

# Child Protection and Indigenous Children

## Introduction

**Stephen Ralph, Forensic  
Psychologist**

The involvement of child welfare authorities in the lives of Aboriginal Australians has been marked by profound distress and suffering on the part of Aboriginal people, both historically and in contemporary times. The “Bringing Them Home” report into the Stolen Generations, for example, concluded that between “*one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from 1910 until 1970.*”<sup>1</sup> The inquiry found that not one family had escaped the effects of forcible removal, and that most families have been affected, in one or more generations, by the forcible removal of one or more children.

The failure of Australian governments to address the plight of Indigenous people and their experience of oppression and social and economic disadvantage has contributed to Indigenous children being over-represented among children receiving child protection services. This is evident in the disproportionate number of Indigenous children who are identified as having suffered child abuse and neglect, as well as the disproportionate numbers of Indigenous children on care and protection orders and in out-of-home care. According to the Australian Institute of Health and Welfare,

*“The reasons for this are complex and are connected to past policies and the legacy of colonisation. Poverty, assimilation policies, intergenerational trauma and discrimination and forced child removals have all contributed to the over-representation of Aboriginal and Torres Strait Islander children in care, as has a lack of understanding of the cultural differences in child-rearing practices and family structure.”*<sup>2</sup>

In 2019-20, for example, one in six Aboriginal and Torres Strait Islander children received child protection services, which is eight times the rate for services provided to non-Indigenous children. Indigenous children were also six times more likely than non-Indigenous children to be the subject of substantiated reports of risk of harm. Indigenous children were also nine times more likely to be in out of home care than

---

<sup>1</sup> Human Rights and Equal Opportunity Commission, (HREOC), “Bringing Them Home”, Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander Children from their Families, Chapter 2, April 1997

<sup>2</sup> Australian Institute of Health and Welfare 2021. Child Protection Australia 2019–20. Child welfare series no. 74. Cat. no. CWS 78. Canberra: AIHW

non-Indigenous children, a figure that has grown every year over the past decade. Of the 18,862 Indigenous children in out of home care, as of June 30, 2020, almost two-thirds (63%) were living with relatives, kin or other Indigenous caregivers.<sup>3</sup> The remaining third were living in placements that were not in accord with the Aboriginal and Torres Strait Islander Child Placement Principle, that has been adopted in all states and territories.

The need to reduce the over-representation of Aboriginal children in the out-of-home-care system was clearly acknowledged in the 2020 National Agreement on Closing the Gap which added health and well-being targets to the strategy. This included the provision that by 2031, the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-home-care would be reduced by 45 per cent.<sup>4</sup> To achieve this target will be extremely challenging given the ever-increasing rate of Aboriginal children going into out of home care. In 2018, it was estimated, for example, that on current trends the population of Aboriginal children in out-of-home care would double in size by 2028.<sup>5</sup>

For many Aboriginal families who have been impacted by inter-generational trauma arising from the Stolen Generations, and whose children have recently been removed by “the welfare,” there is often a sense that policies of the Stolen Generations and forcible removal continue to this day. The disproportionate number of Aboriginal children removed from their families is cited as supporting this view. In responding to this concern, child welfare policy in all jurisdictions emphasises working collaboratively with Indigenous people and the importance of proper consultation.<sup>6</sup> As to how this works in practice is a moot point, and likely to vary widely across and within jurisdictions.

In considering those claims that draw a parallel between the Stolen Generations and contemporary practices of child removal, it must be acknowledged that the policies underpinning the Stolen Generations were based explicitly upon racist beliefs, and

---

<sup>3</sup> Australian Institute of Health and Welfare 2021. Child Protection Australia 2019–20, *ibid*

<sup>4</sup> National Agreement on Closing the Gap, July 2020, [National Agreement on Closing the Gap \(coalitionofpeaks.org.au\)](https://www.coalitionofpeaks.org.au)

<sup>5</sup> The Family Matters Report 2019: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Australia. See [1097 F.M-2019 LR.fupdated.pdf \(familymatters.org.au\)](https://www.familymatters.org.au/1097-F.M-2019-LR.fupdated.pdf)

<sup>6</sup> See NSW Children and Young Persons (Care and Protection) Act 1998, No.157, Part 2, Section 11-14

were genocidal in their intent.<sup>7</sup> Although racism is still highly prevalent in contemporary society, and experienced by many Aboriginal people in their day-to-day life, the contemporary practice of removing Aboriginal children, is more accurately viewed as a failure of governments to address the inequity and disadvantage suffered by Indigenous people over generations, as a result of colonisation, oppression and social exclusion. The significance of history in understanding the current circumstances of Indigenous people was clearly acknowledged by the Report of the Royal Commission into Aboriginal Deaths in Custody in 1991.<sup>8</sup>

*“It is important that we understand the legacy of Australia's history, as it helps to explain the deep sense of injustice felt by Aboriginal people, their disadvantaged status today, and their current attitudes towards non-Aboriginal people and society.”*

Understanding the cultural needs of Aboriginal families and children, and issues relating to Aboriginal parenting capacity, are areas of research and practice that have received relatively little attention from Australian researchers. This is particularly concerning given the increasingly disproportionate number of Aboriginal families coming into contact with child protection and juvenile justice systems across all states and territories. This is a situation that demands that all practitioners working with Indigenous children and their families have sufficient cultural competence and understanding to provide an informed, culturally appropriate and safe service when working with Aboriginal families. As a result, it is incumbent upon all those who work within the child welfare system, including legal practitioners, to have a well-developed understanding of Aboriginal issues within the context of their own professional practice.

The purpose of the current paper is to assist legal practitioners to understand the complex issues that are often involved in working with Aboriginal families in the child protection system. The paper aims to address the key issues faced in representing the interests of the Aboriginal child in child welfare proceedings, and to cultivate understanding and best practice within this area.

---

<sup>7</sup> Human Rights and Equal Opportunity Commission, (HREOC), “Bringing Them Home”, April 1997, *ibid*, Part 4, Chapter 13

<sup>8</sup> National Report of the Royal Commission into Aboriginal Deaths in Custody, 1991, Volume 2, p.3

## **Some fundamentals**

There are some fundamental matters that need to be understood prior to entering into any discussion of Aboriginal people and issues relevant to culture. First and foremost, it is necessary to acknowledge the diversity of Aboriginal Australians and their experiences within the dominant culture. That is,

*“There is no single Aboriginal or Torres Strait Islander culture or group, but numerous groupings, languages, kinships, and tribes, as well as ways of living.”<sup>9</sup>*

Aboriginal Australians are a highly diverse group of people with widely varying lifestyles, values and customs. Some may live in urban settings or traditional outback communities, some may be fair-skinned or dark, and some may engage in traditional cultural practices whilst for others may not. In this context, one should be extremely wary of making generalizations about Aboriginal people due to the diversity of the population and the unique experience of each individual who identifies as Aboriginal. This fact, should be borne in mind in any conversation about Aboriginal Australians.

It is also essential to be mindful of racism, discrimination and stereotyping and the effect of this upon Aboriginal people and their families, as well as that upon non-Aboriginal people. It must be acknowledged that ethnocentrism, stereotyping and prejudice are a natural outcome of the way we are socialized and may work in subtle ways to shape professional practice and thinking in relation to other cultures. It is important to be mindful of the presence of cultural bias in all areas of our work and the manner in which we relate to all people.

In discussing Aboriginal Australians, it is necessary to be mindful of the legacy of colonization, dispossession, and the stolen generations and its impact on Aboriginal families today. The recognition of these matters in Australian history remains a contentious issue for many in contemporary times. Too often the issue has been viewed to be about blame and denial, when the issue is one of simply acknowledging what has happened since colonisation, and how this has contributed to the circumstances of Aboriginal people today.

---

<sup>9</sup> Aboriginal and Torres Strait Islander Social and Emotional Well-being Framework 2017-2023, Principle No.8, page 8

## **Cultural Competence**

The fundamental starting point for developing an understanding of what is required to provide culturally appropriate support and assistance to Aboriginal children and their families is an understanding of the concept of cultural competence. This is defined as

*“A set of congruent behaviours, attitudes, and policies that come together in a system, agency, or among professionals and enables that system, agency, or those professionals to work effectively in cross-cultural situations.”<sup>10</sup>*

A feature of this definition is the notion that cultural competence is not simply about individual competence, but also about the agencies and systems in which they work and the level of competency that exists within such systems and agencies. That is, the policies of the agency, and the practices that flow from this, and the impact of these upon Aboriginal people’s access to services, are relevant matters to consider in assessing cultural competence. It should be noted that systemic racism and discrimination are matters that have impacted upon Aboriginal Australians from the earliest days of colonisation, and that this still remains a concern for many today.

Cultural competence can be conceived of as an on-going process that commences from a point of naivety, or incompetence, to progress through a number of levels to the achievement of proficiency. It should be noted that proficiency can never be truly achieved, as cultural competence is relative to the specific cultural group that the individual is dealing with. It must be acknowledged, for example, that competence in working with one Aboriginal group does not necessarily mean that competence then applies to all Aboriginal groups, as such groups may vary widely in terms of language, traditions and customs. The achievement of competence with one group though provides a sound basis for engaging with others and advancing cultural competence in relation to other groups.

Progress towards achieving cultural competency can be assessed against the model shown in Figure 1 below.

---

<sup>10</sup> Cross, T., Bazron, B., Dennis, K., & Isaacs, M., (1989). *Towards A Culturally Competent System of Care, Volume I*. Washington, DC: Georgetown University Child Development Centre, CASSP Technical Assistance Centre, p8

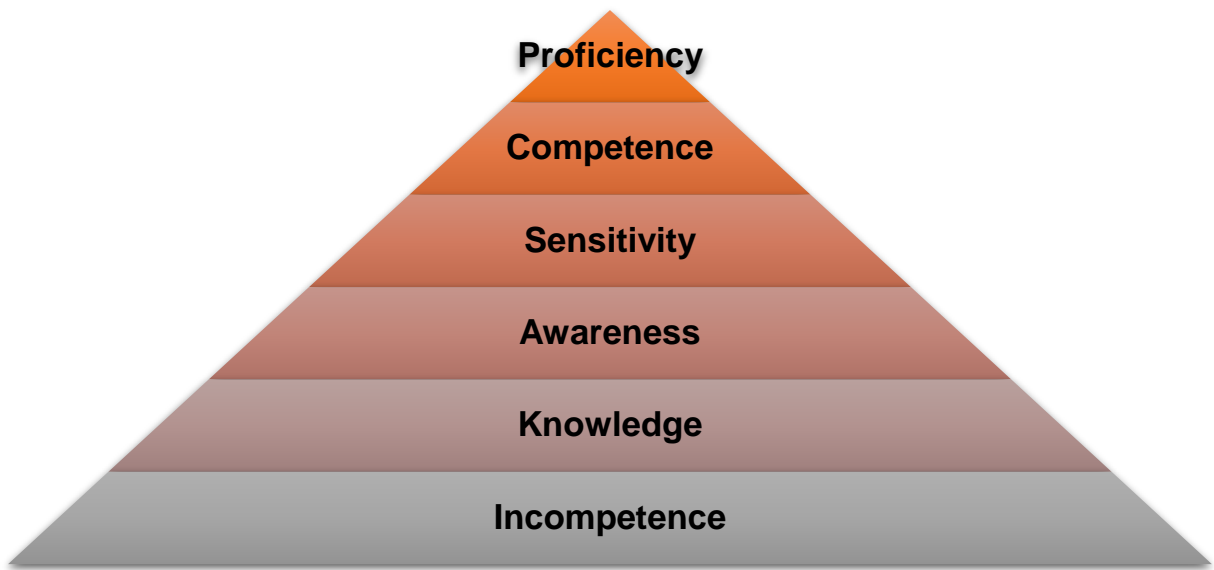


Figure 1: A model of Cultural Competence (Wells and Black, 2000)

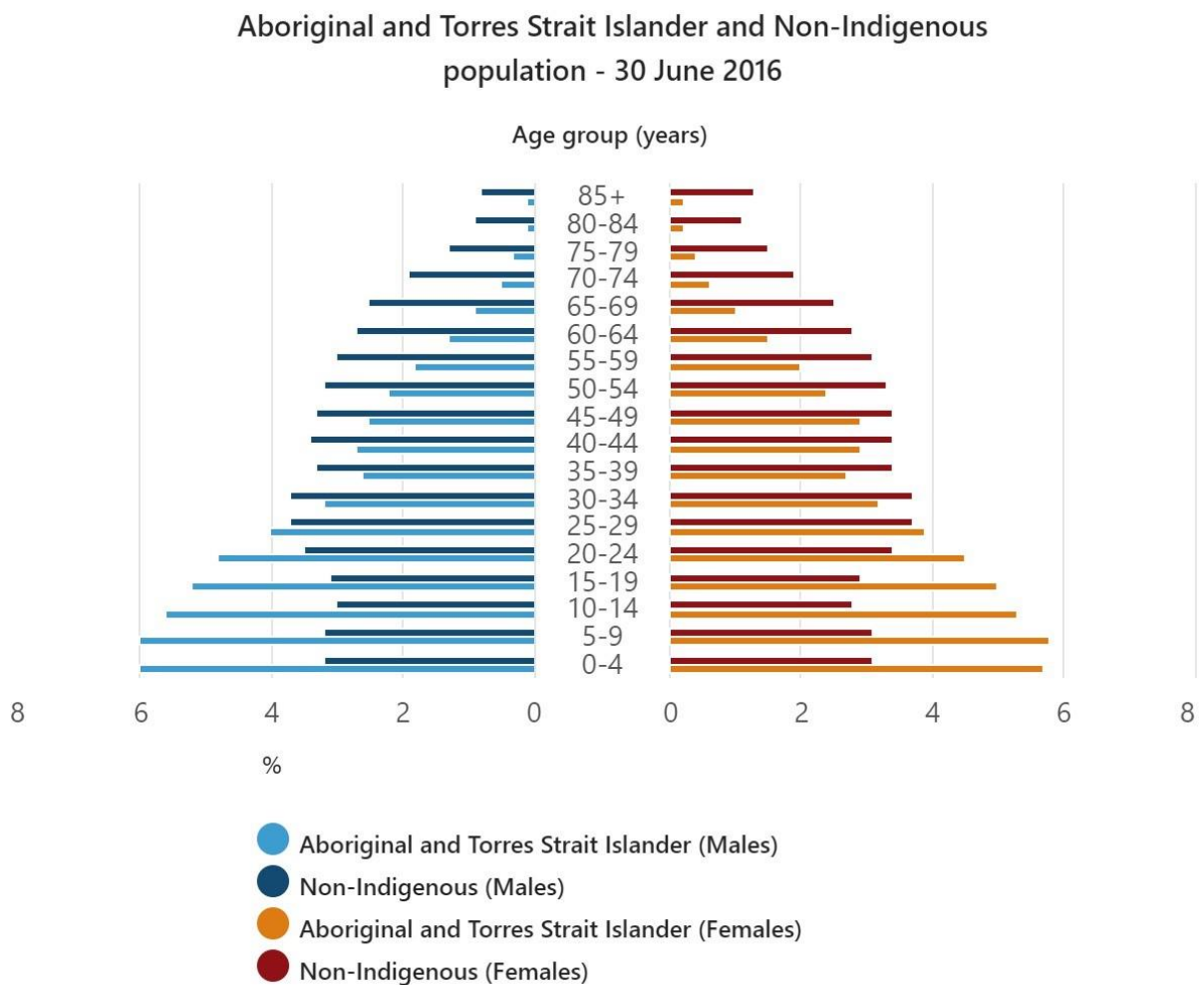
The model proceeds from a level of naïve incompetence through stages of knowledge, awareness and sensitivity to the achievement of cultural competency. In progressing through these stages, knowledge and understanding is acquired, leading to increased awareness and sensitivity towards cultural differences, and culminating in the individual adapting their behaviour to effectively facilitate cross-cultural communication, understanding and trust. The achievement of cultural competence is to be seen in the individual's capacity to readily transition between cultural perspectives, and to behave in a manner that is in accord with the cultural group with whom the individual seeks to engage.

On a practical level, the attainment of cultural competence builds communication, understanding and trust, and allows for the relatively free exchange of ideas and information between individuals from diverse cultural backgrounds. For those working with Aboriginal children and their families it promotes rapport and engagement and encourages discussion of issues in a manner that would otherwise not have been possible. The display of some degree of cultural competence can at times promote trust and engagement with Aboriginal people and provide a platform for the development of a working relationship based on communication and shared understandings. On a broader level, a focus upon the continuing development of cultural competence across cultures serves to promote a more harmonious and inclusive society and lessens the impact of ignorance, racism and discrimination in cross-cultural relationships. Hence, it is incumbent upon all who value fairness, justice

and social harmony, to be mindful of the importance of relating to others in a manner that is culturally competent and appropriate.

### **Snapshot of Aboriginal children and their families**

Australia's Aboriginal population is extremely youthful in comparison to the general Australian population. These differences can be seen in Figure 1 below that represents a comparison of the two populations by Indigenous status, age and gender.



**Figure 1: Population Characteristics by Indigenous status, age and gender (ABS Census 2016)**

The 2016 Census found that the Aboriginal population has a younger age distribution than the non-Aboriginal population, reflecting higher fertility and lower life expectancy. In 2016, the median age for Aboriginal people was 23 years (up from 21 years in 2011), compared with 38 years for non-Indigenous people (up from 37 years in 2011). Indigenous households comprised an average of 3.3 people compared with 2.6 people

in other households. About 1 in 5 Indigenous households (21%) were a one-parent family with dependent children in 2011, compared with 6% of other households.<sup>11</sup>

In 2016, children under the age of 15 years made up 34% of the Aboriginal population, compared with 18% for the non-Aboriginal population. The relative youth of the Indigenous population is contributed to by Aboriginal women having more children at a younger age than non-Aboriginal women. The fertility rate for Aboriginal women in their teenage years, for example, is six times that of their non-Aboriginal cohort. Aboriginal women in the 20–24 years age group had the highest number of births of all Aboriginal females. The comparable figure for non-Aboriginal women is the 30-34 years age group.

These statistics demonstrate that Aboriginal people are dealing with the challenges of forming families and becoming parents at an age well before that of their non-Aboriginal peers. At the same time, they appear to be struggling with a disproportionate burden of ill-health and levels of social and economic disadvantage that make the transition into adult life and the formation of stable and nurturing family groups an even more daunting prospect. There is ample evidence to suggest that in comparison to non-Aboriginal youth they are less well equipped to negotiate the difficulties that they confront. For example, Haswell, Blignault, Fitzpatrick and Pulver (2013) state:

*"Compared to their non-Indigenous peers, Indigenous young people are at much greater risk of poor educational attainment and performance and of being out of the labour force. They are more likely to be the victims of violent crime than other young people and are over-represented in the child protection system, the juvenile justice system and the adult prison population."*<sup>12</sup>

A report by the Australian Institute of Health and Welfare (AIHW) titled *"Young Australians: Their Health and Wellbeing 2011"* refers to Indigenous young people as facing particular challenges that affects their health and wellbeing that include threatened or actual loss of cultural identity; removal from family of origin; family

---

<sup>11</sup> See

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/2076.0Main%20Features612016?opendocument&tabname=Summary&prodno=2076.0&issue=2016&num=&view=>

<sup>12</sup> Haswell, MR, Blignault, I, Fitzpatrick, S and Jackson Pulver, L, 2013 *The Social and Emotional Wellbeing of Indigenous Youth: Reviewing and Extending the Evidence and Examining its Implications for Policy and Practice*, Muru Marri, UNSW Sydney, Chapter 1, page 23.



conflict and disruption; violence and assault; social exclusion; social and emotional well-being and mental health issues; as well as juvenile crime; and imprisonment. The report also notes other common stressors to be poverty, frequent bereavement, pressure from relatives, a lack of culturally responsive services, and a sometimes hostile and racist environment.<sup>13</sup>

In light of these observations, it is not surprising to find that young Aboriginal people report high to very high levels of psychological distress at a rate almost three times higher than their non-Aboriginal peers<sup>14</sup>. The rate is substantially higher for Aboriginal young women and for Aboriginal young people living in non-remote areas. In the 2012-13 Aboriginal and Torres Strait Islander Health Survey youths between the ages of 15-24 years were asked to describe whether they or their family had experienced a range of different stressors. The results of this survey for Aboriginal youth aged 15-24 years are shown in Figure 2 below.<sup>15</sup>

**Figure 2: Proportion of Indigenous people age 15-24 years reporting personal and/or family stressors that have been a problem in the past 12-months.**

Type of Stressor	Proportion %
Death of a family member or close friend	30.9
Not able to get a job	24.3
Serious illness	18.6
Pregnancy	16.1
Mental illness	12.3
Trouble with the police	11.4
Alcohol-related problems	11.1
Drug-related problems	9.4

<sup>13</sup> Australian Institute of Health and Welfare, [Young Australians: their health and wellbeing 2011, Summary - Australian Institute of Health and Welfare \(aihw.gov.au\)](http://www.aihw.gov.au/young-australians)

<sup>14</sup> See Australian Aboriginal and Torres Strait Islander Health Survey: First Results, 2012–13 — Australia, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4727.0.55.0012012-13?OpenDocument>

<sup>15</sup> See <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4727.0.55.001>

Overcrowding at home	9.4
You/family member/close friend spent time in jail	9.0
Involuntary loss of job	9.0

The results contained in this survey are consistent with what is known of the social and environmental circumstances in which young Aboriginal people live. The interconnected nature of Indigenous social and family life often means that grief and loss are not far away due to the connectedness of people to family, kin and community. It should also be noted that the death rate for Aboriginal youths between 12-24 years is more than double that of non-Aboriginal youths with the most common forms of mortality being suicide and motor vehicle accidents<sup>16</sup>. These are experienced by all involved as traumatic events causing extreme and enduring grief and loss reactions.

The results also highlight the effects of high unemployment for this group and their marginalisation in society leading to involvement with the Police, the juvenile justice system and the experience of imprisonment. The impact of serious illness, the ramifications of early pregnancy and issues of alcohol and substance abuse can also be seen in these results.

The experience of such high levels of psychological distress particularly at such a vulnerable time in life, when stepping out into the adult world, and often occurring in the context of significant socio-economic disadvantage, is cause for great concern given the potential for young Aboriginal people to slip and fall into “the gap” and enter a downward spiral of hopelessness and despair. In light of this it is incumbent upon all involved in working with Aboriginal children and their families to ensure that they provide services that are culturally appropriate and effective in responding to the needs of Aboriginal child, young people and their families. To do so is clearly an investment in a better future for all.

### **Aboriginal Identity**

Aboriginal identity is complex, personal, and often fraught with difficulty for Aboriginal and non-Aboriginal people alike. Australia has a lengthy history of attempting to classify and identify Aboriginal people according to matters such as the presumed

---

<sup>16</sup> Australian Institute of Health and Welfare 2011. Young Australians: their Health and Wellbeing 2011. Cat. no. PHE 140 Canberra: AIHW, page 180.

amount of Aboriginal “blood” that an individual may have – “full blood”, “half-caste”, “quarter caste”, and so on. Other efforts to categorize Aboriginal people have focused upon geography and lifestyle – “urban” and “traditional”, for example. This effort to categorize and label Aboriginal people has often been informed by racism, stereotyping and prejudice. A report inquiring into the needs of urban dwelling Aboriginal people, for example, noted that<sup>17</sup>

*“There is a fairly common perception that urban Aboriginal people are not “real” Aboriginals. In this view, Aboriginality is measured only by the darkness of skin and the practice of traditional lifestyles. There is a widespread perception that urban Aboriginal people have lost their culture.”*

Questions as to the legitimacy of people’s Aboriginal identity are not uncommon in public discourse and are matters that at times are raised in family law and child protection proceedings.<sup>18</sup> An Aboriginal litigant in family law proceedings recently commented

*“When I said in court I was Aboriginal, it was like nobody believed me and I had to prove it.”<sup>19</sup>*

The comment reflects the difficulty that Aboriginal people often encounter in dealing with non-Aboriginal people and systems that struggle with the issue of Aboriginal identity. At the heart of this problem has been the fact that Aboriginality over the course of time has been defined by non-Aboriginal people and systems that have passed judgement upon people’s right to identify as Aboriginal. In commenting upon this issue, Jody Broun, former Co-Chair of the National Congress of Australia’s First Peoples commented.

*“Much of this ‘debate’ has become a thinly veiled platform for racists to peddle their tired, ill-informed, racist rhetoric. Racism lies just beneath the surface and*

---

<sup>17</sup> Mainly Urban, Report of the Inquiry into the needs of urban dwelling Aboriginal and Torres Strait Islander People, 1992

<sup>18</sup> Of relevance here is the 2009 Federal Court Case in which a prominent group of Aboriginal people took legal action against Fairfax Media over an article written by columnist, Andrew Bolt, that implied that many fair-skinned Aboriginal people chose to identify as Aboriginal for financial, career and political advantage.

<sup>19</sup> See S. Ralph, Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice, 2012, <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Papers/Papers+and+Reports/Indigenous+Australians+and+Family+Law+Litigation>

*it bubbles out when Aboriginal identity is discussed. Let's be clear, Aboriginal identity is defined by us, no one else. We are a diverse people, reflecting the contemporary Australia we all inhabit.”<sup>20</sup>*

In attempting to make sense of these issues, an important distinction to bear in mind is the difference between

**Heritage** / *“that which comes or belongs to one by reason of birth”*

**Identity** / *“the internal subjective concept of oneself as an individual”*

The relevance of this distinction is aptly described by Shane Houston, former Deputy Vice-Chancellor, Sydney University, who in commenting upon Aboriginal identity explained,

"My mother is a non-Aboriginal woman. My identity as an Aboriginal man is not diminished by the fact that I have a non-Aboriginal mother. I'm quite proud to acknowledge my [white] heritage, but in forming my identity I have made stronger and stronger commitments to values and principles I think are important and they are what govern my identity as an Aboriginal man.”<sup>21</sup>

The above description of Aboriginality draws a clear line between heritage and identity. That is, Aboriginality is in part defined by biological heritage, but it is also firmly shaped by a strong commitment to values and principles that form the basis of Aboriginal identity. These values and principles are acquired through family relationships, connectedness with others, and personal histories. An understanding of Aboriginal history and the adversity and oppression faced by Aboriginal people since colonization is a crucial factor in shaping Aboriginal identity. This is a legacy that has been passed on from generations that have gone before. It is an awareness of a shared history amongst Aboriginal people that contributes strongly to identity and affiliation amongst Aboriginal people.

In responding to colonization, oppression and injustice, cultural survival and resilience are qualities that are highly valued by Aboriginal people. Maintaining respect for, and the integrity of Aboriginal culture is a legacy that is carried by all Aboriginal people. Ensuring that children are knowledgeable of their Aboriginal culture, its values and

---

<sup>20</sup> See <https://www.smh.com.au/entertainment/books/bolt-link-to-racist-reviews-of-book-20120411-1wsa1.html>

<sup>21</sup> See <https://www.creativespirits.info/aboriginalculture/people/aboriginal-identity-who-is-aboriginal>

customs, and draw pride from this, is something that is sought by all Aboriginal parents.

A key point for those who are working with Aboriginal children and their families is an understanding that your role is not to determine or evaluate the legitimacy or authenticity of the client's Aboriginality. The individual's decision to identify as Aboriginal should be acknowledged and respected and should not be subject to the stereotyping, prejudice and racism that often marks any discourse upon Aboriginality. In the context of family law and child-related proceedings, the proper emphasis should rest on the relative significance to be placed on the Aboriginality of the child and the child's need for a connection to Aboriginal culture.

### **Aboriginal family, child-rearing practices and kinship**

Due to the diversity of Aboriginal culture and people it is not possible to provide a single, uniform description of typical Aboriginal child-rearing practices or parenting styles. Some observations can be made, but the reader must remain wary of making generalizations that may not necessarily apply to some, or even many Aboriginal families.

Traditional Aboriginal family structures are based on a collectivist form of social organisation in which the raising of children is not just the responsibility of the parents. In Aboriginal culture the notion of family is broader and more inclusive of extended family members and kinship ties in which matters of mutual responsibility, obligation and reciprocity are tacitly known and understood. This is often evident in the extent to which grandmothers and aunties also play a role in caring for children, particularly when difficulties arise within the family.

An understanding of Aboriginal families and child-rearing practices begins with the understanding that parenting and child-rearing practices are culturally determined and are based upon the culture's expectations, beliefs, values and future aspirations. As a colonized society Aboriginal Australians seek to maintain cultural integrity and the values and practices that have been part of Aboriginal cultural for tens of thousands of years. At the same time there are evident pressures exerted by mainstream, non-Aboriginal society for Aboriginal people to more fully adapt to living within non-Aboriginal society, and thereby comply with the expectations of non-Aboriginal people. Australian history is littered with examples of this tendency that include policies relating to the forced removal of Aboriginal children from their families and related policies of

assimilation and integration that have impacted upon generations of Aboriginal people. The effects of this colonizing process can still be seen today in the inter-generational trauma experienced by Aboriginal families and persistent social issues that are seemingly resistant to any intervention.

In exploring possible differences between Aboriginal and non-Aboriginal parenting styles Malin, Campbell and Aguis (1996) compared four families – two Aboriginal and two non-Aboriginal mothers and their children – and did so by recording and noting evident differences when each mother went on a picnic with their children. The recordings were reviewed and rated on several criteria relating to parenting style. The authors concluded that while Nunga Aboriginal families are *“as different from each other as any other family”*, the Nunga families were observed to

- encouraged independence, resilience and self-reliance
- encouraged taking responsibility for younger siblings at an early age
- were less interventionist

When non-Aboriginal parents were asked to observe and rate the differences, they observed in Aboriginal parenting styles their views focused on the following,

- lack of adequate parental supervision
- children non-compliant
- teasing and aggressive behaviour to siblings

In commenting upon these observations, one of the Aboriginal mother participants stated.<sup>22</sup>

*“These are the kinds of things that government workers will see and turn around and say that maybe I’m not a fit mother. Because they are only seeing things through their white culture, they will misinterpret the way I discipline the kids, and they won’t notice that my kids are happy and loved and growing up in a way that they can look after themselves and do the right thing by their family.”*

“Dorothy”, Nunga Aboriginal mother

This view reflects the aspirations of an Aboriginal mother for her children to grow up to be independent and strong, and who can be relied upon to support their family and

---

<sup>22</sup> See Malin, M., Campbell, K., & Aguis, L., Raising Children in the Nunga Aboriginal Way, Family Matters, 1996, 43, 43-47

to fulfil their obligations, thereby doing “the right thing.” It also reflects the underlying concerns of an Aboriginal mother that her parenting style may be viewed negatively by others, and possibly invite intervention by welfare authorities who for generations have been viewed with distrust and fore-boding by Aboriginal people.

To avoid introducing cultural bias into litigation involving Aboriginal families it is important to understand the differences that may exist in Aboriginal and non-Aboriginal parenting styles, and to properly consider these matters when dealing with issues of child-rearing and parenting practices. Wettinger (1979), for example, describes the following a notable aspects of Aboriginal parenting styles.<sup>23</sup>

- The care of children is shared amongst family members, including siblings /cousins
- There is less focus on primary attachment and “a stable base”
- Parents are far less interventionist
- There is less verbal instruction
- There is less focus upon possessions and individual ownership
- There is a priority placed on respect for culture and keeping strong

The wish for children to grow up being proud of their Aboriginality and strong in their connection to family, culture and community, is an aspiration shared by most Aboriginal families. For a society that has endured the upheaval and trauma of colonization, the preservation and promotion of culture is a highly desirable goal sought by most Aboriginal parents in raising their children. This is achieved by raising children who have a full understanding of their family and its stories, and who are strong and take pride in their Aboriginal identity and culture. The importance of this goal for Aboriginal people has been enshrined in legislation in both the domains of family law and child protection.

The Family Law Act, for example, provides clear guidance for decision-makers who are required to make decisions in relation to the welfare of Indigenous children. The Act requires a Court in making any decision about the best interests of an Indigenous child to consider, along with other things,

---

<sup>23</sup> Wettinger, M.F, (1979) Psychological Assessment of Aboriginal people, Psychologically Speaking

“The child’s right to enjoy his or her Aboriginal or Torres Street Islander culture (including the right to enjoy that culture with other people who share that culture)”<sup>24</sup>

The Aboriginal child’s right to enjoy their culture includes the right to maintain a connection with that culture and to have the support, opportunity and encouragement necessary <sup>25</sup>

- To explore the full extent of that culture consistent with the child’s age and developmental level and the child’s views
- To develop a positive appreciation of that culture

The Family Law Act also directs that the Court also “must have regard to any kinship obligations, and child-rearing practices, of the child’s Aboriginal or Torres Strait Islander culture.”<sup>26</sup> The legislation reflects Australia’s position as a signatory to the UN Convention on the Rights of the Child (1989). The legislation is also in accord with the recommendations of the “Bringing Them Home” report (1997) that referred to the need of “every Indigenous child” to maintain a connection to their Indigenous culture.<sup>27</sup>

The NSW Children and Young Persons (Care and Protection) Act 1998 does not provide the same specific direction to decision-makers in making orders in relation to the best interests of an Aboriginal child. The Act emphasizes the principles of self-determination for Aboriginal people, and the involvement of Aboriginal people in decision-making, as well as the placement of children in accordance with the Aboriginal Child Placement Principle.

The Aboriginal Child Placement Principle is an acknowledgement of the needs of Indigenous children to maintain as far as possible a connection to family and culture through kinship and community networks. All Australian states and territories now have legislation in place that incorporates such a principle, and which emphasizes the importance of Aboriginal children maintaining a connection to their Aboriginal family and culture. The aims of the placement principle can be broadly conceptualized as,

---

<sup>24</sup> Family Law Act (1975) Section 60CC3 (h)

<sup>25</sup> Family Law Act (1975) Section 60CC (6)

<sup>26</sup> Family Law Act (1975) Section 61F: Parental Responsibility

<sup>27</sup> Human Rights and Equal Opportunity Commission (HREOC), “Bringing Them Home”, Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander Children from their Families, April 1997, Recommendation 54



1. Recognising and protecting the rights of Indigenous children, family members and communities in child welfare matters.
2. Increasing the level of self-determination for Indigenous people in child welfare matters.
3. Reducing the disproportionate representation of Indigenous children in the child protection system.<sup>28</sup>

The placement principle also give prominence to the notion of “kinship,” which is also to be considered in decisions relating to the placement of Indigenous children. Kinship is an aspect of Aboriginal culture that derives from ancient forms of social organization in small groups, in which individuals understood their relationship to others in terms of clan membership or “skin groups” based on their family line of descent extending back over millennia.

In contemporary times, kinship has been taken to mean a variety of things and the meaning often varies, and needs to be considered carefully in context. In the context of child welfare proceedings, kinship is often used in a flexible manner to denote an individual who is not necessarily a biological family member, but a person who is still identified by the child’s family as having cultural, community or social ties that invest in them some degree of responsibility or obligation towards the child and his or her care.

### **Attachment and Cultural Affiliation**

Generally, there are differences between Aboriginal and non-Aboriginal approaches to raising children that have implications for the assessment of issues related to bonding and attachment between children and their carer(s). It is important to note that theory and research in relation to bonding and attachment derives from a cultural perspective that is far removed from Aboriginal notions of family and social organisation, and that cultural differences have to be considered in any assessment of bonding and attachment. Attachment theory emphasizes the following.

- The importance of a primary attachment figure for the child

---

<sup>28</sup> Tilbury, C., Burton, J., Sydenham, E., Boss, R., & Louw, T. (2013). Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements. SNAICC: Melbourne. Retrieved from [www.snaicc.org.au/wp-content/uploads/2015/12/03167.pdf](http://www.snaicc.org.au/wp-content/uploads/2015/12/03167.pdf)

- The importance of a stable parenting base
- The importance of consistency of care and routine

In contrast, Aboriginal notions of attachment and child-rearing often display the following characteristics,

- Primary attachment in the first year of life, but progressing to the development of multiple attachments thereafter
- A stable parenting base is wherever the family might be, not location specific, but focused on the presence of family
- Lack of consistency and routine – tendency to allow child to decide, or to be guided by child's routines rather than imposed by others.

An important issue confronting any decision-maker in deliberating upon the best interests of an Aboriginal child is the relative importance that is attached to the child's need to maintain stable attachments versus the child's need for cultural affiliation, or what can be described as a connection to Aboriginal culture via their Aboriginal family. Whilst the achievement of stable and affectionate attachments is a highly important developmental goal for all children, the achievement of a coherent sense of identity based upon cultural affiliation is equally important in many situations. In infancy and early childhood, the process of bonding and attachment promotes a fundamental sense of trust in others, whilst the process of affiliation in early and later childhood promotes a deep sense of cultural belonging that is the foundation of the child's identity. This is ultimately a crucial contributor to the development of a well-adjusted, healthy, adult personality.

The process of cultural affiliation is highly important in the child's long-term development, yet in the past it has not been accorded the status that it merits in decision-making. Often decisions have been justified on the basis of meeting the child's need for "emotional stability" without due consideration being given to the detrimental long-term consequences that follow on from a failure to adequately consider the needs of the child in the appropriate socio-cultural context.

Family assessment, for example, as undertaken by court experts is often steeped in the traditions of western psychology, with its emphasis upon the individual, and based upon modern Anglo-European notions of social and family organisation. Unless a court expert has the required cultural competency and experience in working with Aboriginal families the report may fail to attend to significant cultural issues bearing upon the

child's best interest, and in doing so provide an evaluation of the issues marked by significant ethnocentric bias.

In contrast to the orthodox view of many court experts, Aboriginal people are likely to argue that children have the ability to effectively attach themselves to many carers in the course of their "growing up". In many indigenous cultures multiple, serial attachments are the norm and are not regarded as necessarily harmful to the child's development and long-term adjustment.<sup>29</sup>

The fluid nature of Tiwi Islander peoples' child-care arrangements and associated parenting practices was described in an anthropologist's report to the Family Court as follows.

*"It is not at all unusual for Aboriginal children to move freely, even frequently (between kin and community). These movements .... are seen as important ways in which children acquire their understanding 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."*<sup>30</sup>

The Aboriginal perspective upon attachment and child-rearing is often based upon a collectivist view of family and social life that sees responsibility for the growing up of children invested in many people. According to this view, children come to trust in the capacity and commitment of a multitude of people to care for them and nurture them through childhood and into adulthood. By this means children come to take their place in Aboriginal society where responsibilities and obligation to family and kin are deeply rooted and heart-felt.

From this perspective, the disruption caused to a child's primary attachment, for example, is out-weighted by the benefits derived from the child's exposure to a broader and deeper network of family and kin to whom the child will eventually form strong attachments. The implicit expectation is that children will grow up with maximum exposure to their cultural heritage and eventually take their place within their Aboriginal family and community. From the stand-point of a traditional Aboriginal family living in

---

<sup>29</sup> See Mesman J., Van Uzendoorn M.H., and Sagi-Schwartz A., (2016) Cross-Cultural Patterns of Attachment: Universal and Contextual Dimensions, in J. Cassidy and P. Shaver (eds), Handbook of Attachment, 3<sup>rd</sup> edition, pp 790-815, New York Guilford

<sup>30</sup> Dr G. MacDonald, Anthropological Report on Aboriginal and Torres Strait Islander Child-rearing Practices, Report to the Family Court, Darwin, *re CP (1997)*, 21 Fam LR486.

a rural or remote community, this would ensure the family's spiritual and ceremonial obligations to country would be maintained. In this setting cultural and family considerations are highly important in determining the child's best interest. For Aboriginal people a desirable outcome of such deliberations is the preservation and promotion of Aboriginal culture, particularly its transmission to the next generation - as well as ensuring that children are properly cared for and safe from harm.

## **Common Issues in Child-Related Proceedings**

### **Parenting capacity**

The assessment of Aboriginal parenting capacity is an area of research and practice that has received relatively little attention from Australian psychologists. This is particularly concerning given the increasingly disproportionate number of Aboriginal and Torres Strait Islander families coming into contact with child protection and juvenile justice systems across all states and territories.

A common referral question for those working in this area is often the question of whether an Aboriginal parent or carer is able to adequately provide for the child's developmental needs. In most instances this involves an assessment of numerous matters including family background, mental health, family violence, alcohol and substance abuse, and environmental and cultural issues in forming an understanding of the best interests and needs of the child. The assessment of parenting capacity in such cases requires the assessor to be able to engage effectively with family members and to understand the cultural context in which the family functions, and how this impacts upon the issues to be assessed.

A fundamental consideration in many such cases is the extent to which the extended family is involved in the care of the children and whether their involvement mitigates any identified risks in the capacity of either parent to care for the children. The collective nature of many Aboriginal families, in which children are cared for by several family members, requires the assessor to go beyond a focus on the individual parent and to focus upon the broader dynamics of the family and the support that might be available to each parent. This type of shared care arrangement is consistent with Aboriginal cultural practices and is a common arrangement in which children transition freely between their carers, and other family, in a cooperative and collective approach to the raising of children.

The viability of such a care arrangement is dependent upon the individual functioning of each of the carers as well as the capacity of the carers to work in a cooperative and supportive manner with each other. It is also dependent upon the specific needs of the children and their ability to adapt to a style of care that can involve frequent and regular changes of carers and household routines. At its best, such an arrangement allows children to bond with multiple family members, to fully enjoy the broader network of family relationships that exist, and to experience a greater sense of affiliation with family, culture and community. At its worst though, such an arrangement can leave children vulnerable and neglected when family members, for whatever reason, do not act upon their responsibilities.

A common problem with parenting capacity assessments, particularly in the context of high-levels of socio-economic disadvantage and low educational attainment, is the reliance of assessors upon the comments provided by Aboriginal people in interview. For many people who do not have a good grasp of language and who have difficulty in expressing themselves, particularly in unfamiliar and stressful situations, the task of articulating an informed and considered view on contentious parenting matters can pose great difficulty.

In such situations assessors tend to attribute a lack of knowledge and insight, and/ or a lack of child-focus, to the failure of the individual to articulate an answer that is consistent with what the assessor is looking for, in terms of an educated and thoughtful response. The absence of a coherent verbal response to an inquiry about parenting matters should not be taken to indicate that a deficit exists in the parent's knowledge or skill level. In such situations the assessor is required to look beyond the parent's comments in interview and consult with others who are familiar with the parent and their practices in caring for children. In such a situation the assessor should carefully explore the day-to-day parenting routines and practices of the parent in caring for the children to ascertain the actual functioning of the parent in their parenting role, rather than overly relying upon comments provided in interview.

Comment provided by others must also be viewed in the context of the relationship existing between the observed individual and the informant due to the potential for bias and/or ill-formed views to influence the individual reports of others. Issues of confidentiality and privacy are also relevant considerations in talking with other potential informants, or undertaking broader enquiries.

Family assessments in such cases also need to consider and examine the level of community-based support available to each parent, and the extent to which each

parent has been able to access relevant therapeutic services for themselves and /or the children. A further consideration here is the parent's capacity to implement positive change in addressing any identified deficits in their parenting capacity or any special needs that the children may have. The parent's capacity to change, and their readiness to engage in a change process, are important considerations in examining issues of restoration, for example.

In evaluating the extent to which Indigenous issues have been assessed and considered in parenting capacity assessments, the following content should be viewed as essential to an understanding of the issues involved in any decision-making upon the welfare and best interests of Aboriginal children.

- a. The parties' Indigenous cultural background,
- b. Any active or current involvement of the child with extended Aboriginal and Torres Strait Islander family or kin,
- c. The parent's connection to their Aboriginal and Torres Strait Islander community,
- d. The parties' views of the significance of cultural heritage in the matter,
- e. The extent to which the child identifies as Aboriginal and/or Torres Strait Islander
- f. The capacity of all parties to provide support, encouragement and opportunity for the child to explore the full extent of their Aboriginal and Torres Strait Islander heritage,
- g. The capacity of parties to foster a positive sense of Aboriginal and/or Torres Strait Islander identity, and
- h. The impact of the child being raised in a non-indigenous family (where that is one of the options under consideration).

Assessors should be held to account in meeting these minimum standards, which are part of the Federal Circuit and Family Court guidelines for the preparation of reports involving Aboriginal and Torres Strait Islander children. While these guidelines are not directly applicable in the care and protection jurisdiction, they are a useful resource when considering the factual basis, reasoning and opinions of experts in the care and protection jurisdiction. Such reports should provide clear coverage of the above matters, and failure to do so should be a point of inquiry when examining the assessor in court. This also provides an opportunity to query the expertise of the assessor in

relation to the assessment of Indigenous issues. In this context inquiry should also be made as to how (or whether) the assessor has adapted their usual approach to family assessment in recognition of the cultural issues and their relevance and significance in determining the child's best interests. A broader focus on the extended family, greater use of collateral source information, awareness of language and communication issues and differences in child-rearing practices are responses that would be expected from an assessor with expertise in working with Aboriginal families.

### **Children's Court Clinic**

The Children's Court Clinic was created to provide the NSW Children's Court with expert clinical reports. It is part of the Sydney Children's Hospitals network and is independent from the Court, the Department of Communities and Justice and the legal profession.<sup>31</sup>

The clinic employs people with experience and qualifications in psychiatry, psychology, and social work, who are known as authorised clinicians. Their role is to help the judicial officer, lawyers and parents decide what is the best plan for a child or young person. Many of the assessments tendered in NSW children's court proceedings will have been written by authorized clinicians.

In working with Aboriginal families, Court Clinicians draw upon a recently published "guidance document" that provides context and direction for clinicians in engaging with Aboriginal families and preparing reports following the making of an Assessment Order.<sup>32</sup> The document provides broad direction for clinicians, and was developed following extensive consultation with Aboriginal consultants and court clinicians, and a review of completed assessments.

Clinicians are encouraged to apply the guidelines in working with Aboriginal families. These guidelines also reflect the principles stated in the NSW legislation in relation to Aboriginal and Torres Strait Islander people.<sup>33</sup> This includes an emphasis upon self-determination and the participation of Aboriginal people in decision-making over Aboriginal children. It also emphasizes the importance of consultation with Aboriginal

---

<sup>31</sup> See [Children's Court Clinic \(nsw.gov.au\)](http://www.childrenscourtclinic.nsw.gov.au)

<sup>32</sup> Children's Court Clinic, Guidance Document 4: Working with Aboriginal Children and Families in Children's Court Clinic Assessment Reports, May 2020

<sup>33</sup> Children And Young Persons (Care and Protection) Act 1998 – Chapter 2, Part II, Sect 11-14

people and their agencies in decision-making, and the importance of the application of the Aboriginal child placement principle.

The guidelines recommend, for example, the following.

1. Clinicians should consider the use of Aboriginal Consultants in planning assessments with Aboriginal families.
2. Clinicians should be mindful of the presence of cultural bias in preparing assessments with Aboriginal families.
3. Clinicians are encouraged to undertake Aboriginal “cultural awareness” programs.
4. Clinicians should be clear in identifying cultural connections and specific groups with whom an individual is affiliated, rather than simply describing the individual as “Indigenous.”
5. Clinicians should be knowledgeable of cultural differences in child-rearing practices and the formation of attachments.
6. Clinicians should comment upon the risk that Aboriginal children might face if raised with no cultural knowledge or connection to their Aboriginal heritage.
7. Clinicians should explore strategies and recommendations that may help maintain the child’s connection to their Aboriginal culture, including the cultural provisions of any Care Plan.
8. Clinicians should adopt a strength-based approach to assessment, but should also be mindful of the effects of entrenched disadvantage upon parenting capacity and the contributing factors.

The guidelines are not prescriptive, but provide guidance and direction to clinicians in undertaking assessments with Aboriginal families, based largely on feedback from clinicians and Aboriginal consultants. The guidelines have been developed as part of a quality assurance program, and as such assessments completed by clinicians should be judged by the extent to which they comply with the guidelines.



## **Care Plans and Cultural Plans**

The development of a Care Plan is an important case management tool in working with children and their family when children are in out-of-home care. In any proceedings in which final orders are sought transferring parental responsibility from a parent, a care plan is required by the Court prior to such orders being made. In the case of Aboriginal children, a Cultural Plan is included in the Care Plan as a means of ensuring that the children's cultural needs are met. The plan is based on extensive consultation with the child, their parents and family, their carers, service providers, and any others involved in the care of the child. Cultural planning is necessary to ensure the cultural needs of children and young people are met so they stay connected to their culture, engage in and embrace their cultural development, and grow up with a strong sense of cultural identity.

A Cultural Plan developed as part of the Care Plan, is a standalone, point-in-time document detailing the cultural consultations and supports for participating in culture that occurred leading up to the development of the plan.<sup>34</sup> It records all relevant information on how the child or young person will maintain their cultural identity, meet their cultural needs, be included in cultural development activities, and also details the consultation with culturally significant individuals in the child's life that contributed to the development of the cultural plan.

In developing a cultural plan, a caseworker must:

- complete a minimum of four (4) culturally appropriate consultations to develop an Aboriginal and Torres Strait Islander Cultural Plan. A culturally appropriate consultation is when an individual contributes significant cultural information relevant to the child and their family into the development of the Cultural Plan,
- record a minimum of four (4) supports that will provide the opportunity for the child or young person to fully participate in cultural activities supporting their cultural development and to maintain their cultural identity,
- record any culturally appropriate services significant to the child or young person, as determined through consultations with the child, family, kin and community representatives.

---

<sup>34</sup> See [Policy Statement: Care and Cultural Planning | Family & Community Services \(nsw.gov.au\)](#)

The extent to which Cultural Plans are thorough in their development and effective in ensuring the child's cultural needs will be met are often contentious matters. The requirement for consultation with family members does not necessarily mean that family members views are incorporated into the plan or that the appropriate family members have been consulted. Consultation with family, kin and community also raises issues of confidentiality and privacy for many Aboriginal families who do not want others in the community to be informed of the troubles they are dealing with. The development of cultural plans is intended to be with the agreement of family and those significant to the child. However, obtaining consensus in the midst of children's court litigation, when all parties have differing perspectives upon the care of the child, can be a fraught and highly challenging exercise.

Cultural plans also vary according to whether they have a static or dynamic view of connection to culture. A static view is one in which cultural connection is tied to material matters and symbolic events, such as the display of artwork, Indigenous-themed books, music, and attendance at NAIDOC week events. A more dynamic view of connection to culture involves a greater focus upon participation in cultural activities with others who share that specific culture. This approach is focused more on communication and contact with significant family members and others, and is more forthcoming in promoting the children's contact and communication with family and community members. This approach emphasizes lived experience as the catalyst for promoting connection to culture, rather than a static view of culture in which children are simply exposed to their Aboriginal cultural heritage.

Given the uniqueness of every child's situation, the content of care plans, and their implementation, will depend very much upon issues of child safety, and whether the child is able to maintain consistent and meaningful contact with their Aboriginal family and community. The fundamental question to ask in developing or evaluating any cultural plan is, as follows - *Given what is known of this child and their family, what is necessary and sufficient to ensure that the child develops and maintains a positive and meaningful connection to their Aboriginal culture and identity?*

In responding to this question, the issue of the child's contact with their Aboriginal family comes to the fore. Consideration should be given firstly to the issue of child safety and any potential risk of harm that might be present if the child is to spend supervised or unsupervised time with their family. The presence in the child's life of extended family members and kin who have a significant and meaningful relationship with the child also needs to be considered in making decisions about family contact. It should be acknowledged that regular contact and communication between children

and their family is the best means of ensuring that children will retain a connection to their Aboriginal culture and heritage.

The existence of a cultural plan though does not provide any assurance that a child's cultural needs will actually be met. Cultural plans are not enforceable, and are required to be updated at regular intervals consistent with the child's development and their needs. Oversight of the plan and its implementation is likely to be lost in a system that is poorly resourced, and in which caseworkers regularly come and go. The Children's Court Clinic, for example, acknowledges in its guidelines for clinicians is that "*most cultural plans that clinicians have seen only address limited connections to music, drawing and special events (such as NAIDOC).*"<sup>35</sup> The process of developing cultural plans, and the implementation of those plans, are contentious and challenging matters that warrant greater scrutiny, particularly given the significance given to such plans in decision-making upon the child's cultural needs.

## **Family Violence**

Family violence impacts on Aboriginal people at vastly disproportionate rates in comparison to non-Aboriginal Australians. For example, Aboriginal women are 34 times more likely to be hospitalised from family violence, and almost 11 times more likely to be killed as a result of violent assault.<sup>36</sup> It is sometimes noted that Aboriginal women bear the dual burden of being disadvantaged by both gender and race, and all that this entails for them. It must be acknowledged that Aboriginal men have to bear full responsibility for their attitudes and behaviour towards women. However, in many instances men can also be readily viewed as victims of family violence due to their upbringing in which exposure to violence and negative role modelling was a common occurrence. It should be noted that the intergenerational transmission of violence over the course of generations continues to be an underlying dynamic that impacts upon many Aboriginal people, their families and communities.

The causes of family violence in Aboriginal communities are complex, but are commonly viewed in terms of a response to past traumas, including the long history of oppression and dispossession that Aboriginal people have suffered as a result of colonisation, including the impact of the Stolen Generations and the resultant trauma

---

<sup>35</sup> Children's Court Clinic, Guidance Document: 4 Working with Aboriginal Children and Families in Children's Court Clinic Assessment Reports, May 2020, paragraph 44, page 8

<sup>36</sup> See [www.dvrcv.org.au/knowledge-centre/our-blog/family-violence-aboriginal-communities](http://www.dvrcv.org.au/knowledge-centre/our-blog/family-violence-aboriginal-communities)

and societal dislocation that this has caused. Family violence also arises from unacceptable levels of disadvantage as shown in almost every sociological /or demographical survey of the needs and interests of Aboriginal people.<sup>37</sup> Many also confront the added burden of racism, prejudice and discrimination that exists in contemporary Australian society which also contributes to poor psychological adjustment and dysfunction. As stated in a report by the Australian Institute of Family Studies (2002)<sup>38</sup>

“There is general agreement in the literature that trauma experienced by Indigenous people is not only historic but new traumas are being created in the present. The contemporary social problems experienced by individuals and families (for example, alcohol, drug addiction and family violence), while related to stress in the past, are in turn creating present stresses for many Indigenous people.”

It should be noted though that family violence is not an inherent part of Aboriginal culture. Although traditional Aboriginal society had (and has) clear gender distinctions and power and authority structures, violence towards a female within a group would in many instances draw a response from fathers, brothers and others in a manner that provided women with a degree of protection from violence and abuse. Although ritual punishment, for example, has remained a part of Aboriginal society it is typically carried out in accordance with local traditions, mostly in remote communities, often under the oversight of elders and in the presence of those who might intervene to moderate the punishment and ensure that cultural protocols are not breached. It is not a practice that applies to conflict within a marriage, and has no relationship whatsoever to the behaviour of a drunken man beating his wife with a fence picket.

Such behaviour is to be viewed at least in part as an outcome of all that has gone before, including the historical and intergenerational trauma that continues to impact upon contemporary Aboriginal society today, along with high levels of disadvantage, alienation and marginalisation. Such behaviour should also be viewed as indicative of an individual and/or family that need help and support in addressing the many issues and challenges that they confront in adapting to historical and contemporary change. In this context, the importance of healing and reconciliation is acknowledged by many

---

<sup>37</sup> See any Australian Bureau of Statistics (ABS) or Australian Institute of Health and Welfare (AIHW) reports detailing comparative statistics for Aboriginal and non-Aboriginal people.

<sup>38</sup> See <https://aifs.gov.au/cfca/publications/child-abuse-and-family-violence-aboriginal-communities/causal-factors-family-violence>

Aboriginal (and non-Aboriginal people) as fundamental to improving the plight of Aboriginal families and their communities along with the provision of safe guards for the most vulnerable members of Aboriginal society.

In considering Aboriginal family violence it should also be viewed in the context of collectivism and the impact that violence has not only upon the individual but also upon the broader family and community. The impact often reverberates throughout a family and community and can potentially involve the extended family and others who have a responsibility and an obligation to support an aggrieved or ill-treated family member. The effect is also keenly felt by Aboriginal children and young people who are exposed to conflict and violence within their home and community. This is a situation that increasingly invites the intervention of child protection and police authorities, thereby leading to the potential removal of children from their families, the incarceration of family members and involvement with the legal system.

## **Trauma**

An understanding of the role of trauma and grief in the lives of Aboriginal families is an important starting point for any assessment involving Aboriginal people. The experience of trauma and grief in all its various forms is common to most Aboriginal families and has a widespread and at times debilitating effect upon family functioning and the well-being of family members. This is aptly described by the Aboriginal and Torres Strait Islander Healing Foundation at follows.<sup>39</sup>

“The trauma experienced by Indigenous people as a result of colonisation and subsequent policies, such as the forced removal of children, has had devastating consequences. The disruption of our culture and the negative impacts on the cultural identity of Aboriginal and Torres Strait Islander peoples has had lasting negative effects, passed from generation to generation. The cumulative effect of historical and intergenerational trauma severely reduces the capacity of Aboriginal and Torres Strait Islander peoples to fully and positively participate in their lives and communities, thereby leading to widespread disadvantage.”

---

<sup>39</sup> See <https://healingfoundation.org.au/app/uploads/2017/02/Growing-our-Children-up-SINGLES-updated-2015.pdf>

Intergenerational trauma is a form of historical trauma that is transmitted across generations. It is the trauma that is transferred from the first generation of survivors that directly experienced or witnessed traumatic events to the second and further generations. Atkinson, Nelson and Atkinson (2010) define intergenerational trauma as “the subjective experiencing and remembering of events in the mind of an individual or the life of a community, passed from adults to children in cyclic processes.”<sup>40</sup>

The term “complex trauma” has also been used to describe the experience of chronic and/or recurrent traumatic events in childhood (Van der Kolk 2003). Whereas single traumatic incidents tend to produce isolated behavioural responses to reminders of trauma, chronic trauma can have long-term pervasive effects on a child’s development (Van der Kolk 2003).

The collective nature of Aboriginal social and family life often means that the experience of trauma and grief is not far away from anyone due to the connectedness of Aboriginal people to family, kin and community. It should be noted, for example, that the death rate for Indigenous youths between 12-24 years is more than double that of non-Indigenous youth with the most common forms of mortality being suicide and motor vehicle accidents<sup>41</sup>. These events are experienced by all involved as traumatic events causing extreme and enduring grief. When combined with other adverse life events such as exposure to family violence, childhood neglect and abuse, chronic illness and high levels of socio-economic disadvantage, the effects of complex trauma are to be seen in the cumulative harm experienced by the individual and maladaptive efforts to deal with trauma symptoms. This often finds expression in less than adequate parenting, alcohol and substance abuse, chronic issues with anxiety and depression and/or recourse to antisocial behaviour such as juvenile offending and family violence. The effect of this is to continue the cycle of trauma in all its various forms, and for the effects to reverberate across generations to come.

---

<sup>40</sup> Atkinson, J, Nelson, J, & Atkinson, C 2010, ‘Trauma, transgenerational transfer and effects on community wellbeing’, in N Purdie, P Dudgeon & R Walker (eds), *Working together: Aboriginal and Torres Strait Islander mental health and wellbeing practices and principles*, Department of Health and Ageing, Canberra, pp. 135–144.

<sup>41</sup> Australian Institute of Health and Welfare 2011. *Young Australians: their Health and Wellbeing 2011*. Cat. no. PHE 140 Canberra: AIHW, page 180.

## **Risk and Protective Factors**

In considering issues of risk of harm pertaining to Indigenous children it is important to have an understanding of both the risk and protective factors that apply to many Indigenous families in the context of child protection. These factors include risk and protective factors that are often specific to Aboriginal families and their communities. These factors are listed as follows.

### **Indigenous Specific Risk Factors**

- Cultural alienation, identity confusion and racism
- Trans-generational transmission of trauma
- Distrust of the child welfare system to past exposure to institutional and systemic racism
- Suicide of a family member and collective grief
- Welfare dependence

### **Indigenous Specific Protective Factors**

- Cultural affiliation and resilience
- Extended family, community and kin networks
- Living on country and connectedness

These Indigenous-specific risk and protective factors need to be considered along with the many other risk and protective factors that might apply to the general population in making any decisions relating to the welfare and best interests of Aboriginal children.

The issue of cultural alienation and the importance of children maintaining a connection to their Aboriginal family, community and culture is a highly important consideration that has been highlighted by the experience of the Stolen Generations, and reinforced by the experience of children who have lived in out of home care and who have been raised in non-Aboriginal households with limited access to their Aboriginal family and culture. For many of these children there is a sense of dislocation from family, community and culture, that at times can lead to a sense of cultural alienation, identity-confusion and poor adjustment.

## **Capacity to Change and Restoration decisions**

Decisions in relation to restoration are required to be made in a timely manner and to take into account numerous matters relating to the welfare and best interests of children. These matters include the assessment of parenting capacity, attachment relationships, risk and protective factors, the specific needs of the child, and the parent's capacity to implement positive change.

An important, but often neglected aspect of this process is the assessment of capacity to change on the part of the parent. The assessment of this is fundamental in decision-making upon the viability of restoring a child to their family. However, such assessments are usually a cross-sectional analysis of a family at a given point in time, often in the context of a parent struggling to come to terms with the removal of their child, and often having little understanding of what is actually required of them for restoration to take place. It is important, for example, for an assessor to understand the concept of capacity to change, and to have knowledge and understanding of the process of behaviour change which is vital in assessing the prospect of restoration being successfully achieved.

A recent report focussing upon Aboriginal children in the Australian Capital Territory child protection system emphasizes the importance of finding pathways to restoration for these children, and reducing the over-representation of Indigenous children in the out-of-home care system. The report states,

*“The child protection system must be eternally focussed on the possibility of restoration. Parents change, children change, circumstances change, and this must be considered regularly to promote the possibility of restoration.”<sup>42</sup>*

A constant focus upon the possibility of restoration, however, runs counter to the focus upon permanency planning for children on long-term care orders. Permanency planning seeks to provide children with stable, long-term care arrangements, and “to help a child grow up to be a healthy, caring and responsible adult with positive values and identity, social competencies and support networks.”<sup>43</sup> Permanency planning generally comes into effect when the possibility of future restoration is ruled out due to the extent and severity of the problems the parents are dealing with, the parents’

---

<sup>42</sup> Our Booris Our Way – Final Report, December 2019, page 12

<sup>43</sup> NSW Government, Permanency Case Management Policy Statement, January 2020, page 7



lack of progress in addressing the identified issues, and the assumption that the parents have little, if any capacity to change.

The risk in this situation is that a child may remain in “limbo” and experience a number of placement disruptions if a decision on permanency is not made in a timely manner. Alternatively, a parent may be denied reasonable opportunity to address problem behaviours and be unfairly denied the possibility of their child being restored to their care if a decision to rule out restoration is made prematurely. The inherent tension in such a situation is difficult for all involved to manage, creating uncertainty for parents and carers, and often leaving children exposed to instability and possible further placement disruptions. For young children and toddlers, the development of attachment relationships is also a significant concern in this situation. The need to maintain and develop attachment relationships with parents /carers is an important consideration in relation to the welfare and well-being of any child.

When restoration is deemed unviable, the consequences for parents and children is profound. Future contact between the child and parents is often limited, and for many Aboriginal children this also represents a loss of contact with extended family, kin, community and culture, particularly for those children who are not placed in accordance with the Aboriginal placement principle.

### **The Role of the Children’s Lawyer**

In almost all care proceedings the Children’s Court will appoint a legal representative for a child or young person.<sup>44</sup> Without limiting the role of the child’s legal representative, the role of the legal representative for a child in proceedings before the Children’s Court includes:

- a. Ensuring that the views of the child or young person are placed before the Court, and
- b. Ensuring that all relevant evidence is adduced and, where necessary, tested, and
- c. Acting on the instructions of child or young person, or if they are incapable of giving instructions
  - i. Acting as a separate representative for the child or young person, or

---

<sup>44</sup> See Children and Young Persons (Care and Protection) Act 1998, Chapter 6, Part 1, Section 99.

ii. Acting on the instructions of the guardian ad litem

The NSW legislation also makes the “rebuttable presumption” that a child 12-years or older is capable of giving instructions to his /her legal representative. The presumption also applies to those children with disability, which is not grounds alone for rebutting the presumption.

The court can also make a declaration that in circumstance where a child is not capable of giving instructions to their legal representative, irrespective of their age, the legal representative is to act as an independent legal representative.

The role of a independent legal representative includes the following,

- a. To interview the child after becoming the independent legal representative,
- b. To explain to the child the role of a independent legal representative,
- c. To present direct evidence to the court about the child and matters relevant to the child’s safety, welfare and well-being,
- d. To present evidence of the child’s wishes,
- e. To cross-examine the parties and their witnesses,
- f. To make application and submissions to the Court for orders that are intended to promote the child’s best interests,
- g. To lodge an appeal against an order of the Court if considered appropriate.

Appointment to the role of the child’s independent legal representative imposes a duty upon a lawyer to effectively and appropriately engage with the child, and if the child is capable of expressing a view, ascertaining their views and wishes in relation to possible future outcomes. In representing an Indigenous child, an appropriate level of cultural competence, effective cross-cultural communication, and sensitivity to the circumstances of the child, are particularly important qualities that should be possessed by the child’s representative.

The importance of the child’s participation in decision-making is acknowledged in the United Nations Convention on the Rights of the Child, which explicitly recognises that all children have a right to participate in judicial or administrative proceedings that

affect them (directly or indirectly).<sup>45</sup> The participation of the child in decision-making though is subject to the age and maturity of the child, and their capacity to provide a considered view of the issues involved. According to the peak Indigenous Child Care Agency, SNAICC, what participation “looks like in practice will differ depending on the age and maturity of the child in question.” According to SNAICC, participation involves creating opportunities for the child to express their views about their concerns; fears; hopes for the future; identity; connection to family, culture and community; feelings about siblings; who they would like to live with; and which adults they trust and feel safe with, as well as adults they do not trust or do not feel safe with.<sup>46</sup>

The benefits arising from children’s participation in decision making has been reported upon by Cashmore (2002) who noted that enabling children to participate in decision making can have practical effects such as enhancing placement stability, stating that “planning and decision-making which take the children’s views into account are likely to be both more appropriate and more acceptable to the child.”<sup>47</sup> Participation is also reported by the author to build a child’s self-esteem and confidence, and helps prepare a child who is transitioning to independence.

It should also be noted that ascertaining the views of children, and encouraging their participation in decision-making, is at times a neglected practice in care proceedings. A review of children’s participation in decision-making conducted as part of the Family is Culture Review, concluded that

*“Many issues around participation concerned failures to ascertain the views or invite the input of much older children. In the majority of cases where issues were identified (18 out of 26 cases), FACS did not seek children’s views about placement or other child protection casework decisions despite children being identified as being above an appropriate age to be consulted. This is a concerning finding.”<sup>48</sup>*

As the child’s legal representative, or separate representative, best practice would indicate that children who have sufficient maturity and capacity to express a view of

---

<sup>45</sup> United Nations Convention on the Rights of the Child, 20 November 1989, [1991] ATS 4, Article 12

<sup>46</sup> Family is Culture Review Report, Independent Review of Aboriginal Children in Out of Home Care, October 2019, page 309

<sup>47</sup> J Cashmore, Promoting the Participation of Children and Young People in Care (2002) 26 Child Abuse & Neglect 837, 839

<sup>48</sup> Family is Culture Review Report, Ibid, page 315

proposed care options, should be given the opportunity to do so. Consideration of the child's views must, however, maintain a clear focus upon issues of child safety.

### ***Engaging with the child and family***

For many children the experience of meeting their lawyer provides them with an opportunity to be heard and "to have a say" in future care arrangements. Many will embrace the opportunity, but many will also struggle in this situation due to being torn between their parents /carers and having been spoken to by numerous health and welfare professionals who have also enquired about their well-being. In many complex matters, children have had the experience of dealing with caseworkers, police, doctors, psychologists and counsellors who have all enquired at some time about their family, their safety and their views. For some children, disclosure of information to well-meaning others may confront the child with issues relating to parental loyalty and concerns as to the consequences of disclosing sensitive information to others.

The experience of Aboriginal children in this context is not significantly different to that of non-Aboriginal children. An additional consideration though in relation to Aboriginal children is often the wariness and distrust that they display in this situation, which is often interpreted as "shyness." Many Aboriginal families are distrustful of "white fellas" in positions of authority, especially those involved in policing and legal and court services. This presents a barrier to engaging with many Aboriginal families at times, and is often evident in the discomfort and shyness the child exudes when formally spoken to.

Establishing rapport and engaging with the children requires fore-thought and planning. Children often feel more comfortable with being spoken to as a sibling group rather than being separated from their siblings and spoken to individually. This also provides an opportunity to gauge the nature of the relationships that exist within the sibling group. Most often it will be the eldest sibling who responds to questions and conversation but this also allows the younger children to observe and to slowly develop confidence from observation of the interaction. Having toys or drawing materials available to children is also an approach that allows children to manage the stress of the situation and to feel more comfortable. Toys such as small spinning tops, metal "slinkies", "fidget spinners" and small soft toys that can be manipulated, fiddled with and held are helpful in assisting children to de-stress in such situations. However, engaging with an Aboriginal child and developing rapport and trust is largely dependent upon the individual's capacity to build rapport and trust whilst remaining sensitive and empathic, and attuned to the child's cultural context.

The capacity of children to express an informed and coherent view will largely depend upon their age and developmental level, including cognitive, social and emotional development, as well as the extent to which they feel drawn into family conflict. In some instances, children are torn in their loyalty to others, or fearful of the consequences of expressing a view one way or the other. Children can seem lost for words at such times, but should not be pushed to express a view if they do not wish to. It is important though for children to understand that a conversation with their legal representative, or a court-appointed assessor, is an opportunity for them “to have a say” in matters that will affect them in the future.

For many Aboriginal children who have been exposed to family violence, and who have experienced trauma, discussion of their family situation with an outsider can invoke anxiety, foreboding, fear, shame, withdrawal and/or confusion. Such children can have divided loyalties, and experience confusion and mixed emotions in relation to other family members. They may also be fearful of the consequences for themselves and others in disclosing information due to them having witnessed or experienced violence, and the consequences arising from talking to police and child protection workers. Engaging with children in such circumstances is very difficult, and ascertaining the views and wishes of a child needs to proceed slowly, while building rapport and trust.

For some children, a single one-off interview will be insufficient for the purpose of gaining any insight into their thoughts and feelings about their family situation. It is preferable that there be at least two interviews, particularly when children appear deeply troubled and/or traumatized by their family experiences. The first interview should focus upon the introduction, and engaging with the child and rapport building. It is necessary to explore with the child the limits of confidentiality, and how comfortable they might be if others were to become aware of their views. In addressing any contentious issues with a child, the child should be informed that they are not required to talk about anything that they are not comfortable talking about. At the same time, they should be encouraged to be open and honest in discussing their family situation, if the best outcome is to be achieved for them, their siblings and others. Seeking the child’s permission, for example, to talk about specific matters, say, contact with a parent, or specific incidents, is a sensitive and considerate way of exploring difficult and contentious matters with a child.

In cases where children are “lost for words,” or are avoidant and reluctant to engage, the first interview should encourage the child to consider possible future scenarios that may arise as outcomes of the Court’s decision-making. The child should not be

expected to respond to any of the possible scenarios at the first interview, but is given “food for thought”, with the expectation that the next conversation will focus on their thoughts about the issues posed. The child is encouraged to consider possible outcomes between then and the second meeting, with the expectation that this might promote a more open and focused discussion at the next meeting.

For some children, the level of discomfort and/or trauma they have experienced may render them incapable of expressing a genuine view in relation to future parenting or care arrangements. Some Aboriginal children, for example, may defer to whatever an older sibling wants to do, given the trust and confidence that has developed in the older sibling as a leader, who knows what to do in troubled times. Other children may simply be over-whelmed and unable to articulate a view, regardless of what strategies may be used to engage with them. In such situations, inferences might be drawn about the child’s views from comments made by other family members, or independent others, such as teachers or caseworkers who have had consistent involvement with the child.

In such cases, when the child is unable or unwilling to express a view, it is highly important to have a clear understanding of the child’s history of care within their family, and their experience of trauma and change points over the course of their life. An understanding of these matters, gained from discussion with others and a review of relevant documents, provides some insight into the significant people in the life of the child, and the extent to which they have provided some degree of care and protection for the child. This allows for the identification of relationships that are meaningful for the children, and which need to be maintained and developed over the course of time.

The child’s representative should be open to consultation with extended family members in any negotiations concerning possible placement options for the child. This consultation should also take into consideration specific cultural matters such as the maternal and paternal family’s connection to land/ country, and specific ceremonial and cultural obligations and responsibilities that other family members may have in relation to the child.

### ***Gathering the evidence***

In the event that cultural issues are raised in relation to the care of the child then the onus is placed on the party raising the issue to explain why the child’s connection to culture is an important and relevant matter for the Court to consider. It is essential that the child’s representative has a clear understanding of the parties’ arguments and proposals in relation to the child’s cultural needs and the means by which these needs

are to be met. This understanding should clearly identify the nature of the dispute in relation to the child's cultural needs and the issue of connection to culture. This will assist the child's representative to identify specific issues pertaining to culture that require additional evidence gathering and/or possible input from an independent expert with specialized knowledge of the matters in question.

In the event that there is a contested issue in relation to cultural matters then consideration will need to be given to engaging an expert to assist the Court in understanding the issues involved. In this situation an expert should be chosen who can clearly demonstrate not only proficiency in working with children and families but can also demonstrate a high degree of cultural competence through training and experience in working with Indigenous families. Significant past experience in working with Aboriginal families as well as training in cultural competence are the minimum requirements for the appointment of an expert in this situation.

The drafting of instructions to an expert becomes a significant consideration at this point. An understanding of the contentious issues pertaining to culture should guide the drafting of matters for the expert to address. To assist the Court the terms of reference should be as specific as possible in addressing the issue of Aboriginal culture, but should also be broad enough for the expert to address cultural issues in the broader context of other issues in the case. It should be noted that in most cases cultural issues are one issue amongst many that the Court needs to consider. The assessment of these issues should provide an opinion on the relative significance of cultural issues in relation to other matters relating to the child's best interests, such as family violence and parenting capacity, for example.

When cultural issues are identified as a significant point of dispute for the parties the expert should be instructed to enquire into

- *The needs, perceptions and attachments of the child, with regard to their Indigenous cultural heritage and connection to their Indigenous family and culture*

As a point of reference, it allows the expert to address the child's individual needs in their proper cultural context, and it directs the expert to inquire into the role played by the extended family in caring for the child.

An expert should also be instructed to provide a thorough assessment of risk and protective factors including those risk and protective factors that may be culturally specific. In doing so, it should be acknowledged that placement of an Aboriginal child

in out of home care, particular in a non-Aboriginal placement where they have limited contact with Aboriginal family, is a significant risk factor that needs to be considered in any comprehensive assessment of risk of harm.

The content of the expert's report should not only address the terms of reference but as far as possible should be consistent with the Australian Standards of Practice for Family Assessments and Reporting (2015).<sup>49</sup> Whilst these standards apply in the Federal jurisdiction, and are not directly applicable in care proceedings, the terms of reference for an expert report should, as far as possible, be consistent with the Australian Standards of Practice. This is consistent with best practice in such matters, and provides some guidelines as to specific matters that are to be reported upon in considering the best interests of an Aboriginal child. The document states that,

*“As a minimum standard, a family assessment in which one or more party identifies as Aboriginal or Torres Strait Islander should contain the following:*

- *a description of the Indigenous background of the party (including whether one or both of the party's parents are Indigenous, as well as any tribal affiliations, if known)*
- *an indication of whether the child has current and active involvement with any extended Indigenous family*
- *a description of the party's connection, if any, to their local Indigenous community e.g., relationships with key local figures, use of Indigenous agencies and services, participation in local cultural events, etc.*
- *a description of both parties' views of the significance of the child's Aboriginality and the extent to which this is an issue that the Court needs to consider in determining the matter*
- *an assessment of the extent to which the child identifies (or is identified) as an Aboriginal or Torres Strait Islander*
- *an assessment of the capacity of both parents to provide the support and opportunity for the child to explore the full extent of their Indigenous heritage, consistent with the child's age, developmental level and wishes*

---

<sup>49</sup> The Australian Standards of Practice for Family Assessments and Reporting -February 2015, [Australian Standards of Practice for Family Assessment and Reporting - February 2015 \(familycourt.wa.gov.au\)](http://familycourt.wa.gov.au)



- *an assessment of the capacity of both parents to foster a positive sense of Indigenous cultural identity, and*
- *an assessment of the likely impact on the child of being raised in a non-Indigenous family in circumstances where the Court is asked to make an order that the child lives with a non-Indigenous parent.*

*A family assessment in which one or more party identifies significant cultural issues should contain the following:*

- *a description of the cultural background of the parties*
- *an indication of whether the child has current and active involvement with the cultural backgrounds*
- *a description of the party's active connection, if any, to that community or extended family*
- *a description of both parties' views of the significance of the child's culture and the extent to which this is an issue that the Court needs to consider in determining the matter*
- *an assessment of the extent to which the child identifies with the parents' culture*
- *an assessment of the capacity of both parents to provide the support and opportunity for the child to explore the full extent of their cultural heritage, consistent with the child's age, developmental level and wishes, and*
- *an assessment of the capacity of both parents to foster a positive sense of that cultural identity.*

It should also be noted that the Australian Standards of Practice in relation to assessment and reporting with Aboriginal families also provides a framework that can be used in the drafting of the terms of reference to be put to the expert. At the very least though, the Standards of Practice provide a yardstick to measure the extent to which the expert has appropriately assessed the cultural issues involved in the matter. This also provides a standard by which the expert can be held to account in court under cross-examination upon the conduct of the assessment when Aboriginal children and their families are involved.

A checklist is attached as Appendix 1 that provides guidance in matters to be considered in representing an Aboriginal or Torres Strait Island.<sup>50</sup> The checklist was originally developed by the family courts to assist lawyers in representing the interests of Aboriginal and Torres Strait Islander children. The content of the list is still highly relevant to the work of lawyers in the child protection jurisdiction.

---

<sup>50</sup> Guidelines for Independent Children’s Lawyers (ICLs) 2013 endorsed by the Chief Justice of the FCA, the FFCC and the FCWA

## **Appendix 1: Checklist**

The following are specific matters that the child representative will need to address in representing the interests of an Aboriginal child

### ***Gathering preliminary information***

- Is the child formally identified as Aboriginal and/or Torres Strait Islander in court documents, health or education records?
- Are one or both parents identified as Aboriginal?
- What is the background of the parent's connection to their Aboriginal culture?
- Does the parent identify with a specific tribal / language/ skin group?
- Are there extended paternal and/or maternal Aboriginal family members who should also be consulted in relation to the care of the child?
- Has either parent raised cultural matters as an issue for the Court to consider?
- Are cultural matters such as the child's connection to Aboriginal culture a point of contention and dispute between the parties?
- If so, what are the specific points of disagreement in relation to the child's cultural needs, including gender specific cultural needs?
- Has the family had an opportunity to participate in Family Dispute Resolution or any alternative to this such as Family Conferencing?

### ***Child participation role***

- At what point should I meet the child?
- How is the meeting to be structured?
- Who is to accompany the child to the meeting and what interaction will take place with this person(s)?
- Where is the meeting to take place bearing in mind the need for a child-friendly, comfortable and culturally-safe environment in which the child feels that their cultural identity is positively acknowledged and affirmed?
- What specific strategies do I employ to engage with the child noting their age, developmental level and interests?

- How do I introduce myself to the child and how do I explain my role given the age and capacity of the child to understand the relevant issues and to express a view?
- How do I alleviate the child's possible anxiety and distrust when seeking to discuss sensitive family matters?
- How do I go about discussing issues such as cultural identity and affiliation with the child?
- Is there specific information, perceptions, attitudes and views held by the child that I need to know directly about?
- To what extent is the child able to freely express a considered view of the issues?
- To what extent have the child's views been shaped or skewed by exposure to the views of others?
- What process of note-taking or record keeping should I use in relation to the interview?

### **Evidence gathering role**

- What other sources of information are accessible in relation to the child, i.e., school reports, health and welfare reports, previous assessments?
- What material, if any needs to be subpoenaed?
- What are the specific points of contention upon which the dispute over cultural issues is based?
- What is the position of each party in relation to their understanding of the child's cultural needs and their capacity to address these needs?
- Is there sufficient information available to the Court upon cultural matters to allow the Court to make an informed and just decision upon the issue(s) in dispute?
- If not, what additional evidence is required that would be of assistance to the Court?
- Do I need to engage an expert with specialized knowledge and expertise to provide advice to the Court upon these issues?
- If so, what Terms of Reference are to be supplied to the expert bearing in mind the importance of the expert addressing the specific cultural issues involved?

- Does the expert have the sufficient and necessary training and professional experience to provide an expert opinion upon the matters in question noting that a high degree of cultural competence is also required in this undertaking?
- Does the expert's report meet the Australian Standards of Practice for Family Assessments and Reporting in relation to Aboriginal and Torres Strait Islander families?
- What other evidence or information is necessary to inform culturally appropriate substantive outcomes in the child's care arrangements taking into account geographical and other conditions (financial, practical and cultural constraints on travel, as well as family and community structures and dynamics)?

## **References**

Aboriginal and Torres Strait Islander Social and Emotional Well-being Framework 2017-2023

Australian Aboriginal and Torres Strait Islander Health Survey: First Results, 2012–13 — Australia,  
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4727.0.55.0012012-13?OpenDocument>

Atkinson, J, Nelson, J, & Atkinson, C, 2010, 'Trauma, transgenerational transfer and effects on community wellbeing', in N Purdie, P Dudgeon & R Walker (eds), Working together: Aboriginal and Torres Strait Islander mental health and wellbeing practices and principles, Department of Health and Ageing, Canberra, pp. 135–144.

Australian Aboriginal and Torres Strait Islander Health Survey: First Results, 2012–13.

Australian Institute of Family Studies, Child abuse and family violence in Aboriginal communities: Exploring child sexual abuse in Western Australia, Report – May 2002,  
<https://aifs.gov.au/cfca/publications/child-abuse-and-family-violence-aboriginal-communities/causal-factors-family-violence>

Australian Institute of Health and Welfare 2011. Young Australians: their Health and Wellbeing 2011. Cat. no. PHE 140 Canberra: AIHW

Australian Institute of Health and Welfare 2021. Child Protection Australia 2019–20. Child welfare series no. 74. Cat. no. CWS 78. Canberra: AIHW

Australian Standards of Practice for Family Assessments and Reporting -February 2015,  
[www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/asp-family-assessments-reporting](http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/asp-family-assessments-reporting)

Cashmore, J., Promoting the Participation of Children and Young People in Care (2002) 26 Child Abuse & Neglect

Cross, T., Bazron, B., Dennis, K., & Isaacs, M., (1989). *Towards A Culturally Competent System of Care, Volume I*. Washington, DC: Georgetown University Child Development Centre, CASSP Technical Assistance Centre

Guidelines for Independent Children's Lawyers (CHILD REPRESENTATIVEs) 2013 endorsed by the Chief Justice of the FCA, the FFCC and the FCWA

Family is Culture Review Report, Independent Review of Aboriginal Children in Out of Home Care, October 2019

Family Matters Report 2019: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Australia. See [1097\\_F.M-2019\\_LR.fupdated.pdf \(familymatters.org.au\)](#)

Haswell, MR, Blignault, I, Fitzpatrick, S and Jackson Pulver, L, 2013 *The Social and Emotional Wellbeing of Indigenous Youth: Reviewing and Extending the Evidence and Examining its Implications for Policy and Practice*, Muru Marri, UNSW Sydney

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

Mainly Urban, Report of the Inquiry into the needs of urban dwelling Aboriginal and Torres Strait Islander People, 1992

Malin, M., Campbell, K., & Aguis, L., Raising Children in the Nunga Aboriginal Way, Family Matters, 1996, 43, 43-47

Mesman J., Van Uzendoorn M.H., and Sagi-Schwartz A., (2016) Cross-Cultural Patterns of Attachment: Universal and Contextual Dimensions, in J. Cassidy and P. Shaver (eds), *Handbook of Attachment*, 3<sup>rd</sup> edition, pp 790-815, New York Guilford

MacDonald, G., Anthropological Report on Aboriginal and Torres Strait Islander Child-rearing Practices, Report to the Family Court, Darwin, *re CP (1997)*, 21 Fam LR486.

Lohoar, S., Butera, N., & Kennedy, E. (2014). *Strengths of Australian Aboriginal cultural practices in family life and child rearing* (CFCA Paper No. 25). Melbourne: Australian Institute of Family Studies. Retrieved from <[aifs.gov.au/cfca/publications/strengths-australian-aboriginal-cultural-practices-fam](http://aifs.gov.au/cfca/publications/strengths-australian-aboriginal-cultural-practices-fam)>.

National Agreement on Closing the Gap, July 2020, [National Agreement on Closing the Gap \(coalitionofpeaks.org.au\)](#)

National Report of the Royal Commission into Aboriginal Deaths in Custody, 1991, Volume 2

NSW Government, Permanency Case Management Policy Statement, January 2020

Our Booris Our Way – Final Report, December 2019

Ralph, S., Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice, 2012,  
<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Papers/Papers+and+Reports/Indigenous+Australians+and+Family+Law+Litigation>

Tilbury, C., Burton, J., Sydenham, E., Boss, R., & Louw, T. Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements. SNAICC: Melbourne. (2013).

United Nations Declaration on the Rights of Indigenous People,  
<https://www.humanrights.gov.au/publications/un-declaration-rights-indigenous-peoples-1>

United Nations Convention on the Rights of the Child, 20 November 1989

Van der Kolk B.A., 2003, The neurobiology of childhood trauma and abuse Child Adolescent Psychiatry Clinics of North America Apr;12(2):293-317. DOI:  
[https://doi.org/10.1016/S1056-4993\(03\)00003-8](https://doi.org/10.1016/S1056-4993(03)00003-8)

Wells, S. & Black, R. (2000). *Cultural competency for health professionals*. Bethesda, MD: American Occupational Therapy Association Press.

Wettinger, MF. (1997) Psychological assessment of Aboriginal people. Psychologically Speaking. Perth: Indigenous Psychological Services, see  
<http://www.indigenoupsychservices.com.au/viewStory/Publications>