

# GLIMMERS OF HOPE IN A BROKEN CHILD PROTECTION SYSTEM

by Pip Martin

## INTRODUCTION

The Northern Territory ('NT') is a place of extremes: extreme heat, extreme beauty, extreme poverty as well as rich cultural diversity. Aboriginal people in the NT constitute 30 per cent of the population compared to around 5 per cent or less in all other states and territories.<sup>1</sup> The NT is one of the most linguistically diverse areas of the world, with over 32 living Aboriginal languages and many Aboriginal people speaking English as their second, third or fourth language.<sup>2</sup> The Aboriginal population lives mainly outside the cities with 79 per cent living in remote to very remote areas.<sup>3</sup>

In the NT, 86 per cent of the children in out-of-home care are Aboriginal.<sup>4</sup> Of these, 58.3 per cent are placed with non-Indigenous carers.<sup>5</sup> This is significant because it means that children are not being placed with people who will necessarily know about, or have the commitment to support that child's connection with their family and culture.

The North Australian Aboriginal Justice Agency ('NAAJA') is the Aboriginal Legal Service for the Top End of the NT. It is an Aboriginal organisation committed to 'true justice, respect and dignity for Aboriginal people'.<sup>6</sup> In the area of child protection this means recognising that Aboriginal people and communities are best placed to make decisions about their children; that maintaining a connection to culture and family is an important aspect of a child's development; and that disrupting or severing a child's connection to their cultural heritage is a form of spiritual harm.

Nationally, child protection authorities are overwhelmed. Even though neglect and family violence are the predominant child protection concerns, over 80 per cent of funding goes into child protection services and out-of-home care, rather than preventative measures such as family support.<sup>7</sup> This skews the system towards removal of children and is exacerbated for some Aboriginal families in the NT<sup>8</sup> where the interaction between the social context of poverty, the demographic realities described above, the limitations in the relevant legislation, and the remote service delivery context increases the chances of removal. This

article describes some of the work that NAAJA does when representing parents and families to assist them to overcome the trend towards removal.

## LIMITATIONS OF THE NT CHILD PROTECTION LEGISLATION

The *Care and Protection of Children Act 2007* (NT) is unsophisticated compared to other jurisdictions in Australia. Its lack of safeguards has a direct effect on Aboriginal children and their ability to maintain an ongoing relationship with their family and culture. Unlike elsewhere in Australia:

- There is no provision for an independent Aboriginal agency<sup>9</sup> to provide a voice for Aboriginal people, to consult with families and communities, to monitor the implementation of the Aboriginal Child Placement Principle and to assess and oversee out of home care placements.
- There are no effective mediation provisions enabling child protection matters to be resolved through open discussion between families, the Department of Children and Families ('the Department') and other services to develop a plan for children at risk.
- Critical safeguards such as 'cultural care plans' are left to policy which is not published and therefore not transparent nor accountable.

What this often means is that advocates for parents and families in child protection matters are working in an ad hoc way and in isolation, trying to negotiate a resolution for each matter—often after the children have been removed and court proceedings have commenced. Our challenge is to negotiate for the least restrictive option which will allow the child to maintain a relationship with his or her family and culture when the adversarial relationship is already set.

## ACTIVELY ADVOCATING FOR FAMILY INVOLVEMENT

NAAJA's mandate is to ensure that family is at the centre of decision making about the care of Aboriginal children. Where parents agree that they are unable to care for their child/children either on their

own or at all (temporarily or permanently) we discuss suitable and appropriate alternative family carers, and the range of options for their involvement including: as parties to proceedings, as carers appointed by the Department, and as court appointed carers (with 'parental responsibility').

One of the approaches NAAJA takes to minimise the negative effect of protracted court proceedings is to seek orders for 'daily care and control on adjournment'.<sup>10</sup> We make an application supported by affidavit material for an order that the children live with family in the interim while the Department's substantive application—about who gets parental responsibility and for how long—is being determined. Often there are long delays in the proceedings (eg while professional reports are being organised and prepared). However, one of the main reasons we make these applications are the significant delays (often up to six months) in the Department's ability to process assessments of family members as possible carers. In the meantime, children are being harmed by being away from their family and communities, often with non-Aboriginal carers and having only infrequent access visits.

We brought the first of these applications in 2011. Since then, we make this type of application whenever appropriate. In a recent matter, a teacher in a remote school contacted us when the Department abruptly removed two boys from their parents. The school was beginning to identify the boys' particular learning problems and working out ways to address their needs. However, the Department's application did not take this into account, and they removed the boys citing behavioural problems and the parents' cannabis use.

NAAJA staff met with extended family members in the community and they came up with a short-term plan for the boys' care. We prepared affidavits from the two grandparents, the mother, and the teacher and made an application for the grandparents to have 'daily care and control' while the Department's application for two year orders was being considered. There was also evidence that the boys were not doing well in foster care having been separated when the first (non-Aboriginal) foster family was unable to manage both boys in addition to their other four foster children. At the time of the hearing, the boys were in different families in Darwin. They were going to different schools, and only seeing their parents every 3-4 weeks.

The Magistrate decided that it was in the best interests of the children to return to their community and family until the Department's application in relation to parental responsibility was determined. This result was also positive for the community, which

had been shocked that two boys could be removed without any discussion with parents, extended family or teachers about what care could be provided in their community.

NAAJA has also had success in 'daily care and control' applications for mothers who have had their babies removed at birth. We rely on the ample evidence about the benefits of breastfeeding on early childhood development and the actual harm to the baby by not breastfeeding, to support the mother's application to retain this daily care and control. We also ensure that other potential risks are managed. For example, where there is a history of family violence, we have made this application when the partner is in prison and there is no risk to mother or child. Similarly, if homelessness is an issue, we have assisted mothers to secure temporary accommodation, and if drugs or alcohol are an issue, we have arranged for placements in residential rehabilitation facilities which allow children to accompany parents.

It is unfortunate that it is only after removal (and after NAAJA and the Court has become involved) that mothers are able to obtain the support they need to retain the care of their children. The question has to also be asked about how many mothers that NAAJA is not supporting are having their children taken away in similar situations.

These examples highlight two important issues. First, the enormous vulnerability of Aboriginal people in a child protection system that is ill-equipped to meet their needs and second, the importance of culturally appropriate services, like NAAJA. Our support and advocacy mean that more children are able to be cared for by family; and mothers who have previously had children removed are now getting the extra assistance they need to avoid removal of their newborns.

## PROACTIVE APPROACH TO FACILITATING COMMUNICATION

In the child protection jurisdiction the shortage of resources affects both the Department—an agency that is struggling with the numbers of notifications and families in need of support—and services on the ground in remote communities. The shortage of specialist health, disability services and family support services result in some children being more likely to be in care in the first place. For example, children with disabilities not being able to be live in their community because of the lack of disability and specialist health services; and parents not being able to take the steps required to demonstrate that they can protect their children, such as undertaking counselling, parenting and healthy living training, and moving to safer housing.

Compounding the lack of services to remote communities is the quality of interaction between health care providers in communities and in Darwin. Our clients often do not speak English and do not have more than a rudimentary appreciation about the role of nutrition and early childhood development. Failures in effective communication can have a significant impact on a child's health; as well as child protection proceedings. If interpreters are not used or treatment is not explained carefully, parents do not understand why their child is sick and what needs to be done to make them better. We have observed a number of cases where parents are accused of 'neglecting' their child having failed to follow advice they did not understand, and that child is taken into care unnecessarily. In these matters, we take a proactive role to ensure that open and frank discussions take place.

### **It is unfortunate that it is only after removal that mothers are able to obtain the support they need to retain the care of their children.**

In one example, Ms M lived all her life in a remote community more than 500 kilometres from Darwin. Her first language is not English and she has an intellectual disability. Ms M gave birth prematurely to twins who were then hospitalised for 'failure to thrive'. They required 'peg feeding' through tubes in their stomachs. Following the birth of her babies, Ms M spent significant time in Darwin to be with her twins while they were in hospital. The protection issues focused around whether she could properly care for her twins in her community.

The Department sought a two year protection order transferring parental responsibility to the CEO. The mother and her family opposed this order on the basis that she, with the assistance and support of her extended family, could care for the twins in their community and that they did not want state involvement. The family decided that two of our client's sisters should be joined as parties to the proceedings.

As the proceedings progressed the Department filed medical reports. It became clear that hospital and clinic staff in the community had not been using interpreters to advise the mother about the health needs of her children and the complex care associated with peg feeding. Without that understanding, it is easy to see how the twins' health needs would not be met. At the height of the miscommunications, and shortly after the twins were discharged to their community and then returned to Darwin, the Department amended its application, seeking a five year order.

With no effective mediation provisions, NAAJA's role in this matter was far more involved than that typically of lawyers attending hearings and preparing material for the court. Over a period of 12 months, in addition to preparing material for court, we facilitated and attended meetings in Darwin and in Ms M's community with interpreters, extended family, health care providers, departmental caseworkers and lawyers.

In Ms M's matter, we were ultimately able to negotiate a one year order without the need to go to hearing. Connected with that order was a detailed care plan which—although the twins (by then around two and a half years old) were in foster care—supported Ms M to stay in Darwin to ensure regular and consistent access with her twins and a clear reunification plan.

### **CONCLUSION**

Solving these issues is not as simple as moving Aboriginal people to towns. Recent national debate about the allocation of resources to Aboriginal people living remotely has highlighted the glaring deficiency of resources in remote communities.<sup>11</sup> While acknowledging that living remotely reduces access to basic services and necessitates support, it is important to ground this debate in Aboriginal peoples' rights to maintain their culture and identity which is inextricably bound up with their connection to land, family and language.

In child protection matters in the NT, what is urgently needed is a fair and balanced approach, taking into account the particular local circumstances, the resources available and involving Aboriginal people in the decision-making about their children and their future. This is needed because Aboriginal children are at risk of being removed unnecessarily and losing their connection to family and culture. As both examples show, the work that NAAJA does in child protection matters is resource intensive but absolutely vital to ensure access to justice for Aboriginal people in child protection matters in the NT. Had family been included earlier, more appropriate support offered and open communication been established in the discussions and proceedings, those children might have spent less time away from their family and community or avoided removal altogether.

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- 1 Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2001*, Cat No 3238.0.55.001, ABS, Canberra.
- 2 Northern Territory Government, *Aboriginal languages in the NT* (12 July 2013) Department of Local Government and Community Services <[http://www.ais.nt.gov.au/aboriginal\\_interpreter\\_service/aboriginal\\_languages\\_in\\_the\\_NT](http://www.ais.nt.gov.au/aboriginal_interpreter_service/aboriginal_languages_in_the_NT)>.
- 3 Australian Bureau of Statistics , *Population Characteristics of Aboriginal and Torres Strait Islanders, 2006*, Cat No 4713.00, ABS, Canberra.
- 4 Office of the Children's Commissioner, 'Annual Report 2013-2014' (Northern Territory Government, 2014) 34.
- 5 Ibid, 63.
- 6 North Australian Aboriginal Justice Agency, *Strategic Plan 2014-2017* < <http://www.naaja.org.au/wp-content/uploads/2014/05/NAAJA-Strategic-Plan-2014-2017.pdf>>.
- 7 Australian Institute of Family Studies (Child Family Community Australia), 'The economic costs of child abuse and neglect' (CFCA Fact Sheet, September 2014) <<https://www3.aifs.gov.au/cfca/publications/economic-costs-child-abuse-and-neglect>>.
- 8 It should be noted that the NT Children's Commissioner reported that last year there was a significant backlog of overdue investigations and that given the statistics about violence and factors of disadvantage in Aboriginal communities, it might be expected that more children are in need of protection.
- 9 For example, the Victorian Aboriginal Child Care Agency or the Victorian Commissioner for Aboriginal Children and Young People.
- 10 *Care and Protection of Children Act 2007* (NT) s139.
- 11 Shalailah Medhora, 'Remote communities are 'lifestyle choices', says Tony Abbott', *The Guardian* (online) 10 March 2015 <<http://www.theguardian.com/australia-news/2015/mar/10/remote-communities-are-lifestyle-choices-says-tony-abbott>>.

**Kulama, 2012**

Karina Coombes  
Acrylic on linen  
1530mm x 1220

This work depicts the important ceremony of the Tiwi people in which the dancers and sing. Dancers create a circle and prepare the poisonous yam for eating, as suggested by the circles in the painting. The Kulama Ceremony was given to the Tiwi people by "Nyingawi" who are little spirit people (as depicted in Tiwi mythology). It is a celebration of life and food occurring at the end of the wet season. The Tiwi know when to perform Kulama when the last full moon of the wet season has a yellow halo surrounding it, which tells them that Japarra (the Moon Man) is ready for it to begin.

