

A HUMAN RIGHTS FRAMEWORK FOR CONTEMPORARY ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN'S WELLBEING

Terri Libesman*

I Introduction

It is a good opportunity on the 10th anniversary of *Bringing Them Home*¹ and with the election of a new Federal Government to consider a human rights framework for Indigenous children's wellbeing. This paper will discuss Aboriginal and Torres Strait Islander children's welfare within a human rights framework, and begins with an analysis of what such a framework entails. It then will discuss three matters related to Aboriginal and Torres Strait Islander children's contemporary human rights. Firstly, it discusses misconceptions about the relationship between Aboriginal and Torres Strait Islander children's welfare and rights which have gained some currency in Australia in the past weeks and months. Secondly, it examines the human rights framework recommended by *Bringing Them Home* for Aboriginal and Torres Strait Islander children's welfare. Finally, it evaluates reform to Australian child welfare legislation that has taken place over the past decade. This paper suggests that a human rights framework offers an opportunity for both an immediate response to Indigenous children's wellbeing and for structuring a longer-term response to Indigenous children's needs.

II A Human Rights Approach to Indigenous Children's Wellbeing

A human rights approach can provide an effective framework for Indigenous children's welfare because it is an approach which recognises and supports two essential matters. First of all, a human rights approach addresses the structural inequality and poverty which many Indigenous communities face.² It therefore sees as essential the need to address all those indicators of extreme inequality such

as 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. However, a human rights approach does not simply frame Indigenous people as a subset of those sections of the community who are poor and disadvantaged. A human rights approach also foregrounds Indigenous children's right to their cultural identity and recognises the relationship between children's best interests and support for their culture and for those laws, traditions and activities which foster a secure and safe identity.³

The *Convention on the Rights of the Child*⁴ ('CROC') provides a framework within which children's civil, political, economic, social and cultural rights are articulated. There are frequent references in CROC to the importance of cultural, ethnic and linguistic rights. Article 30 of CROC is the only article in a human rights treaty ratified by Australia which specifically refers to Indigenous people. It provides a strong basis for the recognition of Indigenous children's cultural rights. A human rights approach is consistent with a community development approach to children's wellbeing and support for greater Indigenous participation and control over their children's welfare and wellbeing.⁵ This is an approach which many Aboriginal and Torres Strait Islander organisations and individuals have called for. The election of the Rudd Labor Government in November 2007 opens the possibility for new ways of working with government. Optimism about the possibility of a genuine commitment to Aboriginal and Torres Strait Islander Australians has been ignited with the Prime Minister's apology, on behalf of the Federal Government, to members of the Stolen Generations and their families at the opening of Parliament on 13 February 2008.

III Misconceptions about Indigenous Children's Rights and Indigenous Children's Wellbeing

Misconceptions about the relationship between rights and Indigenous child welfare have been proliferating in many quarters of Australia, including the media, over the past weeks and months. These have a negative impact on public opinion and on the constructive reform of legislation, policy and practice for Aboriginal and Torres Strait Islander children's wellbeing. The following examples are provided to illustrate three popular misconceptions about Indigenous rights and children's welfare which are being traded: that there is a choice between supporting Aboriginal and Torres Strait Islander children's rights and supporting their safety; that *Bringing Them Home* has hindered contemporary Aboriginal and Torres Strait Islander children who are abused and neglected from being removed from their families; and that people who support land rights, self-determination and other rights put these interests above children's safety and wellbeing.

On 21 June 2007 the *Sydney Morning Herald* website carried out the following online readers' poll:

Howard's intervention in Aboriginal child abuse:

Was the PM right to take such tough measures in the Northern Territory?

Yes: It's a huge and tragic problem that needs decisive action.

No: Aboriginal rights could be set back decades.⁶

This poll could be interpreted as suggesting that you either support child protection and the Prime Minister's 'tough' measures or you support Aboriginal rights.

At the Australian Social Policy Conference held in July 2007,⁷ a speaker, in the context of responding to a question about the Northern Territory emergency response, suggested that the *Bringing Them Home* Report had deterred child welfare interventions with respect to Indigenous children. He did not realise that *Bringing Them Home* had both acknowledged significant child welfare needs across Australia and the failure of current child welfare departments to address these needs.⁸ The myth that child welfare departments have their hands tied because of the exposure by *Bringing Them Home* of the

impacts of the forced and unjustified removal of Indigenous children detracts from serious child welfare reform and from consideration of what measures are necessary to avoid removal of children, which should be an intervention of last resort.

Tony Jones commented in the *Australian Magazine* on Saturday 4–5 August:

Nanette Rogers is one of those people who values the truth above an easy life. Where others witnessed the same horrors and kept quiet, often telling themselves that the truth might hurt the cause of land rights or even reconciliation, Nanette cannot take her unflinching gaze off the victims – the children and the women who bear the brunt of physical and sexual abuse. It seems to me she has no time for political correctness, which encourages silence in the face of hard truths.⁹

Tony Jones seems to be suggesting that there is a connection between ignoring child abuse and supporting Indigenous rights, in particular land rights and reconciliation, which are bundled together in the convenient 'political correctness' package. In over a decade of working with Indigenous organisations which advocate for Indigenous children's rights, I have never come across a single person who condones child abuse or believes that an Indigenous child should be left in an unsafe situation. Like the United Nations Committee on the Rights of the Child,¹⁰ and so many Indigenous and non-Indigenous children's organisations internationally, they have recognised that land and other rights support Indigenous children's welfare and wellbeing.

These examples are provided to illustrate three common and related misconceptions which have made it difficult to criticise the measures initiated by the former Howard Government in the Northern Territory or to support a human rights approach to Indigenous children's wellbeing, as advocated for in *Bringing Them Home* and by many Indigenous and non-Indigenous organisations nationally and internationally. Human rights and Indigenous children's wellbeing are complimentary and there is no evidence base for the claims made which suggest that they are either in competition or that rights in some way do not support the safety and welfare of children. The Rudd Labor Government has committed itself to halving the gap in reading, writing and numeracy between Indigenous and non-Indigenous children over the next decade.¹¹ Prime Minister Rudd in his election victory speech¹² committed to move away from old divisions and

old ways of doing things. Although when Labor was in opposition they did support the Howard Government's intervention in the Northern Territory, their support was given with reservations. With a new Federal Government, a great window of opportunity exists for implementing new and effective policy with respect to Indigenous children's wellbeing.

IV What *Bringing Them Home* Recommended

Indigenous organisations and individuals made many submissions to the *Bringing Them Home* Inquiry with respect to child welfare. These submissions made three things clear. The first was that current child welfare legislation and administration was not serving Indigenous communities. Not a single submission to the Inquiry was satisfied with the child welfare services in the relevant State or Territory. The second was that there was acknowledgement of the need for child welfare services and governments to address the current needs of Aboriginal and Torres Strait Islander children and families. The third was that Indigenous communities and families wanted more control over their children's wellbeing and welfare.¹³

The *Bringing Them Home* Report's two-tiered recommendations with respect to child welfare enable both the structural inequality and poverty which many Indigenous communities face and the cultural safety and security of Indigenous children to be addressed. Both these issues are essential for securing Aboriginal and Torres Strait Islander children's fundamental human rights including their safety, dignity and security. The *Bringing Them Home* Inquiry recognised that different communities have different levels of capacity and aspirations with respect to controlling child welfare. The Report's recommendations are founded on fundamental human rights including recognition of the best interests of the child, participation rights, principles of non-discrimination, and principles of recognition of cultural and personal identities.

In recommendation 43, the Inquiry recommended that national legislation be negotiated and adopted between Australian governments and key Indigenous organisations, that this legislation enable binding agreements to be made between governments and communities and that Indigenous people be given the opportunity to fully participate in decisions which affect their children.¹⁴ This recommendation provides that agreements would allow for the transfer of

responsibility and control for Indigenous children's welfare to Indigenous organisations to the extent that communities have the capacity and want to take responsibility for child welfare. It is also recognised that adequate funding and resources must be provided to support the measures adopted by communities and that the human rights of Aboriginal and Torres Strait Islander children must be protected regardless of whether an Aboriginal and Torres Strait Islander or non-Indigenous organisation or a government department is involved with the child.

Other child welfare recommendations made in *Bringing Them Home* include that minimum standards legislation for the treatment of all Aboriginal and Torres Strait Islander children and young people be negotiated by the Council of Australian Governments and peak Aboriginal and Torres Strait Islander organisations (recommendation 44)¹⁵ and that benchmark standards be established for defining the best interests of the child (recommendation 46).¹⁶ This latter requirement recognises the pivotal role which the best interests standard plays in most child welfare legislation. The appropriateness of this standard for Aboriginal and Torres Strait Islander children is dependent on the knowledge and experiences of those defining what constitutes the best interests of a child and the weight which should be accorded to the different factors included.

The *Bringing Them Home* Inquiry also recommended that requirements be established for consultation with accredited Aboriginal and Torres Strait Islander organisations. This recommendation recognises that a process needs to be in place both for identifying relevant organisations to consult with and for the consultation process to ensure that it is thorough and in good faith (recommendation 49).¹⁷ The Inquiry recommended that decision makers ascertain if a child is Aboriginal or Torres Strait Islander when they come to the attention of any statutory organisation (recommendation 49).¹⁸ This recommendation was made in recognition of the fact that many children were having and continued to have contact with child welfare departments without recognition of their cultural background and specific cultural needs. This compromises the effectiveness of services provided to the child and their family and opportunities are lost for securing the child's wellbeing at an early stage of contact. While an Aboriginal and Torres Strait Islander child placement principle had been recognised in a number of jurisdictions prior to the *Bringing Them Home* Inquiry, placement of children in out-of-home care is the most severe child welfare intervention

and usually takes place after a department has already had considerable contact with the family. The importance of consultation and participation at all stages of contact with a child is recognised in this recommendation. The Inquiry also recommended that legislative recognition be given to the Aboriginal and Torres Strait Islander Child Placement Principle, including the order of priority for the placement of children and that wherever possible their ongoing contact with their family is ensured (recommendation 51).¹⁹

These recommendations develop minimum standards for the immediate protection of Indigenous children and a longer-term framework for addressing underlying and structural problems. This two-tiered approach recognises that immediate reform is necessary but that there also needs to be a longer-term commitment of resources and that a process is required for capacity building within communities. This is in contrast to the former Federal Government's approach in the Northern Territory intervention, which failed to consult adequately with the communities affected by its measures, failed to ensure that non-discrimination remains an essential principle in the legislation, and has many measures that have dubious connection to children's wellbeing and could in fact result in children and families being worse off. An example is found in the measures which revoke the need for the general public to obtain a permit to visit the community and measures which compulsorily lease land from communities to the Commonwealth.²⁰ It is important that the current Federal Government review the Northern Territory intervention urgently and with an open-minded attitude.

It is disappointing that the Commonwealth has failed to fulfil its role in implementing the recommendations from *Bringing Them Home*. The Committee on the Rights of the Child in their response to the Australian Government's periodic report in 2005 called on Australia to fully implement the recommendations from *Bringing Them Home*.²¹ While all States and Territories have reviewed and reformed their child welfare legislation over the last decade, some more than once, none have implemented recommendation 43, which addresses principles of self-determination as applied to contemporary child welfare. They have, however, all made some progress in terms of reforming their child welfare legislation as it applies to Indigenous children. Nevertheless, there needs to be a considerable funding injection to enable these legislative reforms to be transformed into policy and practice. These reforms should be stepping stones towards greater capacity building within Indigenous children's

organisations and towards a process of Indigenising child welfare as it serves Aboriginal and Torres Strait Islander communities.²²

V Australian Child Welfare Reform

The reform of child welfare legislation over the past decade in all States and Territories has included a review of the child protection systems as they relate specifically to Indigenous children and families. The following provides an overview of reforms with a few comments on how they compare with the recommendations from *Bringing Them Home* and more generally with a human rights perspective.

It is beyond the scope of this paper to provide an overview of service delivery or policy and programs with respect to Indigenous child welfare. However, it should be noted that legislative reform cannot bring about improvements without parallel programs for addressing the social and economic factors which underpin child abuse and neglect, nor without resources for effective support for Indigenous children's wellbeing.

Many of the reforms discussed are directed towards greater recognition of Aboriginal and Torres Strait Islander peoples' involvement in decision making affecting Indigenous children. They more broadly reflect a 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 towards capacity building and devolving responsibility for Indigenous children's wellbeing to Indigenous agencies and communities. The reforms reflect the influence of both the recommendations from *Bringing Them Home* and the ongoing advocacy by Indigenous children's organisations.

A Aboriginal and Torres Strait Islander Child Placement Principle

In all jurisdictions an Aboriginal and Torres Strait Islander child placement principle has been implemented in legislation. These principles provide an order of placement for Indigenous children who need to be placed in out-of-home care. The principles act as an acknowledgment of the importance of cultural and family connection for Indigenous children and also as recognition of the destructive impacts which the history of assimilationist policies have had on Indigenous people.

In each jurisdiction the Aboriginal and Torres Strait Islander Child Placement Principle has a similar descending order of placement for children who need to be in care. The first preference is to place the child with the child's extended family or kinship group, the second preference with their local community and the third preference with another Indigenous family in the area. If it is not practicable or in the best interests of the child to place the child according to these preferences then they will be placed with a non-Indigenous family.²³ There is also a requirement in each jurisdiction that relevant Aboriginal or Torres Strait Islander organisations, and in some jurisdictions that the extended family, be consulted about the child's placement.²⁴ 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 the children who are placed in non-Indigenous care with their families and communities.²⁵ An innovative provision in the Victorian legislation is the requirement that the Secretary of the Department Of Human Services must prepare and monitor the implementation of a cultural plan for each Aboriginal child placed in out-of-home care under a 'guardianship to the Secretary' order.²⁶

While it is a great achievement to have legislative recognition of an Aboriginal and Torres Strait Islander Child Placement Principle in all jurisdictions in Australia there is still a long way to go before the Principle is in fact achieved. The Committee on the Rights of the Child expressed concern about the full implementation of this principle in their 2005 report on Australia's compliance with CROC.²⁷ Placement of children in out-of-home care is a measure of last resort and, as *Bringing Them Home* recommended, effective and culturally appropriate support for families and communities needs to occur a long time before out-of-home care is considered. This need, as will be discussed below, has been legislatively recognised in child welfare legislation in a number of jurisdictions. The Child Placement Principle is subject in most jurisdictions to the 'best interests of the child' principle 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' principle or other general principles incorporate Aboriginal and Torres Strait Islander experience and common sense.

A related matter is the process for participation of and consultation with relevant family and Indigenous organisations in relation to placement (discussed further below). 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 some jurisdictions, such as Victoria, Queensland and South Australia, there is a process for designating appropriate organisations for the purpose of consultation with respect to placement.²⁸ In other jurisdictions such as New South Wales there is no formal process for designating and identifying who should be consulted with.

A final matter which impacts on the placement of children in out-of-home care is the resurgence of a focus on stability and the early permanent placement in out-of-home care of children who cannot live with their parents.²⁹ This stands in contrast to a countervailing national and international trend emphasising family reunion and support for capacity building within families and communities. The emphasis on early permanent placements usually involves setting short timeframes 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 towards early permanent placements has caused considerable concern within Indigenous communities in many parts of the world including Australia. While all children have a need for stability and security, the impact of loss of culture and identity for Indigenous children who are permanently placed away from their family is also significant.³⁰ In the different Australian jurisdictions, there have been different ways of accommodating Indigenous communities' concerns about the permanent placement of Indigenous children into out-of-home care. The recently reformed Victorian legislation has dealt effectively with the need to balance Indigenous children's stability and security with the maintenance of their cultural and familial ties. Section 323 of the *Children, Youth and Families Act 2005* (Vic) provides that where an Aboriginal child is to be placed solely with a non-Aboriginal person an Aboriginal agency must recommend the placement.

B Self-Determination

The New South Wales and Western Australian child welfare acts each contain a 'self-determination' provision in a similar format, which provides that Aboriginal and Torres

Strait Islander people should be *allowed* to participate in the protection and care of their children with as much self-determination as possible.³¹

While these very similar provisions take a step towards recognising the types of principles outlined in recommendation 43 from *Bringing Them Home*, they have significant limitations. The provisions are unclear and do not provide a definition of the term 'self-determination'. Rather than involving Aboriginal and Torres Strait Islander organisations as partners, any such involvement is at the discretion of the relevant minister, who can outsource programmes and discuss strategies with Aboriginal and Torres Strait Islander communities.³² Further, the provisions fail to provide legislative safeguards as to how, and by who, resources and programs should be designed and implemented.

In Victoria the legislation provides for a more far-reaching involvement of Indigenous organisations in the provision and administration of care and protection services. Section 18 of the *Children, Youth and Families Act 2005* (Vic) provides for the delegation of most of the Secretary of the Department of Human Services' functions to the principle officer of an Aboriginal agency. 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.

C Participation

In New South Wales, Queensland, the Australian Capital Territory, Victoria and South Australia, the legislation requires that Indigenous organisations, and in some jurisdictions also family, must participate in all significant decisions which involve Aboriginal children.³³ In some jurisdictions, such as Queensland, they must be consulted about all decisions, 'significant' or not.³⁴ In Tasmania, submissions made by Indigenous organisations must be taken into account.³⁵ In South Australia, there is a requirement that consultations take place in a manner that is as sympathetic to Aboriginal traditions as is possible.³⁶ In most other jurisdictions the terms and conditions of the consultation process are at the relevant minister's discretion.³⁷ In Victoria, there is a provision that decisions about Aboriginal children should involve a meeting convened by an Aboriginal convenor

who has been appointed by an Aboriginal agency.³⁸ There is, however, little structural support or guidance across the legislation for its implementation.

VI Concluding Comments

While the reforms discussed incorporate Indigenous input into decisions about their children, they do not develop an Indigenous pathway for participating in the care and protection of their children. Instead, they provide an avenue for Aboriginal and Torres Strait Islander participation in the mainstream departmental process. If the wellbeing of Indigenous children is to be taken seriously then addressing the structural disadvantages and poverty which many communities face has to be an integral part of policy for Indigenous children's wellbeing. Legislative reform can facilitate change but it has to be complemented with social and economic reforms. Further, for legislative reforms to be successful there needs to be adequate support for the Indigenous organisations involved in child welfare and more broadly in children's wellbeing. In most cases, this would involve capacity building and more direct funding for service provision. These reforms, however, do indicate a growing recognition that improving the wellbeing of Indigenous children requires inclusion of Indigenous people and understandings in all levels of decision-making, policy formation and service provision. The recommendations from *Bringing Them Home* provide a useful framework for advocacy with respect to further legislative and policy reform and the 10th anniversary of *Bringing Them Home* together with the election of a new Federal Government provides a good opportunity to renew calls for the fuller implementation of the *Bringing Them Home* Inquiry's recommendations. Muriel Bamblett, the CEO of the Secretariat of National Aboriginal and Islander Child Care, commented in a media release about the Federal Government's Apology to the Stolen Generations:

We are confident that the Prime Minister will see this as a new beginning and not the end. The 54 recommendations of the *Bringing Them Home* Report, including reparations for the Stolen Generations, provide a blueprint for reform that the government must follow. The government's commitment to Social Inclusion must create a future of hope, safety, equality of opportunity, health and wellbeing for all Aboriginal and Torres Strait Islander children that embraces, rather than forsakes, their cultural identity and pride. This is the promise that the apology holds for children of today.³⁹

Endnotes

- * Terri Libesman is Senior Lecturer in the Law Faculty, University of Technology, Sydney. She worked as a consultant to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. The author wishes to thank Costa Avgoustinos for his research assistance. This paper is based on a presentation to the 'Ten Years Later: *Bringing Them Home* and the Forced Removal of Children' Conference in Sydney on 28 September 2007. It also incorporates ideas from a paper presented at the 'Social Policy Through the Life Course: Building Community Capacity and Social Resilience' Conference in Sydney on 11–13 July 2007: see Secretariat of National Aboriginal and Islander Child Care ('SNAICC') and Terri Libesman, 'Indigenous Children and Contemporary Child Welfare' (2008) forthcoming in Geoff Monahan and Lisa Young (eds), *Children and the Law*.
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 - 23 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13(6); *Children's Protection Regulations 2006* (SA) reg 4(b).
 - 24 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13(6); *Children's Protection Regulations 2006* (SA) reg 4(b).
 - 25 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13(6).
 - 26 *Children, Youth and Families Act 2005* (Vic) s 176.
 - 27 Committee on the Rights of the Child, above n 21, [39].
 - 28 *Children, Youth and Families Act 2005* (Vic) s 12; *Child Protection Act 1999* (Qld) s 6(1); *Child Protection Act 1993* (SA) s 5.
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 - 30 SNAICC, *Achieving Stable and Culturally Strong Out of Home Care for Aboriginal and Torres Strait Islander Children* (2005) <http://www.snaicc.asn.au/publications/documents/Stable_strong_web.pdf> at 20 March 2008, 2.
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- 32 Ibid.
- 33 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 13(1)(d)(ii), 78A(4)(c).
- 34 *Child Protection Act 1999* (Qld) s 6(1).
- 35 *Children, Young People and their Families Act 1997* (Tas) s 9(2)(a).
- 36 *Child Protection Act 1993* (SA) s 5.
- 37 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 12.
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