
EARLY INVESTMENT –
'FINDING THE LEGAL FOUNDATION TO SUPPORT ABORIGINAL SELF DETERMINATION IN
THE CARE OF OUR FAMILIES IN TROUBLE'

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An Aboriginal Child Commissioner for Tasmania: giving the best placed people the legal right to deal with Aboriginal children

There are two fundamental issues for Aborigines in Tasmania. One is the issue of return of land and the other is the keeping together of the community, especially through our children. We all know about the policies of successive governments of removing Aboriginal children from Aboriginal communities. The results of those policies have had an enormous effect on the Aboriginal community's capacity to be able to move forward as a people. The problem has been compounded by an emphasis on individuals instead of dealing with our needs as a people.

It is for that reason that I am particularly pleased to speak on this topic as the Legal Manager for the Tasmanian Aboriginal Centre because, whilst I administer the Aboriginal Legal Service, the Legal Service is also responsible for liaising with the Aboriginal Family Support Program. That program is really the workers at the coal face dealing with Aboriginal children and families. It also deals with the Department and the Courts whenever there is a child at risk.

We also have Legal Service Field Officers who do not wait for the problem to get to the Courts. They go out into the community. That model has been in place now for nearly thirty years. It has the advantage of finding a problem before it becomes a real or legal problem and at least gives us a head start in sorting it out.

In addition to that of course we have the Aboriginal Health Service under the auspices of the Tasmanian Aboriginal Centre. The Health Service liaises with both the Legal Service and Family Support program.

In more recent times we have taken the initiative of setting up the lungtalanana program on Clarke Island. Clarke sits just south of Cape Barren. At lungtalanana we try to take our kids away from detention centres, at Ashley or from prison, and try to put them in an environment that gives them more scope to make something of their lives in the years to come.

What I want to talk about this morning for about twenty minutes (so those who thought I was going to give a fiery speech are going to be disappointed, and the rest of you pleased) is the existing administrative arrangements under the law, policies and practices in Tasmania dealing with Aboriginal children. I also want to talk about what changes need to be made to both those administrative arrangements and policies so that at the end of the day the Aboriginal children are getting the best deal possible. So I have some suggestions about change.

We all know there are basically three different laws that deal with children. They are the Commonwealth's Family Law Act, which is especially designed to deal with marriages and marriage break-ups, property settlements and what to do with the

children after the marriage has broken down. Of course the Commonwealth has been playing the field in this area, with the consent of the states, since 1975.

Interestingly, the Aboriginal community does not make much use of the Family Law Act. Where there is inter-marriage between Aboriginals and white people there is greater use of the Family Court provisions. Issues arising generally from broken relationships between Aboriginals are often kept away from the Courts. They are generally dealt with on an informal basis. This practice helps part of my argument about picking up the reality of how Aboriginals deal with broken relationships, about trying to adopt them for both policy and law.

The second piece of law that is most relevant is the Youth Justice Act 1997. That Act is the Tasmanian Act dealing with children who have come in contact with police through a conflict with the law, and have to be dealt with under the criminal laws of the state. The Youth Justice Act administers how those criminal laws will apply to a range of children, including Aboriginal children.

But the Act I am most interested in is the Children, Young Persons and their Families Act 1997. I will refer to it as the "Young Persons Act". That Act of course deals with the situation of children who have not come in to conflict with the law but are in a position where they have been neglected, or under threat of injury; or the family is unable to care for them; or not prepared to care for them; or they are not supervised; or if they are under the age of 16, they are becoming truant too frequently. It is to the Young Persons Act that I want to draw a focus. I will be explaining that under the existing arrangements since the 1997 Act came in, the Department works fairly closely with the Aboriginal workers at the Tasmanian Aboriginal Centre. The family support workers because are the ones who generally deal with families on the basis of trying to make sure there is food in the house, trying to sort out accommodation or deal with the Hydro being cut off. It is generally the family support workers at the Tasmanian Aboriginal Centre who are called on to try to fix this problem. Of course they will come across a range of circumstances that infringe upon the way families deal with the children.

The Department is not always called in by the family support workers. They will tend to try to deal with the issue themselves within the Aboriginal community. The success rate over twenty odd years has been remarkable - some of the young Aboriginal people, the subject of this policy approach, have gone on themselves to be very successful parents. It is evidence of the success of the program. The family support workers are often also called in by the Department when the Department comes across a problem eg. a complaint has been lodged or for one reason or another, the Department is involved in the removal of a child. In that case the family support workers try to act as liaison between the families and the Department, and if the matter goes to Court the family support workers again attend in that capacity to try to sort out a long term regime. Consequently, the Court, when it makes its order, is at least asked to take into account the long term needs of that child staying within the Aboriginal community.

The administrative arrangements under the Young Persons Act allows for an assessment. This is after there has been an intervention, or after a child has either been removed or is about to be removed. The assessment about what is to happen

in the immediate future of that child is done by the Department. The Secretary has responsibility for making the assessment and even taking the child into the Department's care for up to five days. After that five day period the Department, or the Secretary's nominee, is required to take the matter to Court and the Court can make a longer order. It is interesting to note that in those two early stages there is no legislative requirement for either the Court, or the Secretary, to involve the Aboriginal community. It is purely up to the Department as to what moves to make.

The second stage after intervention gives the Secretary responsibility for calling a family group conference. The Secretary is obliged to discuss with the Aboriginal family and the child who the facilitator of the family group conference should be. The facilitator is then required, under the Act, to consult a recognised Aboriginal organisation as to who should be at that conference other than those imposed by the statute. One of the compulsory people to be at these conferences is someone from the Department. There is no compulsory requirement for someone from the Aboriginal community to be there. Again there is an emphasis of keeping things away from the Aboriginal community and involving Aborigines in a more peripheral, less substantive way.

The facilitator, as I have indicated, can consult with the recognised Aboriginal organisation. It would be interesting to know whether there is any such consultations. I am not aware of any "recognised Aboriginal organisation" for the purposes of the Act. The Act is framed so that a problem with Aboriginal children requires the Department to consult a recognised Aboriginal organisation. The philosophy underpinning that, as I understand it, was to make sure the mistakes that were made after the Second World War are not repeated. In that period the policy in Tasmania was to 'deal with' Aborigines by taking the kids away and bring them up in white families, or white institutions, in the hope of making them white. There was a belief that imposing cultural values of white society would produce good white citizens.

We know of course that the trauma of Aborigines who are around the age of forty to sixty who were in that situation, is just enormous. It was an absolute failure as a policy. As I understand it, the involvement of Aboriginal organisations in the new Act is to make sure that everybody gets a view from the Aboriginal community about these bigger issues. But the way it is done is to only consult with, and consider, what Aborigines say. The outcome of a family group conference of course, even where Aboriginal families of the child and an Aboriginal organisation attend, is still subject to the approval of the Secretary. Now I can see that there is some common sense in that because the conference might come up with a whole string of arrangements that has financial implications for government. The Department may say we just cannot do that, for it is beyond our capacity. But this is already covered because the Department has a representative at the conference. So why is there this need for the Secretary to have the overriding say over the family group conference? It squarely raises the question again of to what extent the Aboriginal community is not making decisions about its children and what has not changed from the past experience.

Longer term issues like care and custody, and guardianship are made under orders of up to twelve months by the Secretary or after twelve months, by Court order. The

important consideration here is if it is possible for the Secretary to intervene in an Aboriginal family situation and ultimately make the decision that the child has to be removed, on what basis is the Secretary making that decision? Secondly, even if it is a Magistrate making the decision, on what basis, again, is the Magistrate making the decision?

Well, the legislators tried to spell the philosophy or principles behind the current approach in Section 54 of the Act which states: “The matters the Court must consider, (and elsewhere the same applies to the Secretary) in any proceedings under this Act the Court must: a) consider the best interests of the child to be the paramount consideration and secondly to observe the principles set out in Sections 8 and 9.”

I reproduce Sections 8 and 9 in full:-

8. (1) The administration of this Act is to be founded on the following principles:
- (a) the primary responsibility for a child's care and protection lies with the child's family;
 - (b) a high priority is to be given to supporting and assisting the family to carry out that primary responsibility in preference to commencing proceedings under [Division 2](#) of [Part 5](#);
 - (c) if a family is not able to meet its responsibilities to the child and the child is at risk, the Secretary may accept those responsibilities.
- (2) In any exercise of powers under this Act in relation to a child –
- (a) the best interests of the child must be the paramount consideration; and
 - (b) serious consideration must be given to the desirability of –
 - (i) keeping the child within his or her family; and
 - (ii) preserving and strengthening family relationships between the child and the child's guardians and other family members, whether or not the child is to reside within his or her family; and
 - (iii) not withdrawing the child unnecessarily from the child's familiar environment, culture or neighbourhood; and
 - (iv) not interrupting unnecessarily the child's education or employment; and
 - (v) preserving and enhancing the child's sense of ethnic, religious or cultural identity, and making decisions and orders that are consistent with ethnic traditions or religious or cultural values; and
 - (vi) preserving the child's name; and
 - (vii) not subjecting the child to unnecessary, intrusive or repeated assessments; and
 - (c) the powers, wherever practicable and reasonable, must be exercised in a manner that takes into account the views of all persons concerned with the welfare of the child.
- (3) In any exercise of powers under this Act in relation to a child, if a child is able to form and express views as to his or her ongoing care and protection, those views must be sought and given serious consideration, taking into account the child's age and maturity.
- (4) In any proceeding under this Act that may lead to any separation of a child from his or her family, other than a proceeding under [Part 4](#), the child's family and other persons interested in the child's wellbeing must be given the opportunity to present their views in respect of the child's wellbeing.

- (5) In any proceeding under this Act in relation to a child, the child's family and other persons interested in the child's wellbeing should be provided with information sufficient to enable them to participate fully in the proceeding.
- (6) All proceedings under this Act must be dealt with expeditiously, with due regard to the degree of urgency of each particular case.

Principles relating to dealing with Aboriginal children

- 9. (1) A decision or order as to where or with whom an Aboriginal child will reside may not be made under this Act except where a recognised Aboriginal organisation has first been consulted.
- (2) In making any decision or order under this Act in relation to an Aboriginal child, a person or the Court must, in addition to complying with the principles set out in [section 8](#) –
 - (a) have regard to any submissions made by or on behalf of a recognised Aboriginal organisation consulted in relation to the child; and
 - (b) if a recognised Aboriginal organisation has not made any submissions, have regard to Aboriginal traditions and cultural values (including kinship rules) as generally held by the Aboriginal community; and
 - (c) have regard to the general principle that an Aboriginal child should remain within the Aboriginal community.

Philosophically, these provisions are going in the right direction. But of course while we need to observe those principles, the key issue in deciding whether the child will be removed is what is the best interest of the child. Many lawyers, social workers and community people often wonder what does the best interest of the child mean. There have been some fairly recent developments that give us some assistance on what the phrase means.

In 1986 the Commonwealth Government set up the Australian Law Reform Commissioner to look into Aboriginal customary law. One of the issues the Law Reform Commission looked at was the continuing practice in the 1980s of Aboriginal children being taken away under the criminal law jurisdiction, or under the neglected children jurisdiction. The patterns in the 1980s around Australia, including Tasmania, seemed to be just as bad in the 1980s as they were in the dark past. So the Law Reform Commission made the point that the Federal Government needs to look at applying the “Aboriginal child placement principle”. It requested the Federal Government pass a law binding all the states and territories to comply with the Aboriginal child placement principles. It asked the Commonwealth to use its powers as it can legitimately play the field.

This principle was not adopted. It was referred to in the *Bringing Them Home Report* which, as you might remember, was finalised in 1997.

That report dealt specifically with the problem about the policies of state and territory governments taking children away from their families. The Report urged all to learn from the mistakes of the past and not repeat them. The *Bringing Them Home Report* again referred to the Aboriginal child placement principle and explained it in the following recommendations:

- 46a: That the national standards legislation provide that the initial presumption is that best interest of the child is to remain within his or her indigenous family, community and culture;
- 46b: That the national standards legislation provide that in determining the best interests of an indigenous child the decision maker must also consider:

- (1) the need of the child to maintain contact with his or her indigenous family, community and culture;
- (2) the significance of the child's indigenous heritage for his or her future well-being;
- (3) the views of the child and his or her family; and
- (4) the advice of the appropriate accredited indigenous organisation.

Other notable recommendations contained in the report are stated briefly as follows:

Recommendations:

47. In any judicial or administrative decision affecting an indigenous child the best interests of the child is the paramount consideration;
49. In any matter concerning a child the decision-maker must ascertain whether the child is an indigenous child and in every matter concerning an indigenous child ensure that the appropriate accredited indigenous organisation is consulted thoroughly and in good faith;
50. In any matter concerning a child the court must ascertain whether the child is an indigenous child and in every case involving an indigenous child, ensure the child is separately represented;
- 51a. That the national standards legislation provide that, when an indigenous child must be removed from his or her family the placement of the child, whether temporary or permanent is to be made in accordance with the Indigenous Child Placement Principle.

51b & 51c.

These recommendations specify the "order of preference" with respect to placement and the conditions under which "the preferred placement may be displaced". That is, the preferred placement would not be considered appropriate in circumstances where:

- (1) the placement would be detrimental to the child's best interests;
- (2) the child objects to that placement; or
- (3) no carer in the preferred category is available.

Interestingly Section 551(f) of the Tasmanian Act requires the Court to take account of the child's maturity, sex, background and culture, including any need to maintain a connection with the lifestyle, culture and traditions of the Aboriginal community. Nowhere does the 1997 Act even consider the presumption referred to back in 1986. Whereas the better view is that there is a presumption that absence exceptional circumstances, the child should remain within the Aboriginal community. The Tasmanian Act leaves it to a Magistrate or the Secretary to decide if there is a need for the child to remain in the Aboriginal community.

This policy represent a backwards step, neither trusting Aborigines to make decisions nor challenging the assumption that white institutions do it better.

And so, there seems to me to be two fundamental problems with the existing Act. One is the way it is administered - from the time of intervention up until the time that some final order is made. Secondly, the basis upon which the decision is made seems to be out of touch with developments that are happening nationally.

I note the North Americans brought the Indian Child Welfare Act in to effect in 1978 and they adopted a strong principle on the presumption. They said Indian children must remain inside the Indian communities. This is put stronger than the Commonwealth bodies put it where they are simply saying there is a rebuttable presumption that the Aboriginal child should remain inside the Aboriginal community. On this issue of just how understood is the need to apply this principle, see the Full Court of the Family Court decision in the marriage of B and R¹. The Court noted that there were four fundamental themes running through all of the literature dealing with Aboriginal children.

These are:

- a. In Australian society a child whose ancestry is wholly or partly indigenous is treated by the dominant white society as “black”, a circumstance which carries with it widely accepted connotations of an inferior social position.
- b. The removal of an Aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.
- c. Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self esteem and appropriate responses. Racism is a factor which Aboriginal children may confront every day. Because non-Aboriginals are largely oblivious to the fact, they are less able to deal with it or prepare Aboriginal children for it.
- d. Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life.

There is the Full Court of the Family Court telling the legislators if we are going to deal with this issue we have to deal with it in an appropriate way. If we are to make sure that Aboriginal children have the best opportunity that is available then the decisions have got to be made by the right people, on the right basis.

For the reasons I have outlined we need to revisit the provisions of the Tasmanian Children, Young Persons and Their Families Act. Unfortunately it seems the *Bringing Them Home Report* in 1997 may not have been available to the drafters of the Children, Young Persons and their Families Act which was enacted in 1997. That may explain why the Act was already out of date when it became law. It is sadly in need of reform to assist Aboriginal families.

What we propose, and we wrote to the Minister in June 2000, was that there needs to be some structural change to the way the Act requires Aboriginal children be dealt with. First of all we propose that instead of there being one Children's Commissioner, there should be two. One to deal with the broad community and a second one would be an Aboriginal Child Commission. That Aboriginal Child Commission would be run by an Aboriginal person with the appropriate

¹ In the Marriage of B and R (1995) 19 Fam LR 594

qualifications, and comfortably deal with the Aboriginal community and outside bodies. Secondly, the powers the Aboriginal Commission should have should be those that are exercised by the Secretary of the Department, by the facilitator of family group conferences and also by the Magistrates. Just because the Courts have always dealt with these things in the past does not mean they must always in the future. To refuse to question this approach is tantamount to using children as instruments of policy.²

When you look at whether an Aboriginal person or a Magistrate is best placed to make a decision about the interests of an Aboriginal child and their family there can surely be only one conclusion. We need to understand that there are policies and principles, and administrative procedures dealing with Aboriginal children that need to be changed. As I indicated we have not had a response from the Department or the Minister.

I think it is important to say in conclusion that if you look at the way the provisions of the Act deals with Aboriginal children it is not clear what the policy is intended to do. On the one hand it involves Aborigines but on a token basis, and if that is all it is meant to do, why involve us at all? If it is intended to give Aborigines a proper and appropriate say over what should happen to Aboriginal children on the basis that we are best placed to make that decision, then let the Act state it.

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This paper was downloaded from: <http://www.aic.gov.au/conferences/cypc/>.

² Richard Chisolm *Placement of Indigenous Children: Changing the Law* UNSW LJ 1998 vol 3