

**Submission
No 95**

INQUIRY INTO CHILD PROTECTION

Organisation: Aunty Glendra Stubbs and Ms Elizabeth Rice

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Submission to NSW Legislative Council's General Purpose Standing Committee No 2

re

Inquiry into Child Protection

from

Aunty Glendra Stubbs and Ms Elizabeth Rice

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1.0 Introduction

1.1 Who we are

Aunty Glendra Stubbs is an Aboriginal woman of the Wiradjuri people with long experience in many of the issues referred to in the Inquiry's Terms of Reference. She is a former CEO of Link-Up (NSW) Aboriginal Corporation, and is currently an Aboriginal Engagement Advisor with Knowmore, the non-government legal organisation which supports people giving evidence to the Royal Commission into Institutional Responses to Child Sexual Abuse. She is concurrently Aunty in Residence for the National Centre of Indigenous Excellence. Aunty Glendra also has very long experience as a foster carer of Aboriginal children.

In her personal and professional capacities, she has learned a great deal about the issues on which the Inquiry is focussing, which in turn led to her membership of a range of NGO Boards, as well as Departmental and Ministerial Committees.

Elizabeth Rice is a non-Aboriginal woman with several decades of public policy experience, as well as some experience in working on child protection and out-of-home care matters with an Aboriginal organisation and Aboriginal people.

1.2 The issues we will address

We will address, in particular, the following Terms of Reference (ToRs), as they relate to the role of the Department of Family and Community Services (FaCS):

- a) the capacity and effectiveness of systems, procedures and practices to notify, investigate and assess reports of children and young people at risk of harm
- b) the adequacy and reliability of the safety, risk and risk assessment tools used at Community Service Centres
- e) the support, training, safety, monitoring and auditing of carers including foster carers and relative/kin carers
- g) specific initiatives and outcomes for at risk Aboriginal and Torres Strait Islander children and young people
- h) the amount and allocation of funding and resources to universal supports and to intensive, targeted prevention and early intervention programs to prevent and reduce risk of harm to children and young people, and
- i) any other related matter.

Our main focus will be on ToRs a), g) and i), and our comments on the other ToRs above will be governed by the way those ToRs impact on ToRs a), g) and i).

1.3 How we will address them

We will address the issues in the spirit of the comments made in the Media Release which announced the Inquiry:

There is no question that a first order responsibility of government is to ensure that the most vulnerable in society, particularly children and young people, are protected and cared for,' said Hon Greg Donnelly MLC, Chair of General Purpose Standing Committee No. 2.

The aim of the inquiry is to strengthen the protection of the most vulnerable children in our community, those at risk of harm and in out-of-home care.

We will then point out that there are two fundamental risks for governments and societies in attempting to protect and care for vulnerable children and young people: over-protection and under-protection. Both carry grave risks for the futures of children, families and communities. In this submission we focus on over-protection, as it applies to Aboriginal children and young people in NSW.

Over-protection

Over-protection raises issues of equity, effectiveness and efficiency. The equity issue is clearly demonstrated in the massive over-representation of Aboriginal children and young people in the child protection and out-of-home care systems. The effectiveness issue relates to the outcomes for Aboriginal children and young people: over-protection increases rather than decreases risk, and creates worse rather than better outcomes. The efficiency issue relates to the use of resources: over-protection consumes resources that could be used for preventative and early intervention services, and for addressing structural factors associated with Aboriginal child abuse and neglect. It also causes harm which creates lifetime costs for individuals, families, communities, governments and the economy.

We address these over-protection issues in the following way:

- we provide a brief overview of the policy basis for the 'protection' of Aboriginal children and young people in NSW
- we then provide information, based on our own knowledge and on the published work of others, about the way that the NSW child protection and out-of-home care systems function on the ground for Aboriginal children and young people, families and communities
- we then summarise the issues that arise from both policy and practice, and relate them to specific Terms of Reference.

We would like to stress that when we talk about over-protection, we are not talking about situations where a child or young person is clearly at risk. Aboriginal people want their children, and all children, to be safe. What we are referring to is the way the system, which forces Aboriginal child protection into a non-Aboriginal mould, over-applies the statutory measures when, with a greater degree of cultural competence within the system, alternative approaches with better outcomes could be identified and used.

We believe that the most effective approach in NSW would be an Aboriginal community controlled system, and we will continue to advocate for that. However, we also believe that major improvements are needed to the current system while a new system, that fully respects Indigenous rights in this area of life, is developed and established.

2.0 'Protection' Policy

'Protection' policy has a long and disastrous history in Australia, and it began in NSW. As Link-Up (NSW) noted on a previous version of its website:

The separation of Aboriginal children from their families and communities began in NSW as soon as Europeans set foot on our land. In 1788, an Aboriginal boy named Andrew was found in the bush and taken to live with the British colonists (Fletcher 1989). By April 1789, two Aboriginal

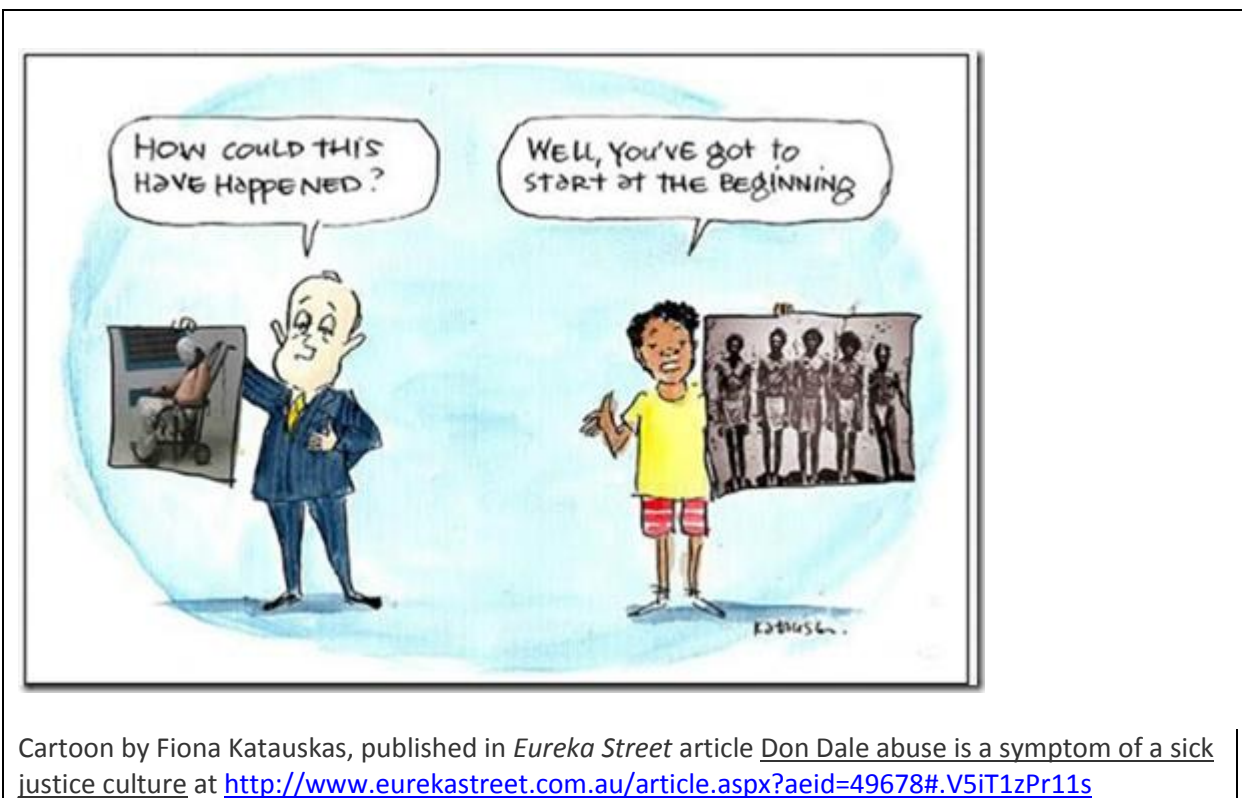
children, Nanberry (a boy about 10 years) and Abaroo (a girl about 14) also lived with Whites (Kenny 1973, pp9-10).

NSW was the first State to be colonised by Europeans, and the laws, policies and practices of separation were developed and perfected here. Officials had the power to remove any child under any pretext, for not even a court hearing was necessary.

The belief that it is in the best interest of Aboriginal children to be removed from their culture and assimilated justified the systematic disruption of Aboriginal families and has been allowed to prevail.

Separation is not past history - it continues today and the serious and ongoing trauma on Aboriginal people goes unrecognised.

This point is illustrated graphically in a recent cartoon critiquing the outrage at the recent mistreatment of young people, including Aboriginal young man, Dylan Voller, at the Don Dale Juvenile Detention Centre in the Northern Territory:



Bringing them Home (BTH), the 1997 report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, also noted that the targeting of Indigenous children for removal from their families began at colonisation. It then documents and critiques those removal policies as they evolved up to the time of the report's development. Eventually, all States and Territories, and the Australian Government, made formal apologies for past removal policies; however, despite this, and despite the formal change from assimilationist removal policies to policies which, as policies, focus solely on child protection, the results are still disastrous for Aboriginal and Torres Strait Islander children and young people, their families, their communities and their nations.

The current results of these policies for Aboriginal children and young people, families and communities in NSW are that:

- Aboriginal children are now nearly 8 times more likely to become part of the child protection system than non-Aboriginal children.
- Aboriginal children are now nearly 10 times more likely to become part of the out-of-home care system than non-Aboriginal children.
- The rate at which this is happening is increasing, “leading to a widening of the gap, from 8.7 to 43.6 care and protection orders per 1000 children”.

(See Australian Institute of Family Studies’ *CFCA) Resource Sheet— September 2015* at <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>, and Productivity Commission’s report *Overcoming Indigenous Disadvantage: Key Indicators 2014*, p 4.77.)

These results also flow on to the juvenile detention system, as in general, children who have been in care are over-represented in juvenile detention. In NSW:

- Aboriginal young people are now around 28 times more likely to be in juvenile detention than non-Aboriginal young people.

(Rate ratio derived from visual inspection of Rate Ratio graph on p 17 of [Youth detention population in Australia 2015](http://www.aihw.gov.au/publication-detail/?id=60129553700) at <http://www.aihw.gov.au/publication-detail/?id=60129553700>).

This surely indicates that the policy itself is flawed and that changing these results requires more than simply additional resources and changed practices. In our view, the main problem with the policies upon which the system is based, and the system itself, is that they deny to Aboriginal and Torres Strait Islander people and Peoples a share in the governance of the child protection, out-of-home care and juvenile detention systems of Australia. The views of Aboriginal children and young people, families and communities are subservient to those of the ‘mainstream’ system, even though they are by far the most significant group of clients in terms of over-representation. That alone would be an argument for at least a greater say for Aboriginal voices; however, as recognised in the United Nations Declaration on the Rights of Indigenous Peoples, to which Australia is a signatory, Aboriginal and Torres Strait Islander people and Peoples have the right to self-determination, which involves a great deal more than just a greater say. This matter is addressed at several points in this submission.

3.0 ‘Protection’ Practice

Our experience is that ‘protection’ practice can vary greatly from ‘protection’ policy. There are many potential reasons for this ranging from, at best, the inevitable difficulties encountered, even by people of good will and skill, in translating policy into practice to, at worst, obstruction from people who disagree with the policy or have a negative relationship with the family involved.

The policy literature provides many examples of these difficulties, and they are real. However, our focus in this submission is on the day to day, year in, year out, experiences of families who have come to the notice, whether justly or unjustly, of the child protection system and, later, the out-of-home care system.

In Aunty Glendra’s case, her knowledge in this area is based on personal experience, as well as the bad stories she has been hearing from people for over 30 years, and is still hearing. These are stories of the grief, damage, and loss of people in care and their families, and the cost of all this to communities.

Before we begin to outline the issues that have come out of this experience, we would like to make it clear that we know that there are many good people, in both the government and non-government sectors, who work hard to try to ensure that all children are safe. However, even the good people are working in a less than adequate system, as the Inquiry's ToRs imply. We will link these system issues, clients' experience of the system, and the ToRs in Section 4.0.

I, Aunty Glendra, will draw on a story about a young person that highlights many of the issues in the ToRs. It is a true story, and I have the permission of the young person to tell it. To protect her privacy, however, I will not use her real name, or the real names of other people involved, or the real names of the places where events occurred. In this part of the submission I will also need to leave out some other details which could identify her and her babies. Even without these details, aspects of the story tell enough of a tale to be useful to this Inquiry.

(I will tell the full story in a confidential attachment to this submission. I want to do this as it is the details in the full story that show how big a gap there can be between policy and practice, and how badly this can affect the people the policy is supposed to help. I understand that the Inquiry by General Purpose Sub Committee 3 into Reparations for the Stolen Generations in NSW found that the details shared by Stolen Generations survivors in their stories were a great help to Committee Members in understanding what the survivors had been through and how it had affected them then and still affects them now. It is in this spirit that I will provide the full story.)

The story is about a young person, her first two children and her then partner, and her third child from a later partner. It is partly a story of the inadequate care provided by FaCS to young people leaving care, partly a story about the way an initial contact with FaCS can turn into the inevitable removal of a child and subsequent children, partly a story of cultural incompetence, and partly a story of constantly beating against the door to get the sorts of support that FaCS policy says is available, and to participate in the partnership approach it says it values, only to find that even though policies change, the results don't.

This story, and the experience I have had in working with other Aboriginal children, young people, their families and their communities has taught me a lot about the practice of child welfare in NSW and the issues that affect good outcomes for Aboriginal children and young people regarded as in need of care and protection. I would like to highlight nine issues:

- i. The policy assumption appears to be that a life in care will provide better outcomes for children at risk than any alternative.
- ii. Policy and practice in relation to cultural competence are inadequate.
- iii. Perceptions of risk are culturally biased.
- iv. Perceptions of appropriate support are inadequate, as is the level of provision of appropriate services.
- v. Interactions with caseworkers are problematic.
- vi. Once a matter proceeds to the Children's Court, removal of the child is almost inevitable.
- vii. The level of care and support provided to children and young people in care and their carers is inadequate.
- viii. The level of care and support provided to young people leaving care is inadequate.
- ix. Addressing these issues effectively requires political will and resources.

The way these issues relate to the Inquiry's terms of Reference is dealt with in the next section.

4.0 'Protection' Policy and Practice and the Terms of Reference

In discussing the issues relating to the ToRs, we have ordered them according to the logic of the way the issues relate to each other, rather than to the order of the ToRs, as some of our issues relate to more than one ToR. In some cases our responses are based on our own experience; in other cases we refer to the documented experience and conclusions of organisations or bodies which have already made considerable contributions in this area such as:

- Grandmothers Against Removals, an Aboriginal group which commenced in NSW and is now part of a national network
- the Aboriginal Child, Family and Community Care State Secretariat (NSW) (AbSec), a NSW non-government Aboriginal peak body for advice and support to Aboriginal community controlled organisations on child protection and out-of-home care matters
- the Secretariat of National Aboriginal and Islander Child Care (SNAICC), which is a national non-government Aboriginal peak body on these matters
- The Australian Human Rights Commission (AHRC) which, under its former name of the Human Rights and Equal Opportunity Commission, published the BTH report.

(The work of GMAR NSW, which resulted in the *Guiding principles for strengthening the participation of local Aboriginal community in child protection decision making*, is documented at <http://stopstolengenerations.com.au/>. The work of AbSec which, in the last three years, has published eight major submissions, as well as a position paper, on aspects of the child protection and out-of-home care systems is documented at <http://www.absec.org.au/submissions-and-research.html>). SNAICC documents its numerous policy and research endeavours at <http://www.snaicc.org.au/policy-and-research/>. The two most recent AHRC documents on matters relevant to this Inquiry are its *Social Justice and Native Title Reports* for 2014 and 2015, available at <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-0> and <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-1> respectively.)

4.1 Assumptions re forms of care (relates mainly to ToRs a), e), g) & h))

Placement of children and young people away from their parents assumes that they will have a stable, culturally connected life in care. This is not always the case. For example, in one case with which Aunty Glendra is familiar, a young person had had 32 placements in care. (This was documented by FaCS in papers presented to a court on another matter.)

The outcomes of children in care have been of concern for a very long time. In its 2005 report, *Protecting vulnerable children: A national challenge*, the Australian Senate's Community Affairs References Committee quotes the following comment from a submission to its Inquiry:

Foster care has now replaced institutionalisation. Multiple placements have replaced the turnover of staff of the institutions. The high cost of institutionalisation has been replaced [by] low cost under resourced foster carers. Children still experience similar difficulties, system abuse, lack of support when they leave, inadequate support while they are in care, poor education and so on. The problems of children in care continue to be much the same. Nothing has really changed.

Nearly 10 years later, in 2014, a paper from the Australian Institute of Family Studies (AIFS) (see <https://aifs.gov.au/publications/family-matters/issue-94/pathways-care>) clearly shows the problem remains. It states:

Research overseas and in Australia has found that children and young people in OOHC fare poorly in comparison with their peers in terms of their physical health, socio-emotional wellbeing and cognitive/learning ability.

However, there is not a great deal of evidence of the precise relationship of various factors to these outcomes.

FaCS is attempting to address these problems through its Pathways of Care project, which it describes (at http://www.community.nsw.gov.au/_data/assets/pdf_file/0017/321713/6_frequently_asked_questions_final_updated_041114v1.pdf) as:

a large-scale representative longitudinal study ... designed to show how children and young people's placement and other service experiences influence their development while taking the characteristics of the child, caregiver, family, and neighbourhood into account.

One of the questions the study seeks to answer (p 17 of AIFS paper) is: "How are the Aboriginal Child Placement Principles used in placement decision-making for Aboriginal children and young people entering OOHC?" However, this will not answer the question of whether an Aboriginal community controlled child wellbeing system would provide better outcomes for Aboriginal children than a non-Aboriginal system that has simply added Aboriginal Child Placement Principles to it.

Regardless of the merits of different types of care, and of the relationship among care factors, we believe that there needs to be a stronger focus on early support for vulnerable Aboriginal families, and a stronger focus on restoration if temporary removal from parental care is required.

Unfortunately, for Aboriginal people, there are factors in the system that work against the potential success of this approach, even if more resources were devoted to it. Some of these factors are outlined in the discussion of the next four issues.

4.2 Cultural competence (relates mainly to ToRs b) & g))

Cultural competence is a necessary skill in any society; it has always been part of Aboriginal societies, which need to be culturally competent in relation to their various nations and the groups within them. Given the reality of modern Australia, cultural competence will always be required, as there will continue to be interactions between Aboriginal people and non-Aboriginal people on all sorts of issues; however, we do not regard cultural competence as a substitute for Aboriginal community control of the child protection, out-of-home care and juvenile detention systems as they affect Aboriginal children and young people, families and communities.

Until a new system of Aboriginal community control in these areas is established, a high level of cultural competence is essential for any staff working with Aboriginal children and young people, families and communities. Without that, staff are unable to interpret accurately what they believe they are observing, or what children and families are saying.

We can do no better than to draw the Inquiry's attention to the work of SNAICC in this area, particularly in its 2013 paper: *A Place for Culture? Exploring Aboriginal and Torres Strait Islander Cultural Competence in the National Quality Standard* (available at <http://www.snaicc.org.au/a-place-for-culture-exploring-aboriginal-and-torres-strait-islander-cultural-competence-in-the-nqs-2013-document/>). This paper was developed to examine "whether the current expectations of cultural competence in the early childhood education and care regulatory framework", including aspects that link to COAG's Indigenous Reform Agenda, "are appropriately articulated" and embedded into the regulatory framework's assessment and rating processes. The underpinning

information on cultural competence and the need to embed it into policy **and** practice are equally relevant to the operation and assessment of the child protection, out-of-home care and juvenile detention systems.

At present, the NSW child protection and out of home care systems rely on (i) the statutory Aboriginal child placement principles and (ii) an assumed level of cultural competence as the tools for meeting the needs of Aboriginal children and young people, families and communities. As indicated in some of the submissions to the Inquiry by General Purpose Sub Committee 3 into Reparations for the Stolen Generations in NSW, concerns exist about how well those tools operate in practice, and about the level of review of their operation.

The SNAICC paper can assist here, at least in relation to cultural competence, with:

- its presentation of Muriel Bamblett's explanation of culture on p 8, which states:

Culture is central to identity. Culture defines who we are, how we think, how we communicate, what we value and what is important to us... Every area of human development which defines the child's best interest has a cultural component. Your culture helps define HOW you attach, HOW you express emotion, HOW you learn and HOW you stay healthy.

- its finding that "the guiding principle that 'Australia's Aboriginal and Torres Strait Islander cultures are valued'" is not operationalised (p 2) in the assessment and rating processes of the regulatory framework – ie "there is no process or guide for assessing and ensuring ... cultural competency" – and its insistence that this needs to be rectified.

The paper goes on to note (on p 9) the:

increasing recognition of the need for a cultural competency framework to support and facilitate implementation of the culturally respectful approach required in the national Closing the Gap agreements and policies.

Drawing on the work of the Victorian Aboriginal Child Care Agency (VACCA), SNAICC then provides (also on p 9) the following description of cultural competence:

Developing cultural competency is the process of integrating attitudes, values, knowledge, understanding and skills that enable effective interventions with people from a culture other than one's own.¹⁷ It recognises that enabling Aboriginal and Torres Strait Islander people to practice their rights to participate in decisions that impact them and to enjoy culture requires cultural awareness. This is the process of "embedding understanding of some of the...knowledge of another culture and an awareness that cultural differences necessitate a different approach to people of that other culture."¹⁸

(The references in the text above are to VACCA's 2008 *Aboriginal Cultural Competence Framework*, which was commissioned and published by the Victorian Department of Human Services. This document is available at http://www.dhs.vic.gov.au/_data/assets/pdf_file/0011/580934/Aboriginal_cultural_competence_2008.pdf.)

Until deficiencies in the current levels of cultural competence in the child protection and out-of-home care systems are addressed, they will continue to affect each of the next three matters.

4.3 Perceptions of risk (relates mainly to ToRs a), b), g) & h))

There are general and specific factors that contribute to potential misunderstandings of risk. All of us need to interpret what we observe, and we interpret it according to our own cultural background.

In relation to the *specific factors* that contribute to misunderstandings, we provide just two examples:

- children's independence
- overcrowding.

The children's independence issue arises from inadequate knowledge of Aboriginal child rearing practices. In general, Aboriginal children are encouraged to develop independence earlier than non-Aboriginal children, and in a context where they are 'parented' by the community not just by their birth parents. However, if a non-Aboriginal person simply observes the behaviours of Aboriginal children, families and communities without understanding the child rearing regime to which they are tied, they may interpret the behaviours as indicating neglect, rather than understanding that they are part of a move, under multiple sets of eyes, towards supported independence.

Overcrowding also seems to be a factor that is automatically regarded as negative. Crowding is one of the areas on which the National Aboriginal and Torres Strait Islander Social Survey (NATSISS) collects data. However, in 2011, in their analysis of the 2008 NATSISS, Memmott and Greenop (paper available from <http://caepr.anu.edu.au/seminars/conferences/natsis2011>) critique the data definitions used for crowding, and the "culturally specific assumptions" they embed, which are "not necessarily applicable to Indigenous Australians". One of their recommendations is that NATSISS "[d]evelop combined quantitative and qualitative methods to better contextualize and model crowding and spatial needs in Aboriginal households". One of the matters that came up in discussion at the conference at which these findings were presented was that, while the health issues that can arise from over-crowding are of concern, overcrowding itself was less of an issue than the capacity of housing to allow the people within it to make arrangements that respected cultural protocols (eg being able to locate sleeping areas in such a way that young people of one sex could not observe people of the other sex in bathrooms). These comments do not deny the reality of the problems of overcrowded housing for Aboriginal people (see, for example, the recent study of Aboriginal housing in western Sydney at <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-016-3049-2>). We make them simply to emphasise two points:

- even apparently obvious indicators of risk need to be interpreted in a culturally competent way if the observer is to understand real as opposed to assumed risks
- responses to risk factors need to address the causes, not just the symptoms (eg for overcrowding, the response needs to address the underlying housing issues involved not just focus on its present impacts).

This leads into the *general factors* relating to perceptions of risk. These general factors are of two kinds: one is the nature of the current system and its inherent incompatibility with good outcomes for Aboriginal children and young people; the other is the failure of governments to do enough to address the most common type of substantiated child abuse, ie neglect, and its strong association with poverty.

On the first system issue we can do no better than quote from another AIFS paper, Child abuse and neglect in Indigenous Australian communities, published in 2003 (see <https://aifs.gov.au/cfca/publications/child-abuse-and-neglect-indigenous-australian-communities>). It states:

Statutory child protection services

While the current non-Indigenous child protection models, based on 'individualising' and 'pathologising' a particular family, may be culturally suited to white Australian culture, there

appears to be a strong argument that they are not suitable for Indigenous culture (Cunneen and Libesman 2002).

The dominant court system individualises people, abstracting them from their family, cultural and racial contexts, in contrast to viewing children as part of a community identity - a perspective held in Indigenous culture.

Child protection - a radical policy change

Indigenous child rearing practices, particularly those maintained by the more remote communities, have many different characteristics from those in the non-Indigenous community, an issue about which the non-Indigenous community is just beginning to learn (Priest 2002). A failure to be cognisant of these and to take them into account in child protection practice is likely to provide a service which doesn't meet the needs of Indigenous children and families. In addition to the great need for services to be available, many commentators argue for radical change in relation to the provision of child protection services within the Indigenous community, although the precise nature of this change varies. Cunneen and Libesman (2000), and Sweeney (1995), argue for a complete revision of child protection services in relation to Indigenous Australians, while others recommend fairly radical legislative changes.

Sweeney (1995) draws on the report, 'Learning from the Past', which was commissioned by the NSW Department of Community Services and prepared by the Gungil Jindibhah Centre at Southern Cross University (undated), which argues for a greater focus in State policies on the concepts of collaboration and empowerment. In 'Learning from the Past' it is recommended that counselling services and measures to reunify Indigenous families should be undertaken by independent Indigenous organisations, and that the role of the child protection departments should be limited to funding and referral (Sweeney 1995).

However, Sweeney believes that the recommendations of the report do not go far enough. He believes that control and responsibility for Indigenous child welfare need to be passed to the Indigenous community, a position supported by the authors of this paper (see Stanley, Kovacs, Cripps and Tomison 2002). Sweeney doubts whether the child protection system is capable of real change, without this process. There are overseas precedents for this approach, although a determination of their effectiveness requires further examination (Cunneen and Libesman 2002).

On the second system issue, there is a great deal of literature about neglect and the structural factors associated with it. One of these factors is poverty. As First Nations research states, in the Canadian context:

... neglect of First Nations children is often a result of structural factors that are often beyond parents' control, such as poverty, poor housing, and substance misuse (Blackstock, 2007).

(See http://www.nccah-ccnsa.ca/docs/fact%20sheets/child%20and%20youth/NCCAH_fs_childhealth_EN.pdf)

In Australia, the majority of the substantiated child protection allegations relating to Aboriginal and Torres Strait Islander children and young people are in the neglect, not the abuse, category. The structural factors associated with both abuse and neglect in Australia are discussed in the AIFS paper referred to earlier in this sub-section. This paper also highlights the historical causes of these factors and their intergenerational transmission.

The current system does not deal with these structural factors well. They become codified as risk factors which are sometimes used to 'red flag' families. If 'red flags' are applied without proper, skilled, culturally competent examination of the particular circumstances, the results for children

and young people, families and communities are disastrous. This approach also undermines child protection aims, as it draws resources away from identifying, examining and responding to the causes of the 'red flags'.

As Aunty Glendra says, we know that the intergenerational issues need to be addressed – family violence, drug and alcohol abuse, poverty and neglect – but we need to address these issues, not just take the kids away. The 'rubber stamping of a red flag' approach does nothing to encourage anyone to come forward and say I'm struggling. It does the opposite, it discourages them. And removal without addressing the issues just perpetuates them. There are other models for working with families facing intergenerational issues without taking their kids. Let's look at the other models and how they work, and at what we need to do to make them work here.

4.4 Perceptions of appropriate support (relates mainly to ToRs b, g) & h))

This issue interacts with the issue of insufficient services. One example illustrates this. It relates to a young Aboriginal couple, both care leavers and both provided with insufficient support, and their new baby. In line with the 'individualising' approach referred to above in Section 4.3, the young mother was offered, and took up, a place in a live-in service which was to provide her with parenting support. Although her partner could visit her there, he was not able to live-in with his partner and their new baby.

There were two problems with this placement:

- It was not an Aboriginal service
- It prevented the young couple from living as a family unit.

When the mother was offered social housing, she was faced with an impossible choice. If she declined the housing offer, in order to complete the live-in program, she and her family would have been homeless when she completed the program, and being homeless would have been a risk factor for the baby. She made the decision to accept the housing offer, but this was viewed negatively by FaCS, and remains an issue on her FaCS file.

Another example is the 'support' provided to a young Aboriginal mother who needed specific supports, identified by NSW Health, so that – even with a mild intellectual disability – she could be a good parent. The 'support' that was provided by FaCS did not match what NSW Health had described. She ended up with a stranger in her home who did not provide support but appeared simply to observe and collect information for FaCS. This was part of the process that led to the eventual placement of this Aboriginal baby into out-of-home care until the age of 18 years.

These are the realities of Aboriginal people's lives and governments and service delivery organisations need to be aware of them. There also need to be more Aboriginal services on which caseworkers can draw for Aboriginal families.

4.5 Interactions with caseworkers (relates mainly to ToRs a, b) & g))

There are numerous problems associated with this issue. The problem of trust is a huge one for Aboriginal people in dealing with government services, and with services provided by any of the other bodies, including churches, who were involved in past child removals and their consequences. AbSec has covered these issues very well on pp 1-4 of its 2013 submission on then Minister Goward's 2012 Discussion Paper on child protection reforms (submission available at <http://www.absec.org.au/images/pdf/Submissions/March2013AbSecsubmissionFaCSChildProtectionOOHCreformsdiscussionpaper.pdf>).

The issues of perception, and lack of familiarity with the reality of Aboriginal families' lives, also complicate these interactions, as does frequent staff turnover and inexperience, which many researchers and observers have also noted. A further factor comes into play when the parents of a child being assessed for risk were themselves in care. Young people whose lives have been under the control of government authorities are very likely to be nervous in their meetings or conversations with case workers. This needs to be taken into account so that the young people's comments are not misinterpreted, taken out of context, or misrepresented. Meetings need to take place in a way that allows the young people to respond positively rather than defensively – so that a true picture of their strengths emerges.

We provide two examples that illustrate the risks of misinterpretation:

Example 1: An assessment of one young Aboriginal mother's home resulted in a report stating that she did not have a steriliser for the baby's bottles. No, she did not – she sterilised the bottles by boiling them in a saucepan on top of the stove, a method familiar to most older Australians.

Example 2: This relates to a caseworker interview of young Aboriginal parents, both care leavers, who were temporarily separated while the mother and baby were in a supportive parenting placement. The interview record presents a picture of a young man who cannot manage his own finances and needs to be encouraged to take responsibility for managing them on his own. The reality is that their finances were carefully worked out so that, although they were managed by the mother, each of them had independent access to money when they needed it. This intelligent arrangement, adapted to their difficult circumstances while separated, was presented as a negative issue, not a strength.

These are very small examples, but repeated perceptions of this kind can accumulate into a file that appears to support a judgement of inadequate parenting skills or neglect of a baby. The constant battling of these perceptions is difficult and tiring, and by the time a matter comes to court, there is little chance of challenging the apparent evidence.

The system impacts of this issue, together with the impacts of Issues 4.3 and 4.4, are summarised in the next section.

4.6 Inevitability of removal under the current system (relates mainly to ToRs g) & i)

In this section we provide an overview of the trajectory from child abuse notification to removal, then make further comments on aspects of the court process.

4.6.1 Overview

From our experience, there are two critical points which determine the future of an Aboriginal child whose situation is being assessed for risk:

- when the child welfare department (currently FaCS) makes the decision that the child is at risk
- when the matter is heard by the Children's Court, which typically involves several hearings.

Our experience is that once the first point has been reached, the matter almost inevitably proceeds to the second point, and the outcome, in terms of decision making, is removal of the Aboriginal child from their family. Increasingly, this removal is until the age of 18 years. Given the inadequacy of cultural plans for Aboriginal children in care, this is likely to mean separation from community and culture until 18 years of age.

The system has a juggernaut-like effect on children, families and communities once an 'at risk' decision has been made. The reasons for this include:

- the contest between FaCS and its clients is an unequal one as:
 - clients and families do not have the resources that FaCS has to make their case to the courts
 - clients and families are exhausted by the process itself and by the trauma it involves.
- The court decision on a case generally marks a point of no return, as once a decision is made the following avenues are no longer available to challenge FaCS decisions:
 - the FaCS complaints system
 - the NSW Civil and Administrative Tribunal
 - the NSW Ombudsman.

In the next few sub-sections we provide some more details on how the process from notification to removal operates, including the use of evidence, the follow-on effects of a first removal, and the adequacy of contact provisions and cultural plans.

These matters can affect any children and families in whom FaCS has taken an interest, but they particularly affect Aboriginal children and families because of:

- the poor understanding of Aboriginal culture
- the poor understanding of Aboriginal child rearing practices
- the poor understanding of the realities of Aboriginal families' lives (eg socio-economic issues, trust, community obligations)
- the burden of trauma that underlies Aboriginal lives (now widely recognised in the literature).

4.6.2 Evidence

Courts rely on evidence. While the 'evidence' presented by FaCS in a particular case may seem reasonable on the face of it, the reality can be very different. I, Aunty Glendra, have personal experience of the way a mother's responses to a caseworker have been either misunderstood or misinterpreted by the caseworker, who appeared to relate the responses to her own frame of reference rather than attempting to understand the responses in the context of the mother's situation.

Once records of interview such as these become part of the files, they become 'facts', not opinions, and attempts by the client or family to set the record straight can be interpreted, to the detriment of the child's case, as 'focussing on themselves and their feelings rather than on the child'. This then becomes another 'fact' in the case. Multiple instances of this kind can then build the case for removal of the child.

4.6.3 Subsequent removals

Once one child has been removed, the parents' and families' histories of involvement with FaCS are used by it to support the case for the removal of the next child, and the next. When parents and families, affected by the pain and unjustness of earlier decisions, try to draw attention to these issues when FaCS is investigating the situation of a later child, this can be taken as more 'evidence' that they are not capable of putting the child's interests before their own.

This position contrasts with that of the Federal Circuit Court where Judge Sexton stated (in *Drake & Drake & Anor* [2014] FCCA 2950 (17 December 2014)), in a case involving an Aboriginal grandmother's care for her Aboriginal grandchildren, that:

... while relevant, the Court's primary focus should not be on the Grandmother's history of involvement with the Department in relation to her own children, but rather on the Grandmother's present capacity to care for her six Grandchildren.

In that same judgement, Judge Sexton returned the care of her grandchildren to the grandmother.

4.6.4 Contact provisions

While contact arrangements may seem reasonable on the surface, they can break down because of:

- the logistics involved (location of carers in relation to parents and family, sometimes compounded by several children being placed in different and distant locations)
- decisions by the carer on a given day
- last minute lack of a supervisor for supervised contact visits.

These factors in turn can be represented as the parents or family failing to turn up for contact visits, with the inference being that they are uninterested or unreliable.

4.6.5 Cultural Plans

That cultural plans are an area of concern is indicated by statements from the President of the NSW Children's Court, His Honour Judge P Johnstone, in two cases involving permanency planning. In both cases, he deferred a decision on the FaCS application because of inadequacies in contact and cultural planning:

35. More particularly, my impression at the moment is that the principles under s 13 of the *Care Act* have not been appropriately addressed by the Department. I have had cause to say something about this issue recently in my decision in *DFACS v Gail and Grace* [2013] NSWChC 4, in which I took the opportunity to be highly critical of the Department's attention to the s 13 principles, and I would have to say that, prima facie, I have a similar view in relation to this case. For that reason, at the moment, I propose to reject the permanency planning and I will adjourn while the issues of contact and cultural planning that under s 13, including a proper cultural plan, are more fully and appropriately addressed.

(The above extract is from a judgement in relation to *DFaCS and Boyd* [2013] NSWChC 9.)

Judge Johnstone also stressed, in his address to the Legal Aid Care and Protection Conference of August 2015 (available from <http://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/family-law/care-and-protection-conference-2015>) that "[t]he need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent". In the same paragraph (para 46), he also noted that he had "made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children". He goes on to refer, in para 48, to "a small working group [which] has been developing a template for a cultural action planning section in the Care Plan". He then adds, in para 50:

There has, for reasons that are unclear to me, been some resistance to the template in parts of the Department. In the past week I have had discussions with the new General Counsel, Alana Starke, and the Minister, Brad Hazzard, and I believe that the template will become a mandatory, integral part of every Care Plan developed for Aboriginal children.

If even the President of the Children's Court encounters difficulties with the Department, it does not take much imagination to appreciate the degree of difficulty encountered by Aboriginal families in these matters.

4.7 Level of care and support provided to children and young people in care and their carers (relates mainly to ToRs e), g), h) & i))

Aunty Glendra has specific experience in this area, which she will detail in the confidential attachment to this submission. Differences in views of a child or young person's needs can lead to tension between carers and caseworkers and their managers, and affect the relationship between carers and caseworkers, to the detriment of the interests of the child or young person, and the

caring capacity of their carer. Failure to value a carer's observations and conclusions can also lead to long delayed treatment and poorer outcomes for the child than would otherwise have been the case.

Another issue that weighs heavily on me, Aunty Glendra, is that so much money is spent on the out-of-home-care system, yet outcomes for children and young people are so poor. When you divide the cost of out-of-home care by the number of children in the system, the cost per child is extremely high. There must be alternative ways of managing the system so that that amount of money can go to specialised support for children in care and improved outcomes.

One example of alternative ways that I know of is the work of the New York Foundling (NYF) (as presented by Dr. Sylvia Rowlands, Senior VP of Evidence Based Community Programs, NYF, at the ACWA Best Practice Forum in November 2015), and the Child Success New York Project, which has played a significant role in "the staggering decrease of the number of children in foster care in NYC". I am not suggesting that NSW should automatically take on all aspects of programs from other places, with different cultures, but I am pointing out that it is possible, with political will, creativity, and cultural competence to create positive alternatives.

I also wonder about whether the funding system provides the right incentives for organisations to prioritise the needs of children and families, and work towards restoration to family. Payment to an organisation for bed nights, for example, is not an incentive to reduce the number of children in its care, nor is the pressure put on it to meet the bed-night targets it is funded for. There is an inherent contradiction here between meeting targets and restoring children to their parents. This approach could be regarded as creating a perverse incentive, and undermining efforts at restoration and preservation and supporting families.

4.8 Level of care and support provided to young people leaving care (relates mainly to ToRs g & i))

This is another area where Aunty Glendra has specific experience, which she will detail in the confidential attachment to this submission. That there is systemic failure in this area is also indicated by the following comments by the NSW Ombudsman, published in 2013 at https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0017/10880/The-continuing-need-to-better-support-young-people-leaving-care-web.pdf.

We were concerned that – 18 months after we published our leaving care review findings – Community Services was unable to report on the number of young people leaving statutory care with an endorsed leaving care plan. We therefore decided to initiate a further review of young people leaving care, with a specific focus on establishing whether there has been a discernible improvement in practice in relation to young people having a leaving care plan at the time of their exit from care.

The Ombudsman's general conclusion (p 6) from this further review is: "It is disappointing to report that, overall, there appears to be no significant improvement in leaving care practice since we examined arrangements for care leavers in 2009."

4.9 Political will and resources (relates mainly to ToRs a), b), g) & i))

The current child protection and out-of-home care systems need to change from the current model, which assumes that adding on to the 'mainstream' systems, principally through the adoption of Aboriginal child placement principles and the exercise of an assumed level of cultural competence, is sufficient to meet the needs of Aboriginal children and young people, families and communities. There is ample evidence that this model is not working. Changing it will require the political will to initiate the process for establishing Aboriginal community controlled systems for Aboriginal children

and young people. That political will also needs to extend to an examination of programs and service delivery, Commonwealth and State, and the way they interact, to ensure that they are contributing effectively to addressing the intergenerational issues, including poverty, that have a structural association with Aboriginal child abuse and neglect.

This change will also require resources, both for the process of engaging with Aboriginal people and communities on the establishment of the new systems, and for the planning, development, operation and review of the new systems, once the model(s) have been agreed. While this might require increased resources in the short and medium terms, in the long term the reduced costs to individuals, families, communities, governments and the economy would be considerable.

5.0 Conclusion: Lessons from Policy and Practice

The previous two sections have outlined what we have learned about the policy and practice of child protection in NSW as it affects Aboriginal children and young people, families and communities. Our experience, and what we have learned, is consistent with the experiences, and lessons from experience, of Aboriginal and Torres Strait Islander people across Australia. There is a wealth of material documenting these experiences, including, but not only, from the organisations referred to in Section 4.0.

However, the seminal report on lessons from practice and future directions for Aboriginal child protection remains the BTH report. BTH drew on the experiences of hundreds of Stolen Generations survivors and on other experts on the 'protection' system, and recommended the establishment of an Indigenous community controlled system for the wellbeing of Aboriginal and Torres Strait Islander children and young people. Its recommendations covered the child protection system, the out-of-home care system and the juvenile detention system. Aboriginal and Torres Strait Islander voices continue to refer to the BTH recommendations as the blueprint for the way to address the specific form of Aboriginal and Torres Strait Islander disadvantage which is manifested in the over-representation of Aboriginal and Torres Strait Islander children and young people in the child protection, out-of-home care and juvenile detention systems.

The reality is that, although Australian Governments commit themselves, in one way or another, to self-determination as the basis for engagement with Aboriginal and Torres Strait Islander people, the way it is practised in relation to child protection amounts to little more than participation in decision making at best, and a tick-a-box approach to Aboriginal and Torres Strait Islander placement principles at worst. The result is that critical Aboriginal organisations, and others working with them, are having to put their energy and effort into trying to wrestle inadequate policy frameworks and practice into something which does least harm to Aboriginal and Torres Strait Islander children, rather than being able to devote their considerable energy, insight, knowledge, skill and experience to ways of establishing an Aboriginal and Torres Strait Islander community controlled wellbeing system for their children and young people.

The evidence makes it blatantly obvious that the current system is failing Aboriginal and Torres Strait Islander children, young people, families and communities, and that it has been doing so for decades (some would say for two centuries). The Don Dale Centre issue is only the latest indication of failure, and one that re-emphasises the unnecessary progression from child protection and out-of-home care to juvenile detention. It seems unlikely that more changes to the 'mainstream' system to try to fit Aboriginal and Torres Strait Islander families and communities into it will have any more success than past changes. The only option that makes sense to us, in these circumstances, is to engage with Aboriginal and Torres Strait Islander children and young people, families, communities and organisations to begin building the type of Aboriginal and Torres Strait Islander community controlled system envisaged by BTH.

There is no inherent contradiction, as some have claimed, between Indigenous rights and Indigenous wellbeing. The available evidence, the most well-known being the work of Chandler and Lalonde on Indigenous youth suicide in Canadian First Nations communities, shows that culture protects wellbeing. This is not to say that no Aboriginal children are at risk of harm. However, Aboriginal people are well aware of these risks, experienced in assessing them, and more than willing to address them within their own system of governance (eg BTH and GMAR).

In summary, our principal conclusions are that:

- both the policy and practice of child protection and out-of-home care in NSW are inadequate in meeting the needs of Aboriginal children and young people at risk or potentially at risk
- the retention, within FaCS or any government agency, of responsibility for the protection and care of Aboriginal and Torres Strait Islander children and young people is a major risk to good outcomes for them.

Our argument for this includes the following points:

- no matter how good the policies appear to be, no matter how good a revised system might appear to be, no matter how much is invested in improving practice, and no matter how much is invested in prevention and early intervention, no child protection system or out-of-home care system can meet the needs of Aboriginal and Torres Strait Islander children and young people unless it is planned, developed, managed, implemented and reviewed by Aboriginal people themselves
- BTH provides the blueprint for how this could be achieved
- the net cost of following this blueprint is unlikely to be greater than that of the current system, which currently produces poor outcomes
- the only impediment remains the general unwillingness of Australian governments to share power with Aboriginal and Torres Strait Islander Peoples
- the Victorian Government has taken the lead in initiating dialogue on treaty with the Aboriginal people in that State
- the NSW Government could take the lead in initiating dialogue in a specific area where Aboriginal and Torres Strait Islander people have already indicated that change is needed – that is, Aboriginal community control of Aboriginal children’s wellbeing
- the NSW Government could initiate this dialogue:
 - within the NSW Aboriginal communities, using approaches to sovereignty already articulated by Aboriginal and Torres Strait Islander people (eg the voices of nations, and the ‘MacAvoy’ model of treaty negotiations, both of which are referred to in AHRC Social Justice reports), and building on the work of GMAR NSW
 - within COAG, which was envisaged by BTH as playing a crucial role in monitoring the implementation of BTH recommendations (although COAG never made the arrangements required for this to occur).

We have also concluded that, in the interim (ie until an Aboriginal and Torres Strait Islander community controlled system is in place), the NSW government needs to work very closely with Aboriginal families, communities, leaders and organisations to:

- ensure better results from the Aboriginal child placements principles and a greater level of cultural competence within agencies as a whole, and for individual staff members
- ensure greater attention to the structural factors associated with the abuse and neglect of Aboriginal children and young people.

6.0 Recommendations

The recommendations we make are designed to implement our conclusions, along with the points on which they are based. They allow for short term improvements as well as for the eventual implementation of an Aboriginal and Torres Strait Islander community controlled system for the wellbeing of Aboriginal and Torres Strait Islander children. We recognise that the implementation of this system will take time. However, action needs to begin now, and it is to this that our recommendations are directed.

The recommendations we make are provisional, as the future direction of child protection and out-of-home care for Aboriginal children and young people is a matter for all the Aboriginal communities in NSW. (This also applies to reform of the juvenile detention system.) The recommendations are also provisional because, while it would be very simple to suggest that specific organisations be given the task of addressing the issues we raise, the process of addressing the issues needs to be inclusive, and the interests of clients and organisations are not always identical. Clients, families and communities, as well as organisations, need to be represented as directly in the process as possible. One way of proceeding would be for the NSW Government to sponsor the establishment of an Aboriginal community controlled task force comprising relevant organisations and community leaders, as well as members who are independent of government and non-government organisations, and have direct experience of the child protection and out-of-home care systems. This is the approach that we have adopted, but we recognise that others may have different views.

Recommendation 1

That the Inquiry recommend that the NSW Government:

- sponsor the establishment of an Aboriginal community controlled task force to work in partnership with FaCS to:
 - address issues of concern about the operation of the Aboriginal child placement principles
 - deepen the understanding of cultural competence in government and non-government agencies and in the child protection and out-of-home care work forces
 - provide advice on the best ways to use, reshape or expand the NSW service system to address the structural factors associated with the abuse and neglect of Aboriginal children and young people in NSW
- adopt an inclusive approach to the membership of the task force, recognising that it needs to include relevant organisations and community leaders, as well as members who are independent of government and non-government organisations, and have direct experience of the child protection and out-of-home care systems
- allocate adequate funding for the establishment, support and activities of the task force.

Recommendation 2

That the Inquiry recommend that the NSW Government:

- investigate the options for full implementation, within NSW, of Recommendations 43a-53b of the *Bringing them Home* Report, which would essentially establish an Aboriginal community controlled child wellbeing system for Aboriginal children in this State
- seek to list the matter of *Bringing them Home* Report Recommendations 43a-53b on the COAG agenda, with a view to national implementation of the Indigenous community controlled child wellbeing system proposed by the Report.

(This recommendation is the same as the one made on this matter by the Aboriginal Justice Support Group.)

Recommendation 3

That the Inquiry recommend that the NSW Government:

- engage, initially, and at a minimum, with the Aboriginal community controlled task force (see Recommendation 1), Grandmothers Against Removals NSW, AbSec, SNAICC and the Social Justice Commissioner of the AHRC, on the most appropriate ways of implementing Recommendation 2 above
- acknowledge the right of the above people and bodies to bring other people or bodies they regard as appropriate into the engagement process.

(This recommendation is a variation on the recommendation made on this matter by the Aboriginal Justice Support Group.)

Recommendation 4

That the Inquiry recommend that the NSW Government:

- Implement the above recommendations according to the Aboriginal and Torres Strait Islander decision-making principles and frameworks inherent in the *Bringing them Home Report* of 1997, and in the recent work on self-determination itself, and self-determination and children's wellbeing, recorded in the Australian Human Rights Commission's *Social Justice and Native Title Reports* for 2014 and 2015.