THE PLACE OF CULTURE IN FAMILY LAW PROCEEDINGS:
MOVING BEYOND THE DOMINANT PARADIGM
OF THE NUCLEAR FAMILY

by Keryn Ruska & Zoe Ratus

A key issue for contemporary Australian family law is how to determine disputes about the custodial arrangements for Indigenous children when all of the parties are Indigenous. Our family law system and the Family Law Act 1975 (Cth) are based on a construction of 'family' in which the two parents are the pillars of a nuclear structure — a construction which lies at the heart of private family law. This has been exacerbated over the last 15 years with reforms which have stressed the ongoing importance of both parents in the lives of their children after separation. This creates a tension with Indigenous practice and culture where the nuclear family may not be so central.

Although there have been significant reforms aimed at taking account of Indigenous cultural issues, we argue that recent cases that involve disputes where all parties are Indigenous and extend beyond the biological parents are testing the effectiveness of these reforms. In particular, we suggest that the law still struggles to deal with Indigenous concepts of kinship and the multitude of child-rearing practices observed by Aboriginal and Torres Strait Islander peoples. Questions continue to arise regarding what evidence is required, by whom it should be gathered, who has the relevant expertise to deliver it and how best to facilitate decisions which move beyond privileging Anglo- and hetero-centric ideals of the nuclear family.

This article presents a brief history of the cases and law reforms essential to understanding the development of jurisprudence around this issue, as background to analysis of a recent Brisbane case, Donnell & Daroo. This case involved families from the Wacka Wakba tribe and the Torres Strait and illustrates the complexity of family law proceedings concerning Indigenous children.

THE EARLY HISTORY: A DEVELOPING JUDICIAL AWARENESS OF CULTURAL CONSIDERATIONS

Since the introduction of the Family Law Act 1975 (Cth) (FLA), the Australian Family Courts have tried to grapple with cultural issues in parenting cases involving Indigenous children. Early cases involved decisions where the children had one Indigenous and one non-Indigenous parent. These cases demonstrated an increasing recognition of the importance of cultural issues and probably reflected social and cultural developments in the broader community at that time. For example, in Gouge and Gouge custody was granted to the non-Indigenous father and the mother's appeal was dismissed by the majority who expressed concern that otherwise there seemed to be a prima facie rule favouring children of 'mixed racial parentage' being placed with the Indigenous parent. However, the dissenting judgment by Chief Justice Elizabeth Evatt would later be described as 'an important early contribution by this Court to the issues'. Evatt CJ explained that while it is not for the court to express a preference for one cultural background over another, factors such as a child's 'Aboriginal origins' and the effects of loss of contact with a child's traditions and cultures are particularly relevant for Indigenous children.

The Australian Law Reform Commission (ALRC) considered this judgment in its 1987 Report, Recognition of Aboriginal Customary Law. While the Report did not specifically consider circumstances where all parties were Indigenous, it made relevant comments with respect to the complexity of Aboriginal societies and their difference from the dominant Anglo culture in terms of child-rearing practices. In particular, the Report noted that in Aboriginal societies the role of the extended family, based on kinship relationships and obligations, is of fundamental importance in child-rearing.

Six years later, the ALRC reaffirmed the importance of kinship care and recommended reforms to the FLA to ensure consideration of these cultural factors. These ideas were supported by the former Chief Justice of the Family Court, Alastair Nicholson, who lobbied the Attorney-General to include a specific provision about Indigenous culture in determining a child's best interests. The Attorney-General later accepted this suggestion and included a provision in relation to Indigenous children in the 1995 reforms to the FLA. However, before any reforms were implemented, a key decision in this area was handed down.
B and R and the Separate Representative(B and R) considered issues of culture, identity and the admissibility of evidence about culture and identity at length. It is likely that the judgment was influenced by the impending reforms of the FLA and the associated dialogue at the time in relation to cultural issues in family law. In spite of a growing awareness indicated by the ALRC, private family law disputes concerning Indigenous children within their own communities were still not really contemplated by the courts.

B and R involved an Aboriginal mother, a non-Indigenous father and their two-year-old daughter. At trial, the separate representative for the child sought to introduce evidence about the experiences of Aboriginal children raised in non-Aboriginal environments and, in particular, the difficulties encountered by those children and the damage to identity and self-esteem suffered. However, the trial judge did not regard that evidence as relevant, sought to restrict its introduction and did not refer to it in his reasons.

On appeal, the Full Court of the Family Court accepted that the evidence was relevant and admissible and went 'well beyond any “right to know one’s culture” assertion' to address 'the reality of Aboriginal experience'. The Full Court further concluded that in cases involving an Aboriginal child, evidence of particular cultural issues should consist of both ‘readily accessible public information’ that a trial judge would be expected to know and information that could be gathered and presented to the court by a suitably qualified expert. The Full Court also said that in such cases a separate representative should be appointed principally to examine relevant cultural issues and ensure all relevant evidence is placed before the court.

B and R is important because it gave specific guidelines for how evidence of cultural issues should be presented and reflected a growing awareness of cultural issues in cases involving Indigenous children. However, as will be seen in Donnell & Dovey, expert evidence of cultural issues is not always presented and this creates serious difficulties for judges in making culturally appropriate decisions.

THE FIRST RECOGNITION OF INDIGENOUS PEOPLES IN THE FAMILY LAW ACT

Shortly after B and R was decided, the first relevant reforms to the FLA took place. However, while Indigenous culture was formally recognised as a factor to take into account in determining a child’s best interests, the reform was in the shape of a parenthetical addition to a general provision: the court was directed to consider the child’s ‘maturity, sex, and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders)’. Commentators at the time mainly contemplated its application to mixed marriages and partnerships. In fact, the cases that would test the reforms came from a new direction: disputes involving all-Indigenous litigants and applicants for custody outside of the biological parents and nuclear family, which are the subject of this article.

For example, Re CP involved a four-year-old Indigenous boy who had lived most of his life in Darwin with an unrelated woman from the Torres Straits. His biological mother wanted her son to be returned to her in the Tiwi Islands where he would be cared for by members of her family. The trial judge awarded custody to the child’s Torres Strait Islander carer and the mother appealed on the basis that the child’s Tiwi culture was not adequately taken into account.

On appeal, the Full Court held that the trial judge did not properly understand the difference between the child’s specific Tiwi cultural heritage and that of his Torres Strait Islander carer and that he therefore did not give sufficient weight to the child’s Tiwi culture. It also commented on the difficulties of applying the provisions of the FLA, which proceed on ‘an Anglo-European notion of parental responsibility’, as opposed to ‘cultural systems of family care’ where a child may ‘live and be cared for within a kin network’. Dewar argues that this case highlighted two problems with the FLA as it was then: an unwillingness to ‘recognise kinship structures other than the nuclear one’ and a failure to appreciate the cultural, value-laden constructs which exist around child-rearing practices. This clear tension between the focus on nuclear family structures in the FLA and Indigenous child-rearing practices was subsequently noted in numerous reports and is explored in depth in Donnell & Dovey.

INDIGENOUS ISSUES: AN EXPANDING POLICY AGENDA

In the next stage of reform, the legislature started to tackle these more complex nuances. In the same year as Re CP was decided, the Human Rights and Equal Opportunities Commission (HREOC) published Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Bringing Them Home Report). HREOC presented analysis of the contemporary separation of Indigenous children from their families by State mechanisms, including family law. HREOC noted that ‘by privileging parents and relegating the rights of other family members, the Australian
family law system conflicts with Aboriginal child-rearing values. HREOC also suggested that the FLA failed to implement Article 30 of the United Nations Convention on the Rights of the Child (‘CROC’) which speaks of a child’s right ‘in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language’. HREOC recommended more than a continuation of the existing provision, which would provide for consideration by decision-makers of ‘the significance of the child’s Indigenous heritage for his or her future well-being, the views of the child and his or her family... [and] the advice of the appropriate accredited Indigenous organisation’.

In 2001, four years after the Bringing Them Home Report, these ideas were considered by the Family Law Pathways Advisory Group, which specifically included an Indigenous member. This Group noted that the FLA ‘does not explicitly recognise child-rearing obligations or parenting responsibilities of family members other than parents’. It recommended legislative reform which captured the CROC language and acknowledged in a new section the ‘unique kinship obligations and child-rearing practices of indigenous culture’. In responding to the recommendation, the Family Law Council (FLC) supported the principle, but it was concerned about how it should be drafted and implemented. The FLC explained that concepts such as ‘kinship obligation’, ‘child-rearing practice’, ‘family’ and ‘adequate and proper parenting’, as they applied in Indigenous communities, were not defined in the proposed legislative reform and are ‘difficult to grapple with’. The reforms it recommended have largely been enacted.

THE SECOND SET OF REFORMS: IMPLEMENTED AGAINST A DOMINANT AND CONFLICTING AGENDA

The current provisions in the FLA relating to Indigenous children and their families were introduced in 2006 and no doubt are an endeavour to reflect some of the concerns raised in these significant reports. However, they were introduced as part of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), which was mainly answering to an agitated agenda from fathers’ rights groups who were seeking to ensure legislative emphasis on the need for a presence of both parents in the lives of children after separation. This meant that the enhanced recognition of Indigenous family practices and structures happened simultaneously with a deep embedding of a new dominant theme; ‘the benefit to the child of having a meaningful relationship with both of the child’s parents’.

As will be seen in Donnell and Dovey, this may contribute to a privileging of parents over other kinship carers in the courts.

Some of the reforms simply clarified and extended the 1995 changes. They situated an Indigenous child’s ‘right to enjoy their culture’ as a principle underlying the objects of the parenting provisions, which includes the right to maintain a connection with that culture and ‘have the support, opportunity and encouragement necessary to explore... and develop a positive appreciation of that culture’. This concept is repeated as an ‘additional consideration’ that the court must consider in determining the best interests of the child and includes ‘the right to enjoy that culture with other people who share that culture’.

The more significant amendment in terms of perceived gaps in the former FLA is section 61F. This section provides that in relation to Aboriginal or Torres Strait Islander children, ‘the court must have regard to any kinship obligations, and child-rearing practices, of the child’s Aboriginal or Torres Strait Islander culture’.

In spite of this positive reform, an analysis of a recent decision highlights the complexity of family law cases involving Indigenous children. In particular, it illustrates the difficulty Australian Family Courts have in abandoning Anglo- and hetero-centric ideals about the centrality of parents. It also demonstrates the complexity of the evidentiary issues which arise.

DONNELL AND DOVEY: REVEALING THE COMPLEXITIES

Donnell and Dovey involved the eight-year-old son of an Aboriginal (Wakka Wakka) mother and a Torres Strait Islander father. The son lived with his mother after his parents separated and then, after his mother died in a car accident in 2007, with his elder half-sister and her husband. The boy had experienced little contact with his father. Both the father and the elder sister sought orders that the boy live with them. At trial, the Federal Magistrate ordered that the child should live with his father, with the change of residence to be introduced gradually. The child’s sister appealed the decision.

One ground of appeal was that the Federal Magistrate erred in placing undue weight on the two family reports, which over-emphasised the importance of the Torres Strait Islander culture to the detriment of a proper examination of the Aboriginal culture. The Full Court found that the sister was not afforded procedural fairness
in the preparation of the reports and that the child's Aboriginal culture was not properly considered. This finding suggests the need for training and perhaps special accreditation for family report writers who provide reports in these cases. Familiarity with Indigenous cultures and a demonstrated ability to work in Indigenous communities are arguably essential attributes.

Another ground of appeal was that the Federal Magistrate did not seek any anthropological evidence in relation to the child-rearing practices of the mother's Wakka Wakka culture. The child's sister had given evidence of the relevant Wakka Wakka traditions, including evidence that 'it is the responsibility of an eldest child to raise a younger sibling in circumstances where the parents have passed away', which positioned her as a possible carer. The Full Court acknowledged potential limitations 'associated with the evidence of cultural traditions being given by a party or a person aligned to a party'; however, it clarified that evidence in relation to cultural issues need not necessarily be given by an anthropologist and 'the best evidence may be that given ... by an elder or such other person within the Indigenous community who is accepted by the community as being able to speak with authority on its customs'.

The Full Court further found that there was a gap in the evidence about Wakka Wakka child-rearing practices in relation to the status of a previously absent father, which the trial judge had attempted to fill by proceeding on his own assumption about what was culturally appropriate. The Full Court noted that this was likely to have been done 'by reference to the norms of the dominant European/white Australian culture — which is taken for granted and about which no expert evidence is required'. The Federal Magistrate's order for the child to live with a parent, his father, over a non-parent, his sister, is hardly a surprising outcome when this dominant cultural ideal is revealed. The Full Court ordered that the matter be remitted for retrial before a different Federal Magistrate.

A critical point made in this case is that the research and literature generally relied on in parenting cases focuses on nuclear families and the parent-child relationship, which can conflict with Indigenous child-rearing values. The Full Court noted that s 61F of the FLA was introduced to decrease the emphasis on the nuclear family model in cases involving Indigenous children but that the purpose was overlooked at trial. The Full Court relevantly commented that while the Federal Magistrate at trial was not referred to any writing on Indigenous child-rearing practices, an 'Australian court exercising family law jurisdiction in the twenty first century' must nonetheless:

'Take judicial notice of the fact that there are marked differences between indigenous and non-indigenous people relating to the concept of family. ... It cannot ever be safely assumed that research findings based on studies of European/white Australian children apply with equal force to indigenous children.'

The Full Court made explicit remarks about what is expected of judicial officers dealing with family law cases involving Indigenous children. These expectations include having a basic level of understanding of Indigenous culture, at least to the extent of 'readily accessible public information', being familiar with reported decisions of the Full Court concerning Indigenous children and being aware of policy considerations that have informed legislative reforms pertaining to Indigenous children.

The Full Court's commentary clearly illustrates that cases involving multiple Indigenous parties, including extended family members, are still not well-catered for in our family law system. In particular, clarity is required with respect to what expert evidence should be given, who should obtain it and how to use publicly accessible information. Furthermore, training and accreditation may be required for experts who wish to be involved in these cases, as well as more definitive guidance for judicial officers.

CONCLUSION

It is clear from the 2006 reforms of the Family Law Act 1975 that the Australian legislature is endeavouring to ensure that cultural issues, including child-rearing practices, will be investigated in cases involving Indigenous children. However, the cases reveal that even with this guidance, there may be a tendency for judicial officers to slide towards their own familiar norms, thereby contributing to a privileging of parents over other kinship carers. There is still some distance to go in formulating legislation that will encourage full and proper investigation of all of the relevant issues and ensure that evidence is provided by people with appropriate cultural knowledge and understanding. In the meantime it is likely that parent claimants will be favoured over non-parents and this will raise issues both in cases involving all Indigenous parties and cases where one of the parents is non-Indigenous.

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1 Note that this article is limited to a consideration of private family law and does not cover cases involving the child protection system.


5 Note that this includes the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court.


7 Note that the latter two cases were heard in State civil courts, not the Federal Court.


14 Harrison, above n 13, 13.


18 ‘Separate representatives’ are now called ‘independent children’s lawyers’ and can be appointed under Family Law Reform Act 1995 (Cth) (FLRA) s 68L. Their role is to form an independent view of what is in the best interests of the child and act in those best interests.

19 B and R (1995) FLC 92-636; [82,396].

20 Ibid [82,414].

21 Ibid [82,415].


24 See, eg, Nygh, above n 17, 11.