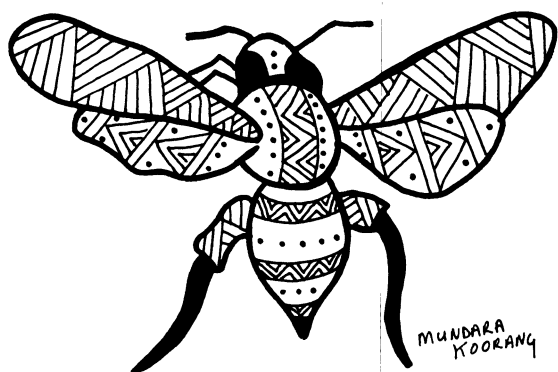


The lost Kooris

Kelly Godfrey

A history of Aboriginal child welfare policies in New South Wales.



All families are exposed to some level of state intervention, designed to ensure that all children receive a minimum standard of care. The state's responsibility is to supply appropriate resources and to intervene as a last resort. The state's willingness to intervene increased during the late 19th and early 20th centuries. With this came the risk of abuse of the power to intervene, for instance by the imposition of majority standards onto minority groups. The state's intervention into Aboriginal family life has been particularly harsh, with Aboriginal children subjected to both general child welfare laws and separate legislation and policies.¹ An understanding of the history of the policies and powers used by the state to intervene and remove Aboriginal children from their parents and community is useful in considering the appropriate nature of state intervention into family life today.

While all Australian States have at one time or another advocated a policy of removing Aboriginal children from their families, the history of Aboriginal child welfare has only recently been explored. Official records on child removal are sparse, due to the denial of access to departmental records by some State governments.² The most information is available for New South Wales, the focus of this article.

Civilisation of a 'barbarous race'

The first significant attempts by Europeans to intervene in the lives of Aboriginal children date back to the early 19th century when white individuals took the children into their homes in an attempt to educate and civilise members of what was viewed as a 'barbarous race'. The aim was to produce 'useful' citizens. The earliest attempts at institutional care date from 1814, the most renowned being the institution at Parramatta which existed until 1829.³ The scale of removal during the 19th century was less dramatic than in the 20th century. During this period, removal was motivated by 'humanitarian' policies, people believing that black children trained as labourers and maids could be 'brought up' to the same status as the white population. The prevailing view was that the Aboriginal population would die out. However, rather than declining, the part-Aboriginal population began to increase after 1850 and by 1870 the white population was demanding that the government do something to address this issue. In response, the Aborigines Protection Board was established in 1883. In 1940 this became the Aborigines Welfare Board, which remained responsible for the control of Aboriginal child welfare until 1969.⁴

The Board implemented a policy of protecting full-blooded Aborigines until their race died away by physically separating them from the rest of society, while seeking the assimilation of mixed-race children into the 'superior' white society. Although by 1900 the Board had begun trying to desocialise mixed-race children as Aborigines and resocialise them as whites, it had no legislative power with regard to Aboriginal children until 1910. Rather, it relied on threats and promises, using Aboriginal children as 'hostages' to maintain the co-opera-

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tion of adults. When 'apprenticeship schools' were established, parents were forced to consent to their children's enrolment under threat of prosecution under the *Neglected Children and Juvenile Offenders Act 1905* (NSW).⁵

The social control phase

The Board received its first legislative powers over Aboriginal children under the *Aborigines Protection Act 1909* (NSW). It was empowered to enforce apprenticeship schemes and to remove children without parental consent if they were found to be 'neglected'.⁶ For the Board the most useful aspect of the definition of 'neglect' was that it included children having 'no visible lawful means of support or . . . fixed place of abode'.⁷ However, the Board wished to remove children who did not fall within the definition of 'neglected' and a series of cases based on this ground failed. Magistrates reasoned that otherwise well-cared for children could not be 'neglected' simply because they lived in tents.⁸ The Board, complaining its powers were inadequate, successfully lobbied for an expansion and convinced both the public and Parliament that Aboriginal parenting was by definition negligent.⁹ The 1915 amending legislation's social control policy had two purposes. First, physical separation between full-blooded and mixed-race Aborigines was to be maintained. Second, pubertal Aboriginal girls were to be removed from their communities in an attempt to reduce the birthrate of the Aboriginal population.¹⁰ This was a policy of 'attempted genocide', under which approximately 1600 children were removed in New South Wales alone.¹¹ This was a fourfold increase in the number of removals between 1909 and 1916.

The amendments gave the Board total power as the legal guardian of Aboriginal children. It enabled younger children to be seized and placed in homes until they were old enough to commence their apprenticeships. The Board could arrange apprenticeships, on whatever terms and conditions it wished, without parental consent.¹² The Board could remove Aboriginal children without consent if it considered removal to be in the child's 'moral or physical welfare' interests.¹³ Being Aboriginal was a good enough reason for seizure.¹⁴ Unlike white children, no court hearings were necessary and it was up to the parents to prove the child should stay with them. Although there was provision for parents to appeal decisions, no appeals were recorded because of unfamiliarity with court procedures, lack of legal aid and fear of reprisals. The basic purpose of this type of legislation was to blame and penalise the parents rather than benefit the children. Drafted in vague, loose terms it was subject to abuse and haphazard intervention on the basis of personal values, giving officials unlimited powers to remove Aboriginal children. The Aboriginal experience supports the argument for clearer and more precise definitions of when intervention is to take place.¹⁵

This oppressive legislation remained in force until 1939, when increased public scrutiny and political pressure from Aboriginal groups led to the introduction of the *Child Welfare Act 1939* (NSW). From 1940 until 1969 the Aborigines Welfare Board implemented a system incorporating many of the provisions of the white child welfare legislation. An amendment to the legislation in 1943 provided that two of the 11 Board members were to be Aborigines, one of whom was to be full-blooded, both of whom were to be nominated by Aborigines.¹⁶ These appointments were generally given to well educated Aborigines who would otherwise have held positions of leadership in Aboriginal communities. While these appointments created some appearance of Aboriginal

self-determination, they really served to weaken the Aboriginal position by separating these powerful people from their community.¹⁷

Under the new Act, court hearings became necessary prior to removal. However, these were merely a formality. Just as many children were removed from their families as under the old legislation. The Board's dominance and the Aborigines' comparative position of powerlessness meant the authority's decisions went unchallenged, perpetuating a system of procedural injustice. Assumptions of Aboriginal inferiority were so deeply entrenched in white minds that light-skinned Aboriginal children were sent to the ordinary child welfare homes and were passed off as white. Advertisements in the 1950s seeking white foster parents expressed the hopes that fostered children would 'adopt the lifestyle, habits and thinking of white people'.¹⁸ It was often hoped they would never realise they were Aboriginal.¹⁹ Today, Aborigines are demanding compensation for the loss of cultural identity this imposed.²⁰

Under the new legislation the children came under the Aborigines Welfare Board's control via 'admission' on the 'request' of their families or committal by the courts if they were found to be 'neglected' or 'uncontrollable'.²¹ The legal categories of neglect under s.72 of the *Child Welfare Act 1939* focused not on children's misbehaviour but on parental failure. This enabled the removal of excessive numbers of Aboriginal children from their families and is now the subject of litigation in *Williams v State of NSW*.²² There are many problems associated with the term 'uncontrollability'. Used against Aborigines it was an easy criterion to apply, with sexual promiscuity often used to scoop up Aboriginal girls who posed a threat to respectability.²³ The trend in recent legislation has been towards its replacement with a focus on harm²⁴ and irreconcilable differences between parents and children.²⁵

White children could also be removed from their parents and charged with being neglected under the *Child Welfare Act 1930* (NSW). However, this system was far more generous in its operation in that it did not intend a permanent separation, allowing for home visits and return on good behaviour. Van Krieken argues that the removal of white children did not have the same impact as removal of Aboriginal children had on Aboriginal families. Rather, it juxtaposed a 'struggle for respectability' amongst the white working class with a system of social engineering for Aborigines.²⁶

Today, there is no real consensus about what constitutes proper upbringing or what constitutes a healthy child, and there is an increasing recognition of a diversity of child-rearing patterns. The Aboriginal experience shows that this has not always been the case. While an appreciation of Aboriginal lifeways in their own right was required,²⁷ white society failed to acknowledge the existence of Aboriginal culture and could not accept its validity. There was only one way to raise children — the white way. This has resulted in the Aboriginal community distrusting state altruism and paternalism and being hesitant to seek out 'white' support services, thus contributing to a continuation of the problem.²⁸

Changing focus

In line with the policy shift away from assimilation toward integration in the 1960s, the Aborigines Welfare Board was abolished in 1969 and much of the discriminatory legislation was repealed. Since then there has been no formal legal distinction between Aboriginal and non-Aboriginal children. Between 1969 and 1980 no statistics were kept on Aboriginal

child welfare due to a prevailing policy of 'equality'. However, in practice the system continues to treat Aboriginal people harshly. Institutionalisation in welfare has replaced institutionalisation on reserves and missions. Current statistics disclose a disproportionate number of Aboriginal children are dealt with under the welfare system: while Aborigines in New South Wales constitute fewer than 1% of the population, they make up 15% of the total number of children in care.²⁹ This cannot be attributed simply to the high incidence of poverty and other related social problems in Aboriginal communities. Children are generally better off with their families despite their situation of poverty.³⁰ The Burdekin Report recognised that poverty amongst children was an institutionalised problem and should not be construed as parental neglect.³¹

Intervention is a risk-taking operation and should only occur if the child is likely to be better off. Ninety percent of removed children have had an increased tendency to show anti-social behaviour and are more disadvantaged than those children allowed to remain with their families.³² Of the 99 people whose deaths were investigated by the Royal Commission into Aboriginal Deaths in Custody 43 had been removed from their families as children.³³ Aborigines with a history of removal also often suffer from psychiatric disorders.³⁴ Wald argues that inadequate parenting alone can never be a valid criterion for intervention, and that intervention should only occur where harm is manifest.³⁵ This 'second limb test' has been enacted in s.57(3) of the *Children (Care and Protection) Act 1987*.³⁶ However, the Director-General's discretion may be tempered in the case of Aboriginal children, as mandatory requirements for their alternative care are specifically set out in s.87.³⁷

The way forward

In the past, Aboriginal relatives and the wider Aboriginal community were not recognised as alternative means of care. However, today the Child Placement Principle is recognised as accepted policy in most States and implemented in legislation in others.³⁸ It requires placement of Aboriginal children with Aboriginal families or in Aboriginal care whenever reasonably possible to do so. The Australian Law Reform Commission argues that the principle should be entrenched in legislation, considering it unsatisfactory to rely simply on the sensitivity of welfare authorities and courts to apply the principle.³⁹ However, the present Child Placement Principle in s.87 is not yet sensitive and flexible enough to adequately respond to the problem. The definition of Aborigine is problematic when applied to children.⁴⁰ A newborn is unable to 'identify' as Aboriginal until it has matured. In addition, Aboriginal children originally placed in white foster care or institutions may not readily identify as Aborigines and may require a gradual introduction to Aboriginal culture. Therefore, a more sensitive Child Placement Principle needs to be developed and applied to include any child of Aboriginal ancestry.⁴¹

The United Nations Convention on the Rights of the Child, ratified by Australia, recognises the rights of Aboriginal children and their families.⁴² However, not only are these rights vague and unenforceable, but previous Conventions ratified by Australia have had little effect on the Aboriginal position. Hence there has been a call for the enactment of national legislation along the lines of the *Indian Child Welfare Act 1978* (USA) incorporating the Convention's principles.⁴³ The Federal Government is responsible for Aboriginal

affairs, while the States traditionally regulate child welfare. Enactment of national legislation in the face of State opposition may not be successful as the State controls services like education, health and housing which significantly interact with the child welfare system.⁴⁴

Conclusion

All Australian States have at one time or another had an official policy of removing Aboriginal children from their parents. There was no one determinative policy in place and in the end Aboriginal children were taken away under 'a system of uncontrolled power'⁴⁵ for many different reasons which reflected the white community's anxiety. Removal clearly involved a policy of social control, designed to eliminate Aboriginal culture and society. While there has been repentance by white society and an increase in the sensitivity of laws and policies to Aboriginal needs,⁴⁶ Aboriginal communities cannot forget the past and it should not be forgotten by white society either. The devastating consequences of past policies and practices must be examined and lessons learnt if the black and white communities are to work together to advance Aboriginal child welfare. Laws alone are not sufficient. The focus must not only be on identification of abuse and neglect but improving the living conditions of Aboriginal communities so they can better care for their children and achieve their goal of self-determination.

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42. Particularly Articles 2, 5, 7, 8 and 30.
43. Butler B., above, pp.40-41.
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45. Chisholm, R., above, p.29.
46. Sections 73(3) and 74 of the *Children (Care and Protection) Act 1987* (NSW) recognise cultural diversity.



NOTICES

FITZROY LEGAL SERVICE LAW HANDBOOK

The 1995 Law Handbook, a practical guide to the law in Victoria suitable for use in community legal centres and by non-lawyers, is now available from Fitzroy Legal Service, for \$45.00.

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NATIONAL WOMEN'S PEACE CAMP

Australian Defence Industries Munitions Factory
Benalla, North East Victoria
Easter, 14-16 April 1995

Invitation to legal workers

The New Australian Defence Industries munitions factory at Benalla has been chosen as the site of a national women's peace action which will take place over Easter 1995.

ADI is a government-owned, profit-oriented company which makes weapons including rifles, machine guns, rockets, and a wide range of ammunition. It is part of the Australian Government's drive to increase arms exports, particularly in the Asia Pacific region. Equipment and parts made by

ADI are being used in this region in places including East Timor and Bougainville. The current restructuring of ADI will produce a massive cut in jobs within the company and consolidate ADI's ammunition manufacturing in a single factory: at Benalla.

Undoubtedly some of the women involved in the action will take this opportunity to express their commitment to ending militarism and other forms of violence by taking arrestable nonviolent direct action. Therefore, the organising collective is planning to provide legal information and support for activists attending the action both in Benalla, and in regional centres before and after Easter.

We are keen to make contact with legal workers (law students, lawyers, paralegal workers, legal academics and others involved in working with and challenging the law) who may wish to come to Benalla or to be part of providing accessible legal information and support for the action in other ways.

For more information about the action contact Clare Cole (03) 903 2698.

For more information about being part of legal support for the action please contact Mary Heath, PO Box 458 Eastwood 5063, tel (08) 271 1240 (h), (08) 201 3889 (wk), or email: lamah@gamgee.cc.flinders.edu.au

LOIS O'DONOGHUE REAPPOINTED ATSIC CHAIR

Ms Lois O'Donoghue CBE AM has been reappointed Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC). Ms O'Donoghue's appointment as a Commissioner and Chairperson has been extended until the next Board of Commissioners is elected after ATSIC regional council elections due in December 1996.

The ATSIC Board of Commissioners currently consists of 17 ATSIC Regional Councillors elected as Commissioners in zone elections and two people selected by the Minister for Aboriginal and Torres Strait Islander Affairs. The Minister also selects and appoints the chairperson.

Under reforms to operate from the next ATSIC elections, the Board will consist solely of 17 elected Commissioners and the Chairperson will be elected by the Board.

ALTERNATIVE LAW JOURNAL — August Issue

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