

SURVEILLANCE, STIGMA, REMOVAL: INDIGENOUS CHILD WELFARE AND JUVENILE JUSTICE IN THE AGE OF NEOLIBERALISM

Chris Cunneen*

I Introduction: The Context of Neoliberalism

This article explores the changes in Indigenous child welfare and juvenile justice in the context of neoliberalism. Neoliberalism is associated with a free market economy involving deregulation, government austerity, free trade and privatisation. One outcome of this has been the greater concentration of wealth and power. This paper is primarily concerned with the values and ideas that underpin neoliberalism. It is argued that neoliberalism has seen a disavowal of colonialism in understanding both child welfare and juvenile justice and is fundamentally assimilationist when it comes to Indigenous people. Two issues in particular stand out when considering the transformation of child welfare and juvenile justice under neoliberalism. The first is the role of managerialism and the related ascendancy of risk-thinking. The second is the rise of responsabilisation and welfare conditionality and its links with criminalisation. Both have led to a growing punitiveness in responses to Indigenous children.

The development of neoliberalism has coincided with both a decline in the welfare state and a rise in the penal state. In other words, the welfare functions of the state have contracted with more limited and conditional access to welfare support, at the same time as the criminal justice system has expanded significantly in its reach and become more punitive in its approach. Wacquant has argued that the USA has led the global spread of neoliberalism, with key ingredients of an expanding penal system or 'penal surge' and a retrenchment of welfare provisions.¹ Wacquant's analysis of the spread of neoliberalism and its effect on marginalised people—which in his work is primarily African Americans—has been influential.² As we have noted elsewhere,³ the differential impact of

more punitive laws, harsher criminal justice policies and practices, and tighter welfare eligibility and policing of welfare compliance have been noted in countries such as the USA,⁴ UK,⁵ Australia,⁶ and Canada.⁷ According to Wacquant 'neoliberalism correlates closely with the international diffusion of punitive policies in both the welfare and the criminal domains',⁸ and there is a need to conceptually and critically relink our analysis of social welfare and penal policies. Wacquant argues further that:

[t]he concomitant downsizing of the welfare wing and upsizing of the criminal justice wing of the American state have not been driven by raw trends in poverty and crime, but fuelled by a politics of resentment toward categories deemed undeserving and unruly.⁹

This raises questions of how we understand the categories of those 'deemed undeserving and unruly' and more specifically how we interpret the impact of neoliberalism on Indigenous people in the context of nation states with their own particular legal, penal and welfare characteristics and histories. Leading neoliberal states such as the USA, Canada, Australia and Aotearoa/New Zealand are also *settler colonial states* with significant internal nations of Indigenous peoples who historically have been systematically socially, economically and politically marginalised through various states' policies and practices. In this context, it is not surprising that neoliberalism has heightened the criminalisation of Indigenous peoples, while at the same time reducing Indigenous access to social services. More prosaically, several decades of neoliberalism have failed to significantly shift the entrenched levels of Indigenous marginalisation and inequality indicative across a range of housing, health, educational, income and employment indicators.

Much of the discussion on the impact of neoliberalism on Indigenous peoples has focused on the negative impacts and costs to Indigenous people (such as loss of traditional lands and environmental degradation) of the increased role of privatisation, 'free markets', trade liberalisation, and so forth.¹⁰ However, neoliberalism is not simply about particular economic imperatives such as marketisation, privatisation and a reduced role for the state (except notably in more punitive criminal justice and child protection spheres), it also reflects and promotes particular values and principles. These include the individualisation of rights and responsibilities; the extolment of individual autonomy; a belief in free and rational choice which underpins criminal liability, penalty and access to welfare; a denial of welfare as central state policy; the valorisation of a free market model and profit motivation as a core *social* value; and the denial of cultural values which stand outside of, or in opposition to, a market model of social relations.¹¹ Specifically in relation to Indigenous people, neoliberalism has seen a disavowal of colonialism in understanding both child welfare and juvenile justice needs and responses. Furthermore, neoliberalism is fundamentally assimilationist when it comes to Indigenous people because a free market model of social relations eschews cultural values that do not rest on a belief in unbridled individualism, and are instead built on social reciprocity and communal responsibilities. As Waters comments, 'a Western free-market economy within a neoliberal ideology just doesn't work in Aboriginal communities. The principles of self-interest and individualism remain too oppositional; they threaten the values and collective consciousness that sustain Aboriginal communities'.¹² Neoliberalism seeks to redefine the self as *entrepreneurial* and to integrate the self into the practice of government. Indigenous culture is defined as dysfunctional because it represents a *failure to make the right choices*: the failure to engage in the (neoliberal) world of 'real jobs' and the acquisition of property, and the failure to abandon reciprocity and 'welfare dependency'.¹³ As McMullen has written in the Australian context, 'neoliberals focus their attack on Aboriginal culture ... remote communities are written off as cultural relics, museum pieces and ghettoes of poverty and pointlessness'.¹⁴

As argued further in this article, particularly in the discussion on risk, neoliberalism has also led to particular discursive constructions of those who are 'welfare dependent' and 'criminal'. Crenshaw has drawn attention to the way neoliberal ideology constructs welfare dependency and criminality as manifestations of 'individual pathologies

and cultural deficits',¹⁵ which is a discursive disavowal of the importance of historical and structural causes of marginalisation. The neoliberal approach to poverty is to 'eschew major redistribution and emphasise moral discipline and markets'.¹⁶ The neoliberal solution for Indigenous people in Australia is to replace self-determination with a free market and privatisation, which, for example, is demonstrated in the approach to housing: Indigenous communal title to land is to be replaced by private land ownership, and social housing in remote communities to be provided at 'market' rent. Indeed, among neoliberal proponents such as Hughes, self-determination policies from the 1970s are the cause of the continuation of dysfunctional Indigenous cultures and the current 'apartheid' of remote communities.¹⁷

However, it is also worth considering the extent to which the struggle for Indigenous self-determination through Indigenous community-based approaches, in both child protection and criminal justice, *may be co-opted into and redefined* by the particular imperatives of neoliberalism, including a reduction in commitment to social welfare through funding less costly community alternatives, covert privatisation of services, and placing greater responsibility on families (and particularly women) to provide support under the guise of the community.¹⁸ Community-based approaches also face the danger inherent in the reframing of basic government obligations to meet human needs around housing, health, education and employment. Rather than being seen as fundamental human rights, they become tied to a discourse about community and family responsibility for child protection or crime prevention. If under-resourced, under-utilised and administratively co-opted Indigenous community-based agencies 'fail', it is used as further evidence of the need to assimilate Indigenous people into mainstream services.

The broader changes in economic and social policy brought about through neoliberalism have coincided with the rise of *responsibilisation*. Responsibilisation refers to the shift towards a mode of governance under which individuals, families and communities are increasingly held responsible for their own safety, economic security and social and physical wellbeing, which is no longer seen as the responsibility of the state. Indigenous community-based organisations can be re-defined to provide for a process of responsibilisation. In Rose's conceptualisation, this is 'government through the community' where a 'sector is brought into existence whose vectors and forces can be mobilised, enrolled, deployed in

novel programs and techniques which encourage and harness active practices of self management'¹⁹. Civic duties and responsibilities can be mobilised and developed by the state for particular purposes, including surveillance, control and intervention. The relationship between the state and Indigenous community-based organisations is more complex than Rose suggests because Indigenous community-based activities often reflect the practical struggle for collective self-determination. However, it is the case that at least some of those activities may be constituted by the state, which may design, establish and fund those activities and provide the regulatory frameworks within which they operate. In this sense, Indigenous community organisations are social entities that are inter-dependent with the state, and to greater or lesser degrees captured within. It can lead to what Craig and Porter, when discussing the impact of neoliberalism on international development policy, refer to as 'inclusion delusion'.²⁰ This analysis is particularly important in relation to Indigenous child protection and for understanding the contradictory and conflicting positions in which Aboriginal Child Care Agencies (ACCA) in Australia have been placed in relation to child protection services—a point I shall return to later.

More broadly, the politics of insecurity in neoliberal societies like Australia, Canada, the United States and Aotearoa/New Zealand have led to a preoccupation with and aversion to risk, uncertainty and dangerousness. One reaction to the 'ontological insecurity' generated by risk aversion is a decline in tolerance and a greater insistence on the policing of moral boundaries. As a result, the role of the state in representing itself as the guardian of internal and external security has become enhanced and there is a greater emphasis on order and conformity over difference. This insecurity and risk aversion has been accentuated in the post 9/11 world and the 'war on terror'—a war that is waged both domestically and externally. Respect for human rights and progressive reform of institutions (such as child protection and criminal justice) is more difficult in an environment of paranoia and punitiveness.

II Managerialism, Risk and Welfare Conditionality in the Neoliberal State

Two issues in particular stand out when considering the transformation of child welfare and juvenile justice under neoliberalism. The first is the role of managerialism and the related ascendancy of risk-thinking. The second is the

rise of responsabilisation and welfare conditionality and its links with criminalisation.

A The Rise of Managerialism and Risk-Thinking

Developments in public sector managerialism and risk-thinking have increasingly permeated criminal justice and social welfare policy over the last several decades.²¹ In both child protection and juvenile justice we saw the rise of risk-thinking from the late 1990s and in both cases they were closely tied to greater regulatory intervention and the growth of public sector managerialism. As we have noted elsewhere, 'managerialism provided the conditions for the re-framing of penal [and child welfare] problems and the rearrangement of long standing systems (such as institutional statistics) into a framework of risk'.²² In the area of juvenile justice, risk-thinking shapes how punishment is socially constructed and what juvenile justice intervention is meant to achieve. There are at least four different ways that the concept and measurement of risk is used in juvenile justice: in the context of risk and protective factors associated with offending behaviour; as an assessment tool for access to programs for young people under supervision or serving a custodial sentence; as a classification tool for young people in custody to determine their security ratings; and, as a generic measure for activating legal intervention (for example, 'three-strikes' mandatory imprisonment).²³

Neoliberalism has also impacted significantly on social work where the profession has been tied to the demands of managerialism and managing risk.²⁴ In child protection, risk assessment has

focussed on the forensic gathering of evidence in situations of suspected child abuse and neglect. Managerial risk-management responses, which aimed at controlling and prescribing child protection practices, contributed to the development of risk-averse practices that were generally event driven and focussed on issues of immediate safety. Family supportive practices [have] struggled to co-exist.
...²⁵

Social support has been reduced and become more authoritarian, particularly in the child protection sphere where requirements for behavioural change have replaced support services, and, according to Rogowski, social workers have become more like 'people processors' managing risk.²⁶

B Responsibilisation and Welfare Conditionality

As noted above, the broader changes in economic and social policy brought about by neoliberalism has coincided with the rise of responsabilisation and welfare conditionality. In a criminal justice context, the notion of responsabilisation has several interrelated components.²⁷ These include:

- Communities should take primary responsibility for crime prevention.
- Individuals should be held responsible for their own actions.
- Families, in particular parents, have a responsibility to ensure that their children do not develop antisocial tendencies.

Values of individual responsibility mean that those who commit crime are the authors of their own fate and ought to receive their 'just deserts'. If they continue to re-offend then mandatory three strikes legislation and/or long sentences justified by incapacitation and community protection may be imposed.²⁸

The values and policies of responsabilisation find their expression in the welfare sector with the rise of welfare conditionality, which by definition imposes greater obligations on citizens as a condition of receiving various forms of welfare support. These obligations are both performative and legal. They require citizens to modify their behaviour and undertake various activities (such as school attendance, job interviews and training); prohibit other activities (including 'three-strikes' social housing eviction policies); and have various legal consequences including both civil and criminal sanctions (for example, penal sanctions for failing to report income; civil consequences for breaching various legally binding agreements, including removal of children, eviction, and so on).

Welfare conditionality can impose extra burdens on the most vulnerable and those least able to meet additional conditions, as well as third parties (in particular, children).²⁹ New obligations imposed through welfare conditionality have involved increased systems of regulatory surveillance as a condition of receiving social services. Importantly, social welfare has come to be informed by the same values and philosophies as criminal justice: deterrence, surveillance, stigma and graduated sanctions.³⁰ These changes impact on marginalised groups. Welfare conditionality not only affects

child welfare policy, but also other intersecting aspects of social policy, including in particular social housing and welfare income. In the context of Indigenous child welfare, the demands of welfare conditionality cut directly across gains that have been made in relation to Indigenous decision-making through, in the Australian context, the development of Aboriginal Child Care Agencies (ACCAs). More specifically, responsabilisation in the child protection sector focuses attention on individual failings and inadequacies, and family dysfunction. Failure to exercise responsibility activates more punitive interventions. As I argue further below, this leads to forced 'consent' by families for their child's removal. Structural and institutional conditions, arising for Indigenous peoples from the long-term impacts of colonisation and contemporary marginalisation, are disavowed, and disempowerment is reproduced.

III Risk Assessment and Juvenile Justice

The concepts of risk (risk factors, risk assessment, risk prediction, risk management) pervade juvenile justice systems. When combined with government 'tough on crime' policies, the emphasis on risk can open the door to highly punitive and intrusive measures. Criminal justice classification, program interventions, supervision and indeed incarceration itself is increasingly defined through the management of risk. The assessment of risk in criminal justice involves the identification of statistically generated characteristics drawn from aggregate populations of offenders, including drug and alcohol problems, school absenteeism, rates of offending and reoffending, living in crime-prone neighbourhoods, single parent families, domestic violence, prior child abuse and neglect, high levels of unemployment, and low levels of education. These characteristics are treated as discrete 'facts' devoid of historical and social context.³¹ Criminogenic risk/needs assessment tools such as the *Youth Level of Service Inventory (YLSI)* used in Australia and Canada, for example, validate particular family relationships (the nuclear family) that may not be either as valued or as prevalent in Indigenous communities.³² Maurutto and Hannah-Moffat warn that few risk/need assessment tools have been examined to determine whether their criteria capture the particular situation of Indigenous people, and that risk assessment tools appear not to address the broader socio-cultural context or unique issues facing Indigenous people.³³ Aboriginality ceases to be founded in social and cultural relationships and can be redefined as another 'risk' factor. For example, take the following: 'over time, the probability of those juveniles, on

supervised orders in 1994-95 who are subject to multiple risk factors (e.g. male, Indigenous, care and protection order) progressing to the adult corrections system will closely approach 100 per cent'.³⁴ Too often, then, being Indigenous is reduced to a potential *risk factor* for involvement with the criminal justice system, akin to alcohol and drug abuse, offending history, and so on. Thus, Indigeneity is actively defined by and correlated with dysfunction.

A core problem is that contemporary socio-economic marginalisation of Indigenous people as an outcome of colonialism and maintained through ongoing laws and policies of exclusion disappears, and is replaced by risk. Paternalistic and authoritarian government approaches (such as we have seen in Australia and elsewhere) to, for example, school attendance, restrictions on alcohol consumption, and access to social security benefits are justified on the basis of risk, and reproduce Indigenous people as a highly controlled, surveilled and criminalised group. In this context, Indigenous activism in finding solutions to problems such as domestic and family violence, child abuse, and social disorder struggles to exist. It is often either not supported, or subsumed within government managed and controlled programs.

The fixation on risk can lead to extensive and intensive intrusions into the lives of Indigenous children and young people. Many risk indicators are associated with socio-economic marginalisation and given Indigenous families, children and young people *as a collective group*, are among the most socially and economically marginalised within settler colonial states, there is the obvious danger that they will receive more intrusive and punitive interventions. Indeed, the emphasis on neoliberal values of rational choice, self-interest and individual responsibility has led to more punitive approaches to those defined as recidivist, 'hard-core' offenders—those who are not amenable to diversionary programs, or community-based sentencing options. The disavowal of historical and intergenerational effects of colonialism, and the contemporary marginalising effects of welfare conditionality, means that Indigenous young offenders are recast as a juvenile criminal class—the racialised, criminalised Other.

A Indigenous Juvenile Detention

There is significant evidence to support the view that Indigenous young people are placed in the category of the

'hard-core' offenders who are less likely to receive juvenile diversionary options, and more likely to be processed through the courts, and then sentenced to detention. Nearly two decades ago the Australian Institute of Criminology noted that the long-term trends of Indigenous juvenile incarceration showed little cause for optimism in relation to the over-representation of Indigenous juveniles in detention.³⁵ Of particular concern were: the consistently high numbers of Indigenous youth in detention in NSW, Queensland and WA; the likelihood that very young detainees will be Indigenous; the apparently steady increase in the rate of detention of Indigenous juveniles in Australia; and an apparent upward trend in the proportion of Indigenous remandees to sentenced Indigenous detainees.

In the years since this observation was made, the situation has not improved. More than half (54%) of young people in detention in Australia on an average night in June 2015 were Indigenous.³⁶ Changes in Indigenous detention are contrary to the trends for non-Indigenous youth. The detention rates of young people in Australia steadily declined from the 1980s through to the early 2000s. At the beginning of the early 1980s the rate of juvenile detention was 64.9.³⁷ It reached a low point in 2004 at 25.5 and has risen since then. By 2012 the juvenile rate of detention was 37.6.³⁸ However, even after the more recent increases, the juvenile detention rate was only slightly more than half than it had been 30 years previously, although this decline has not been apparent with Indigenous young people. From the early 1990s (when rates become available for Indigenous young people in detention) to 2012 the Indigenous rate of juvenile incarceration actually increased by around 5% (from 413 to 437).³⁹ Furthermore, we know that Indigenous young people spend on average around 15% longer in detention than non-Indigenous young people, including both remand and sentenced young people,⁴⁰ and that Indigenous young people have a greater proportion of the detention population in the unsentenced (remand) category than non-Indigenous young people (57% compared to 46%).⁴¹

Much of the change over the last three decades in the lower detention rates for young people generally has been driven by the growth in more formalised pre-court diversionary options and the development of a range of intermediate sanctions which can be imposed by the children's court, as well as various legislative changes which have impacted on sentencing, ranging from the removal of indeterminate sentences for juveniles in the early 1980s, to

the establishment of sentencing hierarchies and principles applicable specifically to juveniles. However, as argued below, the growth in diversionary options has not benefitted Indigenous young people.

B The Failure of Diversion for Indigenous Young People

The most significant problem for Indigenous young people is that they do not receive the benefits of diversionary outcomes and the level of over-representation increases as Indigenous young people move through the juvenile justice system. In other words, Indigenous youth are least over-represented in the least punitive stages of intervention, and most over-represented at the point of police custody or committal to an institution.⁴²

For example, if we compare the way police intervene with Indigenous and non-Indigenous youth, the issue that stands out clearly is that Indigenous young people are most frequently dealt with by way of arrest and charge, while non-Indigenous youth are more likely to receive a far less punitive outcome of a police warning or caution. This differential treatment has been borne out in a number of studies in various states of Australia. Snowball examined the rate of diversion of Indigenous and non-Indigenous young people in New South Wales, South Australia and Western Australia, and found that in all three, Indigenous young offenders were more likely than non-Indigenous offenders to be referred to court, whereas non-Indigenous offenders were more likely to receive a police caution.⁴³ Even when age, sex, offence seriousness and criminal history were controlled for, the difference between Indigenous and non-Indigenous offenders in rates of diversion remained statistically significant.⁴⁴ Allard et al.'s study in Queensland found similar evidence. Indigenous young people were more likely to appear in court for a first offence than non-Indigenous young people, and were less likely to receive a police caution. New South Wales data also show the escalating intervention against Indigenous young people.⁴⁵ They comprised 20.5 per cent of youth conferencing referrals, 37.5 per cent of young people placed on community service orders, and 48.5 per cent of those sentenced to detention.⁴⁶

All this points to how Indigenous young people are treated differently from non-Indigenous young people in the juvenile justice system, tending to receive more punitive outcomes when discretionary decisions are being made. What we have

seen over the last several decades is a greater bifurcation of juvenile justice between those seen as eligible for diversion and those that are seen as the risk-bearing, recidivist, hard-core group that need great disciplinary intervention. This bifurcation clearly splits along racialised boundaries.

IV Neoliberalism and Indigenous Child Protection

The rapid rise over the last decade and a half of Indigenous child protection notifications and the removal of Indigenous children into care is well documented in Australia. For example, over the period 2001-2010 the number of Aboriginal children in out-of-home care in Victoria increased by nearly 80%,⁴⁷ in Queensland the rate of Indigenous children taken into out-of-home care more than tripled between 2002 and 2012,⁴⁸ and in WA the number of Indigenous children removed more than trebled in the 10 years from 2003 to 2013.⁴⁹

The evidence drawn upon in this section of the article emerges from a broader project on Indigenous civil and family law needs in Australia, known as the Indigenous Legal Needs Project (ILNP).⁵⁰ While there was variation between states and territories in Australia, focus group discussion and stakeholder interviews revealed the following as key issues in relation to child protection:

- a lack of community understanding of the way the legal dimensions of child protection work and what rights parents have in the system;
- the reluctance of parents to engage with child protection agencies due to mistrust and feelings of disempowerment;
- complaints of poor departmental practice due to shortages of staff and a lack of cultural competence among those working in child protection;
- the failure of child protection agencies to fulfil their statutory requirements, particularly in relation to cultural plans;
- allegations that child protection staff were obtaining consent to orders from parents without proper consent and, in some cases, through threats of permanent removal of children if consent were withheld;
- the failure of courts to scrutinise consent orders or to ensure statutory requirements were met, including formulating and implementing cultural plans and abiding by the Aboriginal Child Placement Principle; and

- lack of access to either Aboriginal and Torres Strait Islander or mainstream legal aid for various stages of the child protection process.

Three areas in particular are noteworthy in considering the links between Indigenous child protection and the broader discussions around neoliberalism. These are issues of consent, the role of Aboriginal Child Care Agencies and cultural considerations primarily in the context of cultural plans. I draw upon the interviews conducted as part of the ILNP research.

A Consent

There was widespread concern expressed to the ILNP by participants in Indigenous focus groups and by various, mostly Indigenous, organisations that Indigenous parents are coerced into consenting to orders in relation to the removal of their children. There are a number of subsidiary issues that flow from the question of consent, including powerlessness, access to legal advice and assistance, and the role of courts in scrutinising the practices of child protection workers.

Pressuring families to consent to orders can occur through a range of processes, as the following quote from an Indigenous legal service staff member (QLD) suggests:

Well, we sometimes work out that the consent wasn't exactly informed or in fact, they were sort of browbeaten into it or thought there was no other choice, or the old thing of trading off some older children for some younger children in order to get their signature on some sort of agreement. Child protection still does that. "You don't have a choice, you have to sign this." Informed consent is a big issue.⁵¹

A lack of understanding of the terms of what the parent has consented to can be and is exploited, as the following quotes from legal service staff in the NT and QLD suggest:

Parents are given applications with no interpreters, they are spoken to without interpreters, they're just given a chunk of paper and they don't understand what they are to do with it (NT Indigenous Legal Service staff).⁵²

They also end up in situations where they haven't realised that they've signed their children over until their children are maybe 18. I guess the question is around how consensual

these agreements really are (QLD Indigenous legal service staff).⁵³

It was clear from our interviews that child protection agencies actively discourage parents from obtaining independent legal advice, 'much preferring that those families are more vulnerable'(QLD Indigenous community organisation worker)⁵⁴. The absence of advice makes coercion easier for staff and the sense of disempowerment for Indigenous parents stronger.

A lot of parents are signing temporary protection agreements. ... So you can end up with a kid in care for 6 months ... and they never recommend that people get legal advice. I have never had a parent come to me and say 'the department wants me to sign this, can you explain it to me', but I have had an awful lot of parents at the end of 6 months, when they go to court because the agreement has expired, and I say to them well the kid has been in care for six months and they say 'yeah we signed a temporary protection agreement'. I say, 'can you tell me what that means?' 'Nup'. Nothing. That's a huge issue because by then you have had a child in care for 6 months and it is very hard to fight in court (NT Indigenous Legal Service staff).⁵⁵

We know ... that half of our clients do not get legal advice. Many of our clients do not understand all the factors. ... They are often tricked into signing documents and it's one of the things - for community to get legal education (so that they know that) as soon as they get child protection involved, to get a lawyer (Victorian Indigenous Legal Service staff).⁵⁶

We hear of threats and intimidation by departmental staff to families to get them to consent at a much earlier time so that it doesn't have to go to court (Qld Indigenous community organisation worker).⁵⁷

The Department is, in their Act, supposed to tell people to get legal advice but they don't (Qld Legal Aid staff).⁵⁸

Experiences of disempowerment in dealing with child protection agencies can lead to a failure to understand or assert legal rights, which can have significant ramifications for families.

I think often our clients don't have a concept of what their legal rights are in relation to Child Safety and their children,

and they're often misinformed by Child Safety about what those rights are (Qld Indigenous legal service staff).⁵⁹

Parents [are] in grave situations from not knowing their rights... And you know, as a parent, you are walking into a family case plan meeting and you just agree to do anything to get your kids back, to be honest. So that is a concern. This is all going on without any real representation for the families (Victorian Indigenous community organisation worker).⁶⁰

It appears that some courts (particularly in QLD and Victoria) are not actively investigating whether there actually was informed and un-coerced consent by parents to orders. Where there is a consent order, the court considers that the terms of that order are assented to by the family and so further investigation as to its terms is usually not conducted. A passive court contributes to child protection agencies pressuring families to consent to orders.

They [the court] don't question what has gone on before. They get to here, so the court doesn't know that someone has come to their front door and said 'sign this' or they've been brought into DHS [Department of Human Services] and told 'sign this or you won't get your kids back'. The court doesn't investigate that process that's happened beforehand because there is a consent order (Victorian Community organisation worker).⁶¹

In an era of interventionist and punitive approaches to child welfare, child protection systems appear to prefer to operate without basic safeguards for the rights of parents to consent freely on the basis of an informed position. At the same time, institutional processes reproduce a pathological view of Indigenous culture and parenting. In some respects this is not new,⁶² however, dysfunction has been reinterpreted and reinforced through the imperatives of risk and managerialism. At the same time, there is a failure of support systems for parents in need of assistance, and a failure to adequately fund public legal assistance for Indigenous parents.

B Cultural Plans

The requirement for cultural plans to be introduced in respect of Aboriginal and Torres Strait Islander children is meant as a basic protection for the child's Indigenous identity. Yet in the ILNP research there were widespread complaints concerning the failure to adhere to the

legislative requirement around cultural plans which had been designed to protect the rights of Indigenous children and families. It was widely reported that this requirement was not followed in either Queensland or Victoria.

The Victorian Aboriginal Child Care Agency (VACCA) in the 2009 Ombudsman's inquiry into child protection found that only 20% of Aboriginal children for whom a cultural plan was legislatively mandated actually had such a plan in place, and referred to this 'lack of compliance ... [as] a major concern'.⁶³ The inquiry found the DHS was failing to meet its statutory obligations and was in derogation of its duties under the *Charter of Human Rights and Responsibilities Act*.⁶⁴ The ILNP research certainly supports the argument of VACCA both in relation to cultural plans and Aboriginal Family Decision Making (AFDM).

I can tell you that [cultural plans] do not happen, really! And the courts should actually be making those inquiries. ... Often they aren't even made aware of that because they find it too hard work. ... It's not on their list of priorities even though it's legislated in the Act as a requirement. There is a case where over the whole year in terms of involvement there was not one single Aboriginal family decision made (via statutory Aboriginal Family Decision Making (AFDM)), even though the child's paternal grandparents are seeking custody of the child who is currently in a non-Aboriginal family placement out of home. Even though there is family, there is *all* of the makings of the Aboriginal decision making forum, but they just don't do it! They haven't done it! There is no real ramification for that. ... It's come up in cross-examination of the worker. You know, 'You are obligated to it, you haven't done it'. That's about it ... the whole thing is a joke really ... the whole thing becomes this academic theory that has got nothing to do with the practice (Victorian Legal Aid staff).⁶⁵

Similarly, in Queensland it was reported that the formulation and implementation of cultural plans within the context of case planning was variable at best, with very few consequences for the Department for failure to develop anything more than superficial compliances. Indigenous legal and community-based organisations have been critical of the Department of Child Safety's approach to culture which often fails to recognise connection with family as a cultural issue, and has an over-reliance on symbolic gestures such as NAIDOC day.⁶⁶ As a QLD Indigenous legal service staff member stated:

Doing up case plans, they just put in, 'this is the child's father, he belongs to the Wakka Wakka clan' or something, that's it. And the child attends NAIDOC day celebrations. A day. Connection with community is far greater than that.⁶⁷

At a basic level the failure to complete meaningful plans is part of a broader lack of cultural competence among departmental workers. However, at a deeper level it raises issues around the lack of validation and respect for Indigenous culture.

There's this huge frustration and despair on the part of Indigenous clients that there is a complete cultural mismatch between the system that they're interfacing with, Child Safety and the court system, who are making decisions about their children not living with them anymore. And there's this complete mismatch between the systems and the clients' understanding of family and community and how these decisions should be made. And it's very sad (QLD Legal aid staff).⁶⁸

The trivialisation of cultural plans is indicative of a very much deeper problem within the neoliberal logic of denying validity to Indigenous culture. The most extreme example in Australia was the NT Intervention, which was built on the denial of the worth of Indigenous culture and saw Indigenous culture as the fundamental cause of crime and child abuse. However, the denial of the value of Indigenous culture does not simply occur at the more overt ideological level, it is also reproduced through governmental practices around risk assessment which provides the apparent proof of dysfunctionality.

C Aboriginal Child Care Agencies

Aboriginal Child Care Agencies developed as Indigenous initiatives to counteract the removal of Indigenous children and their placement with non-Indigenous families. As Indigenous community-controlled organisations they can play a fundamental role in shifting the way child protection agencies work. The issue that arose in the ILNP research centred around the extent to which ACCAs have become incorporated into government child protection work at the cost of their independence and their ability to provide an Indigenous voice in decisions affecting Indigenous children.

To take Queensland as an example, on the face of it the *Child Protection Act* offers particular protections for Aboriginal and

Torres Strait Islander children and families. The Secretariat of National Aboriginal and Islander Child Care (SNAICC) has noted the following:

The *Child Protection Act 1999* (QLD) contains arguably the strongest requirements in the country for the participation of Aboriginal and Torres Strait Islander peoples in child protection decisions. It requires participation, through a recognised entity, in all significant decisions made for Aboriginal and Torres Strait Islander children under the Act, and consultation in relation to non-significant decisions (s6). Though consultation itself is a high standard for engagement, requirements for 'participation' suggest a much higher standard for the active engagement of recognised entities in decision-making ... the current recognised entity service model does not appear to align with either the formal requirements or the spirit of the legislation to enable participation and promote better outcomes for Aboriginal and Torres Strait Islander children and families.⁶⁹

In relation to the recognised entities (RE), the issues that arose in the ILNP research related to a lack of independence from the Department of Child Safety and their relative under-utilisation in decision-making concerning Indigenous children.

Currently the client for the recognised entities is the Department [of Child Safety], the Department fund the RE, the Department are legislated to consult and have the RE participate. The recognised entity is the Aboriginal and Torres Strait Islander organisation that provides cultural advice and assistance around the child protection process for the families, but more often than not are asked to support the decision-making processes that the Department has undertaken. More often than not, when they provide advice that is contrary it's not included in court reports or in affidavits (Qld Indigenous community organisation worker).⁷⁰

One very basic problem is that recognised entities are funded by the Department of Child Safety. As a QLD Indigenous legal service staff member noted:

The recognised entity that's set up to assist and support the children—we've been informed—are contracted to Child Safety. So they basically 'yes' that, and they don't do the cultural care plans. They're deemed as working [for]

Department of Child Safety. The client is Child Safety. The client is no longer the children.⁷¹

There is a clear conflict here and a lack of legislative guidance on the role of recognised entities. A QLD Indigenous community organisation worker stated:

There's no definition of consultation, there's no definition of participation, so it's completely up to the discretion of the Child Safety officer or the team leader as to the extent of the involvement. And there have been times where the consultation has been a phone call, 'There was nobody there, I left a message, therefore technically I have consulted, and I now have moved on'.⁷²

Alarming, a QLD Indigenous legal service member of staff member noted how a recognised entity worker had been disciplined for opposing a Departmental recommendation in relation to a placement.

Yeah, after she found out information from the subpoenaed documents, information the Department should have made available to the RE and the court and hadn't, that there'd been allegations against this potential carer. She said "No, I can't support that placement," and then she was disciplined quite heavily, went through a whole lot of employment issues because her employers at the RE actually took action against her for daring to speak out.⁷³

And further:

But also there was a child protection matter and the parents had an intellectual disability and the RE advised them to get legal advice and she got disciplined for that as well.⁷⁴

It was also acknowledged that recognised entities were discouraged by the Department from taking a more proactive role.

The other side of the coin is really having a focus on the rights of the child and I think a big player in that space should be the recognised entities. And more often than not, they're either not invited or discouraged by the Department from rocking up to court ... probably the biggest one is having an adequate workforce that can present at court in, I suppose, a professional way, in a way that's going to do a service to the clients that they're

representing. So we need to actually do some work on that, the first part is we need to be asked to the table, and the second part is that we need to make sure that we're ready when we get there (QLD Indigenous community organisation worker).⁷⁵

Many of the issues in relation to recognised entities raised during the ILNP research have also been identified in submissions to the Carmody Inquiry.⁷⁶ SNAICC noted in its submission to the Inquiry that recognised entities were restricted in their critique of government because disagreement could threaten continuance or renewal of their funding agreement, and further that:

Their participation is directed by the demands and proprieties of government, rather than the independent priorities of the service to achieve outcomes for Aboriginal and Torres Strait Islander children and families. This is particularly so for recognised entities as their participation in individual cases can only be enabled by request of the Department.⁷⁷

The Aboriginal and Torres Strait Islander Women's Legal and Advocacy Service has described the role of recognised entities as 'tokenistic'. 'Other than by paying lip-service to the provisions of the Act, we have never seen evidence that the Department takes the role of the recognised entity seriously'.⁷⁸ The greatest weakness of the recognised entity function is the lack of accountability or review of the use and consideration of cultural advice and support. According to SNAICC this lack of accountability or review, 'combined with the absence of any formal authority of input or decisions made by recognised entities, leaves their influence entirely dependent on the willingness of the Department and individual Child Safety Officers to seek, consider and utilise their advice'.⁷⁹ The Carmody Inquiry accepted that there was widespread dissatisfaction with the way recognised entities were currently operating.⁸⁰

Understanding the development and role of recognised entities in the broader context of neoliberalism returns us to the prioritisation of risk and managerialism in government decision-making at the expense of genuine participation. Perhaps the role of ACCAs are reflective of the 'inclusion delusion' noted previously, where the agencies lack any clear authority to provide an independent voice that might be contrary to departmental demands and priorities.

V Conclusion: Neoliberalism and the Discourse of Dysfunctionality

The ascendancy of measurements of risk, and the broader risk-thinking and managerialism within which it is embedded, provides the logic and science to the discourses of dysfunctionality which underpin juvenile justice and child protection approaches to Indigenous children and young people. As Lattas and Morris note:

Like the Durkheimian concept of anomie, dysfunctionality posits an absence of moral governance as the source of suicide, domestic violence, murder, alcohol and drug abuse rather than explaining their causes. Dysfunctionality posits a moral vacuum that needs to be filled by government and the solutions of practical public intellectuals who today rationalise neoliberal forms of governmentality by presenting them as grounded in social science.⁸¹

Thus the increased focus on risk and dysfunctionality within criminal justice and child protection has significant implications for Indigenous people, particularly in the struggle for self-determination. An understanding of crime and victimisation in Indigenous communities is removed from specific historical and political contexts. Mainstream discourses (including criminology and social work) increasingly understand Indigenous over-representation in criminal justice and child protection systems as the result of essentially individualised factors drawn from aggregate populations (as identified previously). Dehistoricising contemporary Indigenous marginalisation facilitates a discourse that presents Indigenous people and their cultures as 'the source of their own oppression and emphasises, in a contrastive manner, the worth of neoliberal values ... including the rationality of individual responsibility and fate'.⁸² Thus, the discourse of dysfunctionality rationalises a new form of assimilationism. Indigenous cultures are seen as pathological and the cause of dysfunction. Addressing this dysfunction necessitates government intervention through child removal and criminalisation, and a long-term solution of abandoning (by choice or legal force) Indigenous values for the 'mainstream'. The 'life-style choice' of being Aboriginal is deemed unacceptable.⁸³ As Garond notes, in neoliberal discourse, the mainstream is seen as a level playing field that is regulated by the market economy, and 'in which free-choosing, free-willing and self-motivated individuals get equal chances to flourish. [To participate] Aboriginal people must simply abandon their maladaptive cultural traits'.⁸⁴ If

they fail to abandon their ways, the more punitive aspects of child welfare and juvenile justice appear as legitimised interventions to force behavioural and cultural change.⁸⁵

Of course, the impoverishment and immiseration of Indigenous people did not simply 'fall from the sky'. It was actively created and maintained through processes of dispossession, and policies of disenfranchisement and social and economic exclusion. These processes of exclusion continue in various forms today, and child removal and criminalisation are two of the most important ways that exclusion is reproduced. For example, in Australia we know child removal is a predictor of juvenile justice involvement and long-term poorer social and economic outcomes.⁸⁶ We know that criminal justice institutions trap Indigenous people in ongoing cycles of re-imprisonment. In fact, the Indigenous re-imprisonment rate is much higher than the retention rate for Indigenous students at either high school or university,⁸⁷ and Indigenous men are two and half times more likely to be sitting behind bars in a prison cell, than sitting behind a desk and a computer in a university or tertiary institution.⁸⁸

The second flaw in seeing Indigenous people as simply a disadvantaged and dysfunctional group is that Indigenous people have specific rights as *Indigenous* peoples. Within the risk paradigm, human rights (both collective rights as Indigenous self-determination, and individual rights as children and parents) are seen as secondary to the membership of a risk-defined group. In other words, the group's primary definition is centred on the type of risk characteristics they are said to possess. Within criminology and social work these characteristics are invariably negative and represent Indigenous people as collectively dysfunctional. In this context it is difficult to conceive of Indigenous people as bearers of collective rights, or as having their own law and preferred solutions to social problems. Indigenous claims to self-determination are presented as irrelevant to solving the problems of social disorder and dysfunction that are increasingly defined as a threat of criminality from risk-prone populations. Overall, then, the problem with seeing Indigenous people as dysfunctional is that it leads to a deficit-based approach to public policy where Indigenous people are invariably cast as a 'problem to be solved', rather than as a people who have been actively oppressed and are demanding recognition of their fundamental human rights.

Lastly, to view Indigenous people through the lens of dysfunction is to deny cultural autonomy and agency,

and to ignore the resistance to settler colonial attempts to eradicate Indigenous people and their cultures. To expose the fallacy of ever-lasting Indigenous dysfunction, we only have to look at what Indigenous peoples have struggled to initiate and maintain. For example, for Aboriginal and Torres Strait Islander people, these have included night patrols, community justice groups, Aboriginal child care agencies, law and justice committees and so on.⁸⁹ Dominant modes of risk-thinking and managerialism also deny the validity and importance of Indigenous knowledges and methodologies. The ‘what works’ literature in both juvenile justice and child protection starts from very particular interpretations of risk and protective factors that are generated in the main by analysis of aggregate statistics which represent ‘dysfunction’. The validity (or ‘what works’) of programs and interventions are tapered to those that address a narrow set of factors that are in fact determined through positivist research paradigms. In this context, Indigenous interventions working to deliver social justice to Indigenous communities often fall outside the limited interpretation of ‘what works’, and policy makers and some academics argue that little or no ‘evidence’ exists of the efficacy of Indigenous responses to crime.⁹⁰

* Professor Chris Cunneen is professor of criminology in the Faculties of Arts and Social Sciences, and Law of the University of New South Wales. He is a conjoint professor at the Cairns Institute, James Cook University.

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