

# THE PROTECTION OF CULTURAL IDENTITY IN ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN EXITING FROM STATUTORY OUT OF HOME CARE VIA PERMANENT CARE ORDERS: FURTHER OBSERVATIONS ON THE RISK OF CULTURAL DISCONNECTION TO INFORM A POLICY AND LEGISLATIVE REFORM FRAMEWORK

Kyllie Cripps and Julian Laurens\*

## I Introduction

Aboriginal and Torres Strait Islander children continue to be significantly overrepresented across all age groups in the Australian Out-of-Home Care system ('OOHC').<sup>1</sup> Recent data from the Australian Institute of Health and Welfare paints a worrying trend. From 2010 to 30 June 2015, the rate by which Indigenous children were placed in OOHC care rose from 40.4 to 52.5 per 1000 children.<sup>2</sup> For the same period, the non-Indigenous rate rose only slightly from 5.1 to 5.5 per 1000 children.<sup>3</sup> This disparity was evident across all jurisdictions, though there were fluctuations. Overall, nationally the rate of Indigenous children entering OOHC was 9.5 times that for non-Indigenous children.<sup>4</sup> Of the 43 399 children in OOHC at June 2015, 15 455 were Aboriginal or Torres Strait Islander.<sup>5</sup>

As Behrendt recently noted, it is of 'serious concern' that the number of children removed and placed into care is higher now than during the 2007 national apology.<sup>6</sup> The 2015 *Social Justice and Native Title Report* describes the overrepresentation of Indigenous children in care and protection as 'one of the most pressing human rights challenges facing Australia today'.<sup>7</sup> The figures mirror international concerns that current policies to tackle Indigenous disadvantage around the world, influenced by a particular neoliberal vision of rationality and an almost zealous preoccupation with the individual over the collective, are failing Indigenous people. A critical issue is that under the current OOHC care system Indigenous children in Australia risk becoming disconnected from their culture, family and community. As the Commissioner argues in the 2015 *Social Justice Report*, 'more could be done to ensure the rights of Aboriginal and Torres Strait Islander children to their culture. The importance of this cannot be understated

given what we know about culture as a protective factor for our young people'.<sup>8</sup>

This echoes comments made by the United Nations Committee on the Rights of the Child in 2012:

The Committee is concerned at the large numbers of Aboriginal and Torres Strait Islander *children* being separated from their homes and communities and placed into care that, inter alia, does not adequately facilitate the preservation of their cultural and linguistic identity. ...<sup>9</sup>

## A Permanent Care Orders and Cultural Identity

This article focuses specifically at one currently under studied aspect of the care system—permanent care orders ('PCO')—which come under the 'Permanency Planning' rubric of responses to transition children out of Statutory care.<sup>10</sup> Recent law and policy reform in most states and territories has prescribed time limits to the process of transitioning children out of OOHC arrangements (whether State or NGOs) from as little as six months in the Northern Territory to a maximum of two years in other jurisdictions such as Victoria.<sup>11</sup> While there is considerable evidence to suggest that children should be exited into permanent relationship as soon as possible, this should not be done in a way that can exacerbate the potential for harm—in this case particularly the harm associated with becoming disconnected from culture.<sup>12</sup> In this current context of 'fast tracking', an examination of what this means for Indigenous children is timely.

PCOs have been introduced throughout Australian State and Territory jurisdictions, and have been sold as a way in which children can be moved from statutory based OOHC into a

supportive stable environment quickly, and with minimal disruption to the development of their identity or ability to attach to their adult caregivers. However, in their application to Indigenous children we argue that a number of risks arise. The central theme of this article is that there is a risk that Indigenous children, in transitioning from State care into permanency planning arrangements such as under a PCO, are susceptible to becoming disconnected from culture, family and community.

A key feature of a PCO is that once removed from OOHC and placed on a PCO, the State generally no longer has any *legal responsibility* for the child's upbringing.<sup>13</sup> This is appealing from a neoliberal costs saving and organisational 'efficiency' perspective, with this often sold as a further rationale for their implementation.<sup>14</sup> While there are general legislative provisions providing for a cultural care plan for Indigenous children under statutory care schemes, this article argues that without an ongoing statutory mandated review of an Indigenous child's cultural care plan once on a PCO (and ongoing support for the carer family) a real possibility exists that Indigenous children can lose a meaningful *connection* to their cultural identity. Such a review is not fanciful, given that a cultural care plan is meant to be a 'living document'. How such a review may look, and who should have responsibility for it will be a matter for further discussion. Suffice to say, review should be undertaken by Indigenous organisations in consultation with community.

In August 2015, the Australian Senate Community Affairs References Committee released its *Out of Home Care* report ('Care Report').<sup>15</sup> The committee found that '[o]verwhelmingly ... outcomes for children and young people in out-of-home care ... remain poor'.<sup>16</sup> It agreed with concerns around Indigenous children in 'legal permanent arrangements' (such as a PCO), remaining connected to culture. A key focus of this article will be to identify findings and recommendations made in that report regarding permanency planning and permanent care orders. This article will first outline the concept of permanency planning, and issues with permanent care orders. Second this article will provide some critical context in which to consider approaches to child welfare. Third, we expand on the previous sections and discuss the importance of culture and family for Indigenous children. Fourth, the article will engage in discussion as to how the ongoing review of an Indigenous child's cultural care plan may look. The article will progressively identify key recommendations and observations regarding PCOs from the Senate Committee

*Care Report*, and situate them within the above structure. The purpose of this article is not proscriptive; rather it is to contribute to the development of a framework for further conversation, analysis, policy development and research around the cultural needs of Indigenous children, their families and their communities.

(i) OOHC, NGOs and the State—A Note on the Scope of This Article

While we focus in this article on 'State' service delivery, we note that Indigenous children are being exited from OOHC via Non-Governmental Organisations ('NGO') for example.

The State's role in direct service provision of OOHC and child protection services is shrinking. Governments around Australia are increasingly seeking to 'outsource' and privatise such services which were traditionally operated by the State. A limitation of this article is that we do not address the role of NGOs and other private, for-profit services directly, though it has been recognised by the Senate Committee that there are problems across the entire sector, and concerns surrounding disconnection from culture would remain, for example, where follow-up support services for a family were inadequate to support ongoing access to cultural activities by the child. It should be noted as well, and we discuss this further in the article, that the State's removal of itself from OOHC and the corresponding transfer of funding to private service providers competing in the 'market' for those funds (and further making explicit a move towards 'privatisation' of OOHC in many jurisdictions) is an aspect of neoliberal ideological belief in 'markets' being the best allocator of resources and therefore the best provider of outcomes. A 'market' in which goods and services are sold has been created and expanded for OOHC services (in a real sense here, and the analogy may appear provocative, the goods and services being traded are young people in need of care on the one hand, and the promise of a permanent placement on the other). There is a strong commercial imperative in this expanding market in which various organisations 'compete' to provide a service at a cost which provides them a profit—many NGOs do in fact operate on a 'for-profit' basis.

While it is not our intention in this article to be unnecessarily critical of the OOHC NGO sector in this regard (and we acknowledge the great work done by many organisations and individuals, and further that many organisations

do operate according to principles beyond mere market imperatives), whether a 'market' with a focus on profit can actually provide positive outcomes for children should be questioned, as the extent of various government privatisation agendas of child protection and children's services such as adoption is coming to light—a question is whether there is a real conflict between the 'market' demands for profit and 'efficiency', and a child's best interests.<sup>17</sup>

For example, in New South Wales the Baird government has pushed hard to outsource adoption placement to the private sector while at the same time pushing to increase the rate of adoptions in NSW (even travelling around NSW in what was described as an 'adoption roadshow' to encourage NSW Family and Community Service Department ('FACS') caseworkers to give adoption higher priority).<sup>18</sup> This pursuit of 'fast-tracking' of adoption has led to new arrangements with organisations such as Barnardos, which are designed to further the government 'fast track' agenda. It has emerged that such arrangements may be failing families, with the organisation in this case ignoring amongst other things, recommendations from actual FACS Departmental case workers as to the parenting ability of the birth mother, and failing to keep the birth mother properly informed of what is occurring, proceeding instead to fast track adoption despite recognising that family reunification should always remain the preferred option to explore.<sup>19</sup> A question is whether these organisations under these new 'commercial/market' arrangements with government have far too much leeway to make critical decisions about a child, and have little oversight of their practices.

In NSW there have been calls for an urgent review of this 'fast tracking' with suggestions that 'the outsourcing of foster care and adoption to non-government organisations has increased pressure to deliver "results" under their funding contracts, and adoption was viewed as a way to reduce costs'.<sup>20</sup>

For the purposes of this article, we agree with McBeth that if a State is essentially to privatise 'human rights', for example, in the sense of moving away from actually providing the service or intervention directly itself, then it still has an obligation to *supervise* those private entities who have taken on the role of providing that service (being a service linked to giving effect to International Human Rights Law instruments).<sup>21</sup>

## II Legal Permanent Arrangements

### A Permanency Planning

Since its emergence in the 1970s, initially in the United States and later in the United Kingdom,<sup>22</sup> 'permanency planning' has increasingly come to dominate policy responses in Australia and internationally, aimed at tackling the issue of children being placed in Stare care for long periods.<sup>23</sup> Relevantly, over time, the actual understanding of the concept, as well as its implementation, has varied between jurisdictions, with different emphasis being placed either on family reunification, or, as in the case of the United Kingdom, its increased association with adoption, for example.<sup>24</sup>

Permanency planning is underpinned by significant research that demonstrates the importance of children having stable relationships with a caregiver to ensure their future positive social and emotional development.<sup>25</sup> Central to this is the concept of 'attachment theory' which considers that it is critical that children develop positive and stable relationships with caregivers with sustained quality interactions as early as possible. Poor attachment has been linked to a myriad of negative outcomes including ongoing interpersonal relationships, emotional and educational difficulties.

While there is no standard definition of what permanency planning is, Tilbury and Osmond have provided some useful conceptualisations that have been used extensively:

Initially for children in out-of-home care, the concept of permanency planning now encompasses a systematic, goal-directed and timely approach to case planning for all children subject to child protection intervention aimed at promoting stability and continuity.<sup>26</sup>

Permanency planning is a case planning process aimed at securing stability and continuity for children in out-of-home care. Permanent options cover the spectrum of placement prevention, reunification, supporting children and carers in kin, foster or residential placements, and adoption. Permanency planning is conceptualised as having relational, physical and legal dimensions: relational permanence pertains to children having the opportunity to experience positive, caring and stable relationships with significant others; physical permanence denotes stable living arrangements; and the legal dimension pertains to the legal arrangements of a child's custody and guardianship.<sup>27</sup>

PCOs (or guardianship orders) are one such option under permanency planning.<sup>28</sup> Significantly for the purpose of this article, Tilbury and Osmond argue that permanency planning is not just about a placement, stating that '[m]ost importantly, permanency planning is about relationships, identity and a sense of belonging'.<sup>29</sup> Such goals, we argue, especially with respect to Indigenous children, are at risk of being supplanted by inappropriate market imperatives when permanency planning is implemented through a neoliberal lens. Thus, the recognised critical importance of Indigenous cultural identity development and the need for children to be in an environment where they can develop a sense of 'belonging' may not get the attention it requires.<sup>30</sup> Reasons may include a systemic bias towards mainstreaming, coupled with the reluctance of neoliberal policy development to grasp and understand that the factors that contribute to Indigenous community *wellbeing* are not necessarily the indicators for which such policy initiatives are measuring and costing.<sup>31</sup> In short, permanency planning arrangements must take into account a child's cultural needs.<sup>32</sup>

Given that the research underpinning permanency planning is clear and uncontested, and that there is a growing impetus throughout Australian jurisdictions to implement permanency planning options, it is of some concern that the Senate Committee in the *Care Report* noted that data shows that 'there is no national consistency in the models used across jurisdictions for permanency planning'.<sup>33</sup> Moreover, the Senate Committee noted that there is a real lack of research into permanency planning in Australia generally, as well as a lack of research into the effectiveness of the individual models being used in Australian jurisdictions.<sup>34</sup> Finally, and critically, it noted that despite various state governments promoting more adoption and special guardianship orders (permanent care orders):

The committee is concerned that in some jurisdictions, children and carers in adoption and guardianship order arrangements do not receive the same level of financial and practical support as those in foster care and relative/kinship care placements. If these placement options are to be utilised more often, more resources need to be made available to ensure children and carers continue to be supported.<sup>35</sup>

## B Permanent Care Orders

All Australian State and Territory jurisdictions contain a process or mechanism by which a person may assume the

legal guardianship of a child via a court order till that child reaches 18 years of age. For example, in Victoria they are known as Permanent Care Orders,<sup>36</sup> in NSW they are known as 'Parental Responsibility by Guardianship Orders',<sup>37</sup> in Western Australia they are called Protection Orders (special guardianship),<sup>38</sup> and in Queensland they are known as Long Term Guardianship Orders.<sup>39</sup> The significant difference between such guardianship orders and adoption is that the child, the subject of the order, retains his or her birth name and identity. They have become an important option for governments seeking to place children: they are regarded as a substitute for adoption generally (which is often regarded as a last resort, though not always); as a way to provide more flexibility to carers and children; and to use where traditional western adoption is not appropriate at all, as is recognised in regards to Aboriginal people where adoption is a concept absent in customary Aboriginal child care arrangements.<sup>40</sup> Despite the difference between adoption and a PCO, Indigenous organisations do reject PCOs as being appropriate for Indigenous people as they are regarded as being too similar to adoption, in that a third party gains legal rights over the child.<sup>41</sup> For Indigenous communities, *family unification* should always be an option.

Further criticism by Indigenous organisations of the appropriateness of a PCO for an Indigenous child has also increasingly centred upon the lack of ongoing cultural supports for Indigenous children upon entering such an arrangement.<sup>42</sup> Such a view is a central theme of this article.

### (i) Cultural Care Planning and Permanent Care Orders

While an Indigenous child is in the care of the State, a cultural care plan is meant to be put in place for them. How this is to be done, and factors to consider, are usually stipulated in the relevant child protection legislation at first instance.<sup>43</sup> Courts have shown a willingness to challenge departments on their application of relevant principles when creating a Cultural Care Plan, and have been at times scathing of the relevant department's efforts in this regard, finding that an Indigenous child's cultural needs would not be met if he or she remained in State OOHC. For example, in *Drake & Drake & Anor*, a family law matter, Sexton J in the Federal Circuit Court of Australia stated:

While the Department [NSW Department of Family and Community Services] says it understands the importance of the Children remaining connected to their Aboriginal

culture and their right to enjoy that culture, I find no basis to conclude that the Children's needs in this regard will be met if they remain in out of home care. For example, in the Department's Safety Assessment Reports of November 2013 and February 2014, the section 'cultural identity' was marked 'not applicable' for each Child, an entry Ms C was unable to explain. On the Department's proposal, I find it unlikely that the Children would have the opportunity to enjoy their culture or to participate in activities with others who share that culture. The authorities, as set out below, confirm Mr R's view that the Department's proposal in relation to connecting the Children to their culture *does not meet the legislative requirements*.<sup>44</sup>

Similarly, the inadequate attention by a relevant department to the cultural needs of Indigenous children in care has resulted in children's courts rejecting the cultural plans put forward by the relevant department in their applications to place the child under a permanency relationship (a care plan must be in place for an Indigenous child when he or she exits State care). For example, in New South Wales, see *DFaCS v Gail and Grace* [2013] NSWChc 4 and *DFaCS re Boyd* [2013] NSWChc 9.<sup>45</sup>

A significant issue then is that cultural care planning is inconsistent, disconnected and haphazard *even at the level of State Care*, and, as we have suggested, there is little support for the promotion of a child's cultural identity *after* he or she has exited the State care system under a PCO, for example. As Arney et al have recently noted in regards to Departmental practice:

Cultural care is one component of the child's best interests; however, cultural care planning has often been seen in practice as a tick-the-box process, with plans being limited in scope. There is an absence of a unifying national practice framework across jurisdictions, underpinning cultural care planning for Indigenous children. Research has shown that the integration of cultural care plans in departmental policies, resourcing for plans and how they are implemented in practice vary greatly between jurisdictions.<sup>46</sup>

In any event, when an appropriate plan is created which meets the legislative requirements, we argue that this is not sufficient. The key issue is that there is no *legislatively mandated ongoing review* process of that child's cultural care plan, and relatedly, a lack of commitment generally to ongoing financial and other support for carers to assist

in maintaining meaningful relationships with the child's family, community and culture.<sup>47</sup> The issues are related and potentially justified by the State because under a PCO the State no longer has any legal responsibility for the child. This is sold as a key feature of a PCO - the promise that the State will not interfere. This neoliberal justification masks the reality that the development and protection of cultural identity in Indigenous children requires ongoing review and support.

#### (ii) Development of Cultural Identity as Dynamic and Connection to Culture as Active

There are, in our opinion, at least two clear and specific rationales for why an Indigenous child's cultural care plan needs ongoing review, and why the child and his or her carers need ongoing financial and other support to help realise the child's development. Both are consistent with the general observation that ongoing support has been shown to preserve and strengthen the child/carer relationship and prevent breakdown.<sup>48</sup> We note that the purpose of review is *not* observation and control. It is to ensure the child and his or her carers (and indirectly the wider community) are getting the support they need to realise their individual *and* collective cultural goals. It is impossible to speak of an Indigenous child's cultural identity without also speaking of the importance of family and community.

First, we argue that a cultural care plan is not a static document, despite them often being regarded as such by departments. Rather it should be seen as a 'dynamic' document, one that is able to be regularly reviewed, adapted and modified and so forth as the child progresses through life stages.<sup>49</sup> A cultural care plan should be able to take into account this and the child's age, and thus encourage and support the child to take more responsibility for their own cultural needs, in concert with their carer family and the community of which they are a part. In this sense, a cultural care plan supports self-determination. It does not relegate a child to a predefined perspective of what encompasses 'cultural activities' and 'cultural identity'.

Second, and relatedly, maintaining a connection to culture has been held to encompass an Indigenous child having an 'active' participation in that cultural community.<sup>50</sup> In *Davis v Davis*,<sup>51</sup> Young J cited approvingly Moore J's comments from *B & F*,<sup>52</sup> in which her Honour considered the scope and meaning of the term 'connection' in relation to an Indigenous

child and culture. This 'active view' was considered by Moore J:

As I see it, the requirement to maintain a connection to their lifestyle, culture and traditions involves an active view of the child's needs to participate in the lifestyle, culture and tradition of the community to which they belong. This need, in my opinion, goes beyond a child being simply provided with information and knowledge about their heritage but encompasses an active experience of their lifestyle, culture and traditions. This can only come from spending time with family members and community. Through participation in the everyday lifestyle of family and community the child comes to know their place within the community, to know who they are and what their obligations are and by that means gain their identity and sense of belonging.

Thus, the development and protection of an Indigenous child's cultural identity is both *dynamic and active*. To realise these elements requires both review and support, including financial support in order to facilitate those interactions with family, kin and the wider Indigenous community. We argue that ultimately such support will assist all in the community to 'connect', because of the interconnectedness of Indigenous community and the critical importance of family. The importance for family is discussed further below. An inference that can be drawn now is that because family is so central to Indigenous culture and identity, carer-families need ongoing support.

In the *Care Report* the Senate Committee recognised the issue, stating,

Where children are placed in legally permanent arrangements, the committee notes the importance of ensuring children remain connected to their families and communities, taking into consideration their cultural background. *The committee is concerned about the lack of national consistency in legislation and practice to ensure children in these placements are supported to maintain a connection to their family and culture, particularly for Aboriginal and Torres Strait Islander children.*<sup>53</sup>

The Senate Committee's concerns with PCOs and Indigenous children were more general as well:

The committee is also concerned about the lack of national consistency on how and when permanent care orders may be made, particularly for Aboriginal and Torres Strait

Islander children maintaining contact with family. The committee notes there is a wide discrepancy in the factors that must be taken into account when making these orders across jurisdictions.<sup>54</sup>

Finally, the Committee recommended that,

COAG include in the Third Action Plan (2015-2018) of the National Framework a project to develop a nationally consistent approach to legal forms of permanence (including guardianship orders and adoption) that ensure children maintain connection to their families and carers continue to receive financial and practical support.<sup>55</sup>

However, the Third Action Plan currently has a broad focus on intervention and prevention. The Plan does state that the intention is to ensure that the five 'domains' of the Aboriginal and Torres Strait Islander Child Placement Principles (prevention, partnership, placement, participation and connection) are applied to the implementation of all strategies and actions identified in the Third Action Plan.<sup>56</sup> What this will mean in an environment strongly focused on transitioning OOH children into permanent placements is not clear.

### III Contexts and Frameworks

#### A The Neoliberal Paradigm

The current influence of neoliberalism on the Australian Indigenous policy landscape is in urgent need of review.<sup>57</sup> It has been suggested that the narrow prism through which neoliberal policy is developed and applied, which often ignores cultural difference and context in preference for 'mainstreaming' of a dominant socio-cultural perspective, conspires to prevent or restrict consideration of solutions which may substantively improve the social and economic disadvantage faced by many Indigenous Australians.<sup>58</sup> As Bessant and Watkinson argue, 'good policy' is not determined by identifying and applying a majority view, and in any event inherent structural inequalities mean that Indigenous voices, even when heard, are rarely part of the majority.<sup>59</sup> The 2009 United Nations *State of the Indigenous Peoples Report* noted that the reliance on market forces to address issues of Indigenous disadvantage was having a detrimental effect:

[Neoliberalism is] [b]ased on a belief that the market should be the organising principle for social, political and economic

decisions, where policy makers promote privatisation of State activities and an increased role for the free market, flexibility in labour markets and trade liberalisation. The benefits of these policies frequently fail to reach the Indigenous peoples of the world, who acutely feel their costs, such as environmental degradation and loss of traditional lands and territories.<sup>60</sup>

Waters argues that the 2014 Productivity Commission *Overcoming Indigenous Disadvantage Report* demonstrates that in many key areas, the past 15 years of neoliberal policy implementation has resulted in a worsening of outcomes for Indigenous people:

To put it bluntly, a Western free-market economy with a neo-liberal ideology just doesn't work in Aboriginal communities. The principles of self-interest and individualism remain too oppositional: they threaten the values of collective consciousness that sustain Aboriginal communities. ... The clash of values between Aboriginality and neoliberalism engenders a state of alienation and exclusion.<sup>61</sup>

(i) Permanency Planning, Culture and Neoliberalism

How neoliberalism manifests itself in OOHC and permanency planning is not subtle in its ultimate result – governments throughout Australia have, however, proceeded almost silently in its imposition upon children's services, avoiding public opposition and debate, while at the same time increasing the tempo of privatisation plans in recent years. The agenda is the implementation of those central pillars of neoliberal ideology - 'marketisation and privatisation'.<sup>62</sup> The market in this context is simply the sphere in which certain organisations compete with each other to gain government funding to care for and, critically, place children who are in need of care and protection. The service which can provide the best service (ie, number of permanent placements) for the lowest cost is likely to be the one that receives that government contract.

A key issue with permanency planning and neoliberalism is what happens *after* the child has exited the care and protection system. In a rush to exit a child from care, we argue that in a variety of ways, from a lack of ongoing financial support to carers, to importantly and particularly for the purpose of this article, a lack of any ongoing review of a child's cultural care plan, this system is failing Indigenous children. It is the end stage of the process

which completely disregards the historical context of the Indigenous child's experience, and can actually undo good work and consideration of the child's needs till then. This is despite evidence that maintenance of formal links between the child, the family, and the relevant department can act as a 'safety net', helping to ensure that placements do not break down.<sup>63</sup> Moreover, it ignores evidence that many Indigenous carers, despite a willingness to care for a child, often experience a lack of financial resources, emotional issues surrounding their own experience of trauma and dispossession, and lack proper training.<sup>64</sup>

It is important to note that while a lot of Indigenous children are placed with Indigenous carers, many are not. In such cases, the application of the relevant Aboriginal and Torres Strait Islander Child Placement Principles provide some protections for an Indigenous child's cultural safety.<sup>65</sup> The authors of this article are not opposed to non-Indigenous people caring for Indigenous children as a rule. However, this presupposes the proper application of the Placement Principles to start with, the proper involvement of an Indigenous organisation, and critically, ongoing support (both educational and financial) for the carers to assist them in meeting the emotional and cultural needs of the child. However, what limited evidence is available in the literature does suggest that the application of the Placement Principles is haphazard amongst the jurisdictions. It is a minor limitation of this article that we do not spend more time discussing the Placement Principles, but it is not possible in the limited space. There remains an urgent need to research compliance with the Placement Principles across jurisdictions, and also to understand better how many Indigenous children are placed with non-Indigenous carers, and the challenges faced by carers more generally, both Indigenous and non-Indigenous.

From a legislative perspective, Australia has a reasonably developed OOHC framework, although there is need for reform in certain areas. The Family Court and Children's Courts have regularly given strong weight to legislative provisions that require an Indigenous child's cultural needs to be considered in the context of his or her 'best interests', explicitly recognising that an Indigenous child's cultural care is critical.<sup>66</sup> But there remains a tension with the broader political and policy landscape, partly because neoliberal policy focuses almost exclusively on administrative and economically quantitative outputs, and hence easily measurable and quantifiable activities and solutions.<sup>67</sup>

In its desire for neat 'market ready and conforming' statistics, neoliberal policy can miss the nuances of a situation leading to an ongoing policy 'failure' despite the expenditure of what appears to be enormous sums of money.<sup>68</sup> Not only is 'failure' created and indeed institutionalised by ideologically driven policy, in which evaluation is almost non-existent, existing inequities and tensions are exacerbated by the inability of the policy processes to recognise and assess the wellbeing indicators that Indigenous people themselves may consider important.<sup>69</sup> For example, the wellbeing associated with a positive cultural identity is a considerably broader concept than pure socio-economic status, with wellbeing regarded as 'a state of health or sufficiency in all aspects of life'.<sup>70</sup> Yet little research exists on this. It is difficult to factor in the benefits of cultural wellbeing to a free market economic model, and even more difficult to evaluate and quantify statistically (and therefore 'rationally') the *economic* benefits of a person's emotional wellbeing over time, in a way that is useable by governments in our current 3-4 year policy cycles.

Central to neoliberalism's attitude towards Indigenous culture is its attempt at *denying* that an Indigenous cultural identity should have any bearing on conduct in public life, which is equated with participation in the 'market'. It thus relegates cultural practice, which is not of the mainstream and constructed around market participation, to the private sphere.<sup>71</sup> Indeed the contemporary construction of differences between an 'authentic' Indigenous culture on the one hand, and a 'traditional' Indigenous culture on the other, is used both to oppress Indigenous people by imposing authority upon them, in the case of 'authentic' culture,<sup>72</sup> and to justify intervention into Aboriginal people's lives. The language of 'dysfunctionality', associated with the perceived failings of 'traditional' culture, provides the central neoliberal moral justification for such interventions.<sup>73</sup> In other words, neoliberalism attempts to reconstruct a 'version' on Indigenous culture that is compatible with 'the market' and then impose this on Indigenous people. Promotion of Indigenous 'culture' under neoliberalism then has little to do with 'wellbeing' in any broader sense than that which can be traded in the marketplace.

Under this 'new' assimilationist strategy, the 'oppressed' become responsible for their own 'oppression'.<sup>74</sup> Neoliberalism then is often context blind, ignoring, for example, the well-documented effects of intergenerational trauma. This is not to say that Indigenous culture is not dynamic and evolving—it is, and should not be seen as

something static. The question is how this is manifested, and to what extent Indigenous people are able to construct identity meaningfully and on their own terms. The promotion of an Indigenous culture is an aspect of self-determination,<sup>75</sup> and self-determination is at odds with the neoliberalism that deprives Indigenous children of the ability to engage meaningfully in the construction of their identity. This goes beyond mere 'dispossession' to threaten the survival of their culture. As Dodson has put it, '[t]aking Indigenous children is not just an act of violence against those children and their families. It is an act of cultural destruction'.<sup>76</sup>

## B Approaches to Indigenous Child Welfare

The critical approach that we favour, and which grounds the methodology of this article can be described as a *human rights* approach to Indigenous children's welfare.<sup>77</sup> Such an approach has two aspects that work together to achieve a positive outcome. First, a human rights approach aims to address the structural inequality and resultant poverty that is endemic in many Indigenous communities. Second, it seeks to recognise Indigenous children's right to a cultural identity, recognising that a cultural identity is a significant source of wellbeing. It is this second arm that we primarily focus on in this article. Such an approach is consistent with, and seeks to give effect to, International Human Rights law instruments, which give voice to an Indigenous child's *right* to maintain connection to culture.<sup>78</sup>

Such an approach provides a robust framework for navigating and *meaningfully* engaging with the wider and fundamental tension that exists in child protection matters. As Parkinson describes:

Modern child protection law demonstrates a tension between two competing approaches. The first emphasises the importance of partnership with birth families in the protection of children. The second emphasises the need for children to have security in alternative care arrangements when it is not safe for them to remain in their parents' care. ...<sup>79</sup>

Parkinson is largely correct in identifying this tension, and it can be readily recognised in both mainstream and Indigenous policy discourse. Consistent with a Human Rights approach we argue that what is required is recognition by policymakers of an expanded sense of 'safety' and 'security' when addressing the needs of Indigenous children. We caution



again, against a 'one size fits all' approach. The authors of this article believe that the physical and sexual safety of a child *is* always paramount, and we do not suggest that Indigenous children should never be placed into care—we share the concern of Douglas and Walsh that what is important is to both reduce the high rates of child removal and to prevent the loss of culture that can result from such interventions.<sup>80</sup>

However, we argue that in assessing an Indigenous child's safety for the purposes of satisfying legislative provisions requiring determinations of an Indigenous child's 'best interests', for example, safety should not be conceived of as just about 'physical security'. For an Indigenous child, safety also encompasses 'cultural security'. In other words, we argue that for an Indigenous child, determining his or her best interests should not be about *weighing* up physical safety against cultural safety, in the sense that physical safety gains priority.<sup>81</sup> We argue they are so intertwined as to be one. Considering the importance of culture to Indigenous children, to be safe from harm means to be safe also from cultural harm. The concept of safety for Aboriginal children and young people needs to be expanded to recognise the ongoing detrimental effect of intergenerational trauma, for example, the significantly higher incarceration rate of Indigenous youth.<sup>82</sup>

One issue that has restricted the ability of policy makers to grasp this and develop appropriate responses, is that neoliberalism treats issues of physical safety as an 'individual' right, whereas cultural issues are seen as 'collective' rights. The resistance to a more nuanced view is based upon an ideological stance that treats 'individual' rights as often taking priority, except where 'collective' rights are conducive to market participation. There is a separation where there should not be. In the *2015 Social Justice Report*, the Commissioner elucidated a perspective on approaches which provides further context to our discussion above, and acknowledged and addressed this 'tension' between 'rights', similarly concluding that such a separation may not be appropriate. The Commissioner stated:

At the service delivery level, tension can arise between the individual rights of children to be safe and free from violence and the collective rights of Indigenous peoples to know who they are, where they come from and maintain contact with their culture and family.

*Whilst the rights of children to be safe from harm will always be of paramount importance, I believe that a more nuanced consideration, beyond a simple competition between apparent 'individual' and 'collective' rights, is required.*

I will always maintain that all children, including Aboriginal and Torres Strait Islander children, should be protected from all forms of abuse and harm. However, I believe that there is great value in a pluralistic human rights-based approach that attempts to realise both the individual rights of children to safety as well as their rights to identity.<sup>83</sup>

To make it clear, we do not suggest that questions of cultural safety should trump those relating to physical and sexual safety. What we do suggest is that considerations of what constitute an Indigenous child's 'best interests' must recognise the historical context of the current situation. We do suggest that institutional conceptions of safety need to be expanded to recognise that to be denied culture *is* a form of violence.<sup>84</sup> We recognise that our discussion on this important issue is limited, and that further discussion around formulating this conception more deeply needs to be undertaken.

#### **IV Indigenous Cultural Identity and Children**

As Magistrate Wallington said in a related note in *Department of Human Services and K Siblings* - in the context of being critical of the Department's ignoring requirements to prepare a Cultural Care Plan for the children while in State Care - being Aboriginal 'is not just a "factor" to be taken into account but intrinsic to the issue of the children's best interests'.<sup>85</sup> Preservation of cultural identity, therefore, is part of an Indigenous child's 'best interests'.

Halloran has provided a useful and relevant outline of how culture may be conceived:

[C]ulture can be thought of as a complex and diverse system of shared and interrelated knowledge, practices and signifiers of a society, providing structure and significance to groups within that society and ultimately an individual's experience of his or her personal, social, and physical and metaphysical worlds. Shared knowledge includes collectively held norms, values, attitudes, beliefs, and the like, while cultural knowledge and practices are dynamic phenomena; collectively maintained and transformed by the ongoing interaction of societal members over time and space. Cultural maintenance, transmission, and transformation

**THE PROTECTION OF CULTURAL IDENTITY IN ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN  
EXITING FROM STATUTORY OUT OF HOME CARE VIA PERMANENT CARE ORDERS: FURTHER OBSERVATIONS ON  
THE RISK OF CULTURAL DISCONNECTION TO INFORM A POLICY AND LEGISLATIVE REFORM FRAMEWORK**

are the result of ongoing interaction of people engaged in shared activities in concrete situations. Put simply, culture is socially constructed and maintained.<sup>86</sup>

The Secretariat of National Aboriginal and Islander Child Care argues that:

A strong cultural identity is a protective factor and contributes to a child's resilience whilst cultural attachment is associated with improved wellbeing and socio-economic outcomes. Therefore, a strong sense of culture in Aboriginal and Torres Strait Islander children can be viewed as a strength that promotes their safety and wellbeing.<sup>87</sup>

### **A The Importance of Family**

Family is the cornerstone of Aboriginal and Torres Strait Islander cultural identity.<sup>88</sup> As SNAICC notes, removing children from their families removes them from their culture.<sup>89</sup> The maintenance then of connections between family and community is crucial for the emotional and spiritual development of Aboriginal or Torres Strait Islander children.

The importance and significance of family has been recognised by the Commonwealth Family Court. In *Davis v Davis*,<sup>90</sup> Young J accepted that 'relationships to family and kin are over-riding factors in maintaining and legitimising Aboriginal identity'. Kinship is central to such cultural activity and 'kin roles and responsibilities are taken very seriously'.<sup>91</sup>

In *Lawson & Warren*,<sup>92</sup> Ryan J, after receiving evidence on how an Aboriginal child is accepted as part of a family and community, noted that:

Culture, he explained [the expert evidence], is about trial and error and learning by example. As I understand his and the maternal great-grandmother's evidence, it is not about any specific aspect of culture, but rather for the child to have the opportunity to be around family in order to establish awareness, identity and belonging. Without this an indigenous child may feel confused and alienated. As they reach adolescence there may be an overwhelming sense of dislocation and confusion of identity. These matters are accepted.

The different way that 'family' is constructed and conceived by Indigenous people compared to Western society has also

been explicitly recognised by the Commonwealth Family Court. This has significant policy implications. In *Donnell v Dovey*,<sup>93</sup> Warnick, Thackray and O'Ryan JJ stated that:

[W]e consider that an Australian court exercising family law jurisdiction in the twenty first century must take judicial notice of the fact that there are marked differences between indigenous and non-indigenous people relating to the concept of family. This is not to say that the practices and beliefs of indigenous people are uniform, since it is well known that they are not. *However, it cannot ever be safely assumed that research findings based on studies of European/white children apply with equal force to Indigenous children, even those who may have been raised in an urban setting.*

In the *Care Report*, the Senate Committee has recognised the importance of family, stating that:

The committee acknowledges that connection to family is integral to wellbeing of Aboriginal and Torres Strait Islander children and young people. The committee is concerned existing frameworks do not adequately facilitate this connection and more needs to be done to support Aboriginal and Torres Strait Islander children and young people.<sup>94</sup>

### **B Further Observations on Indigenous Cultural Identity and Children in the Family Court—The Case of *B v R***

The Commonwealth Family Court has played a significant role in articulating the idea that protection and support of the development of the cultural identity of an Indigenous child is crucial. Indeed, in interpreting the provisions of the Family Law Act,<sup>95</sup> the Family Court has 'led the way' in recognising the importance of culture, by taking culture to be a key consideration in determining a child's best interests, and in making its ultimate decisions. Successive amendments to the Family Law Act have clarified decisions of the Court in regards to the importance of cultural identity, and further entrenched in legislation the recognition of the importance of cultural identity.

The Full Court of the Family Court in the key foundational case of *B v R* held:

It is not just that Aboriginal children should be encouraged to learn about their culture, and to take pride in it in the manner in which other children might be so encouraged. What this

issue directs our mind to is the particular problems and difficulties confronted throughout Australian history, and at the present time, by Aboriginal Australians in mainstream Aboriginal society. The history of Aboriginal Australians is a unique one, as is their current position in Australian life. The struggles which they face in a predominantly white culture are, too, unique. Evidence which makes reference to these types of experiences and struggles travels well beyond any broad 'right to know one's culture' assertion. It addresses the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child ... a reality far deeper and more profound than the type of traditionally broad statements of principle referred to by the trial judge.<sup>96</sup>

Thus, issues surrounding Indigenous children in care do not exist in a vacuum. Quite often the issue surrounding indigenous children in care are directly related to an historical experience which is dominated by dispossession and the subsequent emergence of what we refer to today as 'intergenerational trauma'. This is a key reason why we advocate a human rights approach to issues surrounding Indigenous child welfare. We agree with the Court in *B v R* - it is not about a 'right to know one's culture' at all. It is in fact about the very *survival* of a culture. The Court noted that it is 'beyond' controversy' that the historical removal of Aboriginal children from their Aboriginal family and their upbringing in a white environment has had a 'devastating long-term effect'.<sup>97</sup> While acknowledging that evidence should always be presented in individual cases, the Court in *B v R* argued that the negative consequences of forced removal of Aboriginal children and the critical importance of an Indigenous child being able to develop an Indigenous cultural identity for their wellbeing is, amongst other things, something that is so 'notorious that it would be expected that a trial judge would take judicial notice' of such things.<sup>98</sup> Critically, and in a finding that resonates with the neoliberal paradigm today, a core reason for the removals of Indigenous children was that a child's Aboriginality was seen as if it was a *problem*.<sup>99</sup>

The Court identified a number of themes that ran constant throughout issues relating to Indigenous children and care at that time. They distilled these into four Principles to guide practice.<sup>100</sup> These have had a profound effect and influence on subsequent legislative reform of the Commonwealth Family Law Act and subsequent Court decisions. They remain highly relevant today:

- a) In Australia a child whose ancestry is wholly or partly indigenous is treated by the dominant white society as "black", a circumstance which carries with it widely accepted connotations of an inferior social position. Racism still remains a marked aspect of Australian society. Daily references in the media demonstrate this. Aboriginal people are often treated as inferior members of the Australian society and regularly face discriminatory conduct and behaviour as part of their daily life. This is likely to permeate their existence from the time they commence direct exposure to the outside community and continues through experiences such as commencing school, reaching adolescence, forming relationships, and seeking employment and housing.
- b) The removal of an aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.
- c) Generally an aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses. Racism is a factor which aboriginal children may confront every day. Because non-aboriginals are largely oblivious of that, they are less able to deal with it or prepare aboriginal children for it.
- d) Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life.

In *Donnell v Dovey*,<sup>101</sup> the Full Court of the Family Court noted that all judicial officers who are involved in a matter involving an Indigenous child:

[S]hould be expected to have a basic level of understanding of indigenous culture, at least to the extent that this can be found in what the Full Court in *B v R* called "readily accessible public information". It should not be expected that parties must approach the court on the basis that the presiding judicial officer comes to the case with a "blank canvas".<sup>102</sup>

### C A New Stolen Generation?

Removing an Indigenous child and placing him or her into OOHC is regarded as an ‘intervention of last resort’.<sup>103</sup> It is an extreme action—while provisions do exist for a child to enter care voluntarily, overwhelmingly children are placed in care subsequent to a Court order.<sup>104</sup>

There have been warnings that the failings of the OOHC system in Australia, particularly in the context of Indigenous children being disconnected from culture, and the associated negative life outcomes which can flow from this, are leading potentially to a ‘second stolen generation’,<sup>105</sup> or a ‘new type of stolen generation’.<sup>106</sup> However, most recently, Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, has argued against conflating the experiences of today with that of the past, stating that such a description can ‘muddy the waters’. As he argues, ‘[i]t is inaccurate to equate the injustice experienced by the Stolen Generations with the difficulties experienced by vulnerable children and families today’.<sup>107</sup>

We agree with the Commissioner that things are different today. We also agree that such terms should not be used haphazardly or without thought. Yet practices today, and importantly *outcomes* of policy, appear in *some* respects remarkably similar to the old paternalism. First, while ‘neglect’ remains one of the largest reasons for Indigenous children being removed and placed in care,<sup>108</sup> the definition of ‘neglect’ can be highly subjective,<sup>109</sup> and can also be seen to reflect in some respects Western views of what constitutes proper child rearing that may be at odds with some Indigenous practices. The definition of neglect from a Western viewpoint may also fail to consider appropriately the significant socio-economic disadvantage that many Indigenous families face and that may inhibit their choices in terms of housing, diet, and broader community and service engagement. Secondly, being ‘stolen’ is not just a physical reality. It also incorporates a spiritual and emotional dimension. Children who are disconnected from their cultural heritage can be regarded as ‘stolen’ then, despite them no longer being sent from an institution to domestic service, for example.

In the *Care Report*, the Senate Committee states that:

The committee shares concerns that current practices risk creating a ‘Stolen Generation’. The committee acknowledges the context in which children are removed today is different

to that of past practices, but that the result is similar if adequate supports and services for Aboriginal and Torres Strait Islander communities and families are not provided.<sup>110</sup>

This observation highlights something that we argue is crucial to developing effective responses: viz, the need to provide ongoing support and services for Indigenous communities based around what they value. Investment in early intervention and prevention has been proven to be a cost effective and more culturally appropriate way of attending to the factors that contribute to children being placed in out of home care (assuming it is implemented properly). Yet priority is often placed on funding the out of home care sector at the expense of early intervention and prevention programs. The Productivity Commission’s *Report on Government Services 2016* reported that in 2014–15 \$4.3 billion was spent nationally on child protection, family services and out of home care. Yet, only 15% of that budget was spent on family support services.<sup>111</sup> Whilst the percentage varied widely between the states and territories, the need to do more in regards to family support services more broadly was evident. Family support services, if provided at the right time and in an appropriate context, can prevent children being funnelled into out of home care and consequently proceeding to permanent care orders.

In the context of this paper, we suggest that rather than a PCO being an opportunity for the State to ‘wash its hands’ of an Indigenous child, it should be seen as creating an Indigenous driven space in which Government, children, Indigenous and non-Indigenous carers, families and communities can have an ongoing structured dialogue in which all parties work together to provide the best cultural care for children *and communities*. This would entail a commitment to resourcing family support services on an ongoing basis so that PCOs can be avoided, but where they are necessary that such services can facilitate necessary support to avoid the breakdown of placements.

### V Conclusion and Recent Developments

This article has argued that the State’s push to institute PCOs, inter alia, within prescribed timeframes can potentially have significant negative ramifications for Indigenous children, their families, and communities. The State’s haphazard approach to cultural care plans puts at risk the preservation of Indigenous children’s cultural identity and their ongoing connection to their family/

kin, country and, more particularly, their culture. The development and maintenance of cultural care plans are therefore critical. This article has argued that Cultural Care plans should be considered 'living documents' that are regularly reviewed and monitored to ensure that Indigenous children receive the cultural care and support they need to become confident adults.

To enable the reviewing and monitoring of cultural care plans requires both legislative support, as well as policy and program reform. The legislative support would provide the 'big stick' should Permanent Carers disengage from services or Indigenous family/community members post a PCO being made. It would enable the matter to be bought back before the courts to review and reinforce cultural care plans so that a child subject to a PCO might maintain a positive connection to his or her identity, family, and culture.

Policy and program reform would enable a framework to be structured around how to resource and support the maintenance of cultural care plans on an ongoing basis. This would include adequate resources for employing staff who are well versed in the importance of cultural care plans and their content, and who appreciate the consequences should these not be maintained.

The process would need to be supportive for all involved rather than being an enforced or punitive measure. However, should PCO carers withdraw or refuse to participate, the legislative support would provide the authority to enable compliance with cultural care plan reviews. It would be hoped that this measure would only need to be used in rare instances. For the most part, carers would and should be supportive of interventions that assist them in providing relevant and timely cultural care that builds and fosters a positive Indigenous identity and cultural connection for the children in their care now.

Indigenous child care agencies would be well placed to undertake this work given their existing relationships with Indigenous community members and organisations. They could assist practically in ensuring that Indigenous children subject to PCOs have networks of interested and connected kin who care about them, their families and communities, and can provide a 'blanket of cultural support' that nurtures and supports them as they grow.

## A Recent Developments as at August 2016

Since the authors completed the initial research and draft of this article there have been two significant developments at a State Government level in Victoria and South Australia.

### (i) Victoria

Recognising the importance of cultural care and reflecting the heightened attention the area is receiving, the Andrews Labor Government in Victoria announced in August 2016 a \$5.33 million funding package to better support the development of cultural support plans for Indigenous children and young people. The funding is directed in part towards the creation of specific cultural planning positions at Aboriginal community controlled organisations. The Victorian Minister for Families and Children, Jenny Mikakos said:

We have a responsibility to ensure Aboriginal children and young people in our care stay connected with their rich and proud culture. It's how young Aboriginal people develop a sense of identity and wellbeing.

This funding will support the development of cultural support plans for all Aboriginal children and young people in out-of-home care.<sup>112</sup>

### (ii) South Australia

In South Australia, the long awaited report of the Royal Commission into the South Australian Child Protection System (headed by Margaret Nyland) was delivered on 5 August 2016.<sup>113</sup> Titled *The Life They Deserve*, the 'Nyland Enquiry' found the system was in a state of 'disarray'. For the purposes of this article, Part V of the Enquiry dealt with 'Children with Diverse Needs'. The issues raised by us throughout this article find deep resonance in the Enquiry as do recommendations that are suggested to move forward.

The Enquiry notes there are significant issues around cultural care and safety of Indigenous children in South Australia. Standards in place to assist with compliance with the Aboriginal and Torres Strait Islander Child Placement Principles, for example, are 'in practice ... routinely contravened'.<sup>114</sup> Targets for the preparation of cultural maintenance plans (where they are required, which is not always) are very rarely met, and are often incomplete.<sup>115</sup> This is despite such plans being seen by the relevant Department

**THE PROTECTION OF CULTURAL IDENTITY IN ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN  
EXITING FROM STATUTORY OUT OF HOME CARE VIA PERMANENT CARE ORDERS: FURTHER OBSERVATIONS ON  
THE RISK OF CULTURAL DISCONNECTION TO INFORM A POLICY AND LEGISLATIVE REFORM FRAMEWORK**

as ‘pivotal to achieving therapeutic outcomes with Aboriginal children and families’.<sup>116</sup> Importantly, the Enquiry argued that there needs to be increased and ongoing training and support for carer families (whether Indigenous *or* non-Indigenous) and communities to help meet the cultural care needs of Indigenous children and young people. The Enquiry noted that

All Aboriginal children in care need cultural maintenance plans that provide for their *specific* cultural needs. Caseworkers should be trained, supported and supervised to complete these plans, with input from Aboriginal family practitioners and other Families SA cultural advisors, as well as a recognised Aboriginal organisation.<sup>117</sup>

We anticipate that the Nyland Enquiry will have ramifications for policy beyond South Australia. We welcome the initiatives of the Victorian government and hope that the Nyland Enquiry encourages a positive leadership response from the South Australian government and that the report provides further impetus for other governments to address the issue.

It has often been said that it takes a *community* to raise a child. It is timely that we consider and support this practically to ensure that another generation of Indigenous children do not lose their identity and connections to culture, family, community and country. Let us not be saying ‘Sorry’ again.

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\* Dr Kyllie Cripps is an Indigenous academic, Senior Lecturer and Deputy Director of the Indigenous Law Centre, Faculty of Law, University of New South Wales (‘UNSW’). Her research expertise is focused in the areas of Indigenous violence against women and children. Julian Laurens is a Lawyer, Research Assistant to Dr Cripps and a Sessional Academic at the Faculty of Law, UNSW, where he lectures in Land Law, Equity & Trusts, and Legal Ethics.

1 Australian Institute of Health and Welfare, *Child Protection Australia: 2013-14* (Child Welfare Series No 61, 2015) 50.

2 Ibid 54, 58.

3 Ibid.

4 Ibid 54.

5 Ibid.

6 Larissa Behrendt, ‘Indigenous Kids Are Still Being Removed from Their Families, More than Ever’, *The Guardian* (online), 13 February 2016 <<http://www.theguardian.com/australia-news/>

commentisfree/2016/feb/13/eight-years-after-the-apology-indigenous-kids-are-still-being-removed-from-their-families>.

7 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015) 138.

8 Ibid.

9 Committee on the Rights of the Child, Sixtieth Session 29 May–15 June 2012, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention Concluding Observations: Australia* (28 August 2012) CRC/C/AUS/CO/4 [37].

10 The authors have previously discussed this issue generally: see Kyllie Cripps & Julian Laurens, ‘Protecting Indigenous Children’s Familial and Cultural Connections: Reflections on Recent Amendments to the *Care and Protection Act 2007* (NT)’ (2015) 8(17) *Indigenous Law Bulletin* 11.

11 For discussion of these timeframes and the potential impacts see, eg, Victorian Aboriginal Child Care Agency, *Submission to the Victorian Parliamentary Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*, July 2015 (Legal and Social Issues Committee, Victorian Government). <[http://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Children\\_Youth\\_Families\\_Bill/22\\_VACCA.pdf](http://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Children_Youth_Families_Bill/22_VACCA.pdf)>.

12 Ibid.

13 See, eg, Second Reading motion remarks by John Elferink, Northern Territory (NT) Minister for Children and Families introducing the NT’s *Care and Protection of Children Amendment Bill 2007* (NT) which introduced a Permanent Care Order regime: ‘The order will also provide children and families with a sense of normalcy, as there will be no further departmental intervention in their lives once the order is made’ (emphasis added): Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, (John Elferink, Minister for Children and Families).

14 See, eg, Second Reading motion remarks by John Elferink, Northern Territory (NT) Minister for Children and Families when introducing the NT’s *Care and Protection of Children Amendment Bill 2007* (NT) which introduced a Permanent Care Order regime: ‘There will be financial benefits for the community with the introduction of Permanent Care Orders. It is well known that providing out-of-home care services is a costly component of the child protection system ...’. The Minister goes on to say, ‘[t]his bill, however, is not motivated by finances’: Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, (John Elferink, Minister for Children and Families).

15 Australian Senate Community Affairs Reference Committee, *Out of Home Care* (Commonwealth of Australia, Canberra, August 2015).

- 16 Ibid [4.3].
- 17 Patricia Fronek, 'Privatising Adoption: Easier for Parents, Riskier for Kids', *The Conversation* (online), 12 November 2013 <<http://theconversation.com/privatising-adoption-easier-for-parents-riskier-for-kids-20019>>.
- 18 Kirsty Needham, 'One Mother's View on Fast-track Adoption: 'I Want My Children Back'', *The Sydney Morning Herald* (online), July 10 2016 <<http://www.smh.com.au/nsw/one-mothers-view-on-fasttrack-adoption-i-want-my-children-back-20160709-gq2466.html>>.
- 19 Ibid.
- 20 Ibid.
- 21 See, eg, Adam McBeth, 'Privatising Human Rights: What Happens to the State's Human Rights Duties when Services are Privatised?' (2004) 5 *Melbourne Journal of International Law* 133.
- 22 Lenny Roth, *Permanency Planning and Adoption of Children in Out-of-Home Care* (Briefing Paper No 03/2013, NSW Parliamentary Research Service, 2013) 5.
- 23 Terri Libesman, 'Indigenising Indigenous Child Welfare' (2007) 6(24) *Indigenous Law Bulletin* 17.
- 24 Roth, above n 22.
- 25 For background see Queensland Government, Department of Communities, Child Safety Services, *Permanency Planning Practice Paper* (May 2011) 3-5; Lenny Roth, *Permanency Planning and Adoption of Children in Out-of-Home Care* (Briefing Paper No 03/2013, NSW Parliamentary Research Service, 2013) 5; Victorian Government, Department of Health & Human Services, *Stability Planning and Permanent Care Project Final Report* (September 2014) 26.
- 26 Clare Tilbury and Jennifer Osmond, 'Permanency Planning in Foster Care: A Research Review and Guidelines for Practitioners' (2006) 59(3) *Australian Social Work* 265, 266.
- 27 Jennifer Osmond and Clare Tilbury, 'Permanency Planning Concepts' (2012) 37(3) *Children Australia* 100, 100.
- 28 For discussion of the aims of permanency planning as well as discussion on various options see Queensland Government, Department of Communities, Child Safety Services, *Permanency Planning Practice Paper* (May 2011) 5 ff.
- 29 Clare Tilbury and Jennifer Osmond, 'Permanency Planning in Foster Care: A Research Review and Guidelines for Practitioners' (2006) 59(3) *Australian Social Work* 265, 267.
- 30 Victorian Government, Department of Health & Human Services, *Stability Planning and Permanent Care Project Final Report* (September 2014) 26-27; SNAICC, *Our Children, our Dreaming: A Call for a More Just Approach for Aboriginal and Torres Strait Islander Children and Families* (2013) 7.
- 31 Nicholas Richardson, Leah Bromfield and Alexandra Osborn, *Cultural Considerations in Out-of-Home Care* (National Child Protection Clearinghouse, Research Briefs No 8, 2007) 3-4, 13.
- 32 See, eg, Victorian Government, Department of Health & Human Services, *Stability Planning and Permanent Care Project Final Report* (September 2014) 26.
- 33 Australian Senate Community Affairs Reference Committee, *Out of Home Care* (Commonwealth of Australia, August 2015) [7.10].
- 34 Ibid [7.12].
- 35 Ibid [7.61].
- 36 *Children, Youth and Families Act 2005* (Vic) s 321.
- 37 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79A.
- 38 *Children and Community Services Act 2004* (WA) s 60.
- 39 *Child Protection Act 1999* (QLD) s 61. For South Australia, see the *Children's Protection Act 1993* (SA) s 38(2)(d) and the *Children's Protection Regulations 2010* (SA). For the Northern Territory see the *Care and Protection of Children Act 2007* (NT) ss 137A, 137G, pt 2.3, div 4, subdiv 4. For the ACT see, inter alia, s 481 of the *Children and Young People Act 2008* (ACT) regarding an 'enduring parental responsibility provision' which is inserted into a Care and Protection order and in Tasmania see the *Children, Young Persons and Their Families Act 1997* (TAS) s 42(4)(d)(ii) and s 70.
- 40 See, eg, *Adoption Act 2000* (NSW) s 35(1); New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Report 81 (1997) [9.1], [9.9]. Note that Torres Strait Islanders do recognise a form of customary adoption.
- 41 Cripps and Laurens, above n 10. See also recently, AbSec, *Guardianship Orders for Aboriginal Children and Young People* (November 2015) 2. In *Re CP* (1997) 21 Fam LR 486, expert evidence, which was accepted, noted that 'Aboriginal experience of adoption is largely that of having had children taken away by non-Aboriginal people in positions of power, who alienate them from their own children, what many may refer to as a form of cultural genocide because it both denies the child the right to be socialised within its own cultural context as well as denies the right of both parents and the whole kinship network to their relations with this child'.
- 42 For a brief, relevant outline of this and some further issues around PCOs, see Association of Relinquishing Mothers (Vic) Inc, *Submission to the Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*, 24 June 2015 (Legal and Social Issues Committee, Victorian Government). <[http://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Children\\_Youth\\_Families\\_Bill/20\\_ARM.pdf](http://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Children_Youth_Families_Bill/20_ARM.pdf)>.
- 43 See, eg, *Children, Youth and Families Act 2005* (Vic) s 176. While the Victorian Act does refer to cultural care for an Aboriginal child, not all State and Territory legislation explicitly refers to cultural care.

**THE PROTECTION OF CULTURAL IDENTITY IN ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN  
EXITING FROM STATUTORY OUT OF HOME CARE VIA PERMANENT CARE ORDERS: FURTHER OBSERVATIONS ON  
THE RISK OF CULTURAL DISCONNECTION TO INFORM A POLICY AND LEGISLATIVE REFORM FRAMEWORK**

- 44 *Drake & Drake & Anor* [2014] FCCA 2950 [191]. Authorities referred to include *In the Marriage of B and R* (1995) FLC 92-636; *Hort & Verran* [2009] FamCAFC 214; (2009) FLC 93-418; *Donnell & Dovey* [2010] FamCAFC 15.
- 45 And note relevantly, Judge Peter Johnstone, *Update on the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principles* (Speech at the Hunter/New England Cultural Care Planning Forum, Friday 4 September 2015).
- 46 Fiona Arney et al, *Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and Practice Considerations* (Child Family Community Australia, Paper no 34, 2015) 12.
- 47 We note that as a requirement of the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles, where an Indigenous child is placed with a non-Indigenous family, arrangements are usually made at the time of the order being made to demonstrate how the child will remain connected to its Indigenous family and community. See, eg, s 13(2)(c) of the *Children, Youth and Families Act 2005* (Vic) and *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13(6)(b). But the question is, how is this monitored and enforced?
- 48 Note also that International Human Rights instruments speak of SUPPORT—not just a right.
- 49 Arney et al, above n 46.
- 50 Steven Ralph, The Best Interests of the Aboriginal Child in Family Law Proceedings (1998) 12 *Australian Journal of Family Law*, 140, 142.
- 51 *Davis v Davis and Anor* [2007] FamCA 1149 [77].
- 52 *B & F* [1998] FamCA 239.
- 53 Australian Senate Community Affairs Reference Committee, *Out of Home Care* (Commonwealth of Australia, August 2015) [10.40] (emphasis added).
- 54 Australian Senate Community Affairs Reference Committee, *Out of Home Care* (Commonwealth of Australia, August 2015) [7.62].
- 55 *Ibid* [10.42].
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- 78 For Indigenous children specifically see, eg, United Nations *Convention on the Rights of the Child*, Article 30; and generally, *United Nations Declaration on the Rights of Indigenous People*, Articles 7, 8 11, 13, 14 ff; And also relevantly *International Covenant on Civil and Political Rights*, Article 27; *International Covenant on Economic, Social and Cultural Rights*, Articles 1 and 15.
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- 80 Heather Douglas and Tamara Walsh, ‘Continuing the Stolen Generations: Child Protection Interventions and Indigenous People’ (2013) 21 *International Journal of Children’s Rights* 59, 60.
- 81 SNAICC, ‘Response to Queensland Department of Child Safety Discussion Paper’, *Improving Permanency for Children in Care* (2006). But note that as a threshold question, physical safety is relevant. For example, as the SNAICC has noted, because of the importance of family to cultural identity, retaining links to family or returning to family will always be in an Indigenous child’s best interests *if physical safety issues can be addressed*: SNAICC, *Achieving Stable and Culturally Strong Out-Of-Home-Care for Aboriginal and Torres Strait Islander Children* (2005), 2 (emphasis added).
- 82 Kate Burgess, ‘Intergenerational Trauma Leading to Higher Indigenous Incarceration Rates, Forum Told’, *The Canberra Times* (online), 5 August 2016 <<http://www.canberratimes.com.au/act-news/intergenerational-trauma-leading-to-higher-indigenous-incarceration-rates-forum-told-20160803-gqko56.html>>.
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- 84 ‘Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide *or any other act of violence*, including forcibly removing children of the group to another group’: *United Nations Declaration on the Rights of Indigenous Peoples*, Article 8.
- 85 [2013] VChC 1, 5.
- 86 Michael Halloran, ‘Cultural Maintenance and Trauma in Indigenous Australia’ (2004) 11(4) *Murdoch University Electronic Journal of Law* 3.
- 87 SNAICC, *Our Children, Our Dreaming: A Call for a More Just Approach for Aboriginal and Torres Strait Islander Children and Families* (2013) 7. See also Arney et al, above n 46; *Trevorrow v State of South Australia (No 5)* (2007) 98 SASR 136 (which was appealed by the State in *State of SA v Lampard-Trevorrow* (2010) 106 SASR 331 unsuccessfully overall and not on this point) [1158] where the expert evidence identified the importance of family and attachment: *inter alia*, ‘The separation of [the plaintiff] from his family not only deprived him of the primary attachment relationship to his mother ..., but also the broader context of his family. The extended family plays an important element in nurturance, care giving and the development of identity in aboriginal families. Given the fact that he had older female siblings, [the plaintiff] was deprived of their potential source of nurturance that could have counter balanced some of the difficulties that may have existed in his relationship with his mother and father. These would have been protective factors against some of the disruptions to his early attachment. ...’
- 88 SNAICC, *Achieving Stable and Culturally Strong Out Of Home Care for Aboriginal and Torres Strait Islander children* (2005) 8.
- 89 Ibid 2.
- 90 [2007] FamCA 114 [279].

**THE PROTECTION OF CULTURAL IDENTITY IN ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN  
EXITING FROM STATUTORY OUT OF HOME CARE VIA PERMANENT CARE ORDERS: FURTHER OBSERVATIONS ON  
THE RISK OF CULTURAL DISCONNECTION TO INFORM A POLICY AND LEGISLATIVE REFORM FRAMEWORK**

- 91 *Davis v Davis* [2007] FamCA 114 [279]. On the importance of kinship and the disadvantages of not bringing up an Indigenous child within his or her own community see also, eg, *Re CP* (1997) 21 Fam LR 486; [1997] FamCA 10, 509.
- 92 [2011] FamCA 38, [215].
- 93 [2010] FamCAFC 15 [321] (emphasis added).
- 94 Australian Senate Community Affairs Reference Committee, *Out of Home Care* (Commonwealth of Australia, August 2015) [8.76].
- 95 Relevant sections from the *Family Law Act* (1975) (Cth) regarding Indigenous children's cultural needs can be found at s 60CA (best interests), ss 60B, 60B(2)(e), 60B(3), and 60CC.
- 96 *B v R* (1995) 127 FLR 438, 446 per Fogarty, Kay and O'Ryan JJ.
- 97 *Ibid* 446-447 per Fogarty, Kay and O'Ryan JJ.
- 98 *Ibid* 470 per Fogarty, Kay and O'Ryan JJ.
- 99 *Ibid* 448 per Fogarty, Kay and O'Ryan JJ, citing Richard Chisholm, *Black Children, White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales* (University of New South Wales Press, 1985).
- 100 *Ibid* 449-450.
- 101 [2010] FamCAFC 15
- 102 *Donnell v Dovey* [2010] FamCAFC 15 [322].
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- 104 *Ibid*.
- 105 Birdie Jabour, 'Scheme to Avoid "Second Stolen Generation" Criticised for Paternalism', *The Guardian* (online), 30 October 2014 <<http://www.theguardian.com/australia-news/2014/oct/30/scheme-to-avoid-second-stolen-generation-criticised-for-paternalism>>. See also Heather Douglas and Tamara Walsh, 'Continuing the Stolen Generations: Child Protection Interventions and Indigenous People' (2013) 21 *International Journal of Children's Rights* 59, 62.
- 106 Latika Bourke, 'Kevin Rudd Warns of Emergence of a New Stolen Generation', *The Sydney Morning Herald* (online), 13 February 2015 <<http://www.smh.com.au/federal-politics/political-news/kevin-rudd-warns-of-the-emergence-of-a-new-stolen-generation-20150213-13dvvh.html>>.
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- 109 Australian Senate Community Affairs Reference Committee, *Out of Home Care* (Commonwealth of Australia, August 2015) [3.36].
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- 114 *Ibid* 463.
- 115 *Ibid*.
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