. Why not fix the home, [First Nations people] wonder, but there is little or no funding allocated to services for families ... [the community] perception is that government will pay astronomical costs for someone else to give custodial care to their children while they stand by in helpless poverty because someone else

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<sup>995</sup> Ronnau et al (1990) above n21; Tafoya N (1990), 'Home-Based Family Therapy: A Model for Native American Communities' in Mannes M (eds), *Family Preservation and Indian Child Welfare*. Albuquerque: American Indian Law Centre, 59.

<sup>996</sup> First Nation's Child and Family Task Force (1993) above n56, is another review involving Indigenous community consultations which also recommended a new emphasis on family preservation and home-based prevention.

<sup>997</sup> Community Panel (1992) above n17, 46.

<sup>998</sup> Libesman (2011) above n44, 21.

controls the money and has the power to make decisions about their children.<sup>999</sup>

Anderson's research also found that urban Canadian Aboriginal clients of Native Child and Family Services of Toronto (NCFST) felt that parents' needs were ignored by non-Native child protection agencies, whom they perceived as not caring about them and dishonest. In contrast, clients liked how NCFST treated the whole family as a unit in programs and therapy. Through its focus on families, NCFST was seen as strengthening Aboriginal culture, with interviewees stating that they had 'discovered elements of their culture' through NCFST. In various programs, such as parenting, the agency uses women's circles, Aboriginal medicines, and other culturally-based teachings. Clients referred to NCFST program outcomes as including: better parenting, less violent children, and increased openness and sharing for both parents and children. An important recommendation was that child protection agencies needed to be supportive of parents as well as children. The Cultural Care Report in Australia made similar findings with one of the most frequent concerns being the lack of support for families, in particular single mothers, to address the problems which led to removal of their child or children.<sup>1000</sup>

The Awasis Agency, a First Nations-controlled service serving 18 Manitoba communities, is an example of an Indigenous agency which practices family preservation. The Agency cites the following benefits of a family preservation approach:

- Retention of parental responsibilities;
- Self esteem and confidence on the part of child and family are less affected;
- Feelings of fault on the parts of the family and child are diminished;
- Disempowerment of parents is reduced; and

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<sup>999</sup> First Nation's Task Force (1993) above n56, 49.

<sup>1000</sup> Libesman (2011) above n44, 60.

- Family-focussed interventions promote new patterns of behaviour and attitudes.<sup>1001</sup>

To substantively implement family preservation policy and programming requires a paradigm shift in child welfare, from a model based on child rescue and placement to one of family support. Family preservation models create a 'service continuum,' by delivering services that support and strengthen families in normalised environments such as the home, and focus on basic life skills and environmental problems.<sup>1002</sup> Within Indigenous communities which have more pervasive problems community development needs to parallel family support. Research, evaluations and community consultations highlight a number of important features and orientations for family preservation programs.<sup>1003</sup>

- Building on existing family strengths;
- Intensive home-based support services;
- Community education to engender support for family preservation;
- Recruitment and training of Indigenous staff;
- Fostering cooperation among multiple service providers;
- Effective coordination between various agencies at a given site;
- Secure long-term funding;
- Longer program time-frames;<sup>1004</sup>
- Reunification work;
- Attempts to minimise the impact of placements, where placements are unavoidable; and
- Developing problem -solving skills.

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<sup>1001</sup> Awasis Agency (1997) above n10.

<sup>1002</sup> Mannes (1993) above n22.

<sup>1003</sup> This list was compiled using information derived from the following texts: Mannes (1993) above n22; Mannes M (1990), *Family preservation and Indian child welfare*. Albuquerque: American Indian Law Centre; Community Panel (1992) above n17; Smollar & French (1990) above n42.

<sup>1004</sup> Community Panel (1992) above n17. The Inter-Tribal Council of Michigan found that the usual four to six week duration of most family preservation programs was insufficient. They suggested longer time-frames.



The above-mentioned British Columbia community consultation reported that Aboriginal communities lacked a range of basic social services which are available to non-Aboriginal communities. The same is true of many other Canadian, Australian, United States and New Zealand Aboriginal communities.<sup>1005</sup> In order to enhance child abuse and neglect prevention, and therefore family preservation, services such as the following must be provided to Aboriginal communities:

- Respite and homemaker services, particularly for single-parent families;
- Day care;
- Family support;
- Counselling;
- Drug and alcohol treatment programs;
- Suicide prevention services; and
- Educational and recreational facilities and resources.<sup>1006</sup>

While Indigenous communities who have control over child and family services are overwhelmingly in favour of family preservation, devolution of authority for provision of child protection to Indigenous communities does not necessarily result in lower placement rates, at least in the short term. For example, after the introduction of the *Indian Child Welfare Act* in the United States in 1977, Indigenous out-of-home care placements increased. The number of Native American children in substitute care grew by 25% over the 1980s.<sup>1007</sup> Surprisingly, tribally-run programs were the primary contributors to this post-ICWA increase. However, it is important to recognise that trends in placement numbers are not always a reliable indicator of service effectiveness

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<sup>1005</sup> In 2007 the Aboriginal Caring Society brought a complaint to the Canadian Human Rights Commission with respect to discriminatory funding of child welfare services for First Nations children on reserves. In February 2012 an appeal against dismissal of the complaint, on technicalities, was heard by in the Federal Court. See Chapter 5 for discussion of this complaint.

<sup>1006</sup> Community Panel (1992) above n17. Together with infrastructure support, such as housing, these are the kinds of services that one would have anticipated a large scale program, such as the Northern Territory Emergency Response (NTER, also known as the NT Intervention), would have resourced if child welfare and wellbeing were in fact the primary objective of the measures implemented. See Chapter 6 for discussion of the NTER.

<sup>1007</sup> Mannes (1990) above n174, 11.

as a wide range of factors influence these trends.<sup>1008</sup> Mannes attributes the increase in out-of-home care post-ICWA to caseload and budget pressures. Placement prevention was not possible in an environment of stop-gap measures and makeshift systems resulting from the absence of reliable and sufficient funding.<sup>1009</sup>

Placement rates may also increase after the handover of authority for child protection because Indigenous agencies elicit more trust. In the case of Weechi-it-te-win Family Services, an Ontario tribal agency responsible for child and family services to ten First Nations reserves, disclosures of abuse rapidly increased after they took over responsibility for child protection. The number of children in care increased seven-fold between 1987 (when WFS gained a child protection mandate) and 1995. This does not necessarily reflect higher rates of child abuse and neglect, but rather perhaps the high level of trust which the agency established with the communities which it served.<sup>1010</sup> When the Hollow Water community of Manitoba began implementing a tribal-run sexual abuse intervention program in 1987, the environment of greater trust which followed saw a dramatic increase in the number of sexual abuse disclosures.<sup>1011</sup> Between 1987 and 1990, a 30% increase in the number of children in care was reported. This has been attributed to a previous lack of recognition of the extent of child welfare problems in First Nation communities, in an environment of absent or poor child welfare services.<sup>1012</sup>

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<sup>1008</sup> McKenzie (1997) above n48, 110.

<sup>1009</sup> Mannes (1990) above n174.

<sup>1010</sup> Weechi-it-te-win Family Services (1995) above n81.

<sup>1011</sup> Lajeunesse (1993) above n151.

<sup>1012</sup> McKenzie (1997) above n48. Parallel issues of a failure to service Indigenous communities has occurred in the Northern Territory in Australia see Pocock J (2003), *State of Denial: The Neglect and Abuse of Aboriginal and Torres Strait Islander Children in the Northern Territory*. The Secretariat of National Aboriginal and Islander Child Care (SNAICC); Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Anderson P & Wild R) (2007), *Little Children are Sacred*. Darwin: Northern Territory Government; Board of Inquiry into the Child Protection System in the Northern Territory (2011), *Growing them Strong, Together*. Darwin: Northern Territory Government. In late 2011 a peak Indigenous agency was established for the first time in the Northern Territory. It is likely that engagement of Indigenous agencies in child welfare issues together with increased resources will result in increases in substantiated neglect and abuse amongst Indigenous families in the Northern Territory.

A number of obstacles to the implementation of family preservation initiatives have been recorded in the literature. For example, 'organizational and administrative structures and state and local financing practices appear to be barriers in shifting service provision from child placement focused to family-centred services.'<sup>1013</sup> Canadian provincial child welfare agencies primarily provide services to families in crisis, so perpetuate high removal rates by not providing services to families at risk: children are removed from situations where early intervention could have preserved the family. Financial support for a child is usually primarily available once the child is removed.<sup>1014</sup> United States Federal discretionary funding announcements have also favoured placement over preservation.<sup>1015</sup> However, there is recognition that early intervention is more effective than crises intervention in all jurisdictions and, with this, the implementation of early childhood programs (see below) and, more broadly, programs and services focussed on prevention. However, these programs have not been comprehensive. Further as referred to in previous chapters a public health model for child welfare would see a realignment of funds towards prevention rather than crises interventions.

Ultimately, family preservation also depends on factors outside the scope of most social welfare programs. Most family preservation initiatives focus on psychological therapeutic interventions, while the factors contributing to family crisis include wider social, political and economic issues such as poverty, unemployment, isolation, disempowerment, the legacy of separations and other colonial interventions. Responses which do not also address these factors will not have meaningful long-term impact. Although there is overwhelming support for a switch to family preservation in both mainstream services and Indigenous agencies, it is not unanimous.<sup>1016</sup>

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<sup>1013</sup> Mannes (1990) above n174, 21.

<sup>1014</sup> Community Panel (1992) above n17.

<sup>1015</sup> Mannes (1993) above n22.

<sup>1016</sup> See, for example, Giesbrecht (1992) above n88 where concerns were expressed that the focus on parents and family was at the expense of the fundamental rights of children.

### **Family Group Conferencing and other similar models**

There are many models and programs in place which could appear under the broad heading of Family Group Conferencing, but which do not have similar titles or refer to Family Group Conferencing. Within the field of restorative justice a number of conferencing programs which have been applied in criminal justice systems have parallels with family group conferencing in the context of child welfare. While some of the critical issues pertaining to the framing of issues within family group conferences and restorative justice programs are related, and may be grounded in similar conceptual and practical foundations, the literature on restorative justice is beyond the scope of this chapter.<sup>1017</sup> However, the Hollow Water Community Holistic Circle Healing program was discussed above because it is one of the most influential of restorative justice programs initiated by an Indigenous community and its focus on child sexual abuse has great significance for Indigenous children's welfare and wellbeing. A critical review of family group conferencing in the context of the New Zealand legislation is provided in Chapter 5. These issues will not be reiterated. However, a brief description and discussion of the Canadian Family Group Conferencing pilot, which is based on the New Zealand model, together with discussion of some of the advantages and disadvantages family group conferencing in the context of Indigenous child welfare are considered below.

#### *Family Group Decision Making Project – Canada*

The Family Group Decision Making (FGDM) project was modelled on the New Zealand Family Group Conferencing model. The model was trialled in three areas of Newfoundland and Labrador, including the Nain region, which is populated mainly with Inuit people. Workers were trained by trainers from New Zealand, one Maori and one non-Indigenous.

The three main stages to the process are:

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<sup>1017</sup> For a critique on the benefits and disadvantages of restorative justice programs see Cunneen C & Hoyle C (2010), *Debating restorative justice*. Oxford and Portland: Hart.

- Preparing for the conference – family members are contacted but not compelled to take part. Consultations with the family take place. Abused young people usually select a support person.
- Holding the conference – the meeting is opened in a culturally appropriate manner. The coordinator presents necessary information to the group, followed by private deliberations amongst the family group (and chosen support people) to develop a plan. The plan is finalised with the coordinator. The plan must contain contingency plans, and monitoring and review processes.
- The plan is approved by a field worker and supervisor.

Research and evaluation was conducted during the pilot, in order to a) determine the cultural adaptability of the model, and b) its capacity for building partnerships and participation.<sup>1018</sup>

### *Negative critique of family group conferencing*

The 1995 Gove Report into child welfare in British Columbia suggested that Family Group Conferencing (FGC) interventions neglected monitoring and evaluation, and disregarded the family dynamics of sexual abuse.<sup>1019</sup>

Family Group Conferencing lacks the safeguards of due process and legal representation which are available through formal legal processes. The balance between child protection and family preservation is a difficult issue and this can be more problematic in the context of Family Group Conferencing without the above mentioned checks and balances. Where the child is not removed, or the couple stays together, child abuse may

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<sup>1018</sup> Burford G & Pennell J (1995), *Family group decision making project: Implementation report summary*. Newfoundland: Family Group Decision Making Project, School of Social Work, Memorial University of Newfoundland.

<sup>1019</sup> Gove (1995) above n66.

continue.<sup>1020</sup> For example, 'Pre-Sentence Reports' attached to a report on the Community Holistic Circle Healing (CHCH) model discussed above include a case where a father continued to sexually abuse his adopted daughter after treatment using the CHCH system. After a second cycle through the program, the Assessment Team deemed it appropriate to leave the father living in the family household, where another of his children still resided.<sup>1021</sup> Burford and Pennell suggest that some family members may privately see the Family Group Conferencing process as unfair, preferring formal action and that a family 'conspiracy of silence' may continue under FGC.<sup>1022</sup> Burford and Pennell also note that resources must be made available for the model to work, and that there is a risk that authorities may try to apportion all or too much responsibility to the family, where there is still a vital role for protective services.

Power imbalances between child and family services agencies, legal staff, and families can undermine the effectiveness of Family Group Conferencing for vulnerable participants in the conference. Gender and age inequities are not easily addressed by Family Group Conferencing approaches. Family Group Conferencing, particularly when used in small communities, may inhibit disclosure by victims or result in coercion by the offender to not disclose.<sup>1023</sup> Burford and Pennell suggest that some family members may be too intimidated to make disclosures at conferences due to the presence of the perpetrator or others.<sup>1024</sup> This is exacerbated by problems of ongoing proximity between victims and victimisers in communities. Confidentiality problems which are more prevalent in small communities may also impact on the family group conferencing process.<sup>1025</sup> This issue is discussed under 'Accountability' above.

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<sup>1020</sup> Burford & Pennell (1995) above n189.

<sup>1021</sup> Lajeunesse (1993) above n151.

<sup>1022</sup> Burford & Pennell (1995) above n189.

<sup>1023</sup> Lajeunesse (1993) above n151.

<sup>1024</sup> Burford & Pennell (1995) above n189, 46.

<sup>1025</sup> See also Tafoya (1990) above n166.

### *Positive critique of family group conferencing*

Schmidt claims that FGC approaches ‘emphasize community responsibility in protecting the child through the offender’s accountability to the group. Discounting [the FGC] approach will serve to perpetuate the present system which mitigates against the possibility of reconciliation and holistic healing.’<sup>1026</sup> Burford and Pennell argue that family and extended family are marginalised by justice, health, education and social service systems, and the assumption is that families are not part of the solution.<sup>1027</sup> In contrast to the views above, they see the FGC processes as a means to overcome the ‘conspiracy of silence’ surrounding abuse of both children and adults. The method does not attempt to keep families together ‘at all costs,’ and the authors acknowledge that the system will not always work, and that involvement of abusers is not always appropriate. They argue that the majority of family conference participants participate responsibly and devise useful plans. They claim that the model is highly adaptable across cultures, so long as local people are involved in the adaptation process. They say that the family is empowered, and family ties are renewed, re-established and strengthened.

Consideration could be given to including external check and balances within family group conferencing processes to reduce the risk of coercion, intimidation or replication of power imbalances within the family group conference which often underlie the issues which are being addressed in the conference.

### *Early intervention*

The recognition of the importance of early childhood for longer term brain development together with greater acknowledgment of the importance of early intervention and prevention in the United States, Canada, Australia and New Zealand has led to the development of early childhood programs including

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<sup>1026</sup> Schmidt (1997) above n67, 81.

<sup>1027</sup> Burford & Pennell (1995) above n189.

specialist programs for Indigenous children.<sup>1028</sup> Numerous studies show that the United States' Head Start program, an early intervention initiative targeting at-risk children of pre-school age, has achieved great success over a 30 year period. The Canadian 'Aboriginal Head Start Initiative' is an early intervention program for Canadian Aboriginal children, in both urban and remote communities. The program was launched in 1995. Around 100 projects were implemented in the initial four year pilot phase, at a cost of \$83.7M. Extensive consultations were held with Aboriginal people from 25 urban and remote centres during the design stage. The program involved parents and community in design and implementation of projects, which include promotion of culture and language, education, health and improved social supports. Head Start does not specifically target child abuse and neglect. However, research into the effects of early intervention programs indicates many benefits including some linked to child abuse and neglect issues, including:

- Better relationships between parents and children;
- Improved social and emotional stability in participating children; and
- Enhanced community capacities.<sup>1029</sup>

Evaluation of a pilot Aboriginal Head Start program in Canada found that it was successful, enhancing life for children and families. The project was piloted in seven urban Ontario communities, targeting high risk Aboriginal three to five year olds.<sup>1030</sup> Children involved demonstrated improved confidence, better behaviour, improved language skills, and better communication and expressiveness. While the literature with respect to early intervention, and universal support for early childhood programs appears to be consensually supported, this has only translated into partial funding and a

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<sup>1028</sup> For research on early brain development which has had a significant impact on policy with respect to early childhood in Canada and Australia, see McCain MN & Mustard F (1999), *Reversing the brain drain: Early study: Final report*. Toronto: Ontario Children's Secretariat.

<sup>1029</sup> Health Canada (1998), *Aboriginal Head Start Initiative: Principles and Guidelines*. Canada: Health Canada.

<sup>1030</sup> Becker J & Galley V (1996), *Aboriginal Head Start Summer Pilot Program: Evaluation and Final Report*. Unpublished report.



lack of consistency with respect to complimentary early childhood support systems such as intensive support for families at risk or infrastructure support for communities in need. In Australia, the National framework for Protecting Australia's children includes initiatives to expand early childhood centres, and 35 children and family centres will be established in areas with high Aboriginal populations.<sup>1031</sup> While such initiatives are valuable, their impacts are limited when they are not integrated into a broader structural response to reform and operate within a framework which has the limitations and inconsistencies of bureaucratic child welfare framework discussed in Chapters 2, 3 and 4.

## Conclusion

The extremely high rates of neglect as well as intergenerational sexual and physical abuse found in some Indigenous communities present a major challenge to intervention programs. These high rates reflect poverty and the depth of dysfunction in some communities, both legacies of colonial experiences. Conventional models of intervention and the level of funding that supports them are not sufficient to deal with the scale of problems.<sup>1032</sup> Innovative programs which are responsive to Indigenous experiences and understandings assist to create an institutional context for receptiveness to difference. While pluralised legislative and policy frameworks for decision making create a structure for inclusiveness and improved outcomes for vulnerable Indigenous children, these values become embedded and part of the experience of child welfare through Indigenous modes of service delivery. Successful Indigenous programs and service delivery in turn assist to generate respect for Indigenous ways of understanding and responding to Indigenous children's welfare and wellbeing.

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<sup>1031</sup> Council of Australian Governments (2009), *Protection children is everyone's business – National Framework for Protecting Australia's Children 2009-2020*. Canberra: Commonwealth of Australia, 28. Available at: [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-04-30/docs/child\\_protection\\_framework.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf)

<sup>1032</sup> Armitage (1993) above n61.

As argued in previous chapters a systemic response to abuse and neglect within Aboriginal communities requires that programs must be integrated within a child welfare/wellbeing framework which addresses the underlying causes of abuse and neglect in post-colonial Indigenous communities.<sup>1033</sup> Shifts in attitudes towards Indigenous programs and service delivery need to be accompanied by significant resourcing and responses which address underlying structural causes of breakdown of normative order, poverty and poor access to goods and services such as education, health care and, more generally, opportunities for participating in society. It has been argued in Chapters 2 and 4 that a pluralised human rights framework, with the principle of self-determination being central, can provide the foundation for more effective responses to Indigenous children's wellbeing. While a range of programs, some of which are referred to above, offer innovative responses and strategies to address Indigenous children's welfare, these are often implemented in isolation from the broader issues and in a context which does not embrace holistic reform. This impedes the impact which they are able to make. However, implemented in the context of a human rights framework for Indigenous child welfare, with adequate structural support and resourcing, innovations in service delivery offer the opportunity for fundamental and enduring reform.

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<sup>1033</sup> See, in particular, Chapter 2 with respect to international human rights and a framework for pluralising Indigenous child welfare and Chapter 4 with respect to why a human rights framework responds to concerns regarding child welfare issues addressed within the dominant bureaucratised child welfare systems.

## **Conclusion**

While romanticising extremely difficult circumstances in Aboriginal communities is not advocated it is equally important to unpeel the often assumed superiority of Anglo systems and understandings which have led to responding to Indigenous children and young people in paternalistic and ineffective ways. It has been argued that a pluralised human rights framework offers the opportunity to create structures for long-term change which help to shift relations of domination to ones of respect between Indigenous and non-Indigenous organisations and individuals engaged in addressing Indigenous children's welfare and wellbeing. A pluralised human rights framework was differentiated in Chapter 2 from a regulatory or universal human rights framework for Indigenous child welfare and wellbeing. While a universalised conception of human rights presumes an inherent human nature and the capacity in a singular way to identify and reify transcendental values which rise above the fray, a pluralised conception characterises rights as historical, temporal and dependent on the membership of the rights community. An argument has been made for rights as generative of, or at least supportive of, reciprocal relationships rather than rights as standards which in a static way need to be met. This is not to minimise the importance of particular material standards but rather to acknowledge that attainment of these is both about resources and the relations which define and determine how the goods and values relating to Indigenous children's welfare and wellbeing are generated and distributed.

It has been argued that a pluralised human rights framework, which brings to the fore the right to self-determination, offers a structure from which effective and just decision making can be made. Consideration was given in Chapter 2 to what self-determination means, how it is defined internationally and nationally, and in Chapters 5, 6 and 7 to how different historical and legal understandings have translated into child welfare frameworks with respect to Indigenous children's welfare and wellbeing. The case study in Chapter 3 demonstrated the limitations with case based and bureaucratic responses to Indigenous child welfare which as

argued in Chapter 4 contribute to an inhibition of moral responsibility for, or fair judgements with respect to, Indigenous children's welfare and wellbeing. The colonial histories in comparative jurisdictions have influenced similarities and differences in the ways in which Indigenous children's vulnerability is experienced and how Indigenous and non-Indigenous peoples advocate for and address their welfare and wellbeing. Claims to shared jurisdiction and national forms of self-determination which parallel, but are separate from United Nations human rights principles, such as the recognition of domestic dependent nation status and the exercise of shared jurisdiction with respect to Indian child welfare in the United States, were considered together with child welfare frameworks which have developed more explicitly out of United Nations human rights principles. A common thread across advocacy and law reform with respect to Indigenous children's welfare and wellbeing is the focus on Indigenous peoples' inclusion in decision making with respect to their children's welfare and wellbeing.

Indigenous peoples' participation in human rights advocacy at an international and national level has played a major role in reshaping human rights to encompass more diverse understandings and has contributed to the reframing of human rights as contested ground which does not depend on a fixed and determinate characterisation of human nature or culture. Reform and decision making, as discussed in Chapters 5,6 and 7, is moving out of a state based sovereignty framework and being claimed by Indigenous peoples both formally through legislation and reforms to service delivery and informally through the dialogue and actions of Indigenous children's agencies and communities. It was argued in Chapter 2 that human rights instruments, in particular the Convention on the Rights of the Child and instruments which encompass principles of self determination, provide a dynamic framework of values for both governments and communities to aspire to. Many of the reforms to legislative frameworks discussed in Chapters 5 and 6, both internationally and within Australia, implement some level of Indigenous participation with respect to their children's

welfare and wellbeing. While principles of self-determination with respect to Indigenous peoples in international law are evolving, as discussed in Chapter 2, minimum standards with respect to internal forms of self-determination are evident in the jurisprudence of UN Committees which monitor human rights treaties. Although the international human rights standards discussed in Chapter 2 are often not completely complied with in the reformed legislative frameworks reviewed, the trend in legislative reform as illustrated in Chapters 5 and 6 is towards embedding cultural recognition and greater participation of Indigenous peoples in their children's welfare.

A pluralist approach to human rights is not about establishing a hierarchy with respect to Aboriginal children's collective rights over their individual rights. To the contrary, it is about enabling greater integrity with respect to the identification and protection of relationships which enable Indigenous children's rights and freedoms to be realised. In Chapters 2, 5 and 6 I have argued that the individual rights of Indigenous children will be better protected where the collective interests of the group are protected, and that it is difficult to envisage how cultural care and safety for Indigenous children can be protected without recognition of collective rights. Further, the premise of most legislative frameworks with respect to children's rights places the individual child's best interests as either a primary or the primary consideration when making decisions about a child. As discussed in Chapter 2, a preference for "a" rather than "the," enables decisions to be made in the particular with respect to the weight which should be given to collective compared with individual interests.

A pluralist framework for Indigenous children's welfare and wellbeing, as argued in Chapter 4, assists with the resolution of competing rights, whether they be individual versus collective or different individual rights within human rights treaties or legislation, because it enables those who are most impacted and experience the practical application of these rights to bring their judgement with respect to how problems or conflicts can be resolved. Child welfare requires

constant judgements, often balancing core values of stability, security and cultural identity. Some judgements such as the right of the child to be protected from sexual or physical abuse will always trump that of other potential rights or goods but often the relationship between rights is more nuanced and less clear cut. For example, the situation presented in *Mississippi Band of Choctaw Indians v Holyfield*,<sup>1034</sup> which is discussed in Chapter 5, created more nuanced questions about competing cultural and attachment rights. In this instance the tribal court determined that the child's bond to their non-Indian adoptive family took priority over the tribe's interest in retaining its children: the point being that the Tribal Court was in a good position make a judgement in the particular about which of these competing values should prevail.

Bringing to the fore the right to self-determination also facilitates a better understanding of systemic causes of abuse and neglect within Indigenous communities, where often the nub of the problem lies in structural inequalities and historical experience, which as discussed across the thesis, but particularly in Chapter 4, can easily be distorted when looking at Aboriginal children and families in isolation. Principles of self-determination, with the inclusion of collective as well as individual understandings, facilitate a shift in responsibility and accountability away from an exclusively individual family focus to a capacity to more clearly articulate the balance between institutional and individual responsibility for Indigenous children's welfare and wellbeing. This balance is more readily identified by Indigenous peoples who bear the risk of adverse individual choices which are often enmeshed within contextual influences such as systemic inequality and trans generational trauma.

Engagement in the process of claiming rights, frames one's individual and collective identity within the forums and processes of established institutions and therefore aspects of dominant identity and influence are generated through the rights claiming process. The form and language of legislative and service delivery

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<sup>1034</sup> *Mississippi Band of Choctaw Indians v Holyfield* 490 US 30 (1989).

frameworks also influence how decisions are made and disputes are resolved. There is therefore always a danger of domination through the institutions and processes of reform. The complexity of cultural interchange with respect to addressing indigenous children's welfare and wellbeing has been discussed across the thesis, with specific examples such as: the language and procedural requirements of international human rights influencing and transforming as well as being transformed by Indigenous peoples' advocacy and participation in United Nations jurisprudence in Chapter 2; through the organisation and mode of service delivery by child protection agencies which is discussed with respect to a bureaucratic government department in the case study in Chapter 3 and with respect to a critique of bureaucratic decision making and what is required for moral decision making and good judgement in Chapter 4 ; and in terms of sharing jurisdiction for Indigenous children's welfare at a national level in Chapters 5, 6 and 7. While the paradigm of the dominant, within both international and national laws, in direct and indirect ways privileges the presumptions of the dominant, the challenge of a pluralised human rights framework is to transform this and incorporate Indigenous and less dominant ways of understanding. This cannot be done perfectly within post-colonial nations, where even within reform processes which consciously reject racism, inequality and colonial values persist.

Chapters 2 and 4 theoretically, and Chapters 5, 6 and 7 practically, explored how conceptualisation of human rights with respect to Indigenous child welfare can, and have, influenced national legal and service delivery frameworks to address Indigenous children's welfare and how these in turn influence relationships, understandings and judgements with respect to Indigenous children's welfare and wellbeing at an individual, collective and institutional level. The case study in Chapter 3 considered how a contemporary case based system of child welfare operated in practice for Indigenous children and families and evaluated why this mode of responding to Indigenous children's welfare often generates a failure of moral responsibility and poor judgements at an individual and at an institutional level. The case study demonstrated how case based decision making within a

bureaucratic child welfare department, even where departmental policy includes recognition of Aboriginality, often leads to responses to particular families with a lack of awareness of their historical or community context and with a lack of respect. The case study demonstrated a pervasive lack of cultural awareness of Indigeneity in case work with this often being treated as incidental. In many files it appeared that the Department had effectively given up on the children and their circumstances exacerbated over the course of the Department's involvement in their lives.

Chapter 4 considered why this individualised and bureaucratic approach gravitates towards the lack of personal and institutional responsibility demonstrated in the case study and ways in which judgements and decision making are impacted by including Aboriginal peoples in the decision making processes. In Chapter 4 the idea of impartial and beneficial processes operating within child welfare bureaucracies were evaluated and critiqued. The relationship between the principle of self-determination and more effective and affective judgements through the inclusion of diverse perspectives in the decision making process was also explored. It was argued that the practical and moral quality of decision making will be improved by incorporating Indigenous peoples' sensibilities and understanding into decision making with respect to their children's wellbeing. The interactions and influence of competing understandings and shifting balances in power and communication across vastly different experiences influences what is understood by a human rights framework for Indigenous children's welfare and wellbeing and how the underlying causes and effective responses to vulnerability and risk can be addressed.

Chapters 5, 6 and 7 explored and illustrated how human rights principles and global interactions, particularly with respect to the principle of self-determination and participation, have translated into reformed legislative and service delivery frameworks for Indigenous children's welfare and wellbeing. Consideration was given to how these reforms have influenced: sensibilities with respect to



judgements about child welfare, normative standards with respect to what influences the welfare and wellbeing of Indigenous children, and how collectively and individually past and contemporary experiences are interrelated and understood.

While there is a common desire to protect and nurture children across Indigenous and non-Indigenous communities, how one institutionally and personally can work towards this aspiration, is neither universal nor temporal. Understandings are founded in collective and personal experiences, both contemporary and historical. The question of making judgements cross culturally is considered theoretically in Chapter 4 and cultural competence in service delivery is considered in a practical sense in Chapter 7. Responding to Indigenous children's needs, particularly where they face abuse and neglect, without falling into a relativist position which absconds from judging, is essential both to protect Indigenous children and communities from extreme governmental measures in the name of child protection, as occurred with the forced and unjustified separations of Aboriginal children from their families using 'protection legislation' and with aspects of the Northern Territory intervention but also to protect Indigenous children from abuse by community members who may use powerful positions within their community to shield them against accountability. The issues which pluralising standards and responsibility raises, in terms of procedural and substantive equality and the protection of vulnerable children and families from capricious and subjective interests, were considered theoretically in Chapter 4 and practically in Chapters 5, 6 and 7, in particular with respect to family group conferencing models and the issue of protection of vulnerable parties where the processes of dispute resolution and decision making are partially privatised.

Law, policy and associated processes which contribute to changing normative relations in particular spheres can however be domains of experience which are hived off from other broader community norms. A further challenge is therefore to more broadly shift relations and understanding which are colonial in character.

An aspect of this challenge is to publicise the strengths, innovation and imagination which are abundant in Indigenous communities and are illustrated in examples such as those discussed in Chapters 5 and 6 with respect to legislative frameworks and Chapter 7 with respect to service delivery; to acknowledge the significant problems which are present in many Indigenous communities which many Indigenous and non-Indigenous children's organisations have readily done; and to undertake the difficult task of challenging derogatory and paternalistic presentations of Aboriginal communities which reinforce colonial stereotypes and hereby assist to justify entrenching singular, dominant and destructive responses to the complex problems which beset many Indigenous communities. While shifts in responsibility for child welfare and more broadly Indigenous children's wellbeing may be viewed as a loss of power and control by dominant decision making institutions they can also be viewed in terms of broader and more inclusive understandings and options for responding to Indigenous child welfare.

As the numerous reviews with respect to Indigenous children's welfare in Chapter 1 suggest, the identification of problems is a lot easier than working out how to effectively address these. As discussed in Chapter 4, it is easier, even intuitive, to respond to problems from the dominant paradigm, or in Arendtian and Kantian language to draw on established 'common sense,' than to suspend one's presumptions and move into the less comfortable ground of difference. The limited understanding of or development of Indigenous legislative frameworks for addressing child welfare, compared with the recognition of Indigenous peoples within dominant paradigms, is illustrative of this. However, the examples of legislative reform in Chapters 5 and 6 and innovations in service delivery in Chapter 7 illustrate some of the imaginative possibilities which have been experimented with, that reform is not about instituting something new at a point in time but rather about embedding new relationships within a process of change, and that the depth of difference, inequality and in many instances trauma experienced by Indigenous children and young people makes aspirations for equality complex and difficult to attain. It has been argued that enduring change

and transformation of Indigenous children's wellbeing requires a shift in normative values: one which embraces and builds respect for difference and inclusiveness. In practical terms this means that Indigenous understandings and experience are not left at the door, while Indigenous peoples are invited in to participate as polite guests in foreign institutions, but rather that child welfare and the broader institutions of society which underlie wellbeing embed Indigenous values.<sup>1035</sup>

A human rights framework, with a central right being self-determination, is about realigning relationships which underlie attainment of Indigenous children's fundamental rights by bringing Indigenous values, experience and sensibilities into child welfare decision making. For Indigenous children's rights to be more fully realised, the inclusion of Indigenous peoples within human rights forums needs to be in a voice and manner which situates values in their cultural and historical context, rather than or in addition to mediating or translating them into the bureaucratic language which characterises international and national human rights. This process offers the opportunity to build bridges of commonality and communication across different communities of experience.

Where to from here? It has been argued that a process of transforming dominant Anglo values which inhere in post-colonial laws, institutions and relationships from their singular foundations to more pluralised normative understandings has begun. It can be seen with shifts in normative values in international law and national law and policy reform in a number of jurisdictions with respect to Indigenous child welfare. These shifts have been influenced by Indigenous peoples' advocacy within international human rights bodies and nationally and through the globalisation of indigenous peoples' understandings of child welfare and wellbeing. The engagement and exchange of ideas, at a national and international Indigenous agency to agency level, is reflective of the diffusion of

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<sup>1035</sup> Rosenfeld M (2006), 'Equality and the Dialectic between Identity and Difference' in Payrow Shabani OA (ed), *Multiculturalism and law: a critical debate*. Cardiff: University of Wales Press, 40.

jurisdiction from state agencies to Indigenous organisations in the area of child welfare. Indigenous and non-Indigenous communities share a desire to protect and nurture children, yet how they can institutionally and individually work towards this aspiration is neither universal nor temporal. Understandings are founded in collective and personal experiences, both contemporary and historical. Human rights provide a platform for contestation and commitment, in national and international arenas, to be brought together to respond to and generate better outcomes for Indigenous children and young people's welfare and wellbeing.

While legislative frameworks with respect to Indigenous child welfare, whether national or international, as discussed in Chapters 2, 5 and 6, are inevitably and unavoidably fraught with contradictions and tensions in the process of incorporating Indigenous peoples' values, understandings and sensibilities, the inevitability of limitation does not mean that they are either predestined to failure or that there will be another more perfect option which can escape the bounds of historical experience of colonialism and its contemporary legacy. Differences between an inclusive process founded on respect and a paternalistic process founded on a commitment to dominant values is illustrated with historical protection legislation discussed in Chapters 1, 5, and 6 and in Chapter 6 with the contrast between the legislative, policy and institutional reform of child welfare in Victoria, Australia compared with the response to child sexual abuse with the Northern Territory Intervention in the Northern Territory of Australia. The challenge is to build on the pluralisation of Indigenous child welfare and service delivery which has been attained in many jurisdictions in the United States, Canada, New Zealand and Australia and to extend this approach to developmental projects such as that established in the Northern Territory, Australia.

Pluralised human rights frameworks with respect to child welfare can improve the experiences of Indigenous children and families who have contact with child welfare systems, but they cannot adequately address the underlying causes of abuse and neglect. The shift in focus from crisis management to early intervention

with respect to child welfare in most jurisdictions will also, if services are provided in culturally ‘competent’ ways to Indigenous families and children, assist to improve their experiences. However, if the underlying causes of neglect and abuse are to be addressed, the systemic disadvantage which most Indigenous communities face needs to be addressed. The experiences of Indigenous children’s organisations assuming greater jurisdiction with respect to their children’s wellbeing, which are discussed in Chapters 5 and 6 and 7, should be extended to well resourced community development projects, such as that embarked on in 2007 in the Northern Territory of Australia, but from a pluralised human rights rather than paternalistic framework. A pluralised human rights approach to Indigenous child wellbeing offers the opportunity to consider structures which incorporate values of substantive equality and democratic inclusion. It offers the opportunity to think about principles of self-determination in a manner which will provide practically better outcomes for children, and which will strengthen democratic ideals by enlarging debate and democratic structures to incorporate Indigenous peoples’ experiences.

It has been argued that a human rights framework for Indigenous child welfare is not simply a question of identifying deficits and attempting to address these but rather about transforming relationships and understandings. Human rights are both theoretically and practically founded, that is they are founded in ideas and concepts and they are practically developed through their institutional implementation and through the process of organisations, groups and individuals experiencing them. Pluralised human rights can assist, as discussed across the thesis, to shift ways of understanding how responsibility for Indigenous children’s wellbeing can be addressed. They are in this sense part of a process of affectively and effectively addressing longer term responses to Indigenous children’s welfare and wellbeing which are founded in principles of respect for equality, collective difference and the security of Indigenous children and young people.

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