

Chapter 15

Indigenous Australians: Continuity of colonialism in law and social work

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Chapter summary

Laws have a cumulative and pervasive impact on the lives of individuals and communities. Drawing on the examples from the 'stolen generations', the child protection system and the criminal justice system, this chapter explains how legal and policy provisions have failed to provide effective solutions to the problems faced by Indigenous peoples and have contributed to cumulative disadvantage. It is suggested that it is important to re-frame social work as a rights-based profession and to identify ways in which social workers can engage in practice that enables Indigenous Australians to participate fully in society, while recognising their cultures, aspirations and the impact that history has had.

Introduction

When thinking about social work practice with Indigenous Australians¹ it is particularly important to recognise how past and present laws have set the foundation for the systemic and institutionalised inequalities they currently experience. While the laws that social workers are required to implement purport to be non-discriminatory, it is clear that they frequently maintain injustices and breach the human rights of Indigenous peoples. This can create confusion and tension for those social workers who are required to operate within the confines of these legal parameters. In this chapter we argue that, in order to understand the current situation of Indigenous peoples and their relationship to the law, social workers should have some knowledge of colonisation and the ideologies that have underpinned the imposition of law and policy on Indigenous peoples since that time. The history of protection and assimilation legislation, and more broadly of dispossession, has left a legacy of significant social and economic inequality among Australia's Indigenous peoples. It has also left many communities with a loss of control over personal and communal institutions, and the difficult task of trying to maintain or revive cultural authority and the laws and traditions that sustain it (Libesman 2017). Regrettably, Indigenous peoples remain over-represented in youth and adult correctional structures, and the same young people and their families have often been previously enmeshed in child welfare systems. The continuity of cultural strengths stands in contrast with ongoing over-representation and is a buffer to dire statistics, with Indigenous communities and organisations continuing to fight for rights that will overturn dominant systems.

Laws have a cumulative and pervasive impact on the lives of individuals and communities. Drawing on the examples of the 'stolen generations' and the criminal justice system, this chapter takes a holistic view in presenting understandings of Aboriginal disadvantage, particularly in child welfare and 'corrections', and explaining how legal and policy provisions have not only created the problems, but also failed to provide effective solutions. Even though laws vary between each jurisdiction, the outcomes are often similar and it becomes necessary to reflect upon the continuing inability of lawmakers to design legislation that takes into account Indigenous aspirations. Attempts to address the over-representation in welfare and correctional systems continue to be mere adaptations of western models, rather than to identify solutions that do not rely on western legal, policy and practice models.

From overt discrimination to contemporary over-representation in child welfare

From the time of the commencement of colonisation in the 18th century, laws and policies have been imposed on Indigenous peoples without, or with only minimal, consultation and negotiation (Behrendt et al 2018). Different eras have seen the introduction of a range of different policy approaches

that impact directly on Australia's Indigenous peoples, with perhaps the most destructive and pervasive being the assimilation era, particularly after the Second World War, which saw endeavours to 'breed out' Indigenous peoples and to absorb them into the way of life of the dominant cultural group (Edwards and Read 1992). This built upon the earlier 'protection' era (Coombs 1978) and also the taking of lands, the desecration of sacred sites and the ongoing denigration of Indigenous cultures (Briskman 2014).

Indigenous policy and, specifically, policies of child removal, have been described as part of a more extensive history of what was euphemistically called 'protection' and later 'assimilation' policy and legislation (Chesterman and Galligan 2007). Legislation from the late 19th century onwards established a framework for the control and management of Indigenous peoples' lives through an intricate maze of regulations and discretions that were exercised by police officers and administrators (Haebich 2000). By 1911, Protection Acts had been passed in all States and Territories except Tasmania, where it was presumed that there were no Aboriginal people (HREOC 1997). From the 1930s, policy and legislation changed from protection to assimilation. While assimilation legislation differed across Australia, it broadly had the same aim: to 'absorb' non-'full blood' Aboriginal people into the white community (Armitage 1995). The unjustified removal of Aboriginal and Torres Strait Islander children from their families took place in the context of these discriminatory legislative and policy regimes.

Bringing Them Home

In 2017, the 20th anniversary of the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their families (*Bringing Them Home*), was commemorated (HREOC 1997). The year of 2017 also marked the highest rate and number of removals of Indigenous children from their families in recorded history; as at 30 June 2016, 36 per cent of children in out-of-home care in Australia were recorded as Aboriginal and/or Torres Strait Islander (AIHW 2017), even though many Indigenous children in out-of-home care are either never identified or de-identified and therefore not recorded in these statistics. In 2017, Aboriginal and Torres Strait Islander children were 10 times more likely than non-Indigenous children to be in out-of-home care nationally (AIHW 2018). The recommendations from *Bringing Them Home* remain largely unimplemented, and the Australian government has been criticised for this failure by the UN Committee on the Rights of the Child (2012). These failings have also generated advocacy by groups such as Grandmothers Against Removals and the peak Indigenous child welfare body, the Secretariat of National Aboriginal and Islander Child Care (SNAICC).

This National Inquiry had broad terms of reference: to examine past law and practices with respect to the removal of children from their families by compulsion, duress or undue influence; to examine the adequacy of services for those affected by removal; to consider compensation for those affected; and to examine current laws, practices and policies with respect

to contemporary separations. The National Inquiry heard the stories of hundreds of children who were removed, and of their mothers and families who were left behind. It heard of children stolen from school and never seen by their families again, of children forcefully taken in police cars and vans with mothers chasing behind, of mothers and children searching for their kin over a lifetime. It heard stories of utter loneliness, isolation and dejection, including stories of children who were told that their parents were dead or had given them away, when this was not true, and of children who were subjected to extreme deprivation including hunger, cold, beatings, sexual abuse and a lack of love or affection. Many stories were told of loss – loss of family, loss of identity and loss of opportunity to lay the foundations for a stable adult life. There were stories of alcoholism and drug addiction, stories of broken relationships and poverty, stories of mental illness and imprisonment.

The National Inquiry found that the basic safeguards which protected non-Indigenous families – such as the requirement that determinations that a child be removed from family care should be made by a court rather than by a public servant – were cast aside when it came to Indigenous children. The main components of forced removal were: the deprivation of liberty; deprivation of parental rights; abuses of power; breach of guardianship duties by Aboriginal Protection Boards and guardians, such as the 'Chief Protector' of Aborigines, created under protection legislation; and the violation of international human rights. The Inquiry found that Indigenous children were removed at the discretion of police or public servants, while the removal of non-Indigenous children required a court order (HREOC 1997: Ch 3). In some States and Territories, the Chief Protector was the legal guardian of all Aboriginal children. The legislative regimes and policy for the removal of Aboriginal and Torres Strait Islander children from their families clearly contravened the standards of the time that applied to non-Indigenous children, and entrenched racial discrimination (HREOC 1997: Ch 14).

A consistent message received by the Inquiry was that child welfare departments were failing Indigenous communities. A second consistent message was that effective community-based child protection services were needed in Indigenous communities. With respect to contemporary child welfare, the Inquiry concluded:

The experience of 'The Welfare' has been overwhelmingly one of cultural domination and inappropriate servicing despite attempts by departments to provide accessible services. Past and current legislative and administrative policies, together with bureaucratic structures and mainstream cultural presumptions create a matrix of welfare which cannot be reformed by means of departmental policy alone. If welfare services are to address Indigenous children's needs, they need to be completely overhauled. (HREOC 1997: Ch 22)

The legacy of these policies is evident in the contact which Aboriginal and Torres Strait Islander families have with contemporary child welfare and juvenile justice departments, and more broadly in Indigenous family and community life.

Almost every Aboriginal and Torres Strait Islander family and community has been affected by child welfare history and the impacts of these experiences are intergenerational – adults who were stolen as children often had their own children removed, and many face unresolved grief and trauma which manifests in high suicide rates, domestic and other violence, depression and mental illness and other social problems (HREOC 1997: Ch 22). This has been compounded by the systematic history of undermining Aboriginal cultures and laws, which bind communities together and provide the foundation for safe and stable communities (Libesman 2017).

Failure to address past wrongs

The impact of colonialist practices on all aspects of Aboriginal life has had tragic consequences, with Indigenous peoples located at the lowest end of the socio-economic ladder in terms of health, education, housing and employment (Productivity Commission 2016). Attempts by successive Australian governments to redress the past, restore rights, and eliminate inequities have been a dismal failure, although the plight of Indigenous peoples in Australia is increasingly reaching the public domain. The moving apology by Prime Minister Kevin Rudd on 13 February 2008 to the stolen generations created a sense of optimism that the past would be redressed and the future restored. However, most Indigenous and non-Indigenous advocates stress that this was just a beginning, and disappointment has been expressed about lack of progress.

There has been another sign of hope yet to be realised domestically. After a lengthy and contested process, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples in September 2007. After being stalled for more than a decade, its passing was a significant recognition of Indigenous rights, despite the fact that Australia, the United States, Canada and New Zealand opposed the contents. In April 2009, the Australian Government formally supported the Declaration, which was seen by Australia's major human rights body, the Australian Human Rights Commission, as a commitment by the federal government to a framework 'which fully respects Indigenous peoples' rights and creates the opportunity for all Australians to be truly equal' (AHRC 2009).

Indigenous social movements and advocacy have a long history in Australia (Burgman 1993). Alongside these have been strong Indigenous organisations which attempt to convince governments to take a holistic approach to change in relation to such issues as land justice, community control, more responsive laws and policies, and recognition of Indigenous wisdom and equality at the negotiating table. As a compounding factor, racism arguably pervades the institutional context that entraps Indigenous peoples within discriminatory and unjust systems. Social workers can draw on Indigenous advocacy, the apology, and the Declaration when advocating for the rights of Indigenous children. They should also be cognisant of the content of other UN instruments to which Australia is a signatory, including the Convention on the Rights of the Child. Unlike other western democracies,

Australia does not have constitutional recognition of human rights, which places a greater emphasis on professionals and the wider community to ensure that human rights are respected.

Many reviews and reports into contemporary child welfare have recognised that a case-based focus, which fails to contextualise the situation of individual Indigenous children within their communities' history and contemporary experiences, will not be successful (Cunneen and Libesman 2002). Researchers have also recognised that community development and the engagement of local Indigenous communities are necessary to implement effective policy and programs (Borg and Paul 2004). However, the implementation of reforms that reflect these aspirations has been slow.

State and Territory child welfare

In the decade after the *Bringing Them Home* Report was released, all States and Territories reviewed their child welfare legislation and specifically considered reform with respect to Aboriginal and Torres Strait Islander children's welfare (Libesman 2014). While Recommendation 43 of the Report, which provides for Indigenous self-determination in child welfare and juvenile justice, has not been implemented, legislative reforms have given greater recognition to Indigenous peoples' rights to participate in decisions affecting their children. These reforms reflect the influence of the *Bringing Them Home* Report and the ongoing advocacy of SNAICC, the peak Indigenous children's organisation, and other Indigenous groups. However, these legislative reforms for the most part remain ignored in practice. Since 2014, for example, there have been child welfare reforms in most Australian jurisdictions that prioritise the early permanent placement of children who have experienced out-of-home care (see Chapter 17). These reforms impact disproportionately on the permanent removal of Indigenous children from their families as, on average, they experience fewer restorations. When restoration does occur, it takes longer for Indigenous children and longer than the timeframes prescribed in the legislation. The risk is that there will be an even greater removal of Indigenous children from their families and cultures, creating a new generation of dislocated children (Libesman 2016).

While legislative reforms provide a structural framework for change, they cannot be effective without parallel social and economic reforms across such spheres as housing, education, and employment. They also require adequate funding and support for Indigenous organisations to develop the skills and capacity to effectively address the complex and deep-set problems that are a legacy of past colonial policies. Many of the reforms discussed below are directed towards greater recognition of Aboriginal and Torres Strait Islander peoples' involvement in decision-making affecting Indigenous children. They more broadly reflect recognition of the importance of culture and Indigenous identity for effective child protection and the wellbeing of Indigenous children.

The 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 (see Table 15.1 for the legislative provisions in each jurisdiction). This Principle provides an order of placement for Indigenous children who need to be placed in out-of-home care. It acknowledges the importance of Indigenous culture and family connection for Indigenous children, and also recognises the destructive impacts that the history of assimilation policies has had on Indigenous peoples.

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 out-of-home care: the first preference is for the child to be placed with the child's extended family or kinship group, the second is for placement within their local community, and the third preference is for placement with another Indigenous family in the area. If this order of preference is not practicable or in the best interests of the child, only then would a child be placed with a non-Indigenous family. There is also a requirement in each jurisdiction that relevant Aboriginal or Torres Strait Islander organisations, and in some jurisdictions the extended family, be consulted about the child's placement (SNAICC 2013a).

Table 15.1. Comparative legislation incorporating Indigenous provisions

State or Territory	Aboriginal and Torres Strait Islander Child Placement Principle	Juvenile justice legislation
NSW	<i>Children and Young Persons (Care and Protection) Act 1998 s 13</i>	<i>Children (Criminal Proceedings) Act 1987</i> <i>Children (Detention Centres) Act 1987</i> <i>Children's Court Act 1987</i> <i>Children (Community Services Orders) Act 1987</i> <i>Children (Protection and Parental Responsibility) Act 1997</i> <i>Young Offenders Act 1997</i>
Qld	<i>Child Protection Act 1999 ss 5C, 6, 6AA, 6AB, 83, Ch 4 Pt 2A</i>	<i>Young Offenders (Interstate Transfer) Act 1987</i> <i>Youth Justice Act 1992</i> <i>Children's Court Act 1992</i>
SA	<i>Children's Protection Act 1993 s 5(5)</i> <i>Children's Protection Regulations 2010 reg 4</i>	<i>Young Offenders Act 1993</i> <i>Youth Court Act 1993</i>
Tas	<i>Children, Young Persons and their Families Act 1997 s 9</i> (the principle is more clearly stated as policy of the Department of Health and Human Services in their Operational Manual)	<i>Youth Justice Act 1997</i>

State or Territory	Aboriginal and Torres Strait Islander Child Placement Principle	Juvenile justice legislation
Vic	<i>Children, Youth and Families Act 2005 ss 13, 14 and 18</i>	<i>Children Youth and Families Act 2005 Sentencing Act 1991</i>
WA	<i>Children and Community Services Act 2004 s 12</i>	<i>Children's Court of Western Australia Act 1988</i> <i>Young Offenders Act 1994</i> <i>Sentencing Act 1995</i>
ACT	<i>Children and Young People Act 2008 s 513</i>	<i>Children and Young People Act 2008</i>
NT	<i>Care and Protection of Children Act 2007 s 12</i>	<i>Youth Justice Act (as in force September 2017)</i>

In each jurisdiction, children placed with non-Indigenous carers should be assisted to keep in contact with their family, language, and culture, and in most jurisdictions the aim is to reunite children who are placed in non-Indigenous care with their Indigenous families and communities (SNAICC 2013a). However, there is no monitoring mechanism to ensure that this happens, and widespread discontent within Indigenous organisations and communities with respect to how it is applied, evidence of failure to apply the principle, and even when it is complied with children are often placed with non-Indigenous kin (Commissioner for Children and Young People 2016; Libesman 2011).

An additional factor which will increase removals of Aboriginal children from their families is permanency planning legislative reforms. After children are permanently placed, the legislation in most jurisdictions cuts support and or monitoring of visits between birth families and permanent carers. For example, in New South Wales, a decision about permanent placement for children under two should be made within six months of an out-of-home care order and for children over two within a year. The priority for permanency placements is restoration to birth families, but if this is not possible the second preference is permanent placement with guardianship orders to kin, and if this is not possible the third preference is adoption for non-Aboriginal children, and parental responsibility to the Minister for Aboriginal Children with the last option being adoption for Aboriginal children. The rights which can be conferred with guardianship orders are very similar to the parental rights that are conferred with adoption. This is why these guardianship orders are often described as a proxy for adoption for Aboriginal children in New South Wales. In the other States and Territories, except Western Australia, similar permanency planning provisions have been enacted. While child welfare departments promote permanency planning with claims of stable forever happy homes, and no one would contest the value of stability, Indigenous organisations and advocacy groups have resoundingly rejected the permanency reforms. The reasons for this rejection include:

- the timeframes are too short to address the complex problems which many families face;
- the lack of resources and services to support families;
- the lack of oversight to ensure children are safe once they are 'permanently' placed;
- the removal of support provided by out-of-home care agencies for permanent carers;
- the removal of support and monitoring of contact with community and families once court-ordered contact lapses (for example, in New South Wales after a year);
- the failure to embrace Aboriginal concepts of permanency, which include stability in broader familial and community relationships (Libesman 2016).

In Victoria, an innovative provision in the *Children, Youth and Families Act 2005* (Vic) is the requirement that the Secretary (that is, the delegated representative of the State welfare department) must prepare and monitor the implementation of a cultural plan for each Aboriginal child who is placed in out-of-home care under a guardianship to the Secretary order (s 176). This is to ensure that each child has the opportunity to develop a strong sense of his or her Indigenous identity. To be effective, cultural care plans should be audited and evaluated to ensure that they are not just tokenistic. However, research into cultural care for Indigenous children in out-of-home care found that placing the responsibility for care plans with the Department in Victoria (the only jurisdiction to mandate them) was inappropriate and that they should be developed by resourced Aboriginal and Torres Strait Islander agencies (Libesman 2011). This would help to ensure that cultural care is much more than ensuring that children attend National Aboriginal and Islander Day or other special events, and that they routinely maintain and develop relationships with their Indigenous families and communities. Encouragingly, in 2016, the Victorian Government allocated a significant sum of money to the Victorian Aboriginal Child Care Agency (VACCA), which included support for cultural care for children in out-of-home care.

A pilot was initiated to trial implementation of s 18 of the *Children, Youth and Families Act 2005* (Vic) in 2013. Section 18 was enacted in 2006, but had never previously given effect. It is an exciting reform with respect to Aboriginal communities' and agencies' aspirations for self-determination as it enables all functions of the Secretary, including guardianship, to be transferred to a designated Indigenous agency. The pilot demonstrated the potential for a distinctive Aboriginal approach to child welfare 'that upholds the primacy of the child's, stability and development, and privileges the importance of cultural safety and family empowerment' (Noughton and Co 2015: 7). The Victorian Government, in partnership with VACCA and other Aboriginal community organisations, has committed to transferring all Aboriginal children on guardianship orders to designated Aboriginal organisations.

The difference between delegation as a form of privatisation and cost cutting, and delegation as a strategy for self-determination is evident when one compares the transfer of Indigenous children in out-of-home care to Indigenous agencies in Victoria and New South Wales. In New South Wales, as part of a broader policy to transfer all children in out-of-home care from government to non-government agencies, a transition of Aboriginal children from departmental to private care over five to 10 years commenced in 2012. All Aboriginal and Torres Strait Islander children in out-of-home care were to be transferred to the care of Aboriginal out-of-home care agencies, with Aboriginal carers, and looked after by Aboriginal caseworkers. This was a significant undertaking, which required effective capacity building and adequate resources. The peak New South Wales Aboriginal children's agency, the Aboriginal Child, Family and Community Care State Secretariat (ABSEC), was given the task of building the capacity of Aboriginal out-of-home care agencies.

However, comparative experience in countries such as Canada has demonstrated the pitfalls that can result from a transfer of responsibility without adequate resourcing. The First Nations Child and Family Caring Society and the Assembly of First Nations, have successfully argued that First Nations child welfare agencies on reserves received 22 per cent less funding than other agencies, and are still advocating to get Canada to implement the Canadian Human Rights Tribunal's order to rectify this discrimination (Blackstock 2016).

In New South Wales, Indigenous agencies are facing many obstacles to greater participation and self-determination through the transfer of Indigenous children to non-government out-of-home care agencies. The Abbott/Turnbull Government took half-a-billion dollars out of the Indigenous services budget in 2015 and this was not restored in the 2016 Turnbull/Morrison budget (Siewert 2016). These are the very services which parents and families rely on to protect their rights such as legal representation in care and protection proceedings, housing to provide a safe home for children and young people, and support for victims of domestic violence. Further obstacles to self-determination and participation are discussed below.

While it is a great achievement to have legislative recognition of the 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, embedded in practice. This was recognised by the UN Committee on the Rights of the Child in 2012 when it called for government measures to fully implement the principle and to intensify cooperation with Indigenous community leaders and communities to find suitable solutions for Indigenous children in need of alternative care within Indigenous families (SNAICC 2013b). Further, out-of-home care is the most extreme stage of child welfare intervention and if the over-representation of Indigenous children in out-of-home care is to be reduced – families need to be supported at a much earlier stage.

Principles of self-determination and participation

The New South Wales and Western Australian child welfare legislation includes a 'self-determination' provision, which provides that:

Aboriginal and Torres Strait Islanders should be allowed to participate in the protection and care of their children with as much self-determination as possible. (*Children and Young Persons (Care and Protection) Act 1998* (NSW) s 11; *Children and Community Services Act 2004* (WA) s 13)

While this provision is a step towards recognising self-determination, it falls far short of the rights provided for in the UN Declaration on the Rights of Indigenous Peoples and other expressions of Indigenous self-determination in international treaties to which Australia is party (Libesman 2007), as well as Recommendation 43 from the *Bringing Them Home* Report (HREOC 1997). Rather than involving Aboriginal and Torres Strait Islander organisations as partners in child protection matters, the New South Wales and Western Australian provisions make their participation subject to ministerial discretion, and so provide no guidance as to the manner or extent of Aboriginal participation.

In Victoria, the *Children, Youth and Families Act 2005* enables delegation of most of the Secretary's functions to the Principal Officer of an Aboriginal agency (s 18). As discussed above, this provides extensive opportunities for Indigenous agencies to be involved in all spheres of Indigenous children's welfare and wellbeing, up to and including guardianship. These are delegated powers, meaning that the involvement of Aboriginal organisations is not guaranteed but dependent on the Secretary exercising his or her discretion in this regard, unlike in New South Wales, the transfer of responsibilities in Victoria has been based on a relationship of mutual respect. The Victorian process, which is driven by Aboriginal agencies, has to date been well resourced and has enabled culturally safe and culturally appropriate casework practice (VACCA 2017). This contrasts with the situation in New South Wales where policy is being driven by the Tune report – a secret Cabinet in Confidence report which Aboriginal agencies were not consulted about and cannot read. In addition, the larger portion of New South Wales funding for early intervention has been allocated to US programs which were selected by the Minister with no consultation with Aboriginal organisations, and contracts for service delivery incentivise early permanent placement of children which risks increasing separation of more Indigenous children from their families rather than working with families to achieve restoration (Libesman 2018). The lack of adequate participation, and ambiguity between policies of self-determination and privatisation of Indigenous out-of-home care services experienced in New South Wales are replicated in varied ways nationally.

In all States and Territories, child welfare legislation requires that Indigenous organisations, and in some jurisdictions also family, must participate in all significant decisions which involve Aboriginal children (see, for example, s 13 of the *Children, Youth and Families Act 2005* (Vic)). Further, in some jurisdictions (such as Queensland) they must be consulted about

all other decisions (see, for example, *Child Protection Act 1999* (Qld) s 6(1)). While the reforms of State and Territory child welfare legislation incorporate Indigenous input into decisions about their children, with the partial exception of Victoria and Queensland, they do not develop Indigenous pathways for Indigenous peoples to participate in the care and protection of their children. Rather, they provide an avenue for Indigenous participation in the mainstream departmental process. These reforms do, however, indicate some recognition that improving the wellbeing of Indigenous children requires inclusion of Indigenous peoples and understandings in all levels of decision-making, policy formation and service provision. For this inclusion to effectively recognise Indigenous peoples not only must it incorporate the participation of Aboriginal organisations in non-Indigenous institutions, it also needs to make juridical space for recognition of Indigenous peoples, in their own language and in ways that incorporate their values and understandings (Blackstock 2011). The cycle of reviews that have shone a light on ongoing failing have, however, largely failed to change the growing overrepresentation of Aboriginal and Torres Strait Islander children at the most severe end of child welfare intervention: out-of-home care (Commission for Children and Young People 2016; Senate Community Affairs Reference Committee 2015, Queensland Child Protection Commission of Inquiry 2013).

The Northern Territory Intervention

The 10th anniversary of the Northern Territory Intervention was marked in 2017. The 'Intervention', as it is commonly named, followed considerable publicity about the prevalence of sexual assault of Aboriginal children in communities, particularly in the Northern Territory (ABC 2006), reflecting concerns raised by Aboriginal people over a long period of time (McGlade 2012; Aboriginal Child Sexual Assault Taskforce 2006; Atkinson 2002; Robertson 2000). The release of the *Little Children Are Sacred* Report in 2007, which examined child sexual abuse in the Northern Territory, catalysed the then federal government's Northern Territory Emergency Response (Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007), but while there was consensus that urgent action was needed, the response was seen by many as a further imposition upon Indigenous communities which failed to reflect a human rights approach or the recommendations of the *Little Children Are Sacred* Report. In addition, the inclusion of measures that were reminiscent of earlier protection and assimilation periods exacerbated the concerns that many people had about the Intervention. These included: the initial plans to mandate compulsory medical checks for children (which was later dropped); the quarantining and control of Indigenous families' money; the engagement of government managers with very broad powers over community affairs; the acquisition of Aboriginal land through compulsory leases to the Commonwealth Government for at least five years; the exemption of the Intervention from the *Racial Discrimination Act 1975* (Cth); and, more broadly, concerns that some of the Intervention measures could make children less, rather than more, safe.

The Intervention has also been criticised for failing to address the need for cultural, social and economic security, which underlies a breakdown of law and social norms within some Indigenous communities. It also failed to provide a framework for the future wellbeing of communities and reinforced non-Aboriginal domination and the loss of community control, conflicting with the preferred trend towards community development and cultural recognition in reforms to child welfare legislation (Altman 2007; Libesman 2014). In 2011, the UN Human Rights Commissioner Navi Pillay said that in her discussions with Aboriginal people she could sense the deep hurt and pain they had suffered because of policies imposed on them (cited in *The Sydney Morning Herald* 2011). The UN Human Rights Committee in its 2009 Concluding Observations of Australia's performance under the International Covenant on Civil and Political Rights criticised the suspension of the *Racial Discrimination Act* and called for a redesign of the Intervention in consultation with Indigenous peoples and with due regard for international human right obligations (Human Rights Law Centre 2009; Anaya 2010). The Intervention was nonetheless extended in 2012 for another decade in a program now called Stronger Futures.

Stronger Futures

As with the Intervention that preceded it, it has been argued that Stronger Futures was enacted after consultations that have been widely criticised as rushed and inadequate (Nicholson et al 2012). Stringent measures have been put in place, including the restriction of social security payments when children are not regularly attending school, reinstatement of prison sentences for the possession of alcohol on Aboriginal lands, and bans on the judiciary considering Aboriginal customary law and cultural practices in bail and sentencing decisions (Australians for Native Title and Reconciliation 2012). Aboriginal leaders and elders across the Northern Territory have opposed the legislation and further government control over their affairs; furthermore, 450 submissions received by government from a range of organisations almost unanimously rejected the proposed legislation (Stand for Freedom 2012). The provisions are contrary to international law, particularly the right to self-determination expressed in the International Covenant on Civil and Political Rights and the provisions of the Declaration on the Rights of Indigenous Peoples, which requires states to consult and cooperate with Indigenous peoples before adopting measures that affect them. The Committee on the Rights of the Child in its 2012 report on Australia, recommended that Australia thoroughly review the Intervention measures. In particular, it called for a review of student enrolment and attendance measures, and a strengthening of effective and meaningful participation by Aboriginal and Torres Strait Islander peoples in policy-making and implementation (Committee on the Rights of the Child 2012). The Australian Human Rights Commission, although welcoming the intent of the government to address a critical situation, also stressed that the ongoing engagement of the people

affected by the measures is required in order to achieve Aboriginal people's social, cultural and economic goals (AHRC 2012).

The most comprehensive assessment of the Intervention/Stronger Futures was prepared by the Castan Centre for Human Rights at Monash University. It evaluated impacts in five areas and awarded the Intervention/Stronger Futures a fail on four of the five measures: employment and economic development (3/10); education 5/10; health and life expectancy (4/10); safer communities (4/10); and lowering incarceration levels 0/10 (Castan Centre for Human Rights 2016). On the 10th anniversary of the Intervention, advocates spoke out about 'the litany of failures and stagnating socio-economic conditions, despite the expenditure of over a billion dollars on the Intervention' (Brull 2017).

Criminal justice

The violation of Indigenous rights was encapsulated in the 2008 non-government organisation submission to the UN Committee on Economic Social and Cultural Rights (National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre 2008). Specifically, the submission stressed that many Indigenous Australians confront serious human rights abuses in the justice system, arising in particular from the disproportionate impact of some criminal laws and the incidence and impacts of incarceration. The issues faced by Indigenous peoples in their interaction with the justice system are further compounded by limited access to legal and interpreting services, both of which are often necessary to ensure fair judicial processes. Concerns about mandatory sentencing and recommendations to take measures to repeal these laws were reiterated by the Committee on the Rights of the Child in its 2012 concluding comments and recommendations with respect to Australia (Committee on the Rights of the Child 2012: para 84).

The 1991 *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) was a landmark investigation that provides insights into the past and present failures of the justice system (Royal Commission into Aboriginal Deaths in Custody 1991; Briskman 2007). The RCIADIC investigated the deaths of 99 Indigenous people who had died between 1980–99 in the custody of police, prisons or juvenile justice facilities across Australia, and highlighted the significance of disadvantage factors. Most of those who died were young, unemployed and under-educated, and had experienced separation from their natural families as children (McDonald 1999; Havemann 1999). The RCIADIC report revealed that the most frequent cause of being in custody was the minor offence of public drunkenness, and that underlying social, cultural, historical and legal problems underpinned the Aboriginal disadvantage that contributed to their entry into the criminal justice system. The case studies of Mr Ward and Ms Dhu highlight the tragedy of recurring deaths in custody:

Ms Dhu died in August 2014 while in the custody of police for an unpaid fine. Camera footage showed her being dragged along the floor of her cell by police and taken to the hospital for the third time in the 45 hours of her incarceration. Police believed she was faking her illness but she was desperately ill and died from septicaemia and pneumonia (Carey 2016).

Mr Ward, a respected Aboriginal elder, died from heatstroke in the back of a prison van, which lacked air conditioning. During the long drive from a remote Western Australian community (Laverton) to face court in Kalgoorlie, four hours away, on a drink driving charge, the private contractors assigned to the transportation did not check on him. The State Coroner, Alistair Hope, found that Mr Ward suffered a terrible and avoidable death. Contributing factors were refusal of bail, the decision to transport him in the rear pod of the van and lack of care during the journey. Although the outside temperature exceeded 40 degrees centigrade, he was not checked on (Hunyor 2009).

In both the youth justice (Chapter 21) and the adult correctional systems (Chapter 7), Indigenous groups are over-represented. This, it has been suggested, is consistent with a prevailing view that the problems that beset Indigenous families are their fault alone and not the result of the impact of colonisation and dispossession combined with ongoing exclusion and discrimination (Briskman 2014). In the juvenile justice system, over-representation increases with the severity of the intervention – with the highest over-representation at the point of police custody or committal to a juvenile institution (Cunneen et al 2015). On an average day during 2015–16 there were 787 young people aged 10–17 in detention in Australia; of these, 59.6 per cent (469) were Indigenous young people (Behrendt et al 2018: Ch 4). Indigenous adults also have higher levels of contact with the criminal justice system than non-Indigenous adults, and at an earlier age (Putt, Payne and Milner 2005; Cunneen et al 2015).

The incarceration of Indigenous juveniles together with the removal of Indigenous children into out-of-home care is referred to by advocates as the 'new stolen generations'. Cunneen and Libesman (2000) echo concerns raised in the *Bringing Them Home* Report about the harsher outcomes in children's courts for Indigenous youth than for their non-Indigenous counterparts, together with concerns in relation to Aboriginal/police relations, police powers and over-policing, racism, arrests for public order offences, not receiving cautioning options and the refusal of bail. These concerns have not abated. Western Australia has come in for the severest of criticism for what is known as the 'three strikes and you're in' provision that requires mandatory incarceration on a third conviction for home burglaries (Neill 2002; *Criminal Code* (WA) s 401). The Northern Territory repealed similar legislation for minor property offences in 2001 following the suicide in 2000 of a 15-year-old boy in a Darwin detention facility (National Association of Community Legal Centres, Human Rights Law Resource Centre and Kingsford Legal Centre 2008). Mandatory sentencing has again entered the public domain, with the

Northern Territory now set to review its laws for violent offences (Aikman and Box 2017).

In 2016, the juvenile justice system attracted considerable attention in relation to the Don Dale juvenile justice facility in the Northern Territory when an ABC television documentary accessed film showing inhumane treatment to which the young people were subjected. The image of 17-year-old Dylan Voller, hooded, handcuffed and tied to a mechanical chair, is reminiscent of imagery of torture at notorious military camps such as Guantanamo Bay. The program also aired a catalogue of disturbing footage, including young people being stripped naked, thrown into solitary confinement cells for extended periods and choking and vomiting on tear gas while locked in confined cells. The adverse publicity and pressure on the federal government led to the convening of a Royal Commission (see ABC 2016). At the same time, Queensland is also reviewing its juvenile justice system (Independent Review of Youth Detention 2017).

Conclusion: Moving forward

The question remains as to how social workers can practise in ways that acknowledge the framework of the law and related policies, while adhering to core social work values. In answering this, the profession has been slow to propose answers, even though social workers witness the impact of the laws and policies on Indigenous peoples and communities on a daily basis. It is recommended that social workers familiarise themselves with the cultural context of the people with whom they work and consult with Indigenous communities on an ongoing basis, rather than uncritically implement organisational policies. Although most now understand the past in relation to the stolen generations, few social work voices have critiqued the criminal justice and youth justice systems from Indigenous perspectives, or attempted to promote alternative solutions that involve working with Indigenous groups towards negotiated, rather than imposed, solutions.

Reforms of both the child welfare and justice systems are needed, including a reduction in the numbers of Indigenous children in out-of-home care, and more culturally appropriate solutions to keep young people out of prisons. However, reforms also need to occur in the context of the 'big picture' of land, sovereignty, and cultural recognition, as well as the 'practical reconciliation' areas of education, health, housing and employment so often favoured by governments. This inevitably requires social workers to stand back from their everyday practice to examine the totality of Indigenous aspirations. The law does not stand alone as a measure for the redress of harms and wrongs; social workers have a part to play in advocating for legal and policy change while they remain a critical point of intervention in the lives of Indigenous peoples. Mendes (2013), in conducting an overview of the Australian Association of Social Workers (AASW) *National Bulletin* over a two-year period, suggests a growing and more influential engagement of the AASW with social policy debates. One positive activity, he notes, is the

formation of an AASW Aboriginal and Torres Strait Islander Working Group to promote Indigenous voices and perspectives in the AASW.

Social workers should refer to the most recent formulation of the AASW *Code of Ethics* (2010) which provides some guidance for social workers in both recognising disadvantage and for engaging in appropriate practice. By adopting a human rights approach, with the right to participation as a primary right that requires recognition prior to effective recognition of other rights, a framework for practice and policy can develop that can help to respond to colonial practices. As noted by Bennett (2013), there are numerous reports that speak of the legacy of colonisation and social workers need to find a way to ensure that they do not replicate colonial processes in their practice and work towards robust alternatives that respond to Indigenous needs, rights and aspirations.

Key learning points

- Aboriginal and Torres Strait Islander peoples' contemporary over-representation in child welfare, juvenile justice and criminal justice systems is founded in past colonial laws, policies and practices.
- Effective contemporary responses to legal and social problems need to be multifaceted and effectively include Indigenous peoples in all aspects of decision-making.
- A human rights approach to social work, based on international human rights principles, requires recognition of Aboriginal and Torres Strait Islander peoples' participatory rights.
- In addition to recognition of Indigenous peoples' cultural rights, their systemic disadvantage and marginalisation from the services and opportunities of mainstream society need to be addressed.
- A holistic response requires Indigenous legal rights and social work practice rather than incorporating Indigenous peoples into western legal and social work frameworks.

Questions for consideration

1. How do you explain the continuing over-representation of Indigenous peoples in the child welfare and justice systems?
2. What part can social workers play in ensuring that justice prevails in the legal and service systems?
3. Are there laws existing in your State or Territory that you believe create disadvantage? What are these laws and what form does the disadvantage take? What role can social workers take in advocating for change?
4. How might a human rights approach facilitate understanding and action by social workers?

Additional reading

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- Several journals are of particular use – including the *Indigenous Law Bulletin* and the *Australian Indigenous Law Review* (previously the *Australian Indigenous Law Reporter*), both published by the Indigenous Law Centre, UNSW, Sydney <<http://www.austlii.edu.au/>>.

Websites

No claim is made as to the accuracy or authenticity of the content of the sites suggested in this chapter. Site addresses change – if the address is no longer accurate, search using keywords or the title of the organisation concerned.

Australian Human Rights Commission <<https://www.humanrights.gov.au/>>

Grandmothers Against Removals <<http://stopstolengenerations.com.au>>

Secretariat of National Aboriginal and Islander Child Care <<http://www.snaicc.org.au/>>

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Notes

- 1 The Indigenous peoples of Australia are Aboriginal and Torres Strait Islander. There are numerous Indigenous communities and language groups, each of which has a distinct name and culture. Although the term *Indigenous* is used respectfully in this chapter in accordance with current practice, we also refer to Aboriginal peoples when referring to jurisdictions which have predominantly Aboriginal communities.

Chapter 16

Mental health law and its implications for social work practice

Lisa Brophy, Bill Healy and Chris Maylea

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Chapter summary

This chapter considers the complex interplay that exists between mental health as a field of practice, the law, and social work values and ethics. The chapter provides an overview of mental health legislation and its implementation in Australia and illustrates the policy, ethical and practice implications of this through a series of case examples describing the circumstances of three individuals who are subject to compulsory treatment orders. Guidance is provided to social workers who are committed to taking a recovery-oriented approach to their work with clients and their families, friends and supporters, despite the challenges of working in a context where many clients experience coercion and involuntary intervention. The chapter also updates social workers regarding the expectations of the United Nations Convention on the Rights of Persons with Disability (the CRPD). The CRPD