*John Dewar**

INDIGENOUS CHILDREN AND FAMILY LAW

In its report on *Multiculturalism and the Law*, the Australian Law Reform Commission (ALRC) concluded that, when translated into law, multiculturalism as a policy was best implemented, not by the development of special laws for particular groups, but rather through "a general amendment of Australian law to make it less narrowly monocultural and more flexible to accommodate individual differences".[1] In the context of family law, an interesting and important question to ask is just how flexible and accommodating the general law is to cultural difference. In the particular context of children, that question resolves itself into one of the law's ability to recognise different conceptions of relationship or kinship, and to accommodate child-rearing practices that may differ from those considered desirable by the dominant culture. The argument I want to make in this article is that, when viewed from the perspective of Australia's Indigenous communities, there is still a long way to go; and that the barriers to achieving that sort of flexibility may be so close to the heart of the social practices of the dominant culture that they are almost invisible except from outside that culture. One consequence of this is that "Indigenous families respond to the cultural inappropriateness of Australian family law by avoiding the Court and dealing with family disputes informally, or under traditional law".[2]

The Aboriginality of children in family law is most often visible to family lawyers when a court is required to decide which of two parents, one Indigenous and the other non-Indigenous, should have their child living with them. In such cases, it may be impossible to avoid the case being heard within the formal court system. In this context, the most important decision of the Full Court of the Family Court is currently that of *In the Marriage of B and R*,[3] in which the Full Court held that evidence concerning the history and effects of removal of Indigenous children to non-Indigenous environments was relevant to placement decisions under the *Family Law Act* 1975 (Cth). The Full Court decided that the relevance of Aboriginality in child placement disputes went beyond the "right to know one's culture", and required a proper acknowledgment of "the effects on Aboriginal children of being raised in a white environment, in which the lack of

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1 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) para 1.24.

2 Aust, Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) (hereafter *"Bringing them Home"*) p486.

3 (1995) 19 Fam LR 594.

reinforcement of their identity contributed to severe confusions of that identity and profound experiences of alienation".[4] The Full Court stopped short, however, of introducing a full-blown Aboriginal Child Placement Principle (ACPP) into family law decision-making.[5]

The decision in *B and R* does not by any means settle all the legal and policy questions surrounding child placement decisions in family law. For example, there remains the question of whether Australian family law as it currently stands conforms to Article 30 of the UN Convention on the Rights of the Child,[6] which requires State parties to ensure that an Indigenous child "not be denied the right, in community with other members of his or her group, to enjoy his or her own culture ... or to use his or her own language". The Full Court in *B and R* described Article 30 as conferring "general" rights to know one's own culture.[7] Nevertheless, Article 30 may be open to more "specific" interpretations, including that an ACPP, or something like it, be introduced in family law cases where the dispute is not between the child's parents, but between a child's parent on the one hand and a foster carer from a different culture on the other.[8]

In addition, the *Family Law Reform Act* 1995 (Cth), which came into force in 1996, and therefore after the decision in *B and R*, introduced a new item into the checklist of factors which a court must take into account in deciding where a child's best interests lie, namely, a reference to the child's "background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders)".[9] The meaning of this provision is unclear. First, it seems open to the interpretation that no such need is to be presumed but must be proved in each case.[10] Second, it is unclear what is meant by "connection" for these purposes. The decision in *B and R* would suggest that

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4 At 601.

5 Different versions of the ACPP are to be found in State and Territory child welfare and adoption legislation: *Children (Care and Protection) Act* 1987 (NSW) s87; *Children's Protection Act* 1993 (SA) s5; *Community Welfare Act* 1983 (NT) s69; *Adoption of Children Act* 1994 (NT) s11; *Adoption of Children Act* 1964 (Qld) s18A; *Adoption of Children Act* 1984 (Vic) ss37(1), 50. For discussion, see *Bringing them Home* ch21; McRae, Nettheim & Beacroft, *Indigenous Legal Issues: Commentary and Materials* (Law Book Co, Sydney, 2nd ed 1997) pp428-437.

6 Convention on the Rights of the Child, 20 November 1989, GA Res 25 (XLIV), UN Doc A/RES/44/25 (1989), reprinted in (1989) 28 *ILM* 1457.

7 (1995) 19 Fam LR 594 at 601.

8 An example of such a case is *Re CP* (1997) 21 Fam LR 486, discussed below. For an argument that an ACPP is appropriate in such cases, see Davis and Dikstein, "It Just Doesn't Fit: The Tiwi Family and the Family Law Act - Can the Two be Reconciled?" (1997) 22 *Alt LJ* 64.

9 *Family Law Act* 1975 (Cth) s68F(2).

10 *Bringing them Home* p483. The Report suggests that s68F falls short of full incorporation of Art 30 of the UN Convention on the Rights of the Child.

"connection" means more than just being provided with information about their own culture: but how much more is required?[11]

I will return to these issues towards the end of this article. For the moment, I want to approach the issue of Indigenous children and family law in a slightly different way.

FAMILIES IN LAW

I want to suggest that family law in Australia currently falls some way short of the sort of multiculturalism proposed by the ALRC. This is especially evident from the way in which legal relations amongst family members are constructed.

In defining kinship, or its conceptions of relationship, Australian family law reflects its Anglo-European heritage. So, when it comes to constructing legal relationships around children, the law tends to assume a nuclear model: that is, that a child will have two parents for legal purposes, generally those who are its biological mother and father.[12] These are the people who automatically have legal status with respect to the child, a status that they never technically lose. Thus, s61C of the *Family Law Act* 1975 (Cth) states that each parent of a child has parental responsibility for it, and that this responsibility survives any changes in the relationship between the parents. "Parental responsibility" for the child includes all duties, powers, responsibilities and authority a parent might have in relation to a child.[13] The recent changes to the *Family Law Act*, which introduced the concept of shared and continuing parental responsibility between biological parents, have, if anything, served further to entrench this nuclear model in the law.[14] Thus, according to the principles underlying the new Part VII, contained in s60B, children have a right to know and be cared for by both their parents,[15] but not by other significant figures in their lives; and parents (but not others) share duties and responsibilities for the care, welfare and development of their children, and should agree about their children's future.[16]

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11 Davis & Dikstein, "It Just Doesn't Fit: The Tiwi Family and the Family Law Act - Can the Two be Reconciled?" (1997) 22 *Alt LJ* 64 at 65.

12 "Parent" includes an adoptive parent, and anyone recognised as a parent under State, Territory and Commonwealth legislation dealing with assisted reproduction: *Family Law Act* 1975 (Cth) ss60D(1), 60H. The *Family Law Act* includes the concept of a "relative", which is elaborately defined in s60D(3), and is primarily relevant to the meaning of "family violence" in s60D(1), s68F(2)(i) and (j) and s68J.

13 *Family Law Act* 1975 (Cth) s61B.

14 Although, ironically perhaps, the ALRC supported the broad outline of these changes on the basis that continued parental responsibility after divorce or separation would allay the fears of some immigrant communities at their possible loss of parental status on divorce: "depriving a parent of custody [sic] of a child may result in a major loss of status, honour and identity of that parent and deprive the parent of the opportunity to exercise a deeply felt sense of responsibility for a child": Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) para 6.29.

15 *Family Law Act* 1975 (Cth) s60B(2)(a).

16 Section 60B(2)(c) and (d).

This nuclear model is reflected also in intra-family obligations of financial support. So, for example, both the *Child Support (Assessment) Act* 1989 (Cth), and Division 7 of Part VII of the *Family Law Act* (which concerns maintenance for children who are not covered by the child support scheme), place almost exclusive responsibility for supporting children on their parents.[17] Step-parents may in limited circumstances be ordered to pay support for step-children under the *Family Law Act*, but even here it is explicitly stated that the step-parent's obligation is secondary to the parent's primary duty, and that any step-parental liability does not derogate from that of the biological parent.[18]

The rigidity of this nuclear model for support purposes can have serious consequences for those ethnic groups, including those from Indigenous communities, for whom social obligations of support are in practice more fluid than the legal/nuclear model suggests. For example, under s117 of the *Child Support (Assessment) Act* 1989 (Cth), it is possible for a liable parent to seek a reduction in their child support assessment on the ground that their capacity to provide financial support for a child is significantly reduced because of "the duty of the parent to maintain any other child or another person".[19] Although there has yet to be an authoritative ruling, the consensus is that "duty" for these purposes means only "legal duty".[20] If that is right, then, because those legal duties of support are defined in strictly nuclear terms, it would not be open to a liable parent to argue for a reduction in child support on the basis that they were supporting someone else's children, no matter how strong that obligation might be within the context of a particular community, group or culture. This could cause real hardship in communities in which it is customary for children to be looked after by, and to receive financial support from, adults other than their biological parents.

There are some notable exceptions to this nuclear model of kinship relations. For example, it is possible for someone who is not a parent to obtain parental responsibility for a child by applying for a "parenting order" under Part VII of the *Family Law Act*. Any person concerned with the care, welfare or development of a child may apply for such an order.[21] There is in theory no limit to the number of people who may obtain parental responsibility in this way, although the extent to which a parenting order confers parental responsibility is determined by the order itself: there is no assumption that someone with a parenting order thereby acquires parental responsibility in full.[22] In that respect, the law still gives parents preferential treatment by automatically giving them, and only them, parental responsibility in full.

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17 *Child Support (Assessment) Act* 1989 (Cth) s3; *Family Law Act* 1975 (Cth) s66C.
18 *Family Law Act* 1975 (Cth) s66D.
19 *Child Support (Assessment) Act* 1989 (Cth) s117(2)(a).
20 Riethmuller, "Conflicting Duties: Child Support and Australia's Maintenance Quagmire" (1997) 71 *ALJ* 190. See *In the marriage of Hartcher and Vick* (1991) 15 Fam LR 149.
21 *Family Law Act* 1975 (Cth) s65C(c) .
22 Section 61D(1).

Other departures from the nuclear model can be found in the s68F(2) checklist, which requires a court to take account of a child's relationships with persons other than its parents in making decisions about the child's best interests. Thus, in addition to paragraph (f) already discussed, paragraph (b) refers to "the nature of the relationship of the child with each of the child's parents *and with other persons*"; paragraph (c)(ii) refers to "the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from ... any other child, or *other person, with whom he or she has been living*"; and paragraph (e), which talks of "the capacity of each parent, *or of any other person*, to provide for the needs of the child, including emotional and intellectual needs".[23] Finally, the statement of objects underlying Part VII talks of the child's right of contact with parents and with others "significant to their care, welfare and development".[24] However, each of these provisions has to be seen as a qualification of, or as an exception to, a basically nuclear, two-parent model of parent-child relations.

In general, then, the *Family Law Act* and the child support regime enshrine particular assumptions about relationships between children and parents. While these may seem natural to many members of the dominant European culture, they become, in the context of Indigenous cultures, a serious barrier to the sort of increased flexibility to which the ALRC refers. In the case of support obligations in particular, the current law amounts to a clear breach of the principle of substantive equality, stated to be a cornerstone of multiculturalism, in the sense that the current law "unintentionally act[s] to disadvantage certain groups of Australians".[25] Yet it is the supposed naturalness of these assumptions, and the powerful ideology of the nuclear family surrounding them,[26] that renders them invisible to many. From the point of view of the Indigenous community in particular, this nuclear model doesn't fit at all well with Indigenous child-rearing structures or practices.

INDIGENOUS CHILDREN: STRUCTURES AND VALUES

Although practices vary between Indigenous groups, it seems generally true that conceptions of kinship and of good child-raising practice are significantly different from the nuclear model.[27] Kinship relations are constructed in different ways from Western

23 Emphasis added in each case.

24 *Family Law Act* 1975 (Cth) s60B(2)(b) .

25 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) para 1.1. The child support legislation as currently interpreted does not create an "environment that is tolerant and accepting of cultural and social diversity" (para 1.1).

26 See Bittman & Pixley, "Is the Myth of the Nuclear Family Dead?" in Bittman & Pixley, *The Double Life of the Family: Myth, Hope and Experience* (Allen & Unwin, St Leonards, NSW 1997) ch1.

27 Bourke & Bourke, "Aboriginal Families in Australia" in Hartley (ed), *Families and Cultural Diversity in Australia* (Allen & Unwin/AIFS, St Leonards, NSW 1995) pp48-69; Collard, Crowe, Harries & Taylor "The Contribution of Aboriginal Family Values to Australian Family Life" in Inglis & Rogan (eds), *Flexible Families: New Directions in Australian Communities* (Pluto, Leichhardt, NSW 1994) pp113-126.

kinship systems, with the term "mother", for example, often being used to cover a much wider group of people than the biological mother. Kinship systems amongst many Indigenous groups are classificatory, which means that a much larger proportion of the social group, perhaps all members of the group, are accounted for in terms of kinship. Western kinship systems, by contrast, consist of a much narrower range of relations.[28] As *Bringing them Home* says: "By privileging parents and relegating the rights of other family members, the Australian family law system conflicts with Aboriginal child-rearing values".[29] In addition, child-rearing practices often differ markedly: whereas non-Indigenous culture tends to emphasise permanence and stability as positives for children,[30] Indigenous culture sees movement of children, either geographically or between or within kinship groups, as beneficial. As *Bringing them Home* argues, "by privileging stability of residence, the system similarly entrenches a bias against the Aboriginal practice of mobility of children amongst responsible adults and their households".[31]

Many of these issues arose in a recent decision of the Full Court of the Family Court, *Re CP*.[32] This case concerned the residence of a 4-year-old boy, C. C's parents were from the Tiwi Islands, a geographically remote group of islands 80 miles to the north of Darwin. C had been born on the Islands, but had been living since a very young age in Darwin with F, an Indigenous woman from Thursday Island in the Torres Strait, who had taken C to live with her in Darwin while working on a fishing boat around the Tiwi islands. C's biological mother lived on Melville Island, which is part of the Tiwi group. There was some dispute about the circumstances surrounding C's move to Darwin, especially over the expected duration of the arrangement. The litigation was initiated by F, who sought orders giving her joint guardianship and sole custody of C. This is now old terminology, but amounted to an application that C live with F, and that F and C's mother share responsibility for C's long term welfare and development. In many respects, the case was closer to a child welfare case (involving a contest between a parent and a substitute carer) than to an inter-parental dispute like *B and R*.

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28 Kinship amongst the Mardu people of Western Australia extended "far beyond consanguinal and local group limits to include the most distant of kin and former strangers": Tonkinson, *The Mardu Aborigines: Living the Dream in Australia's Desert* (Holt, Rinehart and Winston, Fort Worth, Texas. 2nd ed 1991) p58. This is also discussed in Gilding, *Australian Families: A Comparative Perspective* (Longman, Melbourne 1997) pp148-156.

29 *Bringing them Home* p486.

30 A good, and influential, example of this is the suggestion of Goldstein, Freud and Solnit that a child's best interests lie in preserving the continuity of a child's relationship with one "psychological parent": see *Beyond the Best Interests of the Child* (Free Press, New York 1973). According to Parker, Parkinson and Behrens in *Australian Family Law in Context: Commentary and Materials* (Law Book Co, Sydney 1994) "[p]reservation of the status quo appears to be the most significant determinant of custody disputes" (p835).

31 *Bringing them Home* p486.

32 (1997) 21 Fam LR 486.

C's mother responded by seeking orders that C be "in the custody of his extended maternal and paternal family at Bathurst and Melville islands".[33] Her application was supported by two sisters, and a cousin (that is, her father's brother's daughter, but someone who, in the Tiwi way, was also regarded as the mother's sister: according to Tiwi kinship thinking, all four women were C's mothers). The cousin was also co-ordinator of Link-Up, a service which assists Indigenous people to regain contact with parents or children from whom they have been separated. Strictly speaking, the order sought by the mother was an order that it was not really possible for the court to make, since, under the *Family Law Act*, custody (or, now, residence) has to be vested in an individual, or individuals, rather than in a kinship group. In other words, while the order applied for may have reflected what was likely to happen if the child went back to the Tiwi islands, namely that responsibility for his care would be shared by his extended family, it could not be given expression by a Family Court order.

There was evidence before the trial judge concerning the child-rearing practices of the Tiwi people.[34] That evidence disclosed that it is common practice for Tiwi children to be brought up by someone other than their biological mother and that "[i]t is not uncommon for the children to locate themselves in several of the extended family households throughout their respective childhood years".[35] There was also evidence from an anthropologist appointed by the child's Separate Representative concerning the differences between mainland and island Indigenous communities, and, more generally, on the importance of an Indigenous child remaining within their own community:

> [The] [d]isadvantages of not bringing up an Aboriginal child within his or her own community of kin and within at least frequent visiting distance of country with which he or she is identified might include: the loss of relations with a vast range of kin who will perform a wide variety of roles associated with social relations, emotional and physical support, educative knowledge, economic interactions and spiritual training. ... loss of knowledge which stems from the social interactions mentioned above; ambiguities in or loss of identity with one's own kin and country, features I understand as essential to identity from an indigenous point of view.[36]

The trial judge granted custody to F. The main issue on appeal was whether the trial judge had properly taken account of the child's Indigenous background, and specifically of his Tiwi background. The Full Court held that the judge had not given sufficient weight to the differences between the Indigenous culture of the Tiwi as against F's Indigenous

33 At 491.

34 The expert evidence is reproduced in greater detail by Davis and Dikstein, "It Just Doesn't Fit: The Tiwi Family and the Family Law Act - Can the Two be Reconciled?" (1997) 22 *Alt LJ* 64.

35 At 65.

36 (1997) 21 Fam LR 486 at 502.

background as a Thursday Islander (which, according to expert evidence in the case, were substantial). The judge, in short, had assumed that all Indigenous cultures were much the same, so that the weight accorded to C's specifically Tiwi background was diminished in the judge's reasoning. As the Full Court put it, the judge "demonstrated an incorrect view of homogeneity of Aboriginal cultures".[37] The judge had also taken the view that the child's need to maintain "connection" with his lifestyle, culture and traditions, as specified in s68F(2)(f), would be satisfied by maintaining C's education about the Tiwi way of life and through regular visits to the Islands. This clearly conflicts with the Full Court's decision in *B and R*, and the Full Court in *Re CP* took this to be evidence of the judge's failure to appreciate the differences between, and specificity of, Indigenous cultures.

The case is of interest for a number of reasons. One is that, at least in cases of inter-Indigenous disputes over children's residence, the Family Court will be open to hearing evidence about differences in Indigenous cultures. It suggests that the rights contained in Article 30, and reflected in s68F(2)(f), will (perhaps contrary to what was suggested in *B and R*) be interpreted as a right to maintain connections with a *specific* Indigenous culture, rather than Indigenous culture in general. It also underlines the point, consistently with *B and R*, that "connection" for the purposes of s68F(2)(f) means more than education and occasional visits.

For present purposes, though, my interest is in two other aspects of the case. The first is the Court's approach to Indigenous child-rearing practices, and especially to the practice of moving children around. The judge had regarded it as a factor favouring F that C's mother was not able to provide a clear picture of who would be looking after the child. The Full Court, however, quoted at length from the expert evidence of an anthropologist, Dr M:

> It is not at all unusual for Aboriginal children to move freely, even frequently, although the legal system tries to control and restrict this. Such movements, except for infants, are almost always with the willing consent of the child and are frequently initiated by the child who has a right to express their own desires with regard to residential arrangements. Moves can be occasioned by many factors, including the desire for change, to reside with paternal kin for some time, to move away from conflicts - in other words, many of the same reasons adults express as well for moving around. These movements between kin, and often between communities, are seen as important ways in which children acquire their understandings of the ways in which kinship and country relationships are lived out. They are thus not a sign of disruption as they might be interpreted by non-Aboriginal people but are an important factor in socialising children.[38]

37 At 501.
38 At 502-503.

The Court went on to suggest that the trial judge had failed to have regard to the importance of movement in an Indigenous child's social development and had therefore wrongly construed the mother's lack of clarity in future plans for the child adversely to her case.

This aspect of the case seems to be a very welcome development: it displays the sort of flexibility and openness to cultural practices that the ALRC was talking about. But it is striking how fragile the legal foundation for any such development might be. The case turns almost entirely on the weight given by the judge to the evidence before him: without the anthropologist's evidence, it might have been harder for the Full Court to have arrived at the conclusion it did. What flexibility there is, therefore, has to be fought for, and the cost reckoned in terms of gathering the necessary evidence. Indigenous parties, it seems, are always likely to be on the back foot when it comes to establishing the validity of cultural difference. This suggests that even the apparently progressive approach of the Full Court in *B and R* may leave something to be desired; for, as Lisa Young has argued, "[a]sking every applicant to take responsibility for these issues [through the production of evidence] is the wrong solution ... Caucasians are not put to proof of matters of such notoriety, why should Aboriginal ... parents be?"[39]

The second important aspect of the case concerns the remarks made towards the end of the judgment about the problems of applying the legal framework of the *Family Law Act* to disputes of this sort. As the Full Court put it:

> this case has highlighted difficulties in the applicability of the *Family Law Act* to cultural systems of family care which, like the Tiwi way, contemplate circumstances where the child will live and be cared for within a kin network.[40]

The Court went on to talk about the limitations of what I have called the nuclear model of parent/child relations enshrined in Australian family law and that it led, in particular, to "the many non-biological mothers of a Tiwi child [being] invisible to the law".[41] Even the provisions about parenting orders, the Court suggests, are not sufficient to deal with the issue, because those in whose favour such orders are made still have to be identified in advance:

> [T]he Act proceeds on the basis that orders will be made in favour of identified persons (who will usually be parties to the proceedings or have indicated their consent to orders being made in their favour). As the present case illustrates, the fluidity of indigenous care arrangements do not

39 Submission to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, quoted in *Bringing them Home* p486.
40 (1997) 21 Fam LR 486 at 505.
41 At 506.

> lend themselves to such a priori specificity and may give rise, as was again evident in this case, to criticisms about the uncertainty of arrangements for a child, which, depending on the facts found in a case, may be unwarranted. It appears to us that the legislative recognition of indigenous culture and heritage in s 68F may need to be complemented by provisions which take account of the kinship care systems of Aboriginal and Torres Strait Islander peoples.[42]

Re CP highlights two problems facing a family law system seeking to become more culturally inclusive in the context of children. The first concerns structures, and in particular a willingness to recognise kinship structures other than the nuclear one, and to make provision for them in law. The second concerns child-rearing values. In making decisions about children, judges are usually governed by the "best interests" principle.[43] It tends to be assumed that the concept of "the best interests of the child" is susceptible of an objectively determined content. The current s68F checklist, and specifically the reference to indigenous culture, are pointers to what that content should be in any particular case. But the challenge of becoming more flexible, more inclusive of other cultures, requires more than that: as *Re CP* illustrates, it requires an acknowledgment that there are different conceptions of the good, or that there are different ways of understanding what it means to bring up children well, which can easily be misunderstood by the dominant culture, and interpreted negatively in its own terms. I want to consider now some ways in which these problems might be addressed.

IS A "MULTICULTURAL" FAMILY LAW POSSIBLE?

It has been said that:

> A constant for Aboriginal people is that non-Aboriginal systems and institutions do not recognise Aboriginal structures and ways of doing things. There is much rhetoric from non-Aboriginal Australians about being culturally aware. Such awareness on its own is no longer acceptable. Aboriginal social structures and codes of behaviour need to be formally acknowledged.[44]

In the preceding discussion, I have suggested that there are real barriers, often unintended, in the way of a full and formal acknowledgment of Indigenous child-rearing practices and values in Australian family law. I have suggested that there are two main problems: that of

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42 As above.

43 The "best interests" principle is not applied throughout the *Family Law Act* to all decisions affecting children, but it does apply, for example, to decisions about parenting orders: *Family Law Act* 1975 (Cth) s65E.

44 Bourke & Bourke, "Aboriginal Families in Australia" in Hartley (ed), *Families and Cultural Diversity in Australia* (Allen & Unwin/AIFS, St Leonards, NSW 1995) p69.

structure, and particularly the structure of the nuclear family that seems so deeply embedded in Australian law, and which is so far removed from the social practices of some Indigenous groups; and those of values, in particular the values concerned with good and bad ways of raising children.[45] In this final section, I want to consider whether "multiculturalism" in the ALRC's sense of one law that is flexible enough for all, is possible.

Taking the issue of structures first, we have seen that one of the difficulties in *Re CP* was that the order sought by the mother, that the custody of the child be vested in the child's kinship group, presented a problem for a legal system that seeks to attach responsibility for a particular child to a limited number of adults, preferably his or her biological parents. As the Full Court pointed out, orders are usually made in favour of parties or those who have consented to the order being made, primarily for reasons of enforcement, since orders relating to children are not "readily enforceable by or against a relatively amorphous group".[46] Yet, as we have seen, such an outcome may be at odds with the reality of Indigenous child care practices, in which responsibility is widely spread and frequently changing. A solution proposed by the Court, but not discussed in detail, was that a Tribal Elder could be nominated to accept responsibility for compliance.[47] While not providing a complete solution (not least because it leaves the underlying nuclear assumptions of the law unchallenged), such a creative approach to order-making by the Court could ameliorate the cultural blindness of basic family law structures.

We turn, then, to the question of values, or the criteria by which cases are to be decided. One way of resolving residence disputes involving Indigenous children would be to adopt a private law version of the Aboriginal Child Placement Principle. This has been advocated by Davis and Dikstein in the context of cases, like *Re CP*, in which the dispute is between a parent on the one hand and a non-parent substitute carer from a different racial group on the other.[48] Given the similarities with those child welfare cases in which ACPP is already operative, there seems to be a strong argument that the ACPP should extend into the realm of the Family Court's decision-making in such cases.[49]

In cases involving disputes between parents of children of mixed parentage, however, the consensus has been that ACPP would be inappropriate. It has been considered and rejected

45 Similar points could be made about lesbian families.
46 (1997) 21 Fam LR 486 at 506.
47 At 507.
48 Davis and Dikstein, "It Just Doesn't Fit: The Tiwi Family and the Family Law Act - Can the Two be Reconciled?" (1997) 22 *Alt LJ* 64.
49 This did not, in the end, occur in *Re CP* itself: when the case was reheard by a different trial judge, the same decision was reached as the original trial judge.

by those who have addressed the issue, either judicially[50] or as law reformers.[51] Further, it would run counter to the Family Court's reluctance to introduce presumptions of any sort into this area.[52] In view of this, it seems that the "best interests" principle will remain the yardstick for the foreseeable future. The question that then arises is whether the best interests principle, in the shape of a general, presumption-free and factor-driven standard, can be adapted so as to acknowledge the distinctive nature of Indigenous child care practices, and the associated conceptions of where a child's best interests might lie? There are, I suggest, grounds for cautious optimism.

The notion of a child's welfare or best interests, even when applied to the dominant culture, is historically specific. Different conceptions of children's welfare have come and gone in the name of the best interests principle. For example, the idea that an adulterous parent was unfit to care for children was accepted in the courts until quite recently, but would now be regarded as simply wrong.[53] Similarly, there has in recent years been a powerful trend towards emphasising the child's need to maintain contact with the non-resident parent, a trend that has dramatically altered the landscape of decision-making in children's cases.[54] In addition to this, the fact that the best interests principle is, on its own, indeterminate, has led to heavy reliance on welfare professionals to give the principle determinate content in particular cases; and these groups have themselves used the principle as vehicle for their own professional ideologies.[55]

The historically conditioned and ideologically determined character of the best interests principle has often been a basis for criticism of it;[56] but, in this context, the malleability of the best interests principle, and its openness to inputs from other disciplines (such as anthropology), makes it potentially a suitable vehicle for a multicultural family law. Deployed sensitively, and with a consciousness of Indigenous child-rearing values, it can avoid the imposition of one set of values on another.

However, the success of the best interests principle in this area depends on a number of factors, such as the availability and admissibility of evidence and the sensitivity of the

50 *In the Marriage of Goudge* (1984) 54 ALR 514 at 524 per Evatt CJ.

51 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report No 31, 1986) p257; Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) para 6.39.

52 *B and B* (1997) 21 Fam LR 676 at 734.

53 See Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (Routledge & Kegan Paul, London 1984) pp92-96.

54 Smart & Neale, "Arguments Against Virtue - Must Contact be Enforced?" (1997) 27 *Fam Law* 332. This pattern is more clearly evident in the United Kingdom than Australia.

55 Fineman, "The Use of the Social Sciences in Custody Policy-Making" in Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (University of Chicago Press, Chicago 1991) ch7.

56 Graycar & Morgan, *The Hidden Gender of Law* (Federation Press, Annandale, NSW 1990) ch10; *Secretary, Department of Health and Community Services v JMB and SMB (Re Marion)* (1992) 175 CLR 218 per Brennan J.

decision-maker to that evidence and its implications. *B and R* is a source for some optimism in this respect. It suggests that the Family Court is willing to admit the relevant evidence, on the basis of equality of respect, and that it has understood the distinction between a tokenistic acknowledgment of the relevance of cultural identity and background and what Bourke and Bourke call a "formal acknowledgment" of Indigenous values and structures.[57] However, *Re CP* itself is evidence that there is still some way to go: that not all Family Court judges at first instance may display the sensitivity of the judges of the Full Court who gave judgment in *B and R* and *Re CP*, and that having the evidence does not automatically mean that Indigenous practices will be given proper weight. More generally, there is the concern, already mentioned, that *B and R* places a heavy evidential burden on Indigenous parents and communities which non-Indigenous parents do not have to bear.

In the light of this, what can be done to ensure that the best interests standard achieves its potential for providing a flexible and inclusive basis for family law decision-making? There is no single answer, but there are a number of possible strategies. One of these is judicial education, so that Indigenous parties are not constantly under the evidential burden of proving the legitimacy of their difference. This is recommended by *Bringing them Home*;[58] and the Family Court has already started to take this seriously through the creation of its Indigenous and Torres Strait Islander Awareness Committee.[59]

Another strategy would be further amendment of the *Family Law Act*. This is also recommended by *Bringing them Home*, which suggests two changes.[60] The first is the addition of a new para (ba) to s60B(2), the subsection that sets out the objects and principles underlying Part VII of the *Family Law Act*, which would incorporate Article 30 (see above) directly into Australian law.[61] The second is the amendment of s68F(2)(f) to make it clear that the need of any Indigenous or Torres Strait Islander child to maintain contact with his or her culture must be taken into account in deciding a child's best interests, as opposed to the current drafting which appears to leave it to the discretion of the judge. These changes would ensure that Indigenous parties would not have to establish the relevance of Indigenous culture, since a judge would have no option but to consider it. However, it could be argued that these changes would do little more than declare what, in

57 Bourke & Bourke, "Aboriginal Families in Australia" in Hartley (ed), *Families and Cultural Diversity in Australia* (Allen & Unwin/AIFS, St Leonards, NSW 1995) p69.

58 The Report recommends education for *all* Family Court officers involved in parenting disputes, including Registrars, counsellors and welfare officers: *Bringing them Home* p487.

59 Harrison and Sandor, "News from the Family Court" *Family Matters* No 44 Winter 1996 pp38-39.

60 *Bringing them Home* pp596-597.

61 The new paragraph would read: "children of Indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language": at p597.

the wake of *B and R*, is already the existing law.[62] In *B and R*, as we have seen, the Court seemed to regard it as essential that the rights in Article 30 be vindicated where relevant.

I suggest that something more is needed. We have seen that one of the problems encountered by Indigenous parents is that child-rearing practices regarded as normal and desirable in Indigenous society may be considered aberrant and harmful by dominant conceptions of children's best interests. The issue of mobility as against permanence, stability and the status quo is a central example. The changes proposed by *Bringing them Home* would not overcome that risk: the emphasis on connection with, or enjoyment of, their culture, however non-optional, may not be enough to persuade a judge to return a child to live in an environment which, on a non-Indigenous view of things, is going to be harmful to the child. I suggest, therefore, that the Full Court's suggestion in *Re CP*, that s68F should be amended to "take account of the kinship care systems of Indigenous and Torres Strait Islander peoples",[63] should be taken very seriously. I understand this to be a suggestion that judges should in future be directed to take account of the child care practices and values of the Indigenous group concerned as a relevant factor in its decision making.[64]

I am not suggesting that this would be an easy thing to do:[65] it would require extensive education of decision-makers, and a heavy reliance on evidence in each case as to what the values of a particular community are. Nor am I suggesting a complete slide into cultural relativism, so that the values of the minority group are determinative no matter what. That would seem to run counter to the legal policy of multiculturalism as presently understood. I am suggesting, however, that those minority values should be accepted in the decision-making process as proper and legitimate, to be weighed as such in the process of balancing the other factors relevant to the child's best interests. In those family law cases in which an ACPP would not be appropriate (and they are likely to be a majority), factor-based decision-making of this sort, conscientiously exercised, is perhaps our best hope of achieving the flexibility and inclusiveness characteristic of a legal policy of multiculturalism.[66]

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62 The proposed amendment may change the onus of proof.

63 (1997) 21 Fam LR 486 at 506.

64 This is not a suggestion that the Family Court should recognise and give effect to Indigenous customary laws concerning children, although any such laws would form part of the "practices and values" of which account should be taken. For a brief discussion, see McRae, Nettheim & Beacroft, *Indigenous Legal Issues: Commentary and Materials* (Law Book Co, Sydney, 2nd ed 1997) pp446-469.

65 It is possible, for example, that parents may come from different groups whose practices differ.

66 Cf Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, New York 1996) who suggests that factor-based (as distinct from rule-based) decision-making is an essential technique in a society characterised by diversity and lack of consensus: see especially ch6.