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# PROTECTING INDIGENOUS CHILDREN'S FAMILIAL AND CULTURAL CONNECTIONS: REFLECTIONS ON RECENT AMENDMENTS TO THE *CARE AND PROTECTION ACT 2007* (NT)

by Kyllie Cripps and Julian Laurens

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## INTRODUCTION

On the 18 February 2015 the Northern Territory ('NT') Parliament passed an amendment<sup>1</sup> to the *Care and Protection Act 2007* (NT) ('the Act') establishing a scheme of Permanent Care Orders ('PCO') for children and young people on other long-term orders under the Act. Effectively once a PCO is in place the government will have no further dealings with the child or host family in relation to the Order. Amid serious concerns that the regime will have a detrimental effect on Indigenous young people and communities in the NT, Indigenous stakeholders have argued the new regime was rushed through Parliament without proper consultation.<sup>2</sup> Concerns about this lack of consultation and the appropriateness of the legislation for Indigenous children have also been directed towards the Minister for Children and Families in Parliament.<sup>3</sup>

The joint submission by the North Australian Aboriginal Justice Agency ('NAAJA') and the Northern Territory Legal Aid Commission ('NTLAC') to the proposed amendment highlighted considerable inadequacies.<sup>4</sup> Of key interest for this article is the issue of cultural identity. The Act does not mandate a cultural plan for Indigenous children, and there are no safeguards protecting the cultural identity of the child once placed on a PCO with either a non-Indigenous family or Indigenous family (who may not be from the same kin group as the child). In an environment where the child will no longer have a clear legal voice in their family arrangement on completion of PCO proceedings, there is a real risk Indigenous children will lose connection with culture, community and country—a situation that has been identified as resulting in a myriad of negative consequences.

## BACKGROUND

The appeal by the Minister for Children and Families, the Hon John Elferink,<sup>5</sup> that the amendments are in line with other Australian jurisdictions obscures three issues:

- Whether such permanency provisions are culturally appropriate for young Indigenous people in the first place.
- Despite legislative incorporation of the Aboriginal and Torres Strait Islander Child Placement Principles ('ATSICPP') across

jurisdictions in Australia, different approaches to permanency planning exist in areas of how cultural plans are integrated—especially when an Indigenous child is placed with a non-Indigenous family.

- Despite the ATSICPP there is growing disquiet as to how these are actually applied and adhered to in practice throughout Australia.

Thus the NT legislation provides a timely opportunity to examine and question generally the appropriateness of the system of PCO's throughout Australia. This is especially relevant for Indigenous children as they are significantly over-represented in the child protection and associated out-of-home care system. It is hoped this brief article will encourage this discussion and raise markers for further research.

## THE APPROPRIATENESS OF PERMANENT CARE ORDERS FOR INDIGENOUS CHILDREN

The key feature of a PCO is that a child is placed with a family until they are 18, and that the family takes full parental rights and responsibility for that child. A final Order is difficult to be changed by a child or carer. While this may encourage stability, it may actually, it has been argued, be in opposition to a child's best interests.<sup>6</sup> Further, once an order is made the formal links to the government may be severed, and they may no longer take an active interest in the child's out-of-home care and protection. It appears similar to adoption despite the child retaining their family name, and other legal linkages to their birth family. Other jurisdictions call them by different names. For example, New South Wales ('NSW') has the 'Sole Parental Responsibility order'; Queensland ('QLD') the 'Long Term Guardianship' order; and South Australia ('SA') the 'Other Person Guardianship'. In Victoria ('VIC') they are also called 'Permanent Care Orders'.

Regardless of their names, it is the similarity to adoption practices, in that a third party gains legal right over a child, which is of considerable concern to Indigenous communities where the suffering associated with the Stolen Generations remains. Indeed,

in the second reading speech for the NT amendment, the Minister for Children and Families states the PCO is 'very much like a quasi or administrative adoption'.<sup>7</sup> This is despite the widely accepted view that adoption as understood and practiced in the non-Indigenous community is not part of Aboriginal customary culture.<sup>8</sup> For this reason, and its close association with the trauma of the Stolen Generations, PCO's are seen as not appropriate for Indigenous children.<sup>9</sup> The inter-generational trauma of forced removal and past adoption policies ensures the continued distrust of the non-Indigenous child welfare system by Indigenous peoples.<sup>10</sup> Many Indigenous people in the NT view the system as nothing more than a vehicle through which their children are removed and communities broken up.<sup>11</sup> Research with lawyers found many believe 'it's still Stolen Generation all over again but just covertly' and that practices are no better today than the 1940s and 50s, except that the process is now more 'legalised' and sold 'for the perceived benefit of the community as a whole'.<sup>12</sup>

### LOSS OF CULTURE AND IDENTITY

Central to concerns over PCO's is their potential to disconnect a child from their Indigenous family, community and culture, a feature that has been acknowledged by Australian Governments.<sup>13</sup> This is particularly (though not exclusively) problematic when children are placed with a non-Indigenous family, but is exacerbated in the absence of cultural care and safety oversight mechanisms. It has been well documented that the

long-term wellbeing and resilience of Indigenous children is closely associated with the strength and maintenance of their connections to family, community and culture. Removing children on PCOs from family networks and disrupting their Indigenous identity development will not only compromise their cultural connections going forward, but can cause lifelong harm manifesting itself in mental health problems, illicit substance and alcohol abuse, child protection reports, increased criminal justice system involvement, and suicide.<sup>14</sup>

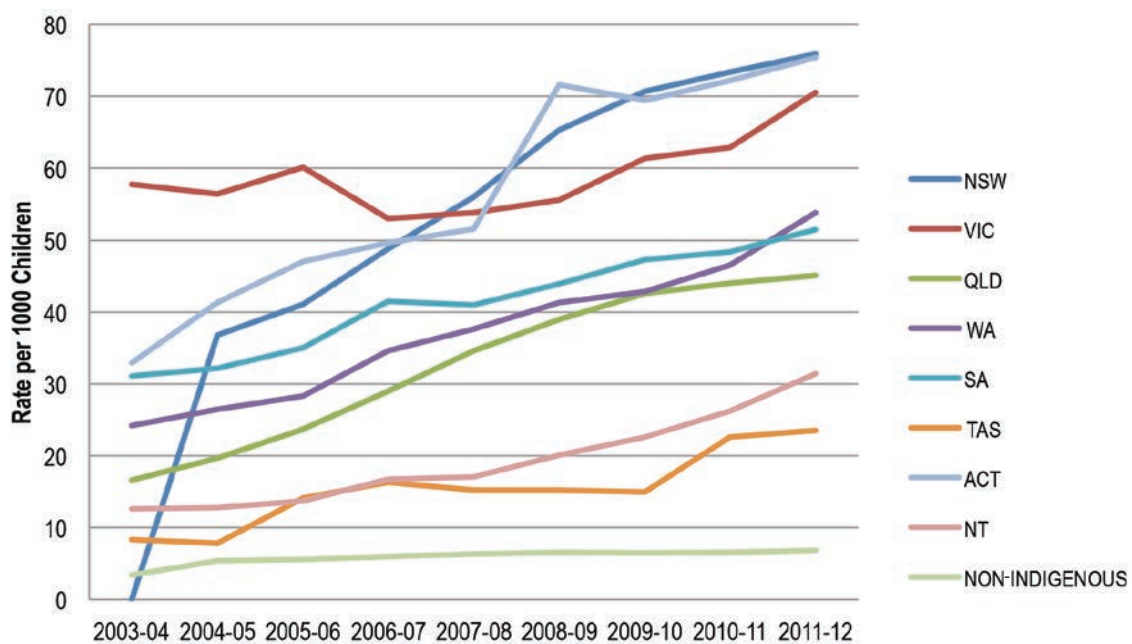
### ABORIGINAL AND TORRES STRAIT ISLANDER CHILD PLACEMENT PRINCIPLES

The ATSI CPP were developed in the mid-1970s by Aboriginal and Torres Strait Islander child care agencies who had become increasingly concerned about the large numbers of Indigenous children being placed with non-Indigenous carers.<sup>15</sup> It is now recognised in all Australian jurisdictions.<sup>16</sup> The principle is:

...an acknowledgement of the importance of Aboriginal and Torres Strait Islander culture and family connection for Aboriginal and Torres Strait Islander children and young people and it is also a recognition of the destructive impact the history of policies of assimilation and forced and unjustified removal of children have had on Aboriginal and Torres Strait Islander peoples.<sup>17</sup>

The ATSI CPP outlines in descending order the priorities for an Indigenous child requiring out-of-home care. The first preference

**CHART 1: INDIGENOUS CHILDREN AGED 0–7YRS IN AT LEAST ONE OUT-OF-HOME CARE PLACEMENT 2003–2013**



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is for the child to be placed with extended family or kinship group; the second preference is placement within the local community of which they are part; and the third preference with another Indigenous family. If neither of the above is practicable, then a suitable non-Indigenous family can be chosen, usually after consultation with the child, and relevant Indigenous agencies, families, kin and community. The scope and worth of this consultation requirement is not always explicit in legislation. In NSW<sup>18</sup> and QLD<sup>19</sup> (the words 'must' are used in QLD) the scope of consultation and its relevance to arriving at a decision is far clearer than in the NT legislation, which merely suggests kinship groups, agencies and community should be able to participate in decision-making. The legislation suggests the decision is one the CEO makes alone: 'in the CEO's opinion.'<sup>20</sup> There is no requirement this opinion 'must' be arrived at after consultation.

### **RATES OF OUT-OF-HOME CARE PLACEMENTS**

There is increasing concern throughout Australian jurisdictions that the ATSI CPP have not always been implemented in a consistent and appropriate manner<sup>21</sup> and that more needs to be done to strengthen compliance with them.<sup>22</sup> Recent data from *The Overcoming Indigenous Disadvantage Report 2014* provides longitudinal data on the rate of Indigenous children being both placed in out-of-home care and in accordance with the ATSI CPP.

In 2003-04, 4026 Indigenous children were placed in at least one out-of-home care placement. By 2012-13 the number had increased four-fold, with some 16 597 Indigenous children placed in at least one out-of-home care placement. These figures are better understood in terms of rates per 1000 children where the disparity between Indigenous and non-Indigenous children becomes more obvious. Over the ten year period from 2003-04 to 2012-13 the rate of non-Indigenous children in out-of-home care has remained relatively stable (3.4-6.7 per 1000). Whereas for Indigenous children, the rate has continued to rise, being 15.4 Indigenous children per 1000 placed in out-of-home care in 2003-04 to 57.5 per 1000 in 2012-13. When this is unpacked by State/Territory we see rates varying as low as 27 per 1000 in Tasmania, to 32.3 per 1000 in the NT, to as high as 76.9 and 77.8 per 1000 in NSW and the ACT respectively as Chart 1 outlines.

This rate of removal becomes even more alarming when one examines compliance with the ATSI CPP and its placement prioritising hierarchy. States and Territories have been inconsistent with the application of these options, with the NT and Tasmania in 2012-13 placing 56.1 per cent and 60 per cent respectively of Indigenous children in non-Indigenous families. Indeed, nationally 31.2 per cent (4290 Indigenous children) of out-of-home care placements failed to be placed in accordance with the ATSI CPP.

When we explore this figure further, and include the number of Indigenous children placed with non-Indigenous relatives (who may or may not be supportive of maintaining their Indigenous familial and cultural links), the percentage of Indigenous children placed in non-Indigenous out-of-home care placements has, at least for the years 2011-12 and 2012-13, sat at 45.3 and 45.6 per cent as detailed in Chart 2 (see over).

Importantly, while the potential for cultural disconnection of the child is apparent if placed in a non-Indigenous setting,<sup>23</sup> research suggests simply complying with the ATSI CPP in the sense of rigidly seeking to place the child in an Indigenous family in no way guarantees that a placement will be 'culturally appropriate' and prevent a child from being disconnected from community and culture. A 'child may be placed with the "white" side of the family, with another cultural group or with kith or kin who may have (as a consequence of their own removal) been disconnected from their traditional culture.'<sup>24</sup>

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**Many Indigenous people in the NT view the system as nothing more than a vehicle through which their children are removed and communities broken up.**

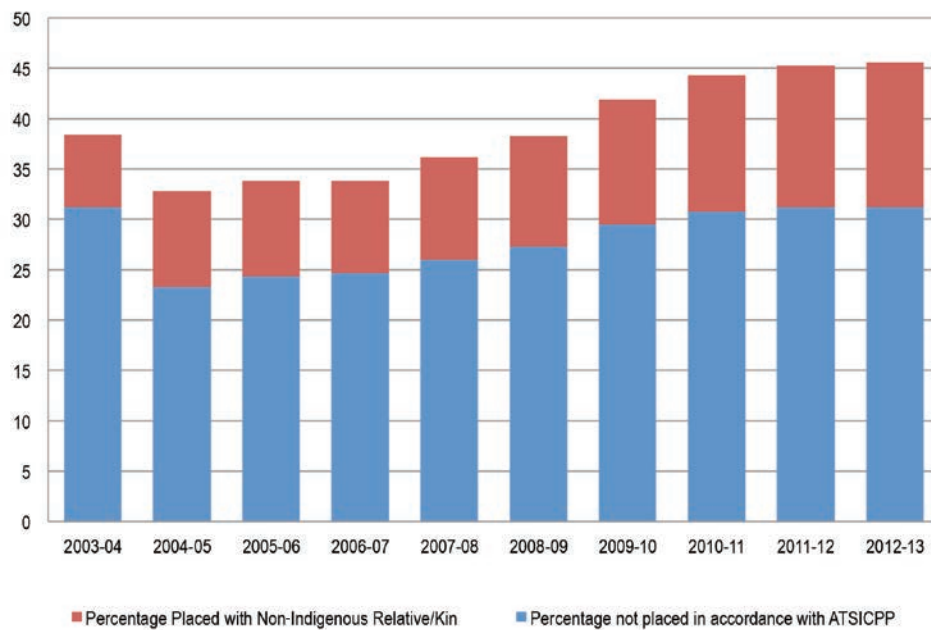
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### **CULTURAL CARE PLANS**

Australian jurisdictions include as part of their ATSI CPP, some kind of obligation on both Indigenous and non-Indigenous carers to assist a young Indigenous person under a PCO in maintaining family, community and cultural connections.<sup>25</sup> Research suggests that 'there are serious shortfalls in implementing this aspect of the placement principle and this is the greatest area of non-compliance with the principle.'<sup>26</sup> Critically, there does not seem to be any uniform mandatory legislative requirement that an ongoing cultural care plan be required when deciding upon a PCO for an Indigenous child. Moreover, where a cultural plan may be considered (and in some jurisdictions a care plan may be developed when a child is first taken into care by the State), apart from the initial assessment of a carer's commitment to maintaining the child's cultural connections there does not appear to be any legal mechanism within jurisdictions to monitor the cultural care and safety of the child once PCO proceedings conclude (excluding some cases where a PCO may be reviewed with consent).

Indeed the thrust of PCO provisions seem to be that once they are made, the relevant department 'washes their hands' on the matter.

**CHART 2: BREAKDOWN OF PLACEMENTS FOR INDIGENOUS CHILDREN IN OUT-OF-HOME CARE 2003–2013**



The second reading speech to the NT amendments confirms this: '[t]he order will also provide children and families with a sense of normalcy, as there will be no further departmental intervention in their lives once the order is made.'<sup>27</sup> Yet research suggests that rather than 'legislating an expectation of an enduring bond', maintaining formal links between the child, family and the relevant department can act as a 'safety net', helping to ensure placements do not break down.<sup>28</sup> Such financial, emotional and educative support links, are important for non-Indigenous carers, but are critical to attract and retain Indigenous carers who, despite their willingness to care for a child, are often facing financial hardship, lack adequate training and support, and may have personal issues related to their own dispossession.<sup>29</sup> Without any state financial commitment to ensuring the child can maintain connection to culture, and no formal ongoing oversight of whether a child's cultural needs are being met, how are we to determine that an Indigenous child's best interests are being met under a PCO? The significance of this can be appreciated given a PCO endures until the child turns 18.

## CONCLUSION

This article has looked briefly at the way PCO's might impact Indigenous children, focusing on the risk that they may become disconnected from culture and identity. This is despite the adoption of ATSI CPP principles across various state and territory legislations. Of particular importance is the lack of a mandatory

ongoing cultural plan for children, with attendant formal oversight prescribed by legislation, and undertaken by an appropriate body. It is essential we learn from the mistakes of the past. 'In short', stated Justice Muirhead in *Jabaltjari v Hammersley*, 'the young aboriginal is a child who requires tremendous care and attention, much thought, much consideration.'<sup>30</sup> With a wealth of critical research and experience from other jurisdictions to draw upon, the PCO amendments to the NT Act represent a missed opportunity to engage meaningfully with ways in which we can better support the cultural and familial connections of Indigenous children subject to PCOs and in out-of-home care more broadly. A display of leadership by our governments' in implementing best practice in this important area is essential to ensuring that Australia's history of stolen children is not repeated.

*Kyllie Cripps is an Indigenous academic, Senior Lecturer and Research Director of the Indigenous Law Centre, Faculty of Law, University of New South Wales ('UNSW'). Her research expertise is focused in the areas of Indigenous violence against women and children.*

*Julian Laurens is a Sessional Academic at the Faculty of Law, UNSW and Research Assistant to Dr Kyllie Cripps. In addition to qualifications in law, Julian is also a qualified youth worker and sits on the Management Committee for Glebe Youth Service.*

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- 1 *Care and Protection of Children Amendment Bill 2014*; see John Elferink, Minister for Children and Families, 'A more stable and permanent home for the Territory's Vulnerable Children' (Media Release, 18 February 2015).
  - 2 SNAICC, 'New permanent care orders rushed and passed without consultation, says NAAJA' (26 February 2015) Secretariat of National Aboriginal and Islander Child Care <<http://www.snaicc.org.au/news-events/ix-articles.cfm?loadref=168&id=1208>>.
  - 3 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 February 2015 <<http://notes.nt.gov.au/lant/hansard/hansard12.nsf/WebbyDate/C63320F2F031F3CB69257E2700019FBA>>.
  - 4 NAAJA & NTLAC, *Joint Submission on the Care and Protection of Children Amendment Bill 2014*, February 2014 <<http://www.naaaja.org.au/wp-content/uploads/2014/05/Care-of-Children-and-Protection-Act-12-2-15.pdf>> The Submission was supported by seven other community based NGO's.
  - 5 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, (John Elferink, Minister for Children and Families) <<http://notes.nt.gov.au/lant/hansard/hansard12.nsf/WebbySubject/F3FA39D156F4744369257DD400162C95?opendocument>>.
  - 6 Sarah Wise, Leah Bromfield & Daryl Higgins, *Improving Permanency for Children in Care. Queensland Department of Child Safety Discussion Paper Consultation Feedback* (Submission) (Australian Institute of Family Studies, Melbourne, 2006) 7 <<http://pandora.nla.gov.au/pan/139816/20130501-0817/www.aifs.gov.au/nch/pubs/submissions/qld/qldpermanency.pdf>>.
  - 7 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, (John Elferink, Minister for Children and Families) <<http://notes.nt.gov.au/lant/hansard/hansard12.nsf/WebbySubject/F3FA39D156F4744369257DD400162C95?opendocument>>.
  - 8 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report 81 (1997) [9.1], [9.9].
  - 9 SNAICC, *Achieving Stable and Culturally Strong Out of Home Care for Aboriginal and Torres Strait Islander Children* (SNAICC, 2005) 21; SNAICC, *Submission Response to Queensland Department of Child Safety Discussion Paper, Improving Permanency for Children in Care* (November 2006); Department of Family and Community Services (NSW), *Child Protection: Legislative Reform Legislative Proposals: Strengthening Parental Capacity, Accountability and Outcomes for Children and Young People in State Care*, Discussion Paper (22 November 2012) 27. In NSW s 35(1) *Adoption Act 2000* acknowledges adoption is not a concept known under Aboriginal customary law. Note a form of customary adoption is part of Torres Strait Islander culture.
  - 10 NSWLRC, above n 8, [9.7], [9.8].
  - 11 Debbie Scott & Daryl Higgins, 'Supporting Families' in *Northern Territory Emergency Response: Evaluation Report 2011* (2011) 276.
  - 12 Heather Douglas & Tamara Walsh, 'Continuing the Stolen Generations: Child Protection Interventions and Indigenous People' (2013) 21 *International Journal of Children's Rights* 59, 62.
  - 13 See, eg, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020. Annual Report to the Council of Australian Governments 2011-12*, 140; Department for Families and Communities (SA), *Other Person Guardianship Position Paper, 2010* (2010) 5.
  - 14 Queensland Child Protection Commission of Inquiry, *Discussion Paper* (February 2013) 127, 168; Stephanie Armstrong et al., *Starting School: a Strengths-based Approach Towards Aboriginal and Torres Strait Islander Children* (ACER, 2012) 15; Douglas & Walsh, above n 12, 65-66.
  - 15 See, eg, Australian Institute of Family Studies, *Child protection and Aboriginal and Torres Strait Islander children*, Resource Sheet (Australian Government, November 2014) <<https://www3.aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-c>>; Terri Libesman, *Cultural Care for Aboriginal and Torres Strait Islander Children in Out of Home Care* (SNAICC, North Fitzroy, 2011) 55 <[http://www.snaicc.org.au/\\_uploads/rsfil/02727.pdf](http://www.snaicc.org.au/_uploads/rsfil/02727.pdf)>.
  - 16 There are differences between the different jurisdictions as to how they are expressed. See eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13 compared with the relative brevity in s 12 of the NT *Care and Protection of Children Act 2007*. In SA the principle is included in the *Children's Protection Regulations 2010* (SA) Reg 4.
  - 17 Libesman, above n 15, 55.
  - 18 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13 (1)(d)(i),(ii).
  - 19 *Child Protection Act 1999* (QLD) s 6.
  - 20 *Care and Protection of Children Act 2007* (NT) s 12(3)(ii).
  - 21 See, eg, Melanie Schwartz, Fiona Allison & Chris Cunneen, 'The Civil and Family Law Needs of Indigenous People in Victoria' [2014] *UNSWLRS* 18, 73; SNAICC, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (SNAICC, North Fitzroy, 2013) 3; UnitingCare, *Submission to the NSW Department of Family and Community Services, Child Protection Legislative Reform Discussion Paper* (21 March 2013) 32; Community Legal Centres NSW, *Response to Discussion Paper: Child Protection Legislative Reform Proposals* (22 March 2013) 7; Queensland Aboriginal and Torres Strait Islander Child Protection Peak Ltd, *Losing Ground: A report on adherence to the Aboriginal and Torres Strait Islander Child Placement Principle in Queensland* (September 2011).
  - 22 *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020* (Commonwealth of Australia, 2009) 30.
  - 23 SNAICC, *Submission Response*, above n 9.
  - 24 Daryl Higgins, Leah Bromfield & Nick Richardson, *Enhancing Out-of-home care for Aboriginal and Torres Strait Islander Young People: A Report to the Australian Council of Children and Parenting* (Australian Institute of Family Studies, Melbourne, 2005) 58.
  - 25 See eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s (6)(b); *Children, Youth and Families Act 2005* (VIC) s 14(5).
  - 26 Libesman, above n 15, 56.
  - 27 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2014, (John Elferink, Minister for Children and Families) <<http://notes.nt.gov.au/lant/hansard/hansard12.nsf/WebbySubject/F3FA39D156F4744369257DD400162C95?opendocument>>.
  - 28 Wise, Bromfield & Higgins, above n 6, 3, 7.
  - 29 See eg, *Ibid* 5-6; Leah Bromfield & Alexandra Osborn, *Kinship Care*, Research brief no.10 (National Child Protection Clearinghouse, The Australian Institute of Family Studies, Melbourne, 2007) <<https://www3.aifs.gov.au/cfca/publications/kinship-care>>.
  - 30 *Jabaltjari v Hammersley* (1977) 15 ALR 94, 98.