

It just doesn't fit

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The Tiwi Family and the Family Law Act — can the two be reconciled?

The concept of 'family' as envisaged by the *Family Law Act 1975* is vastly different from the concept of 'family' as understood by the Tiwi Islanders.

The *Family Law Act* makes certain express and implied assumptions about what constitutes a 'family' in our society. Throughout this article consideration will be given to the concept of the family that the framers of the *Family Law Act* had in mind when drafting the legislation, and the structure of the Tiwi family.¹

The Tiwi Islands are situated approximately 80 kilometres north of Darwin. Two main islands comprise the Tiwi Islands, namely Bathurst and Melville Islands. The Indigenous Australians who inhabit the Tiwi Islands have strongly maintained the traditional cultural practices and language and way of life of their ancestors. The traditional ways of the Tiwi Islanders have remained intact largely because of the geographical remoteness of the Islands. Entry of European settlement on the Tiwi Islands did not occur until the early 20th century.²

The structure of the typical Tiwi family is far removed from that of the typical family unit of European Australians. Nuclear families that are prolific in the southern states of Australia are foreign on the Tiwi Islands. Child rearing practices of the Tiwi family differ greatly from child rearing practices of mainstream Australian families. Unlike children raised in mainstream families, children on the Tiwi Island are raised in large extended families. Raising children is often referred to as 'growing children up'. The parents of a Tiwi child do not have exclusive rights in respect of the child.

The social organisation of the Tiwi Island family

The Tiwi Island family comprises a 'one granny sibling group'. The family includes all children who share a maternal grandmother. Child rearing or the 'growing up' of a child is not exclusively the responsibility of the child's biological parents. Primarily the responsibility for raising children is the responsibility of the Tiwi women. When a child is born he or she is born with multiple mothers. Great importance is placed on the relationship between sisters in the Tiwi family who share between them the responsibility for raising children. The term sister has a wider meaning and covers a greater number of genetic relationships than the equivalent terminology within the European kinship system.

Mother is the word commonly used when a Tiwi Island child is referring to either his biological mother or to any of his biological mother's sisters. The child rearing manifests itself in many ways. It is not uncommon for a woman to give her child to one of her sisters to grow the child up.³

This regularly occurs if one of the sisters is unable to reproduce. If a woman has more children than she can cope with, it is not uncommon for the woman to give one of the children to a sister for an indeterminate period of time. In some situations the Tiwi child may also be given to a woman who is not a biological member of the 'one granny sibling group'.

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If a Tiwi or non-Tiwi woman is befriended by a Tiwi family, and if she has no children, the Tiwi family may give her a child to 'grow up'. If this occurs the expectation is that that woman will become part of the Tiwi family. They do not exclude the child by giving the child to someone to grow up but rather they give the child as a means by which the person is included into the family group.

Agreeing to grow up a Tiwi child involves a great responsibility to all members of the child's extended family. Children are never given to others to grow up for an indeterminate period of time. The Tiwi family expects that it can request that the child be returned to a biological family member at any time.

The Tiwi emphasis is never on formal separation or relinquishing of custody, nor conversely on exclusive custodial or proprietary rights over a child ... Child placement is usually informal. It is premised on the existence of ongoing relationships in extended familial groups.⁴

Tiwi Island children can make demands on either their biological mother or any of his or her other mothers. Tiwi children, perhaps because of the extended motherhood and family constellations, develop a level of independence not experienced by their age similar counterparts raised in a southern nuclear family. Tiwi children are able to locate themselves in any of the biological mothers' sisters' households from a very early age. It is not uncommon for the children to locate themselves in several of the extended family households throughout their respective childhood years.

This independence of the Tiwi child is so uncharacteristic of the child in the southern nuclear family that one has to question how the Family Court will deal with it. The difficulty has arisen and will certainly arise again when contested residence/custody proceedings are dealt with by the Family Court involving a Tiwi family opposed to a non-Tiwi family. We make reference to a recent decision of the Full Court of the Family Court in this regard later in this article.

The family unit envisaged by the *Family Law Act*

The *Family Law Act* contains no express definition of a 'family' within its definition sections. Section 60D(3) does provide a guideline to the definition of a relative for the purposes of the Act. This definition is based on accepted notions of European kinship relationships, and reflects the majority social norm within Australian society. There is no recognition within this definition of traditional Aboriginal or Torres Strait Islander kinship relationships.

Section 60B sets out the objects of Part 7 of the Act which specifically deals with children. Section 60B(1) provides that:

The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

The principles underlying these objects are set out in s.60B(2) which states that children have the right to know and be cared for by 'both their parents'.

This particular section is premised on children having two parents. It is at odds with the structure of the typical Tiwi family and their child rearing practices.

Recent case law

The recent amendments to the *Family Law Act* on the face of it appear to have enhanced the position of Aboriginal children insofar as disputes regarding residence and contact are concerned, but in fact the amendments do not adequately address issues of cultural difference. Aboriginal people are treated as a homogenous group.

The Family Court, when determining the issue of residence, must give consideration to a list of factors set out in s.68F(2) of the Act. The amended section replaces the old s.64 and expands the list of factors to be taken into account by the Court when determining matters involving children.

Section 68F(2) differs markedly from its predecessor, s.64, in that the Court is now required to consider the particular characteristics of the child who is the subject of the proceedings. The section specifically refers to Aboriginal and Torres Strait Island children.

According to s.68F(2)(f) of the Act the Court must 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) and any other characteristics of the child that the court thinks relevant. [emphasis added]

A significant issue that the section raises but does not completely address is what is meant by 'connection'. In matters involving Aboriginal children the clarification of this issue is exceptionally important. It is indeed questionable as to whether a 'connection' is sufficient. The Full Court in the case of *B & R and the Separate Representative* (1995) FLC 82,389 which predates the amendments, decided that:

It is not just that Aboriginal children should be encouraged to learn about their culture, and to take pride in it in the manner in which any other child might be so encouraged. What this issue directs our minds to is the particular problems and difficulties confronted throughout Australian history, and at the present time, by Aboriginal Australians in mainstream Australian society. The history of Aboriginal Australians is a unique one, as is their current position in Australian life. The struggles which they face in a predominantly white culture are, too, unique. Evidence which makes reference to these types of experiences and struggles travels well beyond any broad 'right to know one's culture' assertion. [at 82-398]

If s.68F(2)(f) is read in conjunction with the decision of the Full Court in *B & R* then 'connection' must mean that an Aboriginal or Torres Strait Island children cannot maintain a connection with their lifestyle or culture simply by being provided with information about their people. This raises the question as to the level of 'connection' needed by children so that they are able to participate in the lifestyle, culture, and traditions of their people. The question as to whether an Aboriginal or Torres Strait Island child can successfully live in two worlds, namely mainstream Australian and Indigenous society, has not yet been addressed.

At present it appears that only a minority of Indigenous people have been able to build bridges between the two societies. In the case of *B & R* the Full Court, after extensively reviewing literature about the history of Aboriginal Australians since European settlement, identified four common themes:

- A child is considered as being black by dominant white society if that child is of full or part Aboriginal ancestry. This is a 'circumstance which carries with it widely ac-

cepted connotation of an inferior social position'. Australia remains a racist society and Aboriginal people are confronted by racism on a daily basis.

- 'The removal of an Aboriginal child from his or her environment to a white environment is likely to have a devastating effect upon that child ...'
- A child growing up in an Aboriginal community is usually better able to cope with discrimination because the community reinforces self-esteem and appropriate responses.
- 'Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality.' [at 82,399]

In view of the acceptance by the Full Court of the four common themes that traverse the literature examined, it is necessary to question the sufficiency of the amendments to the *Family Law Act*, which postdated the decision of the Full Court.

The Full Court in the case of *Puruntatameri & Baird v O'Brien* (unreported, Nicholson CJ, Ellis and Moore JJ, 11 March 1997) recognised the shortcomings of the *Family Law Act* insofar as it relates to Tiwi families.

In this case the issue of residence regarding a Tiwi child was in dispute. The Tiwi mother gave her child to a woman of Torres Strait Island descent to 'grow up'. After three to four years a demand was made for the return of the child. This resulted in the matter being determined by the Family Court.

In the first instance the Family Court granted the Tiwi biological mother contact and made a Residence Order in favour of the party of Torres Strait Island descent. This decision was subsequently appealed. The Full Court of the Family Court allowed the appeal.

The Full Court commented:

The relevant provisions of the legislation proceed from an Anglo-European notion of parental responsibility which vests such responsibility exclusively in the biological or adoptive parents of a child. Sections 61B and C(1) are in the following terms:

'S.61B In this Part, "parental responsibility" in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

'S.61C(1) Each of the parents of a child who is not 18 has parental responsibility for the child.'

In the absence of recognition of customary indigenous law, the reference to 'law' in s.61B is to common law and statute. Thus for formal legal purposes, the many non-biological mothers of a Tiwi child are invisible to the law.

Under s.65C of the Act the Court can make a parenting Order in relation to a child in favour of a child's parents or according to subsection (c) 'any other person concerned with the care, welfare or development of the child'. [at 33]

The Full Court when considering the Tiwi child's independence and ability to locate him or herself in any one of his or her relatives' households stated:

It thus appears that the Act proceeds on the basis that orders will be made in favour of identified persons (who will usually be parties to the proceedings or have indicated their consent to orders being made in their favour). As the present case illustrates, the fluidity of indigenous care arrangements does not lend themselves to such *a priori* specificity and may give rise, as was again evident in this case, to criticisms about the uncertainty of arrangements for a child, which depending on the facts found in a case, may be unwarranted. [at 34]

The Aboriginal placement principle

When comparison is made of the *Family Law Act* and the Northern Territory Government protocol for placement of Aboriginal children in need of care it is evident that the recent amendments to the *Family Law Act* do not adequately take into account the needs of Aboriginal children.

The Northern Territory Government's protocol which puts in place the Child Placement Principle provides that all attempts must be made to place an Aboriginal child found to be in need of care, with a member of the child's Aboriginal family. This protocol is given legislative effect in Part IX of the Northern Territory *Community Welfare Act 1993*.

In 1987 KARU, the Aboriginal Child Care Agency was established in the Northern Territory to address the problems now represented by the Stolen Generation. The term 'Stolen Generation' refers to all the children of Aboriginal descent in Australia who were removed from their Aboriginal communities and families by the welfare authorities and placed in alternative care either within children's institutions or fostered by non-Aboriginal carers.

As a part of its functions, KARU enables the Northern Territory Government to fulfil its obligation to support and promote the 'Aboriginal Child Placement Principle'.

The Aboriginal Child Placement Principle was first publicly espoused in 1976 at the First National Conference on Adoption, which concluded that:

Any Aboriginal child growing up in Australian society today will be confronted by racism. His best weapons against entrenched prejudice are pride in his Aboriginal identity and cultural heritage, and a strong support from other members of the Aboriginal community. [see *B and R*, at 82,399]

This view has subsequently been supported in reports following from national enquiries, conferences and an Australian Law Reform Commission investigation.

In the event that all members of the child's extended family are deemed to be not capable of providing a sufficient level of care for the child then KARU must endeavour to place the child with a member of his or her Aboriginal clan. If this is not possible then the child may be placed with another Aboriginal family which is not a member of his or her kin group of origin. It is only after all of the above possibilities have been exhausted that KARU will consider placing the child with non-Aboriginal carers.

As at the time of writing, the President of KARU, Mr Charlie King, has stated that KARU has experienced minimal difficulties placing children in need of care with carers in their own clans.

KARU is responsible for Aboriginal children and accordingly decisions about children being in need of care are governed by KARU and are made by people of Aboriginal ancestry. Decisions about Aboriginal children are rarely, if ever, made by people of Aboriginal ancestry in the Family Court.

While it is possible for a non-Tiwi person to obtain residence/custody of a Tiwi child pursuant to the provisions of the *Family Law Act*, it is near impossible for a non-Tiwi person to be nominated as a carer of a Tiwi child under the provisions of Part IX of the Northern Territory *Community Welfare Act 1993* and as a result of the protocol between the Northern Territory Government and KARU.

Conclusions

It is submitted that the correct approach is that taken by the Northern Territory Government and KARU. If the Aboriginal child placement policy and the reasons for its creation are not carefully considered by the Family Court, the Court may be in danger of promoting a 'Stolen Generation' of the 1990s.

The child placement principle and the Northern Territory Government's response to it, in particular by the establishment of an Aboriginal Child placement protocol with KARU and the operation of Part IX of the Northern Territory *Community Welfare Act 1993*, have gone a considerable way towards the implementation of Article 30 of the Convention on the Rights of the Child to which Australia is a signatory.

Article 30 states:

In those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her own culture, to profess his or her own religion, or use his or her own language.

The child the subject of the Full Court proceedings may as a result of the Orders made by the trial judge in the first instance have been deprived of knowing his language, culture, values and traditions intimately. A non-Tiwi person who was not a biological parent of the child was granted full parental responsibility: the right to exclusively make all decisions about the child and his upbringing. These Orders were made by the judge even though numerous mothers of the Tiwi child expressed their willingness to the court to 'grow the child up'.

The Full Court of the Family Court recognised the inadequacy of the *Family Law Act* insofar as it fails to make provision for the Tiwi family when it acknowledged that:

for formal legal purposes, the many non-biological mothers of a Tiwi child are invisible to the law. [at 33]

When determining residence issues involving Aboriginal children the Court must now, as a result of the Full Court

decision, consider the specific ancestry and culture of an Indigenous child.

The Court held that:

It appears to us that the legislative recognition of indigenous culture and heritage in section 68F may need to be complemented by provisions which take account of the kinship care systems of Aboriginal and Torres Strait Islander peoples. [at 34]

In the absence of such provisions, it is for judges to work out, as best they can, how to deal with these issues. Legislative amendments should be introduced to prevent the issues being dealt with differently by different judges 'working out as best they can, how to deal with these issues'.

The Aboriginal Child Placement Principle has been given legislative effect in jurisdictions throughout Australia where Indigenous Aboriginal and Torres Strait Islander peoples continue to live within their traditional communities speaking their own language and practising their cultures. The Principle is in place to ensure that the disastrous practices of the past which resulted in what is now referred to as the 'Stolen Generation' never occur again.

The recent legislative amendments to the *Family Law Act* resulting in the introduction of s.68F(2)(f) have now been confirmed by the Full Court of the Family Court as failing to give adequate recognition to the cultural and kinship inter-relationship, and child rearing practices of Indigenous Australians.

The current law is clearly inadequate and the Aboriginal Child Placement Principle should be given legislative recognition with in the *Family Law Act*.

References

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2. This information was conveyed to the writers during discussions with Dr G. Robinson, sociologist, NTU.
3. Dr G. Robinson.
4. Dr G. Robinson.

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for example, if such rights were held to have been extinguished along with native title to land. It is arguable, however, that extinguishment of native title to land does not necessarily lead to extinguishment of native title to genetic resources. The question of whether native title to genetic resources was extinguished in a particular case must depend upon whether a 'clear and plain intention' to extinguish existed. Even where such an intention existed in relation to land, it might not necessarily exist in relation to genetic resources or traditional knowledge.

If native title to land and genetic resources exists, the question would arise of how it is to co-exist with the general law. In many cases traditional knowledge would not be restricted to one Aboriginal community or group. Non-Aboriginal scientific or commercial interests might have to negotiate with a number of different groups, each perhaps with different entitlements under traditional law. The question would arise whether the law should differentiate, as patent law currently does, between an Aboriginal group which merely 'owns' a particular plant, and those which also know of the use to which that plant might be put. It is suggested, however, that difficulties of this kind are not unresolvable. To recognise Aboriginal rights to their genetic resources, and to tackle the negotiations which would necessarily follow, is prefer-

able to the present course of almost unrestricted, and legally sanctioned, exploitation.

References

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