Section One

Fostering the future

11th biennial IFCO conference

Melbourne, July 1999

Indigenous children in care

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Indigenous children in care

On bringing them home

Mick Dodson

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***Dr Mick Dodson** is Chairman of the Australian Institute of Aboriginal and Torres Strait Islander Studies in Canberra. He joined the Victorian Bar in 1981, joined the Northern Land Council as a Senior Legal Advisor in 1984, and became Director of the Council in 1990. From 1998 to 1990, he was Counsel assisting the Royal Commission into Aboriginal Deaths in Custody. Dr Dodson was Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner from 1993-1998. He is a prominent advocate on land rights and other issues affecting Aboriginal and Torres Strait Islander peoples and indigenous people of the world.*

My first duty is to acknowledge and pay my respects to the traditional owners of this part of the country, the Kulin Nation; it's a privilege and a great pleasure to make this presentation on your ancestral lands.

In the Submission to the National Inquiry of the Aboriginal Legal Services, Western Australia, they said that the, and I quote:

> the facts remain that Aboriginal children are still being removed from their families at an unacceptable rate, whether by the Child Welfare, or Juvenile Justice systems, or both.

Today I want to spend some time and revisit some of the aspects of the report that this quote relates to, and to examine some of the recommendations, which focus on the processes of child welfare. And then, time permitting, I intend to have a look at what has, or hasn't, been done in response.

Now I can't speak of all the issues that relate to Child Welfare and Juvenile Justice that were examined by the National Inquiry, or the response. Indeed the part of the report that deals with these issues takes up about a third of the 700 pages plus report, so I'll try and focus, as much as I'm able, on the Child Welfare issues and then hopefully look at what's happened to the recommendations, particularly in child welfare, but also have a brief look at what's happened in the Juvenile Justice and Family Law area.

Now not only because of the Western Australian Legal Service Submission, but many, many others, and the overwhelming weight of evidence that was presented to us, we found in the National Inquiry that indigenous children and young people continued to be removed from their families and communities through the laws, policies and practices of Government, and although in the past the removals were based on what is now a discredited and racist policy of assimilation, these days it is the contact with the Child Welfare and Juvenile Justice systems which leads to many indigenous children being removed from their families.

I don't think that many people realised, and still don't realise, the process of what we called the second or subsequent generation removal, and how that occurred and continues to occur. What we meant there was that the children that were taken have in turn had their children taken, and some, and perhaps too many some would say, in some instances the grandchildren are also taken.

Part of the Submission from the Aboriginal Legal Service of Western Australia involved a survey of roughly 500 of their clients who were the stolen generations or children who were removed under those past policies, laws and practices. What they found was that one third of their stolen generation clients had had their children removed. What we set out to do in the National Inquiry, in our recommendations, was designed in part to try and break this trans-generational effect through the recommendations. In effect we are trying to put in place a mechanism, or suggesting a mechanism to the Government in particular, that would break this cycle. We simply believed, for very, very good and genuine reasons, that the cycle had to be broken.

We came to the conclusion that to do this we had to recommend that there be fundamental change to Australian law and practice. The Secretariat of the National Aboriginal and Islander Child

Care Centres told the National Inquiry that, and I quote:

> the way the present Legislation responds, it merely allows Aboriginal community organisations to become part of the process. There is no support for the development of genuine indigenous child care or child welfare, as for instance, there has been in the United States, under the jurisdiction of the Indian Child Welfare Act.

Our indigenous children throughout Australia still remain significantly over represented in care, and they are particularly over represented in long term foster care, and a high percentage of these children live with non-indigenous parents. I don't say that with any intention to embarrass or criticise, but just to point out the fact.

When we, in the National Inquiry, spoke to those who are involved in the area of indigenous child welfare, including governments, government agencies, indigenous organisations, and some commentators, we found that there was broad agreement on a number of basic issues, but two in particular. Firstly, that if indigenous children have to be removed from their families and their communities, their best interest is served by remaining in an indigenous cultural environment. Secondly, indigenous people have a right to look after their own children and thereby sustain their own culture. That was agreed, that was a given. And, of course, it really is necessary to say that these principles largely underpin any notion that we have, any fundamental notion that we have, of the rights of peoples to self-determination.

But in spite of this agreement, in spite of the acceptance of these principles, we still have indigenous kids removed at a disproportionate rate, and continuing to be placed in non-indigenous environments.

Apart from the inter-generational effects of the past removal policies, it is accepted that the under-lying causes of the over-representation relate to the poor socio-economic status and the systemic racism in broader society. These causes combine to produce cultural differences between welfare departments and indigenous communities and organisations. What we're really talking about are issues such as substance abuse, violence, poor nutrition, alienation from social institutions, including the education system, the criminal justice system, limited and poor housing options, and the loss of hope, and most sadly, the loss of hope particularly among young people.

Now in this country we have various welfare systems, each State and Territory has a legislative regime to investigate child abuse and neglect, and a response either with preventative measures or some other form of intervention, and grounds can include neglect, abuse, or an irretrievable breakdown in the parental relationship with the child. The aim, in all jurisdictions if the child has to be removed, is to get a rapid return of the child to family. And if that's not possible, then the aim, the objective, is to maintain family contact. We see Governments funding various initiatives of family based types, such as intensive home-based care and respite care, and it's clear that the policy in all jurisdictions across the country is to de-institutionalise out-of-home care.

Now Governments do have a duty to ensure the well being and protection of children. However, the nature of the Government's response varies from time to time according to prevailing philosophies and ideologies. When we examine the history of child care in this country, it really has its genesis, or origins, in western terms I'm talking about, in child saving, in the late 19th century, and it largely arose from a middle class concern about the so-called dangerous classes, single mothers and working class families who worked in the industrialised areas of England. But by the 1970s the people expected Governments to provide greater social equality and there was a recognition, I believe, that inequality underlies social problems, and that gained a fair deal of currency in the thought on child welfare. But in the 1980s we saw the focus slip back to abuse, particularly sexual abuse, and we saw the re-emergence of the notion that welfare workers were the saviours of children from morally deficient individuals and families.

During the Inquiry, we saw Aboriginals or Aboriginality of families being characterised, per se, as morally deficient. What we said in our report was this, and I'd like to quote this:

> there is evidence that this attitude persists, a child saving philosophy, blaming the family, and viewing the problem as a product of pathology or dysfunction among family members, rather than a product of structural circumstances which are part of a wider historical and social context. Indigenous families face both race and class prejudice among many welfare officers.

Over this little potted history, indigenous communities and families haven't been silent. In fact, indigenous communities over the history of colonisation in this country have fought vigorously to keep control of our children. National organisations began to be formed in the 1960s and 1970s and the effects of the separation of Aboriginal children was brought to national attention at the Australian Adoption Conferences of 1976, 1978 and 1992 and the first Aboriginal Child Survival Conference was held in 1975. Also in the 1970s we saw the formation and emergence of organisations like the New South Wales Aboriginal Children's Service and the establishment of Aboriginal and Torres Strait Islander Child Care Agencies. These went hand in hand together with the multi-functional Aboriginal Children's Services and today we have those two as the main indigenous community-based child care service providers in Australia.

Now State and Territory Governments, in their evidence to the National Inquiry, stressed the need for indigenous communities to exercise greater control over our children's welfare, and speaking often in language of self-determination and management. Well, the rhetoric of self-management hasn't really been matched by practical measures. The administrative, the executive, and the judicial decision-making about indigenous children's welfare are still controlled by State based authorities and institutions, and it's accepted, as I said earlier, that although indigenous organisations and communities have a right to be consulted in some jurisdictions, this often occurs at the end of the decision-making process, when

recommendations are being made for placement in substitute care. This form of decision-making falls well short of what I and many would understand as a fundamental notion of self-determination. And it also continues to fail in what Governments are quick to claim as partnerships and collaboration. Having said that, welfare authorities have nevertheless made efforts toward the establishment over the years of specialised indigenous sections or units within departments and agencies. Now that's all very well and good, but the problem with taking a decision to establish a unit or section, and what happens in practice, is that they get tacked on really to a system which doesn't alter its fundamental structure, which doesn't alter its philosophy, nor does it alter its processes and practices. And there's been much Aboriginal criticism levelled at this, particularly the impossibility of indigenous workers in these sections and units being advocates and spokespeople for indigenous communities and families, because they're beholden to the philosophies, the processes and practices of the particular department or agency.

Also during the 1980s and 1990s there's been a growing awareness of the need for cross cultural training to tackle the problems of cross cultural delivery of services. But sadly, however laudable the goal is, the fact remains that the goal of cross cultural service delivery remains elusive. I think that we found in our inquiry that the single most significant change affecting welfare practice in the 1970s has been the broad acceptance of the Aboriginal child placement principle. Now all Australian jurisdictions recognise either in legislative form, or as policy, that when an Aboriginal or Torres Strait Islander child, or children, are to be placed in substitute care, they should be placed with their own culture and community where that's possible. And each jurisdiction also recognises that indigenous people should be consulted about those placements. And the Aboriginal child placement principle, its acceptance has led to greater recognition of the importance of the cultural needs of indigenous kids and also to the improved consultation processes with indigenous communities and agencies. And in all jurisdictions, at least in theory, indigenous agencies had the opportunity to advise on child welfare matters that affect their children. But again, we need to pause and look at this with some caution, because this advice is given within an established bureaucratic framework, and that again has its own requirements and approaches. And again the extent and the style of consultation varies across the jurisdictions, and this is one of the reasons why we put it into our recommendations or part of our recommendations, that there be national standards established. Because what happens when you look at this area and one of its effects, and something I alluded to a bit earlier, is that the discussions, typically the consultations, typically take place when it's too late in the decision-making process, or it's too cursory, or made in too cursory a manner, to be effective.

The other thing we found in the National Inquiry was that, and it was a huge factor, affecting the capacity of indigenous child care agencies to be properly and effectively involved in the processes, and that was a lack of resources. It really contributes to a breakdown in the process. And indigenous agencies in many jurisdictions have to compete and communicate with various different sources of funding, and invariably the funding is inadequate, because on the one hand, you know the role of the indigenous people's organisations is being seen as crucial to the process, and then on the other hand, we find that more often than not the funding is insecure.

This is something we found in the Inquiry that needs to change if we're going to reverse the disproportionate level of indigenous children in out-of-care homes, it requires an adequate level of resources to these agencies to allow them to effectively do their job. And it's not only about them effectively doing their job, it will also allow those agencies, together with indigenous communities in which they work, to address child neglect and abuse issues, which those communities and those agencies consider as relevant in the local context.

And we also found that where partnerships exist with Governments, they're generally unthinkable. The unequal partnership must end, where they exist. They must change into a true and equal arrangement.

The other thing that Governments and the broader community must accept is that in Aboriginal communities the responsibility for children resides with an extended kinship network and the community as a whole. We must also understand, like any culture, children are the future of our culture, and we have a right to a contribution in the child welfare matters that involve our children. Because what happens now is that Government practices and policies, or some that is, some of their policies, are really raising questions that are fundamental to issues of conflict of values between cultures. For example, in Western terms or in Western society, the absence of a child from the nucleus of a family for an extended period of time, or any period of time, would be seen as something abnormal, and moreover, there would be an assumption almost immediately that the family was having problems. Now the normal Aboriginal practices seem to signal to welfare officers that something's wrong, and we found in the National Inquiry, in the 1990s, in the files of Government departments and agencies, they still see, and it can be demonstrated, that the perceptions of welfare officers about Aboriginality, their perception that Aboriginality of itself, is a cause of delinquency and problems, and Aboriginal behaviour is still too frequently, in their record, in the official record, is still too frequently stereotyped in a racist way.

Welfare departments in all jurisdictions sadly still continue to fail indigenous children; although they recognise the Aboriginal child placement principle, they still fail to consult adequately, if at all, with indigenous families and communities and our organisations. And welfare authorities also frequently fail to acknowledge anything of value that indigenous families could offer children, and still fail to address our children's well-being on indigenous terms.

During the course of our inquiries there was not one single submission from indigenous organisations, and there were dozens in this area, not one single submission saw interventions from

welfare departments and agencies as an effective means to deal with indigenous child protection needs. And that's not to say that departments and agencies don't recognise that they need to provide culturally appropriate and effective services.

Recognition is one thing, but what they do is that they fail to develop them. Too often cultural determinism sees child abuse as a function of Aboriginal culture and not as a consequence of the structural context of Aboriginal life in this country.

Now that's it, I was going to talk about the Recommendations that dealt with these issues, and just see what's happened to them. The Recommendations were through from Recommendation 43, although 42 was relevant which dealt with social justice, but let's see what's happened with these Recommendations, and two of them in particular that talk about standards.

Perhaps I could briefly give you a snapshot of what they were. We talked about standards in child welfare, national standards for indigenous children that arose out of Recommendation 43B. That related generally to principles of self-determination; also 44 and 45, through to Recommendation 52, which dealt with the 'adoption as last resort' standard. Areas of these standards that I wanted to talk about briefly include Standard 1 which is encapsulated in Recommendation 46A and 46B. What was said was that there should be National Standards Legislation. This would provide the initial presumption that the best interest of the child is to remain with his or her indigenous family, community and culture. 46B says that these standards had to be kept in mind and when the decision-maker was making a decision about a placement, that they must consider firstly, the need of the child, the indigenous child, to maintain contact with his or her indigenous family, community and culture; secondly, the significance of the child's indigenous heritage for his or her future well-being; thirdly, the views of the child and his or her family; and fourthly, the advice of the appropriate accredited indigenous organisation.

Now what's happened to the Recommendations some 18 months or so down the track? Well, Recommendation 43 which dealt with self-determination and the National framework legislation, well that hasn't been implemented, and in fact it has effectively been rejected by the Commonwealth and the Queensland and Victorian Governments, the others have signed the banner. 43B, which deals with principles, well that hasn't been implemented. 43C, which dealt with the transfer of authority in certain areas, well that's been partially implemented, it's in place in certain programs across different jurisdictions. Recommendation 44 dealt with the National standards again for indigenous children, well that hasn't been implemented, and again it's been actively rejected by the Commonwealth and by the Queensland and Victorian Governments. 45A and 45B dealt with shared jurisdictions between Commonwealth, States and Territories; neither of those has been implemented. 46A dealt with Standard 1 of the best interest of child practice, that hasn't been implemented, although the principle is applied in Australian Family Law. 46B, which is again Standard 2 which talks about the criteria, that hasn't been directly implemented, but the criteria that I read out earlier, is contained within the Aboriginal child placement principle, which as I said, to varying degrees, is implemented in each Australian jurisdiction. Standard 2 which dealt with the best interest of the child being paramount, that hasn't been directly implemented, although there are various child welfare care policies across Australia that address the issue to different extents. Standard 3, that hasn't been implemented, and in fact the mandatory sentencing laws in Western Australia/Northern Territory directly contradict the recommendation we made. Standard 4, which was Recommendation 49, the involvement of indigenous organisations and agencies, well, that hasn't been implemented, at least not in some jurisdictions, not in an obligatory way, in any jurisdiction in an obligatory way, but it's optional and/or discretionary in some jurisdictions.

They go on and on, and really in any of the Recommendations from Recommendation 42 through to Recommendation 54 which deals with changes to the Family Law Act, you can either say about them they've been partially implemented, but in most cases you have to say they haven't been implemented.

We don't know what the State and Territory Governments are saying about this, and in terms of National Standards, what the Commonwealth has said, and I want to quote from the Commonwealth response, they said that:

> for the Commonwealth to seek to override the Legislative and related responsibilities of the States and Territories in these circumstances, would be counter-productive for all concerned.

This is a direct quote from the Minister. You know, if you want to respond to this, the National Inquiry Recommendations do not, do not, as such, require the Commonwealth to override. There's no need for an override stance from the Commonwealth, that's not what the Recommendation is about and this is a direct misconception or misrepresentation of what the Report said. The Commonwealth is not required to do that, in fact, the reverse is true. What the Recommendations suggest, is that the Commonwealth takes the lead in ensuring a co-operative approach to establishing common frameworks and setting common standards to achieve common goals.

The Report of my successor, the present Social Justice Commissioner of 1998, she said, and I agree, that although a top-down approach to National Legislation might be most desirable, and the most effective means of delivery, it is clearly not an option that has found favour with Governments.

Now, I was asked to leave some time for perhaps some comments, but I want to end by just saying this – without sounding too negative, because that hasn't been my intention today, but I don't think I should let this go, but I do accept that welfare legislation and language has changed in this country, but sadly, little changes, because paternalistic attitudes persist. Indigenous children continue to be over-represented within all State and

Territory welfare systems. And the historical weight of the welfare for indigenous people has not been overcome. And nor, sadly, have the attitudes and the structures that are entrenched in the welfare system. □

REFERENCE

Human Rights and Equal Opportunity Commission 1997, *Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Commonwealth of Australia.

PLENARY DISCUSSION

The following is a transcript of the question and answer session which took place after Dr Dodson's presentation. There are occasional breaks in the transcript where sound quality was not clear.

Q: Are you drawing a parallel with the Indian Child Welfare Act in the United States, or the Treaty of Waitangi in New Zealand, or has the issue of sovereignty been established for the Aboriginal people?

A: The short answer is no. In fact in the High Court, the decision in the Mabo case, the Court actually said that because it's the creation of the sovereign, it can't question the sovereignty, and that issue wasn't dealt with.

Q: It seems like we all have a common theme of bench marking and best practices, perhaps the IFCO would be the best place for us all to compile those, it seems a parallel all the way across with no bench marking with what you work with, ... it seems that we all have that same frustration wherever we're from, maybe we should strategise in some way in building the benchmarking.

A: I'm not sure if I fully understand the question.

Q: It wasn't really a question; it was more a comment about maybe what we all need to do is to start stockpiling all the sorts of practices in some centralised form so that it can be disseminated.

A: So far as indigenous kids are concerned, it's already there; it's in the National Report. These Recommendations that we made weren't things that we invented or thought up. This is what people who are working in the field with professionals, even Governments and their agencies, and indigenous organisations, commentators, specialists in the area, told us what were the best practices, what were the best standards. The standards aren't our invention.

Q: I'm not talking about ... it seems like we all need to find some way to take all of our best practices forward further to overcome the frustration of inaction. I don't know how.

A: All I'm saying is that we don't need to reinvent the wheel. The standards are there. I'm sorry, I've perhaps misunderstood your question, but there is a formula, the only ingredient that's absent in my estimation is the political will to implement it.

Q: We've got place for a real case in Canberra, the mother and her daughter are post war migrants, never married, ran away from home, ran away from school, has no job, a child from a European at age 18. Second child from a person that was supposed to have been Aboriginal, has had casual relationships, and is now living in a relationship with an Aboriginal and had two further kids by him. The second child, the one who concerns me, is now aged 14, hasn't been in school for 3 years, is hanging out with gangs claiming to be Aboriginal, involved in street crime, break and enter, that sort of thing. When this kid goes down, how do we stop him appearing in the Aboriginal statistics because, quite frankly, he's not? He's of the European society, not of the Aboriginal society.

A: I don't know how you stop that particular child appearing in the statistics, but can I just say this, our job in the National Inquiry was to look at children who were forcibly removed, indigenous children, that's not to say that the same problems don't exist for others, you know the kids who were brought over from England after the war for example, other non-indigenous kids who were in institutions and treated appallingly and abusively. The fundamental difference between their experience and the experience of indigenous children, although there is a common characteristic with some non-consent, some force, those kids by and large weren't forced into a different society, into a different culture, they weren't belted for speaking English. Aboriginal kids were belted for speaking their languages. The assimilation policies were a racially discriminatory motivated policy that perceived Aboriginality as fundamentally the problem, and if only the Aboriginality was belted out of these kids, they would be saved. And that's what produced enormous effects for so called disfunctionalism and pathology of Aboriginal behaviour. But I wouldn't for a moment suggest, and I've never suggested, that the problems are only with our kids. I mean we have societal problems with lots of our kids, many of whom are old men and women now who were treated brutally by systems over a hundred years, lots of non-indigenous kids, but we weren't asked to look at that, we were asked to look at indigenous kids.

Q: ...(Question related to Western Europe but too indistinct on tape to transcribe.)

A: Firstly, very few of the Recommendations in this area of child welfare and juvenile justice and family law, I don't think any of them can be said to have been fully implemented. Some have been partially implemented, the majority haven't been implemented at all, but that's not true of other Recommendations. There are other Recommendations that have been fully implemented or are in the process of being implemented outside the child welfare, juvenile justice, and family law area. I didn't speak about them, because I didn't think they were relevant to this Conference. The problem with the legislatures is exactly the same problem that I alluded to in my presentation about what I term systemic racism. It's an institutionalised view of what's in the best interest, not only institutionalised view, but a Western cultural view, of what's in the best interest of indigenous kids, and that's not just, I'm not branding every Government departmental agency individual, because there are many, many, fine hard working public servants who do their best within the

confines of the institutions they work in, it's not a criticism of them, but many of those attitudes you see from welfare workers are also held by politicians. They still have this saviour attitude, and it's no better than the perceptions of people who were involved in the part policy of removal. I mean quite frankly, I'm bloody fed up with people trying to save us. We can save ourselves if we're given a chance.

Q: I'd like to applaud your work and I can't believe you're just talking about Aboriginals, because it seems you're talking about Afro-Americans too. I've been told that people who work in other nations where there are a significant number of people of colour (phrase indistinct) ... and for that reason alone I'd like to thank you for speaking for them and for people who work in the States, thank you.

A: If I could just briefly respond to that – one of the things that perhaps people don't realise is that during the course of our Inquiry we had submissions from many parts of the World, including from the United States from the 'Lost Bird' Institution. From Canada we had a Submission from the Commissioners who conducted the Royal Commission on the dormitory system that was back to back in Canada and the US, we had submissions from Maoris from Aetorua, we had submissions from the Romany people of Switzerland where a similar thing happened to them. For the Romany people in Switzerland, the response of the Swiss Government is in stark contrast to the Australian Government's response.

Wherever Europeans colonised indigenous people, these practices in one form or another took place. □

DRAFT

Declaration for Reconciliation

Speaking with one voice, we the people of Australia, of many origins as we are, make a commitment to go on together recognising the gift of one another's presence.

We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of traditional lands and waters.

We respect and recognise continuing customary laws, beliefs and traditions

And through the land and its first peoples, we may taste this spirituality and rejoice in its grandeur.

We acknowledge this land was colonised without the consent of the original inhabitants.

Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.

And so we take this step: as one part of the nation expresses its sorrow and profoundly regrets the injustices of the past, so the other part accepts the apology and forgives.

Our new journey then begins. We must learn our shared history, walk together and grow together to enrich our understanding.

We desire a future where all Australians enjoy equal rights and share opportunities and responsibilities according to their aspirations.

And so, we pledge ourselves to stop injustice, address disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples to determine their own destinies.

Therefore, we stand proud as a united Australia that respects this land of ours, values the Aboriginal and Torres Strait Islander heritage, and provides justice and equity for all.

(Council for Aboriginal Reconciliation)

This draft declaration was launched in June 1999 by the Council for Aboriginal Reconciliation for nationwide discussion and public consultation. It is proposed to draw on responses to the draft for its revision in the year 2000.

Further details can be obtained from the Council for Aboriginal Reconciliation, Locked Bag 4, Kingston, ACT 2604 or from their website: www.austlii.edu.au/car/