



**New South Wales
Law Reform Commission**

Research Report

7

**THE ABORIGINAL
CHILD PLACEMENT PRINCIPLE**

**This Research Report was prepared by Ms Jennifer Lock.
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acknowledge the funding provided by
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Preface

During 1994, the International Year of the Family (IYF), the New South Wales Law Reform Commission received a grant from the IYF Secretariat in New South Wales to conduct research relevant to families in Australia. The Commission conducted research into two issues: intercountry adoption and the Aboriginal Child Placement Principle.

The lack of empirical data in relation to both of these issues was identified by the Commission after it commenced a comprehensive review of the *Adoption of Children Act 1965* (NSW) in December 1992. This Research Report is published contemporaneously with the Commission's final report, *Review of the Adoption of Children Act 1965* (NSW) (NSWLRC Report 81, 1997).

The Research Report evaluates the application of the Aboriginal Child Placement Principle ("the Principle") in each State and Territory in Australia. The aim of the research was to assess the effectiveness of the Principle in placing Aboriginal children with Aboriginal people for fostering and adoption.

The Research Report examines child welfare and adoption legislation, and presents data from government departments responsible for child welfare, in each State and Territory. It also examines all expressions of the Principle set out in departmental policy documents. Information was also sought from Aboriginal and Torres Strait Islander child care agencies throughout Australia. The Research Report provides a statistical picture of the placement of Aboriginal and Torres Strait Islander children in Australia. However, this picture is limited by reason of widespread failure to record data concerning Aboriginal and Torres Strait Islander child welfare in many of the responsible government departments throughout Australia.

All States and Territories maintain that the Principle is applied, but the figures obtained do not conclusively substantiate this. The research revealed that Aboriginal children are still being placed, disproportionately, with non-Aboriginal people for fostering and adoption. However, including the Principle in legislation rather than an administrative policy seems to reduce the numbers of Aboriginal children being adopted. The effect of including the Principle in legislation relating to the fostering of children is harder to gauge from the statistics provided. The Research Report also examines factors which prevent the effective operation of the Principle.

The value of this Research Report is first, as a source of information in an area where this has been lacking, and second, as an integral part of the research process, aiding the Commission in reaching its final recommendations in the review of *Adoption of Children Act 1965* (NSW). The Commission's Report of this review refers to material contained in this Research Report where that material has been relevant to the formulation of particular recommendations.

This Research Report is based on information received up to March 1997. Since that time the Human Rights and Equal Opportunity Commission has reported on the results of the inquiry into the stolen generation. The *Report on the Inquiry into the Stolen Generation* was released on 26 May 1997.

This Research Report was prepared for the Commission by Jennifer Lock. Additional research assistance was provided by Rachel Way, Liz Leung, Lan Vy Tu, Miranda Biven and Hilton Nader. Adrienne Bailey, Joseph Waugh and Catherine Gray provided comments on the final draft of this Research Report. The Commission gratefully acknowledges the financial assistance from the IYF Secretariat which enabled this research to be undertaken. It would not have been possible without the participation and commitment of the Aboriginal Children's Services in New South Wales.

Peter Hennessy
Executive Director

Acknowledgement

This Report was prepared with the valuable input and assistance of Aboriginal people and in particular Aboriginal non-government organisations. Some of these individuals and organisations expressed concern that in the past, their expertise has been drawn on by government agencies and departments, and used to develop policies and documents which have not necessarily served the interests of the Aboriginal community. They objected to the fact that departments have been funded to implement these policies while many Aboriginal organisations have been under-resourced.

In some cases also, Aboriginal people have had difficulty in gaining access to information about their own families held by government departments, such as case histories of Aboriginal children in care. Concern was also expressed about the information held by government departments about Aboriginal people. Many Aboriginal people resent the control of such information by government departments, which they regard as "belonging" to Aboriginal people.

The valuable contributions and comments of the following people are gratefully acknowledged:

| | |
|----------------------------|--|
| Lyn Hookey | Aboriginal Children's Service (Redfern) |
| Isabell Coe | Aboriginal Children's Service (Redfern) |
| Peter Haroa | Aboriginal Children's Service (Redfern) |
| Dale McLeod Rodney Ella | Koolyangarra Fostering Agency Senior Adviser (Aboriginal) Strategic Policy and Planning Directorate Department of Community Services |
| Paul Behrendt | Aboriginal Research and Resource Unit, University of NSW |
| Nigel D'Souza | Secretariat of National Aboriginal and Islander Child Care |
| Brian Butler | Secretariat of National Aboriginal and Islander Child Care |
| Francis Tapim | Magani Malu Kes (Torres Strait Islander organisation) Townsville |

The Hon Justice Richard Chisholm
Professor Garth Nettheim

Family Court of Australia
Faculty of Law, University of NSW

This is by no means an exhaustive list and thanks are also due to the many other people who contributed to this Report.

Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the then Attorney General, the Honourable J P Hannaford MLC, referred, by letter received on 1 December 1992, the following matter to the Law Reform Commission.

The Commission is to review the current scope and operation of the *Adoption of Children Act 1965* and in particular to consider the following:

- (i) The criteria for the selection of adoptive parents, regulation of standards of practice and recognition of adoption agencies and support groups;
- (ii) The relationship between adoption and other forms of permanent care;
- (iii) Intra-family adoption
- (iv) the relevance of Aboriginal customary law, and ethnic and racial heritage;
- (vi) intercountry adoption and overseas orders of adoption having special regard to any international treaties or conventions to which Australia is a party; and
- (vii) any related matter.

Abbreviations

| | |
|---------------------------|---|
| The Principle | Aboriginal Child Placement Principle |
| ACS | Aboriginal Children's Service |
| ACT | Australian Capital Territory |
| AICCA | Aboriginal and Islander Child Care Agency |
| ALRC | Australian Law Reform Commission |
| ATSI | Aboriginal and Torres Strait Islander ¹ |
| ATSIC | Aboriginal and Torres Strait Islander Commission |
| Cth | Commonwealth |
| the Declaration | The Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally |
| Departmental Policy (Tas) | Tasmania - Department of Community and Health Services <i>Departmental Policy</i> |
| DOCS | Department of Community Services (NSW) |
| the Draft Declaration | The Draft Declaration on the Rights of Indigenous Peoples |
| the Draft Policy (NSW) | NSW - Department of Community Services <i>Draft Policy Statement: Placement of Aboriginal Children for Adoption</i> (8 May 1987) |
| HREOC | Human Rights and Equal Opportunity Commission |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICWA | <i>Indian Child Welfare Act 1978</i> (US) |
| the ILO Convention | International Labour Organisation Convention 169 - Convention Concerning Indigenous and Tribal Peoples in Independent Countries |
| NGO | non-government organisation |
| NSW | New South Wales |

1. It is recognised that ATSI is not a preferred term for many Aboriginal and Torres Strait Islander people. Wherever possible the full term has been used. However, this is difficult in tables and the term ATSI is used.

| | |
|----------------------------------|--|
| NSWLRC NSWLRC DP 34 | New South Wales Law Reform Commission NSW Law Reform Commission <i>Review of the Adoption of Children Act 1965 (NSW)</i> (Discussion Paper 34, 1994) |
| NSWLRC Report 81 | NSW Law Reform Commission <i>Review of the Adoption of Children Act 1965 (NSW)</i> (Report 81, 1997) |
| NT the Policy Statement (Qld) | Northern Territory Queensland - Department of Families, Youth and Community Care <i>Policy Statement in Relation to Aboriginal and Torres Strait Islander Fostering and Adoption</i> |
| Qld RCIADIC | Queensland Royal Commission into Aboriginal Deaths in Custody |
| the Substitute Care Policy (WA) | Western Australia - Department for Family and Children's Services <i>Substitute Care Policy in Relation to Aboriginal Child Placement (1984)</i> |
| SA SAACCA SNAICC | South Australia South Australian Aboriginal Child Care Agency Secretariat of National Aboriginal and Islander Child Care |
| Tas TCA | Tasmania Temporary Care Arrangement |
| UNCROC | United Nations Convention on the Rights of the Child |
| Usher Report | Ministerial Review Committee <i>Review of Substitute Care Services in NSW</i> (Report of the Committee appointed by NSW Minister for Youth and Community Services, Sydney, January 1992) |
| VACCA Vic WA | Victorian Aboriginal Child Care Agency Victoria Western Australia |
| Working Party | Working Party of State Social Welfare Administrators |

1.

Introduction

- Background to the report
- Methodology
- Synopsis of the report
- Application of the principle to Torres Strait Islander children

1.1 The Aboriginal Child Placement Principle ("the Principle") essentially outlines a preference for the placement of Aboriginal children with Aboriginal people when they are placed outside their families. The order of preference is generally that an Aboriginal child be placed:

- within the child's extended family; or, if this is not possible,
- within the child's Aboriginal community; and, failing that,
- with other Aboriginal people.

1.2 This Report examines the Principle and its effectiveness in placing Aboriginal children with Aboriginal people for fostering and adoption. Factors which prevent the effective operation of the Principle are also examined.

1.3 It is not the intention of this Report to make specific recommendations. Rather it seeks to represent the views which have been expressed in the preparation of this Report and emphasise the importance of the involvement of Aboriginal people in the operation of the Principle.

1.4 It is argued that the notion of having Aboriginal people responsible for services for Aboriginal children is important also in the juvenile justice system.¹ Aboriginal youth comprise around 25% of those held in NSW detention centres, although Aboriginal youth account for only around 1.9% of the general youth population.² This Report does not deal with the placement of Aboriginal children through the juvenile justice system.

1. G Luke and C Cunneen *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System* (Juvenile Justice Council of NSW, January 1995) at vii.

2. Luke and Cunneen at iii.

BACKGROUND TO THE REPORT

1.5 The need for an inquiry into the Principle was identified in the course of the NSW Law Reform Commission's work on adoption legislation for the review of the *Adoption of Children Act 1965* (NSW)³ ("NSWLRC Report 81"). The *Adoption of Children Act 1965* (NSW) does not currently refer to the Principle. The Commission decided to review the effectiveness of the Principle in other pieces of legislation in Australia. This project was made possible by funding provided by the NSW Government during the International Year of the Family 1994.

METHODOLOGY

1.6 The focus of this Report is on the operation of the Principle in NSW. To gain a better understanding of the operation of the Principle generally, information and statistics were collected from the departments responsible for child welfare in each State and Territory. Much of the information collected relates to *Aboriginal* children. However, the Principle as it relates specifically to *Torres Strait Islander* children is also discussed.⁴

Legislation and policy

1.7 Child welfare and adoption legislation of each State and Territory of Australia which contains a form of the Principle was studied. All expressions of the Principle set out in departmental policy documents were also examined. These legislative and policy provisions relevant to each State and Territory are contained in

-
3. NSW Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (Issues Paper 9, 1993); NSW Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (Discussion Paper 34, 1994); NSW Law Reform Commission *Review of the Adoption of Children Act 1965* (NSW) (Report 81, 1997).
 4. See paras 8.37-8.44.

Appendices B - I. The main non-government organisations dealing with child welfare in NSW, namely Barnardos Australia, Centacare and Care Force, were also approached. Their policies relating to the adoption and fostering of Aboriginal children are contained in Appendix A.

1.8 The policy documents and statements are current as at June 1996. The legislative provisions are current as at December 1996.

Statistics regarding Aboriginal and Torres Strait Islander children

1.9 The relevant government department in every State and Territory was contacted requesting data relating to the placement of Aboriginal and Torres Strait Islander children into adoptive and foster placements over the last five years. The most conclusive result apparent from this exercise is that there is a widespread failure to record data concerning Aboriginal and Torres Strait Islander child welfare in the relevant government departments throughout Australia.

1.10 While all the States and Territories supplied information regarding the *adoption* of Aboriginal and Torres Strait Islander children, the response was less comprehensive regarding *fostering*. Tasmania, South Australia and Victoria were unable to report how many of the Aboriginal and Torres Strait Islander children in substitute care were placed with Aboriginal and Torres Strait Islander people. This makes it difficult to draw any firm conclusions about the implementation of the Principle with respect to fostering of Aboriginal children in Australia.

1.11 As has been noted by other researchers, it is difficult to obtain reliable national data on the number of Aboriginal children who are in substitute care.⁵ The problems of data collection

5. H Bath "Out-of-Home Care in Australia: A State by State Comparison" (1994) 19(4) *Children Australia* 4 at 4; G Angus and L

regarding child welfare in Australia are compounded by different legislation in each State and Territory, the different methods used by government departments in collecting and reporting the numbers of children in care and the involvement of an extensive and varied non-government sector.⁶ It is therefore not surprising that even official government statistics can be misleading.⁷ This has made statistical analysis of the effectiveness of the Principle difficult. As a result much of the analysis of the Principle in this Report is descriptive.

1.12 The lack of data also raises questions about the accountability of these departments in relation to their implementation of the Principle. One researcher has drawn parallels between the failure to keep accurate records and the "assimilation" policies of the past,⁸ when it was maintained that keeping separate statistics for Aboriginal and Torres Strait Islander children amounted to "discrimination":

The failure to keep accurate records on the exact number of Aboriginal children adopted throughout Australia can be seen as a reflection of the assimilation policies of the 1950s and 1960s. These policies assumed that the "Aboriginal problem"

Golley Children under Care and Protection Orders Australia 1993-94 (Australian Institute of Health and Welfare, Child Welfare Series No 12, AGPS, Canberra, 1995) at 2.

6. S Bocher and J Ward "Changing Patterns of Residential Care: A Report on the 1988 CIRI Survey of Children in Residential Care" (1991) 38 *International Journal of Disability, Development and Education* 151 at 152.
7. The Standing Committee of Social Welfare Administrators confirms that in some States the number of children in substitute care may be understated, and in other States they may be overstated: Standing Committee of Social Welfare Administrators, *WELSTAT: Children Under Care and Protection Orders, National Data Collection, 1989-1990* (1992).
8. Described in Chapter 2.

would be solved if Aborigines adopted the values and ways of the allegedly "superior white society".⁹

1.13 Some statistics regarding the placement of Aboriginal and Torres Strait Islander children were also obtained from certain non-Aboriginal non-government organisations involved in the fostering and adoption of children in NSW, namely Barnardos Australia, Centacare and Care Force.¹⁰ These statistics suffer similar deficiencies to those of the government departments due to differing standards in record-keeping in the different organisations.

Consultation with Aboriginal people

1.14 Consultation with Aboriginal and Torres Strait Islander people is integral to an examination of the operation of the Principle. The Principle was discussed with workers in each Aboriginal and Islander Child Care Agency in NSW, namely:

- Aboriginal Children's Service (Redfern)
- Aboriginal Children's Service (Wagga Wagga)
- Aboriginal Children's Service (St Marys)
- Aboriginal Children's Service (Cowra)
- Hunter Aboriginal Children's Service
- Koolyangarra Fostering Agency
- Great Lakes - Manning Aboriginal Children's Service
- Nunya Aboriginal Fostering Agency
- Coffs Harbour Aboriginal Family Care Centre

1.15 Valuable ongoing input into this Report came from Aboriginal Children's Services (Redfern) and from the Secretariat of National Aboriginal and Islander Child Care (SNAICC)

9. G Atkinson "Aboriginal Adoption: A Re-Evaluation" in R Snow (ed) *Understanding Adoption: A Practical Guide* (Fontana Books, Sydney, 1983) 156 at 156.

10. See paras 4.20-4.31 and 4.46-4.48.

representing Aboriginal and Islander Child Care Agencies throughout Australia. Issues arising from the Principle were discussed with Aboriginal workers in the NSW Department of Community Services in meetings with the Department's Aboriginal Reference Group.¹¹

1.16 Due to limited resources, preparation of this Report has not included consultation at a "grass-roots" level with Aboriginal communities about the Principle. Views of people in Aboriginal communities have been represented by the Aboriginal organisations mentioned above. However, "grass-roots" consultation with Aboriginal communities is important in the ongoing development and application of the Principle.

SYNOPSIS OF THE REPORT

1.17 *Chapter 2* provides a historical account of child welfare policies in NSW and their impact on Aboriginal children. It also contains a brief overview of the current child welfare system in NSW, and its impact on Aboriginal and Torres Strait Islander children.

1.18 *Chapter 3* gives an account of the evolution of the Principle from the 1970s to its operation today, referring to the issue of Federal or State Government responsibility and the involvement of Aboriginal organisations in the evolution of the Principle. This Chapter also contains a section on the principles applied in custody disputes involving parents and at times, other relatives, of Aboriginal children.

11. Aboriginal staff of the Department of Community Services throughout NSW elect representatives to the Aboriginal Reference Group. The Group's role is to provide advice to the department on key issues relating to and impacting on Aboriginal people. Staff at the Department's Gullama Aboriginal Services Centre also commented on the operation of the Principle.

1.19 *Chapter 4* documents the Principle in legislation and administrative policy in NSW concerning the fostering and adoption of Aboriginal and Torres Strait Islander children. There is also an account, with statistical information, of how the Principle is followed in practice, as well as a description of the role of non-government organisations in the placement of Aboriginal and Torres Strait Islander children in NSW.

1.20 *Chapter 5* documents the Principle in legislation and administrative policy in each State and Territory in Australia other than NSW. Statistics provided by the relevant government department which indicate the level of implementation of the Principle are included.

1.21 *Chapter 6* sets out Australia's obligations regarding Aboriginal and Torres Strait Islander children under international instruments such as the UN Convention on the Rights of the Child. It also discusses principles in international law, such as the "best interests of the child" and "self-determination" in relation to the Principle.

1.22 *Chapter 7* looks at the Principle in practice and whether it is operating effectively. Factors which prevent the Principle from being effectively implemented are identified.

1.23 *Chapter 8* identifies factors to be considered in the formulation of the Principle, such as consultation with Aboriginal people. Important components of the Principle as it relates to adoption and fostering are suggested. The issue of whether the Principle should be implemented as legislation or policy is discussed. Broader considerations, such as resourcing, which affect the operation of the Principle in practice are referred to. The Chapter also deals with the application of the Principle to Torres Strait Islander children.

1.24 Appendix A contains the policy of the non-government organisations relating to Aboriginal children. Expressions of the Principle found in legislation or in the policy documents of

government departments are found in the Appendices B - I. Statistics on the number of Aboriginal and Torres Strait Islander children adopted in Australia from 1990/91 - 1994/95 are contained in Appendix J. Articles in international treaties and declarations which are relevant to Aboriginal and Torres Strait Islander child welfare are found in Appendix K.

APPLICATION OF THE PRINCIPLE TO TORRES STRAIT ISLANDER CHILDREN

1.25 Currently, the Principle is known in both legislation and policy as the "Aboriginal Child Placement Principle". While there is only express reference to Torres Strait Islanders in one version of the Principle,¹² in practice the Principle is also generally applied to Torres Strait Islanders. Although Torres Strait Islanders may benefit from the implied application of the Principle, the failure to refer specifically to Torres Strait Islanders is regarded by many Torres Strait Islanders as a failure to give express recognition of the importance of the Principle to the Torres Strait Islander community.¹³

1.26 With this in mind, the usual formula is the "*Aboriginal* Child Placement Principle" and this formula is used in the discussion in Chapters 3, 4, 5, 6 and 7. Due to the information provided to this Report, the discussion in these Chapters refers mainly to Aboriginal children and Aboriginal communities. However, much of the discussion is also of relevance to the placement of Torres Strait Islander children because of common issues arising in relation to Aboriginal and Torres Strait Islander communities.

1.27 Recognising, however, that Aboriginal and Torres Strait Islander communities are generally separate and distinct, Chapter 2 contains a section which describes Torres Strait Islander

12. *Children's Protection Act 1993 (SA)*.

13. Apparent from discussions with Torres Strait Islander people in the preparation of this Report.

The Aboriginal Child Placement Principle

customary child care arrangements. Specific issues which arise when the Principle is applied to Torres Strait Islander children are discussed in a separate section in Chapter 8.

2.

Aboriginal and Torres Strait Islander children and the child welfare system in NSW

- A history of Aboriginal child welfare in NSW
- Impact of past policies
- The present child welfare system in NSW
- Aboriginal children
- Torres Strait Islander children
- Over-representation of Aboriginal and Torres Strait Islander children in the NSW child welfare system

2.1 This Chapter covers four broad areas. First a history of Aboriginal child welfare policies in NSW and the impact of these policies on Aboriginal children is given. Secondly there is an overview of the present child welfare system in NSW. Thirdly, Aboriginal and Torres Strait Islander approaches to child-rearing are described. The fourth section deals with the over-representation of Aboriginal and Torres Strait Islander children in the child welfare system in NSW.

A HISTORY OF ABORIGINAL CHILD WELFARE IN NSW

Colonial period: 1788 - 1883

2.2 It is impossible to examine any policies of Aboriginal child welfare without acknowledging the manner in which the British colony was established in NSW. The entire eastern coast of the Australian continent was claimed for Britain by Lieutenant James Cook in 1770. The first convict settlement was established at Port Jackson in 1788. British occupation of the continent commenced with the founding of this settlement. The land needed for the colony was obtained by the dispossession of Aboriginal peoples. Dispossession was justified in British law by the assumption that Australia was *terra nullius*, meaning vacant and unoccupied land.¹ Under this doctrine, Aboriginal land tenure did not legally exist. This dispossession was met with determined Aboriginal resistance

1. *Cooper v Stuart* (1889) 14 App Cas 286 at 291. See also W Blackstone *Commentaries of the Laws of England* (9th edition, Strahan, Cadell and Prince, London, 1783) Book 1 at 107-109. The doctrine has been rejected by the High Court in *Mabo v State of Queensland* (1992) 107 ALR 1 at 21-22 per Brennan J, at 82-83 per Deane and Gaudron JJ.

from the beginning. Massacres and foreign diseases took a devastating toll on Aboriginal adults and children.²

2.3 Aboriginal policy was not a priority for either British or colonial authorities. There were no treaties between the Crown and the Aboriginal peoples of Australia as Aboriginal policy was considered to be a local issue. It has been claimed that this early lack of official attention placed Aboriginal people on the margins of Australian society.³

2.4 There are some records of individuals in the colony attempting to "civilise" and "Europeanise" Aboriginal children by imposing on them Christian values and a European lifestyle.⁴ An early governor of NSW, Governor Macquarie (1810-1821) experimented with "civilising" the Aboriginal people. A Native Institution was established in Parramatta in 1814 to educate children away from the influence of their families.⁵ Aboriginal parents were encouraged to leave their children at the institution by the provision of rations and tools. At the same time any encampments of Aboriginal people were kept separate from the settlers. These early attempts to protect and "civilise" Aboriginal people were not considered "successful". Despite the

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2. H Reynolds *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Penguin, Ringwood, Victoria, 1990).
 3. A Armitage *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (UBC Press, Canada, 1995) at 14.
 4. NSW - Department of Community Services *Learning from the Past: Aboriginal Perspectives on the Effects and Implications of Welfare Policies and Practices on Aboriginal Families in NSW* (Prepared by Gungahlin Jindibah Centre at Southern Cross University, 10 October 1994) at 10 (the "Learning from the Past Report").
 5. The school was closed in 1823 because it was too expensive. The remaining students were sent to the Blacktown Native Institution. This was closed in 1829. This has been described as the end of government responsibility for Aboriginal education: N Parbury *Survival: A History of Aboriginal Life in New South Wales* (Ministry of Aboriginal Affairs, NSW, 1986) at 49.

institutionalised learning, the Aboriginal children did not adopt European values and lifestyle and did not give up their Aboriginal beliefs and lifestyles. It has been suggested that this may also be characterised as Aboriginal resistance to the threatened loss of their culture.⁶

2.5 During the nineteenth century, there was some recognition of the damage done to Aboriginal people by the British occupation. A House of Commons Select Committee in 1836 recommended the appointment of "Protectors of Aborigines". It seems that the envisaged role of such Protectors, in keeping with a philosophy of "protection", was to "educate their [Aboriginal people's] offspring, and thereby, if possible, to wean them from the habitudes of savage life".⁷

2.6 The first Protector of Aborigines in NSW, the Hon George Thornton MLC,⁸ was appointed in 1881. The Protector's authority was extensive and discretionary and covered all Aboriginal people within the area. The Protector could act as the legal guardian of all Aboriginal children, which included the power to separate them from their parents and consent to their adoption.⁹ The Inspector-General of Police and police officers assisted the Protector in

6. R Chisholm *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales* (Social Welfare Research Centre, University of NSW, Reports and Proceedings No 52, April 1985) at 12-13.

7. This role was advocated by John Dunmore Lang in his submission to the Select Committee: *Report from the Select Committee on Aborigines (British Settlements)* (Irish University Press Series of British Parliamentary Papers, Volume 1, Anthropology Aborigines, 1836) at 683.

8. Thornton had previously been a councillor of the Aborigines Protection Association in 1880: H Radi, P Spearritt and E Hinton *Biographical Register of the New South Wales Parliament 1901-1970* (Australian National University Press, Canberra, 1979) at 273.

9. Armitage at 35.

carrying out his work.¹⁰ The Executive replaced the role of Protector in 1883 with the Aborigines Protection Board.

Protectionist policies: 1883 - 1937

2.7 The Aborigines Protection Board ("the Protection Board") was established in 1883¹¹ with no clear guidelines and no legislative base, and it administered a separate system of Aboriginal child welfare until 1940.¹² The policies of the late 19th century saw "full blooded" Aboriginal children removed from their families and communities by the Protection Board. These early policies were based on a belief that the Aboriginal population would die out,¹³ and were intended to "smooth the pillow of a dying race" of full-blooded Aboriginal people.¹⁴ On the other hand, "half-

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10. *Aborigines (Report of Protector)* (1882) NSW Legislative Assembly Votes and Proceedings, 1882, Vol 4 at 1526.
 11. Edmund Fosbery, the Inspector-General of Police, was among the six appointed to the first Board for the Protection of Aborigines in June 1883, as was the former Protector, George Thornton: NSW *Government Gazette* No 238 (5 June 1883) at 3087.
 12. Chisholm (1985) at 14.
 13. An extract from *The Telegraph* (WA) in 1937 reflects the thinking of the time:
"Mr Neville [Commissioner for Native Affairs for Western Australia] holds the view that within one hundred years the pure black will be extinct. But the half-caste problem was increasing every year. Therefore their idea was to keep the pure blacks segregated, and to absorb the half-castes into the white population ... The pure-blooded aboriginal was not a quick breeder. On the other hand the half-caste was. In Western Australia there were half-caste families of 20 and upwards. That showed the magnitude of the problem. In order to secure this complete segregation of the children of pure blacks, and preventing them ever getting a taste of camp life, the children were left with their mothers until they were but two years old. After that they were taken from their mother and reared in accordance with white ideals.": *The Telegraph* (Brisbane, 5 May 1937) at 19
 14. Learning from the Past Report at 17.

caste" Aboriginal children were removed from their "vicious surroundings"¹⁵ and the Protection Board attempted to assimilate them into the dominant society. These policies were justified in terms of "protecting" Aborigines from their own "weaknesses".¹⁶ The emphasis in the policies on removal and separation was intended, literally, to "breed out" the Aboriginal population:

The aims of the Board in the late 1800s and early 1900s were to concentrate Aborigines on reserves, enforce dependency through a ration system, destroy the culture and absorb those other than "full-bloods" into white Australian society. The removal of Aboriginal children from their families and their subsequent placement in "training homes" and other "educational" institutions was already an integral part of the Board's practice.¹⁷

2.8 The Protection Board removed Aboriginal children to training homes, such as the Kinchela Boys' Home and the Cootamundra Aboriginal Girls' Home, with the intention of placing them in the service of non-Aboriginal families. Life in the homes ranged from merely sterile and cold, to harsh and cruel.¹⁸ At these homes Aboriginal girls were trained as domestic servants, and Aboriginal boys were trained to be rural workers.¹⁹ The majority of

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15. An Aborigines Protection Board Report of 1911 stated:
"To allow these children [Aboriginal children, "half-castes", etc] to remain on the Reserves to grow up in comparative idleness, and in the midst of more or less vicious surroundings, would be, to say the least, an injustice to the children themselves, and a positive menace to the State": *Report of Board for the Protection of Aborigines for Year 1911* (NSW Parliamentary Papers, 1912, Vol 1 at 718) at 2. See also NSW - *Parliamentary Debates (Hansard)* Legislative Council, 24 November 1914 at 1354.
 16. Queensland - *Parliamentary Debates (Hansard)* Legislative Council, 8 December 1897 at 1909.
 17. Learning from the Past Report at 15.
 18. P Read *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (NSW Ministry of Aboriginal Affairs, Occasional Paper No 1, 1982) at 10-14.
 19. Read at 12.

children who were "apprenticed out" received little or no payment.²⁰ There are many disturbing reports of the physical and sexual abuse of Aboriginal children both in the homes and at the hands of their white bosses.²¹

2.9 It was not until 1909 that the Protection Board was granted official power by the *Aborigines Protection Act 1909* (NSW). Previously the Protection Board had relied on unofficial power and the exercise of coercion and inducement to remove children.²² The legislation meant that children could be removed without their parents' consent if they were found by a magistrate to be "neglected". The Protection Board protested that their powers under this Act were inadequate. In 1915 the Act was amended to give the Protection Board the power to remove any Aboriginal child without parental consent and without a court order if the Protection Board considered it to be in the interest of the child's moral or physical welfare.²³ In practice this meant that it "was up to the parents to show that the child had a right to be with them, not the other way round".²⁴

2.10 A further amendment to the *Aborigines Protection Act* in 1918 extended the definition of "Aborigines" in the Act to include "half-caste" Aboriginal people as well as "full-blooded" Aboriginal

20. C Kendall "History, Present and Future: Issues Affecting Aboriginal Adults who were Removed as Children from their Families under the NSW Aborigines Protection Act 1883-1969" in *Has Adoption a Future? Proceedings of the Fifth Australian Adoption Conference* (Post Adoption Resource Centre, Sydney, 1995) 153 at 154.

21. See Learning from the Past Report; Read, and Chisholm (1985).

22. For example the removal of rations for Aboriginal parents who did not send their children to school: Learning from the Past Report at 14. Another example is Aboriginal parents in the Murrumbidgee area being offered free rail passes if they left the area and left any female children behind in the girls' dormitory at Warangesda Aboriginal Station established in 1893: Read at 5. See also NSW *Parliamentary Debates (Hansard)* Legislative Council, 24 November 1914 at 1354.

23. *Aborigines Protection Amending Act 1915* (NSW) s 4.

24. Read at 6.

people.²⁶ As a result, any Aboriginal child could be "apprenticed to any master"²⁶ or removed to a training home or institution by the Board.²⁷ On notices committing Aboriginal children to the care of the Protection Board, under "Reason for Board taking control of the child" some managers wrote simply "for being Aboriginal".²⁸

Assimilationist policies: 1937 - 1969

2.11 The policy of "assimilation" was officially adopted in NSW in 1937,²⁹ following a conference of State and Federal ministers. Its essence was the concept of "one Australian society".³⁰ Effectively, "assimilation" involved Aboriginal people renouncing their own distinct cultures, languages and customs and adopting the dominant Australian culture, language and customs.

The policy of assimilation seeks that all persons of Aboriginal descent will choose to attain a similar manner and standard of living to that of other Australians and live as members of a single Australian community, enjoying the same rights and privileges, accepting the same responsibilities and influenced by the same hopes and loyalties as other Australians.³¹

2.12 Although the word "assimilation" only became common in the 1930s, the philosophy of assimilation had pervaded the work of the

25. *Aborigines Protection (Amendment) Act 1918* (NSW) s 2(i)(a).

26. *Aborigines Protection Act 1909* (NSW) s 11.

27. *Aborigines Protection Act 1909* (NSW) s 11A, inserted by *Aborigines Protection Amending Act 1915* (NSW) s 3.

28. Read at 6.

29. NSW - Aboriginal Children's Research Project *Aboriginal Children in Substitute Care* (Principal Report - Part 1, July 1982) at 28 ("Aboriginal Children's Research Project Principal Report").

30. Learning from the Past Report at 25.

31. *Second Report from the Select Committee of the Legislative Assembly Upon Aborigines* (NSW Parliamentary Papers 1980-81, No 164) at 5.

Protection Board since 1883.³² In 1940 the Protection Board became the Aborigines Welfare Board ("the Welfare Board"). In some ways, little changed with the change of name.³³ The Welfare Board continued to administer Aboriginal child welfare as a separate system from general child welfare, despite the policy of assimilation.³⁴

2.13 The *Aborigines Protection Act 1909* (NSW) was amended in 1940 to incorporate many of the provisions of the *Child Welfare Act 1939* (NSW) which governed the general child welfare system.³⁵ These provisions meant that the Welfare Board could no longer remove Aboriginal children on its own initiative, but instead required Aboriginal children to be brought before the Children's Court in accordance with the procedures outlined below.³⁶

Child Welfare Act 1939 (NSW)

2.14 The Act allowed for the removal of children if they were "neglected" or "uncontrollable" and referred to "improper" or "incompetent" parenting and applied to Aboriginal and non-Aboriginal children alike. The policies were couched in terms of the welfare of the child, but were implemented by non-Aboriginal welfare workers who applied non-Aboriginal definitions of "neglect" and "welfare". These definitions often ignored different Aboriginal values in the rearing of their children, such as the greater role of the extended family.³⁷ In addition, the relative disadvantage and poverty of many Aboriginal people provided justification for non-Aboriginal welfare officers to remove Aboriginal children on the grounds of "neglect".

2.15 The policy of assimilation coupled with the poverty of many Aboriginal families proved to be a double bind. Aboriginal people

32. Chisholm (1985) at 20.

33. Learning from the Past Report at 25.

34. Chisholm (1985) at 28.

35. *Aborigines Protection (Amendment) Act 1940* (NSW).

36. Wilkie at 37. See fn 38.

37. See paras 2.50-2.52.

were supposed to assimilate into the dominant Australian society despite the prejudice and racism which confronted them. In turn, this "failure" to assimilate and the impoverished circumstances of many Aboriginal people provided the grounds for the removal of Aboriginal children. The system of removing Aboriginal children for apprenticeship and training continued to the same extent as under the *Aborigines Protection Act 1909* (NSW).³⁸

2.16 By the 1950s foster care had become the preferred option for caring for Aboriginal children.³⁹ The Welfare Board first advertised for non-Aboriginal foster parents for Aboriginal children in 1957, as the homes for Aboriginal children were impossibly overcrowded and costly to run. Fostering Aboriginal children with non-Aboriginal foster parents was intended to assimilate these children further into the dominant Australian society by teaching them to behave and think like "white people". There was enormous pressure on Aboriginal children to make them *want* to behave like Europeans.⁴⁰ Adoption of Aboriginal children at an early age was also used as a way of reducing the numbers of children in the overcrowded institutions.⁴¹

2.17 Aboriginal protest against the Welfare Board and its policy of assimilation gained momentum. The Welfare Board was dissolved in 1969 and children under its control were transferred to the Department of Child Welfare. Some homes continued to have predominantly Aboriginal populations.⁴² The *Aborigines Protection Act 1909* (NSW) was also repealed in 1969.

38. M Wilkie "The Survival of the Aboriginal Family in NSW 1788-1981: A Review of Government Policies and Administration" (NSW - Aboriginal Children's Research Project, Discussion Paper 4, April 1982) at 38.

39. *Report of the Aborigines Welfare Board for the year ended 30th June, 1953* (NSW Parliamentary Papers, 1953-1954, Vol 1 at 17) at 22.

40. Read at 15.

41. Learning from the Past Report at 27.

42. Wilkie at 39.

1969 to the present

2.18 An assimilationist approach continued to dominate the NSW child welfare system beyond the abolition of the Welfare Board in 1969. The ongoing application of the *Child Welfare Act 1939* (NSW) meant that Aboriginal children continued to be removed from their families and made State wards or placed in foster homes.⁴³ Non-Aboriginal social workers and departmental officers still had the power to define what constituted "neglect" and "moral danger" for Aboriginal children.

2.19 The First Aboriginal Child Survival Seminar, held in Melbourne in 1979, arose out of Aboriginal people's concern at the continued removal of Aboriginal children. At the Seminar Aboriginal people declared that the standards imposed by non-Aboriginal workers were considered inappropriate for their children. It was argued that terms such as "neglect" and "being in need of care and protection" had a far more detrimental effect when applied to Aboriginal families than when applied to other Australian families.⁴⁴ Examples were cited of "neglect" applying to Aboriginal children left in the care of their extended family, and instances where non-Aboriginal officers refused to place an

43. Learning from the Past Report at 48.

44. "The reasons why children are removed from Aboriginal families was still a major cause for distrust of the welfare services by Aboriginal people all over Australia. Such vague reasons as "neglect" - "being in need of care and protection" - and "being exposed to moral danger", when applied to Aboriginal families have a totally different effect than when these same criteria are applied to other Australian families. *The crisis of Aboriginal child welfare will continue until the standards for defining "neglect" and "moral danger" are revised.* [emphasis in original]; B Jackson (ed) *The First Aboriginal Child Survival Seminar (If Everyone Cared): A Report Arising from an International Seminar on Aboriginal Family Life and the Welfare of Aboriginal Children* (Melbourne, 23-25 April 1979) at section 5, page 1.

Aboriginal child with an Aboriginal family citing "overcrowding" as the reason.⁴⁵

2.20 The legacy of assimilation policies is seen as underlying the continuing removal of Aboriginal children from their communities.⁴⁶ D'Souza has found that a disproportionate number of Aboriginal children come into the care of the state on the ground of "neglect".⁴⁷ Non-Aboriginal workers continuing to apply non-Aboriginal standards and inappropriate definitions of "neglect" to Aboriginal families could be seen as part of this legacy of assimilation.⁴⁸

IMPACT OF PAST POLICIES

2.21 It is estimated that from 1883 to 1969, nearly 6 000 Aboriginal children were removed from their families in NSW.⁴⁹ Perhaps one in six or seven Aboriginal children has been taken from his or her family during this century in NSW, compared with about one in 300 for non-Aboriginal children.⁵⁰ In the Royal Commission into Aboriginal Deaths in Custody,⁵¹ Commissioner J H Wootten asserted that the assimilation policies of the Aboriginal Welfare Board amounted to genocide as defined by the United Nations *Convention on the Prevention and Punishment of the Crime of Genocide*.⁵²

45. Chisholm (1985) at 44.

46. Aboriginal Children's Research Project *Principal Report* at 29.

47. N D'Souza "Aboriginal Child Welfare: Framework for a National Policy" (1993) 35 *Family Matters* 40 at 41, see para 2.77.

48. See para 2.11.

49. Read at 9.

50. Read at 18.

51. J H Wootten *Report of the Inquiry into the Death of Malcolm Charles Smith* (Royal Commission into Aboriginal Deaths in Custody, AGPS, Canberra, 1989) at 76-77.

52. Adopted on 9 December 1948: (1951) ATS 2. Article II defines genocide as "acts committed with intent to destroy, in whole or in

2.22 The legacy of this period is the many social problems which affect Aboriginal society today - and undoubtedly touches almost every Aboriginal person.⁵³ It is claimed that today at least one-third of all people removed as children have still not been returned to their families and communities.⁵⁴ There are likely to be many thousands who will never return to their Aboriginal community and who do not identify as Aboriginal.⁵⁵

2.23 The ramifications have been enormous for those who were the victims of these policies. The grief of separation and loss has been devastating for parents whose children were taken away, and for the children who were taken from them. As these children grew up, many experienced alienation and confusion about their cultural identity - a crisis compounded by being faced with prejudice and discrimination.⁵⁶

2.24 The Aboriginal Legal Service of Western Australia identified some common experiences of Aboriginal children removed from their families and placed in children's homes, missions and foster families in WA.⁵⁷ Their stories universally reflect a feeling that a

part, a national, ethnical, racial or religious group such as: ... (e) forcibly transferring children of the group to another group".

53. It is claimed that there is not an Aboriginal person in NSW who is not related to, or does not know, a member of this "stolen generation": Read at 18.
54. S Gilbert "The Effects of Colonisation on Aboriginal Families: Issues and Strategies for Child Welfare Policies" in J Mason (ed) *Child Welfare Policy: Critical Australian Perspectives* (Hale and Iremonger, Sydney, 1993) 37 at 44.
55. This is because their identity was lost when their parents and grandparents were taken away. "We can hardly guess at the number of men and women who deny their own birth-right as Aboriginal citizens of Australia": Read at 18.
56. Secretariat of National Aboriginal and Islander Child Care "Child Abuse and Neglect from an Aboriginal Perspective: Paper to Sixth International Congress on Child Abuse and Neglect" (1987) 3(2) *Black Voices* 25 at 29.
57. Aboriginal Legal Service of Western Australia *Telling our Story: A Report by the Aboriginal Legal Service of Western Australia (Inc) on*

part of themselves has been forever removed and lost to them.⁵⁸ Many people who had been removed were bewildered as to the reasons for removal; felt deprived of their childhood and a loving and caring environment having been in foster care or in the missions and institutions; felt hopeless at the thought of dying without ever resolving the pain of separation from their families; had trouble forming intimate or trusting relationships and experienced difficulty in imparting Aboriginal culture to their own children.⁵⁹ There is no reason to doubt the universality of the feelings expressed.

2.25 There is a growing body of research which indicates the link between the destruction of Aboriginal families and the high incidence of alcoholism, suicide, and mental illness in the Aboriginal population.⁶⁰ One Aboriginal woman, Carol Kendall,⁶¹ relays the impact of separation:

We separated adults suffer more from psychological trauma, physical violence which we do to ourselves or to others. We

the Removal of Aboriginal Children from their Families in Western Australia (Aboriginal Legal Service of Western Australia (Inc), WA, 1995) ("Telling our Story Report") documents the stories of over 600 Aboriginal people who had been removed in childhood from their families in WA.

58. Telling our Story Report at 3.
59. Telling our Story Report at 3-4.
60. In 1987 the Victorian Aboriginal Medical Service found that 65% of clients undergoing psychiatric treatment had been separated from a parent in childhood, while 47% had been separated from both, and 27% had been institutionalised as children: P Swan *200 Years of Unfinished Business* (Aboriginal Medical Service, Redfern) cited in Learning from the Past Report at 53. See also Telling our Story Report at 42-48; E Johnston *Royal Commission into Aboriginal Deaths in Custody - National Report: Overview and Recommendations* (AGPS, Canberra, 1991).
61. Carol Kendall is an officer of Link-Up (NSW), an Aboriginal organisation established in 1980 to assist removed or separated Aboriginal people find their way home to their Aboriginal family and culture.

suffer alcohol and drug related problems. Even those of us who may appear to live happy and "normal" lives suffer in different ways from the grief of separation, loss of culture, loss of families and the loss of identity.⁶²

2.26 Many Aboriginal children removed from their parents did not get the chance to learn parenting skills. They in turn find it difficult to be effective parents, often leading to the removal of their own children by the "welfare".⁶³ Thus the destructive cycle continues.

2.27 There also appears to be an over-representation in the adult criminal justice system of Aboriginal people who were removed from their families.⁶⁴ The Royal Commission into Aboriginal Deaths in Custody found that of the 99 Aboriginal people who had died in prison over the period between January 1980 and May 1989, 43 had experienced childhood separation from their families through intervention by state authorities, missions or other institutions.⁶⁵

2.28 There is also a path to the juvenile justice system which is well-trodden by Aboriginal children who have been placed with

62. C Kendall "History, Present and Future: Issues Affecting Aboriginal Adults who were Removed as Children from their Families under the NSW Aborigines Protection Act 1883-1969" in *Has Adoption a Future? Proceedings of the Fifth Australian Adoption Conference* (Post Adoption Resource Centre, Sydney, 1995) 153 at 156.

63. Telling Our Story Report at 29-30, 55-56.

64. The Victorian Aboriginal Legal Service estimated in the 1970s that 90% of the clients they were representing in criminal matters had been in placement - whether fostered, institutionalised or adopted. In NSW, the comparable figure was 90-95%, with most placements having been in non-Aboriginal families: E Sommerlad (ed) "Homes for Blacks: Aboriginal Community and Adoption" in C Picton (ed) *Proceedings of First Australian Conference on Adoption* (15-20 February, 1976, University of NSW, Sydney) 159 at 161-162.

65. E Johnston *Royal Commission into Aboriginal Deaths in Custody - National Report: Overview and Recommendations* (AGPS, Canberra, 1991) at 5.

non-Aboriginal families and in welfare institutions. In 1979 the magnitude of the problem in Victoria was described:

There are between 50 to 60 Aboriginal male and female juveniles entering our detention centres every year. That rate has been steady over the past four years. One in every three Aboriginal youths who enters detention as a result of delinquent behaviour is a white family adoption or foster-care breakdown. A further third of the Aboriginal juvenile offending population has a significant history of rearing in a children's institution.⁶⁶

2.29 The loss of children from Aboriginal communities in past generations represents the loss of spiritual, cultural, economic and social resources from those communities.⁶⁷ The removal of Aboriginal children to work "in the service of the whites" has been described as representing an immeasurable drain of talent from Aboriginal communities.⁶⁸

2.30 The poverty experienced by many Aboriginal children today is linked with this loss. An Aboriginal perspective of poverty is described as being broader than material poverty, to include also loss of cultural continuity and identity.⁶⁹

2.31 Some Aboriginal women have described the removal of children as a form of abuse. While not denying the significance of, and harm caused by, other forms of abuse:

66. A Palamara "Issues in Aboriginal Child Welfare - Public Policy and Practice" - paper presented at The First Aboriginal Child Survival Seminar "If Everyone Cared" (1979) in Jackson (ed) *The First Aboriginal Child Survival Seminar (If Everyone Cared): A Report Arising from an International Seminar on Aboriginal Family Life and the Welfare of Aboriginal Children* (Melbourne, 23-25 April 1979) Appendix.

67. C Choo *Aboriginal Child Poverty* (Child Poverty Policy Review No 2, Brotherhood of St Laurence, Melbourne, 1990).

68. Read at 18.

69. Choo at 32.

... the women were emphatic that the most destructive and harmful form of abuse which could be inflicted on any child was removal from their country and loss of their cultural heritage. This was identified as a form of emotional and mental abuse which could result in physical illness for the child.⁷⁰

This highlights the strong cultural differences that can exist in approaches to child welfare. The non-Aboriginal welfare system interprets "poverty" and "abuse" as reasons for removing Aboriginal children, whereas some Aboriginal people regard the removal of their children *as* "poverty" and "abuse".

2.32 While it is not the intention of this Report to document exhaustively the effects and impacts of these policies, it is impossible to examine the impact of current child welfare policies on Aboriginal children without understanding the context of this past. Two significant themes in Aboriginal child welfare, observed in the preparation of this Report, are the scepticism with which government welfare bodies are viewed by Aboriginal people and the determination of Aboriginal organisations in their efforts to regain control of their children's future. Both this scepticism and determination are understandable after appreciating these past policies and their impacts on Aboriginal people.

THE PRESENT CHILD WELFARE SYSTEM IN NSW

Overview

2.33 Child welfare is the responsibility of the State and Territory Governments in Australia and the power rests with the relevant individual Minister in each State and Territory. Australia has been criticised on an international level for the fragmentation of

70. *J Harrison Report to the Child Protection Policy and Planning Unit South Australia on the Child Protection Project from the Ngaanyatjarra, Pitjantjatjara, Yankunytjatjara Women's Council* (South Australia, May 1991) at 11.

its child welfare system by having different legislation in every State and Territory.⁷¹ In some ways this may be an inevitable consequence of federation and having the State and Territory Governments responsible for child welfare. In an attempt to achieve some uniformity, the State and Territory Social Welfare Ministers meet annually.

2.34 The Australian Government ratified the *UN Convention on the Rights of the Child* on 17 December 1990, thereby declaring on an international level a commitment to ensuring that the rights of all children are respected.⁷²

NSW legislation

2.35 There are three primary Acts regarding the welfare of children in NSW:

- *Community Welfare Act 1987* (NSW)
- *Children (Care and Protection) Act 1987* (NSW)
- *Adoption of Children Act 1965* (NSW)

In addition, the welfare of children is subject to the policy of the department administering these Acts, the Department of Community Services ("DOCS"). Key terms relating to child welfare are explained in the following section in order to assist an understanding of how these Acts apply to Aboriginal children.

71. Vitit Muntarbhorn, Special Rapporteur on the Sale of Children *Rights of the Child. Sale of Children*. (United Nations Economic and Social Council, Commission on Human Rights, 9 February 1993) E/CN.4/1993/67/Add.1.

72. See Chapter 6.

Terminology

Child "in need of care"

2.36 Under s 10 of the *Children (Care and Protection) Act 1987* (NSW) a child will be declared to be "in need of care" if:

- adequate provision is not being made, or is unlikely to be made, for the child's care, for example, if the child is homeless or neglected;
- the child is being, or is likely to be, abused;
- there is a substantial and presently irretrievable breakdown in the relationship between the child and one or more of the child's parents;
- the child has been living in a non-government children's home for 12 months or more and there has been no substantial contact with the child's parents or carers in that time; or
- the child is less than six months and is being fostered with a person without authority to do so, and it appears that this situation may continue.

2.37 Proceedings relating to the care of children are heard in the Children's Court ("the Court"). Any orders made, or action taken by the Court should be "in the best interests of the child". An application to the Court is usually made by DOCS, although parents can also make an application. DOCS is obliged to ensure that there are no alternative resources available that can effectively be used for the benefit of the child before bringing a care application before the Court.⁷³ In determining a care application, one of the considerations for the Court is the

73. *Children (Care and Protection) Act 1987* (NSW) s 57(3).

importance of preserving the particular cultural environment of the child.⁷⁴

2.38 If the Court finds the child to be in need of care, under section 72 of the *Children (Care and Protection) Act 1987* (NSW) it can:

- order the child's parents to take better care of the child and give an enforceable promise, or undertaking to the Court agreeing, for example, to attend counselling, to be supervised by a departmental officer, or to accept restricted custody and access;
- place the child into the care of a suitable person, such as a relative, neighbour or friend, who is willing to take care of the child;
- place the child with a foster family;⁷⁵ or
- make the child a ward of the state.

2.39 The Court cannot place any child with a foster family, or make the child a ward without first obtaining an assessment report, which must include advice on any issues of cultural conflict if the Court thinks it is relevant.⁷⁶

Ward of the state

2.40 A child or young person can be made a ward of the state by an order of the Court.⁷⁷ Wardship orders should not be made by the

74. *Children (Care and Protection) Act 1987* (NSW) s 72(2)(d).

75. If the child has been brought up in a particular culture or is part of a cultural group, unless he or she says otherwise, the Children's Court must take into account whether it is practical to place the child with a member of that cultural group: *Children (Care and Protection) Act 1987* (NSW) s 73(3).

76. *Children (Care and Protection) Act 1987* (NSW) s 74.

77. *Children (Care and Protection) Act 1987* (NSW) s 72(1)(c)(iii).

Court unless no lesser order, and no other solution to the problem is appropriate.⁷⁸ Wardship involves the transfer of the guardianship and custody of the child exclusively to the Minister for Community Services.⁷⁹ The Minister is responsible for the care, accommodation and maintenance of the child.⁸⁰ The Minister may place a child who is a ward in a foster home or a residential institution.

Substitute care

2.41 This is not a term contained in legislation, but is used to describe the placement of a child in a group home, in foster care or in residential care. It does not include adoption, or placement in a correctional or educational institution, nor does it include informal child care arrangements common in Aboriginal communities.⁸¹

2.42 Substitute care services in NSW are provided by both government and non-government agencies. NSW Government policy as at March 1996 was that "substitute care services will continue to be provided by a range of non-government service providers and by the Department of Community Services"⁸² while aiming to "develop placement options in the non-government sector where this is feasible".⁸³ With regard to Aboriginal children in substitute care, the policy identified "the need to review the consultation processes and resources for Aboriginal services".⁸⁴

78. *Children (Care and Protection) Act 1987* (NSW) s 73.

79. *Children (Care and Protection) Act 1987* (NSW) s 90(1).

80. *Children (Care and Protection) Act 1987* (NSW) s 91(1).

81. See paras 2.50-2.52.

82. Substitute Care Implementation Unit *Strategic Directions for Substitute Care Program* (Department of Community Services, NSW, March 1996) at 7.

83. Substitute Care Implementation Unit at 9.

84. Substitute Care Implementation Unit at 12.

Foster care

2.43 This term is not contained in legislation. It is a form of substitute care involving the formal placement of a child with another family outside his or her natural family. Foster care effectively transfers the care and control of the child but not guardianship. Placement of a child in foster care can arise:

- after the child has been made a ward of the state by a court order and the department has placed the child with foster parents (in this situation the Minister retains legal guardianship of the child and makes decisions as to the child's welfare);
- when the Children's Court has made an order placing the child in a foster placement; or
- when the parents have placed the child with a non-government fostering agency (which has a fostering authority granted by the Government)⁸⁵ which places the child with foster parents.

2.44 Foster care placement can also occur informally, meaning it is outside the ambit of the Act, when a parent places the child with a relative or friend. Such informal fostering arrangements are used widely among Aboriginal people. Customary practices of child care include the care of children within the extended family and within the child's community. However, these practices are more than simply an Aboriginal version of fostering.⁸⁶ Often these informal arrangements lack legal status, and it is sometimes difficult for carers to obtain appropriate government financial assistance.⁸⁷

85. Private fostering arrangements are prohibited: *Children (Care and Protection) Act 1987* (NSW) s 40-44.

86. See paras 2.50-2.52.

87. S Tregagle and L Voigt "Substitute Care and the Law: Improving the Welfare of Young People who Cannot Live with their Parents" in P Swain (ed) *In the Shadow of the Law: The Legal Context of Social Work Practice* (Federation Press, Sydney, 1995) 178 at 188.

Guardianship

2.45 Guardianship is a general responsibility to oversee the child's well-being,⁸⁸ and includes the responsibility for the long-term welfare of the child. It does not necessarily involve responsibility for the custody of the child.

Custody

2.46 Custody is the day to day care and control of the child. Having custody of a child enables the carer to make day to day decisions about the child's lifestyle.⁸⁹

Temporary Care Arrangement

2.47 A Temporary Care Arrangement ("TCA") is an arrangement made by the Director-General of DOCS or his or her delegate for children who are, in the opinion of the Director-General or his or her delegate,⁹⁰ "in need of care". The TCA transfers custody of the child to the Director-General. The TCA may last for a period of up to three months, but there is provision to renew the arrangement for an additional three months.⁹¹ The arrangement may only be made if the parents consent or if the parents cannot reasonably be located.⁹² The purpose of the TCA is to give parents an opportunity to work on problems relating to the care of the children, without the formal intervention of the Court.

Adoption

2.48 Adoption under the *Adoption of Children Act 1965* (NSW) is a legal process by which a person becomes a child of the adopting parents and ceases to be a child of the birth parents. All the legal consequences of parenthood are transferred from the birth parents

88. *Talbot v Minister for Community Services* (1993) 30 NSWLR 487.

89. *Talbot v Minister for Community Services* at 496; *Faulkner v Rugendyke* (1995) 19 Fam LR 507.

90. *Children (Care and Protection) Act 1987* (NSW) s 14(1).

91. *Children (Care and Protection) Act 1987* (NSW) s 14(6).

92. *Children (Care and Protection) Act 1987* (NSW) s 14(2).

to the adoptive parents. The adopted child obtains a new birth certificate showing the adopting parents as parents. The adopting parents acquire rights to guardianship and custody of the child. The birth parents cease to have any legal obligations towards the child and lose their rights to guardianship and custody. The general practice is that the adoptive couple are selected by either DOCS or a private adoption agency and they are unknown to the birth mother. There is, however, a growing trend to openness in adoption where the birth parent assists in the selection of the adoptive parents and contact between the child and the birth parent is possible or even encouraged.⁹³ Adoption applications are determined by the Supreme Court of New South Wales.

ABORIGINAL CHILDREN

2.49 Child welfare policies are typically based on Western notions of the family - a nuclear family model. Aboriginal child rearing practices do not fit into this model, and place more emphasis on the extended family and kinship networks. Aboriginal child care has been described as fundamentally inconsistent with the modes of substitute care operating in the dominant society.⁹⁴

Aboriginal child rearing practices

2.50 The diversity of culture and attitudes among Aboriginal people in the time before 1788 means that it is impossible to give a definitive statement of "Aboriginal child care". Certainly, since that time, traditional ways of child care have been undermined by

93. See generally NSW Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Discussion Paper 34, 1994) ("NSWLRC DP 34"); NSW Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) ("NSWLRC Report 81").

94. A Mongta "Aboriginal Family Life and Child Rearing" in NSW - Aboriginal Children's Research Project *Aboriginal Children in Substitute Care* (Principal Report, Part 1, July 1982)56 at 57.

various factors, including the impact of colonisation and loss of land, influences of the dominant Australian culture and the policies of removal of children. Nonetheless, there is a continuing importance placed on family kinship ties and patterns of sharing⁹⁵ and the kinship system generally remains intact. The kinship system has been described as one of the key strengths of Aboriginal communities.⁹⁶ Kinship is:

the feeling of family togetherness, the ability to rely on each other, and the creation of a spiritual bonding which helps to form strong family relationships. Kinship also includes the creation of inter-dependence and support between the members of a family.⁹⁷

2.51 The child has kinship ties with his or her extended family such as aunts, uncles and cousins, as well as with his or her immediate family of mother, father, brothers and sisters. The effect of the kinship system in Aboriginal child care practice means that Aboriginal children are brought up as a part of an extended family and community rather than merely individuals. Often grandparents and aunts and uncles will play a prominent role in the "growing up" of a child in the community. The care of children in Aboriginal communities has been described as "intermittent flowing care"⁹⁸ where children have different kinship relationships with various members of their extended family and

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95. Aboriginal Child Care Agency *History and First Twelve Months of ACCA's Operation* (Victorian Aboriginal Child Care Agency, Fitzroy, 1978) at 4.
 96. G Atkinson "Aboriginal Adoption: A Re-Evaluation" in R Snow (ed) *Understanding Adoption: A Practical Guide* (Fontana Books, Sydney, 1983) 156 at 164.
 97. Y Walker "Aboriginal Concepts of the Family" (1993) 18 *Children Australia* 26 at 26.
 98. This is a phrase used by an observer of indigenous family systems in Canada: B Wharf *Toward First Nation Control of Child Welfare: A Review of Emerging Developments in British Columbia* (University of Victoria, Canada, 1989) at 54.

care of the children often moves within the extended family, or outside it.⁹⁹

Aboriginal children are all the responsibility of the whole family: of relatives and of their community and any other Aboriginal community. Child rearing is not confined to the natural parents.¹⁰⁰

2.52 While it may seem that the practice in Aboriginal families of children moving to live with various relatives is like non-Aboriginal fostering, the similarity is only superficial. The comparison ignores the importance of Aboriginal children belonging to a family network and a community.¹⁰¹

Aboriginal children and adoption

2.53 Adoption, in particular, is an alien concept to many Aboriginal people. Unlike the Torres Strait Islander community, there is no traditional practice akin to Western adoption in Aboriginal communities. Adoption according to legislation in Australia, in which all ties with the natural family are severed, conflicts with Aboriginal ways of child rearing:

More than any other form of substitute care, adoption is perhaps the most alien to Aboriginal thinking because, in its present form, it can totally and permanently separate an Aboriginal child from his family and potentially all Aboriginal people ... Aboriginal children are not regarded in Aboriginal society as in the same way, property of the parents as they are in Anglo-Australian society.¹⁰²

99. N D'Souza "Aboriginal Child Welfare: Framework for a National Policy" (1993) 35 *Family Matters* 40 at 43. D'Souza has used the phrase "intermittent flowing care" to describe a system of child care in many Aboriginal communities.

100. Mongta at 56.

101. Mongta at 58.

102. Aboriginal Children's Service *Submission to NSWLRC DP 34* (12 July 1993) at 2 and 6; NSWLRC DP 34 at 192-193.

2.54 Adoption has the potential to cut Aboriginal children off from their roots, from their relatives, family, places, customs and history. This potential exists even if the child is adopted by an Aboriginal family, as this family could come from a different area and have different kinship networks from those of the child. The severing of ties between the child and its natural parents is not acceptable to many Aboriginal people.

2.55 The issue of whether adoption should *ever* be an option for Aboriginal children is a contentious issue and there is no clear view in the Aboriginal community on this. Some Aboriginal people have stated that adoption as it now exists is inappropriate for Aboriginal children. However, there is also the view that Aboriginal children and Aboriginal birth parents should not be denied the option of adoption, which is available to the wider community. In many circumstances other arrangements, such as giving a member of the extended family the custody and guardianship of the child, may be more appropriate for Aboriginal children than adoption. The Commission recommends in its Report on the *Adoption of Children Act 1965* (NSW) that the Act should include an Aboriginal Child Placement Principle.¹⁰³

TORRES STRAIT ISLANDER CHILDREN

2.56 Torres Strait Islanders number approximately 33,000 people, with the majority living on the mainland of Australia, particularly in Queensland. In New South Wales there are approximately 5,000 Torres Strait Islanders.¹⁰⁴ It is estimated that the number of Torres

103. NSWLRC Report 81: Recommendation 72.

104. In the 1991 Census the population was recorded at 4 886. It is believed that a census taken in 1995 would put the number at something higher than this. The reason for this is that in 1991 many Torres Strait Islanders were wary of the census and unsure of what use would be made of it. With gradual changes in attitudes towards indigenous peoples, Torres Strait Islanders may now feel confident to declare their racial background in a government census.

Strait Islander children in NSW would be quite small. The incidence of Torres Strait Islander children relinquished for adoption in NSW is rare.¹⁰⁵

2.57 Torres Strait Islanders have a different experience of colonisation from that of Aboriginal people. Torres Strait Islanders have not experienced to the same extent the negative impacts suffered by Aboriginal people as a result of dislocation from their traditional lands and policies of protection and assimilation. Contact with Europeans, initially with explorers, then after 1871 with the London Missionary Society, was generally less traumatic for Torres Strait Islanders.¹⁰⁶ Generally, Torres Strait Islanders have not been dislocated from their lands and their culture and traditions have remained intact. Their history has not been without exploitation and racism. For example, Torres Strait Islanders were used in the early days as a source of cheap labour.¹⁰⁷

2.58 Torres Strait Islanders are a separate and distinct people with their own practices of child-rearing and adoption, which also give rise to different issues in relation to Australian child welfare laws. However, the importance of maintaining Torres Strait Islander children within their communities is also of crucial significance to Torres Strait Islander people. Torres Strait Islanders also regard it as important that they be recognised as separate from Aboriginal people. It is a matter of concern to Torres Strait Islanders that they are not accorded a separate definition

105. There has been one known placement of a Torres Strait Islander child in NSW in the period 1989 - 1994: NSW Department of Community Services *Submission to NSWLRC Report 81* (5 September 1994).

106. P Ban *The Application of the Queensland Adoption Act 1964-1988 to the Traditional Adoption Practice of Torres Strait Islanders* (Unpublished paper, 1988) at 103.

107. Ban (1988) at 104.

from that of "Aboriginal person" in most pieces of child welfare legislation in Australia.¹⁰⁸

Customary adoption and child care practice

2.59 Customary adoption is a practice which is common to many Torres Strait Islander families.¹⁰⁹ Adoption provides stability to Torres Strait Islander society by developing bonds between families and therefore serves a useful and powerful function.¹¹⁰ It is a form of adoption in which the child is given to member of the extended family or a close friend. Customary adoption is akin to Western adoption practice, in that it involves a permanent transfer of parental rights and there is a reluctance to tell the child that he or she has been adopted. However, customary adoption differs from Australian adoption law in that adoption is almost always within the extended family and the adoptive parents are never strangers to the biological parents.¹¹¹ Adoptive parents may be single or married and may already have children of their own. Even though there is a permanent transfer of rights between the parents in customary adoption, there is also a sense of reciprocity and obligation attached to the adoption. The adopting parent is in a position of indebtedness to the birth parents.¹¹²

2.60 Adoptions within the Torres Strait Islander community are usually arranged in accordance with customary law rather than

108. D Wilkinson "Aboriginal Child Placement Principle: Customary Law Recognition and Further Legislative Reform" (1994) 3(71) *Aboriginal Law Bulletin* 13 at 14. See also paras 8.37-8.38.

109. Ban (1988) at 147.

110. P Ban "The Quest for Legal Recognition of Torres Strait Islander Customary Adoption Practice" (1993) in 2(60) *Aboriginal Law Bulletin* 4 at 4.

111. P Ban *The Tree of Life: Report to the Queensland Government on Legal Recognition of Torres Strait Islander Customary Adoption* (prepared for the Iina Torres Strait Islander Corporation, 1990) at 10-11.

112. Ban (1988) at 31.

through a government or private adoption agency. Even in NSW, Torres Strait Islander people arrange adoptions within their own community. If there is no appropriate parent available locally, then the birth parent would probably travel to Queensland or the Torres Strait Islands depending on where their extended family resides.¹¹³

2.61 Torres Strait Islander customary practice also includes a form of short-term temporary care in which a child is placed with a relative for a period of time. The child knows his or her biological parents and continues to refer to them by the same names. This practice is distinguished from traditional adoption although an arrangement can begin as a temporary one and then become a permanent customary adoption.¹¹⁴ Any agreement made is usually verbal. Although this is similar to the Western notion of fostering by relatives, fostering is not a term which is generally used.¹¹⁶

Legal recognition of customary adoption

2.62 Torres Strait Islander customary adoption is not recognised by the legal system on mainland Australia. The lack of legal recognition gives rise to problems concerning:¹¹⁶

- original birth certificates, which are not altered to recognise the customary adoption;
- disputes over wills where a parent has died intestate; and
- child custody, when the customary arrangement breaks down and birth parents reclaim their children.¹¹⁷

113. NSWLRC Report 81 at para 9.62. This was supported also by discussions with Torres Strait Islander people in the course of preparing this Report.

114. Ban (1990) at 21.

115. This type of guardianship arrangement has been referred to as "growing up" a child: Ban (1988) at 34.

116. These problems are discussed more fully in NSWLRC Report 81 at paras 9.79-9.80 and in Ban (1990).

2.63 A solution for these problems sought by Torres Strait Islander people is legislative recognition of Torres Strait Islander customary adoption. Such legislation may be a more appropriate means of solving the problems referred to above, rather than using existing adoption legislation which does not deal with intestacy or custody, only birth certificates.¹¹⁸ The Chief Justice of the Family Court, Justice Nicholson, has urged the Federal Attorney-General to amend the *Family Law Act 1975* (Cth) to take account of the laws and customs of the indigenous people of Australia.¹¹⁹

2.64 Recognition of Torres Strait Islander customary adoption is an important issue, but is beyond the scope of this Report. However, the need for a Torres Strait Islander Child Placement Principle is discussed in Chapter 8 and also in NSWLRC Report 81.¹²⁰

OVER-REPRESENTATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN IN THE NSW CHILD WELFARE SYSTEM

Adoption

2.65 The actual numbers of Aboriginal and Torres Strait Islander children adopted each year in Australia are now quite small. In 1994-1995 there were only 12 Aboriginal or Torres Strait Islander

117. This has become more of a problem as other cultures have had an influence on Torres Strait Islander customary practice. Ban (1988) has noted that the sense of obligation has diminished due to intermarriage of Torres Strait Islanders with other cultures, such as Papua New Guinea, the South Sea Islands, Aboriginal and Anglo-Australian.

118. NSWLRC Report 81 at paras 9.81-9.86.

119. A Nicholson "Indigenous Customary Law and Family Law", address to the *Indigenous Customary Law Forum* (18 October 1995, Canberra).

120. NSWLRC Report 81 at paras 9.61-9.86.

children adopted in Australia, and seven of these children were adopted by Aboriginal or Torres Strait Islander people.¹²¹ However, the number of Aboriginal and Torres Strait Islander children adopted in NSW is still proportionately higher than the number of children adopted in general in NSW. Over the period 1990/91 - 1994/95 Aboriginal children represented 5.4% of all Australian-born children adopted in NSW.¹²² Aboriginal and Torres Strait Islander children represented 2.1% of the child population in NSW at the 1991 Census.¹²³

Substitute care

In the 1980s

2.66 A study by the Aboriginal Children's Research Project of Aboriginal children in substitute care in NSW in 1980 found an alarming over-representation of Aboriginal children:

On average, Aboriginal children comprised 15% (1127)^m of all children in substitute care in 1980, yet Aboriginal children form only around 1.5% of the state's child population. About one in every twenty Aboriginal children (5%) was in substitute care, compared to about one in 235 (0.4%) non-Aboriginal children. That is, Aboriginal children were around twelve times more likely to be in substitute care than other children in NSW ... Over 90% of these children [the 1127

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121. G Angus and L Golley *Adoptions Australia 1994-95* (Australian Institute of Health and Welfare, Child Welfare Series No 14, AGPS, Canberra, 1996) at 15.
 122. See Table 4 in Chapter 4.
 123. Australian Bureau of Statistics *1991 Census of Population and Housing: Aboriginal Community Profile* (Catalogue No 2722.0, AGPS, Canberra, 1993) and Australian Bureau of Statistics *June 1987 to June 1992, Estimated Resident Population by Sex and Age, States and Territories of Australia* (Catalogue No 3201.0, AGPS, Canberra, 1993).
 124. It should be noted that this figure includes 105 Aboriginal children who were in Department of Youth and Community Services correctional institutions.

Aboriginal children in substitute care] were outside Aboriginal control and in the care of white people.¹²⁵

2.67 It appears that the over-representation of Aboriginal children in the child welfare system was also reflected on a nationwide level. A survey of 399 non-government agencies throughout Australia in 1989 found that the proportion of Aboriginal and Torres Strait Islander children in substitute care was four times that of the general child population.¹²⁶

In the 1990s

2.68 It seems that the gross over-representation of Aboriginal children in the child welfare system continues in NSW. A study carried out in 1993¹²⁷ found that in NSW 17.7% of the children in substitute care were Aboriginal or Torres Strait Islander, however Aboriginal and Torres Strait Islander children made up only 2.1% of the child population in NSW in 1991.¹²⁸ In October 1996, Aboriginal and Torres Strait Islander children accounted for almost 21% of children in care.¹²⁹ Thus the level of representation of Aboriginal children in the substitute care system is around ten

125. Aboriginal Children's Research Project *Principal Report* at v [emphasis in original].

126. B Szwarc *Changing Particular Care: A National Survey of Children in Non-Government Substitute Care in Australia* (National Children's Bureau of Australia, Australia, 1992) cited in P Boss, S Edwards and S Pitman *Profile of Young Australians: Facts, Figures and Issues* (Churchill Livingstone, Melbourne, 1995) at 46.

127. H Bath "Out-Of-Home Care in Australia: A State by State Comparison" (1994) 19(4) *Children Australia* 4 at 7.

128. Australian Bureau of Statistics *1991 Census of Population and Housing: Aboriginal Community Profile* (Catalogue No 2722.0, AGPS, Canberra, 1993) and Australian Bureau of Statistics *June 1987 to June 1992, Estimated Resident Population by Sex and Age, States and Territories of Australia* (Catalogue No 3201.0, AGPS, Canberra, 1993).

129. NSW - Department of Community Services *Review of the Children (Care and Protection) Act 1987: Law and Policy in Child Protection* (Discussion Paper 1, Legislation Review Unit, October 1996) at 134.

times the representation of Aboriginal children in the general population.

2.69 Aboriginal and Torres Strait Islander children also tend to remain in care longer than other children. At June 1995, 50% of all Aboriginal and Torres Strait Islander children in care had been in care in NSW for two or more years. The comparable figure for other children was just over 37%.¹³⁰

2.70 It also appears that this over-representation of Aboriginal and Torres Strait Islander children is widespread throughout Australia. A study in 1992 showed that, with the exception of Victoria, all States and Territories had a significant over-representation of Aboriginal and Torres Strait Islander children in care.¹³¹

Aboriginal and Torres Strait Islander children in DOCS statistics

2.71 DOCS statistics for the six year period 1989/90 - 1994/95 are reported in Table 1. It shows the number of Aboriginal and Torres Strait Islander children who have been notified to DOCS by District Officers, people who have an obligation to notify instances

130. NSW - Department of Community Services *Review of the Children (Care and Protection) Act 1987: Law and Policy in Child Protection* (Discussion Paper 1, Legislation Review Unit, October 1996) at 134.

131. In WA the proportion of children in care who were Aboriginal and Torres Strait Islander was 40%, Queensland was 28% and SA was 24%: S Shaver and M Paxman *Homelessness, Wardship and Commonwealth Relations* (Social Policy Research Centre, University of NSW, No 101, 1992) cited in P Boss, S Edwards and S Pitman *Profile of Young Australians: Facts, Figures and Issues* (Churchill Livingstone, Melbourne, 1995) at 46. The proportion of the child population who are Aboriginal for these States is: 4.3% in WA; 2.0% in Queensland and 2.0% in SA: based on Australian Bureau of Statistics *1991 Census of the Population and Housing, Aboriginal Community Profile* (ABS Catalogue No 2722.0, AGPS, Canberra) cited in H Bath "Out-Of-Home Care in Australia: A State by State Comparison" (1994) 19(4) *Children Australia* 4 at 7.

of abuse¹³² and other members of the public who suspect abuse or neglect of the child. It also shows the number of Aboriginal and Torres Strait Islander children in substitute care.

Table 1: Aboriginal and Torres Strait Islander Children notified to DOCS and in substitute care in NSW 1989/90 - 1994/95

| | 1989-1990 | 1990-1991 | 1991-1992 | 1992-1993 | 1993-1994 | 1994-1995 |
|--|-----------|-----------|-----------|-----------|-----------|-----------|
| Number of ATSI* children notified to DOCS | 955 | 1,377 | 1,483 | 1,715 | 2,184 | n/a |
| ATSI children as percentage of all children notified to DOCS | 6.6 | 8.1 | 7.7 | 7.9 | 8.6 | n/a |
| Number of ATSI children in substitute care** | n/a | 885 | 908 | 992 | 1,150 | 1,271 |
| ATSI children as percentage of children in substitute care | n/a | 20.4 | 20.7 | 20.7 | 20.8 | 20.8 |

Source: NSW-Department of Community Services *Letter* (27 June 1995); and NSW-Department of Community Services *Letter* (20 March 1996).

* Aboriginal and Torres Strait Islander

** Being the number of children in substitute care at as 30 June of that year, ie; 30 June 1991 for the period 1990/1991

2.72 The proportion of Aboriginal and Torres Strait Islander children in care is more than double the proportion of Aboriginal and Torres Strait Islander children who are notified to DOCS in the first place. This would seem to indicate that Aboriginal and

132. Such as teachers, doctors and social workers.

Torres Strait Islander children who are notified to DOCS are more likely than non-Aboriginal children to end up in substitute care. The reasons for this are unclear and require further investigation.

Reasons for over-representation of Aboriginal and Torres Strait Islander children

2.73 While the focus of this Report is on the placement of Aboriginal and Torres Strait Islander children once they have come into the child welfare system, the way in which these children are drawn into the system is relevant to a consideration of the Principle. It is beyond the scope of this Report to analyse in great detail the factors which bring Aboriginal and Torres Strait Islander children into care. However, the conclusions of a key study in this area are presented by way of explanation.

2.74 The Aboriginal Children's Research Project Report attributed the high numbers of Aboriginal children in substitute care to the following factors:

- Aboriginal poverty, landlessness and other socio-economic disadvantages;
- the legacy of the removal policies since 1883 and the consequent disruption of Aboriginal family life often resulting in further welfare intervention, child removal and white substitute care;
- more scrutiny of Aboriginal families by the welfare department, exposing Aboriginal families to an increased risk of child removal;
- child welfare laws formulated in "general" (ie; non-Aboriginal) terms which fail to account for the distinctive nature of Aboriginal and Torres Strait Islander society;¹³³ and

133. Notions such as "abuse" and "neglect" can have different cultural interpretations. Cultural differences in the interpretation of "abuse"

- pervasive notions of assimilation in child welfare, from policy and planning to casework and child care.¹³⁴

2.75 The main recommendation made in the Report was that:

The NSW government, the Commonwealth government and other organisations involved in Aboriginal child welfare in NSW recognise and adopt the principle that Aboriginal people have the right to care for all their children, and following from this:

- i. guarantee Aboriginal control over their children
- ii. recognise the Aboriginal extended family as the best environment for Aboriginal children
- iii. return resources to Aboriginal communities for this purpose.¹³⁵

2.76 Another key recommendation of the Aboriginal Children's Research Project was that the Principle be adopted in the terms outlined below. This is quite different to the form of the Principle which is now widely adopted¹³⁶ in that it does not provide for the placement of Aboriginal children with non-Aboriginal people:

All placement decisions involving Aboriginal children should be in accord with the following priorities, in order:

- i. placement with the child's family
- ii. placement with another Aboriginal family in the child's community

is one factor which could explain the disproportionate number of Torres Strait Islander children in care. What Torres Strait Islanders would define as discipline has been defined as abuse by non-Torres Strait Islander welfare workers in some instances: J Larkin "Torres Strait Totems" *The Good Weekend Magazine* (20 May 1995) 38 at 43. See also N D'Souza "Aboriginal Child Welfare: Framework for a National Policy" (1993) 35 *Family Matters* 40 at 41.

134. Aboriginal Children's Research Project *Principal Report* at vi.

135. Aboriginal Children's Research Project *Principal Report* at viii.

136. See para 3.3.

- iii placement with another Aboriginal family
- iv. placement in other Aboriginal controlled care.¹³⁷

2.77 Another theory explaining the over-representation of Aboriginal and Torres Strait Islander children in substitute care is linked to the definition of "neglect". Disproportionate numbers of Aboriginal and Torres Strait Islander children are in care because of neglect.¹³⁸ This could be attributable to an inappropriate definition of neglect being applied to Aboriginal and Torres Strait Islander children. A recent study examined the disproportionate number of Aboriginal and Torres Strait Islander coming into care for abuse and neglect, and analysed the distribution of the cases by type of abuse and neglect. Cases involving neglect constituted 42% of all substantiated cases of abuse and neglect for Aboriginal and Torres Strait Islander children in Australia in 1990-1991.¹³⁹ For all Australian children the number of cases involving neglect constituted around 25%. These figures indicate that for all the substantiated cases of child abuse and neglect involving Aboriginal children, disproportionately more cases were categorised as neglect. In comparison, for all Australian children there were equal numbers of cases of classified as neglect, sexual abuse, emotional abuse and physical abuse.

2.78 Clearly there is an urgent need to address the root causes of this over-representation of Aboriginal and Torres Strait Islander children in the child welfare system, and to find ways of minimising these numbers.

137. Aboriginal Children's Research Project *Principal Report* at viii.

138. A recent study in WA found that Aboriginal children constituted 60% of all neglect cases, while Aboriginal people constitute only 3% of WA's population: D Thorpe *Evaluating Child Protection* (Open University Press, Great Britain, 1994) at 161.

139. 42% of cases involved neglect, 14% of cases involved sexual abuse, 20% of cases involved emotional abuse and 24% of cases involved physical abuse: N D'Souza (1993) at 41; based on figures from G Angus and K Wilkinson *Child Abuse and Neglect Australia, 1990-1991* (Australian Institute of Health and Welfare, Child Welfare Series No 2, 1993).

3.

The origins of the Principle

- The Principle
- Importance of keeping Aboriginal children in their communities
- The evolution of the Aboriginal Child Placement Principle
- Aboriginal and Islander Child Care Agencies
- Aboriginal child custody disputes

3.1 This Chapter outlines the Aboriginal Child Placement Principle ("the Principle") in the form in which it is commonly found today. The Chapter explores the values and assumptions on which the Principle is based, namely the assumption that it is important for Aboriginal children to remain in Aboriginal communities. The evolution of the Principle is then traced. The development of the Principle is closely linked with the development of Aboriginal and Islander¹ Child Care Agencies ("AICCAs") and a brief account of the evolution of AICCAs is given. The movement in policy from "assimilation" to the Principle reflects a change in approach to the "best interests" of Aboriginal children. This change is also evident in the area of child custody. This Chapter includes a section which looks at what factors the courts have considered relevant when determining the "best interests" of an Aboriginal child when settling a custody dispute between parents and other relatives.

3.2 Traditionally the Principle has referred, as the name suggests, exclusively to Aboriginal children rather than Aboriginal *and* Torres Strait Islander children. This section refers only to the *Aboriginal* Child Placement Principle. A *Torres Strait Islander* Child Placement Principle is discussed in Chapter 8.

THE PRINCIPLE

3.3 The Principle essentially outlines a preference for the placement of Aboriginal children with Aboriginal people when they are placed outside their families. The order of preference is generally that an Aboriginal child be placed

- within the child's extended family;
- within the child's Aboriginal community; and, failing that,
- with other Aboriginal people.

1. "Islander" refers to Torres Strait Islander.

3.4 The Principle is based on the premise that Aboriginal children are better off cared for in their Aboriginal families and communities. The Principle is regarded by Aboriginal people as important for Aboriginal communities as well as for Aboriginal children.

IMPORTANCE OF KEEPING ABORIGINAL CHILDREN IN THEIR COMMUNITIES

Importance to Aboriginal communities

3.5 Aboriginal people argue that they, as much as any other people, have the right to raise *all* their children and to retain them in their community.² This arises from a recognition of Aboriginal people as a distinct but varied cultural group, with the right to retain their own heritage, customs, languages and institutions.³ Aboriginal children provide the link between the past and the future for Aboriginal culture.

3.6 The Principle also follows on directly from the recognition of Aboriginal people's right to self-determination in respect of their

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2. NSW - Aboriginal Children's Research Project *Aboriginal Children in Substitute Care* (Principal Report, Part 1, July 1982) at 3 (the "Aboriginal Children's Research Project *Principal Report*").
 3. "Children are the guarantee of the survival and reproduction of any people. They are our future generations who we will entrust with the laws, practices and customs which we in turn have tried to keep alive. Our laws, practices, languages (where they survive) and customs are at the same time our reason for survival and the guarantee of our survival. Without them we have no distinct identity. We believe it is necessary to keep these customs alive because the alternative is destructive, individualistic and short-sighted. It does little or nothing to contribute to the future survival and advancement of the population of the world, let alone that of Australia.": B Butler "Aboriginal Children: Back to Origins" (1993) 35 *Family Matters* 7 at 8.

social, economic, political and cultural affairs.⁴ In asserting a right to raise their own children in culturally appropriate ways, Aboriginal people are claiming no more than what most other Australians already take for granted.

3.7 The Principle is also an important acknowledgement by the government that previous policies directed at Aboriginal children have caused suffering to Aboriginal people.⁵

Importance to Aboriginal children

Sense of Aboriginal identity

3.8 Continuing contact with Aboriginal community and culture is of crucial importance to Aboriginal children. The disastrous results of past policies of removal and assimilation have proven this.⁶ Being in close contact with extended family and community can be important for the sense of identity of Aboriginal children and young people.⁷ Family and kin have been described as a source of

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4. Aboriginal Children's Research Project *Principal Report* at 3.
 5. Chisholm believes that the Aboriginal Child Placement Principle sits well with "an acceptance of cultural and racial diversity (multi-culturalism) and a wish to acknowledge the claims of Aboriginal people arising from their status as indigenous people, and the history of injustice towards them": R Chisholm "Aboriginal Children and the Placement Principle" (1988) 2(31) *Aboriginal Law Bulletin* 4 at 4.
 6. "The argument for confining the principle to Aboriginal children is a practical one: that in view of the past practice of placing Aboriginal children away from their own people, and continuing prejudice against Aboriginal people, it is desirable to state in a public and formalised way that courts should acknowledge the value to Aboriginal children of continuing links with their cultural heritage and identity.": R Chisholm *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales* (Social Welfare Research Centre, University of NSW, Reports and Proceedings No 52, April 1985) at 105.
 7. This may better equip an Aboriginal child to deal with the inevitable questions of identity and belonging which arise in

learning and support for Aboriginal children.⁸ It is through this contact also that a young person can become better equipped to cope with racism.⁹

3.9 The Aboriginal population constitutes a minority of the population in Australia and many of the influences in an Aboriginal child's life will be from the dominant Anglo-Australian culture. It is likely that for many Aboriginal children, their only real opportunity to develop an Aboriginal identity is in an Aboriginal family.¹⁰ This factor has been considered in child custody cases involving Aboriginal children.¹¹

adolescence. See para 3.70 and also NSWLRC Report 81 at paras 8.28-8.29 and 8.32-8.40.

8. I O'Connor *The Impact of Queensland's Family and Child Welfare and Juvenile Justice Legislation, Policy and Practice on Aboriginal and Torres Strait Islander Families and Children* (prepared for the Royal Commission into Aboriginal Deaths in Custody, Queensland, November 1990) at 6. See also paras 2.50-2.52.
9. A strong version of this idea was stated in the Workshop on Aboriginal Community and Adoption at the First Australian Conference on Adoption in 1976: "The major point which whites fail to grasp is that in a racist society an individual is either white or black. One cannot be part black, part white. An Aboriginal child will soon learn from his white classmates that he is not one of them, that he is different, and that he belongs to the black community. Even if he looks white. The position taken by Aborigines on this issue is therefore that any child of Aboriginal parentage, no matter what his physical appearance or his degree of Aboriginality is an Aborigine.": E Sommerlad (ed) "Homes for Blacks: Aboriginal Community and Adoption" in C Picton (ed) *Proceedings of First Australian Conference on Adoption* (Sydney, 15-20 February 1976) 159 at 164. A counter view has also been argued, that an Aboriginal or Torres Strait Islander child can also get a poor sense of identity in an Aboriginal or Torres Strait Islander family if the family isn't appropriate: *Submission to Research Report (Confidential)*. See also para 3.68 and NSWLRC Report 81 at paras 8.69-8.73.
10. This was a factor which was considered by the Family Court in deciding to give custody of two Aboriginal children to their Aboriginal father over their non-Aboriginal foster parents: *Jones v*

3.10 It seems that placement with Aboriginal carers is important for continuing contact not only with Aboriginal culture, but also with their Aboriginal family. A detailed study of Aboriginal children in foster care in SA in 1988 found that children in Aboriginal placements were receiving more access to their natural families than those in non-Aboriginal placements.¹²

Land rights

3.11 The importance of keeping Aboriginal children within their extended family and kin group is also of importance with regard to land rights. *Mabo v Queensland*¹³ changed the common law in Australia to recognise the entitlement of Aboriginal and Torres Strait Islanders, in accordance with their laws and customs, to their traditional lands. In order to establish native title at common law an Aboriginal person, clan or group must "substantially maintain" its traditional connection with the land.¹⁴ Under Commonwealth¹⁵ and similar State and Territory¹⁶ native title legislation Aboriginal people can claim land if they can show unbroken traditional links with land where native title survives.

3.12 However, Brennan J acknowledged that native title could disappear "when the tide of history has washed away any real acknowledgement of traditional law and any real observance of

Darragh; Department of Community Services (1992) 15 Fam LR 757 at 769.

11. See para 3.65.
12. South Australian Aboriginal Child Care Agency *Identity and Belonging in Aboriginal Foster Care: A Study of Aboriginal Children in Long Term Foster Care, Their Foster Families and Natural Families* (SA Aboriginal Child Care Agency Forum Inc, Adelaide, 1988) at 9.
13. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
14. *Mabo* at 59 per Brennan J and at 110 per Deane and Gaudron JJ.
15. *Native Title Act 1993* (Cth).
16. For example *Native Title (New South Wales) Act 1994* (NSW).

traditional customs".¹⁷ Thus the forcible removal of Aboriginal people from their land and the removal of Aboriginal children from their communities may well have destroyed, in a legal sense, this traditional connection to the land. In many such circumstances it is likely that Aboriginal people will not be able to establish native title at common law or under the legislation.¹⁸

3.13 These rights could be denied to Aboriginal children placed away from their extended family and community and who lose their links with their kinship group and their land. The Principle is important to prevent further injustice in terms of land rights.

THE EVOLUTION OF THE ABORIGINAL CHILD PLACEMENT PRINCIPLE

3.14 The form of the Principle varies across the various jurisdictions in Australia. The emergence of the Principle is a significant shift, at a policy level at least, in the thinking of Australian child welfare departments. The Principle is stated policy, in one form or another, in all States and Territories¹⁹ which represents a significant advance from the policies of assimilation and protection discussed in Chapter 2.

3.15 This recognition has been principally due to the efforts of Aboriginal and Islander Child Care Agencies ("AICCAs"), the first of which was formed in 1977.²⁰ At the First Australian Conference on Adoption in 1976 the concerns of Aboriginal people were voiced about the large number of their children in the care of "white" families.²¹ This conference sowed the seeds for the formation of the

17. *Mabo* at 60 per Brennan J.

18. R H Bartlett *The Mabo Decision* (Butterworths, Australia, 1993) at xix.

19. See Chapter 5.

20. See paras 3.43-3.47.

21. C Picton (ed) *Proceedings of First Australian Conference on Adoption* (Sydney, 15-20 February 1976).

Principle. It has been largely the work of Aboriginal organisations such as the AICCAs, including the Aboriginal Children's Services in NSW and Link-Up (NSW)²² which has kept the issue of Aboriginal child care alive and been the force behind the development of the Principle. The AICCAs drew inspiration from the advances in North America regarding American Indian child welfare, namely the introduction of the *Indian Child Welfare Act 1978* (US).

The Indian Child Welfare Act 1978 (US)

3.16 The Federal *Indian Child Welfare Act* ("the ICWA") came into effect in 1978. It was considered a major advance in indigenous child welfare.²³ The ICWA was enacted by Congress to:

[P]rotect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.²⁴

3.17 The ICWA applies to Indian children²⁵ who are the subject of child custody proceedings, which includes foster care placement,

22. Link-Up (NSW) is an Aboriginal organisation founded in 1980 and based in NSW. It assists Aboriginal people who were removed or separated from their families to find their way home to their family and their Aboriginal culture.

23. N D'Souza "Aboriginal Child Welfare: Framework for a National Policy" (1993) 35 *Family Matters* 40 at 42.

24. 25 USC §§ 1902.

25. An "Indian child" under the ICWA means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe": 25 USC §§ 1903(4)

the termination of parental rights and adoptive placement.²⁶ Tribal courts have exclusive jurisdiction over such proceedings involving Indian children residing in or domiciled on a tribal reservation.²⁷ In the case of Indian children not domiciled on a tribal reservation, the ICWA requires the state court to transfer the case to a tribal court unless there is good cause to the contrary, the child's parents object, or the tribal court declines to accept the transfer.²⁸ If, however, a custody case involving an Indian child is heard in a state court, the child's tribe has a right to intervene.²⁹

3.18 The ICWA sets down clear preferences for the placement of an Indian child which are similar to the Principle. For the foster placement of an Indian child, these preferences are:

1. a member of the Indian child's extended family;
2. a foster home licensed, approved or specified by the Indian child's tribe;
3. an Indian foster home licensed or approved by an authorised non-Indian licensing authority; or
4. an institution approved by an Indian tribe or operated by an Indian organisation which has a program suitable to meet the Indian child's needs.³⁰

For the adoptive placement of an Indian child, the preferences are:

1. a member of the child's extended family;
2. other members of the Indian child's tribe; or
3. other Indian families.³¹

3.19 The ICWA is still in force today and considered largely successful.³² However, it is also a warning against relying solely on

26. 25 USC §§ 1903(1).
27. 25 USC §§ 1911(a).
28. 25 USC §§ 1911(b).
29. 25 USC §§ 1911(c).
30. 25 USC §§ 1915(b).
31. 25 USC §§ 1915(a).

legislation to achieve self-determination over child welfare because removal of Indian children from Indian reservations still continues. This is attributed, among other things, to non-Indian couples, religious groups and state agencies wanting to "save" Indian children from a life on a reservation; Indian mothers wanting their children to be adopted by non-Indian people; state courts ignoring the mandate of the tribal courts in Indian child welfare cases;³³ and Indian children getting lost in bureaucratic and jurisdictional disputes.³⁴ The ICWA did, however, prove to be a model which influenced the evolution of the Principle in Australia.

Federal Government action

3.20 The Commonwealth Government's expressed position in 1976 was that Aboriginal child welfare, as with child welfare generally, was the responsibility of the State and Territory Governments.³⁵ This was in response to a call on the Government to "support the setting up of Aboriginal-run and controlled agencies in the States and Territories to facilitate the placement ... of children".³⁶ The Principle itself was first proposed at the Commonwealth level by the Department of Aboriginal Affairs

32. P Kunesh "Building Strong, Stable Indian Communities through the Indian Child Welfare Act" (1993) 27 *Clearinghouse Review* 753 at 753.

33. D J Goldsmith "Individual v Collective Rights: The Indian Child Welfare Act" (1990) 13 *Harvard Women's Law Journal* 1 at 45.

34. R-M Orrantia *The Indian Child Welfare Act: A Handbook* (USA, 1991) at 11.

35. NSW - Department Of Community Services *Learning from the Past: Aboriginal Perspectives on the Effects and Implications of Welfare Policies and Practices on Aboriginal Families in NSW* (Prepared by Gungil Jindibah Centre, 10 October 1994) at 48.

36. This issue of Aboriginal self-determination in the area of child welfare was raised by Senator Keefe: Australia Parliamentary Debates (Hansard) Senate, 17 March 1976 at 531.

(Cth) at a conference of the Council of Social Welfare Ministers in 1979.³⁷

Department of Aboriginal Affairs (Cth) policy guidelines

3.21 In 1980 the Department of Aboriginal Affairs (Cth) published policy guidelines for the adoption and fostering of Aboriginal children.³⁸ The guidelines, while accepting that adoption and fostering were the preserve of the State and Territory Governments, placed a high priority on maintaining Aboriginal children in their family and community environment for both fostering and adoption.³⁹ They recommended that the advice of appropriate Aboriginal bodies be sought regularly on adoption and fostering procedures and individual placements and that such bodies might assist in the assessment of placements for Aboriginal children and the co-ordination of relevant family and child services.⁴⁰ The role of Aboriginal bodies envisaged by these guidelines went further than the role set out in the Principle which was eventually adopted by the Council of Social Welfare

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37. Representing the Welfare Ministers of all States and Territories in Australia.
38. Australia - Department of Aboriginal Affairs *Aboriginal Adoption and Fostering - Policy Guidelines* (Doc.B.10.3, January 1980) ("Department of Aboriginal Affairs *Policy Guidelines*") reproduced in Australian Law Reform Commission *Aboriginal Customary Law: Child Custody, Fostering and Adoption* (Research Paper 4, 1982) at Appendix 1 ("ALRC RP 4").
39. "Where action to commit an Aboriginal child to care appears necessary, State Government Departments and voluntary welfare organisations concerned with fostering programs should attempt to follow these procedures:
- develop adequate support services in order to help parents care for their children in satisfactory ways; or
 - foster the child with Aboriginal relatives or with other Aboriginal foster parents preferably in the same Aboriginal community." The guidelines also stated that Aboriginal children should be adopted with Aboriginal families wherever possible: Department of Aboriginal Affairs *Policy Guidelines*.

40. Department of Aboriginal Affairs *Policy Guidelines* at para 15.

Ministers ("the Council"). The latter form of the Principle does not deal with the issue of Aboriginal control over the placement of Aboriginal children.

Council of Social Welfare Ministers

3.22 The Council consists of the social welfare Minister of each State and Territory and is advised by the Working Party of State Social Welfare Administrators ("the Working Party"). The Council was slow to pick up on the recommendations of the Department of Aboriginal Affairs and only in 1984 did the Principle receive any express recognition by the Council. Even then, the Principle was not adopted as policy by the Council until 1986.

3.23 In 1983 a report of the Working Party accepted the broad principles of the Department of Aboriginal Affairs guidelines.⁴¹ The Working Party recommendations, endorsed by the Council of Social Welfare Ministers in 1984, regarding fostering and adoption respectively, were:

That in the foster placement of an Aboriginal child a preference be given, in the absence of good cause to the contrary, to a placement with:

- a member of the child's extended family;
- other members of the child's Aboriginal community who have the correct relationship with the child in accordance with Aboriginal customary law;
- other Aboriginal families living in close proximity.⁴²

That in the adoptive placement of an Aboriginal child a preference be given, in the absence of good cause to the contrary (and after considering the wishes of the consenting parent to confidentiality and anonymity) to a placement with:

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41. Australia - Working Party of the Standing Committee of Social Welfare Administrators *Aboriginal Fostering and Adoption: Review of State and Territory Principles, Policies and Practices* (October 1983) (the "Working Party Report").
42. Recommendation 6 of the Working Party Report at 6.

- other members of the child's Aboriginal community who have the correct relationship with the child in accordance with Aboriginal customary law;
- other approved Aboriginal couples.⁴³

3.24 The Working Party noted the commitment of all States and Territories to the Principle and believed that effective and acceptable implementation of the Principle was within the capability of each welfare department.⁴⁴ The Working Party recommended that each State and Territory consult with Aboriginal organisations and communities and consider *legislative* enactment of the Principle.⁴⁵ Ultimately, the Working Party believed that implementation of the Principle rested with the States and Territories, and rejected the idea of federal legislation on the Principle.⁴⁶

3.25 The Working Party's Report was rejected by the Secretariat of National Aboriginal and Islander Child Care ("SNAICC")⁴⁷ which didn't believe it had been prepared with adequate consultation with Aboriginal people.⁴⁸ SNAICC also noted that the report failed to address several major issues, such as the funding of Aboriginal child care agencies and "real decision-making powers to Aboriginal/Island people". SNAICC also found the rejection of the concept of federal legislation unacceptable.

43. Recommendation 8 of the Working Party Report at 7.

44. Working Party Report at 4.

45. Recommendation 10 of the Working Party Report at 7.

46. Working Party Report at 38.

47. The umbrella organisation for Aboriginal and Islander Child Care Agencies in Australia. See para 3.48.

48. The Report was rejected at the National Conference of Aboriginal and Islander Child Care Agencies (March 1984, Townsville) cited in R Chisholm *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales* (Social Welfare Research Centre, University of NSW, Reports and Proceedings No 52, April 1985) at 110-111.

3.26 It appears that in 1986 a slightly modified version of the Principle was accepted by all States and Territories at the Social Welfare Ministers' Conference.⁴⁹ The accepted version seems to be the same as that in *Departmental Policy* (Tas).⁵⁰

3.27 The Ministers agreed to implement the Principle as *policy*, but not necessarily as legislation. The Ministers were also resistant to the notion of federal legislation regarding the Principle.⁵¹ At this 1986 Conference, the Commonwealth Government made its position clear regarding the Principle:⁵²

- It did not accept financial responsibility for the implementation of the Principle, given that child welfare was, in its view, traditionally and properly an area of State and Territory responsibility.
- It regarded the State and Territory Governments as having full responsibility for children presently in care and that these Governments had been responsible for removing Aboriginal children from their families and communities.
- It considered that its previous funding of the Aboriginal and Islander Child Care Agencies (AICCAs) represented a significant and sufficient financial commitment to

49. Department of Community and Health Services (Tas) *Departmental Policy*; D Wilkinson "Aboriginal Child Placement Principle: Customary Law Recognition and Further Legislative Reform" (1994) 3(71) *Aboriginal Law Bulletin* 13 at 13.

50. Department of Community and Health Services (Tas) *Departmental Policy* (see Appendix G). Exhaustive efforts to verify the exact form of this Principle have proved unsuccessful.

51. R Chisholm "Aboriginal Children and the Placement Principle" (1988) 2(31) *Aboriginal Law Bulletin* 4 at 4.

52. Statement by the Minister for Aboriginal Affairs, Mr Holding, and the Minister for Community Services, Senator Grimes, referred to as the "Holding-Grimes Agreement" cited in G Atkinson *Report on the Joint National Review of Aboriginal And Islander Child Care Agencies [AICCAs]* (Report to the Ministers for Aged, Family and Health Services and Aboriginal Affairs, January 1991) at 9-10 (the "Atkinson Report").

implementing the Principle and that any further financial obligations rested with the States and Territories.

3.28 Five years later, this discord between the States and Territories, and the Commonwealth led to the Report on the Joint National Review of the AICCA's (or "Atkinson Report") into the funding of the AICCA's. It recommended that the Commonwealth and State and Territory Governments join with AICCA's and other funding sources to develop a National Aboriginal Child and Family Welfare Strategy, with the Principle as the primary goal.⁵³

Australian Law Reform Commission Report on Aboriginal customary law

3.29 The 1986 Australian Law Reform Commission Report ("the ALRC Report") on Aboriginal customary law dealt with issues of child custody, fostering and adoption of Aboriginal children. The ALRC recommended that:

legislation should deal expressly with the placement of Aboriginal children ... It should require that, in cases of adoptive and foster placements of Aboriginal children, preference should be given, in the absence of good cause to the contrary, to placements with:

1. a parent,
2. a member of the child's extended family,
3. other members of the child's community (and in particular, persons with responsibilities for the child under the customary laws of that community).⁵⁴

3.30 The ALRC Report also recommended that child welfare legislation should explicitly acknowledge the right of relevant Aboriginal people to be consulted and involved in decisions involving Aboriginal children, and provide a guarantee of involvement and consultation with appropriate family members or

53. Atkinson Report at 100.

54. Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) at para 366.

an appropriate Aboriginal agency.⁵⁵ In addition, the ALRC recommended that careful attention be given to the possibility of handing over child care responsibilities to regional or local child care agencies backed up by appropriate resources.⁵⁶ The ALRC also promoted the inclusion of the Principle in federal legislation, so that the Principle would apply throughout Australia as a uniform expression of public policy and be more likely to be better known and effectively implemented.⁵⁷

3.31 In 1994, in a response to the recommendations of the ALRC Report on Aboriginal customary law, the Commonwealth Government rejected the ALRC view and re-affirmed its position that the recognition of the Principle is primarily the legislative and administrative responsibility of the States and Territories.⁵⁸

3.32 The ALRC recommendation was, however, supported by the National Council for the International Year of the Family in 1994, which urged the Commonwealth to develop a national policy for Aboriginal and Torres Strait Islander families, children and young people, underpinned by culturally relevant federal legislation. The Council envisaged that such policy and legislation be developed in full consultation with the relevant community organisations and in consultation with the States and Territories.⁵⁹

55. ALRC Report 31 at para 373.

56. ALRC Report 31 at para 375.

57. ALRC Report 31 at para 368. See also paras 3.38-3.42.

58. Australia - Office of Indigenous Affairs *Aboriginal Customary Laws: Report on Commonwealth Implementation of the Recommendations of the Australian Law Reform Commission* (Department of the Prime Minister and Cabinet, AGPS, Canberra, 1994) at 25.

59. Australia - National Council for the International Year of The Family *Creating the Links: Families and Social Responsibility. Final Report by the National Council for the International Year of the Family* (AGPS, Canberra, 1994) at 142.

Further Federal support for legislation

3.33 Following the adoption of the Principle by the Council of Social Welfare Ministers in 1986, there have been many comments at a federal level, in addition to those of the ALRC, about the need for the Principle to be in legislation. Some have suggested that this legislation should be federal legislation. In 1984, the then Minister for Aboriginal Affairs, the Hon Clyde Holding, held the spectre of federal Aboriginal Child Welfare legislation over the States and Territories in an attempt to convince them to legislate on the Principle. Some Aboriginal groups declared this to be largely a bluff and called for stronger steps to be taken.⁶⁰ Around this time there was also pressure at a State level, in NSW at least, for the Principle to be implemented in federal legislation.⁶¹

3.34 The Royal Commission into Aboriginal Deaths in Custody ("the RCIADIC") in 1989 affirmed the need for the Principle to be contained in legislation, and recommended in its report:

That in States and Territories which have not already so provided there should be legislative recognition of:

- a. The Aboriginal Child Placement Principle; and
- b. The essential role of Aboriginal Child Care Agencies.⁶²

60. B Butler "Words are not Enough" in J Harvey, U Dolgopol and S Castell-McGregor (eds) *Implementing the UN Convention on the Rights of the Child in Australia* (Proceedings of a National Seminar of the South Australian Children's Interest Bureau, Adelaide, February 1992) 17 at 18.

61. The Aboriginal Children's Research Project recommended that the Principle be adopted to reduce the large numbers of Aboriginal children in substitute care. It also recommended federal legislation to guarantee the rights of Aboriginal children to remain in their communities and to protect them from undue intervention by State authorities: NSW - Aboriginal Children's Research Project *Aboriginal Children in Substitute Care* (Principal Report, Part 1, July 1982) at viii.

62. Recommendation 54: E Johnston *Royal Commission into Aboriginal Deaths in Custody - National Report: Overview and Recommendations* (AGPS, Canberra, 1991).

3.35 In 1989 Mr Brian Burdekin, then the Human Rights Commissioner, suggested that federal legislation in certain areas of child welfare generally needed to be seriously considered.⁶³ Inclusion of the Principle in legislation was also supported in the Human Rights and Equal Opportunity Commission Report ("HREOC Report") into homeless youth in 1989.⁶⁴ The HREOC Report also identified the urgent need to provide the AICCAs with resources and administrative support in order fully to implement the Principle.

3.36 In 1995, the Commonwealth Government initiated a National Inquiry into Separation of Aboriginal and Torres Strait Islander Children conducted by HREOC and chaired by the President of HREOC, Sir Ronald Wilson. The then Attorney-General requested that HREOC examine, among other issues, current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children and advise on any reforms required taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples.⁶⁵ The Commonwealth Government's submission to the Inquiry referred briefly to the Principle, claiming that it had been incorporated into legislation in most jurisdictions.⁶⁶ To date, HREOC has not reported on the National Inquiry. There is presently no federal legislation regarding the placement of Aboriginal or Torres Strait Islander children.

63. B Burdekin "The Draft UN Convention on the Rights of the Child: An Australian Perspective" (1989) 1 *Australian Social Policy* 71 at 71.

64. Australia - Human Rights and Equal Opportunity Commission *Our Homeless Children: Report of the National Inquiry into Homeless Children* (Canberra, AGPS, 1989) at 135.

65. Terms of Reference for the National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families dated 2 August 1995, as amended. HREOC is expected to report on its findings in mid-1997.

66. Australia *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families: Commonwealth Government Submission* (October 1996) at 5.

Response of State and Territory Governments

3.37 The response from the State and Territory Governments has not been overwhelming. Over a decade after the Working Party of State Social Welfare Administrators recommended in 1983 that the implementation of the Principle was the responsibility of the States and Territories, only half the States and Territories in Australia have some form of the Principle in legislation relating to the adoption and fostering of Aboriginal children.⁶⁷ All States and Territories maintain that the Principle is applied by way of administrative policy, yet the figures do not necessarily substantiate the effectiveness of such policies.⁶⁸ Even in the States and Territories which have included the Principle in legislation, the actual wording and effect of the Principle varies.⁶⁹

Federal or State responsibility for the Principle?

3.38 The Federal Government maintains the position that Aboriginal child welfare is a matter of State and Territory Government responsibility and, as such, any legislation should be at a State and Territory level. Some Aboriginal organisations believe that leaving the implementation of the Principle to the discretion of the States and Territories has been ineffective and that it is time for Federal legislation. The Chief Justice of the Family Court of Australia, the Hon Alastair Nicholson, is also of the view that "[s]o far as Aboriginal and Torres Strait Islander

67. Those pieces of legislation which include the Principle are: *Adoption Act 1993* (ACT) s 21; *Children (Care and Protection) Act 1987* (NSW) s 87; *Community Welfare Act 1983* (NT) s 69; *Adoption of Children Act 1994* (NT) s 11; *Children's Protection Act 1993* (SA) s 5; *Adoption Act 1988* (SA) s 11; *Children and Young Persons Act 1989* (Vic) s 119; and *Adoption Act 1984* (Vic) s 50.

68. See Chapter 7.

69. See para 5.2.

children are concerned the *Commonwealth* has a primary legislative responsibility".⁷⁰

3.39 The legislation envisaged by Aboriginal organisations would construct an Aboriginal child welfare system run by Aboriginal communities and Aboriginal organisations, based on a model implemented in the United States by the *Indian Child Welfare Act 1978* (US).⁷¹

Aboriginal support for federal legislation

3.40 SNAICC has been calling for culturally relevant national legislation, acceptable to all Aboriginal and Islander communities, relating to Aboriginal and Torres Strait Islander child welfare for over 25 years. SNAICC maintains that Aboriginal customary practice is more amenable to federal legislation. It also submits that the problems faced by indigenous children are unique and warrant separate attention rather than trying to solve problems within the existing framework of state child welfare legislation. Many Aboriginal children are still to a large extent identified by their kinship ties, which do not correspond with the artificial boundaries of States and Territories. SNAICC argues that different pieces of State and Territory legislation cut across tribal boundaries and impose different regimes on Aboriginal children regardless of the differing areas of customary jurisdiction.⁷² This denies Aboriginal people the right to operate according to their tribal and regional identities which are linked to their

70. A Nicholson "Indigenous Customary Law and Family Law", address to the *Indigenous Customary Law Forum* (18 October 1995, Canberra) at 4 [emphasis in original].

71. See paras 3.16-3.19.

72. B Butler "Our Responsibility for Our Children's Future", Paper presented at the *International Year of the World's Indigenous Peoples Conference* (Wollongong, December 1993) at 4.

identification with their lands. SNAICC passed a resolution in 1984 calling for national legislation⁷³ which it envisaged would:

- safeguard the rights of Aboriginal children and their families;
- give the Federal Government the authority to make grants to Aboriginal communities and organisations to establish Aboriginal child and family service programs;
- generally recognise the sovereignty of Aboriginal people by empowering local communities to carry out the work of supporting families and children; and
- override state legislation.⁷⁴

3.41 The Commonwealth Government arguably already has the power to implement such legislation under s 51(xxvi) of the Constitution which gives the Commonwealth "special powers" to legislate for Aboriginal people.⁷⁵ The Commonwealth also unquestionably has the power under s 51(xxix) of the Constitution which allows the Federal Government to legislate to bring into effect treaties, such as the United Nations Convention on the Rights of the Child ("UNCROC"), which Australia has ratified.⁷⁶ Australia is obliged under Article 4 of UNCROC to undertake all legislative, administrative and other measures for the

73. R Chisholm "Destined children: Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy" (1985) 14 *Aboriginal Law Bulletin* 6 at 8.

74. N D'Souza "Aboriginal Child Welfare: Framework for a National Policy" (1993) 35 *Family Matters* 40 at 45.

75. The Federal Government acquired this power by referendum in 1967.

76. *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (Tasmanian Dams case) (1983) 158 CLR 1; *Queensland v Commonwealth* (1989) 167 CLR 232; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

implementation of rights under UNCROC.⁷⁷ Such an obligation would implicitly require that there is consistency and uniformity in the measures taken. The current approach of the Australian States and Territories in the area of Aboriginal child welfare can be described as anything but uniform and consistent. This is despite the ten years which have passed since the State Social Welfare Ministers agreed to implement the Principle. It is also generally accepted that a state party to a convention cannot avoid its obligations under that convention by maintaining that the responsibility lies with its constituent member states.

3.42 If the Commonwealth Government were to legislate in the area of Aboriginal child welfare to give effect to the provisions of UNCROC, such legislation would override any inconsistent State legislation.⁷⁸ Such legislation may meet with opposition from the State Ministers, who may resent the intrusion of the Federal Government into their fundamental powers. Alternatives have also been put forward, one of which is a uniform "Model Child Care and Welfare Legislative Code", agreed upon by all States and Territories.⁷⁹ Another option may be to ensure that all States and Territories comply fully with the Principle and the recommendation of the RCIADIC, through the Standing Committee of Attorneys-General or the Council of Social Welfare Ministers.⁸⁰ Aboriginal groups may well be sceptical at the likelihood of the States succumbing to such pressure now, when previous pressure has achieved little more than policy in some

77. "State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention": UNCROC Article 4.

78. Commonwealth Constitution s 109.

79. D Wilkinson "Aboriginal Child Placement Principle: Customary Law Recognition and Further Legislative Reform" (1994) 3(71) *Aboriginal Law Bulletin* 13 at 14.

80. Wilkinson at 14.

States. They are acutely aware of the difficulties of achieving lasting consensus between the States and Territories.⁸¹

ABORIGINAL AND ISLANDER CHILD CARE AGENCIES

3.43 The impetus for establishing AICCAs came from the Aboriginal Legal Service in Victoria in the 1970s which identified a need for an Aboriginal child placement service. It observed that approximately 90% of its Aboriginal clients seeking assistance for criminal charges had been in some form of placement - foster, adoptive or institutional placement.⁸² The formation of AICCAs became a reality following the First National Conference on Adoption in 1976. This Conference saw the issue of the adoption of Aboriginal children forced onto the mainstream agenda for the first time.⁸³

3.44 There are now almost 100 Aboriginal and Torres Strait Islander community-run children's services scattered throughout Australia.⁸⁴ AICCAs play a crucial role in the welfare of Aboriginal children by providing localised services for Aboriginal and Torres Strait Islander children and their families including family counselling, court advocacy, substitute care, vacation care, after

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81. B Butler "Our Responsibility for Our Children's Future", Paper presented at the *International Year of the World's Indigenous Peoples Conference* (Wollongong, December 1993) at 5-7.
 82. E Sommerlad (ed) "Homes for Blacks: Aboriginal Community and Adoption" in C Picton (ed) *Proceedings of First Australian Conference on Adoption* (Sydney, 15-20 February 1976) 159 at 161.
 83. C Picton (ed) *Proceedings of the First Australian Conference on Adoption* (Sydney, 15-20 February 1976). See also NSW - Department Of Community Services *Learning from the Past: Aboriginal Perspectives on the Effects and Implications of Welfare Policies and Practices on Aboriginal Families in NSW* (Prepared by Gungil Jindibah Centre, 10 October 1994) at 49.
 84. B Butler "Aboriginal Children: Back to Origins" (1993) 35 *Family Matters* 7 at 8.

school care and family day care.⁸⁵ The basic principles behind AICCAs' services have been described as:

- The principle of self-determination. This is reflected in how and by whom the agencies are run.
- The right to bring up children as Aboriginal children. This is the right to rear them in a way that is uniquely Aboriginal in the understanding of the beliefs of their particular community, and in language, custom, culture and religion.
- The need for additional assistance to give extra support to families and children arising from the comparative socio-economic disadvantage of Aboriginal people.⁸⁶

3.45 AICCAs have been characterised as carrying on the long tradition of resistance by Aboriginal people.⁸⁷ They challenge the image of Aboriginal people as merely passive victims of welfare policy. It is in organisations such as AICCAs that the roots of Aboriginal and Torres Strait Islander self-determination in child care may be found.⁸⁸ AICCAs have been described as:

the real expression of the fight for self-determination and survival. They are acting out the sovereignty of Aboriginal peoples in Australia in our struggle to survive.⁸⁹

85. Secretariat of National Aboriginal and Islander Child Care "Child Abuse and Neglect from an Aboriginal Perspective: Paper to Sixth International Congress on Child Abuse and Neglect" (1987) 3(2) *Black Voices* 25 at 29.

86. Butler (1993) at 10.

87. R Chisholm "Destined Children: Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy" (1985) 14 *Aboriginal Law Bulletin* 6 at 6.

88. See paras 6.40-6.46.

89. Secretariat of National Aboriginal and Islander Child Care (SNAICC) "Child Abuse and Neglect from an Aboriginal Perspective: Paper to Sixth International Congress on Child Abuse and Neglect" (1987) 3(2) *Black Voices* 25 at 29.

3.46 Both the ALRC Report and the HREOC Report⁹⁰ recognised the crucial role of AICCAs in the effective implementation of the Principle. However, there is even less legislative recognition of the role of AICCAs than that of the Principle. Only two States, Victoria⁹¹ and South Australia,⁹² give statutory recognition to specific AICCAs by way of a Ministerial declaration or gazetted notice. In other jurisdictions⁹³ it is a requirement to consult with "appropriate Aboriginal welfare organisations" before making an adoptive or foster placement involving an Aboriginal child. However, some Aboriginal child care organisations resent being referred to as "welfare organisations".⁹⁴ Also, the decision about which organisations are "appropriate" is left to the discretion of administrators.

3.47 Much has been achieved by these organisations over these 20 years. As a result of their efforts, there is a greater awareness of the importance of keeping Aboriginal children in Aboriginal communities. Despite this, AICCAs continue to struggle for recognition of their role in the welfare of Aboriginal children and for resources to sustain their work. The major problems of Aboriginal organisations have been identified as grossly inadequate resources, excessive caseloads, lack of recognition by the appropriate authorities to determine the future of Aboriginal children and total reliance on government funding.⁹⁵

90. See paras 3.30 and 3.35 respectively.

91. *Children and Young Persons Act 1989* (Vic) s 6; *Adoption Act 1984* (Vic) s 50(3)-(5) (see Appendix H).

92. *Children's Protection Act 1993* (SA) s 5(3)-5(4) (see Appendix F).

93. *Community Welfare Act 1983* (NT) s 69 and *Adoption of Children Act 1994* (NT) s 11(1) (see Appendix D); *Children (Care and Protection) Act 1987* (NSW) s 87 (see para 4.4).

94. See para 8.10.

95. SNAICC at 29.

The Secretariat for National Aboriginal and Islander Child Care

3.48 SNAICC was founded in 1981 by a group of Aboriginal people from around Australia representing various AICCA's.⁹⁶ It was formed as a national umbrella organisation for all AICCA's and has been calling for federal Aboriginal child welfare legislation since its inception. The Chairman of SNAICC describes it as:

... a collective agency of community-based, community controlled Aboriginal and Islander Child Care Agencies, services and committees across the nation ... The most outstanding feature of SNAICC is its ability to gain local, community opinion by always maintaining the principles and practices of community control (self-determination and self-management).⁹⁷

The Aboriginal Children's Service (NSW)

3.49 In NSW AICCA's tend to be called Aboriginal Children's Services. The first Aboriginal Children's Service ("the ACS") was established in Sydney in 1975. It is a community-based, Aboriginal controlled, Aboriginal staffed child care agency. It operates on a State-wide basis. The aims of the agency are to:

- Cease the practice of Fostering and Adoption of Aboriginal children to non-Aboriginal families.
- Offer alternatives to courts other than the Institutionalisation of Aboriginal children.⁹⁸

96. N D'Souza "The Secretariat of the National Aboriginal and Islander Child Care" (1994) 18 *Aboriginal and Islander Health Worker Journal* 27 at 27.

97. B Butler "Adopting an Indigenous Approach" (1989) 13 *Adoption and Fostering* 27 at 28.

98. Aboriginal Children's Service Ltd pamphlet.

The objectives of the ACS are to:

- Use the natural family and extended family as the alternative. This will result in the formal acknowledgement link in Aboriginal culture.
- Provide a service that is identifiable to the Aboriginal community and used as such.
- Help re-link/re-trace family members separated by Welfare Practices and Policies of the past.
- Provide assistance wherever applicable to ensure that all Aboriginal children and families who come to the attention of Authorities are adequately represented.⁹⁹

3.50 The ACS was originally funded by Australian Catholic Relief, but now operates on a mixture of Commonwealth¹⁰⁰ and NSW Government¹⁰¹ funding. The ACS runs, among other services, a foster placement service for children in need of short-term alternative care. The ACS is also a member of SNAICC. There are now nine Aboriginal organisations providing services for Aboriginal children throughout NSW: in Redfern, St Mary's, Cowra, Wagga Wagga, Nowra, Dareton, Coffs Harbour, the Hunter region and the Manning region.¹⁰²

Funding

3.51 AICCA's receive funding from various sources. This section outlines the somewhat *ad hoc* manner in which the Commonwealth and NSW Governments fund the AICCA's in NSW. The Commonwealth Government's involvement with two of the AICCA's in NSW has been long-running and their continued funding of these services seems to stem from this history rather than an acceptance of responsibility for the services.

99. Aboriginal Children's Service Ltd pamphlet.

100. Provided by the Aboriginal and Torres Strait Islander Commission (Cth) and the Department of Health and Family Services (Cth).

101. Provided by the Department of Community Services (NSW).

102. See para 4.18.

Commonwealth Government funding

3.52 The AICCA in Victoria was initially funded by the Office of Child Care in the Commonwealth Social Security Department.¹⁰³ It seems that, in the face of State and Territory inaction, the Commonwealth felt "compelled" to act on the "appalling" numbers of Aboriginal children entering the child welfare system across Australia.¹⁰⁴ The Commonwealth then funded other AICCA's across Australia through its Family Services Program in what has now become the Department of Health and Family Services. There was contention between the Commonwealth and State and Territory Governments over the disparity in contributions to AICCA's which led to a Commonwealth review of its funding of AICCA's in 1991.¹⁰⁵ State funding was found to be far less than Commonwealth funding, even though the activities carried out by AICCA's were regarded as being more in the area of State and Territory responsibility.¹⁰⁶ Lack of effective integration and co-ordination between the funding sources of AICCA's was also identified as a factor hampering the effective operation of AICCA's.¹⁰⁷

3.53 In 1995, Senator Crowley, then the Minister responsible, after consulting with the Minister for Aboriginal and Torres Strait Islander Affairs, gave an undertaking that the Commonwealth would continue to fund the AICCA program. This undertaking was consistent with the wishes of AICCA's to maintain links with the

103. M Dyer "Working With Aboriginal Families and Children" (1980) 5(3) *Australian Child and Family Welfare* 17 at 18.

104. B Butler "Aboriginal and Torres Strait Islander Children: Present and Future Services and Policy" (1993) 18 *Children Australia* 4 at 4. See also the Holding-Grimes Agreement referred to at para 3.27 and note 52 in this Chapter.

105. G Atkinson *Report on the Joint National Review of Aboriginal And Islander Child Care Agencies [AICCA's]* (Report to the Ministers for Aged, Family and Health Services and Aboriginal Affairs, January 1991) (the "Atkinson Report").

106. In NSW in 1989/90 the Commonwealth provided 64.4% of the funding to AICCA's and the NSW provided 35.6% of the funding: Atkinson Report at 101.

107. Atkinson Report at 95-96.

Commonwealth. The Department is in the process of negotiating agreements with the AICCAs which distinguish the functions of the AICCAs funded by the Department from those functions funded by other sources, such as ATSIC and State Governments.¹⁰⁸ The Commonwealth Department of Health and Family Services now funds eleven AICCAs across Australia to assist in their fostering and adoption of Aboriginal and Torres Strait Islander children and related family welfare matters.¹⁰⁹ In NSW the Commonwealth contributes to the funding of the ACS (Redfern)¹¹⁰ and the Coffs Harbour Aboriginal Family and Community Care Centre.¹¹¹

3.54 The Aboriginal and Torres Strait Islander Commission (ATSIC) has a supplementary role in the funding of AICCAs, although it does not accept a specific responsibility in the area of Aboriginal child care. ATSIC tends to fund specific projects or provide "one-off" grants, although the future of such grants is now tenuous due to funding cuts to ATSIC.

108. Information provided by the Department of Health and Family Services (Cth). The Commonwealth Government in a report to the HREOC National Inquiry, referred to its commitment to funding AICCAs and the need to have a clear understanding of how funds are separated from funds provided from other sources: *Australia National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families: Commonwealth Government Submission* (October 1996) at 6.

109. *Australia National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families: Commonwealth Government Submission* (October 1996) at 5-6.

110. Through the Aboriginal and Torres Strait Islander Commission (Cth) and the Department of Health and Family Services (Cth).

111. Through the Department of Health and Family Services (Cth).

NSW Government funding

3.55 The NSW Department of Community Services funds a number of ACS organisations to provide alternative care (both through foster care and group homes) for Aboriginal children.¹¹² These organisations include:

- Cowra ACS
- Wagga Wagga ACS
- St Mary's ACS
- Hunter ACS
- Koolyangarra Fostering Agency (Nowra)
- Nunya Aboriginal Fostering Agency (Dareton)
- Manning ACS

ABORIGINAL CHILD CUSTODY DISPUTES

3.56 The Principle strictly applies to the placement of Aboriginal children outside of their natural family for fostering and adoption. However, disputes over where Aboriginal children should live also arise between parents and relatives in child custody disputes. An examination of the principles applied to such custody disputes highlights issues involved with the operation of the Principle.

3.57 Disputes between parents over the custody of children of a marriage are a Commonwealth matter governed by the *Family Law Act 1975* (Cth) and are dealt with in the Family Court of Australia. Custody of Aboriginal and Torres Strait Islander children under the *Family Law Act 1975* (Cth) is governed by the same law and principles as that for non-Aboriginal and non-Torres Strait Islander children.¹¹³ Disputes over the custody of children can also arise between birth parents and foster or adoptive parents, and these matters generally are dealt with in the Supreme Court of the relevant State or Territory.

112. See para 4.19.

113. *In the Marriage of Goudge* (1984) 54 ALR 514 at 526 per Evatt CJ; *In the Marriage of Sanders* (1976) 26 FLR 474.

Best interests of the child

3.58 While there is no formulation of the Principle in the *Family Law Act 1975* (Cth),¹¹⁴ the Family Court has indicated the factors it considers important in the determination of the "best interests" of an Aboriginal child. The "best interests of the child" is the paramount consideration for the Court in making a parenting order for the child.¹¹⁵ The leading cases generally involve a dispute between Aboriginal parents¹¹⁶ or their relatives and non-Aboriginal parents or their relatives.

3.59 It has been firmly established that one culture or race is not to be preferred over another in determining the best interests of a child.¹¹⁷ All relevant factors must be taken into consideration.¹¹⁸ Section 64 of the *Family Law Act 1975* (Cth) listed a number of factors which the Court was required to take into account in considering the welfare of the child, but did not specifically refer to

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114. In *Jones v Darragh* (1992) 15 Fam LR 757 at 762 Renaud J considered that while the Aboriginal Child Placement Principle was a matter which the Court must take into account in care and protection matters, in custody proceedings the paramount consideration is the welfare of the child.
115. *Family Law Act 1975* (Cth) s 65E. The concept of "parenting orders" was introduced by the *Family Law Reform Act 1995* (Cth) and replaces the concepts of guardianship, custody and access under the Act. Parenting orders encompass issues such as the person(s) with whom the child will live, contact between the child and other person(s), maintenance of a child and any other aspect of parental responsibility: *Family Law Act 1975* (Cth) s 64B.
116. None of the leading family law cases in this area has dealt with the custody of a Torres Strait Islander child. However, it is assumed that similar issues of cultural background and heritage would arise.
117. In *the Marriage of Goudge* at 524 and 526 per Evatt CJ, at 536 per Strauss J; *F v Langshaw* (1983) 8 Fam LR 833 at 847, approved on appeal in *Rushby v Roberts* [1983] 1 NSWLR 350; *N and N* [1981] FLC ¶91-111 at 76,828-9; *In the Marriage of Sanders* (1976) 26 FLR 474.
118. See *Halsbury's Laws of Australia* para [5-1980].

the cultural or ethnic background of the child.¹¹⁹ The *Family Law Reform Act 1995* (Cth) amended the relevant section to include the child's background, generally, as one of the factors which the Court must consider when determining the child's best interests which includes a child's "need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders".¹²⁰ This section has not as yet been considered by the courts.

3.60 Previously, judges were not required to consider a child's Aboriginal or Torres Strait Islander origins, but were required to take into account any fact or circumstance relevant to the child's welfare.¹²¹ There have been a number of cases in which a child's Aboriginality has been a relevant consideration in determining the best interests of the child. Judges have shown an increasing awareness that it is inappropriate to apply European standards to an Aboriginal way of living when determining where a child should live.¹²² In some cases, the standard of living and material benefit to the child offered by the relevant Aboriginal community

119. *Jones v Darragh* at 762.

120. *Family Law Act 1975* (Cth) [as amended by the *Family Law Reform Act 1994* (Cth)] s 68F states that in determining the Child's best interests, the Court must consider ... "(2)(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) any other characteristics of the child that the court thinks are relevant". Note that even though the new term is the "best interests of the child", there is no intended change in concept from that of the "welfare of the child": *Explanatory Memorandum to the Family Law Reform Bill 1994* at para 330. The relevant sections of the *Family Law Reform Act 1995* (Cth) came into operation on 11 June 1996.

121. *Family Law Act 1975* (Cth) s 64(1)(bb)(vi) as it was prior to the operation of the *Family Law Reform Act 1995* (Cth) on 11 June 1996.

122. "It seems to me to be quite inappropriate to judge the standards of accommodation available at [an Aboriginal community] by reference to a European yardstick." *In the Marriage of McL and McL* (1989) 15 Fam LR 7 at 24 per Rourke J.

was lower than that offered by the non-Aboriginal family in which the child would live. Even so, the Court found that by Aboriginal standards the standard of living was adequate and placed the child with the Aboriginal parent.¹²³ While the Family Court has moved away from an emphasis on the standards of health and hygiene of white suburban Australia as a primary consideration, there has also been a note of caution:

It would be as wrong to fall into the trap of concluding that white Australian suburban values are to be preferred as it would idealise the life of the tribal aboriginal and imagine that it has survived the corrosive influences of white settlement.¹²⁴

However, the Court made it clear that such factors are only to be considered if they are relevant to the facts of the individual case.¹²⁵

Relevant factors in determining "best interests"

3.61 The courts have considered a number of factors to be relevant to the child's welfare in cases involving the custody of an Aboriginal child.¹²⁶

123. *McMillen v Larcombe* [1976] NTJ 1001 at 1005-1006; *In the Marriage of McL* at 24.

124. *In the Marriage of Sanders* (1976) 26 FLR 474 at 495 per Evatt CJ and Watson J; approved in *In the Marriage of R and R* (1985) FLC ¶91-615 at 79,978 per Haese J.

125. "I make these remarks [regarding the relevance of the child's Aboriginality] only for the purpose of making clear what seems to me to be the important issues in this case and they should not be taken as intending to lay down any principles applicable to circumstances other than the ones with which the court is now concerned." : *F v Langshaw* (1983) 8 Fam LR 833 at 847-8 per Waddell J.

126. Note: "Aboriginal child" includes children of mixed Aboriginal and European parentage.

The unique position of Aboriginal people in Australian society

3.62 The Full Family Court in *In the Marriage of B and R*¹²⁷ considered that the difficulties faced by Aboriginal people both throughout Australian history and at the present time means that their current position in Australian society is unique. Because of this unique history and position, it is not enough to consider an Aboriginal child's rights in terms of a general right of every child to know their cultural heritage.¹²⁸ To do so is to adopt too narrow a view of the significance of the child's Aboriginality.¹²⁹

Aboriginal or mixed racial origins of the child

3.63 The Aboriginal origin of a child has been considered relevant in determining whether custody should go to the Aboriginal or non-Aboriginal parent.¹³⁰ It has been argued that even though there should not be a preference for one culture over another, the Aboriginal culture and background available to an Aboriginal child placed with Aboriginal people should be regarded as "a positive feature, able to provide something worthwhile to these children".¹³¹ Aboriginal history and culture "are to be seen as important in regard to the sense of identity and development of these [Aboriginal] children, as part of their links to an Aboriginal

127. (1995) 19 FamLR 594 at 602.

128. Article 30 of the United Nations Convention on the Rights of the Child was referred to; see para 6.11.

129. This case also held that in cases where the Aboriginality of a child is a significant issue, because of the importance of these issues in Australia and the complexity which they ordinarily involve, a separate representative should be appointed to represent the child at an early stage of the proceedings: *In the Marriage of B and R* (1995) 19 FamLR 594 at 626. See also NSWLRC Report 81 at paras 3.43-3.71 for a discussion on the role of special representatives.

130. *F v Langshaw* at 848; *In the Marriage of R and R* at 79,978 per Asche SJ; *In the Marriage of McL* at 24; *In the Marriage of Goudge* (1984) 54 ALR 514 at 526 per Evatt CJ; *Connors v Douglas* (1981) 7 Fam LR 360 at 364; *Peterson v Kumar* (Australia, Family Court, Full Court, No SA13/93, 14 September 1993, unreported).

131. *Goudge* at 524 per Evatt CJ.

culture and heritage".¹³² In one case it was considered that the Aboriginal father and his parents were best able to equip the child to deal with his mixed racial background.¹³³

Difficulties for Aboriginal children in integrating into non-Aboriginal society

3.64 Difficulties encountered by children of both Aboriginal and European descent in integrating into the society of a European parent after marriage breakdown have also been considered relevant.¹³⁴ In *In the Marriage of McL* the Judge took note of "the notorious fact that life in this country is fraught with difficulty for children of mixed blood attempting to come to terms with white society".¹³⁵

Loss of contact with Aboriginal traditions

3.65 Another relevant factor is the potential for loss of contact with the Aboriginal parent's traditions and culture.¹³⁶ In *Jones v Darragh* it was considered that the only real opportunity for the children to develop the Aboriginal side of their identity was for them to live in an Aboriginal family.¹³⁷

Extended family support

3.66 The extended family support that may be available to a child in an Aboriginal community has also been considered relevant.¹³⁸

132. *Goudge* at 525 per Evatt CJ.

133. *F v Langshaw* at 848.

134. *In the Marriage of R and R* at 79,979 per Asche SJ; *Goudge* at 526 per Evatt CJ.

135. (1989) 15 Fam LR 7 at 23 per Rourke J.

136. *In the Marriage of R and R* at 79 975 per Haese J, and affirmed on appeal to the Full Court of the Family Court at 79,979 per Asche SJ and approved in *Goudge* at 526-527 per Evatt CJ.

137. (1992) 15 Fam LR 757 at 768-769.

138. *Goudge* at 518-9, 521 per Evatt CJ; *Marriage of R and R* at 79,976 per Haese J.

The Family Court has considered that contact with a child's extended Aboriginal family is valuable.¹³⁹ One judgment in particular praised the role of the extended family in Aboriginal communities:

... it is clear that the supportive extended family environment offered by the Aboriginal community at [an Aboriginal community] would have the effect of giving these children far more quality time with caring family members than is the norm in a conventional European household.¹⁴⁰

Difference in attitudes between Aboriginal and non-Aboriginal communities

3.67 Differing attitudes in Aboriginal and non-Aboriginal communities to issues such as children of mixed racial parentage have been relevant to a consideration of the welfare of the child.¹⁴¹ For example, the Court in *McMillen v Larcombe* considered that an intellectually disabled child would experience fewer pressures living in an Aboriginal community than living in a white community.¹⁴²

139. *Goudge* at 539-540 per Strauss J; however, this was outweighed by other needs of the children, such as the need for guidance. It was considered that these needs could be better met by the non-Aboriginal parent.

140. *In the Marriage of McL* (1989) 15 Fam LR 7 at 23. Custody of the two children was ultimately granted to the Aboriginal mother because it was found that the children would be exposed to an unacceptable risk of abuse if they lived with their non-Aboriginal father.

141. *In the Marriage of R and R* (1985) FLC ¶91-615 at 79,976 per Haese J and affirmed on appeal to the Full Court of the Family Court, at 79,979 per Asche SJ. The community's hesitations about the child's future marriage prospects in the community were also considered. See also *In the Marriage of McL* at 23.

142. [1976] NTJ 1001 at 1006.

Racial prejudice and discrimination

3.68 The Court has also considered the racial prejudice a child may suffer or whether the child will be brought up in an atmosphere of racial tension. In *F v Langshaw*¹⁴³ the Court considered that, even though the child in question may encounter racial discrimination at an earlier age if he stayed with his Aboriginal father in Moree, the father and his extended family, being members of the Aboriginal community, would be in a better position to support him and sustain his self-esteem than the proposed non-Aboriginal adoptive parents.¹⁴⁴ There was cautious support for the notion that Aboriginal people may be better able to instil self-esteem and support in Aboriginal children in situations of racial prejudice.¹⁴⁵

3.69 The extent of discrimination a child may be subject to in a particular situation has also been considered by the Court. In *In the Marriage of R and R*¹⁴⁶ it was found that the child, being of mixed racial parentage, would experience far less discrimination in an Aboriginal community than she might encounter in white suburban society.¹⁴⁷

143. (1983) 8 Fam LR 833. This decision was affirmed on appeal to the NSW Court of Appeal in *Rushby v Roberts* [1983] 1 NSWLR 350.

144. *F v Langshaw* at 840-841.

145. *F v Langshaw* at 847. See also *In the Marriage of McL* at 23 per Rourke J.

146. (1985) FLC ¶91-615 at 79,976 per Haese J and affirmed on appeal to the Full Court of the Family Court at 79,979 per Asche SJ. Haese J also considered evidence that the child, being of mixed racial parentage, may experience "positive discrimination" in the Aboriginal community in that she would be considered somewhat special in the community: at 79,976.

147. See also *F v Langshaw* at 840-841 and affirmed in *Rushby v Roberts* at 361-362; *In the Marriage of Sanders* (1976) 26 FLR 474 at 486 per Evatt CJ and Watson J; *Goudge* at 526 per Evatt CJ and 538-539 per Strauss J.

Other relevant factors

3.70 The following factors have also been considered relevant to a consideration of the child's best interests:

- **identity problems** Aboriginal children may suffer around adolescence when raised in a non-Aboriginal family;¹⁴⁸
- **isolation of the Aboriginal community** and lack of contact between the Aboriginal community and the general community of Australia are not, of themselves, reasons for refusing to place a child in that community;¹⁴⁹
- that living in a "**tribal society**" can better equip a child of mixed parentage to cope with periodic visits to a "non-tribal society" than vice versa;¹⁶⁰

148. In *McMillen v Larcombe*, Forster J commented at 1005: "... the evidence satisfies me that it is likely that as he grows through puberty and beyond he is likely to regard himself as a half black child rather than half white, both of which descriptions are literally true. Why this should be I do not quite understand but the evidence satisfies me that it is so." However, in *C v T* (1985) 10 Fam LR 458, McLelland J found that opinion evidence as to the outcome of placing Aboriginal children in non-Aboriginal families was not a sufficiently organised branch of specialised knowledge to make expert opinion admissible: at 463. Compare this view with the following cases in which such evidence was admitted without dispute: *F v Langshaw* at 845-847; *Goudge* at 531 per Ross-Jones J, *In the Marriage of R and R* at 79,977 per Haese J; *Torrens v Fleming* (1980) FLC 90-840 at 75,309-75,311. *C v T* was eventually overruled in *In the Marriage of B and R* (1995) 19 FamLR 594 where it was held that the Aboriginality of a child is a matter which is relevant to the welfare of the child and accordingly evidence from an appropriately qualified expert should be adduced and taken into account.

149. *In the Marriage of R and R* at 79,979 per Asche SJ and approved in *In the Marriage of McL* at 23.

150. *In the Marriage of R and R* at 79,977-79,978 per Haese J and affirmed by the Full Court of the Family Court at 79,979 per Asche SJ. It has been suggested that the Court is more willing to identify

- the **custodial parents' attitude** to the child's Aboriginal background, such as whether they would foster the children's contact with their Aboriginal background and community.¹⁶¹

3.71 While consideration of these factors does not necessarily result in custody being given to the Aboriginal parent, each factor can lend weight towards such a result. There is no presumption that any of these factors is applicable to a particular Aboriginal child.¹⁶² The court is also assumed to have some knowledge of the effects of white settlement on Aboriginal people,¹⁶³ and of attitudes prevalent in Australian society in making its decisions.¹⁶⁴

3.72 One factor which has weighed *against* custody being awarded to the Aboriginal parent is the length of time the child has spent in the care of foster parents. In *Torrens v Fleming*¹⁶⁵ custody of an Aboriginal child was given to the non-Aboriginal foster parents who had cared for the child for nearly ten years. The child's need for stability, security and certainty were considered more important than her need to be with her Aboriginal mother and to experience Aboriginal culture.¹⁶⁶ This raises a difficult question as

with a "tribal" Aboriginal society, but finds it hard to identify the same qualities in a "non-tribal" Aboriginal society: Comments by N D'Souza, Executive Officer, SNAICC (11 April 1996).

151. See *Goudge* at 527 per Evatt CJ; *In the Marriage of R and R* at 79,975.
152. In one case no evidence was led relating to the different racial background of the Aboriginal mother and non-Aboriginal father. There was no evidence as to the importance of the Aboriginal children maintaining cultural links. As a result the Judge did not take this into account when determining the question of their custody: *Davis v Councillor* (1981) 7 Fam LR 619 at 623-624. See also *Goudge* at 527 per Evatt CJ; *F v Langshaw* at 847-848.
153. *Goudge* at 525 per Evatt CJ.
154. *F v Langshaw* at 847.
155. (1980) FLC 90-840.
156. In *Connors v Douglas* (1981) 7 Fam LR 360 the length of time the child had spent with the foster parent was also a deciding factor; the child had spent nine years with the foster mother. There was

to what length of time in non-Aboriginal care is sufficient to displace an Aboriginal child's need to be with their Aboriginal family and Aboriginal community.

3.73 As was noted by the ALRC, the courts have generally adopted a fairly enlightened and sensitive interpretation of "the best interests of the child" when dealing with the custody of Aboriginal children.¹⁵⁷ However, in the majority of child welfare cases, such decisions are made by administrative officers, who are not required to give reasons for their decisions. The vague concept of "best interests of the child" leaves room for the decision-maker to exercise discretion, and makes any decision made in the "best interests of the child" difficult to challenge.

3.74 The ALRC specifically recommended that the Principle should *not* apply in custody disputes between parents or indeed between relatives.¹⁵⁸ It was the ALRC's view that the Principle should not give statutory preference to one parent over another and in such cases the welfare of the child should be of paramount importance. However, the ALRC did refer favourably¹⁵⁹ to Chief Judge Evatt's dissenting judgment in *Goudge* which stated that, while the Principle did not have a place in determining the custody of children from a marriage in which one partner is Aboriginal and the other partner is non-Aboriginal, it did indicate that cultural factors are to be given weight in deciding the best interests of the child:

Many cases arising under the Family Law Act involve children who have real connections with two different cultural, racial or religious backgrounds. The principle that emerges from such cases is that while neither culture is to be

the added consideration in this case that the foster mother was an Aboriginal woman living in an Aboriginal community. See also *C v T* (1985) 10 Fam LR 458.

157. Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) at para 351.

158. ALRC Report 31 at para 367.

159. ALRC Report 31 at para 367.

preferred over the other, both may be of importance to the child. As a result, the implications of any order for the continuing connection of the child with each culture need to be considered.¹⁶⁰

3.75 The Principle was also referred to in *F v Langshaw*.¹⁶¹ The Judge accepted the recommendations of the Aboriginal Children's Research Project contained in the report *Aboriginal Children in Substitute Care* that:

All placements of Aboriginal children should be in accord with [the] following priorities, in order:

- a. placement with the child's family
- b. placement with another Aboriginal family in the child's community
- c. placement with another Aboriginal family
- d. placement in other Aboriginal controlled care.¹⁶²

The Judge accepted that such a principle should be followed in the case of a child whose mother and father are Aboriginal and a child who has one Aboriginal parent and has been brought up by Aboriginal caregivers for any significant period in his or her life. However, the Judge was also keen to limit these comments only to the facts of that case, and not to lay down any principles to be followed in other cases.

160. (1984) 54 ALR 514 at 526.

161. (1983) 8 Fam LR 833 at 847.

162. NSW - Aboriginal Children's Research Project *Aboriginal Children in Substitute Care* (Principal Report, Part 1, July 1982) at 4.

The Aboriginal Child Placement Principle

4.

The Principle in New South Wales

- Substitute care in New South Wales
- Adoption in New South Wales

4.1 The Aboriginal Child Placement Principle ("the Principle") is contained in s 87 of the *Children (Care and Protection) Act 1987* (NSW) which governs the fostering of Aboriginal and Torres Strait Islander children. The Principle is not contained in the *Adoption of Children Act 1965* (NSW), and is implemented with respect to adoption only by way of a draft policy document.¹

4.2 The Department of Community Services ("DOCS"), as a matter of policy, applies two different definitions of "Aborigine" in relation to fostering and adoption of Aboriginal children. A definition of "self-identification" is applied to Aboriginal children in relation to fostering,² whereas a definition of "descent" is applied to Aboriginal children in relation to adoption.³ Torres Strait Islander people are not defined in the *Children (Care and Protection) Act 1987* (NSW), *Adoption of Children Act 1965* (NSW) or the Draft Policy in NSW. The issue of the definition of an Aboriginal child is discussed in paragraphs 7.25-7.32.

4.3 Another relevant piece of legislation is the *Community Welfare Act 1987* (NSW), s 4(1)(d) of which sets out the objects of community welfare legislation, which includes the *Children (Care*

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1. *Draft Policy Statement: Placement of Aboriginal Children for Adoption* (the "Draft Policy") (see Appendix B).
 2. *Children (Care and Protection) Act 1987* (NSW) s 3(1): "'Aboriginal' has the same meaning as it has in the Aboriginal Land Rights Act 1983", which in s 4 defines an Aboriginal as a "person who: (a) is a member of the Aboriginal race of Australia; (b) identifies as an Aboriginal; and (c) is accepted by the Aboriginal community as an Aboriginal".
 3. NSW - Department of Community Services *Draft Policy Statement: Placement of Aboriginal Children for Adoption* (8 May 1987) defines an Aboriginal child as "a child at least one of whose parents is Aboriginal as defined by the *Aborigines Act* of 1969". An Aboriginal is "a person who is a descendant of an aboriginal native of Australia": *Aborigines Act 1969* (NSW) s 2(1). Note that this Act was repealed by the *Aboriginal Land Rights Act 1983* (NSW) on 10 June 1983.

*and Protection) Act 1987 (NSW) and the Adoption of Children Act 1965 (NSW).*⁴ The objectives are:

4(1)(d) to promote the welfare of Aborigines on the basis of a recognition of:

- (i) Aboriginal culture and identity;
- (ii) Aboriginal community structures;
- (iii) Aboriginal community standards;
- (iv) the rights of Aborigines to raise and protect their own children; and
- (v) the rights of Aborigines to be involved in the decision-making processes that affect them and their children;

SUBSTITUTE CARE IN NEW SOUTH WALES

Children (Care and Protection) Act 1987 (NSW)

Section 87

4.4 The Principle, contained in s 87 of the *Children (Care and Protection) Act 1987 (NSW)*, applies only to the placement into the care or custody of another person of Aboriginal children who are "in need of care"⁵. It does not apply to the voluntary placement of children into care, or to short term placements.⁶ It states:

An Aboriginal child shall not be placed in the custody or care of another person under this Part unless:

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- 4. Both Acts are administered by the Minister for Community Services: *Community Welfare Act 1987 (NSW)* s 3(1).
 - 5. See paras 2.36-2.39.
 - 6. For example Aboriginal children who are dealt with informally through the Child Protection Program of DOCS, or children under temporary care arrangements: NSW - Department of Community Services *Review of the Children (Care and Protection) Act 1987: Law and Policy in Child Protection* (Discussion Paper 1, Legislation Review Unit, October 1996) at 131 ("DOCS Review Discussion Paper 1").

- (a) the child is placed in the care of a member of the child's extended family, as recognised by the Aboriginal community to which the child belongs;
- (b) if it is not practicable for the child to be placed in accordance with paragraph (a) or it would be detrimental to the welfare of the child to be so placed - the child is placed in the care of a member of the Aboriginal community to which the child belongs;
- (c) if it is not practicable for the child to be placed in accordance with paragraph (a) or (b) or it would be detrimental to the welfare of the child to be so placed - the child is placed in the care of a member of some other Aboriginal family residing in the vicinity of the child's usual place of residence; or
- (d) if it is not practicable for the child to be placed in accordance with paragraph (a), (b) or (c) or it would be detrimental to the welfare of the child to be so placed - the child is placed in the care of a suitable person approved by the Director-General after consultation with:
 - (i) members of the child's extended family, as recognised by the Aboriginal community to which the child belongs; and
 - (ii) such Aboriginal welfare organisations as are appropriate in relation to the child.

Interpretation of section 87

4.5 *Purpose.* In the District Court of NSW Justice Graham, in the *Department of Community Services v Johnson*,⁷ considered that the purpose of s 87 was to remedy two problems which arose in the past with the placement of Aboriginal children:⁸

- past policies of removal of Aboriginal children from their Aboriginal environment in order to bring them up with (and as) white people; and

7. District Court, NSW, Graham DCJ, 28 October 1992, DCC7/1992-11/1992, unreported.

8. *DOCS v Johnson* at 10-11.

- the placement of Aboriginal children in Aboriginal foster homes or institutions which were removed both geographically and spiritually from their own communities, without regard to the particular traditions and cultures of the child.

4.6 *The welfare and interests of children.* The case also tried to reconcile the provisions of s 87 with the "paramountcy principle" in s 55(a) of the Act, which states that "the welfare and interests of children are to be given paramount consideration". His Honour considered that the Principle was not an absolute rule that Aboriginal children should be placed in accordance with the descending order of preference. Instead, consideration must also be given to the "detriment" and "practicability" of any placement.⁹ This approach incorporates the "welfare of the child" principle into the Principle by reference to the word "detriment".

4.7 *"Detriment"*. His Honour interpreted "detriment to the welfare of the child" as the product of balancing the advantages and disadvantages of any particular proposed placement. Any detriment must not be a merely trivial or insignificant detriment, or be a detriment which merely or substantially conflicts with the purposes of s 87. The purpose and intent of s 87, being to place Aboriginal children back into Aboriginal communities, may result in placements which are "less than the ideal in the way of material benefits" and may "to some extent create circumstances of possible danger for such children".¹⁰ His Honour believed that this detriment is in some ways inherent in the underlying purpose of s 87. However, he believed that it should be given far less weight than other forms of detriment.¹¹

4.8 Another interpretation which gives more force to the Principle would treat s 87 as a legislative presumption that placement with Aboriginal people *is* in the best interests of an

9. *DOCS v Johnson* at 12.

10. *DOCS v Johnson* at 25-26.

11. *DOCS v Johnson* at 27.

Aboriginal child. This approach adopts a stronger interpretation of the word "detriment" which requires actual detriment to be shown before the Principle is displaced.¹²

4.9 DOCS has suggested that having to show "detriment" may not necessarily be the most appropriate way to approach a placement question and restricts the Court to making decisions where the emphasis is not based primarily on the best interests of the child. DOCS's *Review of the Children (Care and Protection) Act 1987* suggests that one way of overcoming this is for the Court to weigh up placement with the extended family, members of the child's Aboriginal community and other Aboriginal people in terms of what is in the child's best interests, and to apply the stricter test of "detriment" only when the child is likely to be placed outside the Aboriginal community.¹³

4.10 *Community to which the child belongs. DOCS v Johnson* also brought to light the circularity of s 87(a). In identifying the "community to which the child belongs", the child's extended family needs to be considered, which in turn needs to be recognised by the community. His Honour, however, took a broad approach to s 87(a), saying that it recognised that within Aboriginal communities what is understood by a child's extended family may not necessarily accord with a strict genealogical approach to extended family and may include people other than direct blood relations.¹⁴ In this case it was accepted on the evidence that there was an Aboriginal community to which the children belonged.¹⁵ It may not necessarily be desirable or possible to define "Aboriginal community" for the purposes of legislation. Defining the child's extended family as that "recognised by the Aboriginal

12. R Chisholm "Aboriginal Children and the Placement Principle" (1988) 2(31) *Aboriginal Law Bulletin* 4 at 5. See also paras 6.27-6.31.

13. NSW - Department of Community Services *Review of the Children (Care and Protection) Act 1987: Law and Policy in Child Protection* (Discussion Paper 1, Legislation Review Unit, October 1996) at 133.

14. *DOCS v Johnson* at 15.

15. *DOCS v Johnson* at 16.

community to which the child belongs" may be advantageous in that it refers specifically to Aboriginal rather than white Australian notions of extended family. However, there may be differences among Aboriginal communities on the meaning of extended family.¹⁶

4.11 *Placement with extended family.* Logically, the placement of an Aboriginal child with "members of the child's extended family" under s 87(a) includes members of the child's non-Aboriginal family.¹⁷ This is consistent with the Principle.

4.12 *Placement with a member of the child's Aboriginal community.* DOCS workers interpret the requirement for placement in the "Aboriginal community to which the child belongs" in s 87(b) to include placement in Aboriginal group homes. In some circumstances, an Aboriginal group home may be a more appropriate placement option for an Aboriginal child than placement with a non-Aboriginal family.

4.13 *Some other Aboriginal family residing in the vicinity.* It has been argued that s 87(c) unnecessarily restricts the members of an Aboriginal family who can care for a child, in that they must "[reside] in the vicinity of the child's usual place of residence". This wording of the Principle could suggest that it is more important for an Aboriginal child to remain in the same place and continue contact with his or her family than be in the care of any Aboriginal person.¹⁸ Clearly an Aboriginal family "in the vicinity" would be preferable so that the child can maintain links with his or her community and family. However, if such an option is not practicable, Aboriginal families outside the vicinity of the child's

16. Chisholm (1988) at 5.

17. This view has been expressed in the preparation of this Report by both Aboriginal workers within DOCS and Aboriginal workers in Aboriginal Child Care Agencies.

18. Chisholm (1988) at 5.

community should be included in the list of options for an Aboriginal child.¹⁹

The Principle in practice

4.14 The numbers of Aboriginal and Torres Strait Islander children placed in substitute care in NSW in recent years appear in Table 2. Aboriginal and Torres Strait Islander children are placed into substitute care²⁰ in NSW in a number of ways:

- placement directly into substitute care by DOCS, which can be after consultation with an Aboriginal organisation;
- referral by DOCS to non-government organisations (NGOs) for placement into foster care or a group home. The NGOs in NSW which provide foster care services include a number of Aboriginal NGOs, and non-Aboriginal NGOs, such as Barnardos Australia, Care Force and Centacare;
- placement by a NGO into voluntary foster or respite care with the consent of the parent or parents. These children would not necessarily be known to DOCS, as the parent or parents would approach the agency directly and there is no court intervention, and as such might not appear in the DOCS statistics in Table 2.

19. This was apparent from discussions with Aboriginal people in the preparation of this Report.

20. The term "substitute care" is explained in para 2.41.

Table 2: Aboriginal and Torres Strait Islander Children in Substitute Care in NSW: 1990/91 - 1994/95

| | 1990/ 91 | 1991/ 92 | 1992/ 93 | 1993/ 94 | 1994/ 95 |
|---|-------------|-------------|-------------|-------------|-------------|
| ATSI children placed by NGOs | | | | | |
| <i>ATSI care*</i> | 191 | 195 | 242 | 296 | 304 |
| <i>non-ATSI care**</i> | 66 | 57 | 37 | 44 | 60 |
| Total | 257 | 252 | 279 | 340 | 364 |
| ATSI children placed by DOCS | | | | | |
| <i>ATSI care^α</i> | 471 | 503 | 555 | 653 | 750 |
| <i>non-ATSI care^ο</i> | 157 | 153 | 158 | 157 | 157 |
| Total | 628 | 656 | 713 | 810 | 907 |
| Total number of ATSI children | 885 | 908 | 992 | 1150 | 1271 |
| Percentage of ATSI children in non-ATSI care | 25.2 | 23.1 | 19.7 | 17.5 | 17.1 |

Source: NSW - Department of Community Services *Letter* (20 March 1996)

* in ATSI programs or with ATSI carers

** in non-ATSI programs or with non-ATSI carers

^α with ATSI carers

^ο in non-ATSI placements or where the ethnicity of carers was not recorded

4.15 Despite a decline during the last five years, NSW still has a high proportion of Aboriginal and Torres Strait Islander children in the care of non-Aboriginal and non-Torres Strait Islander people. On average, DOCS is responsible for placing slightly more Aboriginal and Torres Strait Islander children in non-Aboriginal and non-Torres Strait Islander care (21.2%) than the NGOs (17.7%). This slight variation could be explained by the increasing involvement of Aboriginal NGOs and the reluctance of non-Aboriginal NGOs to take referrals of Aboriginal and Torres Strait Islander children.

4.16 In NSW, DOCS reported that as at March 1995, they had 347 Aboriginal and Torres Strait Islander couples registered to

foster children.²¹ This number appears inadequate compared with the 907 Aboriginal and Torres Strait Islander children placed by DOCS over 1994-95. However, DOCS reports that many Aboriginal children are placed informally with their extended families or under kinship arrangements rather than through formal fostering arrangements. Of the 1 271 Aboriginal and Torres Strait Islander children in care at June 1995, 65% lived away from their families because they were in need of care, while the remaining 35% were placed in kinship care.²²

The role of non-government organisations

4.17 DOCS funds a number of NGOs specifically to provide alternative care services to Aboriginal children.²³ These services include both foster care services and group homes and all are run by Aboriginal NGOs, except Marella which is run by Care Force.²⁴ At the present time there is no specific Torres Strait Islander non-government organisation involved in the fostering of Torres Strait Islander children in NSW. DOCS also refers Aboriginal and Torres Strait Islander children to other mainstream NGOs. The main non-Aboriginal NGOs dealt with in this Report are Barnardos Australia, Centacare and Care Force. These NGOs may also provide a voluntary fostering service when Aboriginal parents approach the agency directly. DOCS policy is that responsibility for providing substitute care services will be increasingly transferred to NGOs where possible, although DOCS will continue

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21. NSW - Department of Community Services *Letter* (27 June 1995). This does not mean that these couples were actually fostering Aboriginal and Torres Strait Islander children, but that they had been approved by the Department to do so.
 22. NSW - Department of Community Services *Review of the Children (Care and Protection) Act 1987: Law and Policy in Child Protection* (Discussion Paper 1, Legislation Review Unit, October 1996) at 134.
 23. Some of these services are totally funded by DOCS, others receive some of their funding from the Commonwealth Government: see paras 3.51-3.55.
 24. See para 4.26.

to provide substitute care services for children and young people with high support needs.²⁵

Aboriginal non-government organisations

4.18 There are a number of Aboriginal NGOs throughout the State:

- Aboriginal Children's Service Ltd, with offices in Redfern, Wagga Wagga, Cowra and St Marys;
- Hunter Aboriginal Children's Service;
- Koolyangarra Fostering Agency (Nowra);
- Great Lakes-Manning Aboriginal Children's Service;
- Nunya Aboriginal Fostering Agency (Dareton); and
- Coffs Harbour Aboriginal Family Community Care Centre.

4.19 The *Children (Care and Protection) Act 1987* (NSW) provides for the granting of a fostering authority to private fostering agencies.²⁶ This process was in transition following the implementation of the Usher Report.²⁷ Until recently these Aboriginal organisations did not have an official licence to operate as a fostering agency, but were informally recognised, or "deemed to be licensed" as fostering agencies by DOCS.²⁸ This placed these organisations in a tenuous position regarding their legal status under the Act as fostering agencies. In some instances, magistrates in the Children's Court, in the absence of a fostering licence, have refused to recognise the relevant Aboriginal

25. NSW - Substitute Care Implementation Unit *Strategic Directions for Substitute Care Program* (Department of Community Services, NSW, March 1996) at 7 and 9. See also para 2.42.

26. *Children (Care and Protection) Act 1987* (NSW) s 40-46.

27. NSW - Ministerial Review Committee *Review of Substitute Care Services in NSW: A Report to the Minister for Health and Community Services, the Hon John P Hannaford, MLC from the Committee Established to Review Substitute Care Services* (Sydney, January 1992) ("the Usher Report").

28. This appears to be the situation on the advice of DOCS workers and the Aboriginal workers given in the preparation of this Report.

organisation when making a care order for a child. This situation appears to have been resolved by new Regulations under the Act, which came into force on 1 September 1996. Aboriginal organisations which are funded by DOCS are now not required to have a licence to operate as a fostering agency.²⁹ The Aboriginal Children's Service (Redfern), which does not receive full funding from DOCS, is currently undergoing the application process for a fostering licence.

Barnardos Australia

Barnardos Australia believes that Aboriginal children and their families are best cared for within their own community, but recognises the needs of Aboriginal families.³⁰

4.20 Barnardos Australia ("Barnardos") has a policy of generally not accepting Aboriginal children in its substitute care program.³¹ As Barnardos does not have any Aboriginal workers, they would consult with Gullama Aboriginal Services Centre in DOCS before recruiting any Aboriginal or Torres Strait Islander families for fostering. Barnardos has had little involvement with the Aboriginal Children's Service or any other of the Aboriginal NGOs.

4.21 Barnardos reported that only two Aboriginal children had been fostered through their Permanent Family Care Program in the five year period 1991-1995.³² Both of these children were placed with an Aboriginal foster father and non-Aboriginal foster mother. Recently, the Aboriginal origins of several children who had previously been placed with non-Aboriginal carers through the Permanent Family Care Program have been identified.

4.22 Barnardos also runs a Temporary Family Care ("TFC") Program through its Auburn, Waverley, Penrith and Illawarra offices. Aboriginal and Torres Strait Islander children represented:

29. *Children (Care and Protection) Regulation 1996* (NSW) cl 4 and 46.

30. *Barnardos Australia Staff Handbook* (May 1995).

31. See Appendix A.

32. *Barnardos Australia Letter* (10 November 1995).

- 3% of children in the Auburn TFC program over the five year period January 1991 - January 1996;³³
- 2.5% of children in the Waverley TFC program over the last five years,³⁴
- 7.7% of children in the Illawarra TFC program at 22 March 1996;³⁵ and
- 5% of children in the Penrith TFC program from December 1994 - November 1995.³⁶

4.23 Although exact numbers are unknown, due to different standards of record keeping for the various TFC programs, it seems there were at least 50 Aboriginal and Torres Strait Islander children placed through the TFC programs over the last five years. It appears that the majority of these children were placed in non-Aboriginal families. There are generally no Aboriginal carers in the pool of available carers in the TFC program as a result of the Barnardos' policy of not accepting Aboriginal or Torres Strait Islander referrals. Any Aboriginal couples willing to foster children would be referred to an Aboriginal organisation unless they wanted to foster specifically through Barnardos.³⁷

4.24 In a number of instances, the Aboriginality of a child placed through both the Permanent and Temporary Family Care Programs was only discovered after the placement of the child. This could occur either because DOCS or the non-government agencies failed to make the necessary investigations into a child's cultural background; or Aboriginal or Torres Strait Islander parents were reluctant to identify as such when they approached the agency directly.

33. Barnardos Auburn Children's Family Centre *Letter* (30 January 1996).

34. Barnardos Australia *Submission* (13 May 1996).

35. There had been a total of 26 Aboriginal and Torres Strait Islander children fostered through Barnardos Illawarra Centre from January 1991 - December 1995: Barnardos Illawarra Centre *Letter* (22 March 1996).

36. Barnardos Penrith Children's Family Centre *Letter* (26 April 1996).

37. Barnardos Australia *Submission* (13 May 1996).

Care Force

4.25 Care Force, operating under the auspices of the Anglican Home Mission Society, runs an Aboriginal foster program and an Aboriginal group home. It receives referrals from DOCS and from the community. In the absence of a separate policy regarding the placement of Aboriginal children, Care Force is guided by DOCS policy regarding Aboriginal children and s 87 of the *Children (Care and Protection) Act 1987* (NSW).

4.26 Care Force attempts to employ Aboriginal workers in Marella, the group home. It previously had an Aboriginal community management committee, but this has now dissolved. Presently, Marella houses four Aboriginal children, and also receives other Aboriginal children for respite care and temporary care.

4.27 Care Force has provided figures for the number of Aboriginal children they placed into alternative care in the period 1993-1995. This information appears in Table 3.

Table 3: Placement of Aboriginal Children into Alternative Care 1993-1995

| | 1993 | 1994 | 1995 | Total |
|---|------|------|------|-------|
| Aboriginal Group Home (Marella) | 8* | 13 | 26 | 47 |
| Aboriginal Foster Care | 2** | 1 | 1 | 4 |
| non-Aboriginal Foster Care | 0** | 8 | 2 | 10 |
| Total | 10 | 22 | 29 | 61 |
| Percentage of children in non-Aboriginal care | 0% | 36% | 7% | 16% |

Source: Care Force Child and Family Services *Letter* (24 January 1996)
 * there were also four more children already in the home at 31 December 1992
 ** there was already one child in care at 31 December 1992

Centacare

4.28 Centacare is part of Catholic Community Services. Centacare's substitute care policy states that Aboriginal and Torres Strait Islander children will usually be referred to an "Aboriginal children's service", and that Centacare will only place a child with the support of an Aboriginal agency, and after ensuring that the Principle has been observed.³⁸

4.29 Centacare Sydney operates:

- two permanent foster care programs;
- two medium term foster care programs for an average placement of about eight months (the Community Placement Program); and
- two short-term foster care programs for a maximum placement of three months (the Temporary Family Care programs).³⁹

4.30 As of June 1996, Centacare did not have any Aboriginal or Torres Strait Islander workers in its fostering programs. Centacare reports that consultation with Aboriginal family members and an Aboriginal agency will always occur if the placement of an Aboriginal child is being considered.⁴⁰

4.31 Centacare reported that the proportion of Aboriginal children placed through their programs is very low. There have been eight Aboriginal children placed through Centacare's programs over the five year period March 1991 - March 1996:

- one child with moderate to severe disabilities was placed in a long term/permanent placement with an Aboriginal foster mother; and

38. See Appendix A.

39. Centacare Children's Services *Letter* (5 June 1996).

40. Centacare Children's Services *Letter* (5 June 1996).

- seven children were placed into non-Aboriginal care through the Temporary Family Care program.⁴¹

Effectiveness of section 87

4.32 The 1987 legislation has been described as a considerable improvement on previous policy. The credence given to the Principle is significant because it is enshrined in legislation, rather than contained in departmental policy:

The benefits of maintaining Aboriginal people's community solidarity, cultural transmission, family links and individual identity were at last given some credence by the law.⁴²

4.33 However, there is still a significant proportion of Aboriginal children in substitute care in NSW in the care of non-Aboriginal people. In 1994-1995, 16.5% of the Aboriginal children placed into substitute care by NGOs were placed into non-Aboriginal care. In the same year, 17.3% of the Aboriginal children placed by DOCS were placed into non-Aboriginal care. Such figures could be the result of lack of consultation with the Aboriginal organisations by DOCS and the non-Aboriginal NGOs. It is difficult to see how such a situation can still exist in light of the mandatory requirement that Aboriginal organisations and the child's extended family be consulted before Aboriginal children are placed into non-Aboriginal care.⁴³

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41. This represents approximately 0.6% of all children placed through the long-term and Temporary Family Care programs over the past five years: Centacare Children's Services *Letter* (5 June 1996).
 42. NSW - Department of Community Services *Learning from the Past: Aboriginal Perspectives on the Effects and Implications of Welfare Policies and Practices on Aboriginal Families in NSW* (Prepared by Gungil Jindibah Centre, 10 October 1994) ("the Learning from the Past Report") at 54.
 43. Chapter 7 discusses the factors which may prevent the operation of the Principle.

Concerns about section 87

4.34 In discussions with workers in Aboriginal organisations and workers within DOCS regarding section 87, a number of concerns have been raised which will be discussed in greater detail in Chapter 7:

- The definition of "Aboriginal child" requires that the child identify as Aboriginal. This is not practical in a number of situations, such as in the case of very young children.
- Section 87 gives departmental officers discretion in placing Aboriginal and Torres Strait Islander children.
- Section 87 does not give any real recognition to the role of Aboriginal and Torres Strait Islander NGOs and refers to them, in s 87(d) as "Aboriginal *welfare* organisations" which some Aboriginal groups find deeply offensive.
- Section 87 requires "Aboriginal *welfare* organisations" to be consulted only as a last resort.
- Section 87 is not always implemented in practice.

ADOPTION IN NEW SOUTH WALES

4.35 There is no reference to the Principle in the *Adoption of Children Act 1965* (NSW), although there are other provisions in the Act which are relevant to Aboriginal children. The Principle is contained instead in a draft departmental policy document, the *Draft Policy Statement on the Placement of Aboriginal Children for Adoption*.⁴⁴ DOCS is also guided by the *National Minimum Principles in Adoption*, developed by the Standing Committee of Social Welfare Administrators, which state that, in adoption, "the child should preferably be placed in a culturally/ethnically appropriate placement".⁴⁵

44. See Appendix B.

45. Australia - Council of Social Welfare Ministers *National Minimum Principles on Adoption* (June 1993): Principle 12. These principles are soon to be replaced by the *National Principles in Adoption*

Adoption of Children Act 1965 (NSW)

4.36 The *Adoption of Children Regulation 1995* (NSW) requires that all reasonable efforts be made to place the child with a person who belongs to an ethnic group requested by the relinquishing parent.⁴⁶ The placement of an Aboriginal child under this provision would not necessarily be with an Aboriginal person unless a relinquishing parent had specifically requested it.⁴⁷

Recognition of traditional Aboriginal marriage

4.37 In 1987, the Act was amended to incorporate a provision allowing for adoption by traditionally married Aboriginal couples by adding a reference to de facto couples seeking to adopt. After the amendment, an Aboriginal couple recognised by their community as being married according to the traditions of their Aboriginal community or Aboriginal group can adopt an Aboriginal child as a de facto couple.⁴⁸ This provision uses the same definition of "Aborigine" as the *Children (Care and Protection) Act 1987* (NSW).⁴⁹ The amendment was intended to overcome the situation where an Aboriginal child may be denied placement in an

(June 1995) which were approved in draft form by the Standing Committee of Social Welfare Administrators in September 1995, however Principle 12 remains unchanged in the new National Principles.

46. *Adoption of Children Regulation 1995* (NSW) cl 33(1) provides: "The Director General or the principal officer of the private adoption agency is to make all reasonable efforts to place the child with an approved person: (a) who is of the ethnic group expressed by a parent or guardian of the child in Form 6 ... as being the ethnic group from which the parent or guardian wishes a person adopting the child to be drawn."
47. This would not occur if, for example, a non-Aboriginal mother was relinquishing an Aboriginal child and requested that the child be placed in a non-Aboriginal family, and the consent of the Aboriginal father was not required.
48. *Adoption of Children Act 1965* (NSW) s 19(1A)(c) (see Appendix B).
49. That is, the definition in the *Aboriginal Land Rights Act 1983* (NSW) (see note 2 in this Chapter).

otherwise suitable home, because there is no "legal" marriage.⁵⁰ DOCS is of the view that the provision has been helpful in approving more Aboriginal couples as adoptive parents.⁵¹

4.38 While the effect of this provision seems to be positive, the provision itself could be insulting to Aboriginal people.⁵² That is, the *Adoption of Children Act 1965* (NSW) treats customary marriage merely as a de facto relationship, and not a marriage as far as the law is concerned.⁵³ In other jurisdictions, an Aboriginal customary marriage is recognised as a marriage for the purposes of adoption.⁵⁴

4.39 In addition, the NSW provision limits traditionally married Aboriginal people to the adoption of only Aboriginal children. This may not be important in practical terms, but sends a "statement by the NSW Parliament that tribally married Aborigines are acceptable to adopt black children, but not white".⁵⁵ The amendment does not deal with consent to adoption, and does not require the consent of the father of a child born within a tribal marriage.⁵⁶ Thus, on this argument, the legislation still fails to recognise marriage under Aboriginal customary law. This has been

50. NSW *Parliamentary Debates (Hansard)* Legislative Assembly, 16 September 1987 at 13 669.

51. NSW Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Discussion Paper 34, 1994) at 201.

52. R Chisholm "Aboriginal Children and the Placement Principle" (1988) 2(31) *Aboriginal Law Bulletin* 4 at 7.

53. It also requires both the man and the woman in the customary marriage to be Aboriginal: *Adoption Act 1965* (NSW) s 19(1A)(c)(i). This would exclude customarily married couples in which one party is Torres Strait Islander or non-Aboriginal.

54. *Adoption Act 1984* (Vic) s 11(1) (see Appendix H); *Adoption of Children Act 1994* (NT) s 13(1) (see Appendix D); *Adoption Act 1994* (WA) s 4(2)(c) (see Appendix I).

55. Chisholm (1988) at 7.

56. Unless the tribal relationship could constitute a de facto relationship for the purposes of s 26(3)(b)(iii) "... lived together after the child's birth as husband and wife on a bona fide domestic basis in a household of which the child formed a part".

characterised as an attempt at a progressive reform which is an embarrassment and an insult to Aboriginal people.⁵⁷

DOCS Draft Policy Statement: Placement of Aboriginal children for adoption

4.40 DOCS recognises the Principle in the departmental *Draft Policy Statement: Placement of Aboriginal Children for Adoption* ("the Draft Policy").⁵⁸ The Draft Policy acknowledges in the preamble that adoption is alien to Aboriginal culture, and that in the past great suffering has been caused to Aboriginal people by the inappropriate use of adoption. Nevertheless, it states that modern adoption practice will continue to provide a positive option for some Aboriginal children.

4.41 The Draft Policy stipulates that "Aboriginal children surrendered for adoption must be placed with Aboriginal families". It also requires that an Aboriginal worker, experienced in adoption policy and practice, must be involved in any decision about the future of an Aboriginal child, while ensuring the confidentiality of the parent and child outside the meeting. There is also an emphasis on wider recruitment of Aboriginal adoptive parents, including single Aboriginal people and Aboriginal couples married according to the customs of their community. Placement of an Aboriginal child contrary to the Draft Policy requires the written approval of the Director-General of DOCS. Guidelines for the implementation of the Draft Policy emphasise the importance of involving an Aboriginal person in the counselling of a parent prior to surrendering the child for adoption.

4.42 Current practice in relation to the placement of Aboriginal children by DOCS is for an Aboriginal worker to be involved at all stages of the placement process. DOCS also reports that the Draft

57. Chisholm (1988) at 7.

58. See Appendix B.

Policy has, generally, enabled appropriate decisions to be made for Aboriginal children relinquished for adoption.⁵⁹

Adoption of Aboriginal and Torres Strait Islander children in New South Wales

4.43 Statistics of the number of Aboriginal and Torres Strait Islander Children adopted in NSW in the past five years have been collected by the Australian Institute of Health and Welfare⁶⁰ and appear in Table 4. These statistics include all children adopted in NSW, whether through DOCS or through a NGO. DOCS organises the adoption of the majority of Aboriginal and Torres Strait Islander children in NSW. The relevant NGOs which organise the adoption of children in NSW, Barnardos Australia, Care Force Anglican Adoption Agency, and Centacare Adoption Services, have reported on the Aboriginal and Torres Strait Islander children who were adopted through them over the past five years, and the policies they apply in such a situation. Each agency is required to notify DOCS of every adoption.⁶¹

59. NSW - Department of Community Services *Submission from the New South Wales Department of Community Services to NSWLRC DP 34* (5 September 1994) at 38.

60. This information is drawn from: K Wilkinson and G Angus *Adoptions Australia 1990-91* (Australian Institute of Health and Welfare, Child Welfare Series No 1, 1993); G Angus and K Wilkinson *Adoptions Australia 1991-92* (Australian Institute of Health and Welfare, Child Welfare Series No 4, 1994); P Zabar and G Angus *Adoptions Australia 1992-93* (Australian Institute of Health and Welfare, Child Welfare Series No 7, 1994); P Zabar and G Angus *Adoptions Australia 1993-94* (Australian Institute of Health and Welfare, Child Welfare Series No 11, 1995); G Angus and L Golley *Adoptions Australia 1994-95* (Australian Institute of Health and Welfare, Child Welfare Series No 14, 1996), and further information provided by the Australian Institute of Health and Welfare.

61. *Adoption of Children Regulation 1995* (NSW) cl 11(4) and 15.

Number of Aboriginal children adopted in NSW 1990/91 - 1994/95

4.44 There have been a number of Aboriginal children adopted in NSW in the past five years.⁶² Just over half of these children have been adopted by Aboriginal people.

Table 4: Adoption of Aboriginal and Torres Strait Islander children in NSW 1990/91 - 1994/95

| | 1990/ 91 | 1991/ 92* | 1992/ 93 ^o | 1993/ 94* | 1994/ 95 | Total |
|--|-----------------|--------------|--------------------------|--------------|-------------|-------------|
| Adoption by ATSI people | 5 | 4 | 1 | 3 | 5 | 18 |
| Adoption by non-ATSI people | 9 | 1 | 1 | 3 | 2 | 16 |
| Total number of Aboriginal children adopted | 14 ^o | 6** | 2 | 6 | 7 | 35** |
| Total number of Australian-born children adopted ^{oo} | 158 | 151 | 110 | 98 | 127 | 644 |
| Aboriginal children as a proportion of all Australian-born children adopted | 8.8% | 4.0% | 1.8% | 6.1% | 5.5% | 5.4% |

Source: Australian Institute of Health and Welfare *Adoptions Australia* series 1990/91-1994/95

* in this year there were a further four adoptions where the child's Aboriginality was not known

** this includes the adoption of one child where the Aboriginality of the adoptive parents is unknown

o in this year there was one further adoption where the child's Aboriginality was not known

oo adopted by non-relatives

62. Aboriginal children and Torres Strait Islander children are not separated in the demographic statistics. However, in the five year period 1990-1994, DOCS reported that they were aware of one baby with a Torres Strait Islander background placed for adoption in NSW: NSW - Department of Community Services *Submission to NSWLRC Report 81* (5 September 1994) at 38.

DOCS noted that the high numbers of adoptions in 1990/91 are exceptional. They have been unable to account for this number, beyond suggesting incorrect recording in that year: NSW - Department of Community Services *Letter* (4 October 1996)

Note: Aboriginal and Torres Strait Islander children represented 2.1% of the child population in NSW at the 1991 Census: Australian Bureau of Statistics *1991 Census of Population and Housing: Aboriginal Community Profile* (Catalogue No 2722.0, AGPS, Canberra, 1993)

Adoptions by DOCS

4.45 DOCS was able to provide an account of only four of the 16 Aboriginal and Torres Strait Islander children who were adopted by non-Aboriginal and non-Torres Strait Islander people.⁶³ Four Aboriginal wards were placed with non-Aboriginal families under the discretionary approval of the Director-General, following consultation with Aboriginal workers. Of these four children, two children's Aboriginality was only traced later in the adoption process, and the other two young people, aged 16 and 18 years, despite involvement in the Aboriginal community chose not to identify themselves as Aboriginal and consented to their own adoptions.⁶⁴ During this period, an adolescent Aboriginal boy with special needs was also available for adoption, however no suitable adoptive parents could be found for him. Unfortunately the lack of a complete account gives little insight into factors which prevent the adoption of Aboriginal children by Aboriginal people.

Barnardos

4.46 Barnardos Australia has placed one Aboriginal child for adoption in the last five years who was placed with a family of Aboriginal and non-Aboriginal descent. Barnardos' approach is that they would not generally place Aboriginal children for

63. This may be because not all of the Aboriginal children were placed by DOCS.

64. NSW - Department of Community Services *Submission to NSWLRC Report 81* (5 September 1994) at 38; and data provided for the purposes of this Report by the NSW - Department of Community Services *Letter* (5 August 1996).

adoption, but would instead refer them to other Aboriginal services.⁶⁵ In cases where the birth mother wanted to place the child through Barnardos, they would consult with Gullama Aboriginal Services Centre within DOCS. Barnardos does not have any Aboriginal or Torres Strait Islander workers.

Care Force

4.47 Care Force estimates that only three Aboriginal children were adopted through the agency in the last five years, and that all of these children were adopted by Aboriginal people.⁶⁶ It is Care Force Anglican Adoption Agency policy⁶⁷ to place Aboriginal children with Aboriginal families.⁶⁸ There is an exception to this where the child has a "trace of" Aboriginality and is not Aboriginal in appearance. If the birth parent of such a child does not identify as Aboriginal, nor wish for the child to be adopted by Aboriginal people, then the birth parents wishes are respected. If the child is of Aboriginal appearance, then the Principle is applied regardless of the birth parent's wishes. Suitable families are found by consulting with the Aboriginal workers at the agency's Aboriginal group home, Marella,⁶⁹ or with an Aboriginal worker in DOCS.

Centacare

4.48 There has been one Aboriginal child placed through Centacare, in an Aboriginal family, for adoption in the five year period July 1991 - July 1996. Centacare Adoption Services stated that the agency's adoption policy reflects the Principle and that the agency would explore options with an Aboriginal birth parent and liaise with relevant Aboriginal welfare organisations.⁷⁰ Centacare does not have any Aboriginal or Torres Strait Islander workers on staff, and does not have any prospective Aboriginal

65. Barnardos Australia *Letter* (10 November 1995).

66. Care Force *Submission* (6 November 1995).

67. Care Force Anglican Adoptions Agency *Letter* (7 November 1995).

68. See Appendix A.

69. See para 4.26.

70. See Appendix A.

adoptive parents. Should an adoption be sought for an Aboriginal or Torres Strait Islander child, Centacare would attempt to recruit Aboriginal or Torres Strait Islander adoptive parents.⁷¹

Effectiveness of the Draft Policy in New South Wales

4.49 Despite the Principle being implemented in the Draft Policy it seems that nearly half the Aboriginal children adopted in NSW over the past five years have been adopted by non-Aboriginal people. Of the 35 Aboriginal children adopted over the past five years in NSW, 16 (45.7%) were adopted by non-Aboriginal people. DOCS maintains that this figure of 35 adoptions is inflated due to possibly incorrect recording of the number of adoptions in 1990/91.⁷² Even disregarding the nine children adopted by non-Aboriginal people in this year, there have been 9 Aboriginal children adopted by non-Aboriginal people and one more child where the Aboriginality of the adoptive parents was not recorded in the following years. DOCS can provide explanations for, at most, four of these children. This suggests that, at the very least, there is room for improvement in DOCS's recording of its compliance with the Draft Policy.

4.50 Another important factor to note is that the agencies involved may not necessarily know of a child's Aboriginality if the birth mother does not identify as being Aboriginal, or if a non-Aboriginal birth mother does not identify the father as being Aboriginal. Therefore, the number of Aboriginal children adopted into non-Aboriginal families may well be much higher than recorded.

4.51 Factors which may prevent the effective implementation of the Principle are discussed in Chapter 7. The effectiveness of the Principle in NSW may well be limited by the fact that it is not

71. Centacare Adoption Services *Letter* (29 November 1995).

72. NSW - Department of Community Services *Letter* (4 October 1996).

contained in legislation and instead is found in a draft policy document. This issue also is discussed in Chapter 7.

5. Legislation, policy and practice across Australia

- Introduction
- Level of implementation
- Definition of Aboriginal child
- Australian Capital Territory
- Northern Territory
- Queensland
- South Australia
- Tasmania
- Victoria
- Western Australia

INTRODUCTION

5.1 The responsibility for legislating for children's welfare lies with each State and Territory Government in Australia. This Chapter discusses the Principle in each State and Territory in Australia. The text of the Principle, as contained in either legislation or policy, is found in Appendices B - I, according to State and Territory. Any other relevant legislative provisions are also found in the Appendices.

5.2 The form of the Principle, in both legislation and administrative policy, varies widely throughout Australia. Each expression provides for a different process by which the decision to place a child is reached. Each gives a different person the ultimate power to make the placement and none gives the ultimate power of placement to an Aboriginal and Torres Strait Islander community. All of the provisions allow for the possibility of placing an Aboriginal or Torres Strait Islander child in a non-Aboriginal or non-Torres Strait Islander family.

LEVEL OF IMPLEMENTATION

5.3 The Working Party of State Social Welfare Administrators recommended in 1984 that each State and Territory enact the Principle in legislation.¹ To date, Queensland, Western Australia and Tasmania have not included the Principle in legislation concerning either the adoption or fostering of children, although each State maintains the Principle is followed in practice. Table 5 sets out where the Principle is found in each State and Territory in Australia. It is clear from this Table that the Principle appears in eight of the 16 pieces of legislation in Australia which deal specifically with the fostering and adoption of children.

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1. Australia - Working Party of the Standing Committee of Social Welfare Administrators *Aboriginal Fostering and Adoption: Review of State and Territory Principles, Policies and Practices* (October 1983) Recommendation 10 at 7.

Table 5: Status of the Principle across Australia

| State/Territory | Where the Principle is found in relation to fostering | Where the Principle is found in relation to adoption |
|-------------------------------------|--|---|
| Australian Capital Territory | Policy* | <i>Adoption Act 1993</i> (ACT) s 21 |
| New South Wales | <i>Children (Care and Protection) Act 1987</i> (NSW) s 87 | Policy |
| Northern Territory | <i>Community Welfare Act 1983</i> (NT) s 69 | <i>Adoption of Children Act 1994</i> (NT) s 11 |
| Queensland | Policy | Policy |
| South Australia | <i>Children's Protection Act 1993</i> (SA) s 5 | <i>Adoption Act 1988</i> (SA) s 11 |
| Tasmania | Policy | Policy |
| Victoria | <i>Children and Young Persons Act 1989</i> (Vic) s 119 | <i>Adoption Act 1984</i> (Vic) s 50 |
| Western Australia | Policy | Policy* |

* There are no policy documents available for these jurisdictions

DEFINITION OF ABORIGINAL CHILD

5.4 Various definitions of "Aboriginal child" are used in the legislation and administrative policy which deals with the fostering and adoption of children. The definition used is crucial in that it formally determines which children come within the ambit of the Principle.

5.5 This section deals with the definition of "Aboriginal child" as opposed to "Torres Strait Islander child". South Australia is the only jurisdiction which has a separate definition for "Torres Strait Islander child" in the legislation or policy relating to the adoption and fostering of children.² In other pieces of legislation and policy,

2. *Children's Protection Act 1993* (SA) s 6(1) (see Appendix F).

Torres Strait Islander children are defined as "Aboriginal children",³ or not defined at all.

5.6 Table 6 shows where the definition of "Aboriginal child" is to be found, if anywhere, in the relevant pieces of legislation and policy relating to the Principle which were set out in Table 5.⁴ Few expressions of *policy* contain a definition of "Aboriginal child". Not all *legislation* which incorporates the Principle, has a definition.

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3. *Adoption Act 1993* (ACT) s 4(1) (see Appendix C); *Children and Young Persons Act 1989* (Vic) s 3(1) (see Appendix H); *Adoption Act 1984* (Vic) s 4(1) (see Appendix H) and *Substitute Care Policy in Relation to Aboriginal Child Placement* (WA) (see Appendix I). This issue is discussed in paras 8.37-8.41.
 4. Those jurisdictions which do not have the Principle in the relevant legislation also do not have a definition of "Aboriginal child" in the legislation: *Child Protection Act 1974* (Tas); *Child Welfare Act 1960* (Tas); *Adoption Act 1988* (Tas); *Children's Services Act 1986* (ACT); *Adoption Act 1994* (WA); *Child Welfare Act 1947* (WA); *Adoption of Children Act 1964* (Qld); *Children's Services Act 1965* (Qld).

Table 6: Definition of "Aboriginal child" in legislation and policy containing the Principle

| | Principle in legislation | |
|----------------------|---|--|
| | Fostering | Adoption |
| Definition | <i>Children's Protection Act 1993 (SA) s 6(1)</i> <i>Children and Young Persons Act 1989 (Vic) s 4(1)</i> <i>Children (Care and Protection) Act 1987 (NSW) s 3(1)</i> | <i>Adoption Act 1993 (ACT) s 4(1)</i> <i>Adoption Act 1984 (Vic) s 4(1)</i> <i>Adoption of Children Act 1994 (NT) s 3(1)</i> |
| No definition | <i>Community Welfare Act 1983 (NT)</i> | <i>Adoption Act 1988 (SA)</i> |
| | Principle in policy | |
| | Fostering | Adoption |
| Definition | Substitute Care Policy (WA) | Draft Policy (NSW) |
| No definition | Departmental Policy (Tas)** Policy Statement (Qld) Policy (ACT)* | Departmental Policy (Tas) Policy Statement (Qld) Policy (WA)* |

* There are no policy documents available for these jurisdictions

** Department of Community and Health Services (Tas) reports that it relies on the assessment and identification of the Aboriginal community through the Aboriginal Family Support and Care Program.

5.7 Definitions of "Aboriginal child" used in the various pieces of legislation or policy listed above can be characterised as one of the following approaches:

- "self-identification";
- "descent"; or
- "member of the Aboriginal race of Australia".

Problems which arise out of each approach and their impact on the operation of the Principle are discussed in Chapter 7.⁵

5. See paras 7.25-7.32.

"Self-identification"

5.8 The most common approach to the definition of "Aboriginal child" in legislation or policy containing the Principle is one of "self-identification".⁶ In this formulation, an Aboriginal person is defined as:

- a person of Aboriginal descent;
- who identifies as an Aborigine; and
- who is accepted as such in the community in which he or she lives.

5.9 This definition was formulated in the early 1970s and was more acceptable to Aboriginal people than previous definitions of "Aborigine" which had often been drafted to suit non-Aboriginal purposes and were expressed in terms of "caste" or degree of Aboriginal blood.⁷ This definition is acceptable to many Aboriginal people who object to non-Aboriginal definitions of an "Aboriginal person".

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6. *Children (Care and Protection) Act 1987* (NSW) s 3(1) (see note 2 in Chapter 4); *Children and Young Persons Act 1989* (Vic) s 3(1) (see Appendix H); *Adoption Act 1984* (Vic) s 4(1) (see Appendix H); *Adoption Act 1993* (ACT) s 4(1) (see Appendix C); *Children's Protection Act 1993* (SA) s 6(1) (note: this definition requires self-identification, or identification by at least one parent in the case of a young child, but does not require acceptance by the community: see Appendix F); *Substitute Care Policy in Relation to Aboriginal Child Placement* (WA) (see Appendix I) and *Policy Statement in Relation to Aboriginal and Torres Strait Islander Fostering and Adoption* (Qld) (note: this provision also requires parental identification in the case of a baby or young child: see Appendix E).
7. Which gave rise to terms such as "quadroon" and "octoroon" people who were defined as either Aboriginal or non-Aboriginal depending on the purpose of the legislation: NSW - Aboriginal Children's Research Project *Identifying Aboriginal Children in Non-Aboriginal Substitute Care* (Discussion Paper 5, July 1982) at 6-7.

"Descent"

5.10 The Draft Policy on the Adoption of Aboriginal Children (NSW) uses a "descent" definition of "Aboriginal", being "a person who is a descendant of an aboriginal native of Australia".⁸ This defines as Aboriginal a person who has any Aboriginal blood, regardless of degree.

"A member of the Aboriginal race of Australia"

5.11 The definition of "Aboriginal" contained in the *Adoption of Children Act 1994* (NT) is "a person who is a member of the Aboriginal race of Australia".⁹ This definition is also used in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth)¹⁰ and the *Family Law Act 1975* (Cth).¹¹

AUSTRALIAN CAPITAL TERRITORY

Fostering

5.12 There is no provision relating to the placement of Aboriginal and Torres Strait Islander children into alternative care arrangements in the *Children's Services Act 1986* (ACT). The Children's, Youth and Family Services Bureau of the ACT ("Family Services") has advised that they endorse, and try to implement, the Principle. The legislation is being reviewed and it is intended that the Principle will be included in the legislation.¹²

8. *Aborigines Act 1969* (NSW) s 2(1). Note that this Act was repealed by the *Aboriginal Land Rights Act 1983* on 10 June 1983.

9. *Adoption of Children Act 1994* (NT) s 3(1).

10. s 4(1) "Aboriginal person" means a person of the Aboriginal race of Australia.

11. s 68F(4) "Aboriginal peoples" means the peoples of the Aboriginal race of Australia.

12. Information provided by Family Services (ACT) (20 February 1997).

5.13 The ACT has no specific foster care program for Aboriginal and Torres Strait Islander children. As at October 1995, Family Services' foster care program had no Aboriginal or Torres Strait Islander carers. There are five non-government agencies (NGOs) in the ACT which provide all other substitute care, but none is Aboriginal or Torres Strait Islander, nor have any been successful in recruiting Aboriginal carers to date.

5.14 Over the three year period from July 1992 to June 1995 there were 77 Aboriginal or Torres Strait Islander children placed in foster care in the ACT, all were placed in non-Aboriginal care. Family Services attributed this to the fact that there were no suitable extended family members able, or Aboriginal or Torres Strait Islander foster carers available, to care for the children. Family Services advised that efforts are being made to address this problem by contacting the Aboriginal and Torres Strait Islander Consultative Committee in the ACT.¹³

5.15 Family Services referred to the fact that the ACT has the smallest Aboriginal and Torres Strait Islander population in Australia.¹⁴ This may be a constraining factor on the availability of appropriate placements for Aboriginal and Torres Strait Islander children. Family Services also reported that 246 Aboriginal and Torres Strait Islander children "came to the attention" of the department over the last three years: 91 children in 1992/93, 79 children in 1993/94 and 76 children in 1994/95.¹⁵ This means around 9% of Aboriginal and Torres Strait Islander children in the ACT come to the attention of Family Services each year.¹⁶ The disproportionate number of Aboriginal and Torres Strait Islander

13. ACT - Family Services *Letter* (20 October 1995).

14. In 1991 there were 1 775 Aboriginal and Torres Strait Islander people in the ACT - the most recent figure available from the Australian Bureau of Statistics *Census of Population and Housing 6 August 1991* (ABS Catalogue No 2740.0, AGPS, Canberra, 1993).

15. ACT - Family Services *Letter* (20 October 1995).

16. At the 1991 Census there were 846 Aboriginal and Torres Strait Islander children in the ACT: ACT - Family Services *Letter* (20 October 1995).

children becoming involved with Family Services warrants provisions which deal specifically with Aboriginal and Torres Strait Islander children. While the actual numbers of Aboriginal people in the ACT may be small, the needs of Aboriginal children and the concerns of the Aboriginal community deserve special attention. Many Aboriginal people regard it as crucial that Aboriginal children are cared for by Aboriginal people. Such concerns exist regardless of the total Aboriginal population of the ACT.¹⁷

Adoption

5.16 Section 19 of the *Adoption Act 1993* (ACT) sets out the criteria for exercising the Court's discretion in making an adoption order, and includes a general requirement that the Court have regard to any wishes of the birth parents as to the racial background of the proposed adoptive parents.¹⁸

5.17 In addition, section 21 of the *Adoption Act 1993* (ACT) specifically provides for the adoption of Aboriginal and Torres Strait Islander children in the ACT. This is a strong version of the Principle and provides that an adoption order shall not be made for an Aboriginal child unless it is not practical for the child to stay with the birth parents or a "responsible person" who has an interest in the welfare of the child, according to the customary law of the child's community. Failing this, adoptive parents should be chosen from the Aboriginal community. The choice of adoptive parents must be made after consideration of the importance of the child *maintaining contact* with:

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17. Comments made by N D'Souza, Executive Officer SNAICC (11 April 1996).
 18. *Adoption Act 1993* (ACT) s 19(2): "In deciding whether or not to make an adoption order, the Court shall have regard to - ... (b) any wishes expressed in an instrument of consent, including wishes as regards - ... (i) the racial or ethnic background of the proposed adoptive parents."

- his or her birth parents;
- any "responsible person"; and
- his or her Aboriginal community.¹⁹

5.18 Records of the Australian Institute of Health and Welfare show that there have been no adoptions of Aboriginal children in the ACT in the five years 1990/91 - 1994/95.²⁰

NORTHERN TERRITORY

Fostering

5.19 Section 69 of the *Community Welfare Act 1983* (NT) contains an expression of the Principle.²¹ When an Aboriginal child is in need of care the Minister, or his or her delegate²², or the Court²³ must ensure that every effort is made to place the child in the following order:

- with the extended family; or otherwise
- with Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law; or, if this can't be arranged without endangering the child's welfare,²⁴ then

19. See Appendix C.

20. Australian Institute of Health and Welfare *Adoptions Australia* series: see Chapter 4 note 60. See also ACT - Family Services *Letter* (20 October 1995).

21. See Appendix D.

22. *Community Welfare Act 1983* (NT) s 6.

23. Family Matters Court: *Community Welfare Act 1983* (NT) s 4(1) and 43(1)(e).

24. Both this Act and the *Children (Care and Protection) Act 1987* (NSW) s 87 require that the third preference only be used if placement in the extended family or the Aboriginal community would be "endangering the welfare of the child" (NT) or "detrimental to the welfare of the child" (NSW). Both of these phrases seem to imply that there should be some real risk of harm

- in a placement that is consistent with the best interests of the child.

This last option cannot occur unless:

- there has been consultation with
 - * the child's parents and other people responsible for the child under customary law; and
 - * appropriate Aboriginal welfare organisations;
- preference for custody by suitable Aboriginal people has been considered;
- placement of the child close to his or her family or relatives has been considered; and
- undertakings to encourage the child's contact with kin and culture given by the prospective carer have been considered.

5.20 Section 68 of the Act places an obligation on the Minister to provide support and assistance to Aboriginal communities and organisations for the welfare of Aboriginal families and children, including the promotion of the training and employment of Aboriginal welfare workers.²⁵ Section 43 of the Act²⁶ requires that the NT Family Matters Court also consider the criteria contained in s 69 when the Minister makes an application that an Aboriginal child be found in need of care. Section 43 also provides that any assessment of an Aboriginal child as being in need of care should be determined in light of the standards of the community in question.

5.21 Territory Health Services ("the Department") has advised that policy guidelines for both the Substitute Care and Guardianship Program require workers to apply the Principle in

before the first two options are rejected. The consistency of this phrase and the principle of "best interests of the child" is discussed in paras 6.27-6.31.

25. See Appendix D.

26. See Appendix D.

all cases and to consider the cultural continuity of the child as a very important issue.²⁷

5.22 Aboriginal children constitute a large proportion of children in care in the NT. The Department reported that of all children in care (124) at 1 May 1995, 53% (66) were Aboriginal,²⁸ although Aboriginal children represent only 33.7% of the child population in the NT.²⁹ Despite this seemingly high proportion of Aboriginal children in care, the NT in fact has the lowest placement rate for Aboriginal children in care in Australia. A study in 1994 found that only three per 1 000 Aboriginal children entered care in the NT compared with a national average of 20 per 1 000 Aboriginal children.³⁰ This "remarkably low rate" of Aboriginal children entering care was attributed to the Department adhering to the Principle and consulting with the extended family before the child comes into care.³¹

5.23 The Department reported that consultation with family members and relevant Aboriginal organisations typically occurs long before the child enters care in order to resolve safety issues and alleviate the need for substitute care.³² When these attempts fail, the child enters care as a last resort.

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27. NT - Department of Health and Community Services (now Territory Health Services) *Letter* (11 July 1995).
 28. NT - Territory Health Services *Northern Territory Government Interim Submission to the Human Rights and Equal Opportunity Commission's Inquiry into the Stolen Generation* (Darwin, May 1996) at 54 (the "NT Interim Submission").
 29. The most recent figure available is the Australian Bureau of Statistics *1991 Census of the Population and Housing, Aboriginal Community Profile* (ABS Catalogue No 2722.0, AGPS, Canberra) cited in H Bath "Out-Of-Home Care in Australia: A State by State Comparison" (1994) 19(4) *Children Australia* 4 at 7.
 30. H Bath "Out-Of-Home Care in Australia: A State by State Comparison" (1994) 19(4) *Children Australia* 4 at 7.
 31. Bath at 9.
 32. NT Interim Submission at 48.

Aboriginal children with disabilities

5.24 The Department identified that the Aboriginal children who do enter care as a last resort often have high support needs, often as a result of disabilities or multiple disabilities, which have prevented family members or others from being able to care for them. The nature of the Aboriginal population in the NT, with many Aboriginal people living in remote rural communities, may mean that it is difficult to locate a suitable Aboriginal placement for these children with high support needs.³³ This difficulty in locating Aboriginal carers for Aboriginal children with disabilities is a factor hampering the effective operation of the Principle and is discussed further in paragraphs 7.38-7.39.

5.25 A significant proportion (41%) of Aboriginal children in care in the NT were children with disabilities as compared with only 12% of non-Aboriginal children in care. Aboriginal children with disabilities represented 79% of all children with disabilities in care in the NT.³⁴ The majority of all children with disabilities had been in care for longer than one year, with a small proportion having been in care for over ten years.³⁵ Most children with disabilities were being cared for in either foster placements or in specific disability residential services.³⁶ Table 7 shows the proportion of Aboriginal children in substitute care with disabilities compared with non-Aboriginal children.

33. NT Interim Submission at 49.

34. NT Interim Submission at 54.

35. NT Interim Submission at 54.

36. NT Interim Submission at 54.

Table 7: Children with disabilities in substitute care in the NT at 1 May 1995

| | Aboriginal children in care | | non-Aboriginal children in care | | Total |
|----------------------|-----------------------------|--------------------------------------|---------------------------------|--|------------|
| | Number of children | % of all Aboriginal children in care | Number of children | % of all non-Aboriginal children in care | |
| with disabilities | 27 | 41% | 7 | 12% | 34 |
| without disabilities | 39 | 59% | 51 | 88% | 90 |
| Total | 66 | 100% | 58 | 100% | 124 |

Source: NT - Territory Health Services *Substitute Care Census* 1 May 1995

5.26 The Department identified that only around half the Aboriginal children in care (53%) were placed with Aboriginal carers. Placement with Aboriginal carers was higher for Aboriginal children who had no identified disability (64%) than for those Aboriginal children with disabilities (37%).³⁷ Most Aboriginal children with disabilities were placed in non-Aboriginal community-based foster care placements, with only a small group of children with severe and/or multiple disabilities being placed in residential care settings. Table 8 shows the placement of Aboriginal children in the NT.

37. NT - Territory Health Service *Substitute Care Census* 1 May 1995: cited in NT Interim Submission at 56.

**Table 8: Placement of Aboriginal children in NT
at 1 May 1995**

| | Placement with Aboriginal carers | | Placement with non- Aboriginal carers | | Total | |
|-------------------------|-------------------------------------|--|--|---|-----------|------------|
| | No | % of all Aboriginal children in care | No | % of all Aboriginal children in care | No | % |
| with disabilities | 10 | 15 | 17 | 26 | 27 | 41 |
| without disabilities | 25 | 38 | 14* | 21 | 39 | 59 |
| Total | 35 | 53 | 31 | 47 | 66 | 100 |

Source: NT - Territory Health Services *Substitute Care Census* 1 May 1995

* The Department noted that some of these children were actually being cared for by a non-Aboriginal parent or relative. A further two children were placed with a female Aboriginal carer who subsequently died, and the children were still living with her non-Aboriginal partner at the time of the Census: NT Interim Submission at 57

5.27 In November 1995, the Department implemented a protocol setting out the role of KARU, an Aboriginal and Islander Child Care Agency in the NT.³⁸ Under the protocol, KARU has primary responsibility for the recruitment, training and support of care providers for Aboriginal children, although the Department retains the power to make the final placement decision.³⁹

Adoption

5.28 Section 11 of the *Adoption of Children Act 1994* (NT)⁴⁰ deals with the adoption of Aboriginal children. Before making an

38. NT - Territory Health Services *Guidelines and Procedures for Working Co-operatively in Respect of Children in the Care of the Minister for Health Services*.

39. NT Interim Submission at 49.

40. See Appendix D.

adoption order, a Court must be satisfied that every effort has been made to arrange appropriate custody within the child's extended family or with Aboriginal people who have the correct relationship with the child under customary law (including consultation with the child's parents, with people who have responsibility for the child under customary law and with appropriate Aboriginal welfare organisations).⁴¹

5.29 If such "appropriate custody" arrangements cannot be made, or would not be consistent with the welfare and interests of the child, the Court can make an adoption order.⁴² In doing so the Court must:

- give preference to Aboriginal adoptive parents;
- consider a placement geographically close to the family or other relatives of the child; and
- consider undertakings by the adoptive parents to encourage and facilitate the child's contact with Aboriginal kin and culture.

5.30 The Act also allows Aboriginal couples who are traditionally married to adopt a child.⁴³ A "traditional Aboriginal marriage" is a marriage recognised as such by the community of either partner.⁴⁴

5.31 The interests and welfare of the child are the paramount consideration in the *Adoption of Children Act 1994* (NT).⁴⁵ The birth parents' ethnicity and religion are considerations when determining the interests and welfare of a child. Schedule 1 of the

41. The Department advised that there are two main Aboriginal Child Care Agencies in the Northern Territory which are preferred "Aboriginal welfare organisations" for the purposes of the Act: KARU in Darwin and the Central Australian Aboriginal Child Care Agency in Alice Springs: NT - Department of Health and Community Services *Letter* (11 July 1995).

42. *Adoption of Children Act 1994* (NT) s 11(2).

43. *Adoption of Children Act 1994* (NT) s 13(1)(b) (see Appendix D).

44. *Adoption of Children Act 1994* (NT) s 3(1).

45. *Adoption of Children Act 1994* (NT) s 8.

Act sets out guiding principles in relation to ethnicity and religion,⁴⁶ including, where the child is Aboriginal:

- recognition that adoption is absent in customary child care arrangements;⁴⁷
- recognition of the desire of and effort by the Aboriginal community to preserve the integrity of its culture and kinship relationships, so that efforts must be made to place Aboriginal children within their families, kin groups or ethnic communities;⁴⁸ and
- the need for appropriate consultation with the child's parents, relatives or appropriate organisations to ascertain the best course of action to promote the ethnic welfare of the child.⁴⁹

Workers in the Adoptions Program are required to apply the Principle in all cases and consider the importance of cultural continuity under policy guidelines.⁵⁰

5.32 This is a strong embodiment of the Principle which was included in legislation in 1994. There have been no Aboriginal or Torres Strait Islander children adopted in the NT since its introduction. The adoption of Aboriginal and Torres Strait Islander children in the Northern Territory over the last five years appears in Table 9.

46. See Appendix D.

47. *Adoption of Children Act 1994* (NT) Sch 1, cl 2(i).

48. *Adoption of Children Act 1994* (NT) Sch 1, cl 2(ii).

49. *Adoption of Children Act 1994* (NT) Sch 1, cl 3. Note: this section applies generally to children of an ethnic background.

50. NT - Department of Health and Community Services (now Territory Health Services) *Letter* (11 July 1995).

Table 9: Adoption of Aboriginal and Torres Strait Islander Children in the Northern Territory 1990/91 - 1994/95

| Type of placement | ATSI* | non-ATSI** | Total |
|-------------------|----------|------------|----------|
| 1990/91 | 1 | 0 | 1 |
| 1991/92 | 0 | 1 | 1 |
| 1992/93 | 1 | 0 | 1 |
| 1993/94 | 0 | 0 | 0 |
| 1994/95 | 0 | 0 | 0 |
| Total | 2 | 1 | 3 |

Source: NT - Department of Health and Community Services *Letter* (11 July 1995) and Australian Institute of Health and Welfare *Adoptions Australia series 1990/91-1994/95*⁵¹

* Aboriginal or Torres Strait Islander family

** non-Aboriginal or non-Torres Strait Islander family

QUEENSLAND

5.33 The Principle is policy within the Queensland Department of Families, Youth and Community Care ("the Department") and is applied to both the fostering and adoption of Aboriginal children. The Principle is contained in the *Policy Statement in Relation to Aboriginal and Torres Strait Islander Fostering and Adoption* ("the Policy Statement") produced more than ten years ago.⁵² It states that Aboriginal and Torres Strait Islander children should be maintained within their own family and community, but, in the event of an alternative placement, should be placed with:

- a member of their extended family;
- other members of their community with the correct relationship to the child under customary law; or

51. See Chapter 4 note 60.

52. See Procedure 1 in Appendix E.

- other Aboriginal families living in close proximity.⁵³

5.34 If such a placement is not reasonable or practical, then other options should be developed which allow for the continuing relationship with the child's parents, extended family, community and culture. The Policy Statement requires regular review of placements. Application of the Principle includes consultation with family members, the child, and other families and agencies (taking into consideration the parents' requirements for confidentiality).⁵⁴

5.35 The level of implementation of the Policy Statement (Qld) was criticised strongly in a paper prepared for the Royal Commission into Aboriginal Deaths in Custody ("RCIADIC paper") in 1990. It found that the Policy Statement had not been fully or comprehensively implemented across the State and that there was no guarantee that all Departmental officers were aware of the Policy Statement and its extensive ramifications.⁵⁵ Also found was a lack of overall monitoring of the implementation of the Policy Statement. The RCIADIC paper identified an urgent need for the Principle to be embodied in legislation and for the development of alternative Aboriginal care and support systems.⁵⁶

5.36 In the five years since the RCIADIC paper was published, the proportion of Aboriginal and Torres Strait Islander children under care and protection orders placed with Aboriginal and Torres Strait Islander people has increased from 55.3% at 30 June 1990 to 64.2% at 30 June 1995.⁵⁷ The Department maintains that

53. See also paras 8.12 and 8.17.

54. See Procedure 3(a) in Appendix E.

55. I O'Connor *The Impact of Queensland's Family and Child Welfare and Juvenile Justice Legislation, Policy and Practice on Aboriginal and Torres Strait Islander Families and Children* (prepared for the Royal Commission into Aboriginal Deaths in Custody, Queensland, November 1990) (the "RCIADIC paper") at 38.

56. RCIADIC paper at 48.

57. Note that placement includes placement in institutions, homes, with relatives, foster placement and independent placement:

greater efforts have been made to implement the Principle in Queensland more effectively.⁵⁸

Fostering

5.37 The *Children's Services Act 1965* (Qld) does not contain the Principle and so there is currently no legislative assurance that Aboriginal and Torres Strait Islander children will be placed with Aboriginal and Torres Strait Islander families. A Departmental review of child protection policy and legislation has been recently undertaken and new child protection legislation is currently being considered by the Government.⁵⁹ The review revealed widespread support for including the Principle in legislation. It is proposed that the Principle be enshrined in the new legislation.⁶⁰

5.38 The *Policy Statement in Relation to Aboriginal and Torres Strait Islander Fostering and Adoption* ("the Policy Statement") explicitly states that the Principle should be applied when Aboriginal and Torres Strait Islander children are to be placed into alternative care.⁶¹ The Policy Statement also expresses the need for flexibility in applying assessment criteria to carers and in the placement procedures.

5.39 The Department provides funding to Aboriginal and Islander Child Care Agencies (AICCAs) to recruit, train and support Aboriginal and Torres Strait Islander care-providers. The Department maintains that there is a close working relationship

information provided by the Department of Families, Youth and Community Care (Qld) (20 August 1996).

58. Information provided by the Department of Families, Youth and Community Care (Qld) (19 August 1996).

59. Information provided by the Department of Families, Youth and Community Care (Qld) (19 August 1996).

60. Australia - Attorney-General's Department *Australia's Report under the Convention on the Rights of the Child* (December 1995) at 135.

61. See Procedure 8 in Appendix E.

with the AICCAs in Queensland, and that the relevant AICCA is approached before the Department intervenes with any Aboriginal family, or any placement of an Aboriginal child is made. AICCAs have indicated that this is not always the case in practice.⁶² While the Principle is applied well in Brisbane due to the good working relationship between the Department and the Brisbane AICCA, the same does not occur in some country areas and Aboriginal children are not brought to the attention of the relevant AICCA.

5.40 The Department in Brisbane will often contact the IINA⁶³ Torres Strait Islander Corporation to seek their assistance in placing Torres Strait Islander children. However, there are also instances where Torres Strait Islander children have been placed with non-Torres Strait Islander families.⁶⁴

5.41 As at 10 April 1995, the Department had 926 Aboriginal care-providers, and 53 Torres Strait Islander care-providers registered to foster children. The Department advised that of the total of 3 215 Aboriginal and Torres Strait Islander children placed into alternative care over the last five years, 1 258 (39.1%) were placed into non-Aboriginal and non-Torres Strait Islander care.⁶⁵ Table 10 shows the trend in the number of Aboriginal and Torres Strait Islander children under Protective Orders placed with care-providers over the last five years. Protective Orders can provide either for guardianship to transfer to the Director-General (care and protection order) or for guardianship to remain with the parent under the supervision of the Director-General (protective supervision order).

62. Based on discussions with AICCAs in Queensland in the preparation of this Report.

63. Means "we are here".

64. Discussions with Torres Strait Islanders in the preparation of this Report.

65. Queensland - Department of Family Services and Aboriginal and Islander Affairs (now the Department of Families, Youth and Community Care) *Letter* (1 June 1995).

Table 10: Aboriginal and Torres Strait Islander children under Protective Orders placed with care-providers: 1989/90, 1993/94 and 1994/95

| Year | Placed with ATSI* care-provider | | Placed with non-ATSI care provider** | | Total | |
|---------|---------------------------------|------|--------------------------------------|------|-------|-----|
| | No | % | No | % | No | % |
| 1989/90 | 567 | 70.2 | 241 | 29.8 | 808 | 100 |
| 1993/94 | 497 | 70.0 | 213 | 30.0 | 710 | 100 |
| 1994/95 | 464 | 67.4 | 224 | 32.6 | 688 | 100 |

Source: Queensland - Department of Families, Youth and Community Care (20 August 1996)

* Aboriginal and Torres Strait Islander

** Note: this includes a number of Aboriginal and Torres Strait Islander children who are placed with non-Aboriginal or non-Torres Strait Islander members of the extended family. Such a placement is consistent with the Principle.

Adoption

5.42 Section 18A of the *Adoption of Children Act 1964* (Qld) governs the adoption of children with indigenous or ethnic backgrounds. It provides that the Director should approve prospective adoptive couples with the same indigenous background as the child, unless such a couple is not reasonably available or it would not be in the best interests of the child to do so.⁶⁶ However, the provision does not take account of the importance of Aboriginal and Torres Strait Islander children remaining within their extended family or within their community.

5.43 The Policy Statement refers specifically to the adoption of Aboriginal and Islander children.⁶⁷ It states that the Principle should be applied in all cases. Where an Aboriginal or Torres Strait Islander parent wishes to consent to adoption, the Policy Statement requires that there be a referral to counselling with an

66. See Appendix E.

67. See Procedure 9 in Appendix E.

Aboriginal or Torres Strait Islander worker which fully explores alternatives such as family support, custody and guardianship. The Policy Statement urges the use of consultation to find appropriate Aboriginal and Torres Strait Islander adoptive families (subject to requirements of confidentiality) and for flexibility in applying assessment criteria to applicants.

5.44 Despite the provisions of the Policy Statement, adoption of Aboriginal and Torres Strait Islander children does occur in Queensland, although it seems to have been effective placing these children with Aboriginal or Torres Strait Islander families. The Department has reported that 15 Aboriginal and Torres Strait Islander children were adopted in Queensland from 1990/91 - 1994/95.⁶⁸ Only one of these children was placed with a non-Aboriginal family, and that was at the request of the Aboriginal birth mother, who has continuing contact with the child. Placement of these children is outlined in Table 11.

68. Queensland - Department of Family and Community Services (now the Department of Families, Youth and Community Care) *Letter* (22 February 1996). The Department advised that these figures are more accurate than those previously supplied to the Australian Institute of Health and Welfare by the Department which show 14 adoptions of Aboriginal and Torres Strait Islander children over this period, eight adopted to Aboriginal or Torres Strait Islander families, 6 adopted to non-Aboriginal or Torres Strait Islander families: Australian Institute of Health and Welfare *Adoptions Australia* series: see Chapter 4 note 60.

Table 11: Adoption of Aboriginal and Torres Strait Islander children in Queensland: 1990/91 - 1994/95

| | 1990 /91 | 1991 /92 | 1992 /93 | 1993 /94 | 1994 /95 | Total |
|------------------------------------|-------------|-------------|-------------|-------------|-------------|-----------|
| Adoption by ATSI* parents | 1 | 3 | 2 | 4 | 4 | 14 |
| Adoption by non- ATSI** parents | 0 | 0 | 1 | 0 | 0 | 1 |
| Total | 1 | 3 | 3 | 4 | 4 | 15 |

Source: Queensland - Department of Family and Community Services
Letter (22 February 1996)

* Aboriginal or Torres Strait Islander adoptive parents

** non-Aboriginal or non-Torres Strait Islander adoptive parents

SOUTH AUSTRALIA

Fostering

5.45 The *Children's Protection Act 1993* (SA) states that preserving and enhancing a child's racial and cultural identity, and making decisions consistent with racial traditions and cultural values are serious considerations in the exercise of powers under the Act.⁶⁹ The *Children's Protection Act 1993* (SA) is currently the only piece of child welfare legislation in Australia which gives separate recognition to Aboriginal children and Torres Strait Islander children in the Principle.

5.46 Section 5 of the *Children's Protection Act 1993* (SA) is an extensive provision which implements the Principle in relation to

69. *Children's Protection Act 1993* (SA) s 4(2): "Serious consideration must, however, be given to the desirability of - ... (e) preserving and enhancing the child's sense of racial, ethnic, religious or cultural identity, and making decisions and orders that are consistent with racial or ethnic traditions or religious or cultural values."

Aboriginal and Torres Strait Islander children.⁷⁰ The section requires that a recognised Aboriginal or Torres Strait Islander organisation must be consulted before an Aboriginal or Torres Strait Islander child is placed. A recognised Aboriginal or Torres Strait Islander organisation under this section is one which is declared as such by the Minister by a notice in the Gazette, after consultation with the Aboriginal or Torres Strait Islander communities.⁷¹ In placing the child, the decision-maker must have regard to the submissions of the Aboriginal or Torres Strait Islander organisation or, where there has been no consultation, the traditions and cultural values of the Aboriginal or Torres Strait Islander community. When conducting consultations with Aboriginal or Torres Strait Islander people, all reasonable endeavours must be made to consult in a manner and at a venue that is as sympathetic to their Aboriginal or Torres Strait Islander traditions as reasonably practicable.⁷² The section also refers to the general principle that an Aboriginal child should be kept within the Aboriginal community and a Torres Strait Islander child should be kept within the Torres Strait Islander community.⁷³

5.47 The *Children's Protection Act 1993* (SA) also provides for the use of "family care meetings" in making arrangements for children at risk in order to allow the child's family to make informed decisions about arrangements for best securing the care and protection of the child.⁷⁴ The Act specifically provides for the presence of a person nominated by a recognised Aboriginal or

70. See Appendix F.

71. *Children's Protection Act 1993* (SA) s 5(3). This is discussed further in paras 7.54-7.57. There are currently 22 recognised Aboriginal organisations and one Torres Strait Islander organisation which have been declared by notice in the Gazette in South Australia: SA - Department for Family and Community Services *Letter* (26 May 1995).

72. *Children's Protection Act 1993* (SA) s 5(5) and 5(6).

73. *Children's Protection Act 1993* (SA) s 5(2)(c).

74. *Children's Protection Act 1993* (SA) s 27 and 28.

Torres Strait Islander organisation if the child is an Aboriginal or a Torres Strait Islander.⁷⁶

5.48 As at 31 March 1995 there were 159 Aboriginal children under the care and protection of the Department for Family and Community Services ("the Department"). This figure represents 13.3% of the total number of children under care and protection,⁷⁶ whereas Aboriginal and Torres Strait Islander children represent about 2% of children in South Australia.⁷⁷ According to the Department's records, at the end of July 1994 there were 251 Aboriginal and Torres Strait Islander children in out-of-home care in South Australia.⁷⁸ The Department was unable to provide information about whether any of these children were placed in Aboriginal or Torres Strait Islander placements. Therefore, the success of the s 5 of the *Children's Protection Act 1993* (SA) is difficult to gauge.

Adoption

5.49 Section 11 of the *Adoption Act 1988* (SA) applies specifically to the adoption of Aboriginal children.⁷⁹ There was a requirement in this section that "guardianship" be used in preference to adoption for Aboriginal children.⁸⁰ This has recently been amended

75. *Children's Protection Act 1993* (SA) s 31(h).

76. SA - Department for Family and Community Services *Letter* (26 September 1995).

77. The most recent figure available is the Australian Bureau of Statistics *1991 Census of Population and Housing, Aboriginal Community Profile* (ABS Catalogue No 2722.0, AGPS, Canberra) cited in H Bath "Out-Of-Home Care in Australia: A State by State Comparison" (1994) 19(4) *Children Australia* 4 at 7.

78. SA - Department for Family and Community Services *Letter* (26 May 1995).

79. See Appendix F.

80. The South Australian Aboriginal Child Care Agency (SAACCA) suggested that relative care and foster care also be included as options which are preferable to adoption, rather than just

to require that "any alternative order" be used in preference to adoption.⁸¹ When it is in the interests of the child to be adopted, he or she should be adopted by:

- a member of his or her Aboriginal community who has the correct relationship in accordance with Aboriginal customary law; or failing this,
- with some other Aboriginal person.⁸²

An order in favour of a non-Aboriginal person will only be made if the Children's Court is satisfied that there are special circumstances and the child's cultural identity will not be lost as a result.

5.50 Section 15(4) gives birth parents generally the opportunity to express a wish that their child remains in the extended family by allowing consent to be limited to adoption of the child by a

guardianship. Their argument was that guardianship being a permanent order was not necessarily the most preferable option for Aboriginal children, who may be part of an extensive and interlocking family network. They identified the need to find the most appropriate placement from a range of alternatives: South Australian Aboriginal Child Care Agency *Adoption Policy and Practice in South Australia: ACCA Response to the Report of the Review Committee* (South Australian Aboriginal Child Care Agency Forum Inc, North Adelaide, November 1986) ("the SAACCA Report") at 3, 9 and 10.

81. This amendment was passed on 12 December 1996 but has not been proclaimed at the time of writing.
82. Note that there is no explicit preference for adoption by a member of the child's extended family. SAACCA criticised this omission, and recommended that there should be a primary preference, after considering the wishes of the consenting parent to confidentiality and anonymity, to a placement with a member of the child's extended family. They proposed that such an amendment would recognise that the needs of Aboriginal children and families may differ from those of the non-Aboriginal community: SAACCA Report at 3 and 13.

relative.⁸³ This opportunity is available to all birth parents and may allow Aboriginal birth parents to express a wish that their child be adopted by a member of their extended family.

5.51 The *Adoption Act 1988* (SA) s 4(3) recognises traditional Aboriginal marriage for the purposes of adoption.⁸⁴ There is also a requirement in the Regulations to the *Adoption Act 1988* (SA) that the birth parent of an Aboriginal child be made aware of the availability of counselling from Aboriginal organisations.⁸⁵

5.52 The Department reported that Aboriginal women who have approached the Adoption Services have been referred back to their communities. The Department reported only one adoption of an Aboriginal child in the last five years and this was a child "adopted to a non-Aboriginal couple by mutual agreement".⁸⁶

TASMANIA

5.53 Tasmania has applied the Principle to both the foster placement and adoption of Aboriginal children since 1987 as administrative policy.⁸⁷ The wording of the Principle appears to be the same as that accepted at the 1986 Social Welfare Ministers' Conference.⁸⁸ The policy also states that a commitment is made to provide resources and administrative support to the Aboriginal community to assist in the implementation of the Principle and to engage in community work. The Aboriginal Family Support and Care Program operates State-wide and the policy requires that it

83. *Adoption Act 1988* (SA) s 15(4): "The consent of a parent or guardian - ... (b) may be limited, authorising the adoption of the child - (i) by a relative of the child."

84. *Adoption Act 1988* (SA) s 4(3) (see Appendix F).

85. Regulation 4 (see Appendix F).

86. SA - Department for Family and Community Services *Letter* (26 September 1995).

87. Tasmania - Department of Community and Health Services Departmental Policy (see Appendix G).

88. See para 3.26.

must be involved in assessment, planning and service co-ordination for all Aboriginal children alleged to be at risk, under State orders or in care.

Fostering

5.54 There is no provision containing the Principle in either of the Tasmanian Acts relating to the welfare of children, the *Child Protection Act 1974* (Tas) and the *Child Welfare Act 1960* (Tas) although, as noted above, it has been policy since 1987.

5.55 The Department of Community and Health Services ("the Department") has reported problems in applying the Principle because of difficulties, due to the small size of the Aboriginal and Torres Strait Islander community, in recruiting and maintaining Aboriginal and Torres Strait Islander couples and individuals who are able and willing to provide foster care. In June 1995 the Department had 12 registered Aboriginal foster care placements. The Department funds the Tasmanian Aboriginal Centre to recruit Aboriginal foster carers and provide Aboriginal representation in meetings concerning Aboriginal children.⁸⁹

5.56 Aboriginal children in care over the past five years have comprised 10% of total children in care, despite Aboriginal children comprising only 3.8% of the total Tasmanian child population. There has been a total of 123 Aboriginal children in alternative care in the last five years, however, the Department was unable to advise whether these children were placed into Aboriginal or non-Aboriginal care.⁹⁰

89. Tasmania - Department of Community and Health Services *Letter* (22 June 1995).

90. Tasmania - Department of Community and Health Services *Letter* (22 June 1995).

Adoption

5.57 The Principle is not contained in the *Adoption Act 1988* (Tas), but under s 24(1) of the Act the Director or the principal officer responsible for the adoption of any child is obliged to give consideration, so far as practicable, to the wishes of the parent of the child in relation to the religion, race, or ethnic background of the prospective adoptive parents of the child.⁹¹ A birth parent's request to place an Aboriginal child with an Aboriginal family would therefore be considered. The obligation is only to *consider* the wishes of the parent, and only arises if such wishes have been expressed. It is not a guarantee that Aboriginal children will be placed with Aboriginal families.

5.58 The Department reports that no Aboriginal children have been adopted in Tasmania over the last five years.⁹²

VICTORIA

5.59 Victoria's legislation deals quite extensively with the Principle, due largely to the efforts of the Victorian Aboriginal Child Care Agency. The legislative changes have been described as "landmark" and as "a model for other Aboriginal Child Care Agencies and indigenous peoples to follow".⁹³

91. See Appendix G.

92. Tasmania - Department of Community and Health Services *Letter* (22 June 1995).

93. B Butler "Adopting an Indigenous Approach" (1989) 13 *Adoption and Fostering* 27 at 30.

Fostering

5.60 Section 119(1)(m) and 119(2) of the *Children and Young Persons Act 1989* (Vic) contain reference to the Principle.⁹⁴ In case planning for Aboriginal children, relevant members of the child's Aboriginal community should be involved in decision-making. Reference is made to the principles of Aboriginal self-management and self-determination in making arrangements for Aboriginal children. Placement of an Aboriginal child for supervision, custody, guardianship or access must be in the following order:

- with a member of the child's Aboriginal community; or if such a person is not reasonably available,
- with a member of an Aboriginal community; or if such a person is not reasonably available,
- with a person approved by the Director-General *and* by an Aboriginal agency.

5.61 An "Aboriginal agency" for the purposes of the Act is one which has been declared as such in the *Victorian Government Gazette* by the Governor in Council.⁹⁵ The *Children and Young Persons Act 1989* (Vic) s 112(1)(e) also requires the approval of an Aboriginal agency before a permanent care order can be made regarding an Aboriginal child.

5.62 A Protocol between the Department of Human Services⁹⁶ ("the Department") and the Victorian Aboriginal Child Care Agency ("the VACCA") states that no Aboriginal child should be placed away from his or her immediate family without the involvement of the VACCA in decision-making.⁹⁷ This involvement is subject to negotiation depending on the individual family

94. See Appendix H.

95. *Children and Young Persons Act 1989* (Vic) s 6 (see Appendix H). This uses the same definition as that in the *Adoption Act 1984* (Vic) s 50(3)-50(4) (see Appendix H).

96. Formerly the Department of Health and Community Services.

97. See Appendix H.

involved and their attitudes to VACCA. The Department advises that regional or local Aboriginal agencies may be involved instead of the VACCA under the Protocol.⁹⁸

5.63 The 1995 Census of Clients in Placement and Support Services in Victoria found that of the 4 867 children, there were 347 (7.1%) Aboriginal and Torres Strait Islander children,⁹⁹ and of these, 311 were in out-of-home care placements. Aboriginal and Torres Strait Islander children constitute only 0.64% of the child population of Victoria.¹⁰⁰ The majority (80%) of Aboriginal and Torres Strait Islander children in placement in 1995 were in foster care, and 53% of all Aboriginal placements were long-term or in transition to permanent placements.¹⁰¹ The Department was unable to provide information on how many of the children were in Aboriginal or Torres Strait Islander foster care and how many were in non-Aboriginal or non-Torres Strait Islander foster care.

5.64 The Department reports that as the majority (approximately 75%) of Aboriginal children in placement are placed through Aboriginal agencies, it can be assumed these children are placed with Aboriginal caregivers.¹⁰² However this may not necessarily be

98. Section 9 of the Protocol: Victoria - Department of Human Services *Letter* (9 September 1996).

99. Victoria - Department of Human Services *Letter* (9 September 1996).

100. The most recent figure available is from the Australian Bureau of Statistics *1991 Census of Population and Housing, Aboriginal Community Profile* (ABS Catalogue No 2722.0, AGPS, Canberra) cited in H Bath "Out-Of-Home Care in Australia: A State by State Comparison" (1994) 19(4) *Children Australia* 4 at 7. The 1994 Australian Bureau of Statistics estimate is that Aboriginal and Torres Strait Islander children constitute 0.73% of the child population in Victoria. The Department stressed that this figure is believed to understate the true population: Victoria - Department of Human Services *Letter* (9 September 1996).

101. Victoria - Department of Human Services *Letter* (9 September 1996).

102. Victoria - Department of Health and Community Services *Letter* (13 October 1995).

the case as Aboriginal agencies, experiencing difficulties with resources and staffing, may not be able to place these children in Aboriginal or Torres Strait Islander care in every circumstance.¹⁰³

5.65 The Placement and Support Program of the Department funds nine Aboriginal agencies which provide services to children who are or may be at risk. The remaining Aboriginal and Torres Strait Islander children are placed by Protective Workers in the Placement and Support Program (6%) and through general agencies (20%). It is not known how many of these placements are with Aboriginal or Torres Strait Islander carers. The Department commented that sometimes Aboriginal or Torres Strait Islander children are placed through general agencies because of the expressed preference of the family or client, and sometimes because Aboriginal agencies cannot provide Aboriginal placements within an acceptable distance of the family.¹⁰⁴

5.66 The Department advises that a state-wide review is being undertaken to address a range of issues in relation to out-of-home care for Aboriginal children and young people in Victoria.¹⁰⁵

Adoption

5.67 The Principle is embodied in s 50 of the *Adoption Act 1984* (Vic),¹⁰⁶ which is prefaced by an acknowledgement that adoption is absent in customary Aboriginal child care arrangements. The section takes effect when the parent has expressed the wish, in the instrument of consent, that the child be adopted in the Aboriginal community, or when the Court has dispensed with consent.

103. Comments made by N D'Souza, Executive Officer SNAICC (11 April 1996).

104. Victoria - Department of Health and Community Services *Letter* (13 October 1995).

105. Information from Department of Human Services (Vic) (24 February 1997).

106. See Appendix H.

Effectively this means that the Principle applies unless the relinquishing parent nominates otherwise.¹⁰⁷

5.68 The operation of s 50 means that no order for adoption can be made unless:

- the birth parent has received, or else has expressed in writing the wish not to receive, counselling from an Aboriginal agency; and
- the proposed adoptive parent(s) are members of the consenting birth parent's Aboriginal community; or if such a person is not reasonably available,
- the proposed adoptive parent(s) are members of *an* Aboriginal community; or if such a person is not reasonably available,
- the proposed adoptive parent(s) are approved by the Director-General (or the principal officer of an approved agency) *and* by an Aboriginal agency.¹⁰⁸

This last provision effectively gives the Aboriginal agency the right of veto over the adoption of Aboriginal children by non-Aboriginal applicants.¹⁰⁹

5.69 Under s 50, the Department is only obliged to consult with the Aboriginal agency as to the placement of an Aboriginal child when Aboriginal families cannot be found. However, the Department follows the policy that an Aboriginal Agency should be

107. It appears to be departmental policy that the placement principle will be followed whether the consent is conditional or general. The Standards in Adoption state that unless the relinquishing parent nominates otherwise the placement principle applies: Victoria - Department of Health and Community Services *Standards in Adoption* (1986) 5.2.3 [10] (see Appendix H).

108. An "Aboriginal agency" is one which has been declared as such by an Order of the Governor in Council published in the *Government Gazette: Adoption Act 1984* (Vic) s 50(3)-50(5) (see Appendix H).

109. Standards in Adoption (1986) 5.2.3 [14].

involved at all stages in the adoption of an Aboriginal child.¹¹⁰ Although VACCA described the legislation as a step toward Aboriginal self-determination and self-management, it nonetheless said that it gives no "real" control over Aboriginal child welfare to Aboriginal communities.¹¹¹

Conditional and general consent

5.70 The parent or parents of an Aboriginal child can give what is known as a conditional consent placing conditions on the consent to adoption, namely that the child be adopted within the Aboriginal community, and that the natural parents, other relatives and/or members of the Aboriginal community have a right of access to the child.¹¹² The Department is obliged to take all steps which are reasonable in the circumstances to satisfy any such condition placed on the consent and must also consider a report from an Aboriginal agency.¹¹³ Even in the absence of conditions placed by the birth parent or parents on the consent, known as a general consent, the Court can make the adoption order subject to the natural parents' and other relatives' right of continuing access or the right to continuing information about the child.¹¹⁴ This is based on a wish of the parent or parents after the consent to adoption has been given, rather than as a condition of the consent. The adoptive parents must also agree to the order being made subject to these conditions.

5.71 If access by members of the Aboriginal community is a condition of the adoption order, a person from an "Aboriginal agency" is then given the right to visit the child once a year to assess the extent of contact between the child and the Aboriginal

110. Standards in Adoption (1986) 5.2.3 [11] and [12].

111. Victorian Aboriginal Child Care Agency *Victorian Aboriginal Child Care Agency* (VACCA, Victoria, 1987) at 18.

112. *Adoption Act 1984* (Vic) s 37(1). Section 59 of the Act permits a subsequent adoption order to be made subject to the condition (see Appendix H).

113. *Adoption Act 1984* (Vic) s 37(4) (see Appendix H).

114. *Adoption Act 1984* (Vic) s 59A (see Appendix H).

community, assist the adoptive parents in arranging this contact, and arrange a conference to resolve any difficulties with access.¹¹⁵

5.72 The *Adoption Act 1984* (Vic) allows traditionally married Aboriginal couples to adopt as if they were legally married.¹¹⁶ The Act also places an obligation on the Department to inform the child of his or her Aboriginality when he or she reaches 12 years of age.¹¹⁷

5.73 The Department reports that there have been no adoptions of Aboriginal children in Victoria since 1990-91.¹¹⁸

WESTERN AUSTRALIA

Fostering

5.74 The *Child Welfare Act 1947* (WA) does not provide specifically for the placement of Aboriginal and Torres Strait Islander children into foster care arrangements. The Department for Family and Children's Services ("the Department") states that the Principle was incorporated into Departmental policy in 1984 as the *Substitute Care Policy in Relation to Aboriginal Child Placement* ("Substitute Care Policy").¹¹⁹ The Department is in the process of updating the current policy and guidelines for applying the Principle in WA.¹²⁰

115. *Adoption Regulations 1987* (Vic) Reg 20.

116. See Appendix H.

117. *Adoption Act 1984* (Vic) s 114 (see Appendix H).

118. Victoria - Department of Health and Community Services *Letter* (26 July 1995). Confirmed also by statistics from the Australian Institute of Health and Welfare *Adoptions Australia* series (see Chapter 4 note 60).

119. See Appendix I.

120. Information from Department for Family and Children's Services (WA) (24 February 1997).

5.75 The Substitute Care Policy states that cultural consistency and family linkage are considered more important than material standards. The Substitute Care Policy states that, where possible, Aboriginal children should be placed within the extended family, with other Aboriginal families, or in another form of culturally consistent care. The order of priority for placement, according to the Substitute Care Policy, is:

- in the child's home locality with members of the extended family or the same Aboriginal community/tribal group, or another Aboriginal family;
- in a different locality with members of the extended family or Aboriginal tribal group, or another Aboriginal family; or
- in a departmental or residential group home or a hostel with Aboriginal caretakers preferably in the child's locality.

5.76 The Substitute Care Policy also requires that the Department consult with relevant Aboriginal groups or members of the Aboriginal community when the Department takes on the case of an Aboriginal child. One of the Substitute Care Policy's objectives is to explore the potential for Aboriginal communities and organisations to exercise functions in relation to the welfare of children.¹²¹ The Department maintains that it has a close working relationship with the relevant Aboriginal child placement agencies and that this ensures the Principle is followed in practice.¹²² The Department also maintains that there are stringent procedures for the approval of placements for Aboriginal children with non-Aboriginal carers, and for the monitoring of such placements. The approval for such placements rests with the Director General who must be notified within 48 hours of such a placement.¹²³

121. *Substitute Care Policy in Relation to Aboriginal Child Placement* (WA) at 5.

122. The Department referred to reciprocal policies and guidelines between the Department and the Aboriginal agencies: WA - Department for Family and Children's Services *Letter* (29 August 1995).

123. *Substitute Care Policy in Relation to Aboriginal Child Placement* (WA) at 4.

5.77 According to figures from the Department, Aboriginal children comprised around 389 (34%) of all the children in placement (1 142) in WA at 30 June 1994.¹²⁴ Aboriginal children constitute around 4.3% of all children in WA.¹²⁵ The Department has also advised that the proportion of Aboriginal children with Aboriginal carers has increased from 44% at 30 June 1989 to 79% at 30 June 1995. Therefore 21% of Aboriginal children in WA were in non-Aboriginal placements at 30 June 1995.¹²⁶

Adoption

5.78 There is no formal policy within the Department regarding the Principle in relation to adoption, although the Department reports that the Principle is applied to adoption of Aboriginal children in WA.¹²⁷ The *Adoption Act 1994* (WA) contains no provisions specifically regarding the adoption of Aboriginal or Torres Strait Islander children. Nor does the Act contain any reference to the importance of preserving the cultural, ethnic or racial identity of the child when placing the child for adoption. The Act does, however, recognise Aboriginal customary marriage as a marriage for the purposes of adoption.¹²⁸

5.79 There is provision in the *Adoption Act 1994* (WA) for any relinquishing parents to state their wishes regarding the prospective adoptive parents for their child and to be involved in

124. WA - Department for Family and Children's Services *Letter* (29 August 1995).

125. The most recent figure available is from the Australian Bureau of Statistics *1991 Census of Population and Housing, Aboriginal Community Profile* (ABS Catalogue No 2722.0, AGPS, Canberra) cited in H Bath "Out-Of-Home Care in Australia: A State by State Comparison" (1994) 19(4) *Children Australia* 4 at 7.

126. WA - Department for Family and Children's Services *Letter* (29 August 1995).

127. WA - Department for Family and Children's Services *Letter* (March 1996).

128. *Adoption Act 1994* (WA) s 4(2)(c) (see Appendix I).

the selection of the adoptive family.¹²⁹ This merely ensures that the wishes of a relinquishing parent can be expressed and recorded. While these provisions may allow for the placement of an Aboriginal child with Aboriginal people in limited circumstances, the Act does not guarantee that such a placement would be considered for *all* Aboriginal children who need to be adopted in WA. There is also limited provision for the continuity of the "child's established cultural, religious or educational arrangements" to be a factor, if relevant, in placing a child for adoption.¹³⁰

5.80 A provision in keeping with the Principle was contained in an earlier draft of the *Adoption Bill 1992* (WA).¹³¹ There was a requirement for an Aboriginal child to be placed with a member of the child's Aboriginal community or, failing that, with an Aboriginal person who is culturally and geographically as close as possible to the child's community. The provision also required consultation with Aboriginal workers in the Department and, where appropriate, members of the child's Aboriginal community as well as their involvement in the child's placement. This provision was later removed with a change of Government and does not appear in the *Adoption Act 1994* (WA). The new legislation was described by the Minister for Community Development as providing greater flexibility for practitioners to place children with the best possible family that is available, and stated that the guiding principle for placing children with an Aboriginal background will always be placement based on the best interests of the child.¹³² The Act has been criticised for failing to ensure observance of the Principle as one of the intentions of the

129. *Adoption Act 1994* (WA) s 45 (see Appendix I).

130. *Adoption Act 1994* (WA) s 52(1)(a)(v) (see Appendix I).

131. *Adoption Bill 1992* (WA) cl 51 (see Appendix I).

132. *Western Australia Parliamentary Debates (Hansard)* Legislative Assembly, 30 November 1993 at 8 377.

legislation.¹³³ The Department is in the process of reviewing the Act.¹³⁴

5.81 Schedule 2 of the Act outlines the "Rights and Responsibilities to be Balanced in Adoption Plans". It contains an extensive list, organised according to life stages¹³⁵ of the adopted person, of the rights and responsibilities of adoptive parents, birth parents and the child.¹³⁶ There is no recognition of a child's right to a racial, cultural or religious identity, nor the right of an Aboriginal community to maintain contact with Aboriginal children.

5.82 The Department reports that the Principle is applied in relation to the adoption of Aboriginal children.¹³⁷ There have been seven Aboriginal and Torres Strait Islander children adopted in the period 1990/91 - 1994/95; six of these children were adopted by Aboriginal or Torres Strait Islander people. This information appears in Table 12.

133. Western Australia *Parliamentary Debates (Hansard)* Legislative Assembly, 24 March 1994 at 10 660, 10 814 and 10 859.

134. Information from Department for Family and Children's Services (WA) (24 February 1997).

135. Infancy, childhood, adolescence and adulthood: *Adoption Act 1994* (WA) Sch 2.

136. Such as the right of adopting parents to rear their child without undue disruption by the birth parents; the responsibility of birth parents to respect the privacy of the child's adoptive family; the right of the child to resolve identity issues; and the child's responsibility for the effects of his or her actions on others if access to information is made available about the adoption: *Adoption Act 1994* (WA) Schedule 2.

137. WA - Department for Family and Children's Services *Letter* (March 1996).

Table 12: Adoption of Aboriginal and Torres Strait Islander children in WA: 1990/91 - 1994/95

| | 1990/91 | 1991/92 | 1992/93 | 1993/94 | 1994/95 | Total |
|--------------|----------|----------|----------|----------|----------|----------|
| ATSI* | 1 | 0 | 2 | 2 | 1 | 6 |
| non-ATSI** | 1 | 0 | 0 | 0 | 0 | 1 |
| Total | 2 | 0 | 2 | 2 | 1 | 7 |

Source: WA-Department for Family and Children's Services *Letter* (March 1996); and Australian Institute of Health and Welfare *Adoptions Australia* series 1990/91-1994/95¹³⁸

* adopted by an Aboriginal or Torres Strait Islander person

** adopted by a non-Aboriginal or non-Torres Strait Islander person

138. See Chapter 4 note 60.

The Aboriginal Child Placement Principle

6.

International instruments and the Principle

- The status of international instruments in Australia
- Rights of indigenous children
- Best interests of the child
- Rights of indigenous people
- Self-determination in international law

6.1 Treaties, Conventions and Covenants are international instruments which give rise to rights and obligations among the countries which sign and ratify them. They set out guiding principles on issues in international law, including human rights. This Chapter looks at the rights of indigenous¹ children and the rights of indigenous people in international instruments. The most relevant international instrument in a consideration of the Principle is the *United Nations Convention on the Rights of the Child* ("UNCROC").²

- the International Covenant on Civil and Political Rights;³
- the Draft Declaration on the Rights of Indigenous Peoples;⁴ and
- the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.⁵

Relevant sections from these instruments are found in Appendix K.

6.2 Two main principles referred to in these instruments raise important issues regarding the Principle: the "best interests of the child" and the principle of self-determination. These issues are discussed in relation to the Principle. When discussing the tension between the "best interests of the child" and the Principle, s 87 of the *Children (Care and Protection) Act 1987* (NSW) is used by way of example, although the discussion applies broadly to all forms of the Principle.

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1. This is the term used in international law. Aboriginal and Torres Strait Islander people are indigenous people.
 2. Adopted on 20 November 1989 in New York: (1991) ATS 4.
 3. Adopted on 19 December 1966 in New York: (1980) ATS 4.
 4. United Nations. Economic and Social Council. Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities. Forty-sixth session E/CN.4/Sub.2/1994/2/Add.1 (20 April 1994).
 5. Adopted by General Assembly Resolution 41/85 of 3 December 1986.

THE STATUS OF INTERNATIONAL INSTRUMENTS IN AUSTRALIA

6.3 International instruments which have been ratified by Australia do not create rights or obligations under Australian law unless the Australian Government legislates to give them effect.⁶ However, there is an acceptance that international instruments may assist courts in interpreting statutes,⁷ or developing the common law.⁸ The Commonwealth may give effect to international instruments which Australia has ratified by enacting legislation under the "external affairs" head of power in the Australian Constitution.⁹ Such legislation would also be binding on the States and Territories.

6.4 A recent case in the High Court extended the effect of international treaties in Australia. In *Minister for Immigration and Ethnic Affairs v Teoh*¹⁰ the High Court held that Australia's ratification of a treaty generated a "legitimate expectation" that administrative decisions would be made in accordance with the terms of the treaty. In response, the Attorney-General and the Minister for Foreign Affairs released a joint statement which

6. *Koowarta v Bjelke Petersen* (1982) 153 CLR 168; *Kioa v West* (1985) 159 CLR 550; *Mabo v Queensland [No2]* (1992) 175 CLR 1; *Dietrich v R* (1992) 177 CLR 292; *Coe v Commonwealth (The Wiradjuri Claim)* (1993) 68 ALJR 110; *Minister for Immigration v Teoh* (1995) 183 CLR 273.

7. *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Dietrich v The Queen* (1992) 177 CLR 292; *Minister for Immigration v Teoh* (1995) 183 CLR 273; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

8. *Mabo v Queensland [No2]* (1992) 175 CLR 1; *Jago v District Court of New South Wales* (1988) 12 NSWLR 558; *Dietrich v The Queen* (1992) 177 CLR 292; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Western Australia v Commonwealth* (1995) 183 CLR 373.

9. Section 51(xxix).

10. (1995) 183 CLR 273.

declared that no such legitimate expectation would arise from ratification of international treaties. Shortly after, the *Administrative Decisions (Effect of International Instruments) Bill* 1995 (Cth) was introduced into Parliament, s 5 of which affirmed that ratification of an international instrument does not give rise to a legitimate expectation that "an administrative decision will be made in conformity with the requirements of that instrument". This bill lapsed, and has not been re-introduced.

RIGHTS OF INDIGENOUS CHILDREN

United Nations Convention on the Rights of the Child (UNCROC)

6.5 UNCROC sets out the obligations of countries (State Parties) in relation to children. Australia ratified UNCROC on 17 December 1990, which means that Australia is obliged to comply with its terms. UNCROC sets down common standards for children throughout the world and encompasses a whole range of human rights - civil, political, economic, social and cultural. It acknowledges the primary role of the family and parents in the care and protection of children, and the obligation of the state to help them in this role and to intervene if the child is being abused or neglected.

6.6 UNCROC is guided by the principle of "best interests of the child", which is also referred to as "the welfare principle". Article 3(1) states that: "In all actions concerning children ... the best interests of the child shall be a primary consideration".

6.7 Relevant sections of UNCROC are found in Appendix K. Examples of specific rights of children spelt out in UNCROC are:

- the inherent right to life, survival and development of the child (Article 6);

- the child's right to a name and a nationality and to know and be cared for by his or her parents (Article 7);
- the right to preservation of identity (Article 8);
- the right to privacy (Article 16); and
- the right to protection from all forms of physical, mental and sexual abuse (Article 19).

6.8 According to Article 12 children who are capable of forming their own views have the right to express those views in all matters affecting them. These views must be given due weight, taking into account the age and maturity of each child.

6.9 Article 9 holds that a child can only be removed from his or her parents if it is in the child's best interests. All interested parties have the right to participate in the proceedings, and the child has a right to maintain contact with his or her parent(s), subject to the child's best interests. In the case of adoption, Article 21 stipulates that *the* paramount consideration is the "best interest of the child".

Indigenous children and UNCROC

6.10 There are a number of provisions in UNCROC which are of particular relevance in considering the Principle. The Preamble of UNCROC emphasises "the importance of the traditions and cultural values of each people for the protection and harmonious development of the child". Therefore, decisions regarding an Aboriginal child's welfare should be made with reference to his or her cultural context.

6.11 Article 30 and Article 20 of UNCROC refer to specific rights of indigenous children:

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or

her group, to enjoy his or her culture, to profess and practise his or her own religion, or to use his or her own language.¹¹

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State ...

3. ... When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

6.12 The Principle is consistent with the right of indigenous children to enjoy their culture with other members of their community. The Principle could also be seen as providing for cultural continuity by ensuring that, wherever possible, an Aboriginal child remains in his or her community. It could also be argued that in accordance with Article 9 of UNCROC, members of an Aboriginal child's extended family and, possibly, Aboriginal child care organisations, as "interested parties", should have the opportunity to participate in proceedings affecting a child's welfare.

The relevance of UNCROC for Australia

6.13 On 22 December 1992 the Attorney-General declared UNCROC to be an international instrument for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).¹² This means that the rights under UNCROC fall within the definition of "human rights" in Australia. UNCROC has not yet been incorporated into Commonwealth legislation and so is not part of the domestic law of Australia. The Human Rights and

11. This echoes Article 27 of the *International Covenant on Civil and Political Rights*, discussed in para 6.34.

12. Australia - Joint Committee on Foreign Affairs, Defence and Trade *A Review of Australia's Efforts to Promote and Protect Human Rights* (AGPS, Canberra, November 1994) at 153.

Equal Opportunity Commission ("HREOC") can, however, inquire into the Acts and practices of the Commonwealth to evaluate consistency with UNCROC. As the area of child welfare is governed by State and Territory legislation, over which HREOC has no jurisdiction, this measure is largely ineffectual in relation to the welfare of Aboriginal and Torres Strait Islander children.

6.14 Australia's ratification of UNCROC met with more than a little scepticism from Aboriginal organisations. While the organisations were in agreement with its principles, they doubted that it would achieve any more for Aboriginal people than any of the previous instruments which Australia had ratified.¹³ Despite the scepticism, it is recognised that UNCROC is a powerful tool in advocating children's rights. One advocate of Aboriginal children's rights, after referring to the oppression of Aboriginal people which exists despite many other international instruments, stated:

Despite these sobering considerations, the Government's ratification of the Convention on the Rights of the Child must be viewed as a positive development. It provides us with an internationally accepted standard that we may use in exposing the absence of these rights in Australia.¹⁴

6.15 UNCROC is also seen as a clearly expressed framework of children's rights useful for lobbying the Australian Government to provide necessary support for Aboriginal child care organisations.¹⁵ Being a party to UNCROC also exposes Australia's treatment of Aboriginal and Torres Strait Islander children to international scrutiny.

13. B Butler "Aboriginal Children 1990 and the International Convention on the Rights of the Child" (1990) 15(2) *Children Australia* 15 at 16.

14. B Butler "An Aboriginal View on the Convention" in P Alston and G Brennan (eds) *The UN Children's Convention and Australia* (Human Rights and Equal Opportunity Commission, Canberra, 1991) 50 at 50.

15. N D'Souza "An Aboriginal and Islander Perspective" (1989) 14 *Australian Journal of Early Childhood* 31 at 32.

6.16 One mechanism for ensuring compliance with the standards set out in UNCROC is the obligation on State Parties to provide regular reports to the Committee on the Rights of the Child ("the Committee").¹⁶ By these means the Australian Government can be held accountable for the situation of Aboriginal children in Australia. Australia's first report to the Committee was released in December 1995, nearly three years overdue.¹⁷ The Government reported briefly but favourably on Australia's implementation of the Principle:

The [Aboriginal Child Placement] principle is generally adhered to in practice in all States and Territories although it is sometimes difficult to adhere to particularly in isolated parts of the country where resources are limited.¹⁸

6.17 Aboriginal and Torres Strait Islander people may also submit information to the Committee. Any recommendations which the Committee makes are unenforceable, although they may impinge on Australia's international reputation.

6.18 Another potential mechanism for drawing international attention to the situation of Aboriginal children within the child welfare system in Australia is the visit of a Special Rapporteur. Special Rapporteurs are generally mandated under the Commission of Human Rights to investigate and examine State practice in the relevant field. Mr Vitit Muntarbhorn, the Special Rapporteur on Child Pornography and Child Prostitution, visited Australia in 1992 and made mention of Aboriginal children and the Principle in his Report. He recognised that the Principle had been only partly implemented at a State and Territory level, and stated that child protection calls for combined contributions at

16. UNCROC Article 44 (see Appendix K).

17. Australia - Attorney-General's Department *Australia's Report under the Convention on the Rights of the Child* (December 1995) ("Australia's Report under UNCROC").

18. Australia's Report under UNCROC at 131.

both Federal and State level.¹⁹ Such a Report lends support to Aboriginal people's calls for national legislation for Aboriginal children, and has the potential to embarrass the Australian Government internationally.

The Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children

6.19 The *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* ("the Declaration") makes the best interests of the child *the* paramount consideration in all matters relating to the placement of the child outside of his or her family, in both adoption and fostering arrangements.²⁰ The Declaration was adopted by the General Assembly of the United Nations on 3 December 1986. Declarations are not considered binding in international law.

BEST INTERESTS OF THE CHILD

6.20 The "best interests of the child" is a primary consideration in all actions concerning children under UNCROC, and *the* paramount consideration for foster and adoptive placement of children under the Declaration. In Australian child welfare legislation it is a guiding principle. The meaning of "best interests of the child" has inspired much debate. A child's need to be brought up in a stable and secure family (including extended family) environment must be balanced with the need to be safe and protected from all forms of abuse.

19. United Nations, Economic and Social Council Report submitted by *Mr Vitit Muntarbhorn, Special Rapporteur on the Sale of Children, Report on Visit to Australia*, 1992 (E/CN.4/1993/67/Add.1. 9 February 1993) at 19.

20. Article 5 of the Declaration (see Appendix K).

Aboriginal and Torres Strait Islander children and "best interests"

6.21 More complex issues are involved when the best interests of an Aboriginal or Torres Strait Islander child are being considered.²¹ The importance of protecting the child's Aboriginal or Torres Strait Islander cultural identity and maintaining the child's extended family and community relationships must also be taken into account in determining "best interests".²² Furthermore, the concept of "best interests of the child" needs to be flexible to take account of Aboriginal and Torres Strait Islander approaches to child rearing. It is argued that, for Aboriginal people, the best interests of the child are interwoven with the best interests of the extended family and the community.²³

6.22 UNCROC provides some guidance in determining what is meant by the "best interests of the child" in relation to Aboriginal and Torres Strait Islander children. By stating that the child's best interests are to be *a* primary consideration rather than *the* primary consideration, it was intended to introduce a degree of flexibility to the concept of "best interests of the child" while not detracting from the rights of children.²⁴ This has been interpreted as an indication that the best interests of the child are to be

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21. See discussion in Chapter 3 about the "best interests of the child" in the context of child custody disputes, at paras 3.58-3.75.
 22. South Australian Aboriginal Child Care Agency *Adoption Policy and Practice in South Australia: ACCA Response to the Report of the Review Committee* (South Australian Aboriginal Child Care Agency Forum Inc, North Adelaide, November 1986) at 3.
 23. B Butler "Aboriginal Child Protection" in G Calvert, A Ford and P Parkinson (eds) *The Practice of Child Protection: Australian Approaches* (Hale and Iremonger, Sydney, 1992) 14 at 18. See also *In the Marriage of B and R* (1995) 19 FamLR 594 at 623.
 24. P Alston "The Legal Framework of the Convention on the Rights of the Child" in *The Rights of the Child, 91/2 Bulletin of Human Rights* (United Nations, New York, 1992) 1 at 9.

considered in the context of the Preamble and all the other rights of children expressed in UNCROC.²⁶

The Principle and the "best interests of the child"

6.23 UNCROC contains other rights which need to be given attention in considering the best interests of an Aboriginal or Torres Strait Islander child with respect to the Principle. All children, including Aboriginal and Torres Strait Islander children, have the right to express their views in matters which concern them and to have these views heard and given due consideration.²⁶ In some instances this may override the general assumption that an Aboriginal or Torres Strait Islander child should be placed with an Aboriginal or Torres Strait Islander family.²⁷

6.24 A child also has the right to be protected from all forms of abuse.²⁸ Often protective mechanisms exist within Aboriginal communities through the positive intervention of the extended family. However, in some extended families these mechanisms may have broken down due to the levels of domestic violence and drug and alcohol abuse.²⁹ In some Aboriginal communities the level

25. J Eekelaar "The Importance of Thinking that Children have Rights" in P Alston, S Parker and J Seymoure (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) 221 at 232-233.

26. UNCROC Article 12 (see Appendix K).

27. For example, for some Aboriginal or Torres Strait Islander young people, contact with Aboriginal or Torres Strait Islander people may not be as important to them as being with particular non-Aboriginal people with whom they have a special relationship. For this right to be fully realised, the young person should be able to form his or her own ideas freely and have access to Aboriginal or Torres Strait Islander people to discuss issues with them.

28. UNCROC Article 19 (see Appendix K).

29. These problems have been described as being intrinsically tied to the loss of cultural identity, to the breakdown of traditional family roles and respect for elders, and to the social and economic disadvantage which many Aboriginal people face in Australian

of alcoholism, domestic violence and abuse may mean that there are no appropriate placements available for Aboriginal children in need of care.³⁰ In such instances other options would need to be explored, such as Aboriginal group homes. A placement with a non-Aboriginal family which is supportive of contact with the Aboriginal community may be an appropriate option, but only after all other options have been exhausted.³¹

6.25 A consideration of the "best interests of the child" leads to a dilemma over how rigidly the Principle should be applied. Should the Principle be the paramount consideration, that is should Aboriginal and Torres Strait Islander children *always* be placed with Aboriginal and Torres Strait Islander people?³² Alternatively, should the "best interests of the child" be the paramount

society: M Sam *Through Black Eyes: A Handbook of Family Violence in Aboriginal and Torres Strait Islander Communities* (SNAICC, Victoria, 1991).

30. A report on Aboriginal communities in the Western Division of DOCS (NSW) found that some communities claimed the level of physical and sexual abuse of children was as high as 60%: M Smith *Report on Visits to Koori Groups Across Western Division* (Report to the Department of Community Services, Western Division, December 1993) at 3.
31. A view has also been expressed that it is sometimes dangerous to assume that Aboriginal foster parents are automatically the ideal family for abused Aboriginal children and that an Aboriginal child can grow up in an inappropriate Aboriginal foster family with a poor identity and shame about their Aboriginality. The assumption that Aboriginal foster parents automatically instil a sense of cultural pride in Aboriginal children has also been questioned. *Submission to Research Report (Confidential)*.
32. Some members of the Aboriginal community have argued, in the course of preparing this Report, that the Principle should be absolute, ie; no Aboriginal child should be placed with non-Aboriginal people, as placement away from the community is *always* detrimental to the individual child and his or her future (both immediate and long-term) and strikes at the fabric of Aboriginal society.

consideration, that is should the placement only ever be determined by considering the best interests of the child?³³

6.26 An example of this tension between the Principle and the "best interests of the child" is found in s 87 of the *Children (Care and Protection) Act 1987* (NSW). In the following analysis, the text of s 87 will be discussed by way of example. However, the same tension is inherent in any form of the Principle.

Section 87 and the "best interests of the child"

6.27 The *Children (Care and Protection) Act 1987* (NSW) has the "welfare and interests of children" as the paramount consideration.³⁴ It does not use the words "best interests of the child" but instead, s 87 refers to a situation where:

... it is not practicable for the child to be placed ... [with the extended family] ... or it would be *detrimental to the welfare of the child* ... [emphasis added]

6.28 "Detrimental" seems to suggest something more than merely not being the "better" option in terms of the "best interests of the child". There are two possible interpretations of this wording.

6.29 "*Detriment*" is different from "*best interests of the child*". One view is that the "unusual and deliberate phrasing" of s 87 implies that even if a placement with a member of the community would be "better" for the child, if placement with the extended family is not shown to be "detrimental" then s 87 requires that the child be placed with the extended family.³⁵ This interpretation of s 87 at first seems inconsistent with notions of the "best interests of the child". It presumes that it is in the "best interests" of an

33. State and Territory child welfare departments generally accept the Principle on the proviso that it is not absolute, and is subject to the "best interests of the child" in each individual case.

34. *Children (Care and Protection) Act 1987* (NSW) s 55(a).

35. R Chisholm "Aboriginal Children and the Placement Principle" (1988) 2(31) *Aboriginal Law Bulletin* 4 at 5.

Aboriginal child to remain in the care of Aboriginal people. This interpretation is consistent with provisions in UNCROC, which articulate both the importance of traditional and cultural values to a child and the "best interests" principle.³⁶ The rights of the child expressed in UNCROC provide some guidance as to how a balance may be struck.

6.30 A presumption that it is in the "best interests" of Aboriginal children to be placed with Aboriginal people also makes sense in the context of the way Aboriginal children have previously been treated by the non-Aboriginal welfare system, and in the light of continuing prejudice against Aboriginal people. Historically, the concept of "best interests of the child" has had little room for Aboriginal standards and notions of child-rearing. Thus, introducing a standard which makes it clear that a child should be placed within the Aboriginal community unless detriment to the child's welfare can be shown, does not detract from the concept of "best interests of the child" but instead gives substance to a rather indistinct concept.

6.31 *"Detriment" is the same as the "best interests of the child"*. The District Court of NSW has adopted a narrower interpretation of the interaction between the best interests of the child and the Principle. In *Department of Community Services v Johnson*³⁷ the Court preferred to interpret the word "detriment" in s 87 as incorporating the principle that the welfare and interests of the child are to be given paramount consideration.³⁸ Although, in saying this, Judge Graham was careful to state that "detriment" should be read to produce consistency with the overall purpose of s 87. Thus, "detriment" in s 87 should not be merely that detriment which may be considered inherent in placing an

36. UNCROC Articles 20(3) and 30: see para 6.11; and Article 3(1): see para 6.6.

37. District Court, NSW, Graham DCJ, 28 October 1992, DCC7/1992-11/1992, unreported.

38. *Children (Care and Protection) Act 1987* (NSW) s 55(a).

Aboriginal child into Aboriginal communities which may be "less than ideal in the way of material benefits".³⁹

Who decides the "best interests of the child"?

6.32 The real issue behind the "best interests of the child" is who assesses "best interests". Non-Aboriginal people's assessments of the "best interests" of Aboriginal children have in the past focused on material comforts and benefits. This often meant that Aboriginal children would be placed with non-Aboriginal people if it were considered that the child would be better provided for by non-Aboriginal people. However, an Aboriginal person's assessment of the child's best interests may well focus on different concerns. The Victorian Aboriginal Child Care Agency argues that if a child is both well loved and well cared for, the parents cannot justly be criticised for their poverty and non-material outlook.⁴⁰ There has also been a gradual rejection of material benefits as a primary consideration in determining the "best interests of the child" in family law.⁴¹

6.33 An effective way to ensure that the "best interests" principle is applied in a culturally appropriate way may be to place Aboriginal and Torres Strait Islander people in the position of decision-makers. It is consistent with principles of international law that the views of an Aboriginal or Torres Strait Islander child's extended family and community are considered when determining the "best interests" of that child.⁴²

39. *DOCS v Johnson* at 26.

40. *Aboriginal Child Care Agency History and First Twelve Months of ACCA's Operation* (Victorian Aboriginal Child Care Agency, Fitzroy, 1978) at 4.

41. See para 3.60.

42. UNCROC Article 9.

RIGHTS OF INDIGENOUS PEOPLE

The International Covenant on Civil and Political Rights

6.34 The *International Covenant on Civil and Political Rights*⁴³ ("the ICCPR") is one of the major human rights treaties. It lists the fundamental rights and freedoms that all people should be able to enjoy. Article 27 of the ICCPR recognises the right of ethnic minorities to enjoy their own culture in community with other members of their group.⁴⁴ Removal of children from a particular ethnic group could be said to cut across this right as it removes the people through whom the culture will be perpetuated. The ICCPR entered into force for Australia on 13 November 1980.

Draft Declaration on the Rights of Indigenous Peoples

6.35 The *Draft Declaration on the Rights of Indigenous Peoples* (the "Draft Declaration")⁴⁵ has only moral force in Australia and imposes no legal obligations.⁴⁶ Article 6 of the Draft Declaration states:

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence,

43. Adopted on 19 December 1966 in New York: (1980) ATS 23.

44. ICCPR Article 27 (see Appendix K).

45. United Nations, Economic and Social Council. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-sixth session E/CN.4Sub.2/1994/2/Add.1 (20 April 1994).

46. The text of the Draft Declaration was completed by an independent Working Group on Indigenous Populations in 1994. It is currently being considered by an intergovernmental Working Group of the Commission on Human Rights. It still needs to move through the relevant human rights bodies of the UN before it can be adopted by the General Assembly and become a treaty. It is not binding in international law.

including the removal of indigenous children from their families and communities *under any pretext*.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person. [emphasis added]

6.36 This provision is somewhat stronger than the Principle, as it seems to prohibit the placement of Aboriginal children with non-Aboriginal people under any circumstance. Although, presumably, according to the latter part of the Article, an Aboriginal child could be removed if his or her right to life, physical and mental integrity, liberty and security of person were threatened in his or her family or community.

SELF-DETERMINATION IN INTERNATIONAL LAW

6.37 There is an evolving concept of self-determination of indigenous peoples in international law. The issue of what constitutes "self-determination" is both highly contentious and dynamic. The principle of self-determination was initially linked to the right of colonies to assert their independence. It is central to the notion that all States⁴⁷ in the United Nations are sovereign and equal. This is affirmed in Article 1 of the two main human rights instruments: the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR):

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

6.38 The notion of self-determination is evolving to include the rights of indigenous peoples within sovereign States. This application of self-determination involves indigenous people

47. "States" in this context means "countries".

having the right to choose their political status within a State.⁴⁸ One view is that, as a first step, this requires indigenous people being given an appropriate form of autonomy that provides for the protection and self-control of every aspect of their lives,⁴⁹ including land rights, health care and child welfare.

6.39 The notion of self-determination is being developed in other international instruments. Relevant sections of the following instruments are found in Appendix K:

- *International Labour Organisation Convention 169 - Convention Concerning Indigenous and Tribal Peoples in Independent Countries* ("the ILO Convention").⁵⁰ This Convention refers to the right of indigenous peoples to participate in the formulation, implementation and evaluation of policies for national and regional development (Art 7), and recognises the importance of consultation with indigenous peoples regarding administrative or legislative measures which may affect them directly (Art 6). Australia has not yet ratified this Convention and is therefore not bound by its terms.
- *Draft Declaration on the Rights of Indigenous Peoples* (the "Draft Declaration"). The Draft Declaration refers to indigenous people's right to determine freely their political status and pursue freely their economic, social and cultural development by virtue of their right to self-determination (Art 3). Its Preamble recognises the right of indigenous families and communities to retain the shared responsibility for the upbringing, training, education and well-being of their children. The Draft Declaration emphasises the right of

48. S Pritchard "The Right of Indigenous Peoples to Self-Determination under International Law" (1992) 2(55) *Aboriginal Law Bulletin* 4 at 6.

49. L Wong "Indigenous Peoples' Rights: Redrawing the Boundaries between State Rights and Peoples' Rights" (1994) 13 *Social Alternatives* 29 at 31.

50. This Convention came into force on 5 September 1991.

indigenous people: to participate in decisions which affect their lives and to develop their own indigenous decision-making institutions (Art 19); to participate in devising legislative and administrative measures which may affect them (Art 20); to special measures for the improvement of the social condition of their children (Art 22); and to be autonomous or self-governing in social welfare matters, as well as have the ways and means for financing these autonomous functions (Art 31).⁵¹

Self-determination and Aboriginal and Torres Strait Islander peoples

6.40 The Australian Government officially adopted a policy of self-determination for Aboriginal people in 1972. There was initial hesitancy, but the Government moved to a point where self-determination was a key concept in policy. With the change of Government in 1996, the focus in policy shifted to "self-empowerment".⁵² The concept of "self-empowerment" was described by the Minister for Aboriginal and Torres Strait Islander Affairs as being a means to an end - social and economic equality - as opposed to "self-determination" which he regarded as merely an end in itself. Recognition of self-determination has been slower at a State and Territory level.⁵³

51. This issue is discussed in relation to Aboriginal organisations at paras 7.70-7.72.

52. "Self-empowerment" was defined as involving Aboriginal and Torres Strait Islander people in planning, developing and implementing programs, enabling ownership of programs and engendering a sense of responsibility and independence: Senator the Hon John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, 9th Annual Joe and Enid Lyons Memorial Lecture (October 1996).

53. The Aboriginal Children's Research Project noted that it wasn't until late 1981, with the establishment of the NSW Ministry for Aboriginal Affairs, that the NSW Government began to move away from assimilation as an underlying philosophy in Aboriginal affairs:

6.41 The principle of self-determination supports the involvement of Aboriginal and Torres Strait Islander people in the area of child welfare in Australia. The existence of Aboriginal and Torres Strait Islander Child Care Agencies (AICCAs) is seen as an expression of self-determination, and an expression of Aboriginal and Torres Strait Islander people's right to participate fully in their children's welfare.

6.42 National child welfare legislation dealing exclusively with Aboriginal children has been sought by Aboriginal people on the grounds of self-determination.⁵⁴ The principles of self-determination are also used to justify special measures giving attention to the special needs of indigenous children, such as the Principle.

6.43 What Aboriginal self-determination actually involves in the area of Aboriginal child welfare varies.⁵⁵ It can range from merely a requirement that government departments consult with Aboriginal and Torres Strait Islander people⁵⁶ to having Aboriginal and Torres Strait Islander people administer departmental policies and services as departmental workers.⁵⁷ Some of these

NSW - Aboriginal Children's Research Project *Aboriginal Children in Substitute Care* (Principal Report, Part 1, July 1982) at 29.

54. See paras 3.38-3.40.

55. Various models of Aboriginal involvement with child welfare departments have been devised: see R Chisholm "Child Care, Aboriginal Children and Permanency Planning: A Sceptical View" in R Oxenberry (ed) *Changing Families: Proceedings of Third Australian Conference on Adoption* (Adelaide, May 1982) 76 at 83-84.

56. For example, *Children (Care and Protection) Act 1987* (NSW) s 87 requires "consultation with ... such Aboriginal welfare organisations as are appropriate in relation to the child" regarding the foster placement of Aboriginal children. The involvement of Aboriginal and Torres Strait Islander people is only advisory and the real decision-making power still rests with the Department.

57. For example, there is a commitment in NSW by DOCS to employ Aboriginal District Officers and Community Project Officers. There

approaches may only create the illusion of self-determination without affecting the structure of power and responsibility relating to child welfare. It is also argued that employing Aboriginal people as workers in government departments can effectively remove people from their communities who might otherwise have been community leaders.⁵⁸

6.44 One interpretation of self-determination which has been advocated by Aboriginal and Torres Strait Islander people involves them being able to make decisions regarding the welfare of their children within their own communities and organisations. On this approach Aboriginal and Torres Strait Islander people would also determine the mechanisms through which this decision-making power can be exercised.⁵⁹ The AICCA's are an example of such a mechanism. Ultimately control over the welfare of Aboriginal and Torres Strait Islander children would pass from government departments to Aboriginal and Torres Strait Islander people.⁶⁰ There is also a recognition of the need to empower individual communities to take control of their children's welfare.⁶¹

6.45 The Royal Commission into Aboriginal Deaths in Custody placed stress on self-determination of Aboriginal people in dealing

is also an Aboriginal office, Gullama Aboriginal Services Centre, run by DOCS and staffed entirely by Aboriginal workers.

58. Other criticisms of this approach are that such positions may well be directing funding away from Aboriginal community organisations, which are struggling to operate effectively; and that the appointment of Aboriginal *individuals* to a department is not consistent with Aboriginal notions of *community* responsibility for Aboriginal children: R Chisholm "Aboriginal Self-Determination and Child Welfare: A Case Conference" (1982) 17 *Australian Journal of Social Issues* 258 at 271.
59. This is consistent with Article 20 of the Draft Declaration on the Rights of Indigenous Peoples (see Appendix K).
60. There are aspects of this model evident in NSW in the existence of the Aboriginal Legal Services and the Aboriginal Medical Service. There appears to be a willingness on the part of DOCS to devolve more responsibility to Aboriginal organisations such as ACS.
61. See paras 7.45-7.46.

with the number of Aboriginal deaths in custody.⁶² The Royal Commission found that:

in the process of negotiating with Aboriginal communities and organisations in the devising of Aboriginal youth programs governments should recognise that local community based and devised strategies have the greatest prospect of success and this recognition should be reflected in funding.⁶³

6.46 Whatever form Aboriginal and Torres Strait Islander self-determination takes, resources are required to sustain it. It is consistent with principles of international law that the transfer of power must be accompanied by a transfer of resources to Aboriginal and Torres Strait Islander communities.⁶⁴ To do otherwise has been described as a "cruel reform".⁶⁵

Self-determination and the Principle

6.47 The Principle, in most jurisdictions, refers to some form of consultation with Aboriginal and Torres Strait Islander people. This is consistent with a more "conservative" interpretation of self-determination which merely seeks to ensure that the views of Aboriginal and Torres Strait Islander people are taken into account in decision-making.⁶⁶ In some jurisdictions, this option is only considered after all others have been exhausted.⁶⁷ In all forms

62. See also para 3.34.

63. Australia - Royal Commission into Aboriginal Deaths in Custody *National Report Volume 5* (AGPS, Canberra, 1991) at 122.

64. Article 31 of the Draft Declaration (see Appendix K).

65. R Chisholm "Destined Children: Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy" (1985) 14 *Aboriginal Law Bulletin* 6 at 8.

66. R Chisholm "Aboriginal Self-Determination and Child Welfare: A Case Conference" (1982) 17 *Australian Journal of Social Issues* 258 at 271.

67. For example, *Children (Care and Protection) Act 1987* (NSW) s 87.

of the Principle, the ultimate decision-making power is given to an officer of the government department; and the role of Aboriginal and Torres Strait Islander organisations and people is advisory only. In this sense, the Principle could be described as a ruse for Aboriginal self-determination.

6.48 There is scope within the Principle for greater control to be given to Aboriginal and Torres Strait Islander communities. An interesting version of the Principle which embodies this transfer of decision-making power was recommended by the Aboriginal Children's Research Project in 1982.⁶⁸ It envisaged that the Department of Youth and Community Services (now DOCS) and other non-Aboriginal organisations should only provide for the care of Aboriginal children in exceptional circumstances and at the request of appropriate Aboriginal organisations. According to this version of the Principle, Aboriginal organisations are ultimately responsible for the welfare of Aboriginal children.

6.49 When the Principle was first being formulated, the Working Party of the Standing Committee of Social Welfare Administrators ("the Working Party") recognised the need for a transfer of power and responsibility to Aboriginal people regarding the care of their children. The Working Party stopped well short of recommending the devolution of functions and power to Aboriginal organisations and communities, saying only that it is a "complex issue which requires further consideration".⁶⁹ The Working Party endorsed the principle of consultation with appropriate Aboriginal people and

68. The Aboriginal Children's Research Project's Report into Aboriginal children in substitute care in NSW (July 1982) proposed a version of the Aboriginal Child Placement Principle which, unlike other versions of the Principle, did not include non-Aboriginal care as an option: see para 3.75.

69. Australia - Working Party of the Standing Committee of Social Welfare Administrators *Aboriginal Fostering and Adoption: Review of State and Territory Principles, Policies and Practices* (October 1983) at 45 ("the "Working Party Report").

Aboriginal communities and organisations prior to any decision or action being taken with an Aboriginal child.⁷⁰

6.50 A sensitive and tolerant welfare administration which consults with Aboriginal and Torres Strait Islander people concerning the welfare of their children is an important step towards Aboriginal and Torres Strait Islander self-determination. However, many Aboriginal and Torres Strait Islander people would regard it as insufficient. Principles of self-determination are relied on to demand a devolution of power to Aboriginal and Torres Strait Islander people,⁷¹ to be exercised through mechanisms determined by them. Aboriginal and Torres Strait Islander organisations such as the AICCAs and the ACS are seen as examples of mechanisms which already exist. This also requires resources and other forms of support to be given to such organisations and requires a restructure of the child welfare system so that Aboriginal and Torres Strait Islander people exercise real power.

70. Recommendation 15, Working Party Report at 43.

71. R Chisholm "Destined Children: Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy" (1985) 15 *Aboriginal Law Bulletin* 7 at 8.

7.

The Principle in practice

- Effectiveness of the Principle
- Current problems in the application of the Principle in NSW
- Why involve Aboriginal organisations?

7.1 This Chapter deals with the effectiveness of the Principle in practice across Australia, and the difficulties in assessing its effectiveness; and then considers problems in applying the Principle to the placement of Aboriginal children. One problem identified is the lack of consultation with Aboriginal organisations and the arguments for such consultation are examined. The discussion regarding problems draws largely on the experiences of Aboriginal people and workers in NSW and so relates to the Principle in NSW. Comments from Aboriginal people and workers in other States and Territories suggest that many of these problems are common to the application of the Principle generally.

EFFECTIVENESS OF THE PRINCIPLE

7.2 Measuring the effectiveness of the Principle is difficult. The test of effectiveness applied in this Report is the number of Aboriginal children placed in the care of non-Aboriginal people. However, this is not necessarily a definitive indication that the Principle is being applied. The Territory Health Services (NT) suggests that it is not so much the placement outcome but the fact that there has been appropriate Aboriginal involvement in the decision that indicates whether or not the Principle has been effectively applied:

Compliance with the principle should be interpreted in terms of identifying and achieving the most preferred placement preference option for the child. This process does not preclude the possibility that in a limited number of cases the most appropriate placement for the child may be with a non-Aboriginal family.¹

7.3 Information from the relevant departments as to whether the correct procedures have been complied with in the placement of

1. NT - Territory Health Services *Northern Territory Government Interim Submission to the Human Rights and Equal Opportunity Commission's Inquiry into the Stolen Generation* (NT, May 1996) at 56 (the "NT Interim Submission").

Aboriginal children and whether the necessary Aboriginal people have been involved in the placement decision is not readily available. It has been difficult in some instances, even to get accurate statistics outlining where Aboriginal children are placed, let alone how that placement decision was made.² Several departments were not able to provide adequate explanation for the placement of Aboriginal children with non-Aboriginal people. Such information would need to be routinely recorded in order for a department to demonstrate compliance with the Principle. In the absence of such records, the most readily available indication of the effectiveness of the Principle has to be the proportion of Aboriginal children placed with non-Aboriginal people.

7.4 The following statistics do not show conclusively the effectiveness of the Principle, however they do provide a reliable indication for the following reasons:

- The fact that many Aboriginal people are emphatic that Aboriginal children should be placed with Aboriginal people suggests that there would be very few instances in which Aboriginal families and communities would consent to placement with non-Aboriginal people.
- The *disproportionate* numbers of Aboriginal children placed with non-Aboriginal people in some States and Territories indicates that the process which the Principle sets out probably has not been followed.
- Comments made by Aboriginal people and Aboriginal organisations throughout the preparation of this Report suggest that adequate consultation is not taking place, therefore it is unlikely that very many of the Aboriginal children placed with non-Aboriginal people have been placed with the agreement of the child's Aboriginal family or community or Aboriginal organisations.

2. See para 1.10.

7.5 As all States and Territories apply the Principle either as a matter of policy or as a legislative provision, the proportion of Aboriginal children placed with non-Aboriginal people should be relatively low. With regards to foster placement of Aboriginal children, SA, Tasmania and Victoria were unable to state reliably how many Aboriginal children were placed with non-Aboriginal people. In NSW, ACT, NT, Queensland and WA, the proportion of Aboriginal children placed with non-Aboriginal people ranged from 17% to 100%.

7.6 With regards to adoptive placement, over the period 1990/91 - 1994/95, 61 Aboriginal children were adopted throughout Australia and 40 (66%) of these children were placed with non-Aboriginal people.³

7.7 The rough picture which these statistics paint indicates that Aboriginal children are still being placed, disproportionately, with non-Aboriginal people. This seems to indicate that the Principle is not as effective in placing Aboriginal children with Aboriginal people as it could be. This may be due to broader problems which prevent the Principle from operating effectively. These problems are dealt with later in this Chapter.

Is the Principle more effective in legislation or departmental policy?

7.8 Given that the Principle does not appear to be as effective as expected, it is useful to determine whether the Principle is more effective as a legislative provision or as part of departmental policy.

Adoption

7.9 There have been very few adoptions of Aboriginal or Torres Strait Islander children in the last five years in jurisdictions which

3. See Appendix J.

have included the Principle in adoption legislation. Interestingly, proportionately more Aboriginal and Torres Strait Islander children are adopted by non-Aboriginal and non-Torres Strait Islander people in the States and Territories which *have* included the Principle in legislation (50%) than in those which *have not* (31.6%). However, it is hard to draw any firm conclusion from these statistics, given that only four Aboriginal and Torres Strait Islander children were adopted in those States and Territories which have the Principle in legislation.⁴

7.10 There is, however, a difference between the *actual numbers* of Aboriginal and Torres Strait Islander children adopted over the last five years in jurisdictions which have included the Principle in adoption legislation (four children) and those which have not (57 children).

7.11 In jurisdictions where the Principle is included in adoption legislation:

- ACT reported no adoptions of Aboriginal or Torres Strait Islander children.⁵
- Victoria reported no adoptions of Aboriginal or Torres Strait Islander children.
- SA reported that one Aboriginal child was adopted by non-Aboriginal people.
- NT reported that three Aboriginal children were adopted, one by non-Aboriginal people.⁶

7.12 It should be noted that, in the NT, the three Aboriginal children were adopted before the introduction of the Principle in legislation in the NT in 1994. Thus only one Aboriginal child has

4. This could also be due to factors which hamper the effective implementation of the Principle, which are discussed in the next section.

5. Note however, that the Principle was not included in legislation in the ACT until 1993.

6. Note however, that the Principle was not included in legislation in the NT until 1994.

been adopted in Australia *despite* the Principle existing in legislation in the last five years.

7.13 By comparison, States which have the Principle in administrative policy reported considerably more adoptions of Aboriginal and Torres Strait Islander children over the last five years. A total of 57 Aboriginal children were adopted in these States over the last five years:

- Tasmania reported no adoptions of Aboriginal or Torres Strait Islander children.
- WA reported the adoption of seven Aboriginal children, one by non-Aboriginal people.
- Queensland reported the adoption of 15 Aboriginal and Torres Strait Islander children; one child by non-Aboriginal people.
- NSW reported the adoption of 35 Aboriginal children, 16 by non-Aboriginal people.⁷

7.14 One explanation for this difference in numbers of Aboriginal children adopted could be that WA, Queensland and NSW have much larger Aboriginal and Torres Strait Islander populations than the other States and Territories. However, even after taking account of population differences, there seems to be proportionately more Aboriginal and Torres Strait Islander children being adopted in these three States.

7. DOCS noted that 14 adoptions of Aboriginal children in 1990/91 is exceptional. They have been unable to account for this number, beyond suggesting incorrect recording in that year: NSW - Department of Community Services *Letter* (4 October 1996).

Table 13: Adoption of Aboriginal children across Australia

| State/Territory | Number of ATSI* children adopted 1990/1991 - 1994/95 | Total number of ATSI children 0-19 years** | Number of ATSI children adopted per 10 000 ATSI children |
|---|--|--|--|
| States and Territories with the Principle in legislation | | | |
| ACT | 0 | 956 | 0 |
| Vic | 0 | 9 225 | 0 |
| SA | 1 | 8 923 | 1.1 |
| NT | 3 | 22 180 | 1.4 |
| States and Territories with the Principle in policy | | | |
| Tas | 0 | 5 154 | 0 |
| WA | 7 | 23 777 | 2.9 |
| Qld | 15 | 39 770 | 3.8 |
| NSW | 35 | 39 541 | 8.9 |

* Aboriginal and Torres Strait Islander

** This information derived from the Australian Bureau of Statistics *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings* (ABS Catalogue No 4190.0, AGPS, Canberra, 1995): Table C Projections of Aboriginal and Torres Strait Islander Populations, 30 June 1994

7.15 Another explanation is the operation of the Principle. The ACT, SA and the NT have clear legislative provisions which state an adoption order will only be made by the Court if other arrangements, such as guardianship or custody with the extended family, are not suitable. Victoria and SA have a legislative requirement that the birth parent of an Aboriginal child must have received counselling from an Aboriginal organisation before an order is made. Departments in these States assert that these provisions divert Aboriginal children away from adoption into other forms of guardianship or custody within the Aboriginal community.

Fostering

7.16 The effectiveness of the Principle with regard to the fostering of Aboriginal children is difficult to gauge. Only NSW, WA,

Queensland, ACT and the NT were able to state with any accuracy the numbers of Aboriginal children placed with Aboriginal families. The differing ways of recording this information⁸ and the different time periods reported make it impossible to make comparisons across the jurisdictions. The following information presents what was provided. It is difficult to draw any firm conclusions from it.

7.17 Of the jurisdictions where the Principle is contained in legislation for the fostering of Aboriginal children:

- NSW reported that 17.1% of Aboriginal children in substitute care were with non-Aboriginal carers during 1994-95.
- NT reported that 47% of Aboriginal children in care were with non-Aboriginal carers at 1 May 1995.⁹
- Victoria *estimated* that possibly 25% or more of Aboriginal children may be placed with non-Aboriginal people.

7.18 Of the jurisdictions where the Principle is contained in departmental policy regarding the foster placement of Aboriginal children:

- WA reported that 21% of Aboriginal children were with non-Aboriginal carers at 30 June 1995.
- Queensland reported that 32.6% of Aboriginal children in foster care were with non-Aboriginal carers during 1994/95.
- ACT reported that *none* of the 77 Aboriginal children placed in foster care in the period July 1992 - June 1995 was in the care of Aboriginal people.¹⁰

8. For example, some departments refer to children in "out-of-home care" which may differ from what is termed "foster placement". See para 1.11.

9. Territory Health Services (NT) reported also that the number of Aboriginal children requiring special needs placements is a contributing factor in this relatively high proportion of Aboriginal children placed with non-Aboriginal people: see paras 5.24-5.26 and 7.38-7.39.

CURRENT PROBLEMS IN THE APPLICATION OF THE PRINCIPLE IN NSW

7.19 Given the limitations of a quantitative evaluation of the Principle, it is also necessary to investigate how the Principle operates in practice and make a qualitative assessment. The following evaluation draws on the experience of both Aboriginal and non-Aboriginal people with experience of the operation of the Principle, either as workers in DOCS, workers in Aboriginal organisations or members of the Aboriginal community. Factors identified as working against effective implementation of the Principle include:

- identification of Aboriginal children;
- definitions of "Aboriginal child";
- finding Aboriginal carers;
- some parents of Aboriginal children, and some Aboriginal children themselves, requesting placement with non-Aboriginal people; and
- the level of consultation with Aboriginal and Torres Strait Islander organisations.

7.20 Some of the solutions to these problems may lie in legislative changes. However, many problems in the application of the Principle stem from the social and economic disadvantage which faces many Aboriginal people. Meaningful solutions also lie in addressing this disadvantage through providing adequate financial support and resources. It is also clearly impossible to legislate for every circumstance where human relationships are concerned. Culturally appropriate solutions to problems arising from applying the Principle to specific situations may come from involving Aboriginal organisations in the process and discussing issues with the family and extended family. The issue of

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10. Family Services (ACT) suggested that the relatively small Aboriginal population in the ACT could be a contributing factor: see para 5.15.

consultation with Aboriginal organisations is dealt with at the end of this Chapter.

Identifying Aboriginal children

7.21 If a child is not identified as Aboriginal then the Principle is not even brought into operation. Identification usually depends on the parent indicating the cultural background of the child when dealing with the NSW Department of Community Services ("DOCS") or the non-government organisations ("NGOs"). Inadequate investigation into the child's cultural background means the Aboriginal origins of the child will remain unknown, the child will be placed without regard to this important factor and will not appear in any statistics regarding the placement of Aboriginal children.

7.22 The problem appears to be not uncommon in NSW. Both a non-Aboriginal NGOs and DOCS in NSW have reported cases in which the Aboriginal heritage of a child is not discovered until late in the adoption process or after the child has been placed.¹¹ Identification of children is also recognised as an important issue by Aboriginal workers within DOCS.

7.23 There is a clear obligation on DOCS to make all reasonable enquiries necessary to determine the cultural heritage of any child. Privacy issues may, in some instances, limit the extent to which DOCS can enquire about the child's Aboriginality, especially in adoption where the birth mother may want to keep the matter confidential. The involvement of Aboriginal workers, either from the department or Aboriginal organisations, who are mindful of issues of confidentiality, may overcome the reluctance of families to reveal the child's cultural heritage.

7.24 Problems in *identifying* Aboriginal children will exist regardless of the definition used to describe "Aboriginal child". The

11. See paras 4.21 and 4.45.

Commission recommends in the *Review of the Adoption of Children Act 1965 (NSW)* that a clear obligation be expressed in legislation that any adoption agency or government department must establish to the best of its ability the cultural heritage of a child.¹² The involvement of Aboriginal workers in the department, or close liaison with Aboriginal organisations may assist DOCS in fulfilling this obligation.

Definitions of "Aboriginal child"

7.25 Difficulties inherent in the definition of "Aboriginal child" may prevent the effective operation of the Principle.

"Self-identification"

7.26 Currently the "self-identification" definition outlined in Chapter 5 is used widely in relation to the Principle.¹³ Problems arise when this definition is applied to children¹⁴ for the following reasons:

- A baby or very young child is not yet able to identify as an Aborigine.
- An older child who may be capable of identifying as an Aborigine may not do so if he or she has been removed from Aboriginal culture for a long period, for example, in non-Aboriginal foster care.
- Privacy issues surrounding the adoption of Aboriginal children may mean that the relevant Aboriginal community is unaware of the birth of the child, and therefore unable to accept the child as an Aborigine.

12. NSW Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997): Recommendation 71 ("NSWLRC Report 81").

13. See para 5.8.

14. These problems are discussed further in NSWLRC Report 81 at paras 9.17-9.21.

7.27 In SA¹⁵ and Queensland¹⁶ the difficulty of identifying a baby or young child as Aboriginal is overcome by requiring that at least one parent identifies the child as such. Legislation in the ACT overcomes this difficulty by defining an "Aboriginal child" as a child who has at least one parent who is Aboriginal.¹⁷ However, these options do not overcome situations where birth parents, either Aboriginal or non-Aboriginal, do not declare the child's or their *own* Aboriginal identity either intentionally or because they do not know.

"A member of the Aboriginal race of Australia"

7.28 This definition¹⁸ has been considered by Drummond J in *Gibbs v Capewell*¹⁹ to involve more than merely a question of descent. If the degree of descent is small, then Aboriginality would depend on a person's self-identification and community recognition.²⁰ This is effectively a mixture of the two definitions of "descent" and "self-identification". Such a definition may therefore be inappropriate for Aboriginal children for the same reasons as a "self-identification" definition is inappropriate.

"Descent"

7.29 The Commission recommends in Report 81 that where it is found that a child is of Aboriginal descent, then the child should be identified as such and the Principle should apply accordingly.²¹

15. *Children's Protection Act 1993* (SA) s 6(1) (see Appendix F).

16. *Policy Statement* (Qld) Procedure 2(a) (see Appendix E).

17. *Adoption Act 1993* (ACT) s 4(1) (see Appendix C).

18. This definition is used in the *Adoption of Children Act 1994* (NT) s 3(1); *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 4(1) and *Family Law Act 1975* (Cth) s 68F(4).

19. (1995) 128 ALR 577 at 584-585.

20. Such an interpretation could be seen as re-introducing concepts of "degrees of Aboriginality" which the "self-identification" definition sought to avoid.

21. NSWLRC Report 81: Recommendation 70.

This approach is broader than the "self-identification" definition and more children would fall within its terms.

7.30 *Advantage of a "descent" definition.* Applying a "descent" definition to the Principle does not mean that all children of Aboriginal descent will be placed automatically with Aboriginal families. However, it does mean that the issue of the child's Aboriginal heritage will be explored where previously it may have been overlooked. This is important so that the child is not denied at least the chance of discovering and developing an Aboriginal identity.²²

7.31 There is also a persuasive argument that socially, a person with Aboriginal blood will be regarded as Aboriginal both by the Aboriginal community and the non-Aboriginal community alike.²³ A definition based on descent also avoids the inappropriate, older definitions based on "degrees of Aboriginality".

7.32 *Disadvantage of a "descent" definition.* A consequence of applying a "descent" definition is that the Principle may apply to children of Aboriginal descent who have not had any previous experience with Aboriginal culture, and young people of Aboriginal descent who are old enough to form their own cultural identity and do not identify as Aboriginal. These children may have grown up with prejudices against Aboriginal people and the Principle should be applied with sensitivity to their situation.²⁴ In such cases a placement with a non-Aboriginal family which has the capacity to

22. NSW - Aboriginal Children's Research Project *Identifying Aboriginal Children in Non-Aboriginal Substitute Care* (Discussion Paper 5, July 1982) at 21.

23. It has been argued that Aboriginal people who have one quarter Aboriginal ancestry will not receive half as much discrimination as those with half Aboriginal ancestry: Chisholm (1983) at 60.

24. R Chisholm "Aboriginal Children and the Placement Principle" (1988) 2(31) *Aboriginal Law Bulletin* 4 at 6.

encourage the child to develop a healthy and positive cultural identity may be appropriate.²⁵

Finding Aboriginal carers

Social and economic factors

7.33 The Principle places the onus on the relevant child welfare department to find Aboriginal placements for Aboriginal children. However, there are difficulties in finding a sufficient number of Aboriginal people available and able to foster or adopt.

7.34 A review of services provided by DOCS for Aboriginal clients in NSW in 1994 ("the Heilpern Report ") identified the lack of placements available for Aboriginal children as, in some ways, an inevitable result of the poverty and disadvantage which afflict many Aboriginal communities. Dimensions of poverty and disadvantage identified include the fact that Aboriginal adults die younger and many are in jail or are affected by drugs or alcohol, or are suffering from mental illness or poor health.²⁶

7.35 Many Aboriginal families are already caring for children other than their own. Many Aboriginal families are already struggling to survive on limited finances and do not have the resources to support more children.²⁷ Those Aboriginal people who are "surviving" despite these hardships tend also to be committed to work or over-committed in other areas. Therefore there is a lack of available and able Aboriginal foster parents. Another relevant explanation is that since nearly every Aboriginal family in NSW has been affected in some way by the previous practices of child

25. See also the discussion in paras 7.51-7.52.

26. S Heilpern, H Heilpern, S Bolt and A Clancy *Evaluation of Departmental Services for Child Protection: Aboriginal Clients* (Report prepared for the NSW Department of Community Services, June 1994) at 106 ("the Heilpern Report").

27. Although this would not necessarily mean that these families are unwilling to care for more children, as many families would have the view that "there's always room for one more".

welfare²⁸ it is no wonder that there is often a lack of appropriate placements.²⁹ In some cases insufficient investigation by DOCS into possible placements within the extended family perhaps occurs because of the attitude of workers involved or the limited resources of the department.

7.36 In this sense, the Principle was described as a "two-edged sword" in the Heilpern Report.³⁰ The Report identified the dilemma for a departmental worker: whether to place an Aboriginal child in a non-Aboriginal family, or leave the child in a possibly abusive situation, or place the child in the extended family where there are also concerns about the welfare of the child. It has been reported that confusion about the application of the Principle has led to some Aboriginal children being left in unacceptable, unsafe situations.³¹ However, under the Principle it is clear that if remaining with the extended family would be detrimental to the child, then an alternative placement should be made.

7.37 Another dilemma identified by DOCS is that between placing an Aboriginal child in a non-Aboriginal family and placing the child in an Aboriginal family in a district far from home.³² The Usher Report in 1992 suggested that one of the less desirable aspects of the Principle, mainly in smaller rural communities where there were no "appropriate" Aboriginal carers in the area, was that children were sometimes moved far away from their communities, school and friends in order to be placed with an

28. See paras 2.21-2.32.

29. P O'Shane "Assimilation or Acculturation: Problems of Aboriginal Families" (1993) 14 *Australian and New Zealand Journal of Family Therapy* 196 at 197.

30. Heilpern Report at 106.

31. NSW - Child Protection Council *Child Protection and Aboriginal Communities: Inter-departmental Working Party Report* (unpublished, 1996) at 66; cited in NSW - Department of Community Services *Review of the Children (Care and Protection) Act 1987: Law and Policy in Child Protection* (Discussion Paper 1, Legislation Review Unit, October 1996) at 131.

32. NSW - Department of Community Services *Letter* (27 June 1995).

Aboriginal family.³³ Alternatively, this may be acceptable for some Aboriginal people and in fact informal placements within the Aboriginal community may involve children moving long distances to remain within their kinship group because of a desire for Aboriginal children to maintain their kinship links.³⁴

Aboriginal children with special needs

7.38 It has been suggested that children with disabilities represent a higher proportion of Aboriginal children placed for adoption and fostering compared with non-Aboriginal children.³⁵ In the Northern Territory a significant proportion (41%) of the 66 Aboriginal children in care at 1 May 1995 were children with a disability,³⁶ while only 12% of non-Aboriginal children in care had a disability. Aboriginal children represented 79% of all children in care with disabilities. Significantly more Aboriginal children *without disabilities* were placed with Aboriginal carers (64%) than Aboriginal children *with disabilities* (37%). The situation could be attributed to high levels of meningitis and foetal alcohol syndrome in Aboriginal communities, and the lack of support services for children with disabilities in rural and remote communities.³⁷ Although no clear evidence is available, it is quite likely that a similar situation exists, though perhaps to a lesser extent, in other States and Territories.

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33. NSW - Ministerial Review Committee *Review of Substitute Care Services in NSW: A Report to the Minister for Health and Community Services, the Hon John P Hannaford, MLC from the Committee Established to Review Substitute Care Services* (Sydney, January 1992) at 97-98 ("the Usher Report").
 34. Comments by N D'Souza, Executive Officer, SNAICC (11 April 1996).
 35. Comments by N D'Souza, Executive Officer, SNAICC (11 April 1996).
 36. NT - Territory Health Services *Substitute Care Census* (1 May 1995) cited in NT - Territory Health Services *Northern Territory Government Interim Submission to the Human Rights and Equal Opportunity Commission's Inquiry into the Stolen Generation* (Darwin, May 1996) at 54-57 ("NT Interim Submission").
 37. NT Interim Submission at 56.

7.39 The resources required for the care of children with special needs may prove to be beyond the means of many Aboriginal families. Territory Health Services (NT) has advised that children with disabilities in care often have high support needs which prevent family members from being able to care for them.³⁸ It acknowledges that the lack of appropriate services in rural and remote Aboriginal communities should not be the basis for children entering care and has begun to develop alternative options for Aboriginal children with disabilities in the substitute care system in the NT.³⁹

Possible solutions

7.40 Problems in finding suitable Aboriginal carers for Aboriginal children, especially those with special needs, cannot necessarily be resolved by legislation. Solutions also need to be sought by addressing the underlying social issues, and may include the following approaches.

7.41 *Involving Aboriginal organisations.* Possible placements for Aboriginal children need to be sought out by people who have the respect of the community. Aboriginal organisations may be well placed to find appropriate carers in the Aboriginal community. Involvement of Aboriginal organisations throughout the process of finding a placement for an Aboriginal child may be necessary to ensure that all options are indeed exhausted before an Aboriginal child is placed with non-Aboriginal people.⁴⁰

7.42 *Selection criteria for foster carers.* The lack of Aboriginal foster parents was also linked to departmental workers trying to recruit, assess and train Aboriginal foster parents by reference to a mainstream model, and which was not necessarily appropriate

38. NT Interim Submission at 49.

39. NT Interim Submission at 56.

40. See the discussion regarding consultation with Aboriginal organisations in paras 7.61-7.69.

for Aboriginal people.⁴¹ Changing eligibility criteria which exclude Aboriginal and Torres Strait Islander people has been suggested.⁴² Having Aboriginal workers assess and recruit Aboriginal foster parents may mean that the selection criteria are applied in a more culturally sensitive manner. DOCS also plans for the Aboriginal Children's Service to provide training for Aboriginal foster parents in NSW.

7.43 *Resources for Aboriginal foster parents.* Sufficient resources in the community to meet the placement needs of Aboriginal children do not exist simply because there is a Principle. Carers need adequate resources to enable them to care for their children. The structural disadvantage which prevents many willing Aboriginal and Torres Strait Islander people from being foster carers can be overcome with adequate financial and emotional support to enable them to perform this role effectively. Many Aboriginal children who are in need of foster care have behavioural problems. It is also argued that Aboriginal foster carers must be provided with appropriate training to enable them to cope with such children.⁴³

7.44 A Non-Parental Allowance is often available to extended family members to assist them financially in looking after children in their care. It is criticised as insufficient to help effectively with the care of children generally and this would also apply to many Aboriginal foster carers. Some Aboriginal foster carers go without any financial assistance, perhaps because they are unaware of the availability of financial assistance or because they fail to meet the eligibility requirements.

7.45 *Community development.* One definition of community development is "the development and utilisation of a set of ongoing

41. Heilpern Report at 73.

42. R Chisholm "Destined Children: Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy" (1985) 15 *Aboriginal Law Bulletin* 7 at 8.

43. *Submission to the Research Report (Confidential).*

structures which allow the community to meet its own needs".⁴⁴ In the absence of sufficient community resources some form of community development may be necessary to support the operation of the Principle, and may be a more appropriate response than carrying out casework with individuals within a community.⁴⁵

7.46 Community development would be directed at alleviating the problems contributing to the abuse and neglect of Aboriginal children, and also encouraging and equipping Aboriginal people to foster Aboriginal children. It would ultimately aim to alleviate the need for Aboriginal children to be placed outside their families. The form of community development would depend on the needs and direction of the individual community. DOCS may need to facilitate community development by encouraging and supporting communities in the development of their own services.

Requests for placement with non-Aboriginal people

7.47 It can be difficult to apply the Principle when the parents of Aboriginal children, or indeed Aboriginal young people themselves,

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44. J McArdle "Community Development - Tools of the Trade" (1989) No 16 *Community Quarterly* at 2 cited in NSW - Department Of Community Services *Learning from the Past: Aboriginal Perspectives on the Effects and Implications of Welfare Policies and Practices on Aboriginal Families in NSW* (Prepared by Gungil Jindibah Centre, 10 October 1994) at 84 ("the Learning from the Past Report").
 45. The Heilpern Report identified a dilemma for Aboriginal District Officers in being restricted to the "standard model of casework" in their communities, and instead suggested that they be encouraged and permitted to carry out community development along with casework: Heilpern Report at 73. The Learning from the Past Report also claimed that the most effective Aboriginal District Officers were those who stepped outside the traditional role of the departmental District Officer and concentrated instead on developmental work in collaboration with local communities: Learning from the Past Report at 92.

request a placement with non-Aboriginal carers. The reasons for such requests are complex, but could be a legacy of past policies of removal and assimilation.

7.48 A similar dilemma is created in cases where the child has a non-Aboriginal parent and extended family, whose rights as alternative carers are equal to those of the child's Aboriginal family. Placement with the extended family, whether Aboriginal or non-Aboriginal, is consistent with the Principle.

Adoption

7.49 It is not uncommon for a birth parent, either Aboriginal or non-Aboriginal, to request the adoption of their Aboriginal child by non-Aboriginal people. While it is important for the birth parents' wishes to be heard, it may not necessarily be in the child's best interests to be adopted by non-Aboriginal people. Parents' reluctance to have their child adopted by an Aboriginal person may well be resolved after they have spoken with Aboriginal people. In a number of States provision for pre-consent counselling with Aboriginal people is an important element of the Principle in relation to adoption.⁴⁶

7.50 When a birth parent opposes the adoption of the child by Aboriginal people, an open adoption⁴⁷ is potentially made difficult. The child's need for a continuing relationship with a birth parent who is supportive of the adoptive placement must be balanced with the child's need to develop an Aboriginal identity. This issue is discussed more fully in NSWLRC Report 81.⁴⁸ There, the Commission recommends that the birth parent(s) should be entitled to express a wish regarding the placement of the child and

46. See para 8.24.

47. That is an adoption where there is some form of ongoing contact between the child and his or her birth parents, varying in frequency and type of contact. See NSW Law Reform Commission *Review of the Adoption of Children Act 1965 (NSW)* (Report 81, 1997) at paras 7.4-7.7 ("NSWLRC 81").

48. NSWLRC Report 81, Chapter 7.

such a request should be given consideration by the Court. Ultimately, though, the child's best interests must prevail. The Commission also recommends that a consultation between a birth parent and an approved Aboriginal agency be arranged prior to taking consent to the adoption of an Aboriginal child.⁴⁹

7.51 Another situation in which the application of the Principle is difficult is where an Aboriginal young person consents to his or her own adoption by non-Aboriginal foster parents. In such a case respect for the young person's wishes and need for stability may outweigh the value of the young person being adopted by Aboriginal people. However, it is important for the young person to have contact with Aboriginal people to discuss the issues surrounding his or her Aboriginality.

Fostering

7.52 Similar circumstances occur in fostering when an Aboriginal parent may choose to place the child, either formally or informally, with a non-Aboriginal person.⁵⁰ DOCS referred to scenarios where an Aboriginal child is placed with the non-Aboriginal parent who opposes the child's continuing contact with the child's Aboriginal family or Aboriginal community;⁵¹ or where an Aboriginal young person, old enough to contribute to the placement decision, has requested that he or she not be placed with an Aboriginal family.⁵² Such a dilemma is more acute in fostering than in adoption, which involves the severing of the child's ties with his or her birth parent. With adoption it is likely that a child will be placed against the wishes of the birth parent if it is in the best interests of the child. In fostering however, there is generally the ultimate goal of returning the child to his or her parents. This means that reconciling the birth parent to the foster placement of the child is

49. NSWLRC Report 81, Recommendations 75 and 76.

50. Learning from the Past Report at 55.

51. NSW - Department of Community Services *Review of the Children (Care and Protection) Act 1987: Law and Policy in Child Protection* (Discussion Paper 1, Legislation Review Unit, October 1996) at 132.

52. NSW - Department of Community Services *Letter* (27 June 1995).

important for harmonious and continuing contact between the child and his or her birth parents, and eventual successful reunion.

Consultation with Aboriginal and Torres Strait Islander communities and organisations

Consultation with the extended family and Aboriginal community

7.53 It is implicit in the Principle that an Aboriginal child's extended family be consulted in order to determine whether placement within the extended family is possible. Implicit also is consultation with the child's Aboriginal community to determine whether a suitable placement exists. Such consultation is crucial to the effective operation of the Principle. It appears that the present level of consultation is inadequate, although apparently characteristic of service provision across many areas of policy and programs in Aboriginal child welfare.⁵³

Consultation with Aboriginal organisations

7.54 Determining appropriate placements for Aboriginal children could also be enhanced by the involvement of Aboriginal organisations. An "Aboriginal organisation" in this section is a non-government organisation which provides, among other services, foster care and support services for Aboriginal children and is controlled and run by Aboriginal people.⁵⁴ Lack of

53. G Brewer and P Swain *Where Rights are Wronged: A Critique of Australia's Compliance with the United Nations Convention on the Rights of the Child. A Report of the National Children's Bureau of Australia for the Children's Rights Coalition* (Llenlees Press, Melbourne, 1993) at 4. This is an independent report prepared by a coalition of child-oriented and other organisations to the United Nations Committee on the Rights of the Child regarding Australia's compliance with UNCROC.

54. This includes organisations such as the Aboriginal and Islander Child Care Agencies across Australia (AICCA's), which are often

consultation with Aboriginal organisations has been commonly identified by Aboriginal organisations in NSW in the preparation of this Report as a factor which affects the effective implementation of the Principle.

Existing requirements for consultation

7.55 Some legislative versions of the Principle omit any reference to consultation with Aboriginal people.⁵⁵ A common form of the Principle only requires consultation with Aboriginal organisations as a last resort.⁵⁶ A few legislative versions make consultation with Aboriginal organisations an integral part of the Principle.

7.56 The *Children's Protection Act 1993* (SA) s 5 requires consultation with a recognised Aboriginal organisation or a recognised Torres Strait Islander organisation before a decision can be made.⁵⁷ The *Adoption of Children Act 1994* (NT) s 11 requires consultation with the child's parents, with other people who are involved with the child under Aboriginal customary law and with appropriate Aboriginal welfare organisations before an Aboriginal child is adopted,⁵⁸ giving the Court discretion to decide the "appropriate" organisation for consultation. The *Children and Young Persons Act 1989* (Vic) s 119 has a very clear and simple direction that "decision-making should involve relevant members of the Aboriginal community to which the child belongs",⁵⁹ which could include both the Aboriginal organisations representing the community as well as Aboriginal people who have an interest in the welfare of a particular child.

known as Aboriginal Children's Services in NSW (ACS): see para 3.49.

55. *Adoption Act 1993* (ACT) s 21 (see Appendix C); *Adoption Act 1988* (SA) s 11 (see Appendix F).

56. *Children (Care and Protection) Act 1987* (NSW) s 87 (see para 4.4); *Community Welfare Act 1983* (NT) s 69 (see Appendix D).

57. See Appendix F.

58. See Appendix D.

59. See Appendix H.

7.57 While *Adoption Act 1984* (Vic) s 50 does not explicitly require consultation with Aboriginal organisations, it does require that the birth parent be offered the opportunity of counselling with an "Aboriginal agency" and gives the Aboriginal agency the right of veto over the placement of an Aboriginal child with a non-Aboriginal person.⁶⁰ Most policy statements incorporating the Principle refer to the need for consultation with Aboriginal workers within the relevant department,⁶¹ or Aboriginal organisations⁶² regarding Aboriginal children. Merely having the requirement in policy does not necessarily mean that it is adhered to in practice.⁶³

60. See Appendix H.

61. *Draft Policy* (NSW) states that an Aboriginal worker must be involved in any case where an Aboriginal child is proposed to be surrendered for adoption. The *Draft Policy* also talks of developing Aboriginal Community Groups in each region to "provide community contact and support for Aboriginal workers involved in adoption" (see Appendix B). *Departmental Policy* (Tas) states that the Family Support Worker in the Aboriginal Centre, Family Support and Care Program must be contacted prior to the placement of an Aboriginal child (see Appendix G).

62. *Substitute Care Policy* (WA) requires consultation with the child's parents, other people with responsibility for the child under Aboriginal customary law, and appropriate Aboriginal organisations (see Appendix I). *Policy Statement* (Qld) provides for consultation with family members and, if appropriate, the child. Consultation with other family members and Aboriginal organisations is considered after determining the parents' views on these issues (see Appendix E). Victoria's *Standards in Adoption* specify that there must be ongoing consultation with an Aboriginal agency during all stages in the adoption of an Aboriginal child, and the *Protocol* between the Department and the Victorian Aboriginal Child Care Agency states that VACCA must be involved in the placement of every Aboriginal child (see Appendix H).

63. See paras 8.32-8.35. In NSW an Aboriginal worker would not necessarily be involved in the foster placement of every Aboriginal child.

Consultation with Aboriginal organisations in NSW

7.58 Under s 87 of the *Children (Care and Protection) Act 1987* (NSW) the obligation to consult with the Aboriginal community only arises after all of the other options for placing an Aboriginal child have been exhausted. The onus is on DOCS to explore the options of placing a child with a member of the child's extended family, a member of the child's Aboriginal community or with an Aboriginal family residing in the vicinity of the child's home,⁶⁴ and only then with an Aboriginal organisation. In practice this has meant that consultation with the Aboriginal organisation has been last minute and has allowed insufficient time to explore all the options, with the result that the child has been placed with a non-Aboriginal family.

7.59 Aboriginal organisations in NSW hold the view that s 87 fails to give adequate recognition to their role in dealing with Aboriginal children.⁶⁵ They maintain that often they are only consulted regarding cases that are "too hard for the Department to handle",⁶⁶ rather than having a real say in the placement of all Aboriginal children.

7.60 The level of consultation between DOCS and the relevant Aboriginal organisations appears to vary across NSW. In some country areas the relationship between DOCS and the Aboriginal organisation is quite close and they would consult in most instances, due largely to the good working relationships and rapport between individual workers. Problems with consultation seem to be most evident in Sydney.

64. See paras 8.12 and 8.17.

65. This view was apparent in discussions with Aboriginal Children's Service organisations throughout NSW in the preparation of this Report.

66. For example, Aboriginal children with special needs, such as disabilities.

WHY INVOLVE ABORIGINAL ORGANISATIONS?

7.61 There are differing views in the Aboriginal community about whether Aboriginal people's needs are best met by Aboriginal people working within existing government departments, such as DOCS, or by independent Aboriginal community organisations. This tension is ongoing and is apparent in many areas of Aboriginal concern.

Arguments for consultation with Aboriginal organisations

7.62 The following arguments are raised by Aboriginal organisations and other observers to justify their involvement in cases involving Aboriginal children.

Experience and expertise of Aboriginal organisations

7.63 In some cases consultation with the extended family alone may not be sufficient to ensure the best interests of the child are met.⁶⁷ It is imperative that Aboriginal people with experience and expertise in the area of Aboriginal child welfare are also consulted regarding the welfare of an Aboriginal child. Aboriginal organisations have such experience and expertise and should be involved in cases of Aboriginal children. Aboriginal organisations have been operating across Australia for over 20 years and this history has been outlined in Chapter 2. Aboriginal organisations are seen as functioning very effectively in working with Aboriginal children.⁶⁸ Their strength is identified as their understanding of

67. For example, members of the extended family may suffer from alcoholism and be unable to provide adequate direction about the future welfare of the child.

68. R Chisholm *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales* (Social Welfare Research Centre, University of NSW, Reports and Proceedings No 52, April 1985) at 116.

Aboriginal ways of caring for children and the complex matters of kinship and social structure. Their knowledge of the local community can be highly particular, with workers in the organisation knowing members of a child's family, or what is going on in the child's local community. This knowledge is seen to be of the greatest value in determining a placement for a child.⁶⁹

Ability to find suitable foster carers

7.64 Aboriginal organisations are also regarded as being better able to locate suitable Aboriginal people to foster children, largely because their selection criteria are likely to be more appropriate for Aboriginal people.⁷⁰ Aboriginal organisations may also have a better chance of finding appropriate placements within the community than a worker from DOCS, given the history of Aboriginal child welfare⁷¹ and the scepticism with which DOCS is viewed by some Aboriginal people.⁷² It is crucial, however, that these Aboriginal organisations also have the respect of the relevant Aboriginal community.⁷³

A check on the exercise of departmental discretion

7.65 The placement of an Aboriginal child under the Principle often leaves much to the discretion of the departmental officer. For example, s 87 of the *Children (Care and Protection) Act 1987* (NSW) involves the exercise of a degree of discretion by the DOCS officer working with the child as to whether a placement for an Aboriginal child is "practicable" and whether an "Aboriginal

69. Chisholm (1985) at 116.

70. E Sommerlad (ed) "Homes for Blacks: Aboriginal Community and Adoption" in C Picton (ed) *Proceedings of First Australian Conference on Adoption* (Sydney, 15-20 February 1976) 159 at 163-164.

71. See Chapter 2.

72. The perception of a DOCS worker as being from "the welfare", may intimidate some Aboriginal people who would not feel able to express their views adequately.

73. See paras 7.66-7.69.

welfare organisation" is "appropriate" for consultation. Many Aboriginal people argue that too much discretionary power rests with DOCS and this hampers the implementation of the Principle.⁷⁴ Lack of consultation could result in a lack of accountability for the department in the exercise of discretion. A requirement that the departmental officer consult with an Aboriginal organisation throughout the placement process would serve as an accountability mechanism in the placement of Aboriginal children. For example, in Victoria the *Adoption of Children Act 1984* (Vic) requires the joint approval of the department or an adoption agency *and* a suitable Aboriginal agency before placement with non-Aboriginal adoptive parents can be made.⁷⁵ Under s 5 of the *Children's Protection Act 1993* (SA) there is a mandatory requirement that the decision-maker have regard to any submissions from a recognised Aboriginal or Torres Strait Islander organisation.⁷⁶

Concerns expressed about Aboriginal organisations

7.66 A number of sources suggested that in order to be effective, Aboriginal organisations need to have the support of and be representative of their Aboriginal community. Concern has been expressed that Aboriginal organisations be accountable and follow clear policies and guidelines.⁷⁷ Aboriginal people have identified difficulties with consultation and decision-making in communities which are divided into a few main groups.⁷⁸ One Aboriginal organisation may not be able to represent each group effectively.

74. Learning from the Past Report at 55.

75. *Adoption Act 1984* (Vic) s 50(2)(e) (see Appendix H).

76. See Appendix F.

77. *Submission to Research Report (Confidential)*.

78. Conflict between factions of an Aboriginal community was identified as having an impact on AICCA service delivery: G Atkinson *Report on the Joint National Review of Aboriginal and Islander Child Care Agencies [AICCAs]* (Report to the Ministers for Aged, Family and Health Services and Aboriginal Affairs, January 1991) at 107.

As well, workers in the organisation may have difficulties in dealing with families from other groups. The Department for Family and Community Services (SA)⁷⁹ expressed concern that not every "clan group" in the Aboriginal community in SA would be effectively represented by "recognised" Aboriginal organisations for this reason.

7.67 While such issues impact on the effectiveness of Aboriginal organisations, they should not detract from the fundamental importance of having Aboriginal people and communities involved in the welfare of Aboriginal children. Inevitably, the increased control of Aboriginal organisations over services for Aboriginal children will have some difficulties. The Learning from the Past Report noted that more than two centuries of "white solutions" have been of little benefit to Aboriginal people and that Aboriginal people are best able to find appropriate solutions to these problems.⁸⁰ It is unlikely that effective representation of Aboriginal people could be achieved through existing non-Aboriginal organisations or government departments.

7.68 Such solutions may lie in allowing decisions to be made by the extended family or clan group, or empowering Aboriginal communities to make decisions in relation to their children. This may involve the emergence of numerous localised Aboriginal organisations representative of the Aboriginal community, with the role of empowering communities to make decisions regarding Aboriginal children.⁸¹ Alternatively, it could involve introducing

79. SA - Department for Family and Community Services *Letter* (26 May 1995).

80. NSW - Department of Community Services *Learning from the Past: Aboriginal Perspectives on the Effects and Implications of Welfare Policies and Practices on Aboriginal Families in NSW* (Prepared by Gungil Jindibah Centre, 10 October 1994) at 83.

81. R Chisholm *Black Children: White Welfare? Aboriginal Child Welfare Law and Policy in New South Wales* (Social Welfare Research Centre, University of NSW, Reports and Proceedings No 52, April 1985) at 107. One disadvantage of this, in the short-term

review mechanisms which make existing Aboriginal organisations more accountable to the communities they represent. It may not be possible for the one Aboriginal organisation to represent all Aboriginal people in a State or Territory.

7.69 The following factors have been identified as impacting on the effectiveness of Aboriginal organisations:

- the talents and training of their workers;⁸²
- support for these workers, and the support they can provide for Aboriginal families already caring for children;⁸³
- their acceptance within their Aboriginal community;⁸⁴
- the extent to which the government provides funding and co-operation;⁸⁵ and
- mechanisms which make the organisations accountable.⁸⁶

Resourcing

7.70 The effectiveness of Aboriginal organisations will be undermined unless there are sufficient resources to enable them to provide the necessary services, such as training for Aboriginal carers and support for Aboriginal children in foster placement. Aboriginal organisations have developed almost in spite of, rather than because of, the level of support provided by the government. Given their limited resources it is an achievement that many of them have even existed over the last 20 years. The child welfare system in Australia has been likened to a dual system involving

at least, may be that it spreads the existing expertise of Aboriginal workers quite thinly.

82. R Chisholm "Destined Children: Aboriginal Child Welfare in Australia: Directions of Change in Law and Policy" (1985) 14 *Aboriginal Law Bulletin* 6 at 7.

83. Comments by N D'Souza, Executive Officer, SNAICC (11 April 1996).

84. Chisholm (1985) at 7.

85. Chisholm (1985) at 7.

86. *Submission to Research Report (Confidential)*.

[o]ne which is comparatively well-resourced and controlled and operated in the main by white people, making the rules for the other, under-resourced sector, over-loaded and run by Aboriginal people who are under-paid and over-worked, whose experience does not count for anything and who are described as "unqualified".⁸⁷

7.71 One observation is that Aboriginal workers have case loads 10 - 20 times greater than their colleagues in other welfare fields.⁸⁸ Aboriginal organisations in NSW have reported that, despite their staff and services being over-stretched, they often feel an expectation from DOCS that they will deal with referrals of Aboriginal children regardless.

7.72 The funding of the different Aboriginal organisations is drawn from a variety of sources - both Commonwealth and State Governments. Funding from some sources must be applied for quarterly, and can therefore be tenuous and unreliable. This has implications for the service delivery of these organisations, in that the continuity of some services cannot be guaranteed, and long-term planning is contingent on funding. There appears to be a need for better funding of Aboriginal organisations to ensure that they can provide, monitor and improve their services for Aboriginal children.

87. N D'Souza "Aboriginal Child Welfare: Framework for a National Policy" (1993) 35 *Family Matters* 40 at 44.

88. M Gunn "Assimilation Policy Comes Back to Haunt Families" in K Healey (ed) *Children in Care - Issues for the Nineties Vol 14* (Spinney Press, Australia, 1993) at 26.

The Aboriginal Child Placement Principle

8.

A way forward

- Guiding tenets
- General elements of the Principle
- The Principle and adoption
- Legislation or policy?
- Other factors affecting the operation of the Principle
- Application of the Principle to Torres Strait Islander children

8.1 This Chapter uses the analysis in the preceding Chapters to identify key areas of concern in formulating the Principle. The key areas identified include:

- important components of the Principle generally, and specific elements which relate to the adoption of Aboriginal children;
- the status given to the Principle - whether it is implemented as a legislative or policy provision;
- other factors affecting the operation of the Principle; and
- the application of the Principle to Torres Strait Islander children.

GUIDING TENETS

8.2 The analysis of important components of the Principle in this Chapter is based on the following factors:

- The importance of keeping Aboriginal children in their extended family and community and generally, the importance of placing Aboriginal children with Aboriginal people.
- Views of Aboriginal people concerned with issues of Aboriginal child welfare expressed in the preparation of this Report,¹ specifically their desire for Aboriginal people to have meaningful participation in decisions made regarding Aboriginal children.
- The need to move away from previous policies in child welfare such as "protection" and "assimilation", and recognise the devastating impact of these past policies on Aboriginal people and Aboriginal communities.
- Over-representation of Aboriginal children in the child welfare system in Australia.
- Differences between Aboriginal cultural values and child care practice and the prevailing child welfare system, based on Western notions of the nuclear family.

1. See Acknowledgement and paras 1.14-1.16.

- The concept of "best interests of the child" expanding to take account of Aboriginal cultural values, both in international law and in family law in Australia.
- Principles of self-determination supporting the increased involvement and control of Aboriginal people over issues which affect them, such as child welfare.
- Recognition of the role that Aboriginal Child Care Agencies have played, and will continue to play in the area of Aboriginal child care, and the lack of consultation with Aboriginal organisations.
- Views of various government departments responsible for child welfare, including the views of Aboriginal workers in the Department of Community Services (NSW).

Consultation with Aboriginal people in formulating the Principle

8.3 It is imperative that Aboriginal and Torres Strait Islander people be involved in the formulation of the Principle. This is consistent with Aboriginal self-determination. It is appropriate in recognition of the failure of previous policies devised *for* Aboriginal people rather than *with* Aboriginal people. With this in mind, the following components are put forward as suggestions, based on a consideration of the factors outlined above.

GENERAL ELEMENTS OF THE PRINCIPLE

8.4 It is not possible to say definitively that a specific form of the Principle in one jurisdiction has worked better than forms in other jurisdictions. However, it is possible to identify some elements from the various formulations of the Principle across Australia which reflect important features of the Principle and what it is intended to achieve. Many of these elements are common to both the *fostering* and *adoption* of Aboriginal children. Elements which relate specifically to the *adoption* of Aboriginal children are dealt with separately.

Definition of "Aboriginal child"

8.5 The definition of "Aboriginal child" is important as it determines the children to which the Principle applies. A "descent" definition, such as "a child of Aboriginal descent", is a broad definition which would include all Aboriginal children under the Principle. This would ensure that issues regarding a child's Aboriginality are considered regardless of the child's "degree" of Aboriginal blood. Such a definition does not have the inherent problems of a "self-identification" definition which may preclude Aboriginal children from the operation of the Principle,² but nevertheless, does not overcome the problems with identification of Aboriginal children.³

An introductory statement about the objectives of the Principle

8.6 One objective of the Principle is to preserve and enhance an Aboriginal child's sense of Aboriginal identity⁴ by ensuring that where possible he or she remains with Aboriginal people. Another objective of the Principle is to give recognition to the principle of Aboriginal self-management and self-determination⁵ and to move away from previous policies of assimilation.

2. See discussion at para 7.26.

3. See discussion at paras 7.21-7.24.

4. See, for example, *Children's Protection Act 1993* (SA) s 4(2): "Serious consideration must, however, be given to the desirability of - ... (e) preserving and enhancing the child's sense of racial, ethnic, religious or cultural identity, and making decisions and orders that are consistent with racial or ethnic traditions or religious or cultural values."

5. See *Children and Young Person's Act 1989* (Vic) s 119(1)(m)(ii); and *Adoption Act 1984* (Vic) s 50(1).

A preference for the placement of Aboriginal children with Aboriginal people

8.7 A statement which sets out the general principle that Aboriginal children should be placed with Aboriginal people establishes the purpose of the Principle.⁶ A more specific objective of the Principle is to maintain Aboriginal children within their own family and community.⁷ This is linked with the desire and efforts of Aboriginal people and communities to preserve the integrity of their culture and kinship arrangements by placing Aboriginal children within families, kinship groups and Aboriginal communities,⁸ and recognises the importance of the Aboriginal extended family in child rearing.⁹

A clear requirement that Aboriginal people and the Aboriginal child be consulted

8.8 An Aboriginal child who is of an appropriate age, as with any other child, should be given the opportunity to have a say in his or her placement.¹⁰ It is integral to the Principle that the child's extended family, the child's Aboriginal community and Aboriginal organisations be consulted.¹¹ It is also important that consultation

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6. See *Children's Protection Act 1993* (SA) s 5(2)(c); *Community Welfare Act 1983* (NT) s 69(c)(iii); *Draft Policy* (NSW); *Adoption Act 1993* (ACT) s 21(2)(b)(i); and *Adoption of Children Act 1994* (NT) s 11(2)(a). Note that while the *Adoption of Children Act 1964* (Qld) does not contain the Principle, s 18A of the Act states a preference for adoption by couples of the same indigenous background as the child.
 7. See *Substitute Care Policy* (WA); *Policy Statement* (Qld) Procedure 1.
 8. *Adoption of Children Act 1994* (NT) Sch 1 cl (2)(ii).
 9. See *Substitute Care Policy* (WA).
 10. See *Policy Statement* (Qld) Procedure 3.
 11. For example, the *Substitute Care Policy* (WA) aims to "ensure that consultation occurs with extended family, significant others and, where appropriate, Aboriginal organisations".

with Aboriginal people is meaningful and amounts to real involvement in the decision-making process.¹² Some forms of the Principle refer to the involvement of Aboriginal workers in the relevant department.¹³ This may be unnecessarily restrictive and prevent Aboriginal people in non-government organisations with expertise and experience in the area of child welfare from being involved¹⁴ to ensure that the most appropriate placement is made.¹⁵

Recognition of the role of Aboriginal organisations

8.9 Aboriginal organisations and other observers consider the involvement of Aboriginal organisations in placement decisions is an important aspect of the Principle. It is not a feature of all expressions of the Principle, and where it is, recognition of their role is achieved in different ways.¹⁶ This recognition gives these organisations the right to make a submission regarding the placement of an Aboriginal child,¹⁷ or the power of veto over the placement of a child with non-Aboriginal people.¹⁸ A requirement that no Aboriginal child be placed unless an Aboriginal organisation has been consulted is also a mechanism for

12. *Children and Young Person's Act 1989* (Vic) s 119(1)(m)(i) refers to relevant members of the Aboriginal community being *involved* in decision-making, rather than referring to consultation.
13. *Draft Policy* (NSW).
14. See *Adoption of Children Act 1994* (NT) s 11(1); Sch 1 cl 3; *Policy Statement* (Qld) Procedure 3 provides for consultation with relevant agencies after considering the parents' requirements for confidentiality. The *Adoption Act 1984* (Vic) s 50(2)(e) gives an Aboriginal agency the power of veto over non-Aboriginal adoptive placements of Aboriginal children.
15. See discussion in paras 7.62-7.65.
16. For example, giving Aboriginal organisations legal recognition by way of notice in the *Government Gazette: Children's Protection Act 1993* (SA) s 5(3)-(7); *Children and Young Person's Act 1989* (Vic) s 6; *Adoption Act 1984* (Vic) s 50(2)(e).
17. *Children's Protection Act 1993* (SA) s 5(2)(a).
18. *Children and Young Persons Act 1989* (Vic) s 119(2)(c); *Adoption Act 1984* (Vic) s 50(2)(e).

recognising their role.¹⁹ The role of Aboriginal organisations could extend to responsibility for placing Aboriginal children, subject to the department's ultimate responsibility for the welfare of all children.

8.10 The *process* by which an Aboriginal organisation becomes "recognised" for the purposes of the Principle is also important. There is a danger that, in order to achieve recognition, Aboriginal organisations will be required to be more like a government department and less like a community organisation. Consultation with Aboriginal people and organisations may be necessary to develop a process which ensures that the organisation has the support of the community and that the role set out for the organisation and the terms used are appropriate. An example of an inappropriate term used in legislation is found in s 87 of the *Children (Care and Protection) Act 1987* (NSW). Some Aboriginal groups find the reference to them as "Aboriginal *welfare* organisations" offensive. In the light of past treatment of Aboriginal people, "welfare" is understandably a "dirty word" and Aboriginal organisations are unwilling to identify themselves as "welfare" in order to be consulted.

8.11 There may be difficulties when the child's parents do not wish for an Aboriginal organisation to become involved. The *Policy Statement* (Qld) acknowledges that the views of the child's parents about the involvement of Aboriginal organisations must be considered in order to balance the parents' needs for confidentiality against the child's best interests. This would be a matter of balancing the parents' rights and needs for confidentiality and privacy, and the importance of the involvement of Aboriginal organisations. Ultimately the guiding principle would be what is in the best interests of the child.

19. See *Children's Protection Act 1993* (SA) s 5(1); *Departmental Policy* (Tas); *Protocol between Health and Community Services - Protective Services and the Victorian Aboriginal Child Care Agency (1994-95)* (Vic).

A list of placement preferences for Aboriginal children

8.12 From discussions with Aboriginal people, Aboriginal departmental workers and workers in Aboriginal organisations in the preparation of this Report, there seems to be general support for a list of placement preferences for Aboriginal children. A favoured order of preference for either the adoptive or foster placement of an Aboriginal child is:

- a member of the child's extended family;
- other members of the child's Aboriginal community;²⁰ or
- other members of the wider Aboriginal community.

Some expressions of the Principle place a limitation on the last option of "living in close proximity" to the child.²¹ This has been criticised as placing an unnecessary limitation of geographic proximity on the Aboriginal families who could adopt or foster Aboriginal children.²²

8.13 While consultation with Aboriginal people should ensure that all these options are considered, it may still be desirable to include such a list of preferences in the Principle. A list sends a clear message to decision-makers that all such options should be

20. The *Departmental Policy* (Tas); *Community Welfare Act 1983* (NT) s 69(b) and *Policy Statement* (Qld) Procedure 1(a)(ii) have a further qualification, referring to members of the child's Aboriginal community: "who have the correct relationship with the child in accordance with Aboriginal customary law". However, this qualification seems unnecessary if members of the child's own Aboriginal community participate in the decision-making, as they would be well aware of the correct relationships.

21. *Children (Care and Protection) Act 1987* (NSW) s 87; the *Departmental Policy* (Tas) and the *Policy Statement* (Qld). These expressions of the Principle seem to be based on the Principle accepted by the Social Welfare Ministers in 1986: see para 3.26 and Appendix G.

22. R Chisholm "Aboriginal Children and the Placement Principle" (1988) 2(31) *Aboriginal Law Bulletin* 4 at 5-6. See also para 8.17.

exhausted before a child is placed with non-Aboriginal people and may also operate as a safeguard if consultation with Aboriginal people does not occur. It also accords with customary child care practice.

Application of preferences to adoption

8.14 Application of these placement preferences to adoption of Aboriginal children may be difficult in that adoption is not acceptable to many Aboriginal people.²³ If the child's Aboriginal extended family is unable to care for the child in some other way, including fostering, it is unlikely that they would agree to adopt the child. A form of the Principle which may overcome this issue is one where:

- the first preference for placing an Aboriginal child is within the Aboriginal community to which the child, or one of the child's parents, belongs (a broad option encompassing both the extended family and kinship networks); and
- the second preference is for placement with a person who is a member of the Aboriginal community (this, too, is a broad option encompassing all Aboriginal people, therefore maximising the chances of the Aboriginal child being adopted by an Aboriginal person).²⁴

Placement with non-Aboriginal people

8.15 In certain situations, placement with Aboriginal people may not reasonably be possible and it may be necessary to consider the placement of an Aboriginal child with non-Aboriginal people. This is of particular concern with respect to adoption, due to the finality of the adoption order. Further requirements may need to be introduced as safeguards, for example:

23. See discussion in paras 2.53-2.55.

24. *Adoption Act 1988* (SA) s 11(2); *Adoption Act 1984* (Vic) s 50(2).

- that the Court be satisfied that there are special circumstances and the child's Aboriginal cultural identity will not be lost as a result of the adoption before finalising the adoption order;²⁵ and
- that the non-Aboriginal adoptive parents are approved of by an Aboriginal agency as suitable to adopt an Aboriginal child.²⁶

Factors to be considered in placing an Aboriginal child

8.16 As an alternative to setting out placement preferences, the Principle could simply emphasise the importance of consultation with Aboriginal people and set out the factors to be considered in making a placement.²⁷ For example:

- the preference for placing the child with suitable Aboriginal people;²⁸
- placing the child geographically close to the immediate family or relatives who have an interest in the welfare of the child;²⁹
- whether the Aboriginal child's cultural identity will be lost as a result of the placement;³⁰
- the desirability of the child being able to maintain contact with his or her family and Aboriginal culture,³¹ including any undertakings of the prospective carers to encourage this;³² and

25. *Adoption Act 1988* (SA) s 11(3).

26. *Adoption Act 1984* (Vic) s 50(2)(e).

27. *Draft Policy* (NSW); *Adoption Act 1993* (ACT) s 21(2).

28. *Adoption of Children Act 1994* (NT) s 11(2)(a); *Adoption Act 1993* (ACT) s 21(2)(b)(i).

29. *Adoption of Children Act 1994* (NT) s 11(2)(b).

30. *Adoption Act 1988* (SA) s 11(3)(b).

31. *Adoption Act 1993* (ACT) s 21(2)(b)(ii); *Policy Statement* (Qld) Procedure 1(b).

32. *Community Welfare Act 1983* (NT) s 69(c)(v); *Adoption of Children Act 1994* (NT) s 11(2)(c).

- the consideration that cultural consistency and family linkage are more important than material standards in the placement of an Aboriginal child.³³

8.17 The advantage of simply listing factors to be considered would be to increase flexibility in the application of the Principle, and mean that all relevant factors are considered, rather than having one factor, such as geographic proximity, place a limitation on the Aboriginal people eligible to foster or adopt a child.³⁴ On the other hand, the placement preferences are approved of widely by Aboriginal people, and to remove them from the Principle may remove an important safeguard. A list of preferences may also place an onus on the relevant department to demonstrate to the Court that the preferences have been exhausted before the Court finalises an adoption order for an Aboriginal child.

Provision for the transfer of responsibility to Aboriginal communities and Aboriginal people

8.18 If an objective of the Principle is to reflect the principles of Aboriginal self-determination, the Principle should involve more than consultation with Aboriginal people. The *Substitute Care Policy* (WA) states that one object of the policy is to facilitate the transfer of appropriate functions to Aboriginal communities and organisations in relation to the welfare of children.

An obligation for the government to support the efforts of Aboriginal organisations

8.19 The transfer of functions to Aboriginal communities and organisations is meaningless without the provision of adequate resources to enable them to perform such functions. A statement that the government is obliged to provide the necessary support

33. *Substitute Care Policy* (WA).

34. See para 8.12.

and assistance to Aboriginal communities and organisations in respect of the welfare of Aboriginal children may go some way to ensuring adequate resources to undertake the responsibilities they are given.³⁵

THE PRINCIPLE AND ADOPTION

8.20 Some important components of the Principle relate specifically to the adoption of Aboriginal children.

Adoption is not part of customary Aboriginal child care

8.21 It should be recognised that adoption is not part of customary Aboriginal child care arrangements.³⁶ This is an important consideration in the application of the Principle to the adoption of Aboriginal children.

Other forms of alternative care are to be used in preference to adoption

8.22 In addition, there is a provision in the Principle in a number of States and Territories that adoption should only be considered an option for Aboriginal children after every effort has been made to arrange other appropriate forms of custody. This alternative custody could be a foster care arrangement with members of the child's extended family or with Aboriginal people who have the

35. See *Community Welfare Act 1983* (NT) s 68; *Substitute Care Policy* (WA); and *Departmental Policy* (Tas).

36. This recognition is contained in the preamble to the *Draft Policy* (NSW); *Adoption of Children Act 1994* (NT) Schedule 1 cl 2(i); and *Adoption Act 1984* (Vic) s 50(1).

correct relationship with the child in accordance with Aboriginal law.³⁷

8.23 Mechanisms to ensure compliance with such a provision have been suggested. One involves departmental workers following a clear protocol in the placement of an Aboriginal child, and demonstrating compliance with the protocol before an adoption order can be made.³⁸ Alternatively, it was suggested that there be a review panel of Aboriginal workers to review the adoptions of any Aboriginal children to ensure that correct procedures have been followed,³⁹ or to assess a proposed adoptive placement.

Counselling by Aboriginal people

8.24 Another means of ensuring that adoption is used only as a last resort for Aboriginal children is the inclusion of a provision that the birth parent of an Aboriginal child discuss options with Aboriginal people.⁴⁰ It is significant that in the two States that make counselling with Aboriginal people prior to consent a legislative requirement, SA reported one, and Victoria reported no adoptions of Aboriginal children in the last five years.

8.25 Counselling by trained Aboriginal counsellors allows for an informed exploration of the child's needs relating to his or her Aboriginality; a consideration of alternatives to adoption and for a non-Aboriginal birth parent to be given an opportunity to question an Aboriginal person about ideas of child rearing and to challenge existing stereotypes.⁴¹ It has been suggested that this opportunity

37. *Adoption Act 1993* (ACT) s 21(2)(a); *Adoption Act 1988* (SA) s 11(1); *Adoption of Children Act 1994* (NT) s 11(1).

38. Aboriginal Reference Group *Submission* (23 May 1996).

39. Aboriginal Reference Group *Submission* (23 May 1996).

40. See *Adoption Act 1984* (Vic) s 50(2)(b); *Adoption Regulations 1989* (SA) Reg 4; *Draft Policy* (NSW); *Departmental Policy* (Qld) Procedure 9(a).

41. *Draft Policy* (NSW): "Guidelines for Implementation of Aboriginal Policy". See also *Policy Statement* (Qld) Procedure 9.

also be given to Aboriginal children who are old enough to consent to their own adoption.⁴²

8.26 If Aboriginal birth parents wish to keep the adoption of their child concealed from their Aboriginal community, they may be wary of the involvement of an Aboriginal organisation in the adoption process. Such concerns are legitimate and procedures should be in place to ensure privacy for birth parents. However, these concerns should not result in the exclusion of Aboriginal people from the adoption process. The best interests of the child should be the determinant.

8.27 It is imperative that the Aboriginal people who provide this counselling are trained and experienced in issues relating to adoption. These trained Aboriginal workers may come either from the relevant department or from Aboriginal organisations.⁴³

Consultation with the Aboriginal child and Aboriginal people

8.28 Counselling by Aboriginal people for birth parents is one aspect of consultation. However, as with the foster placement of Aboriginal children, it is preferable that the decision-making process involve consultation with the extended family, the child's Aboriginal community and Aboriginal organisations.⁴⁴ This is of particular importance for adoption as consultation would be necessary in order to exhaust completely the possibility of an alternative custody arrangement. Obviously, issues of confidentiality surrounding adoption may mean that such consultation is not appropriate in all circumstances, but again, the child's best interests must be considered paramount.

42. Aboriginal Reference Group *Submission* (23 May 1996).

43. *Adoption Act 1984* (Vic) s 50(2)(b) provides for counselling from an Aboriginal agency.

44. See *Adoption of Children Act 1994* (NT) s 11(1), Sch 1 cl 3; *Policy Statement* (Qld) Procedure 3.

Recognising traditional Aboriginal marriage

8.29 A provision which recognises traditional Aboriginal marriage as a marriage for the purposes of adoption⁴⁵ may make a difference to the numbers of Aboriginal couples who are eligible to adopt children.

Selection criteria for Aboriginal adoptive parents

8.30 Flexibility in applying eligibility criteria to Aboriginal couples who want to adopt may also increase the number of Aboriginal couples eligible to adopt children.⁴⁶ Such flexibility could also be encouraged by the involvement of Aboriginal workers, departmental or non-departmental, in the assessment, selection and training of prospective Aboriginal adoptive couples.⁴⁷ The NSWLRC Report 81 recommends a broader range of eligibility criteria which may also make it easier for Aboriginal couples to gain approval to adopt.⁴⁸

Preserving Aboriginal identity

8.31 If, after considering all other options, an Aboriginal child is adopted by non-Aboriginal people, it is important that the Principle contain mechanisms which ensure that the Aboriginal child does not lose a chance to develop his or her Aboriginal identity. One mechanism may be including a preference for

45. *Adoption Act 1984* (Vic) s 11; *Adoption Act 1994* (WA) s 4(2)(c); *Adoption Act 1988* (SA) s 4(3); *Adoption of Children Act 1994* (NT) s 13(1)(b). Note: the *Adoption of Children Act 1965* (NSW) s 19(1A)(c) allows traditionally married Aboriginal couples to adopt as de facto couples rather than as married couples. See paras 4.37-4.39.

46. *Policy Statement* (Qld) Procedure 9(c).

47. *Draft Policy* (NSW).

48. NSWLRC Report 81, Chapter 6.

placement with non-Aboriginal people who recognise the importance of the child maintaining contact with his or her Aboriginal family and culture.⁴⁹ Another mechanism for providing this guarantee may be to place an obligation on the department to provide information to the child about his or her background when he or she reaches a certain age.⁵⁰

LEGISLATION OR POLICY?

Arguments for the inclusion of the Principle in legislation

8.32 The Principle is more secure when it is in legislation as it requires an Act of Parliament to amend rather than simply a departmental direction. A legislative provision is a clear statement by the Parliament that the Principle is important and should be followed. The Principle expressed as departmental policy or practice has been described as little more than a guideline,⁵¹ whereas expressing the Principle in legislation may lend it more weight and mean that it is taken more seriously by decision-makers.⁵² An expression of the Principle in legislation may mean

49. Or alternatively allowing certain Aboriginal family or community members to have access to the child: *Adoption Act 1984* (Vic) s 37(1); see also paras 5.70-5.71.

50. For example, 12 years of age: *Adoption Act 1984* (Vic) s 114. The *Draft Policy* (NSW) contains a general statement that all adopted Aboriginal children should have access to information regarding their family background and cultural heritage.

51. D Wilkinson "Aboriginal Child Placement Principle: Customary Law Recognition and Further Legislative Reform" (1994) 3(71) *Aboriginal Law Bulletin* 13 at 13.

52. Concern has been expressed that the Principle is not widely known in the Department in Queensland despite being contained in policy and the need for legislation containing the Principle has been identified: I O'Connor *The Impact of Queensland's Family and Child Welfare and Juvenile Justice Legislation, Policy and Practice on Aboriginal and Torres Strait Islander Families and Children*

that people outside the department are more aware of its existence and make the department more accountable for implementing the Principle.

8.33 The Australian Law Reform Commission⁵³ has identified inherent deficiencies in leaving the implementation of the Principle to the discretion of decision-makers:

It is not sufficient to rely on the sensitivity of particular welfare officers, authorities or magistrates in ensuring that appropriate principles are applied - and that concealed ethnocentric judgments are not applied - in deciding on the future of Aboriginal children. Legislation providing a statutory basis for an Aboriginal child placement principle would help to ensure that those involved in making decisions on Aboriginal child placements make every effort to ensure that, wherever possible, Aboriginal children are placed within the care of their own families and communities.⁵⁴

8.34 These factors suggest that it is preferable for the Principle to be contained in legislation rather than departmental policy. It also appears from the evidence of recent years that the Principle has been more effective in relation to *adoption* of Aboriginal children

(prepared for the Royal Commission into Aboriginal Deaths in Custody, Queensland, November 1990) at 38-39: see paras 5.35-5.36. Chisholm also expressed concerns in the early 1980s that while the Principle was recognised as policy by senior level officers in the Department of Youth and Community Services (now Department of Community Services), it was unclear how fully the principle was understood and accepted at the field officer level: R Chisholm "Aboriginal Children: Political Pawns or Paramount Consideration?" in J Jarrah (ed) *Child Welfare: Current Issues and Future Directions* (Social Welfare Research Centre, University of NSW, Seminar, 6 July 1983) 43 at 55.

53. See paras 3.29-3.30.

54. Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (Report 31, 1986) at para 365.

when contained in legislation rather than policy. The effectiveness of the Principle is less clear in relation to *fostering*.⁵⁵

- **Adoption.** Over the five year period 1990/91 - 1994/95, a total of four Aboriginal and Torres Strait Islander children were adopted in States and Territories where the Principle is included in adoption legislation (ACT, SA, NT and Victoria). Furthermore, three of these children were adopted in the NT prior to the Principle being enacted. Effectively only one Aboriginal or Torres Strait Islander child has been adopted under legislation which includes the Principle. By comparison, 57 Aboriginal and Torres Strait Islander children were adopted in those States and Territories which follow the Principle in policy (WA, Qld, SA and NSW).⁵⁶
- **Fostering.** It is difficult to draw firm conclusions on the effectiveness of the Principle in legislation compared with policy since some States and Territories were unable to supply information, and different data collection methods prevent valid analysis of data.

8.35 However, it is also clear that having the Principle embodied in legislation does not necessarily mean that it will be effectively applied. This point has been made in relation to the achievements of the Aboriginal and Islander Child Care Agencies:

There are no adequate legislative safeguards. The only insurance we have against abuses in the future is our own vigilance.⁵⁷

55. See paras 7.16-7.18.

56. See paras 7.9-7.15.

57. B Butler "Adopting an Indigenous Approach" (1989) 13 *Adoption and Fostering* 27 at 31.

OTHER FACTORS AFFECTING THE OPERATION OF THE PRINCIPLE

8.36 Factors were identified in Chapter 7 which hamper the application of the Principle. These factors involve broader social and economic problems which cannot be cured by legislation. The following factors, by no means an exhaustive list, could contribute to the more effective operation of the Principle:

- Placing an onus on government departments to keep adequate records of Aboriginal children showing how placement decisions were made, who was consulted and where the child was placed. Such records would make the department more accountable in terms of compliance with the Principle and enable the effectiveness of the Principle to be assessed.
- Placing an onus on both government departments and non-government organisations to make all reasonable inquiries to establish a child's Aboriginal background.
- Provision of adequate financial and material assistance to Aboriginal families to ensure that Aboriginal children are only placed outside their family when it is not possible for them to remain with their families.
- Provision of adequate resources for Aboriginal children with disabilities and other special needs to ensure that, wherever possible, they can remain in their communities.
- Provision of adequate resources and support for Aboriginal foster parents.
- Provision of adequate funding for Aboriginal organisations to enable them to recruit and train Aboriginal carers and provide support services for Aboriginal children and families.
- Provision of resources to assist the development of Aboriginal community structures to enable consultation with the community and the development of alternative child care programs for Aboriginal children within that community.

APPLICATION OF THE PRINCIPLE TO TORRES STRAIT ISLANDER CHILDREN

Current application in legislation and policy

8.37 Currently, the Principle is known in both legislation and policy as the "Aboriginal Child Placement Principle", although the Principle has generally been accepted as also applying to Torres Strait Islanders. There is currently only one piece of legislation in Australia which contains a form of the Principle specifically for Torres Strait Islander children. The *Children's Protection Act 1993* (SA) acknowledges the distinct identities of Aboriginal and Torres Strait Islander people by defining "Aboriginal child" and "Torres Strait Islander child" separately.⁶⁸ It requires that recognised Torres Strait Islander organisations be consulted with regard to Torres Strait Islander children, and that decision-makers have regard to the general principle that Torres Strait Islander children be kept within the Torres Strait Islander community.⁶⁹

8.38 Legislation in the ACT and Victoria,⁶⁰ includes Torres Strait Islander children in the Principle by defining them as "Aboriginal children". Such a definition is offensive to Torres Strait Islander people and ignores their wishes to be recognised as a distinct and separate people. In other States and Territories, whether in legislation or policy, the Principle refers exclusively to "Aboriginal children".⁶¹ The status of Torres Strait Islander children under such provisions is unclear. These shortcomings are related more to the expression than the substance of the Principle. Even so, this

58. *Children's Protection Act 1993* (SA) s 6(1).

59. *Children's Protection Act 1993* (SA) s 5(1) and 5(2)(c).

60. *Adoption Act 1993* (ACT) s 4(1); *Adoption Act 1984* (Vic) s 4(1); *Children and Young Persons Act 1989* (Vic) s 3(1).

61. *Children (Care and Protection) Act 1987* (NSW) s 87; *Adoption Act 1988* (SA) s 11; *Adoption of Children Act 1994* (NT) s 11 and 3(1); *Community Welfare Act 1983* (NT) s 69; *Draft Policy* (NSW); *Departmental Policy* (Tas).

fails to give express recognition to the importance of the Principle to the Torres Strait Islander community.

8.39 The failure of many States and Territories to mention Torres Strait Islander children in their child welfare and adoption legislation could well be due to the small numbers of Torres Strait Islanders in Australia, outside of Queensland. However, Torres Strait Islander people do live in every State and Territory in Australia, and the fact that in some places their population is quite small is not a convincing argument for failing to recognise their needs.

8.40 Outside Queensland, the largest population of Torres Strait Islander people is in NSW.⁶² In NSW this is further justification to include a form of the Principle specifically relating to Torres Strait Islander children in the *Adoption of Children Act 1965* (NSW) and the *Children (Care and Protection) Act 1987* (NSW).

Definition of "Torres Strait Islander child"

8.41 For the reasons discussed in relation to the definition of "Aboriginal child"⁶³ the Commission recommends in the *Review of the Adoption of Children Act 1965* (NSW) that a Torres Strait Islander child be defined as a child of Torres Strait Islander descent.⁶⁴ As with Aboriginal children sensitivity in the application of a "descent" definition is called for.

62. According to the Australian Bureau of Statistics 1991 Census figures, there were 4 886 Torres Strait Islanders in NSW and 14 650 in Queensland.

63. See paras 7.25-7.32.

64. NSWLRC Report 81: Recommendation 79.

A Torres Strait Islander Principle

8.42 It is appropriate that a form of the Principle apply specifically to Torres Strait Islander children as a separate Torres Strait Islander Placement Principle or by the Principle being known as the *Aboriginal and Torres Strait Islander Placement Principle*.⁶⁵ Consultation with Torres Strait Islander people and organisations in the preparation of this Report indicated that the placement preferences applied to Aboriginal children are also applicable to Torres Strait Islander children.⁶⁶ However, differences in attitudes to adoption between the Aboriginal and Torres Strait Islander communities may warrant a separate Principle.

8.43 Torres Strait Islander people are proud and protective of their culture - which they believe is preserved through the strength of the family. Unlike in Aboriginal communities, customary adoption is practised and is often within the family bloodline, to preserve family heritage and customs.⁶⁷ Customary adoptions are not arranged outside their own culture for this reason, and are not desired. Furthermore, keeping children within the family is even more important than placement with non-related Torres Strait Islanders in the same community.⁶⁸ It would be important that all possibilities of placing a Torres Strait Islander child within the family be exhausted (including interstate extended family) before the child is placed outside the extended family.

65. Or broadly as the Indigenous Child Placement Principle.

66. Being placement with the extended family, with members of the child's community and then with Torres Strait Islanders generally.

67. P Ban *The Tree of Life: Report to the Queensland Government on Legal Recognition of Torres Strait Islander Customary Adoption* (prepared for the IINA Torres Strait Islander Corporation, Queensland, 1990) at 20. See also paras 2.59-2.61.

68. Comment by Mr Francis Tapim of Magani Malu Kes, a Torres Strait Islander organisation in Townsville.

8.44 Principles, such as self-determination and consultation, explained previously in relation to the Aboriginal Child Placement Principle,⁶⁹ are also important to Torres Strait Islander people, and as such any Principle should be developed in consultation with Torres Strait Islander people.

69. See paras 6.37-6.50.

The Aboriginal Child Placement Principle

Appendices

The Aboriginal Child Placement Principle

APPENDIX A: NON-GOVERNMENT ORGANISATIONS

Barnardos Australia - Staff Handbook (May 1995)

Aboriginal Children

Barnardos believes that Aboriginal children and their families are best cared for within their own community, but recognises the needs of Aboriginal families.

Barnardos Substitute Care programs would not generally accept an Aboriginal child as a referral. The basis of this policy is that substitute care has been used in the past as an instrument of oppression of the Aboriginal people and that the community itself does not wish for this service.

Barnardos Family Support Services would wherever possible refer an Aboriginal family to an appropriate Aboriginal service. However, where this was not available, and where the family itself was seeking assistance the referral would be taken.

In this situation we would do our utmost to respect the cultural background of the family.

Wherever possible Barnardos would work in close co-operation with Aboriginal services and consultation would be sought at every available opportunity.

Care Force Anglican Adoption Agency - Policy on Aboriginal Placements (Adoption)

Definition

- i) Where a child is surrendered for adoption, aboriginality is defined in the first instance in terms of the parents' perception of themselves as aboriginal.

- ii) If one parent of a child surrendered for adoption identifies himself as aboriginal and is identified in the community in which he lives as aboriginal, it is imperative that the child be placed in an aboriginal family.
- iii) If the birth parent is aware of a trace of aboriginality in his background, but is significantly caucasian or other race, and does not identify with aboriginal people, nor wish the child to be placed in an aboriginal family, and aboriginal appearance is not evident in the child, the surrendering parents wishes should be respected.
- iv) If the parent and the child are aboriginal in appearance, aboriginal placement must be considered, even if the parent would prefer placement with non-aboriginal parents. Counselling will be given prior to the consent being taken.

Guidelines for Aboriginal Placements:

- i) *Working with the Birth Parents:* If the aboriginality is acknowledged and/or significant, the Agency's policy of placing the child with an aboriginal family should be discussed with the birth parents in the initial information giving stages, and the parents' wishes ascertained. The birth parents should have full knowledge of this before signing a consent for the adoption of the child. It is essential to work with parents to help them recognise and accept the issues involved, relating to the child's cultural identity and the subsequent alienation the child may experience if significantly aboriginal, yet placed in a caucasian family. Assistance of an aboriginal worker in counselling the birth parents will be offered.
- ii) Attempts should be made to establish relevant kinship ties and ancestry of the birth parents, so that these may be considered in recruitment and selection of adoptive parents.

- iii) Given the different concept of family in aboriginal culture and the importance of kinship links, access of the birth parents to the child should be considered in making arrangements for the adoption of the child if birth parents request it.

Recruitment, Selection and Placement with Adoptive Parents

- i) Recruitment and assessment of adoptive parents shall be undertaken in consultation with, and assistance from, an aboriginal worker.
- ii) A placement plan will be worked out together by the aboriginal worker and the adoption worker in relation to the particular case, defining roles and responsibilities in decision making.
- iii) Recruitment of suitable adoptive parents will be initiated by the aboriginal worker within the aboriginal community.
- iv) Selection, assessment and preparation of suitable adoptive parents will be undertaken by an adoption worker in consultation with an aboriginal worker.
- v) Approval of adoptive parents shall be given by the Adoption Committee at a meeting of that committee to which the aboriginal worker will be invited. An aboriginal child will not be placed in contravention of the wishes of the aboriginal worker.
- vi) Follow-up and the legal application for the adoption order will be the responsibility of the Adoption Agency, with continuing consultation where necessary with the aboriginal worker.

Centacare Catholic Community Services

Substitute Care Policy

Aboriginal and Torres Strait Islander children will usually be referred to an Aboriginal children's service. Centacare will only place Aboriginal or Torres Strait Islander children with the support of an Aboriginal agency and after ensuring that the placement principle set out in Section 87 of the Children (Care and Protection) Act has been observed.¹

Adoption Policy

It is our policy to explore with an Aboriginal birthparent the care options within the child's extended family and/or Aboriginal community to which the child belongs. If such care was not practicable or in the child's best interests, then we would seek placement with prospective adopters who identify as Aboriginal and who have a commitment to raising the child with an understanding of his/her cultural and racial heritage. In so doing, Centacare Adoption Services would liaise with relevant Aboriginal Welfare Organisations and Aboriginal Children's Services.²

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1. Centacare Children's Services *Letter* (5 June 1996).
 2. Centacare Adoption Services *Letter* (29 November 1995).

**APPENDIX B:
NEW SOUTH WALES - DEPARTMENT OF
COMMUNITY SERVICES**

**Draft Policy Statement: Placement of Aboriginal
Children for Adoption (8 May 1987)**

This policy is in draft form only and has never been adopted formally.

Preamble

Adoption is the most radical of the alternate care options for a child since it severs legal ties with the original family and makes the child a full member of a new family. Its great strength is that it provides, as no other alternative does, a basis for a security of relationships and of parental commitment. Such a radical severance of family ties is however alien to Aboriginal culture and it is acknowledged that in the past inappropriate use of adoption has caused great suffering for Aboriginal children and their parents. Modern adoption practice with its stress on the importance of genealogical awareness and of ensuring a continuity of the child's past with his/her present strongly supports the development of a cultural identity. Adoption, therefore will continue to provide a positive option for some Aboriginal children.

The Policy and guidelines for implementation which are here presented have been developed in consultation with Aboriginal workers in the Department. They are based on the assumption that given appropriate information and support Aboriginal and non-Aboriginal parents can make good adoption decisions for their Aboriginal child, and that where a conflict of ideas exist, providing there is goodwill on all sides, reasonable compromises can be found.

For the purposes of the Policy an Aboriginal child is defined as a child at least one of whose parents is Aboriginal as defined by the Aboriginal Act of 1968.¹

Objectives:

1. To ensure that an adopted Aboriginal child develops a positive identification of himself/herself as Aboriginal.
2. To place all Aboriginal children surrendered for adoption within the Aboriginal community or with parents at least one of whom is Aboriginal.
3. To ensure Aboriginal involvement in any decision regarding the surrender or placement for adoption of an Aboriginal child from counselling prior to surrender through to the child's placement.
4. To promote the recruitment of Aboriginal families so that there is an adequate choice of parents for Aboriginal children surrendered for adoption.
5. To promote within the Aboriginal Community, with other adoption and child care agencies and in the wider community, understanding of the value of the policy to Aboriginal children.

Policy

1. Aboriginal children surrendered for adoption must be placed with Aboriginal families.
2. All adopted Aboriginal children should have access to information regarding their family background and cultural heritage.

1. This should be the *Aborigines Act 1969* (NSW).

3. In any case where an Aboriginal child is proposed to be surrendered for adoption an Aboriginal worker must be involved in any decision or in any case conference or in any meeting convened to make a decision about the future of the child.
4. The involvement of Aboriginal workers in case consultations, case conferences, or case meetings should be conducted in a manner which ensures the confidentiality of the child and of the child's family outside of the meeting.
5. The Youth and Community Services Aboriginal Worker consulted and/or involved in cases of Aboriginal children being surrendered for adoption must be experienced and trained in adoption policy and practice.
6. Where an adoption is being considered for an Aboriginal child the wishes of the child's parents must be considered and respected if they are able to suggest a reasonable alternative to that indicated by this policy.
7. Disputes regarding the application of the policy to Aboriginal children surrendered for adoption, or for whom adoption is being considered are to be referred to a case conference including the local office, Adoption Branch and the relevant Operations Manager and the CPO (Aboriginal) (or a delegated Aboriginal Officer where this position is not filled). Prior to such referral this policy document should be fully discussed with the child's parents.
8. Aboriginal workers, either Departmental or non-Government, experienced and trained in the area of substitute care should be involved in the recruitment, assessment, selection, and education, of Aboriginal adoptive parents.
9. Recruitment of adoptive parents for Aboriginal children should give consideration to:

- Aboriginal couples married in accordance with the customs of their community.
 - Married Aboriginal couples.
 - Aboriginal couples living in de facto relationships.
 - Married or de facto couples, one of whom is Aboriginal.
 - Single Aboriginal persons.
10. For the purpose of meeting this policy, Regional Directors shall be responsible for establishing and maintaining contact and liaison with significant Aboriginal Community Groups within each Region. Regional Directors are responsible for the establishment of a Regional Aboriginal Consultative Group within each region. This group will monitor the implementation of this policy within the Region and provide community contact and support for Aboriginal workers involved in adoption.
11. Where it is considered that in the interests of the child some action should be taken contrary to a provision of this policy, the Director-General may give written approval of such action if he is satisfied that there is good and sufficient reason, for example the special physical, intellectual or emotional needs of the child.

Guidelines for Implementation of Aboriginal Policy

1. *Presentation of the need for involvement of an Aboriginal person in Counselling.*
 - 1.1 This involvement enables informed exploration of the child's needs as they relate to its Aboriginality, recognising that this is a significant but not the sole consideration in placement.
 - 1.2 It gives the parent the opportunity to question an Aboriginal person about their ideas of child rearing, the child's position in the family, the relationship of

Aboriginal families to each other and to other families in the community.

- 1.3 Where the surrendering parent is non-Aboriginal contact with an informed Aboriginal Counsellor provides reassurance by destroying what could be an existing negative stereotype.

2. *Issues of great importance:*

- 2.1 It should be stressed that no pressure will be brought to bear - overt or covert - about the decision to be made - the presence of the Aboriginal Counsellor should be presented as a service to the surrendering parent, - providing information which will enable a well thought-out decision about the child's future.
- 2.2 Assurance should be given of the confidentiality of the contact - whatever decision is made, no disclosure will be made to any other member of the Aboriginal Community. Placement arrangement will, where wished for, ensure that the identity of the parent remains unknown.
- 2.3 Where the Aboriginal Worker is in the Consultant role, the primary worker should ensure that there is thorough briefing as to the alternatives already discussed and the client's attitude to these alternatives.
- 2.4 The Department's policy and the reasons for it should be explained in the context of the child's right to a placement which ensures the continuance or development of a sense of his/her Aboriginal identity.

3. *Disputes Procedures:*

3.1 If after detailed discussion and having been offered reassurance about the purpose and function of the involvement by an Aboriginal worker, the parent declines the counselling, then the disputes procedure as outlined in Clause 6 of the Policy should be used and the Regional Director makes a submission to the Director-General.

3.2 If, the parent's choice is for placement of the child outside of the Aboriginal community, then, after discussion, the dispute procedure as outlined in Clause 6 of the Policy should be used and the Regional Director makes a submission to the Director-General.

4. *Who is to provide consultation:*

Aboriginal consultation should ideally be provided by a DO or CPO from Gullama or a Community Welfare Centre. Involvement by Central Office or by Adoption Branch may be appropriate but should involve careful discussion with the local office so that the individual roles, the line to be followed and the action to be taken are clearly understood.

5. *General Comment:*

There is considerable room for error and misunderstanding in implementation of the guidelines for placement of Aboriginal children which can lead to protracted delays in placement and, at worst, custody disputes between parents. The area of obvious difficulty is the surrender of the child of a non-Aboriginal mother and an Aboriginal father where only the mother's consent is required. The difficulties increase where the relationship between parents has broken down in circumstances which leave the mother with bitter feelings about the father which are generalised to create feelings of dislike or distrust of the Aboriginal Community.

The importance to an Aboriginal child of placement within the Aboriginal Community is recognised and affirmed. The attainment of that ideal by implementation of the policy must be approached with sensitivity.

Adoption of Children Act 1965 (NSW)

19. *Persons in whose favour adoption orders may be made*

...

(1A) The Court may make an adoption order in favour of a man and a woman who are living together as husband and wife on a bona fide domestic basis although not married to each other if, without derogating from the other provisions of this Part, the Court is satisfied:

... (c) that:

- (i) the man and woman are Aborigines (within the meaning of the *Aboriginal Land Rights Act 1983*) and are recognised as being married according to the traditions of an Aboriginal community or Aboriginal group to which they belong, and
- (ii) the child in respect of whom the application for the adoption order is made is an Aboriginal (within the meaning of that Act).

The Aboriginal Child Placement Principle

APPENDIX C: AUSTRALIAN CAPITAL TERRITORY

Adoption Act 1993 (ACT)

Section 21 Aboriginal child

(1) The following provisions of this section are in addition to, and do not derogate from, section 19.¹

(2) An adoption order shall not be made in respect of an Aboriginal child unless the Court is satisfied that -

- (a) it is not practicable for the child to remain in the custody of the birth parents or of a responsible person; and
- (b) the choice of the adoptive parents has been made having regard to the desirability of the child -
 - (i) being in the custody of a person who is a member of an Aboriginal community; and
 - (ii) being able to establish and maintain contact with his or her birth parents, any responsible person and the Aboriginal community of which the child is or was a member.

Section 4(1) Interpretation

"Aboriginal child" means a child at least 1 of whose parents is an Aborigine;

"Aborigine" means a person who -

- (a) is descended from an Aborigine or Torres Strait Islander;
- (b) identifies as an Aborigine or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community;

"responsible person", in relation to an Aboriginal child, means -

- (a) a person who, in accordance with the traditions and customs of the Aboriginal or Torres Strait Island

1. *Adoption Act 1993 (ACT)* s 19 refers to other factors which the Court must regard in making an adoption order.

community of which the child is a member, has responsibility for, or an interest in, the welfare of the child; or

- (b) if the child is not in the custody of any person or is in the custody of a person who is not a parent of the child or a member of an Aboriginal or Torres Strait Island community - a person who, in accordance with the traditions and customs of the Aboriginal or Torres Strait Island community of which a parent of the child is or was a member, has responsibility for, or an interest in, the welfare of the child;

APPENDIX D: NORTHERN TERRITORY

Community Welfare Act 1983 (NT)

Section 68 Assistance to Aboriginal Communities, &c

The Minister shall provide such support and assistance to Aboriginal communities and organisations as he thinks fit in order to develop their efforts in respect of the welfare of Aboriginal families and children, including the promotion of the training and employment of Aboriginal welfare workers.

Section 69 Aboriginal Child in Need of Care

Where a child in need of care is an Aboriginal, the Minister shall ensure that -

- (a) every effort is made to arrange appropriate custody within the child's extended family;
- (b) where such custody cannot be arranged to his satisfaction, every effort is made to arrange appropriate custody of the child by Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law; and
- (c) where the custody referred to in paragraph (a) or (b) cannot be arranged without endangering the welfare of the child - after consultation with -
 - (i) the child's parents and other persons with the responsibility for the welfare of the child in accordance with Aboriginal customary law; and
 - (ii) such Aboriginal welfare organisations as are appropriate in the case of the particular child,a placement that is consistent with the best interests and the welfare of the child shall be arranged taking into consideration -
 - (iii) preference for custody of the child by Aboriginal persons who are suitable in the opinion of the Minister;

- (iv) placement of the child in geographical proximity to the family or other relatives of the child who have an interest in, and responsibility for, the welfare of the child; and
- (v) undertakings by the persons having the custody of the child to encourage and facilitate the maintenance of contact between the child and its own kin and with its own culture.

Section 43 Findings of Court

(1) In proceedings in relation to a child in relation to whom an application under this Part is made, the Court shall consider -

... (e) where the child is an Aboriginal - the person or persons to whom, in its opinion, custody of the child should be given should the child be found to be in need of care, having regard to the criteria imposed on the Minister by section 69.

(2) Subject to subsections (1) and (3), the Court shall only declare a child to be in need of care where it is satisfied that an order declaring the child to be in need of care would ensure that the standard of care of the child as a result of that order would be significantly higher than the standard presently maintained in respect of the child.

(3) For the purposes of subsection (2), the Court shall, in assessing the standard of care of the child, consider the social and cultural standards of the community in which the parents, guardians or persons having the custody of the child (and, where appropriate, the extended family of the child) reside or with which they maintain social and cultural ties.

Adoption of Children Act 1994 (NT)

Section 11 Adoption of Aboriginal Child

(1) Where an order for the adoption of an Aboriginal child is to be made, the Court shall satisfy itself that every effort has been made (including consultation with the child's parents, with other persons who have responsibility for the welfare of the child in accordance with Aboriginal customary law and with such Aboriginal welfare organisations as are appropriate in the case of the particular child) to arrange appropriate custody -

- (a) within the child's extended family; or
- (b) where that cannot be arranged, with Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law.

(2) In making an order for the adoption of an Aboriginal child, where, in the opinion of the Court, the custody referred to in subsection (1) is not possible or would not be consistent with the welfare and interests of the child, the Court shall ensure that a placement is made that is consistent with the best interests and welfare of the child and in so doing shall -

- (a) give preference to the adoption of the child by applicants one or both of whom are Aboriginal persons who are, in the opinion of the Minister, suitable to adopt the child;
- (b) take into consideration the placement of the child in geographical proximity to the family or other relatives of the child who have an interest in, and a responsibility for, the welfare of the child; and
- (c) take into consideration undertakings, if any, by the persons who will have the care and custody of the child to encourage and facilitate the maintenance of contact between the child and its own kin and with its own culture.

Section 3(1) Interpretation

"Aboriginal" means a person who is a member of the Aboriginal race of Australia;

Section 13 Adoption by couple

(1) Except as provided by this section, the Court shall only make an order for the adoption of a child in favour of a couple where the man and woman -

...
(b) have entered into a relationship that is recognised as a traditional Aboriginal marriage and has been so recognised for not less than 2 years,

on the date on which the order is made.

Schedule 1 Matters of Ethnicity and Religion

With regard to the matters of ethnicity and religion in determining the welfare and interests of a child, the Minister and the Court shall take into account the following principles:

(1) it is preferable that the child should be placed with a family that has the same ethnic and cultural origins as the child's birth parents in order to facilitate an environment that will promote the child's cultural heritage and identity;

(2) where the child is an Aboriginal child, recognition is to be given to -

(i) the absence of adoption in customary Aboriginal child care arrangements, arrangements for the custody and guardianship of the child being made within the child's extended family or with other Aboriginal people who have the correct relationship under customary Aboriginal law; and

(ii) the desire and effort of the Aboriginal community to preserve the integrity of its culture and kinship relationships so that efforts must be made to find placements within families, kin groups or ethnic communities as appropriate;

- (3) there should be appropriate consultation with the child's parents or other relatives, or representatives of appropriate associations, organisations or groups, in order to ascertain what is the best course of action to promote the ethnic welfare and development of the child;
- (4) where it is the express wish of the birth parents of a child that the child be placed with a family that has particular religious convictions, preference is to be given to the placement of the child with such a family.

The Aboriginal Child Placement Principle

**APPENDIX E:
QUEENSLAND - DEPARTMENT OF FAMILIES,
YOUTH AND COMMUNITY CARE**

**Policy Statement in Relation to Aboriginal and Torres
Strait Islander Fostering and Adoption**

Procedure 1

- (a) Aboriginal and Islander children should be maintained within their own family and community environment as a matter of principle. In the event of alternative placement, in the absence of good cause to the contrary, preference is to be given to placement in the following order of priority, with -
 - (i) A member of the child's extended family;
 - (ii) Other members of the child's Aboriginal or Islander community who have the correct relationship according to "customary law" practised by that local community;
or
 - (iii) Other Aboriginal or Islander families living in close proximity if possible and compatible with the child's community of origin.
- (b) Where such placement is not reasonable, practicable other placement alternatives should be developed that will enable the best possible retention of the child's relationship with his or her parents, extended family, community and culture in a manner which best serves the welfare and interests of the child.
- (c) Each placement made in terms of (a) or (b) above, will be reviewed within six months and at six monthly intervals thereafter to ensure the best possible placement for the child.

Procedure 2

- (a) An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and who is accepted

as such by the Aboriginal or Torres Strait Islander community.

- (i) In the case of a baby or very young child, identification by either parent should be substituted for self-identification.
- (ii) When no parent/kin is practicably available and there is reason to believe a child is Aboriginal or Torres Strait Islander, a person will be consulted who is a representative of the Aboriginal or Torres Strait Islander community.

Procedure 3

- (a) In any individual child and family welfare matter, including all matters in which the child placement principle is to be applied, consultation should occur with family members, and when it is considered that a child is of an appropriate age, that child should be consulted. Parents' views on consultation with family members, other families or agencies should be considered in order that their requirements for confidentiality are respected whilst giving priority to serving the welfare and interests of the child. Assistance should be sought from within established community and agency networks to locate and consult family members.

Procedure 8

- (a) The child placement principle should be applied in all situations where formal alternative care is considered for children in care.
- (b) It should be recognised that assessment and placement procedures may differ from general fostering guidelines.
- (c) Flexibility should be exercised in selection and assessment criteria of care providers to give due consideration to the cultural context.
- (d) A sensitive, case by case approach should be applied in reviewing situations of Aboriginal and Islander children in existing long-term non-Aboriginal foster placements. Any

actions taken should be carefully planned and in the best interests of the child concerned. This may involve projects to link children back with their culture.

Procedure 9

- (a) The child placement principle should be applied in all cases when an Aboriginal or Islander parent wishes to consent to adopt. At first point of contact, parents will be offered referral to an Aboriginal and Islander worker for counselling. Parents should be advised of (a) the child placement principle and (b) aspects of anonymity and confidentiality associated with adoption. Counselling by child care staff should fully explore alternatives to adoption, including family support, custody and guardianship options.
- (b) When a consent is taken, subject to an expressed desire of a parent for confidentiality, the established consultation structure should be used to find appropriate Aboriginal and Islander adoptive families.
- (c) Flexibility should be exercised in applying criteria and assessment guidelines related to Aboriginal and Islander adoption, in recognition of the special needs of such children.

Adoption of Children Act 1964 (Qld)

18A Placement of children with indigenous or ethnic backgrounds

In making arrangements with a view to the adoption of a child in respect of whom a general consent has been given or dispensed with and, in particular, in determining which prospective adopter or prospective adopters the Director will approve in the case of such a child the Director shall have regard to the indigenous or ethnic background and cultural background of the child and shall approve a prospective adopter who, or prospective adopters 1 of whom, has a similar indigenous or ethnic background and cultural background, unless -

The Aboriginal Child Placement Principle

- (a) it appears to the Director that such a prospective adopter or prospective adopters is not or are not available and cannot reasonably be expected to become available promptly; or
- (b) in the Director's opinion, the welfare and interests of the child would not be best served by so doing.

APPENDIX F: SOUTH AUSTRALIA

Children's Protection Act 1993 (SA)

Section 5: Provisions relating to dealing with Aboriginal or Torres Strait Islander children

(1) No decision or order may be made under this Act as to where or with whom an Aboriginal or Torres Strait Islander child will reside unless consultation has first been had with a recognised Aboriginal organisation, or a recognised Torres Strait Islander organisation, as the case may require.

(2) A person or court, in making any decision or order under this Act in relation to an Aboriginal or Torres Strait Islander child, must, in addition to complying with the requirements of section 4¹, have regard -

- (a) to the submissions made by or on behalf of a recognised Aboriginal or Torres Strait Islander organisation consulted in relation to the child; and
- (b) where there has been no such consultation - to Aboriginal traditions and cultural values (including kinship rules) as generally expressed by the Aboriginal community, or to Torres Strait Islander traditions and cultural values (including kinship rules) as generally expressed by the Torres Strait Islander community, as the case may require; and
- (c) to the general principle that an Aboriginal child should be kept within the Aboriginal community and a Torres Strait Islander child should be kept within the Torres Strait Islander community.

(3) For the purposes of this Act, a recognised Aboriginal or Torres Strait Islander organisation is an organisation that the Minister, after consulting with the Aboriginal community or a section of the Aboriginal community, or the Torres Strait Islander

1. *Children's Protection Act 1993 (SA)* s 4 sets out principles to be observed in dealing with children under the Act.

community or a section of the Torres Strait Islander community, as the case may require, declares by notice in the *Gazette* to be a recognised Aboriginal organisation, or a recognised Torres Strait Islander organisation, for the purposes of this Act.

(4) The Minister may, by notice in the *Gazette*, after consulting with the relevant community or a section of the relevant community, vary or revoke a declaration under subsection (3).

(5) All reasonable endeavours should be made when conducting consultations, negotiations, meetings or proceedings of any kind under this Act involving an Aboriginal person (whether a child or not) to do so in a manner and in a venue that is as sympathetic to Aboriginal traditions as is reasonably practicable.

(6) All reasonable endeavours should be made when conducting consultations, negotiations, meetings or proceedings of any kind under this Act involving a Torres Strait Islander person (whether a child or not) to do so in a manner and in a venue that is as sympathetic to Torres Strait Islander traditions as is reasonably practicable.

(7) The Minister will cause discussions to be held from time to time between the Department and the relevant community for the purposes of implementing subsections (5) and (6).

Section 6 Interpretation

"Aboriginal child" means a child -

(a) who is a descendant of the indigenous inhabitants of Australia; and

(b) who regards himself or herself as an Aboriginal or, if he or she is a young child, is regarded as an Aboriginal by at least one of his or her parents;

"Torres Strait Islander child" means a child -

(a) who is a descendant of the indigenous inhabitants of the Torres Strait Islands; and

(b) who regards himself or herself as a Torres Strait Islander or, if he or she is a young child, is regarded as a Torres Strait Islander by at least one of his or her parents;

Adoption Act 1988 (SA)

Section 11 Adoption of Aboriginal Child

(1) The Court will not make an order for the adoption of an Aboriginal child unless satisfied that adoption is clearly preferable, *in the interests of the child, to any alternative order that may be made under the laws of the State or the Commonwealth.*²

(2) Subject to subsection (3), an order for the adoption of an Aboriginal child will not be made except in favour of a member of the child's Aboriginal community who has the correct relationship with the child in accordance with Aboriginal customary law or, if there is no such person seeking to adopt the child, some other Aboriginal person.

(3) An order for the adoption of an Aboriginal child may be made in favour of a person who is not an Aboriginal person if the Court is satisfied -

- (a) that there are special circumstances justifying the making of the order; and
- (b) that the child's cultural identity with the Aboriginal people will not be lost in consequence of the adoption.

Section 4 Interpretation

- ... (3) If a man and woman are married according to Aboriginal tradition, they will be regarded as husband and wife for the purposes of this Act.

2. The words in italics were inserted by *Adoption (Miscellaneous) Amendment Act 1996 (SA)* which was passed on 12 December 1996 but has not been proclaimed at the time of writing. The words which have been replaced are: "to guardianship in the interests of the child".

Adoption Regulations 1989 (SA)

Regulation 4 Counselling

(1) An officer authorized by the Director-General for the purposes of section 15(5)(c) or 16(2)(c) of the Act to counsel a person before that person consents to an adoption -

... (d) must, in the case of an adoption of an Aboriginal child, ensure that the person is aware of the availability of further specialized counselling from Aboriginal organizations and help the person to obtain such counselling if the person so wishes.

APPENDIX G TASMANIA - DEPARTMENT OF COMMUNITY AND HEALTH SERVICES

Departmental Policy

Source: Family Services Operational Manual 1993 at 134.

Aboriginal Child Placement Principle

When a child is to be placed outside his/her natural family, the Family Support Worker in the Aboriginal Centre, Family Support and Care Program must be contacted prior to placement.

The order for priority of placement should be:

A member of the child's extended family

Other members of the child's Aboriginal Community who have the correct relationship with the child in accordance with Aboriginal customary law

Other Aboriginal families living in close proximity.

This order of priority of placement is to be followed in absence of good cause to the contrary at all times.

This Principle has been accepted by all States at the 1986 Social Welfare Ministers' Conference.

A commitment was also made to provide resources and administrative support to the Aboriginal community to assist in the implementation of the Placement Principle and to engage in community work.

The Aboriginal Family Support and Care Program operates Statewide and must be involved in assessment, planning and Service Co-ordination for all Aboriginal children on Status.

Adoption Act 1988 (Tas)

Section 24

(1) The Court shall not make an order for the adoption of a child unless the court has received a report in writing on behalf of the Director or the principal officer of an approved agency concerning the proposed adoption and, after considering the report and any other evidence before it, the court is satisfied that -

... (b) the Director or principal officer has given consideration so far as practicable to any wishes expressed by a parent of the child, particularly in relation to the religion, race, or ethnic background of the prospective adoptive parents of the child;

APPENDIX H: VICTORIA

Children and Young Persons Act 1989 (Vic)

Section 119 Principles of case planning

- (1) Decisions made by the Director-General as part of the case planning process must, as far as possible, be made according to the following principles:
- ...
- (m) In the case of an Aboriginal child -
 - (i) decision-making should involve relevant members of the Aboriginal community to which the child belongs; and
 - (ii) in recognition of the principle of Aboriginal self-management and self-determination, arrangements concerning the child, and his or her care, supervision, custody or guardianship, or access to the child, must be made in accordance with the principles listed in sub-section (2).
- (2) For the purpose of sub-section (1)(m)(ii) the principles are:
- (a) Persons involved in the arrangements mentioned in sub-section (1)(m)(ii) must be, or at least one of them must be, a member of the Aboriginal community to which the child belongs; or
 - (b) If a person or persons of the class mentioned in paragraph (a) is or are not reasonably available for that purpose, the persons involved in those arrangements must be members of, or at least one of them must be a member of, an Aboriginal community; or
 - (c) If a person or persons of the classes mentioned in paragraphs (a) and (b) is or are not reasonably available for that purpose, the persons involved in those arrangements must be persons approved by the Director-General and by an Aboriginal agency as suitable persons for that purpose.

Section 3(1) Definitions

"Aborigine" means a person who-

- (a) is descended from an Aborigine or Torres Strait Islander; and
- (b) identifies as an Aborigine or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community;

Section 6 Aboriginal Agency

- (1) The Governor in Council may, by Order published in the Government Gazette, declare an organisation to be an Aboriginal agency.
- (2) An organisation may only be declared to be an Aboriginal agency if the Director-General is satisfied -
 - (a) that the organisation is managed by Aborigines; and
 - (b) that its activities are carried on for the benefit of Aborigines; and
 - (c) that it has experience in child and family welfare matters.
- (3) An Order in Council made under sub-section (1) with respect to an organisation must state that the Director-General is satisfied as to the matters referred to in sub-section (2).

**Protocol between Health and Community Services -
Protective Services and the Victorian Aboriginal Child
Care Agency (VACCA) 1994-95**

7. Placement of an Aboriginal Child:

- 7.1 Consistent with the Aboriginal Child Placement Principle ... and the Children and Young Persons Act s 119(m), if an Aboriginal child requires placement away from their immediate family, VACCA must be consulted about the most appropriate placement. No Aboriginal child is to be placed without VACCA's involvement in decision-making. VACCA's

experience in and knowledge of Aboriginal placement issues must be recognised by CSV¹ in decision-making.

9. *Involvement of Regional/Local Aboriginal Organisations:*

9.1 The involvement of regional/local Aboriginal Organisations in case plan decision-making will be negotiated by those Aboriginal organisations and VACCA, using the CSV/VACCA protocol as a basis for negotiation ...

9.3 Regional/Local Aboriginal organisations may be involved when:

- i) the child and/or family chooses for the local community to be involved in decision-making. This decision does not reduce the need to consult with VACCA.
- ii) the local community are involved in assessment implementation or monitoring within the context of the case plan.
- iii) VACCA contracts for the local organisation to undertake VACCA's role in decision-making.

Adoption Act 1984 (Vic)

Section 50 - Adoption of an Aboriginal child

- (1) The provisions of this section are enacted in recognition of the principle of Aboriginal self-management and self-determination and that adoption is absent in customary Aboriginal child care arrangements.
- (2) Where -
 - (a) consent is given to the adoption of a child by a parent -
 - (i) who is an Aborigine; or
 - (ii) who is not an Aborigine but, in the instrument of consent, states the belief that the other parent is an Aborigine -

1. CSV meaning the Department of Community Services Victoria which is now the Department for Human Services.

and who in the instrument of consent, expresses the wish that the child be adopted within the Aboriginal community; or

- (b) the Court has dispensed with the consent of the parents and the Director-General or principal officer of an approved agency believes on reasonable grounds that the child has been accepted by an Aboriginal community as an Aborigine and so informs the Court - the Court shall not make an order for the adoption of the child unless the Court is satisfied as to the matters referred to in section 15² and, where a parent has given consent, is satisfied that the parent has received, or has in writing expressed the wish not to receive, counselling from an Aboriginal agency and -
 - (c) that the proposed adoptive parents are members, or at least one of the proposed adoptive parents is a member, of the Aboriginal community to which a parent who gave consent belongs;
 - (d) that a person of a class referred to in paragraph (c) is not reasonably available as an adoptive parent and that the proposed adoptive parents, or at least one of the proposed adoptive parents, is a member of an Aboriginal community; or
 - (e) that a person of a class referred to in paragraph (c) or (d) is not reasonably available as an adoptive parent and that the proposed adoptive parents are persons approved by or on behalf of the Director-General or the principal officer of an approved agency and by an Aboriginal agency as suitable persons to adopt an Aboriginal child.
- (3) In this section, "**Aboriginal agency**" means an organisation declared by Order of the Governor in Council published in

2. *Adoption Act 1984* (Vic) s 15 is a general provision regarding the requirements which are to be satisfied before the Court can make an adoption order. One such requirement is that the wishes of the birth parents regarding the religion, race or ethnic background of the proposed adoptive parents be considered.

- the Government Gazette to be an Aboriginal agency in accordance with sub-section (4).
- (4) An organisation shall not be declared under sub-section (3) to be an Aboriginal agency unless the Director-General is satisfied that the organisation is managed by Aborigines, that its activities are carried on for the benefit of Aborigines and that it has experience in child and family welfare matters and the declaration includes a statement to that effect.
- (5) The Governor in Council may, by Order published in the Government Gazette, revoke or vary an order made under sub-section (3).

Section 37 - Consent subject to conditions

- (1) A consent by a parent to the adoption of a child in which the wish is expressed under section 50 that the child be adopted within the Aboriginal community may be made subject to a condition that that parent, and such relatives of the child as are specified in the consent and members of the Aboriginal community to which the child belongs have a right of access in accordance with the prescribed terms to the child.
- (4) The Court may make such order as it thinks fit on an application under sub-section (3)³ where it is satisfied that the Director-General or the principal officer has taken such steps as are reasonable in the circumstances to satisfy the conditions to which the consent was subject and has received and considered a report from an Aboriginal agency within the meaning of section 50.

Section 59 - Certain adoption orders subject to condition

Where the consent of a parent to the adoption of an Aboriginal child was given subject to a condition in accordance with section 37, the adoption order may, subject

-
3. An application under sub-section (3) is an application to the Court to revoke or alter the conditions to which a consent is subject.

to and in accordance with consents given to the adoption, be made subject to a condition that a parent or the parents, relatives of the child and members of the Aboriginal community to which the child belongs have such rights to have access to the child as specified in the order.

Section 59A Adoption order subject to certain conditions

Where the Court is satisfied -

- (a) that circumstances exist which make it desirable so to do, whether by reason of the age of the child or otherwise; and
- (b) that the parent or parents and the adoptive parent or adoptive parents have, after consent to the adoption was given, agreed that the adoption order should be made subject to certain conditions -
the adoption order may be made subject to either or both of the following conditions:
- (c) A condition that a parent or both parents or such other relatives of the child as are specified in the order or both the parent or parents and relatives so specified have such right to have access to the child as is specified in the order;
- (d) A condition that the adoptive parent or adoptive parents of the child provide information about the child to the Director-General or principal officer of an approved agency to be given to the parent or parents at such periods and in accordance with such terms as are specified in the order.

Section 4(1) - Definitions

"Aborigine" means a person who -

- (a) is descended from an Aborigine or Torres Strait Islander;
- (b) identifies as an Aborigine or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community;

Section 11 - Persons in whose favour adoption orders may be made

(1) An adoption order may be made in favour of a man and a woman -

...

(b) whose relationship is recognized as a traditional marriage by an Aboriginal community or an Aboriginal group to which they belong and has been so recognized for not less than two years

- before the date on which the order is made.

Section 114 - Registrar to give notices concerning Aboriginal children

(1) Where a memorandum was sent to the Registrar under section 70(2)⁴ in relation to the adoption of a child, the Registrar shall, on or within the period of 28 days after the adopted child attains the age of twelve years, give notice in writing -

(a) to the Aboriginal agency (if any) named in the memorandum or, where it has ceased to exist, to such other agency (if any) as is prescribed for the purposes of this section; and

(b) to the Director-General -
stating that the adopted child has attained the age of twelve years.

(2) Where the Director-General receives a notice under subsection (1), the Director-General shall take reasonable steps to ensure that notice is given -

(a) to the adopted child; and

(b) to the adoptive parents of the adopted child or, where they cannot be found, to some other person in whose care the child is for the time being -

4. Section 70(2) requires that the Court, when making an order for an Aboriginal child under section 50, send a memorandum to the Registrar giving the name of an Aboriginal agency and stating that section 114 applies.

to the effect that the adopted child may be entitled to certain rights and privileges that exist for the benefit of the child.

Department of Health and Community Services - Standards in Adoption (1986)

5.2.3 - Procedural Principles

...

(viii) The Permanent Care Agency must maintain ongoing consultation with the Aboriginal agency during all stages in the placement of an Aboriginal child.

Conditional Consent

...

12. An Aboriginal agency must be consulted before the placement of a specific child with an approved couple, whether Aboriginal or not, is made.

...

14. An Aboriginal agency has right of veto over the placement of non-Aboriginal applicants to adopt an Aboriginal child...

General Consent

...

3. Where a relinquishing parent(s) has signed a conditional consent, these provisions of Section 59A relating to access and information exchange are also available to them, as long as any new conditions do not duplicate, or are inconsistent with, previous conditions.

...

10. Unless the relinquishing parent nominates otherwise, the placement priority for an Aboriginal child is to be placed with:

- (1) an Aboriginal family belonging to the same community as the relinquishing parent;
- (2) an Aboriginal family from a different community; or

(3) a non-Aboriginal family.

...

11. An Aboriginal agency must be consulted before the placement of a specific child with an approved couple, whether Aboriginal or not, is made.

The Aboriginal Child Placement Principle

**APPENDIX I:
WESTERN AUSTRALIA - DEPARTMENT FOR
FAMILY AND CHILDREN'S SERVICES**

**Substitute Care Policy in Relation to Aboriginal Child
Placement 1984**

Principles of Aboriginal Children's Welfare

The Principles of Aboriginal Children's Welfare embody accepted principles of child welfare practice together with the recognition and consideration of the importance of customary roles and responsibilities of the Aboriginal extended family in child rearing.

Principles

- To provide for the protection and care of children and to promote family welfare.
- To maintain and develop family relationships that are in the best interest of the child.
- To acknowledge the importance of maintaining and promoting the relationship between the child, the parents, guardians or persons having the custody of the child (and where appropriate, the extended family of the child).
- To maintain the continuity of living arrangements in the child's usual ethnic and social environment.
- To consult with the child's parents and other persons with responsibility for the welfare of the child in accordance with Aboriginal customary law; and such Aboriginal organisations as are appropriate in the case of the particular child.
- To encourage Aboriginal control in matters relating to the welfare and care of Aboriginal children and practice sensitivity and have respect for Aboriginal cultural issues in providing child welfare services to Aboriginals.

The Child and the Natural Family

- The maintenance of Aboriginal children with their own family and community environments is to be the first priority.
- Other than in serious crisis situations, child removal should be a planned and co-ordinated action based upon a case conference which includes consultation with relevant Aboriginal organisations/community persons.
- Should removal of child/ren be unavoidable, services to the natural family should continue with the intention of returning the children at the earliest possible time.
- If placement of Aboriginal children cannot be achieved in the same geographic region as their family, then the family should continue to be officially recognised and assigned as a case to the local field officer.
- Should substitute care placement be necessary, the wishes of the natural family are to be taken into consideration in determining placement.
- Regular contact is to be maintained between the child and his family, subject to the terms of the case conference plan.

Aboriginal Children Requiring Placement

- Cultural consistency and family linkage are considered more important than material standards.
- Where possible Aboriginal children should be placed within the extended family, with other Aboriginal families, or in another form of culturally consistent care. Placement should be considered in the following order of priority:
 - In the child's home locality with members of the extended family or the same Aboriginal community/tribal group, or another Aboriginal family.
 - In a different locality with members of the extended family or Aboriginal tribal group, or another Aboriginal family.
 - In a departmental or residential group home or a hostel with Aboriginal caretakers preferably in the child's locality.

- In all cases except for emergencies, approval must be obtained from the Director General to place the child in non-Aboriginal care.
- ... The Director General must be notified within forty eight (48) hours of such a placement.
- ... In conjunction with the above point, the following principles should be considered in placement selection:
 - The placement should contribute to the best possible retention of the child's relationship with his parents and community, including regular contact.
 - Siblings should be placed together, but where this is not possible, regular sibling contact is to be maintained.
 - Except in the case of emergencies, consultation in regard to placement of the child will take place with the Aboriginal Child Care Agency and/or relevant Aboriginal groups or members of the Aboriginal community as soon as case responsibility is accepted by the Supervisor.
- Following an initial case conference, each child, his sibling group, and his natural family shall be formally reviewed on a six month basis.

Emergency Placements

- Should the removal of the child on an emergency basis require the child's placement with non-Aboriginal caregivers, the responsible Departmental Officer should immediately investigate possible arrangements in accordance with the above priorities of placement.

Consultation

- The Department will work with Aboriginal Child Care Agency in the metropolitan areas and will use it for consultation purposes, in case planning, child care matters and for the recruitment of Aboriginal child placement resources.

- The Department will also assist in the development of local Aboriginal groups, particularly in country areas, to work with field staff in locating Aboriginal foster parents, in selecting suitable placements for Aboriginal children and in advising the Department on the care of Aboriginal children generally.

Objectives of Aboriginal Child Placement

Aboriginal Child Placement

- To ensure that consultation occurs with extended family, significant others and, where appropriate, Aboriginal organisations.
- To arrange appropriate substitute care as warranted which is in the best interests and promotes the welfare of the child, and which takes into account the importance of customary roles and responsibilities of the Aboriginal family in child rearing.
- To promote and maintain relationships and contact between the child, his family, kin and culture.

Aboriginal Community Development

- To explore with Aboriginal communities and organisations the potential for them to exercise functions, in relation to the welfare of children.
- To facilitate the transfer of appropriate functions which those communities and organisations have demonstrated a desire and ability to undertake.
- To support those communities and organisations in the discharge of those functions.

Definitions

Aboriginal

A person of Aboriginal descent, Torres Strait Islander descent who identifies as Aboriginal and is accepted as such by his/her community.

Community/Tribal Group

A number of people sharing common traditions, interests and goals, who are conscious of themselves as a social unit and identify as a group. They may or may not be limited to geographical or tribal areas. Widely scattered people can still hold a strong sense of community group.

Kin

One's identified blood and classificatory relatives.

Adoption Act 1994 (WA)

Section 4 - Interpretation

(2) A reference in this Act to a married person is a reference to -

...

(c) an Aboriginal person who is regarded by the community in which the person lives as being married in accordance with the customs or rules of the community.

Section 45 - Selection of Prospective Adoptive Parents

Where a person signs a form of consent to a child's adoption (not being adoption by a step-parent or carer of the child) then not less than 18 days after the form of the consent is signed and not more than 14 days after the revocation period expires -

- (a) the Director-General is to give to the person the opportunity of -
 - (i) expressing to the Director-General, the person's wishes in relation to the child's upbringing and the preferred attributes of the adoptive family; and
 - (ii) studying information provided under paragraph (b)(ii), and selecting a prospective adoptive parent;

and

- (b) the Director-General is to -
 - (i) record the wishes expressed under paragraph (a)(i); and
 - (ii) provide to the person information on a selection of prospective adoptive parents for the child, whose names are entered in a register under section 44(1)(b) so that, if practicable, the selection is consistent with the wishes expressed under paragraph (a)(i).

Section 52 - Restrictions on Placement

(1) The Director-General is not to place a child with a view to the child's adoption unless -

- (a) the prospective adoptive parent -

...

- (v) meets, if relevant, the child's wishes and shows a desire and ability to continue the child's established cultural, religious or educational arrangements...

Adoption Bill 1992 (WA)

Clause 51 - Restrictions on Placement

(1) The Director-General is not to place a child with a view to the child's adoption unless -

- (a) the prospective adoptive parent -

...

- (vi) in the case of an Aboriginal child -
- (A) is an Aboriginal person who is accepted by the child's community as a member of the community and who, according to the community's customs or rules, has the appropriate relationship with the child to be the child's adoptive parent; or
- (B) if there is no suitable person under item (A), is an Aboriginal person who is culturally and geographically as close as possible to the child's community.

...

- (d) where the child is an Aboriginal child -
 - (i) employees of the Department who are Aboriginal persons; and
 - (ii) if appropriate, representatives of the child's community or other communities of Aboriginal persons that are relevant to the child, have been consulted and are involved in the child's placement.

The Aboriginal Child Placement Principle

**APPENDIX J:
ABORIGINAL AND TORRES STRAIT ISLANDER
CHILDREN ADOPTED IN AUSTRALIA BY STATE
AND TERRITORY - 1990/91 - 1994/95**

Table 14: Adoptions of Aboriginal children by State/Territory - 1990/91 - 1994/95

| | TAS | ACT | SA | WA | NT | QLD** | VIC | NSW | TOTAL |
|----------------|----------|----------|------------|----------|----------|-----------|----------|------------|------------|
| 1990/91 | | | | | | | | | |
| ATSI | 0 | 0 | n/a | 1 | 1 | 1 | 0 | 5 | 8 |
| non-ATSI | 0 | 0 | n/a | 1 | 0 | 0 | 0 | 9 | 10 |
| Total | 0 | 0 | n/a | 2 | 1 | 1 | 0 | 14 | 18 |
| 1991/92 | | | | | | | | | |
| ATSI | 0 | 0 | n/a | 0 | 0 | 3 | 0 | 4 | 7 |
| non-ATSI | 0 | 0 | n/a | 0 | 1 | 0 | 0 | 1 | 2 |
| Total | 0 | 0 | n/a | 0 | 1 | 3 | 0 | 6° | 10° |
| 1992/93 | | | | | | | | | |
| ATSI | 0 | 0 | n/a | 2 | 1 | 2 | 0 | 1 | 6 |
| non-ATSI | 0 | 0 | n/a | 0 | 0 | 1 | 0 | 1 | 2 |
| Total | 0 | 0 | n/a | 2 | 1 | 3 | 0 | 2 | 8 |
| 1993/94 | | | | | | | | | |
| ATSI | 0 | 0 | n/a | 2 | 0 | 4 | 0 | 3 | 9 |
| non-ATSI | 0 | 0 | n/a | 0 | 0 | 0 | 0 | 3 | 3 |
| Total | 0 | 0 | n/a | 2 | 0 | 4 | 0 | 6 | 12 |
| 1994/95 | | | | | | | | | |
| ATSI | 0 | 0 | n/a | 1 | 0 | 4 | 0 | 5 | 10 |
| non-ATSI | 0 | 0 | n/a | 0 | 0 | 0 | 0 | 2 | 2 |
| Total | 0 | 0 | n/a | 1 | 0 | 4 | 0 | 7 | 12 |
| Total | | | | | | | | | |
| ATSI | 0 | 0 | 0 | 6 | 2 | 14 | 0 | 18 | 40 |
| non-ATSI | 0 | 0 | 1 | 1 | 1 | 1 | 0 | 16 | 20 |
| Total | 0 | 0 | 1* | 7 | 3 | 15 | 0 | 35° | 61° |

Notes to Table 14

Source: Australian Institute of Health and Welfare *Adoptions Australia* series 1990/91-1994/95: see Chapter 4 note 60

- Please note that while AIHW has no records for the adoption of Aboriginal children in South Australia for this period, South Australia - Family and Community Services provided information to this Report that one Aboriginal child had been adopted by non-Aboriginal people in the last five years: South Australia - Family and Community Services *Letter* (26 September 1995).
- ** Note: these figures have been supplied separately by the Queensland - Department of Family and Community Services. The Department reported a difficulty in maintaining accurate computer records regarding adoptions of Aboriginal and Torres Strait Islander children, and stated that these figures are more accurate than those supplied previously to the AIHW: Queensland - Department of Family and Community Services (now Department of Families, Youth and Community Care) *Letter* (22 February 1996). The figures held by the AIHW show 14 adoptions of Aboriginal and Torres Strait Islander children over this period, eight adopted to Aboriginal or Torres Strait Islander families, 6 adopted to non-Aboriginal or Torres Strait Islander families.
- This figure includes the adoption of one Aboriginal child where the Aboriginality of the adoptive parents is unknown.

The Aboriginal Child Placement Principle

APPENDIX K: INTERNATIONAL INSTRUMENTS

United Nations Convention on the Rights of the Child

Adopted on 20 November 1989 in New York: (1991) ATS 4

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide

appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the

adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:
 - (a) Within two years of the entry into force of the Convention for the State Party concerned;
 - (b) Thereafter every five years.

Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally

Adopted on 3 December 1986 by General Assembly Resolution 41/85

Article 5

In all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.

International Covenant on Civil and Political Rights

Adopted 16 December 1966 in New York: (1980) ATS 23

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

International Labour Organisation Convention (No 169) Concerning Indigenous and Tribal People in Independent Countries

Adopted by the General Conference of the International Labour Organisation on 27 June 1989 in Geneva.

Article 6

1. In applying the provisions of this Convention, governments shall:
 - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Draft Declaration on the Rights of Indigenous Peoples

Text of the forty-sixth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (20 April 1994).¹

Article 3

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

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

1. E/CN.4/Sub.2/1994/2/Add.1

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

The Aboriginal Child Placement Principle

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