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Indigenous Children's 'Best Interests' at the Crossroads: Citizenship Rights, Indigenous Mothers and Child Protection Authorities

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Abstract

This article reviews the use of the term 'best interests' as it is commonly used in Australian child protection systems and its application in Indigenous contexts. In 2010–11 there were some 12,358 Indigenous children in out-of-home care in Australia, representing 32.85% of the total number of Australian children in care. In this review, I carefully consider, in the context of a rights discourse, the many influences, historical and present day, Indigenous and non-Indigenous, that have contributed to this situation. While the 'family' has traditionally been considered a private sphere in which the state rarely intervenes, I seek to investigate why the nation state has increased surveillance of and intervention into Indigenous families. The article concludes with a reflection on how the nation state, and its agents via child protection authorities, can take stock of the present situation to consider more meaningful ways of supporting Indigenous mothers, families and communities to raise their children in safety.

Introduction

The principle of the 'best interests of the child' is set out in the United Nations Convention on the Rights of the Child (1989). Broadly understood, 'best interests' refers to the unalienable right of children to develop physically, mentally, morally, spirituality and socially in a healthy and normal manner and in conditions of freedom and dignity. Upholding and maintaining the 'best interests' of children involves the work of parents, families, communities and nation states. In situations where the rights of children are threatened, for example, in situations of abuse and/or neglect, the state, with all good intent and with legal authority, makes 'best interests' decisions for children, often involving removal of children from their families and communities.

When the state makes the decision to remove Indigenous children from their families, several questions arise. How are these decisions made and what influences impact on the decision making? What rights do parents and children have in child protection processes, and more importantly, what happens when those rights are in conflict? For example, when the nation state's ideologies of parenting or motherhood conflict with Indigenous standpoints, whose rights have primacy and under what conditions? Furthermore, for the party whose rights are subjugated, is there an alternative process that could be considered to negotiate rights in the 'best interests' of Indigenous children? These questions are particularly important given that in 2010–11 Indigenous children were placed in out-of-home care at ten times the rate for non-Indigenous children (Australian Institute of Health and Welfare 2012). The significant over-representation of Indigenous children and families in Australian child protection systems has resulted in many Indigenous and non-Indigenous commentators reflecting on past and current practices, questioning whether, as a consequence of intention, poor policy or misguided practice, we are creating another stolen generation (Delfabbro et al 2010; Libesman 2007; Bamblett et al 2010).

In this article, I explore these important questions, reflecting on past and present child protection practices in the context of a rights discourse. I seek to understand the nation state's rationale for increased surveillance and intervention into Indigenous families when, traditionally, the 'family' has been considered a private sphere into which the state rarely intervenes. The article concludes with a reflection on how the nation state, and its agents via child protection authorities, can take stock of

the present situation to consider more meaningful ways of supporting Indigenous mothers, families and communities to raise their children in safety, rather than demanding that they conform to a dominant 'mother' or 'family' type.

'Best interests' in a culturally-significant context

The term 'best interests' has evolved over time and has particular significance when used with reference to children. Whilst it has been the subject of much academic analysis, particularly for its use in the Convention on the Rights of the Child adopted by the United Nations in 1989, its history and use predates the Convention. For example, in 1959, the Declaration of the Rights of Child defined the term in Principle 2 stating:

the child shall enjoy special protection and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

In this reference, the Declaration clearly articulates the wide scope within which the principle of 'best interests' applies to children. Yet, what is not clear is how the definition of best interests is applied in policy, legal and practice contexts within nation states, particularly for children and their families who are a minority group in a society controlled by a dominant class. For example, in the application of 'best interests' are the complexities of race, class, age and sex considered to ensure equality of treatment? There is no easy answer to this question. Indeed, a legal precedent has been established in Canada that, when determining the best interests of a child, the child has to be considered 'as an individual not as part of a race or culture' (Harris-Short 2012, 58). This approach fails to recognise the large body of evidence supporting the importance of culture in childhood identity formation. It also fails to recognise the role that the state plays in such decision-making to enforce its own dominant cultural stereotype in the context of best interests.

For Indigenous peoples, the term 'best interests' has a much longer history than that associated with the United Nations and the Convention on the Rights of the Child. It is a term which has been used to contain and control us within the context of policies and practices of colonisation. It has allowed 'others' to make decisions for us creating an 'enforced dependency upon [a] white bureaucracy' (Sabbioni 1993, 9) and has effectively excluded us at various points in time from being treated as citizens with full citizenship rights within the Australian nation state. This has meant that our lives have been regulated by the state in ways not experienced by other Australian citizens. We have had to request permission from agents of the state, for example, to marry, to work, to visit relatives, to attend funerals, and to access wages collected on our behalf but rarely provided directly to us.

According to Marshall (1964), full citizenship—encompassing *civic rights* giving individuals equal protection of their freedoms under the law, *political rights* to vote and to be elected to office and *socio-economic rights* giving all Australian citizens rights to enjoy the same entitlements to Commonwealth welfare benefits, access to public schooling and the possibility of decent housing—have been taken for granted by the average Australian citizen as rights freely available to all members of society. For Indigenous people, full citizenship rights is an important concept as membership of the dominant society has never been assumed by us. In our experience, membership had to be earned and this could only be achieved by demonstrating compliance with a dominant ideal lifestyle that incorporates specific attitudes to work, property, housing, family, saving money and the acceptance of white legal structures.

This lifestyle encourages individuality and individual responsibility as opposed to communal living and reliance on group relationships (Chesterman and Galligan 1997). Even when Aboriginal people complied with these standards, citizenship may still have been unattainable, with certain groups specifically excluded purely on racial grounds, such as when 'full blood' Aboriginal people were quarantined to mission reserves (Gray 1998). For others, who were successful in receiving citizenship, it came at a great cost in that they were forced to give up their claim to and all connections with their Aboriginality, including their family, cultural practices and languages. This was enforced via random home visits, usually by local police or Aboriginal protectors, and if it was found that new 'citizens' were not behaving in a manner consistent with their citizenship it could be revoked and their lives would once again become regulated by the nation state (Chesterman and Galligan 1997; Goodall 1995). This is particularly true for the period pre-1960. After this period, formal Commonwealth and state restrictions that had denied Indigenous people meaningful citizenship rights were slowly abandoned. These changes coincided with the 1967 referendum and with legislative changes that began to recognise Indigenous rights, as well as

rights that respected equality of treatment free from discrimination, such as the *Racial Discrimination Act 1975* (Cth) (Chesterman and Galligan 1997, 193).

It should be noted that modern understandings of citizenship formalised by Marshall (1964, 77) are based on the idea that membership of a society must rest upon a principle of formal equality and that individuals attain rights through processes of reciprocal duties, some implied and some articulated through other more formalised mechanisms (e.g. a constitution or legislation). Marshall (1964, 150) has identified that:

there is no universal principle that determines what those rights and duties shall be, but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed.

In this context, citizenship is a social construct and its rights and duties are determined by the dominant group. This construct is also influenced by time, as societal events encourage adaptation. Inequality often arises in terms of how citizenship rights and duties are distributed, according to class, race and sex, despite legislative protections. This theoretical context is important in reflecting on past efforts to regulate Indigenous people's citizenship within the nation state. It is also important in appreciating the context through which Indigenous parents, in particular mothers, have been regulated by the nation state, impacting on their rights to be parents and to care for their children.

The state, in defining an ideal citizenship, has also prescribed a dominant ideology for the context of 'motherhood'. Any woman whose circumstances have not fitted that ideal has been subjected to social and legal scrutiny, including regulation by the nation state via child protection authorities. Representations of the ideal motherhood and the accompanying expectations, like citizenship, are social constructs that are in constant flux as they adapt to the changing socio-cultural context (Porter and Kelso 2006, xii).

Arendell (1999, 3) claims that the 'good mother' stereotype, against which all others are measured, has had the following characteristics: she is heterosexual, married and monogamous. She is also white and native born, and is not economically self-sufficient as she relies on her income-earning husband. She is not employed, as she is fulfilled in the private sphere, putting her children's care and needs first, followed by completing the many home duties involved in keeping a hygienic and tidy home and supporting the interests of other family members (Arendell 1999; Kline 1995).

There is no room within this stereotype to accommodate experiences of racism, colonialism, classism, nor violence that may mediate individual actions and responsibilities of women as they navigate their 'motherhood'. Women are, however, often evaluated against these very experiences negatively, in terms of their conformity to the ideal mother stereotype. For example, when a single, teenage Aboriginal mother experiencing family violence is judged against the ideal she is quickly labelling deviant and decisions are made by authorities to regulate and reform her behaviour under threat of having her children removed from her care should she not comply with the nation state's orders. Many would ask would the same regulatory oversight be imposed on a teenage mother of the dominant class, or an ideal mother in all other respects, in a situation where she was experiencing family violence? Researchers have found that such women are labelled 'troubled but redeemable' (Johnston and Swanson 2003, 22).

It should be noted that whilst fatherhood is also a social construct, the expectations of the nation state and of society more generally of fathers as carers to children differs greatly to that of mothers. In circumstances where the nation state removes children from their parents' care, fathers are typically excluded or become 'invisible' participants in the proceedings as agents of the state focus their attentions on the primary carer who spends the most time with the child(ren), that is, the mother (Dominelli et al 2011; Fleming 2007)².

Indigenous mothering and the state

In today's legalistic society, courts are typically loath to usurp parental rights and the state must provide sufficient evidence to warrant a child being removed from their family. However, pre-1960, Aboriginality alone provided sufficient legal justification for the denial of Aboriginal women's right to nurture and grow their own children (Robertson et al 2005, 40). For several decades prior to this, policy makers had viewed the traditional values and skills which Indigenous women brought to their role of mothering as dangerous and corrupt, requiring intensive training so that they could be brought up to a standard sufficient to appropriately mother Indigenous children in contemporary society (Goodall 1995). As the *Bringing Them Home* (Human Rights and Equal Opportunity Commission 1997) report has

demonstrated, many children were separated from their mothers and their broader kin network on this ill-conceived basis.

Nevertheless, many mothers fought with authorities for the return of their children. However, the response of the nation state's agents typically was to demand that they do certain things to reform their 'primitive' mothering habits so as to be more in tune with a dominant mothering stereotype before the state would consider the return of their children. Many Indigenous mothers complied with the state's requests, including agreeing to relinquish Indigenous parenting practices and demonstrating experience in the domestic work areas of mothering, childcare and housekeeping.

Ironically, the state deemed Indigenous women 'unfit' to care for their own children but used them to perform childcare and domestic tasks for dominant 'white' mothers. As one woman said: 'we was allowed to take care of their kids but we wasn't allowed to keep our own' (Robertson et al 2005, 41). Robertson et al also make the point that 'all white women had the inherent capacity and right to be(come) mothers, yet this privilege was denied to Aboriginal women' as a consequence of policies and practices of colonisation and lack of recognition of full citizenship rights.

This is a legacy that many Indigenous women and their families are still feeling the consequences of today. It has been estimated that the removal of Indigenous children from their families affected between one in three and one in ten families during the period 1910–70. It has been widely acknowledged that no Indigenous family escaped the effects of forcible removal and that one or more generations in most families have been affected (Haebich, 2000; Read 1999). Indeed, the latest results from the National Aboriginal and Torres Strait Islander Social Survey 2008 indicate that 8.2% of the Indigenous population had been removed from their natural families; 38.4% reported that their relatives had been removed (Australian Bureau of Statistics 2010).

Whilst the Australian government apologised to Indigenous Australians on 13 February 2008 for the profound grief, suffering and loss experienced by those removed from their families, communities and traditional homelands (Rudd 2008), the legacy of the trauma lives on, compounded by limited opportunities and practical supports for those affected to address the past and to move forward to the future (Haebich 2000; Human Rights & Equal Opportunity Commission 1997). The impact upon familial life is significant: mothers³ are deeply wounded, as the *Bringing them Home* report attests. They blame themselves for losing their children, they are ashamed and humiliated and they judge themselves as failures, unworthy of loving and caring for their own children—a message that has been clearly indoctrinated into them by the nation state with an assimilationist agenda intent on denying them their citizenship rights as well as their rights as women to be mothers (Human Rights and Equal Opportunity Commission 1997, 185). Grandmothers and aunties have been just as vulnerable as mothers to the pain of child removal in the context of Indigenous familial responsibilities where the raising of children was a shared responsibility amongst women (Goodall 1995, 92).

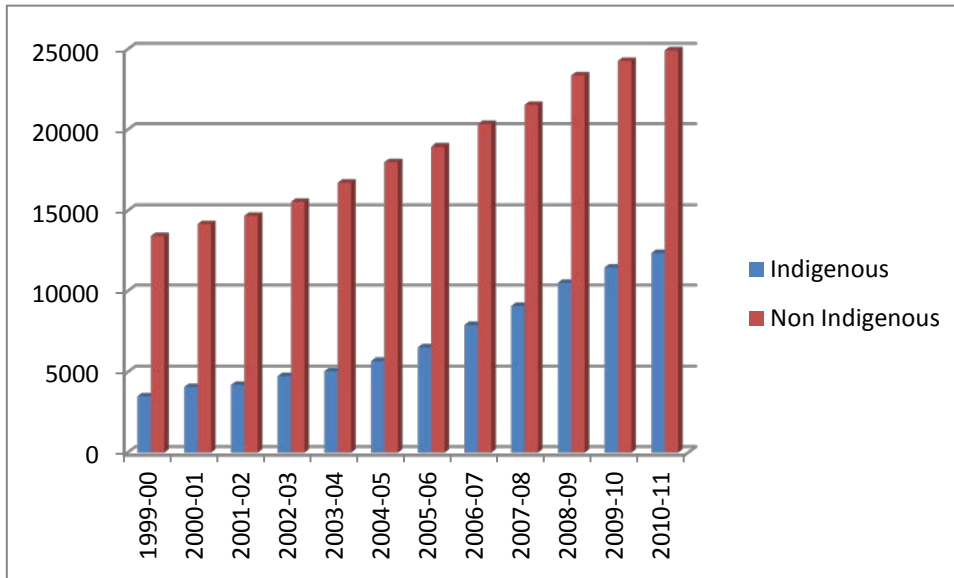
However, individuals removed from their families have arguably been the most affected by the systematic denial of their citizenship rights. Many have difficulty knowing who they are, where they come from and where they belong (Haebich 2000; Human Rights and Equal Opportunity Commission 1997; Little Bear 2000, 84–5). When people lose the ability to 'know' and situate themselves in their familial and kinship environments, they also lose the ability to relate and contribute meaningfully to those relationships. This results in individuals who cannot appreciate or comprehend their position in any real sense when attempting to reconnect with their families. They are further disadvantaged when rearing their own children: having been brought up in institutions and/or homes in which abuse was common,⁴ they are in effect 'unparented parents' whose responsibilities for their own children are confounded by their lack of personal experience and knowledge of child-rearing practices (Poupart 1996). Clearly, there are exceptions to this generalisation, and in some instances 'stolen' children have successfully sought and found their original families and fitted back into their kinship system, but this is by no means the norm (Human Rights and Equal Opportunity Commission 1997; Read 1996; 1999).

An added difficulty for such Indigenous parents is that they are now expected to raise their children within a nuclear family environment whilst lacking parenting skills and without the traditional emotional and economic support of their extended families (Fischler 1985, 100; Poupart 1996, 200; Schafer and McIlwaine 1992, 161). Some have managed this situation well, while for others these circumstances have produced conditions of stress that have once again brought them to the attention and surveillance of the nation state via child protection services to have their lives and that of their children regulated to a 'norm' or 'ideal' that is a dominant social construct (Human Rights and Equal Opportunity Commission 1997, 425; Ivec et al. 2009; Poupart 1996, 200).

Indigenous child abuse and neglect in the present context

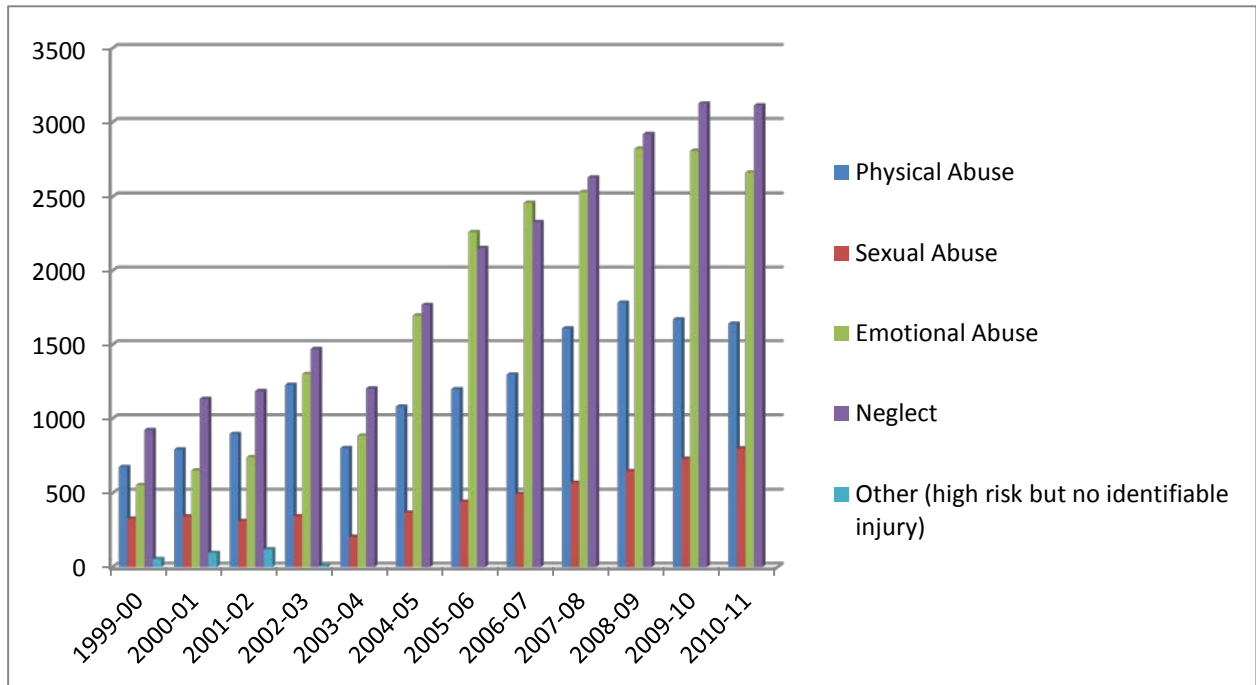
In the context described above, for Indigenous families, child protection triggers immediate fear and distrust. This anxiety can only be compounded when the current statistics relating to Indigenous children's engagement with child protection is examined. In 1999–2000, 3,496 Indigenous children 0–17 years were placed in out-of-home care. In 2010–11, over ten years later, there has been more than a threefold increase to 12,358 Indigenous children in out-of-home care.

Table 1: Comparison of Indigenous and non-Indigenous children 0–17 years in out-of-home care 1999–2011⁵



Whilst representing 4.66% of the 0–16 year-old population, Indigenous children last year represented 31.95% of children in out-of-home care. The types of abuse to which these figures relate indicate increasing trends of exposure to emotional abuse and neglect as detailed in Table 2.

Table 2: Indigenous children 0–17 years subject of a substantiation of a notification, by abuse type, 1999–2011



In Canada, it is now common practice to record reports of child abuse and neglect in five categories: physical abuse, neglect, sexual abuse, emotional abuse and, importantly, exposure to family violence (Ogrodnik 2006). This is in response to increasing demands over the past decade within the child protection field for children's exposure to family violence to be considered a form of abuse. There is now a significant body of evidence illustrating the detrimental effect of exposure to family violence on the health and wellbeing of children (Berrios and Grady 1991; Campbell and Lewandowski 1997).

In Australia, unlike in Canada, exposure to, including witnessing of, family violence is not routinely recorded and/or reported in all jurisdictions. However, there are some exceptions. In Victoria, exposure to family violence is captured as a sub-category of emotional abuse. For example, the definition provides that 'emotional abuse occurs when a child is repeatedly rejected, isolated or frightened by threats or the witnessing of family violence' (Department of Human Services Victoria 2007). Given that child protection authorities are yet to accurately and consistently record data across all Australian jurisdictions on this sub-category, it is not possible to quantify the number of children exposed to family violence. Of the estimates that we do have, largely drawn from police data files and women's own self-reports to refuges, the available evidence suggests that the Australian prevalence rate for children witnessing family violence is between 12% and 23% (Price-Robertson, Bromfield and Vassallo 2010, 4). For the Indigenous population, however, the estimates are far greater. For example, Victorian family violence data (largely based on a review of police attendance at family violence incidents) highlights that family violence continues to be the single biggest risk factor for child abuse notifications to be substantiated in Victoria. It is present in 64% of cases affecting Indigenous children (Victorian Indigenous Family Violence Taskforce 2003; Victorian Government, Department of Justice 2008). In the context of substantiated cases of child abuse and neglect, it is therefore not surprising to find that emotional abuse rates as one of the primary types of abuse affecting Indigenous children.

The question that follows this data is how do authorities appropriately intervene? There is much discussion within the literature around the level and type of intervention required by the nation state to regulate families in such situations and whether removal of children in such circumstances is appropriate or necessary. Some researchers in the field of family violence have been highly critical of these discussions, largely because attention is too often focused on investigating and substantiating the presence of family violence but not providing families with services that directly address the violence that is occurring (Hughes, Chau and Poff 2011). Furthermore, child protection authorities place responsibility for leaving abusive relationships on mothers, with little concrete help offered to assist them in making the changes needed over the longer term (Hughes, Chau and Pof 2011).

The latter is particularly important in the context of Indigenous women with children who will be negotiating kinship, familial, community and cultural responsibilities together with safety (Cripps, Miller and Yarram 2012). The lines can often become blurred as to how to manage these responsibilities safely, including in particular contexts such as funerals and sorry business. Should such a situation arise, how does one communicate these circumstances to child protection authorities without pathologising the mother and her individual choices, but rather appreciating the broader socio-economic and cultural spaces that she negotiates in a position of little power or influence over the individual behaviours and/or actions of others? In fact, the nation state has both a legal and moral responsibility to provide safety for the mother and her children in such circumstances and actions should be focused on enabling her rights and choices rather than regulating, reforming or inhibiting them.

The disproportionate incidence of neglect experienced by Indigenous children must also be put into context. Poverty and social isolation are increasingly being conceptualised within the child protection field as risk factors with predictive potential rather than being understood as factors that explain (at least in part) the incidence of child neglect. Indigenous people in Australia experience high levels of poverty and significant levels of disadvantage in comparison to their non-Indigenous counterparts. This is represented, for example, in data relating to unemployment, educational attainment levels, housing, mortality and morbidity, income, imprisonment rates, alcohol and substance abuse and reported crime. The Australian government has recognised this and requires a report to be tabled in parliament each year entitled 'Overcoming Indigenous Disadvantage' that details progress in key areas of disparity. While gaps are narrowing in some areas, in too many cases, outcomes are not improving, or are even deteriorating (Steering Committee for the Review of Government Service Provision 2011).

The experiences of colonisation and the denial of Indigenous citizenship rights clearly influence the continued disadvantage experienced by Indigenous people. When this is linked to a growing evidence base clearly establishing the association between poverty, social dysfunction and child neglect in

societies around the world, it is not unexpected that we would see higher rates of neglect in Indigenous communities. However, whilst socio-economic factors are clearly important, the responsibility for the intergenerational poverty experienced by Indigenous families and communities needs to be questioned, particularly in light of the fact that Indigenous Australians have been denied full citizenship rights. Indigenous people have had limited opportunities to 'uplift' themselves when the state has actively prevented their full participation in society (e.g. employment, education), in ways that could be expected of other citizens, and therefore do not carry the sole responsibility for the burgeoning numbers of Indigenous children in out-of-home care.

In Canada, the Gove Inquiry concluded that the nation state was also responsible for the problem. The report stated that 'poverty is a child welfare issue and when government allows children to live in poverty, they are in effect, committing systemic child neglect' (1995, 24–5). However, this is only a partial explanation for the complacency that exists in relation to understandings specific to Indigenous child neglect. It is easy to blame the mother and/or the Indigenous community for the dysfunction that exists. The nation state stands apart as the innocent party or the party acting in the 'best interest' of the child. However, the reality is that the nation state has been complicit in the past, as well as in the present, in justifying the disproportionate number of removals of Indigenous children from their mothers (Harris-Scott 2012; McConnell and Llewellyn 2005). In the present context, whilst it is not formally directed by a policy of assimilation, as it has been in the past, it is affected by poverty and by family violence. It is also clearly evident that ethnocentrism has played a key role in defining and shaping Indigenous citizenship rights and our relationship with the nation state. Its impact on Indigenous mothers through the child protection system has been particularly profound.

A new relationship and a new approach to child protection

Given this history, how do we, as Indigenous peoples, redefine and renegotiate our relationship with the nation state to ensure our citizenship rights are known by all parties and are at all times respected and protected in all dealings relating to child protection? This is no easy task because it cannot be assumed that all citizens are aware of their rights and/or duties, as defined by the nation state. It is often the case in child protection-related matters that parents are unaware of their rights. They may comply with directions from the nation state with the sole purpose of being reunified with their child, but this relies on the nation state acting fairly and with transparency. This is not always the case. Breakdowns in communication often occur between parents and child protection workers who assume parents understand the legislation, court orders and process and that they are being appropriately advised by legal or community advocates. Parents often feel that they are being unfairly treated and that there is no transparency because of the assumptions made by departmental workers (Ivec et al 2009).

In light of this, I support Delfabbro et al's (2010) approach that we move away from focusing on the pathology of individuals, the identification of risk factors and the detection of harm towards primary intervention. This would include strategies that involve the prevention of abuse, support for families and community development, with Indigenous collaboration and partnership at the core of all activities. With the right systems and processes in place, this would address Indigenous parents' criticisms of the current system in which they regularly report feeling disrespected, stigmatised, disempowered and misunderstood (Dumbrill and Lo 2009; Ivec 2009). The fear and mistrust that has been a constant challenge to relationship building between Indigenous mothers, their families and child protection authorities could be worked through on the basis that it would be acknowledged upfront, not ignored as the elephant in the room. Indeed, real and sustainable change for those most vulnerable is only achievable if we can move parents and families from being passive recipients of child protection interventions to positions of influence where they are willing and able to actively take on the responsibility for ensuring the safety and wellbeing of their children.

Conclusion

The survival of Indigenous families means nothing less than the survival of Indigenous peoples and cultures. Failure to provide the support needed to address the problem of violence and neglect as it affects all community members jeopardises our very existence. Our children represent the future and Indigenous mothers are an essential key to growing them up strong. Yet as this article has argued, historically, Indigenous mothers' rights have been fundamentally stripped from them on the basis of their failure to conform to a dominant 'mother' and/or 'citizen' stereotype. While the government policy is no longer overtly assimilationist, the legacy of these stereotypes in the contemporary context is pervasive. The over-representation of Indigenous children in out-of-home care, as a result of neglect and/or emotional abuse, is a direct consequence of this history. However, I would argue that this is wholly

preventable, from a systemic perspective. Acknowledging this past is fundamental to moving forward, as is treating mothers as citizens with rights and enabling them to utilise those rights to determine a safer future for themselves and their children.

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² It is on this basis that the article focuses attention on Indigenous mothers.

³ Fathers have also experienced profound grief and loss, which was acknowledged in the *Bringing Them Home* report, but little has been written more broadly than this on the personal stories in this regard (Human Rights and Equal Opportunity Commission 1997).

⁴ The *Bringing Them Home* report (Human Rights and Equal Opportunity Commission 1997) found that the living conditions for Indigenous children removed from their families were incredibly harsh. One in five children reported to the inquiry that they had been physically assaulted. Children are also vulnerable to sexual abuse and exploitation. Almost one in ten boys and just over one in ten girls alleged, when giving evidence to the inquiry, that they were sexually abused in a children's institution; one in ten boys and three in ten girls alleged that they were sexually abused in a foster placement(s); and one in ten girls further reported being sexually abused in work placements.

⁵ Data included in Tables 1 and 2 were collated from Australian Institute of Health and Welfare reports (2001a; 2001b; 2002; 2004; 2005; 2006; 2007; 2008; 2009; 2010; 2011; 2012).