

# FOREWORD

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Terri Libesman

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This edition of the *Australian Indigenous Law Review* ('AILR') is a special edition on *Indigenous Children's Wellbeing*. It derives from a joint UTS Law and Secretariat of National Aboriginal and Islander Child Care (SNAICC) symposium held in September 2015. The symposium was in response to concerns about the increasing over-representation of Aboriginal and Torres Strait Islander children in out of home care, despite almost twenty years of human rights advocacy following the *Bringing Them Home* report ('BTH'). A further, and more immediate, issue driving the event was disquiet amongst Indigenous organisations and communities about recent reforms to child welfare, in all Australian jurisdictions, which focus on permanency planning. These reforms set short time frames for the permanent placement of children in out of home care if they are not restored to their birth families. They will have a disproportionate impact on Indigenous children. Further, they have been implemented in the context of widespread funding cuts for related Indigenous service providers such as legal services. These issues are tied to broader concerns with continuities and changes in colonial policy from the Protection period to the contemporary Neoliberal political and social environment. The symposium aimed to investigate if there is a relationship between the limited impact of human rights advocacy and the increased ascendance of neoliberal values, and if so how this relationship is unfolding in the child welfare/juvenile justice space.

The symposium questions are timely, as demonstrated by the recent *Four Corners* expose of the treatment of Indigenous children and young people in the Don Dale detention centre in Darwin. In response to that expose, the Australian Prime Minister established a Royal Commission into failings in the child protection and youth detention systems of the Northern Territory. Advocacy programs such as *Grandmothers Against*

*Removals* and SNAICC's *Family Matters* campaign have also attracted considerable publicity and highlighted the failings of child welfare departments to Indigenous families. The Aboriginal Children's Commissioner in Victoria, Andrew Jackomos, has completed a 1000 case review of Aboriginal child welfare files, while in NSW Minister Brad Hazzard, in response to advocacy by *Grandmothers Against Removals*, has committed to an Aboriginal child welfare case file review. These responses to institutional failings raise questions about the purpose of commissions, inquiries and reviews. In light of the failure to implement the recommendations of *BTH* and the Royal Commission into Aboriginal Deaths in Custody: what more will further inquiries tell us, and what if anything will influence the implementation of their recommendations? This special edition is concerned with the ways in which neoliberal values effect the expression and exercise of colonial powers with respect to Indigenous children, and how this influences the interface between human rights advocacy and Indigenous peoples' aspirations for equality and self-determination.

After 20 years of failure to implement the recommendations of numerous detailed reports, the First Nations Child and Family Caring Society of Canada (the Caring Society) and Assembly of First Nations lodged a discrimination claim against Canada in the Canadian Human Rights Tribunal (CHRT). On 26 January 2016, after more than seven years and Canada's expenditure of \$10 million dollars defending the claim, the CHRT found that Canada had discriminated against 163 000 First Nations children on reserves. It ordered that the unequal child welfare funding and related discriminatory policies be remedied immediately. Cindy Blackstock, who is the Executive Director of the Caring Society, outlines why public interest litigation, with a parallel advocacy and education campaign, can be an

effective way to influence public opinion, which is necessary for meaningful change.

Anna Haebich analyses the continuity of assimilation aspirations and practices in the Australian Settler state from the time of original colonisation to contemporary punitive child welfare policies and practice. While Indigenous resistance, and moments of settler recognition and regret occur, Haebich argues that a deeper confrontation with collective settler amnesia is needed. She suggests that Settler remembrance of and responsibility for colonial harms must be assumed for the ongoing injustices to be addressed. Like Haebich, Chris Cunneen also argues that the ascent of neoliberal values serves a new form of assimilation which frames Indigeneity as dysfunctional and responsible for the harms which Indigenous peoples' experience. Cunneen considers how neoliberal values have redefined responsibility for historic and ongoing colonial harms against Indigenous peoples as individual failings which are addressed with respect to children and young people through child welfare and juvenile justice interventions. Cunneen analyses the simultaneous growth of managerialism and responsibilisation in juvenile justice and child welfare together with the reduction in welfare support services. Within this neoliberal frame, Indigenous strengths, culture and aspirations for self-determination are secondary to Indigenous peoples' membership of a group defined by risk.

Terri Libesman reflects on why, after almost 20 years of human rights advocacy, the contemporary child welfare recommendations from *BTH*, which focus on cultural recognition and self-determination, even when partially legislated for, have largely not been implemented in practice. She argues that while there are deep set difficulties with recognition of Indigenous peoples' collective rights within a liberal legal environment, the neoliberal political and social values which have ascended post the National Inquiry are incompatible with, and directly undercut, the human rights framework recommended by *BTH*. Linda Briskman provides a framework of banishment for understanding assimilation policies which from the time of colonisation have exceptionalised and excluded Indigenous peoples from the nation state. Banishment of Indigenous children is in her analysis threefold: from sites, rights and identity. This eradication strategy forms a nexus between racist monoculturalism and breaches of Indigenous children's human rights. Briskman suggests

that a break from dispassionate metrics, and responding to Indigenous peoples' experiences with emotion and critical reflection, may provide a way forward to facilitate transformation and political solutions to a political problem rather than technical solutions which ignore the history and broader context.

Kyllie Cripps and Julian Laurens specifically examine the pressing practical question of ongoing cultural connection for Indigenous children who are placed on Permanent Care Orders ('PCO') in Australia. They argue that cultural care plans need to be living documents. Further, they suggest that legislative, policy and program reform is necessary to address concerns with the lack of oversight once a child is placed on a PCO. They argue that the current haphazard state of cultural care planning is putting Indigenous children at risk and that further judicial oversight is necessary where carers fail in their cultural responsibility to children on PCOs. Further, they suggest successful cultural care planning requires resources and support which could be provided through existing Indigenous child care agencies. Deidre Howard-Wagner looks at the interface between Indigenous organisations ongoing aspirations for self-determination and how they navigate the neoliberal spawn of regulation seen in contractual, accountability and accreditation arrangements in the child welfare space. Her qualitative research, which draws on 14 in-depth interviews with Aboriginal and non-Aboriginal people working in child welfare/well-being in Newcastle, New South Wales illustrates the ongoing commitment of Aboriginal people to aspirations for community control and their responsiveness to their communities in the face of neoliberal regulation. Melissa Tatum provides a comparative US perspective. She examines an initiative in response to gross domestic violence, often involving children, experienced by women living on reserves. One of the contributors to this violence was that non-Indian men living on reserves were not prosecuted because of jurisdictional issues, including that Tribal courts lack powers to prosecute non-Indians. Tatum looks at two pilot programs that were implemented following the passage of the *Violence Against Women Act* (2013), which restores to tribes the ability to prosecute non-Native men who commit domestic violence on Indian country, providing relevant prerequisites are met. Tatum asks if these pilots and this legislative reform provide more general lessons with respect to community-based solutions to Indigenous children's welfare and wellbeing.

A common theme across the articles is the persistence in different guises of settler assimilation policy and Indigenous resistance to this with aspirations for cultural and community control. The politics of neoliberalism and its pervasive and corrosive influence have blurred lines between self-determination and privatisation and corroded the wider non-Indigenous consensus with respect to the significance of community knowledge and cultural care in the child welfare space. However, there has been an Indigenous community resurgence in resistance, which is evident at a grass roots and organisational level with campaigns such as *Grandmothers Against Removals* and *Family Matters* calling out the failings of the State. This edition of the AILR exposes the conundrums which neoliberal morality and practice bring to the politics of contemporary Indigenous child welfare and well-being in the context of ongoing Indigenous resistance to assimilation and colonial exercises of power.