# PLACEMENT OF INDIGENOUS CHILDREN: CHANGING THE LAW

RICHARD CHISHOLM*

## I. INTRODUCTION

The report *Bringing Them Home*[1] is a major development of the awakening of non-Indigenous Australians to what is arguably the most tragic and shameful chapter in Australia's history; the deliberate and systematic removal of Indigenous children from their families and communities. It makes important and wide ranging proposals. Some of them, such as the proposals for reparation and support for Indigenous people who are seeking to discover their relatives and recover their identity, may be seen as an attempt to deal with the damage the Removal has caused. The focus of this little piece, however, is on the proposals that are designed to prevent it happening again, and in particular what has become known as the Indigenous Child Placement Principle.

* BA, LLB, BCL; Judge Family Court of Australia; formerly Associate Professor of Law, University of New South Wales. Readers will appreciate, I hope, that my position requires restraint in taking positions on matters of legislative or political policy.

1 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997 (hereafter, the Report). The Report includes a detailed bibliography, and I will not burden this paper with unnecessary citations.

## II. THE REMOVAL

I want to emphasise some particular features of the story which for convenience I will refer to as 'the Removal'.

It was a policy developed and implemented by 'the white man', in particular through the church, government and law. It was not the result of consultation with Indigenous people, or with parents of the children who were removed, or with the children themselves. It was imposed on them by non-Indigenous people. It was developed against a background of ideas about Indigenous people and their fate. These ideas included notions of racial superiority sometimes referred to as 'Social Darwinism' and the belief that 'full blood' Indigenous people were a dying race, but that mixed blood children could be merged into the general (that is, non-Indigenous) community.

The Removal started without specific legal backing, but was then based on the legislation dealing with Indigenous people. In later times, it was an application of the general child welfare laws: Indigenous children were removed under such categories as being 'neglected'. Should the Removal be seen as misguided benevolence, a kind of 'do-gooding' gone wrong, or should it be characterised as, say, an expression of hostility?

On this large question I only wish to make a few specific points. First, on my reading of the materials, most of the non-Indigenous people involved seemed to *see themselves as behaving appropriately*: they were not, at the time, ashamed of what they were doing. Yet what they were doing was later characterised as 'cultural genocide', since it represented a deliberate policy whose intended consequence was that there would be no identifiable Indigenous people in existence. And at an individual level, it was almost inconceivably cruel, to the parents and families and communities of the Stolen Children, and to the children themselves. The Report contains a great deal of evidence that Removal had a devastating and permanent impact on the children, families and communities it affected. Their stories would break your heart.[2]

I think this is important, because it poses the question as to what extent the legal system can and should prevent people from doing such things *thinking they are the right thing to do*. It seems clear that those who carried it out were not fully aware of the long term consequences of what they were doing. They must have been aware of the immediate distress Removal caused, but the underlying views and assumptions about Indigenous people seem to have had extraordinary power to influence their perceptions, even of such 'obvious' matters. A vivid example of this is the remark of a 'travelling protector' in 1908: "I would not hesitate for one moment to separate any half-caste from its aboriginal mother, no matter how frantic her momentary grief may be at the time. They soon forget their offspring."[3]

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2 One woman was told in adolescence that she had "mud in her veins"; this caused severe distress. She opened her veins to examine her blood for mud. *Ibid*, p 304.

3 *Ibid*, p 276.

Those who actually had the care of the children behaved in the various ways that people do with children: some were loving, some cruel, some both at times. The revulsion felt today is, I think, generally directed to the scheme as a whole; the values and assumptions that underlay it, which would now be widely regarded as racist, and the impact of the Removal on generations of Indigenous communities and families. This is illustrated by a resolution passed by the National Assembly of the Uniting Church in 1966, which acknowledged:

> ... the trauma and on-going harm caused to individuals, families, the Aboriginal community as a whole and the entire Australian community by the practice of separating Aboriginal children from their parents and raising them in institutions, foster homes or adoptive homes ... [and] ... that the church thought that it was acting in a loving way by providing them with homes, but was blind to the racist assumptions that underlay the policy and practice.[4]

## III. THE PLACEMENT PRINCIPLE

The Placement Principle was developed largely as a result of reform work done by Aboriginal organisations and individuals, notably the Aboriginal Child Care Agencies, the first of which was formed in 1977. In various forms, it is widely reflected in state and territory laws and policies relating to child welfare and adoption.[5] Despite a great deal of lobbying and argument on behalf of Indigenous people, and by law reform commissions, it is not yet embodied in a national law.

The Principle, which draws to some extent on North American influences,[6] has two basic components. The first is a set of preferences, or priorities, for the placement of Indigenous children who are thought to need to be placed outside their families. There are different formulations possible, but in substance the first component of the Principle is that the placement of Indigenous children should be governed by a set of priorities: non-removal; removal to another family member; removal to another member of the Indigenous community; removal to some other Indigenous family or organisation.

The second component relates to the decision making process. It requires that decisions about the placement of Indigenous children should be made by, or in consultation with, appropriate Indigenous people or organisations. For example, the Principle might require that if it is thought that a child in a particular community requires placement, the Aboriginal Children's Service, or the Aboriginal elders or community organisation, should be consulted.

You can see how this Principle represents the opposite of some of the key features of the Removal. It treats the child's connection with Indigenous family and community as a positive rather than a negative feature. It is the opposite of trying to remove children from those influences. And it seeks to involve

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4 *Ibid*, p 290.

5 Its current status and history are well documented. See in particular Australian Law Reform Commission Report 31, *The Recognition of Aboriginal Customary Laws*, 1986, and New South Wales Law Reform Commission Research Report 7, *The Aboriginal Child Placement Principle*, 1997.

6 In particular the *Indian Child Welfare Act* 1978 (USA).

Indigenous people in the decision making process. The Placement Principle is historically associated with the policy of 'self-determination' for Indigenous people.

Important issues arise when one tries to formulate the Principle with precision. For example, in the first component, what force does each presumption have? Are you justified in moving from one step to the next only where it is *impossible* or *impracticable* to comply with the first; or where to comply with the first would threaten to *harm* the child; or is it enough that the decision maker is satisfied that moving to the next step would be *better* for the child? Answering this question requires us to decide whether the essence of the Principle is to provide guidelines about what is likely to be best for each child, or to keep Indigenous children with their families even in cases where they might be better placed elsewhere. Similarly, the second leg raises questions: Which Indigenous people or organisations are to be consulted? Do they have the final say, or a veto? Is there some obligation on government to support such organisations by providing training and funding?

Other legal responses consistent with the Placement Principle include the approach of courts to cases involving Indigenous children.[7] The *Family Law Act* 1975 has recently been amended to include among the things that the court has to consider when making orders about children, a reference to the child's "background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders)".[8] The Court has taken significant steps, in consultation with Indigenous people, to try to make its services available to them, in forms which they can readily use.

## IV. APPLYING THE PLACEMENT PRINCIPLE

The Principle provides a valuable starting point: It represents the considered views of many Indigenous and non-Indigenous people who have grappled with the problem, and it involves a reversal of the key features of the Removal. I want to make a few points about its application.

First, it does not deal with all situations in which Indigenous children are liable to be removed. In particular, it does not deal with the removal of children under juvenile justice laws, or, for example, problems arising from placement of Indigenous children for significant periods in hospitals or health facilities far from their home.

Next, the application of the Principle is most straightforward where the issue is whether a child should be removed from a home and placed elsewhere. It is more difficult in parenting disputes, where two people, perhaps but not necessarily the parents, each seek orders that the child live with them. If one parent is Indigenous and the other is not, should the principle apply, and in what form? Some would argue that in determining competing applications between

7 See in particular *R v B* (1995) 19 Fam LR 714.

8 *Family Law Act* 1975, s 68F(2)(f).

parents or others, it is best to have no preconceived assumptions, but to direct the court to have regard to all circumstances, and in the end do what seems best for the child. That view seems to underlie the *Family Law Act* 1975: Its provisions do not *expressly* require the court to assume that for a child with Indigenous ancestry, the Indigenous connection should be considered more important than other genetic or cultural inheritances.

Finally, analysis of the Principle leads to a fundamental issue. What is the appropriate response to the placement of Indigenous children in the light of the Removal? Some might say that all efforts should be put into keeping Indigenous children with their families and communities. Others might say that a singleminded effort to avoid repeating the specific mistake represented by the Removal might run the risk of making the same underlying error. This view underlies criticism of certain social work policies in the United States which imposed an absolute ban on the adoption of Indian children by non-Indian adoptive parents. On this view, the underlying error *was to use children as an instrument of policy*, and, the argument goes, we risk making the same error if we use children as instruments of a different policy. On this view, it would be a mistake to move from a policy of removing children (regardless of the impact on the children) to a policy of keeping them with their families (regardless of the impact on the children). The way we formulate and apply the Placement Principle and related laws and policies might reflect a choice between these two views.

These are just some of the issues posed by the Report on the children known as 'the Stolen Generation'. We will be judged, by our own children and the world, according to the wisdom and humanity of our response to them.