INDIGENOUS CHILD WELFARE POST BRINGING THEM HOME: FROM ASPIRATIONS FOR SELF-DETERMINATION TO NEOLIBERAL ASSIMILATION

Terri Libesman*

I Introduction

In 1997 the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families ('National Inquiry') released its report *Bringing Them Home ('BTH')*.[1] The National Inquiry found that almost every Indigenous family in Australia is affected by former government policies which enabled the removal of children from their families on the basis of their Indigeneity.[2] About a third of *BTH* addresses contemporary removals under child welfare, juvenile justice and family law. The National Inquiry found that human rights based law and policy reforms must be implemented to ensure that Indigenous families and communities in Australia never again suffer the forcible removal of their children because of their ethnicity.

The National Inquiry's recommendations recognised that the forced removal of children was part of a more extensive colonial project which dispossessed many Indigenous peoples of their country and culture. Within *Bringing Them Home* Indigenous child welfare is grounded in an historical understanding of colonialism, and its recommendations are founded in a human rights law and policy framework for transferring control from government departments to Indigenous agencies and communities. The implementation of these principles, as discussed below, has been stymied by bureaucratic and political resistance to the relinquishment of power. Their implementation is premised on and requires a depth of change across and within political and departmental infrastructures. *BTH*'s recommendations for radical reform generated debate and law reform within a liberal legal and political landscape. The difficulty with implementing changes which challenge established and historically entrenched bureaucratic and political structures is evident in the difference between the relative success in effecting legislative change and relative failure in translating this legislation into practice. This article argues that neoliberal political values, which have ascended in the two decades following the National Inquiry, further undercut and are incompatible with the meaning and purpose of the National Inquiry's child welfare recommendations and the associated advocacy and subsequent law reform.[3] While there are and remain deep impediments to implementation of the National Inquiry's recommendations within a liberal political paradigm, with the transition to neoliberal political values the framework and foundations of the *BTH* recommendations are undercut.

There is an extensive literature on neoliberalism.[4] For the purpose of this article neoliberalism is defined as a political rationality which extends liberal market economic values, as opposed to liberal political values, into the centre of politics. Within a neoliberal polity the political and social spheres are dominated by a commitment to developing market-ready individuals and policies which facilitate 'free' market success, with other spheres of value largely relegated to lifestyle choices. The moral engine of neoliberalism is a belief in 'personal responsibility' which in this context means individuals looking after their own needs and ambitions. Within this framework the over-representation of Indigenous children in Australian child welfare systems is framed as largely the result of personal moral failings rather than systemic inequality founded in historic experiences. There is a prevalent discourse within government debates and popular media which frames Indigenous families and communities as 'dysfunctional', 'pathological 'and in need of intervention to 'normalise' their lives.[5] This has been responded to through policies which encourage 'personal responsibility' and punish welfare dependence. Neoliberalism is distinct from classic economic liberalism in

that the state plays a role in creating 'free market' economic conditions. It is distinct from liberal political values as the core political commitment is to the market rather than classic liberal democratic values such as equality and the rule of law. These distinct neoliberal values are seen in the child welfare sphere in the high level of government intervention and expenditure directed at Indigenous communities which aims to modify Indigenous peoples' values and behaviour while at the same time reducing funding and transferring responsibility for services to the non-government sector.[6]

This article looks at five issues: first, *Bringing Them Home's* recommendations with respect to contemporary child welfare; second, the conceptualisation of a human rights framework for exercising jurisdiction with respect to Indigenous child welfare post the National Inquiry; third, the manner and extent to which the child welfare recommendations from the National Inquiry have been implemented with particular reference to very recent reforms which emphasise early permanent placement of children in out-of-home care; fourth, a brief review of two other major Australian reform programs which claim to address Indigenous child welfare, the Cape York Family Responsibility Commission and NT Intervention, which are embedded in neoliberal values; and finally, the paper concludes with thoughts on the difficulty with progressing the *BTH* human rights agenda in a political environment which embraces neoliberal values.

II Bringing Them Home

There is barely an Indigenous family in Australia who has not been impacted by Australian Government polices to remove children from their families and assimilate them into non-Indigenous Australian society.[7] The impacts are psychological and physical. They are pervasive. Consultations with Aboriginal and Torres Strait Islander parents and families relating to their current parenting needs and practices, and with respect to risks and strengths experienced in the raising of their children, consistently raise the themes of intergenerational loss and the need for healing.[8]

The National Inquiry found that the policy and practices of forced removals deprived children of their liberty, deprived families of their parental rights, involved abuses of power, breaches of guardianship duties and constituted a gross violation of human rights.[9] Children frequently experienced cruelty and abuse in the institutions and homes to which they were taken. It was common for children to be malnourished and hungry, cold and without adequate clothing or appropriate shelter, brutally punished and sexually abused, and to live in fear deprived of love or affection.[10] Some of the intergenerational effects of past removals identified by the National Inquiry include unresolved grief and trauma, behavioural problems including violence and substance abuse, loss of parenting skills, loss of cultural and community connection, depression and mental illness.[11] These factors, together with poor socio-economic circumstances, which are also a legacy of past colonial policies, contribute to the circumstances which underlie contemporary contact with child welfare departments.[12] The National Inquiry also found, and subsequent research confirms, that contemporary child welfare departments are also imbued with historical experiences and racist attitudes towards Indigenous families.[13] This is despite attempts by many to provide culturally appropriate services to Aboriginal and Torres Strait Islander families.

The National Inquiry made numerous recommendations with respect to reparations for past removals.[14] The Inquiry recommended with respect to non-repetition that national child welfare legislation with respect to Indigenous children be negotiated and adopted between Australian governments and key Indigenous organisations such as the peak Indigenous children's organisation the Secretariat of National Aboriginal and Torres Strait Islander Child Welfare ('SNAICC'); that this legislation enables binding agreements to be made between governments and communities and that Indigenous people have the opportunity to participate fully in decisions which affect their children (Recommendation 43). This recommendation provides that agreements would allow for the transfer of responsibility and control for Indigenous children's welfare to Indigenous organisations to the extent that communities have the capacity and desire to take responsibility for child welfare. It is also recognised that adequate funding and resources must be provided to support the measures adopted by communities and that the human rights of Aboriginal and Torres Strait Islander children must be protected regardless of whether an Aboriginal and Torres Strait Islander or non-Indigenous organisation or a government department is involved with the child. These recommendations are innovative and contrast with dominant conceptualisations of human rights as individual and regulatory.[15] They frame Indigenous children's rights as collective and political and complement other National Inquiry child welfare recommendations which address the child's individual rights.

Other child welfare recommendations made by the National Inquiry include: that minimum standards legislation for the treatment of all Aboriginal and Torres Strait Islander children and young people be negotiated by the Council of Australian Governments ('COAG') and peak Aboriginal and Torres Strait Islander organisations (Recommendation 44) and that benchmark standards be established for defining the best interests of the child (Recommendation 46).[16] The inquiry also recommended that requirements be established for consultation with accredited Aboriginal and Torres Strait Islander organisations (Recommendation 49). This recommendation recognises that a process needs to be in place both for identifying relevant organisations to consult with and for the consultation process to ensure that it is thorough and in good faith. The inquiry recommended that decision makers ascertain if children are Aboriginal or Torres Strait Islanders when they come to the attention of any statutory organisation (Recommendation 49). This recommendation was made in recognition of the fact that many children were and continue to have contact with child welfare departments without recognition of their cultural background and specific cultural needs.[17]

While an Aboriginal and Torres Strait Islander child placement principle had been recognised in a number of jurisdictions prior to the National Inquiry, the placement of children in out-of-home care is the most severe child welfare intervention and usually takes place after a welfare department has already had considerable contact with the family. The importance of consultation and participation at all stages of contact with a child is recognised in the recommendation that accredited Aboriginal and Torres Strait Islander organisations be consulted at each stage of decision making with respect to the child (Recommendation 49). The inquiry also recommended that legislative recognition be given to the Aboriginal and Torres Strait Islander Child Placement Principle, including the order of priority for the placement of children and that, wherever possible, their ongoing contact with their Indigenous family is ensured (Recommendation 51).

III Conceptualising Human Rights and *BTH's* Recommendations

Human rights are conceptualised in a number of different ways. The framing of rights, including the influence of this framing on justice advocacy is the subject of much contestation.[18] A powerful element of the recommendations from *Bringing Them Home* is the manner in which the collective and political interest of Indigenous communities in caring for their children is framed. This framing grew out of Indigenous advocacy at an international and national level, in particular the advocacy of the peak Australian Indigenous children's organisation SNAICC.[19] The aim of much child welfare advocacy after *Bringing Them Home* has focused on the transfer of jurisdiction, or aspects of jurisdiction, from child welfare departments to Indigenous children's organisations.[20]

While redemptive aspects of a rights framework have been mobilised by Indigenous children's organisations, the genealogical critiques of human rights niggle below the surface. Some of these critiques include: the colonial and Eurocentric origins of human rights;[21] the paradoxical nexus between human rights and 'free markets' and the way human rights often reiterate ongoing poverty through the apparently neutral frame of economic development;[22] the reiteration of hierarchical and racially charged dichotomies around the saved and saviours;[23] inequality in the space and form that Indigenous peoples' participate in human rights forums;[24] and the lack of effective implementation and enforcement of rights and the ubiquitous contingency of rights language.[25] Although these critiques are more powerful and searching with respect to the dominant conception of human rights as individual and universal, the issues which they raise are evident in the failure almost 20 years post the National Inquiry to translate adequately a human rights framework for Indigenous child welfare into better outcomes for Indigenous children. While cognizant of the above mentioned critiques, which contribute to understanding the limitations of translating human rights aspirations into outcomes, the main focus of this paper is on the cultural and political barriers to implementing the contemporary child welfare recommendations from *BTH* and how the values which underpin the recommendations are undercut by bourgeoning neoliberal values.

Human rights are most commonly conceptualised as universal moral rights which attach to each human being by virtue of them being human.[26] While this conception of universal rights has considerable political and ethical leverage, it is one which preferences dominant western values more than alternative conceptions.[27] An alternative conceptualisation is of human rights as the space of contestation between universal human rights ideals and their particular political manifestation.[28] Within this conception human rights are not

static standards, but rather a political space within which the meaning of rights and distribution of political power (ie, aspects of self-determination) are contested and created.

While both conceptions are and have been enlisted by Indigenous children's advocates in Australia, there has been post the National Inquiry an emphasis on the latter alternative conception. This is seen in the framing of Indigenous children's rights with respect to the right to self-determination and then advocating for the translation of this right into domestic legislation which recognises cultural safety, community identity and the incremental transfer of jurisdiction to Indigenous children's organisations - albeit in the form of delegated authority.[29]

There are paradoxes, but also many strategic, practical and political reasons for recourse to international human rights law. The right to self-determination within child welfare is predicated on recognition of the unjust colonial acquisition of absolute sovereignty and the need for redistribution.[30] The preference for framing child welfare rights in terms of the exercise of jurisdiction and self-determination rather than universal standards is because this both takes rights claims to the source of the inequality - the unjust and unjustified assumption of sovereignty—and enables recognition of plural cultural and political values. Within the child welfare space the unjustified assumption of sovereignty was manifested through legislation which enabled the state to assume control over Indigenous children.[31] 'Protection Legislation' enacted racially discriminatory powers which enabled state officials to remove Indigenous children from their families and to place them in institutions and non-Indigenous homes.[32] The exercise of self-determination with respect to child welfare has encompassed Indigenous people formally, through rights within child welfare legislation, regaining some control over their children through principles, such as the Aboriginal and Torres Strait Islander child placement principle and their right to participate in decision making with respect to Indigenous children who have contact with child welfare systems. However, these legal rights have never effectively been translated into practice. Further, the longer term aspiration of many Indigenous children's advocates has been to Indigenise child welfare.

In addition to claiming rights with respect to jurisdiction or shared decision making, Indigenous organisations have also used human rights strategically to provide a political forum to contest claims when domestic avenues for challenge have been foreclosed, which they often are and historically have been, for Indigenous peoples in Australia. The failure to adequately implement the recommendations of the National Inquiry with respect to contemporary Indigenous child welfare have, for example, been commented on by the Committee on the Rights of the Child in response to Australia's periodic reports on compliance with the Convention on the Rights of the Child.[33] Human rights have also been used to claim and publicise breaches of established international principles such as equality and non-discrimination and in this way draw upon universal moral conceptions of rights.

The human rights promise has not been adequately realised for Indigenous children and this raises the question of whether more than rights advocacy is needed or if rights advocacy needs to dig deeper to respond to the inequality and injustice which contemporary neo-liberal politics, in the wake of colonialism, generates and perpetuates for Indigenous children, families and communities. The failure of human rights reforms is evident in the statistics outlined below. The failure to effect change has generated community groups such as Grandmas against Removals and SNAICC's Family Matters initiative which are responding to crises in Indigenous child welfare. Observations made by people such as Aunty Hazel, from Grandmas against Removals, echo the comments made by Indigenous organisations to the National Inquiry nearly 20 years prior: 'I'm not saying there's no need for these services, but you've got to work with the families to deal with this issue, not rip them apart'.[34] Submissions from Indigenous organisations to the National Inquiry acknowledged that there were serious issues with respect to Indigenous children's welfare and well-being that need to be addressed yet not a single submission believed that child welfare departments were helping.[35]

IV Child Welfare Reform Following the National Inquiry

A Over Representation of Indigenous Children in Out-of-Home Care

The statistics of child welfare which are outlined below demonstrate the failure to translate the human rights aspirations expressed in *BTH* into practice.[36] In 2013-14, Aboriginal and Torres Strait Islander children were 9.2 times more likely to be in out-of-home care than non-Indigenous children in Australia.[37] As of 30 June 2014, 43,009 children were in out-of-home care and 14,991 of these children were

Indigenous. That means more than one in three children in out-of-home care (34.9 per cent) are Indigenous though they make up only an estimated 4.2 per cent of all Australian children and young people according to the Australian Bureau of Statistics. These statistics under-estimate the over-representation of Indigenous children as a result of a failure to identify all Indigenous children in the raw data.[38] For young children, the rate disparity is even higher, with Indigenous children aged 1–4 years being 11 times more likely than non-Indigenous children to be in out-of-home care at 30 June 2014.[39]

This disparity has been growing since 2000. The graph below illustrates the increasing disparity between the rate of placement of Indigenous compared to non-Indigenous children in out-of-home care between 2011 and 2015.

If an Aboriginal child is to be placed in out-of-home care, legislation in each jurisdiction prescribes an order of placement.[40] The placement principle is an acknowledgment of the importance of Indigenous culture and family connection for Indigenous children and also recognises the destructive impact which the history of Protection and Assimilation policies has had on Indigenous peoples. In each jurisdiction the Aboriginal and Torres Strait Islander child placement principle has had a similar descending order of placement for children who need to be placed in out-of-home care. The first preference is to place the child with his or her extended family or kinship group, the second preference with his or her local community, and the third preference with another Indigenous family in the area. If this order of preference is not practicable or in the best interests of the child, then he or she will be placed with a non-Indigenous family.

Children in out-of-home care are most likely to be placed with relatives or kin and this is particularly so for Indigenous children (67 per cent). However, we do not have clear data with respect to Indigenous children placed with non-Indigenous kin or consistent national guidelines for implementing the placement principle. There are many accounts of departmental failure to locate suitable Indigenous kin through the department's lack of community connection and their failure to liaise with or adequately fund Indigenous out-of-home care organisations to make and support placements. Further, as outlined below, the recent enactment of permanency planning legislation across all Australian jurisdictions undermines the placement principle, and associated legislative rights, which aim to

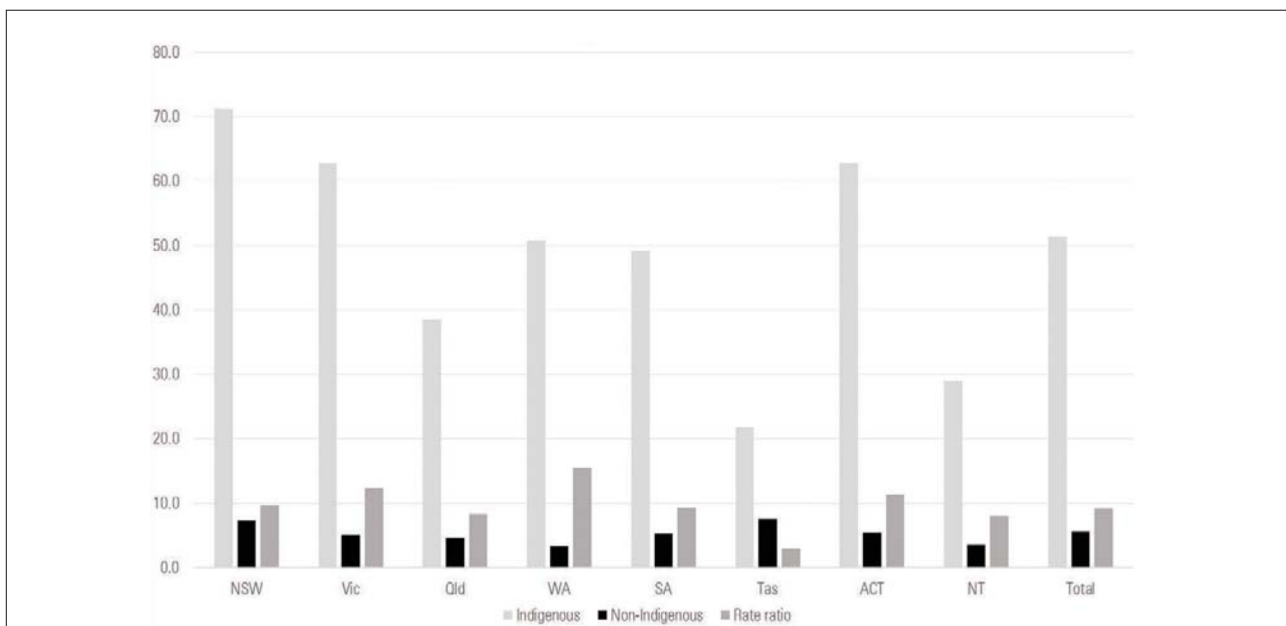

Figure 1. Rate of Indigenous and non-Indigenous children in out-of-home care by state and territory in Australia, as at 30 June 2014. Source: AIHW *Child Protection Australia 2013–14* Table 5.4, page 51.

support Indigenous children to grow up in their Indigenous families and communities.

B Law Reform Post-*Bringing Them Home*

The legal reforms to child welfare legislation post-*Bringing Them Home* have never matched the aspiration within *Bringing Them Home* to decolonise child welfare. The National Inquiry concluded with respect to contemporary child welfare:

> For many Indigenous communities the welfare of children is inextricably tied to the wellbeing of the community and its control over its destiny. Their experience of 'the welfare' has been overwhelmingly one of cultural domination and inappropriate servicing, despite attempts by departments to provide accessible services. Past and current legislative and administrative policies, together with bureaucratic structures and mainstream cultural presumptions create a matrix of 'welfare' which cannot be reformed by departmental policy alone. If welfare services are to address Indigenous children's needs, they need to be completely overhauled.[41]

A focus of Australian Indigenous children's organisations advocacy after the National Inquiry has been on self-determination, equality and cultural security for children.[42] This has resulted in incremental law reform which provides for Indigenous children's organisations and in some jurisdictions families' participation in decision making. The scope of both the power, which is usually delegated, and the reach of responsibility exercised by Indigenous organisations with respect to child welfare differs nationally. Child welfare is the responsibility of states and territories. There are therefore seven different child welfare systems in Australia. Despite different arrangements for recognition of Indigenous peoples' participation in child welfare decision-making, there was a trend after the National Inquiry, across jurisdictions, to *legally* recognise aspects of Indigenous peoples' responsibility for and authority with respect to their children's well-being. However, child welfare reforms since 2013, which focus on the early permanent placement of children in out-of-home care and have been propagated within a broader neoliberal policy context, challenge the precepts of self-determination and community control which underpin the National Inquiry's child welfare recommendations. Indigenous children's organisations and communities are facing the dual impediments of failure to implement rights which are accorded to Indigenous families and organisations within the legislation and reforms which

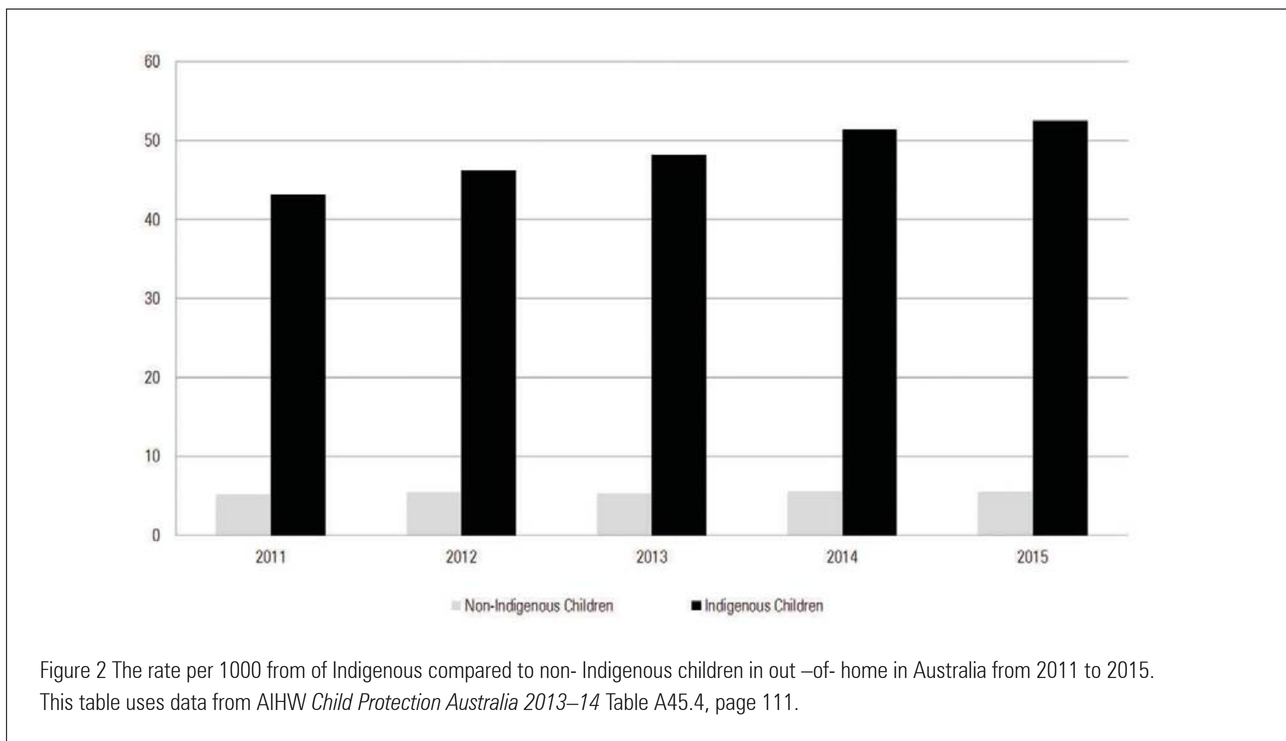

Figure 2 The rate per 1000 from of Indigenous compared to non- Indigenous children in out –of- home in Australia from 2011 to 2015.
This table uses data from AIHW *Child Protection Australia 2013–14* Table A45.4, page 111.

prioritise the early placement of children in out-of-home care over other values which are used to determine the best interests of the child.

Child welfare reforms which recognise Indigenous culture and participatory rights have extended the Aboriginal and Torres Strait Islander child placement principle to preference not only culturally appropriate placements in out-of-home care but also to transfer delegated responsibility for aspects of child welfare from departments to Indigenous organisations. Advocacy around cultural care and the right to self-determination has created a legal space for claims with respect to Aboriginal participation in all spheres of child welfare decision making from early intervention, to participation in child welfare processes from the point of notifications to children's court decision making and placement in out-of-home care if necessary. For example, in all states and territories legislation requires that Indigenous organisations, and in some jurisdictions also family, must participate in all significant decisions which involve Aboriginal children and in some jurisdictions, must be consulted about all other decisions.[43] In four jurisdictions (Queensland, South Australia, Victoria and Western Australia) there is legislative provision for the gazetting or designating of Aboriginal and Torres Strait Islander organisations, which has formalised their role in decision making. Designated or gazetted organisations such as the Victorian Aboriginal Child Care Agency ('VACCA') have developed into large organisations, which are respected by all stakeholders in child welfare, including government departments and non-Indigenous NGOs. Three jurisdictions specifically refer to Aboriginal and Torres Strait Islander self-determination.

Despite these legislative reforms, principles of self-determination and participation have largely in practice been ignored. For example, in NSW Indigenous families, kinship groups, representative organisations and communities have a right to participate in decision making by means approved by the Minister.[44] However, no specific means for this participation have been put in place. A frequent complaint is that Aboriginal people are inadequately consulted with their opinions given little weight, that their voices are often not heard in the Children's Court, and that the placement principle is applied without consulting relevant family and community members, leading to a loss of children from Aboriginal families and communities. Further, we continue to hear stories not only of failure to implement participatory rights, but also of arbitrary, discriminatory and unfair conduct by child welfare departments.[45]

The responsibility for Aboriginal children in out-of-home care in NSW is being transferred to Aboriginal organisations. However, this transfer is taking place in the context of permanency planning legislation which requires a permanent placement of children with a carer other than their parents after 6 months for children under 2 and after 12 months for older children, if restoration is not possible within this time frame. Frequently, the support which is necessary to enable parents to address the issues necessary for restoration is not available in the time periods prescribed and the time periods even with support are inadequate to address deep set issues such as: homelessness, drug dependency and family violence which are often associated with child protection interventions. There is a dissonance between the recognition of wrongs to children who were removed under prior government policies because of their Indigeneity and the lack of understanding or support for the intergenerational impacts of these experiences, such as drug and alcohol addiction, which are part of the lives of many contemporary child welfare clients.

In Victoria, VACCA provides a range of services including Laikdja, the Aboriginal Child Specialist Advice Support Service ('ACSASS') which provides advice and contributes to the case planning and decision making for all Aboriginal and Torres Strait Islander children who have contact with child protection services in Victoria. ACSASS is involved from the point when the Department is notified about a child to involvement in compliance with the placement principle if the child needs to be placed in out-of-home care. However, there has been insufficient funding for this role to be substantially performed; the advice sought has often been obtained in a superficial manner and then not given adequate weight; the agency has not had the capacity to participate in court proceedings; and the larger number of Aboriginal children in out-of-home care are looked after by non-Aboriginal agencies.

The delegation of responsibility to Aboriginal children's organisations such as VACCA, within an established bureaucratic matrix which has been resistant to relinquishing power, and particularly resistant to changing entrenched practice, has made the transformation of practice by Indigenous children's organisations very difficult. They have not only had inadequate resources to develop culturally

based service delivery, but have had to develop their capacity with the impediment of layers of culturally inappropriate tools for the protection of children such as the Looking After Children ('LAC') documentation for monitoring children in out-of-home care's development.[46] For human rights reforms to be effective, in addition to law reform there needs to be substantive change at a bureaucratic/service delivery level. There also needs to be sufficient funding to address the underlying causes of neglect and abuse. However, the allocation of significantly greater funds to VACCA in 2016 - which is welcomed - takes place within the context of permanency planning legislation which mandates that children be placed permanently in out-of-home care, if restoration is not possible after a cumulative period of 12 months out-of-home, with an extension to a maximum of 24 months in exceptional circumstances.[47]

Similar early permanency planning reforms have been implemented in all Australian jurisdictions.[48] Permanency planning will have a disproportionate impact on Indigenous children because they are already seriously over represented in the out-of-home care system and prior to implementation of these reforms have remained in out-of-home care on average for significantly longer than other children.[49] The likely outcome is many breaches with respect to cultural care planning and the placement of complex and high needs children in less than ideal homes to comply with statutory time frames. The breakdown of many of these 'permanent' placements is likely partly because the children and young people often have significant problems which place stress on the placements, partly because carers will be taken because they are available rather than for their match with the child, and partly because supports such as respite care will no longer be available. A second and more problematic scenario is that less than ideal permanent placements could be made, with the loss of departmental oversight, and children and young people could face further abuse in their 'permanent' placement. Even where these adverse outcomes do not eventuate, the court does not oversee ongoing contact arrangements with birth families. The likely outcome of this is significant loss of family connection.

With the implementation of short time frames before permanent removal the requirements for cultural care planning for children in out-of-home care has been strengthened in some jurisdictions. For example, the *Children, Youth and Families Act* 2005 (Vic) requires that the Secretary to the Victorian Department of Human Services must prepare and monitor the implementation of 'a cultural plan for each Aboriginal child placed in out-of-home care under a guardianship to the Secretary order'.[50] Amendments to the Act have extended this requirement from March 2016 to all children in out-of-home care, and not just those on guardianship orders.[51] The Act also provides that the Court cannot make a permanent care order for an Aboriginal child unless it has received a report from an Aboriginal organisation recommending the order and a cultural care plan has been prepared for the child.[52]

However, cultural recognition requires more than cultural care plans. It requires support for communities to look after their own children. There is considerable anxiety amongst Indigenous child welfare advocates and organisations about the impact which permanency reforms will have. Concerns include the lack of resources to support parents within the prescribed time frames, the lack of available carers to look after the increased number of children who will be placed in permanent out-of-home care and the lack of support or oversight with respect to vulnerable children who are placed in permanent care arrangements including guardianship and adoption. The short time frames for permanent out-of-home care placements together with inadequate resourcing to support finding culturally appropriate placements, and further inadequate resourcing to support children and young people who are placed in out-of-home care, suggests that what has to date been inadequate implementation of the placement principle, could become an unprecedented loss of Indigenous children from their families and communities. The legislative reforms around early permanent placement of children in out-of-home care in all jurisdictions cut directly across the core aim of reforms post-National Inquiry: to return control of Indigenous children back to their Indigenous families.[53]

Bureaucracies have powerful histories and internal imperatives which require more than legislative reform to transform. The legislative reforms around participation and cultural care which have been implemented have been incremental, partial and are routinely breached. Further, the more recent transfers of responsibility for out-of-home care, and other aspects of departmental responsibility, to Indigenous organisations, in jurisdictions such as NSW and Victoria, are taking place within a political environment of cost cutting, privatisation of public services

and individualisation of responsibility. Whilst permanency planning is justified on the basis of the importance of early and secure attachment for children and young people to their carers, it provides a way of exiting children from out-of-home care, which cost $2.2 billion nationally in 2013-2014.[54] It is also a way of rapidly reducing the alarming out-of-home care statistics. The preference in legislation for adoption and then permanent long term placement is a way of privatising responsibility for some of the nation's most vulnerable children. (In some jurisdictions, such as NSW, adoption is provided as a final option rather than first preference for Aboriginal children). Within this political environment there is a blurring of the distinction between aspirations for self-determination and delegation of responsibility through contractual arrangements. The former empowers Indigenous peoples and is founded in a sharing of political powers while the latter transfers responsibility, within a framework which at large retains the political, social and economic status quo, without adequate resourcing, and is bound by state child welfare laws and regulations. Such delegations of responsibility risk excising the most vulnerable and difficult of child welfare clients from government to Aboriginal, and other non-government agencies, without addressing the systemic and historical factors which underpin child welfare needs.

The problem with transferring responsibility without adequate resources or authority is evident in Canada, where much fuller delegation of child welfare responsibilities to First Nations Caring Societies has taken place. First Nations Caring Societies are funded to provide departmental child welfare services to First Nations children on reserves with a funding formula which incentivises removal of children and which is inadequate to enable compliance with the Provincial and Territory legislation with which the agencies are required to comply.[55] The First Nations Child and Family Caring Society of Canada and Assembly of First Nations filed a discrimination claim against Canada in 2007 claiming inequality in funding of First Nations children' services on reserves. Canada challenged this claim on technical grounds, delaying a substantive hearing of the evidence with 8 appeals. The Canadian Human Rights Tribunal found for the applicants on January 2016. At the time of writing, the Tribunal had received submissions with respect to implementation of its recommendations, which require immediate change to the funding formula to enable Caring societies to deliver culturally-based and equitable child welfare services.

C Poverty and Child Welfare

The majority of Aboriginal and Torres Strait Islander children are removed because of neglect which is closely associated with poverty. For example, in 2013-2014, 41 per cent of Indigenous children's substantiated findings were for neglect compared with 22 per cent for non-Indigenous children.[56] Structural inequalities, which underlie and perpetuate poverty, are prevalent in most Aboriginal and Torres Strait Islander communities and inequality in Australia is increasing.[57]

Child welfare law and practice operates within a broader framework of social, political and legal affairs. While *BTH* and Indigenous advocacy has framed child welfare as a community well-being issue this is all but negated within the contemporary child protection framework. The largest budgetary expenditure on child welfare remains for out-of-home care. A reduction in this expenditure is being addressed with the law reform referred to above through exiting children permanently out of the system rather than dealing with the underlying inequality which has driven neglect. Parents are focused on individually through, for example, parenting contracts and parenting plans, which require them to fix their parenting. This is within a context where resources are frequently not available, not culturally suitable, and referrals often take as long as the time frame provided before children are permanently removed. Looking after children while living in poverty makes all the challenging aspects of raising children, and particularly responding to welfare department requirements, more difficult. For example, undertaking parenting courses while homeless, addressing addiction whilst struggling to put food on the table, protecting children from domestic violence whilst having no alternative accommodation, are all scenarios which Aboriginal parents, usually single mothers, subject to child welfare interventions routinely face.

While time frames for permanent removal are reducing, and responsibility for the ongoing welfare of the most vulnerable children is being privatised through contract arrangements with non-government agencies and to individuals through guardianship and adoption, the services to support Aboriginal families and communities are being cut. It is these services, in conjunction with early intervention and family support, which are needed to enable families to look after their children at home. The Abbott/Turnbull government took half a billion dollars out of Indigenous services prior

to the 2016 budget and this was not restored in the 2016 Turnbull/Morrison budget.[58] These are the very services which parents and families rely on to protect their rights, such as legal representation in care and protection proceedings, housing to provide a safe home for children and young people, and support for victims of domestic violence. Policies which combine austerity, such as restrictions on sole parent pensions, with punitive measures such as cashless welfare cards, impact particularly severely on Aboriginal and Torres Strait Islander women and children. This is because they are more likely to be subject to these measures because of where they live, their over representation in child welfare systems, discrimination and inequality. Further, the centralised and bureaucratised bidding process for funding advantages large non-Indigenous organisations with expertise in writing grants rather than targeting needs and prioritising service provision by those who could most effectively provide the service to Indigenous communities.

While the residue of cultural acknowledgement remains within child welfare legislation and rhetoric, the super structure of reduced expenditure, privatisation, and individualisation of cultural care and well-being, create an environment which challenges the intent of *BTH* human rights principles such as the right to self-determination and cultural recognition, through transfer of child welfare responsibility to Indigenous children's communities and organisations. Policies of permanency planning are in effect responding to poverty, and the ongoing legacy of colonialism, which is intertwined with contemporary child welfare experiences, with the early removal of children rather than as *BTH* recommended through reparation as outlined above. Without significant support for Indigenous families and communities, the twentieth anniversary of Bringing Them Home in 2017, will be commemorated with law and policy reform which will enable the greatest removal of Indigenous children from their families since *Bringing Them Home* was released and sets the foundation for the next apology.

D The Rhetoric of Blame

Uncoupled from their historical foundations, the structural inequalities experienced by Indigenous peoples, which are founded in colonialism, poverty and historical disadvantage, are codified as personal deficits within contemporary neoliberal child welfare law reform, policy and rhetoric. There is therefore not only a failure to implement Indigenous organisations and families' legislative rights to participate in child welfare decision making, but also a loss of commitment to these rights with the influence of neoliberal reform agendas and related moral values and populist rhetoric. This retreat from recognition of rights is being experienced within a broader ascent to neoliberalism. It is characterised with respect to Indigenous children and young people by debates which re-emphasise private and individual over public and collective responsibility and integration and assimilation over principles of self-determination and pluralism. With these changes there is a related loss of understanding of contemporary child welfare in an historical context and as part of the ongoing impacts of colonial policies, such as Protection and Assimilation policies, which underpinned the forced and unjustified removal of Indigenous children from their families.

Instead Indigenous child welfare is framed in a temporal present as a question of personal responsibility. Responsibility for systemic and structural inequalities - endemic poverty, lack of educational and employment opportunity, poor health outcomes - is reassigned to personal failings. This view is exemplified by commentators, such as Jeremy Sammut, who argue that the Indigenous child placement principle is a form of exceptionalism which is denying Indigenous children the chance to enjoy the full benefits and opportunities of Australian citizenship and that it endangers the bi-partisan efforts to close the gap through retention of a 'separatist regime'.[59] This type of argument repositions the placement principle from a commitment to Indigenous communities retaining control over their children to a moral and policy failing. Preferencing placement with Indigenous families, in Sammut's argument, denies equality to Indigenous children. The interaction between commentary such as Sammut's and populist rhetoric is seen, for example, in the presentation of these ideas by shock jock Alan Jones. Jones claimed on radio 2GB that 'we need another stolen generation'.[60] This provocation was made in response to a caller who complained about the minutes silence to commemorate the stolen generations and a traditional Aboriginal dance performed at an Indigenous NRL All Stars match. Jones described Aboriginal parents who have their children removed as 'on top of the world with drugs and alcohol'. Within the neoliberal moral framework of 'personal responsibility', policies which support Indigenous families and communities to look after their children, such as the Indigenous child placement principle, together with historical understandings of the colonial foundations for systemic inequality within Indigenous communities, are minimised or erased from the picture.

The effect of neoliberal political and cultural ideas, which are powerfully influencing policy and popular attitudes, is a twofold assault on restitution through non-repetition. First, it transfers responsibility from the perpetrators of harm to the victims for ongoing consequences of the human rights breaches which they have suffered. Second, cultural difference is framed as a private aspect of lifestyle choice rather than as a collective right to self-determination. These changes in framing of responsibility are manifested in the underfunding of Indigenous children's services;[61] pressure towards mainstreaming of services;[62] the movement of children from their communities to regional centres;[63] punitive responses to poverty;[64] less historical and more overtly paternalistic and morally charged framing of Indigenous children and young people's welfare within populist media;[65] the trend away from family reunion and towards early permanency planning and placement of children in out-of-home care;[66] higher rates of Indigenous children and families coming into contact with child welfare agencies;[67] and reports of more overt adversely differential treatment of Indigenous families both as victims and as perpetrators of neglect or abuse. This reframing of child welfare policy is more overtly evident in Australian law reform and policy programs such as the Northern Territory Intervention, the Cape York Families Responsibility Commission, and their successors.

V Cape York Families Responsibility Commission and NT Intervention

The NT Intervention/Stronger Futures and the Cape York Families Responsibility Commission are also both major legislative and policy programs in Australia which expressly claim to address Indigenous children' safety, but are separate from child welfare systems. They overtly embody neoliberal values with their aim to punish and discipline Indigenous peoples into the moral ethos of individualism, efficiency, personal responsibility and market readiness. The Cape York Welfare Reform ('CYWR'), which is closely associated with a prominent Aboriginal activist Noel Pearson's publication 'From Hand out to Hand up',[68] aims to transform four Cape York communities by engineering changes in attitudes to social welfare and transitioning people into the 'real economy'. The program ties social security to behavioural expectations in the areas of child welfare, education, housing and employment with the central mechanism for implementing this change being the Family Responsibilities Commission ('FRC'). The premise of this program is that there is a nexus between 'passive welfare' and 'dysfunction' in communities and this can be addressed through transitioning people into the market economy. As Rogowski notes with respect to neoliberal child welfare policy, 'Rather than support being offered to children and families, the emphasis has become one of changing their behaviours and life styles so they become "responsible" citizens'.[69]

The NT intervention, which subsequently changed names to Stronger Future, was implemented ostensibly in response to a crisis in child sexual abuse in Aboriginal communities in the Northern Territory in 2007. The NTER is controversial and in contrast to the recommendations made by *Bringing Them Home* with respect to contemporary child welfare or the *Little Children are Sacred* report, which purportedly catalysed the Intervention, because it rejects child welfare responses based on human rights principles, in particular principles of self-determination. There are many parallels between the justifications used by the Australian government for using the Australian army to enter and 'secure' prescribed Aboriginal communities in the NT and the justifications provided for interventions in international humanitarian crises. The 'crises' in child sexual abuse within communities was focused on to the exclusion of what produced it, the people who were meant to be the beneficiaries of the intervention or what would proceed it.[70]

The NT intervention, like the Cape York experiment which preceded it, but on a much larger scale, aims to transform and 'save' NT Indigenous people through conditional welfare. In both these programs the suffering of Indigenous peoples is framed as a product of their own moral failings rather than the ongoing legacy of historical wrongs. In both programs, the way to address the harms is through development. Both programs are framed in terms of a moral responsibility to assist where an emergency exists and vulnerable people need protection or where poverty underpins a deprivation of social and economic rights, yet like in the international sphere of humanitarian intervention, few authoritative juridical foundations were or are available for negotiating this jurisdiction to intervene.[71] The lack of juridical foundations for shared authority between Indigenous peoples and intervening governments/authorities raises issues with respect to the source, extent and manner in which this 'duty' has and is being discharged and whether the interests and values of the Indigenous peoples, in whose name the intervention is taking place, are in fact being served.

By 2012, the Federal government had prepared 98 reports and held seven parliamentary inquiries examining the intervention and its successors, yet it is difficult to get clear data on its impacts.[72] The most comprehensive assessment of the different sources of data has been prepared by the Castan Centre for Human rights at Monash University. It evaluated impacts in five areas and awarded the Intervention/Stronger Futures a fail on four of the five measures: employment and economic development (3/10), education 5/10, health and life expectancy (4/10), safer communities (4/10) and lowering incarceration levels (0/10).[73] Indigenous peoples in the NT make up 86 per cent of the adult prison population and 96.9 per cent of young people in detention. There has been a dramatic increase in self-harm and suicide in communities. The NT has the highest rate in Australia of Aboriginal children placed in non-Aboriginal out-of-home care.[74]

The BasicsCard, which quarantines 50–80 per cent of the recipient's money, is one of the headline features of the Intervention. It purports to prevent irresponsible expenditure of welfare benefits, such as on alcohol and drugs, by requiring recipients to spend their money at government prescribed stores on items that are allowed. While drug and alcohol misuse are a problems in many communities, addiction is a complex issue that requires solutions, which have an evidence base to demonstrate that they work and which target the underlying causes. The BasicsCard has attracted much criticism.[75] Recipients report feeling stigmatised when using the card: users often cannot check their balance; have to purchase at designated stores and as such cannot take advantage of discounts at other stores; cannot purchase food or other basics when they need to travel for cultural or health reasons as many Indigenous recipients who live in remote or rural areas often do; and cannot move to seek employment or for safety reasons such as to escape domestic violence.[76] The adverse impacts of the BasicsCard on Indigenous recipients in terms of employment, safety from family violence, health and freedom of movement have been documented.[77] Punitive approaches to disadvantage, such as Stronger Futures and cashless welfare, are in sharp contrast to the human rights approach advocated for in much of the research and literature nationally and internationally with respect to Indigenous child welfare. Stronger Futures echoes the paternalism of the protectionist period, which has left a legacy of harm and loss, and which, paradoxically, is associated with contemporary child protection issues.

VI Conclusion: The Conflict between the *BTH* Rights Agenda and Neoliberal Values

There are three major impediments to child welfare reforms with respect to Indigenous children being more effective. The first is the failure discussed above to implement in practice the legislation which provides for Indigenous 'families' and 'organisations' participation in their children's welfare and well-being. Legislative provisions which provide for Indigenous participation are routinely breached. While there has been a lack of commitment to implement principles of self-determination, these were post-*Bringing Them Home* theoretically and in principal regarded by government, non-government and community stake holders as the most appropriate way of addressing Indigenous children's welfare and well-being. The second impediment is the values shift away from the underlying principle of Indigenous peoples' control through the right to self-determination which underpinned the National Inquiry's recommendations and which informed the legislative reforms referred to above. This change in ideas and associated policy is part of a broader change in Indigenous affairs, which is reducing resources, services and support for Indigenous communities and framing inequality as a product of personal failing.[78] The third factor is the failure to address systemic poverty and inequality. This factor relates to the above mentioned factors in that it is exacerbated by cuts to services and resources.

The recommendations from *Bringing Them Home*, which were based on principles of self-determination, envisaged the sharing of political responsibility for Indigenous child welfare, within a framework which addressed systemic social and economic inequality. The *BTH* principles of plurality and equality have been distorted into programs of privatisation which are more about cutting costs through transferring child welfare programs to under-resourced Indigenous agencies and reducing the number and cost of children in out-of-home care through exiting children from the system into early permanent placements. While the Indigenous child welfare sector has, for more than two decades, been infused with human rights understanding, this awakening is confronted by a neoliberal counter discourse associated with individual blame and detached from historical and contemporary colonial experiences.

Much of the opportunity and hope which delegated jurisdiction based on *BTH* principles sparked, is being diluted by over-riding impacts of neoliberal regulation

of child welfare, related punitive social welfare reforms and material inequality. With the heightened influence of neoliberal politics in Indigenous affairs in Australia, it is timely to question whether we can mobilise the political currency of human rights more effectively to respond to both the failure to translate Indigenous children's rights into practice, and the neoliberal erosion of a commitment to these rights, or whether we need to think about supplementary or alternative strategies and responses to re-commit to reparation through non-repetition as recommended by *BTH*.

---

* Terri Libesman is an Associate Professor in the Law Faculty UTS. She has worked for nearly two decades with Indigenous children's organisations including the peak Aboriginal and Torres Strait Islander children's organization, the Secretariat of National Aboriginal and Torres Strait Islander Child Care (SNAICC).

1 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997).

2 Ibid ch 2. The National Inquiry reviews a range of historians' estimates of removals and other methods such as surveys of Indigenous adults with respect to removals. The records do not enable exact rates, but the Inquiry found between 1 in 3 and 1 in 10 children were removed.

3 Ibid ch 26.

4 See, eg, Daniel Steadman Jones, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics* (Princeton University Press, 2012); Joe Soss, Richard C. Fording, and Sanford F. Schram*, Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race* (University of Chicago Press, 2011); Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009); Wendy Brown, 'American Nightmare: Neoliberalism, Neo-conservatism, and de-democratisation' (2006) 34(6) *Political Theory* 690.

5 This language is pervasive in popular media. For an analysis of political rhetoric which frames Indigenous peoples as deficient see, Melissa Lovell, 'Languages of Neoliberal Critique: The Production of Coercive Government in the Northern Territory Intervention' in John Uhr and Ryan Walter (eds), *Studies in Australian Political Rhetoric* (ANU Press, 2014) 221.

6 An example of extensive spending to modify peoples' behaviour is seen in the Cape York Families Responsibility Commission and the NT intervention which are discussed below.

7 Peter Read, *The Stolen Generations: the Removal of Aboriginal Children in New South Wales 1883 to 1969*, (NSW Department of Aboriginal Affairs, 1996); Anna Haebich, *Broken Circles: Fragmenting Indigenous Families 1800–2000* (Fremantle Arts Centre Press, 2000); see also, NISATSIC, above n 1, ch 2.

8 Tracey Borg and Anne Paul, *Indigenous Parenting Project*, Secretariat of National Aboriginal and Islander Child Care (SNAICC), 2004.

9 NISATSIC, above n 1, 253-258.

10 Ibid 266-270.

11 Ibid.

12 Judy Atkinson, *Trauma Trails, Recreating Song Lines: the Transgenerational Effects of Trauma in Indigenous Australia*, (Spinifex Press, 2002); Chris Cunneen and Terri Libesman, 'Postcolonial Trauma: the Contemporary Removal of Indigenous Children and Young People from Their Families in Australia' (2000) 35(2) *Australian Journal of Social Issues* 102.

13 NISATSIC, above n 1, ch 21.

14 For a full list of NISATSIC recommendations see: Australian Human Rights Commission 'Bringing Them Home- Appendix 9 Recommendations' <https://www.humanrights.gov.au/publications/bringing-them-home-appendix-9-recommendations> at January 2016.

15 'Regulatory' in this context means applying human rights principles with respect to set standards which are then used as measures to determine compliance. While set standards are important they are only one aspect of human rights and can be aspired to within a paradigm which does not address issues with respect to who makes decisions, how they are made, or where control lies.

16 NISATSIC, above n 1.

17 Secretariat of National Aboriginal and Islander Child Care ('SNAICC'), *Stable and Culturally Strong Out of Home Care for Aboriginal and Torres Strait Islander Children* (2006); Terri Libesman, *Cultural Care for Aboriginal and Torres Strait Islander Children in Out of Home Care* (Secretariat of National Aboriginal and Islander Child Care, 2011).

18 See, eg, Samuel Moyn, *The Last Utopia* (Harvard University Press, 2012); Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7(2) *Constellations* 230; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart, 2000); Philip Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126 *Harvard Law Review* 2043; David Kennedy*, The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004); Ben Golder, 'Foucault's Critical (Yet Ambivalent) Affirmation: Three Figures of Rights' (2011) 20(3)

Social & Legal Studies 283.

19 Linda Briskman, *The Black Grapevine: Aboriginal Activism and the Stolen Generation*s (Federation Press, 2003).

20 'Jurisdiction' is defined in this context as the legal space for decision making, resolving disputes and defining social and moral values.

21 See, for example, Makau Matua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

22 See, eg, Sundhya Pahuja, *Decolonising International Law* (Cambridge University Press, 2011); David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004).

23 See, eg, Makau Matua, 'Savages, Victims and Saviours: The Metaphor of Human Rights' (2001) 42(1) *Harvard International Law Journal* 201; Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

24 Wendy Brown, 'Suffering the Paradoxes of Rights' in Wendy Brown and Janet Halley (eds), *Left Legalism Left Critique* (Duke University Review, 2002) 420.

25 See, eg, Matua, above n 21.

26 See, eg, James Griffin, *On Human Rights* (Oxford University Press, 2002).

27 See, eg, Pahuja, above n 22.

28 Ibid; Terri Libesman, *Decolonising Indigenous Child Welfare: Comparative Perspectives* (Routledge, 2014).

29 Ibid.

30 Patrick Macklem, 'What is International Human Rights Law? Three Applications of a Distributive Account' (2007) 52 *McGill Law Journal* 3.

31 NISATSIC, above n 1.

32 NISATSIC, above n 1, pt 2.

33 Committee on the Rights of the Child, 40th session, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 20 October 2005; Committee on the Rights of the Child, 60th session, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 28 August 2012.

34 Sam Bungey, 'The Next Stolen Generation', *The Saturday Paper*, 17 May 2014 <https://www.thesaturdaypaper.com.au/news/society/2014/05/17/the-next-stolen-generation/1400248800> at January 2016.

35 Chris Cunneen and Terri Libesman, 'Post Colonial Trauma' (2000) 35(2) *Australian Journal of Social Issues*, 95, 104.

36 This statistical information is drawn from: Judy Cashmore and Terri Libesman, 'Fact Check Q and A: Are Indigenous children 10 times more likely to be living in out-of-home care?' *The Conversation* February 2016 <https://theconversation.com/factcheck-qanda-are-indigenous-children-ten-times-more-likely-to-be-living-in-out-of-home-care-54825> at April 2016.

37 Australian Institute of Health and Welfare (AIHW), *Child Protection Australia 2013–14,* (8 May 2015) <http://www.aihw.gov.au/publication-detail/?id=60129550762>.

38 Child Family Community Australia, 'Child Protection and Aboriginal and Torres Strait Islander Children' (Resource Sheet, Australian Institute of Family Studies, September 2015) <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children> at April 2016.

39 Australian Institute of Health and Welfare, above n 37, Table A32.

40 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13. For a discussion of the placement principle, see Clare Tilbury, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (SNAICC, 2013); Fiona Arney et al, *Enhancing the Implementation* of the Aboriginal and Torres Strait Islander Child P*lacement Principle: Policy and Practice Considerations* (Research Paper, Child Family Community Australia, Paper No. 34: Child Family Community Australia information exchange, 2015) 1-10 <https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child> at April 2016.

41 NISATSIC, above n 1, 459.

42 See, eg, Secretariat of Aboriginal and Torres Strait Islander Child Welfare (SNAICC) History and Achievements <http://www.snaicc.org.au/about/dsp-default.cfm?loadref=129> accessed January 2016.

43 Libesman, above n 28, ch 6.

44 *Children and Young Persons (Care and Protection) Act* 1998 (NSW) s 12.

45 Accounts of such treatment are contained in a SNAICC case study of arbitrary removal provided by legal and children's services currently being reviewed by the author, accounts from Grandmother's Against Removal, and the following resources: Message Stick, 'Wirringah Women' (ABC, 23 May 2010) <http://www.abc.net.au/tv/messagestick/stories/s2906122.htm> at 19 January 2016; Melanie Schwartz, Fiona Allison and Chris Cunneen, *The Civil and Family Law Needs of Indigenous People in Victoria* (James Cook University Press, 2013); Hannah McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights* (Aboriginal Studies Press, 2012).

46 Terri Libesman and Costa Avgoustinos, *The Cultural Appropriateness of Looking After Children Assessment and Action Records for Aboriginal and Torres Strait Islander Children* (SNAICC, 2011) 1-83.

47 *Children Youth and Families Act* 2005 (Vic) s 167(3).

48 For a discussion of the impact of permanency planning in the NT, see Kyllie Cripps and Julian Laurens 'Protecting Indigenous

Children's Familial and Cultural Connections: Reflections on Recent Amendments to the *Care and Protection Act 2007* (NT)' (2015) 8(17) *Indigenous Law Bulletin* 11.

49 Indigenous children spent on average one year and four months longer than other children in care in Victoria. See, eg, Department of Health and Human Services, *Stability Planning and Permanent Care Project 2013-2014*, (Australian Government, September 2014) 2-3.

50 *Children, Youth and Families Act* 2005 (Vic) s 176.

51 *Children, Youth and Families Act* 2005 (Vic) ss 166-169, s 179.

52 *Children, Youth and Families Act* 2005 (Vic) s 32(2).

53 Child Family Community Australia, 'Australian 'Australian Child Protection Legislation' (Resource Sheet, Australian Institute of Family Studies, 2014) <https://aifs.gov.au/cfca/publications/australian-child-protection-legislation> accessed January 2016.

54 Child Family Community Australia, 'The Economic Cost of Child Abuse and Neglect' (Resource Sheet, Australian Institute of Family Studies, 2015) <https://aifs.gov.au/cfca/publications/economic-costs-child-abuse-and-neglect> at January 2016.

55 *First Nation Child and Caring Society of Canada v Attorney General of Canada* 2016 CHRT 2 - 2016-01-26. For an historical and contextual review of the case see Cindy Blackstock, 'The Canadian Human Rights Tribunal on First Nations Child Welfare: Why if Canada Wins, Equality and Justice Loses' (2011) 33 *Children and Youth Services Review* 187.

56 Australian Institute of Health and Welfare, above n 37.

57 Australian Productivity Commission, 'Overcoming Indigenous Disadvantage: Key Indicators' (Report, Australian Government, 2014) <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/key-indicators-2014> at April 2016.

58 Rachel Siewert, 'Beyond the Rhetoric: Turnbull and Abbott Have Left Indigenous Affairs in Chaos' *Newmatilda* (March 2016) <https://newmatilda.com/2016/03/23/beyond-the-rhetoric-turnbull-and-abbott-have-left-indigenous-affairs-in-chaos> at April 2016.

59 Jeremy Sammut, *The Kinship Conundrum: The Impact of Self-Determination on Indigenous Child Protection* (Centre for Independent Studies, 2014) 15.

60 Graham Richardson, 'Alan Jones Isn't Racist, He Wants Aboriginal Kids to be Safe' *The Australian* (February 2016)<http://www.theaustralian.com.au/opinion/columnists/graham-richardson/alan-jones-isnt-racist-he-wants-aboriginal-kids-to-be-safe/news-story/9f1d66361ec70caa0c111f9eb9595c93> at April 2016; Calla Wahlquist, 'Alan Jones Says Australia Needs Another "Stolen Generation" To Protect Aboriginal Children' *The Guardian* (February 2016) <http://www.theguardian.com/australia-news/2016/feb/15/alan-jones-says-australia-needs-another-stolen-generation-to-protect-children> at April 2016.

61 See, eg, Myles Morgan, 'Budget Figures Show Government Savings Will Dwarf Its Spending on Indigenous Programs over the Next Few Years' *NITV News* (May 2014) <http://www.sbs.com.au/nitv/nitv-news/article/2014/05/13/government-dramatically-reduce-indigenous-programs accessed January 2016>; Julie Doyle, 'Indigenous Communities Fear Federal Government's Child Care Changes Will Impact "Most Vulnerable"', *ABC* (29 December 2015) <http://www.abc.net.au/news/2015-12-29/indigenous-child-care-centres-fear-impact-funding-changes/7057188> at January 2016.

62 See, eg, Patrick Sullivan, *The Aboriginal Community Sector and the Effective Delivery of Services: Acknowledging the Role of Indigenous Sector Organisations* (Working Paper 73, Desert Knowledge CRC, 2010.).

63 See, eg, Jon Altman J, 'Practical Reconciliation and the New Mainstreaming: Will It Make a Difference to Indigenous Australians?' (2004) 23(2) *Dialogue* 1 <http://caepr.anu.edu.au/sites/default/files/Altman/Journal/2004_Dialogue2.pdf> at January 2016.

64 See references at above n 62.

65 See, eg, Nicole Watson, 'Of Course It Wouldn't Be Done in Dickson! Why Howard's Battlers Disengaged from the Northern Territory Emergency Response' (2009) 1(8) *Borderlands e-Journal* <http://www.borderlands.net.au/vol8no1_2009/nwatson_dickson.htm>; Rebeca Stringer, 'A Nightmare of the Neo-colonial Kind: Politics of Suffering in Howard's Northern Territory Intervention' (2007) 6(2) B*orderlands e-Journal* <http://www.borderlands.net.au/vol6no2_2007/stringer_intervention.htm>.

66 See discussion above under Legislative reforms post the National Inquiry.

67 Australian Institute of Health and Welfare, above n 37.

68 Cape York Institute for Policy and Leadership, 'From Hand Out to Hand Up' (May 2007, Cape York Institute for Policy and Leadership accessed January 2016) <http://capeyorkpartnership.org.au/wp-content/uploads/2014/07/from-handout-to-hand-up-welfare-reform-report.pdf >.

69 Steve Rogowski, 'From Child Welfare to Child Protection/Safeguarding: A Critical Practitioner's View of Changing Conceptions, Policies and Practice' (2015) 27(2) *Practice: Social Work in Action* 97.

70 See Anne Orford, An *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011) with respect to the justifications provided for international humanitarian interventions where parallel issues with respect to de facto authority is claimed with complex and troubling failures to provide de jure authority for these interventions.

71 Ibid; Rogowski, above n 69; Pahuja, above n 22.

72 Calla Wahlquist 'Northern Territory Intervention "Fails on

Human Rights" and Closing the Gap' *The Guardian* (February 2016)<http://www.theguardian.com/australia-news/2016/feb/08/northern-territory-intervention-fails-on-human-rights-and-closing-the-gap> at April 2016.

73 Stephen Gray, *The Northern Territory Intervention: An Evaluation* (Castan Centre for Human Rights, Monash University, July 2015) <http://www.monash.edu/law/centres/castancentre/our-research-areas/indigenous-research/the-northern-territory-intervention/the-northern-territory-intervention-an-evaluation> at January 2016.

74 Child Family Community Australia, 'Children in Care' (Resource Sheet, Australian Institute of Family Studies, June 2015) <https://aifs.gov.au/cfca/publications/children-care> at January 2016.

75 See, eg, Jon Altman and Melinda Hinkson, 'Very Risky Business: The Quest to Normalise Remote-living Aboriginal People' in Greg Marston, Jeremy Moss and John Quiggin (eds), *Risk, Welfare and Work* (Melbourne University Press, 2010); Equality Rights Alliance, *Women's Experience of Income Management in the Northern Territory*, (2011) 6 <http://www.equalityrightsalliance.org.au/projects/womens-experience-income-management-northern-territory>; Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, Report No 117 2011) 267.

76 Australian Law Reform Commission, above n 76.

77 Child Family Community Australia, above n 75.

78 Melissa Lovell, 'Languages of Neo Liberal Critique: The Production of Coercive Government in the Northern Territory' in John Uhr and Ryan Walter (eds), *Studies in Australian Political Rhetoric* (ANU Press, 2014) 221.