6th World Congress on Family Law and Children’s Rights

“Building Bridges – From Principle to Reality”

“At the session titled “Child’s Right to Retain its Culture” – 20 March 2013

Sydney Convention and Exhibition Centre, Darling Harbour, Sydney, New South Wales, Australia

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Summary

The current legal understanding of the short and long term effects on a child from being raised apart from their natural family and culture by persons who are patently ethnically different is examined to ascertain the best practice in such circumstances.

The paper examines trans-racial placement of children for fostering and adoption as discussed within the context of expert evidence in applications for permanent placement.

The issue has received appellate judicial consideration in respect of the application of the United Nations Convention on the Rights of the Child 1989 (UNCROC) to issues of trans-racial placement in fostering. Trans-racial placement where the child of black or non-white parentage is securely attached to white proposed foster parent(s) raises the issues of attachment and identity.

The undesirability of the child being raised apart from the natural biological family’s culture and ethnicity, and the undesirability of disrupting secure attachments, and the significance of birth parent’s parenting capacity are placed in stark contrast.

The benefits of contact in reducing sense of abandonment and loss of parental care and culture of origin are also examined.

The best practice for trans-racial placements depends upon the cultural prominence determined as in the child’s best interests. Placements favoured are those where attachment is secure and parenting capacity judged superior.

The child’s best interests may generally be considered by the courts in the short to medium term to be enhanced by placement with the person(s) with whom the child has the strongest attachments. The longer term issue is more problematic and not determined with confidence.
Introduction

In this paper the term trans-racial placement refers to the placement of a child with carer(s) who are patently ethnically different to the child. Also, the terms ‘fostering’ and ‘adoption’ imply specific legal concepts. These concepts include the short and long term authorised legal placement with a family of a child outside of its family and kinship group of origin. The placement may involve placement outside the racial or ethnic group to which one, or both, of the child’s parents belong.

The implications for the child’s rights caused by placement outside the racial or ethnic group of origin is highlighted by the recognition that the United Nations Convention on the Rights of the Child 1989 (UNCROC), to which Australia is a signatory, has received in Australian case law and legislation. The amendment of section 60B of the Family Law Act 1975 effective from 7 June 2012, now makes the consideration of the UNCROC essential in interpreting or applying the provisions of that Act for applications commenced after that date in the Family Court.

The provisions of the UNCROC have been held to be relevant to the exercise of discretion in relation to decisions relating to children, in both judicial exercise of the discretion, and in administrative decisions. Articles of the UNCROC which may be relevant in this context are Articles 3, 5, 7, 8, 9, 18, 29, and 30. The UNCROC states in Article 7 that children have the right to a legally registered name and nationality, and that children also have the right to know their parents and, as far as possible, to be cared for by them. The State parties to the UNCROC “shall ensure” that a child should not be separated from his or her parents against their will unless it is necessary in their best interests, for instance, in the case of abuse or neglect, or separation of the parents and a decision must be made in relation to the child’s place of residence. Article 8 read with Article 29 and Article 30 support the view that the original cultural identity of the child is highly significant and should be protected. The UNCROC states in Article 30 that children have the right to learn and use the language and customs of their families, whether or not these are shared by the majority of people in the country where they live, as long as this does not harm other people. Article 41 of the UNCROC, however, provides that if the laws of a country protect children better than the Articles of the UNCROC, then those laws should override the UNCROC.

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Permanent placement of a child out of their family of origin can occur either through fostering on a long-term basis with authorised carers, or through adoption. Customary practices seen particularly with Torres Strait Islander, and Pacific Islander cultures have apparently existed prior to the modern concepts of adoption and placement of children under the legal authority of the state\(^3\). Reference is made to these practices later in this paper.

Attachment issues arise in most jurisdictions dealing with placement of children, whether in biologically and ethnically homogenous although separated families, or in alternative placements. The understanding of the process of attachment and the biological imperative for the child’s survival lend more than academic interest to the processes and importance of formation of a “secure attachment”\(^4\). The current knowledge about attachment indicates that the neurological development of an infant is closely tied with formation of a secure attachment, and together with adequate stimulation and nutrition this nurturing is essential for the development of critical processes of the brain, which gives the maturing child and person resilience to cope with the adverse vicissitudes of life.\(^5\) The process of attachment it should be emphasised is viewed primarily from the infant or child’s point of view, not from the adult’s perspective, although the adult interaction is also important for the process to be complete.

While growing up is challenging for most children from stable backgrounds, it is perceived that it may be more difficult for children who grow up looking different from their parents, family, and friends. The research on these issues is referred to in detail later in this paper, but further research is called for in relation to the long-term outcomes of trans-racial placement, both psychological and medical.\(^6\) Children placed in trans-racial families also often do not grow up in bilingual households in contact with their extended family of origin, language or the culture of origin. Children have little or no initial choice in the change from fitting in, to standing out. These facts make it imperative to protect children’s rights to preserve their culture of origin, and identity, as far as possible. It is a controversial issue which does not have a clear answer.

**Legal provisions**

In many jurisdictions in order for permanent placement of a child to occur outside its family of origin, and/or outside its country of origin, a formal legal process is mandated. The international context is considered first since it is a clear example of placement outside the child’s family and ethnic group, and placement of a child with carer(s) who are patently ethnically different to the child. The *Hague Convention on Intercountry Adoption 1993*\(^7\) (“the HCIA”), to which Australia is a signatory or Contracting State, recognises and regularises the often encountered difficulties in implementing this process in relation to international or intercountry transracial placements. Then the provisions in relation to indigenous children’s placement are considered. More general placements are next considered.

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\(^3\) Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No. 2) [2010] FCA 643.


\(^7\) For the full text see [http://www.hcch.net/index_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69)
Protecting the Rights of Indigenous and Multicultural Children and Preserving their Cultures in Fostering and Adoption

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The best interests of the child are paramount under the HCIA. The ‘Subsidiarity’ principle is contained in the HCIA and means in this context that Contracting States recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent care in the country of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests. As a general rule, institutional care should be considered as a last resort for a child in need of a family. The HCIA embodies safeguards to protect children from abduction, sale and trafficking and envisages a system in which all Contracting States work together to ensure the protection of children. Co-operation between Contracting States is essential to ensure the effectiveness of any safeguards put in place. The HCIA establishes a system of automatic recognition of adoptions made in accordance with the Convention. Every adoption, which is certified to be made in accordance with Convention procedures, is recognised “by operation of law” in all other Contracting States (see Article 23). The HCIA is implemented by only competent authorities which perform Convention functions. Competent authorities may be Central Authorities, public authorities including judicial or administrative authorities, and accredited bodies.

For an example of a practical safeguard under the HCIA, a child who is domiciled in NSW cannot be adopted outside of Australia unless it is determined that a suitable family to adopt or otherwise care for the child cannot be found in Australia\(^8\). If there is no-one suitable, then under Article 16 of the Hague Convention on Intercountry Adoption the report prepared under section 40 of the Adoption Act 2000 (NSW), which is to include information about the child’s identity, adaptability, background, social environment, family history, medical history of the child and the child’s family and any special needs of the child and is to indicate that the consents required under the Adoption Act 2000 (NSW) have been obtained, will be transmitted by the relevant designated authority (the Director-General) to the appropriate authority in the place outside Australia.

At the same time, there are trends in intercountry adoptions which have meant that the numbers of children made available for adoption have ebbed and flowed. In the more than 50 years since the beginning of transracial international adoption from Korea in 1953, global numbers of children engaged in international adoption increased to an estimated total worldwide of over 45,000 a year in 2004\(^9\). The trend implicitly predicted that growth would continue, and the number of applicants in receiving states continues to rise. It did not continue according to trend and the number of adoptions worldwide fell by 17 percent between 2004 and 2007\(^10\). That downward trend has apparently continued, with the increases which have occurred in some yearly totals coming mainly from African children\(^11\). Some commentators question the morality of transracial international adoption, or intercountry adoptions (ICA), and the competing arguments in relation to that are conveniently summarised by Dr Peter Selman:

“The situation of the many childless couples in the rich countries of the West hoping for a child seems likely to worsen, so that many of those approved will face a long wait and may never receive a child... The USA is facing a major shortfall in the number of children available if the moratorium

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\(^8\) Section 40 Adoption Act 2000 (NSW).
on adoptions from Guatemala continues. The global economic crisis may lead to a reduction in demand or could result in an acceleration of market forces and an increased risk of trafficking. Smolin (2004: 325) has pointed to the continuing evidence of child trafficking as a reason why ICA should end unless reformed, and has suggested that history may label ‘the entire enterprise as a neo-colonialist mistake’, just as it is now widely accepted that in the case of the ‘shipment’ of poor children from England to Australia and Canada ‘a damning verdict is inescapable’ (Parker, 2008: 293) and that apologies have rightly been given to the ‘stolen generation’ of aboriginal [sic] children in Australia.

Negative judgements and overgeneralizations would be hurtful to the many thousands of people who have adopted children from overseas and to many adoptees who recognize the positives in their experience, knowing that without such intervention they might well not have survived. The counter-argument that ICA can be a global gift is particularly compelling in the cases of the many children with special needs who are now being adopted, and is backed by the growing body of research that indicates the potential of a new family for reversing the impact of early deprivation (Juffer and Van IJzendoorn, 2009). Some advocates of ICA, such as Bartholet (2005) and Wallace (2003), go further and call for an increase in the numbers to meet the needs of children in the developing world, seeing ICA as the most logical solution to the problem of orphaned and abandoned children.”

Dr Peter Selman who has comprehensively analysed the figures provided by official sources, predicts that unless childless couples in the rich countries of the West are willing to accept an older child with special needs, the future of international adoption will depend more upon new source countries for children, and in receiving countries a desire to eliminate continuing irregularities and implement the HCIA. New source countries include the Democratic Republic of Congo, Mali, Nigeria and South Africa, all of which Dr Selman states are likely to be in the top 20 sending countries in the next few years. The Congo sent more children in 2010 to France, Italy and the U.S. than to all countries in the previous year and a similar pattern can be seen in Ghana and Nigeria, where most children have gone to the U.S.A. In Australia the statistics are that during 2010-11 there were 384 finalised adoptions across Australia which was then the lowest annual number on record. Of these adoptions 56% were intercountry, 12% were local and 32% were ‘known’ child adoptions; 62% of adopted children were under 5 years of age; the majority of intercountry adoptees came from Asia (80%). The three most common countries of origin in Asia were China (24%), the Philippines (17%), and Taiwan (12%). Ethiopia was the most common country of origin outside the Asian region (19%). During 2011-12 there were 333 finalised adoptions across Australia which is now the lowest annual number on record. Of these adoptions 45% were intercountry, 17% were local and 39% were ‘known’ child adoptions; 58% of adopted children were aged under 5 years of age. It is noteworthy that 86% of intercountry adoptees came from Asia and 54% of ‘known’ adoptions were by carers, such as foster parents. This latest statistic probably reflects encouragement of long term foster carers to adopt the children in their care. In 2011–12, in relation to intercountry adoptions of children other than from Asia, 12% were from Africa, and 2% from South/Central America. The most

common countries of origin were the Philippines (29 or 19%), South Korea (26 or 17%), China (24 adoptions or 16%) and Taiwan (22 or 15%). Since 2010–11, the number of finalised adoptions from China, Ethiopia and India halved (from 51 to 24, 40 to 18 and 19 to 8, respectively). Fluctuations were less pronounced for other countries of origin.

The experience in Australia has been a decline in the number of intercountry adoptions finalised in 2011–2012 compared to each year between 1999 and 2011. There were more intercountry adoptions finalised each year in the previous decade than the other types of adoptions combined. This latest trend has represented, according to the official authority, the 7th year of decline in annual numbers and the lowest number of intercountry adoptions during the period16.

In 2011–12, there were 9 adoptions of an Aboriginal and Torres Strait Islander child finalised in Australia. These adoptions were all known child adoptions, with three by Indigenous parents.17

On 28 June 2012 the Australian Attorney-General closed the Ethiopian Adoption Program with immediate effect.18

In all jurisdictions in Australia the child’s best interests are paramount in any decision relating to the child19. It is noteworthy that Article 3 of UNCROC states: “the best interests of the child shall be a primary consideration”. The child’s best interests are not said to be paramount in UNCROC. The use of expert evidence to help a legal authority determine what is in the child’s best interests may not always yield the same answer.

Indigenous adoption and placement are subject to additional legislative considerations in the Australian context. The Family Law Act 1975 specifically provides at sections 60B(2)(e)20, 60B(3)21, 60CC(3)(h)22, 60CC(6)23, 61F24 reference to indigenous cultural issues. For example, the Adoption Act

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19 This is expressed by different phrases with the same imported meaning. For example, the Family Law Act 1975, states at section 60CA the “best interests” of the child are paramount, the Adoption Act 2000(NSW) states at section 8 that the “best interests, both in childhood and in later life” are paramount, while child welfare legislation uses the phrase “safety, welfare and well-being” of the child is paramount: section 9(1) Children and Young Persons (Care and Protection) Act 1998 (NSW).
20 Section 60B(2)(e) provides that the principles underlying these objects are that (except when it is or would be contrary to a child’s best interests), children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
21 Section 60B(3) provides that for the purposes of subparagraph (2)(e), an Aboriginal child’s or Torres Strait Islander child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right: (a) to maintain a connection with that culture; and (b) to have the support, opportunity and encouragement necessary: (i) to explore the full extent of that culture, consistent with the child’s age and developmental level and the child’s views; and (ii) to develop a positive appreciation of that culture.
22 Section 60CC(3)(h) provides that additional considerations by a court in determining what is in the child’s best interests are: if the child is an Aboriginal child or a Torres Strait Islander child: (i) the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and (ii) the likely impact any proposed parenting order under this Part will have on that right.
23 Section 60CC(6) provides that for the purposes of paragraph (3)(h), an Aboriginal child’s or a Torres Strait Islander child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right: (a) to maintain a connection with that culture; and (b) to have the support, opportunity and encouragement necessary: (i) to explore the full extent of that culture;
2000 (NSW) provides at section 8(f) and 8(g) that the Aboriginal child placement principles, or the Torres Strait Islander child placement principles are to be applied, if the child is Aboriginal or Torres Strait Islander. These principles were first enacted in the Northern Territory Community Welfare Act 1983 (NT). The Children and Young Persons (Care and Protection) Act 1998 (NSW) also has similar mandated principles, and so does the other State and Territory legislation. Torres Strait customary adoption practice, known as Kupai Omasker, is the subject of extensive discussion and recommendation by the Family Law Council report to the Attorney-General, “Improving the Family Law System for Aboriginal and Torres Strait Islander Clients”, dated February 2012. Suffice it to say in this context that there was a Practice Direction to which His Honour the former Chief Justice of the Family Court Justice Nicholson referred in his judgment at par [39] in Lara & Lara and Marley & Sharp [2003] FamCA 1393; (2004) FLC ¶93-186, which was issued on 29 March 2004 and set out the procedure in the Family Court at that time to make ‘Applications arising from traditional customary adoption practise – Kupai Omasker’. The practice has been recognised as integral to the culture of Torres Strait Islander people.

Trans-racial placement where the child of black or non-white parentage is securely attached to white proposed parent(s) raises the issues of attachment and identity versus racial, ethnic and cultural identity issues. Consideration of the child’s family, racial, ethnic and cultural background is required in determining the child’s best interests pursuant to the legislation which informs the court which factors must be taken into account in any placement.

The New South Wales Supreme Court in an unusual contested adoption case heard before Justice Paul Brereton, in Director-General Department of Community Services v D [2007] NSWSC 762; (2008) 37 FamLR 595, concerned a black African female child who was placed as a young infant 3 months of age, with a white couple. With respect to His Honour, the issues raised and commented upon in His Honour’s judgment accurately identify the issues in trans-racial placements and give a practical example of the resolution of some of them. The child had become attached to her white carers, and was part of their family. The white couple were exemplary carers for the child and wished to adopt her. The biological mother who lives in a different geographical place to the child and the white...
family, but within Australia, wished to have her child returned to her care. The identity and location of the father of the child is unknown because the child was conceived after the mother was sexually assaulted in a refugee camp in Kenya, prior to her arrival in Australia. His Honour Justice Brereton, in Director-General Department of Community Services v D (supra), summarised the effect of the expert evidence in that case, which will be later referred to in more detail, and came to the following conclusions:

“[84] In my view, the expert evidence supports the following propositions. First, all else being equal, it is preferable that a child be raised in the context of her natural family, ethnicity and culture. These all contribute to the development of a robust self-concept, which is important to psychological development and the ability to form relationships. Secondly, adoptees generally have a more fragile sense of self, and are more prone to identify confusion, because of the separation from their birth family. The period of greatest risk for this is adolescence. To some extent, this can be mitigated by “open adoption”, in which a relationship with the birth mother is maintained. Thirdly, the risk of a diminished self-concept and of identity confusion is exacerbated in cases of trans-racial adoption, because the child is deprived not only of the birth mother, but also of her ethnic and cultural context of origin. Cultural traditions cannot be handed down by those outside them. Trans-racial adoptees are less likely to be able to develop robust mechanisms for dealing with the racism that they might well encounter. Fourthly, these consequences can be mitigated to some extent, though not avoided, by the adoptive family providing exposure to and contact with the child’s ethnic and cultural origins, in particular through living in a setting in which there are present black families and role models.”

Issues also raised in that context concern the fact that the biological mother in that case had no real concept of adoption becoming a permanent transfer of care of the child to another family. The adoption consent which had been given in that matter was successfully contested and set aside by His Honour Justice Brereton. Significantly for the mother, the concept of adoption or permanent placement of the child in a different racial, ethnic and cultural group was not within her (and her child’s) previous cultural experience.

The legal landscape described should surely protect the rights of indigenous and multicultural children to preserve their cultures? However, the best interests principle has more aspects to it than simply cultural preservation. Much also depends upon the child’s development and attachment history, as will be seen in the ensuing examination of the reality. The initial placement of the child can be seen as critical to the later issues which may arise, and it is suggested should assiduously be undertaken in accordance with the best interests principle.

The process of inter-racial placement – from Principle to Reality

A case example in which the issue of inter-racial placement was considered extensively by the expert evidence, and that evidence was used to come to a determination of the best interests is illustrative of the reality of the process. The evidence accepted by the Court is necessarily extracted in a concise form in the following discussion, even though it may appear lengthy. For that reason, the important issues may appear truncated, and the reader may benefit from according the full judgment further independent analysis.
The judgment of Justice Brereton in *Director-General Department of Community Services v D* (supra), summarised the relevant expertise of Professor Ilan Katz, as follows: “[he] is Acting Director of the Social Policy Research Centre, at the University of New South Wales. He has a PhD from Brunel University, conferred in 1994, for a thesis, *The Development of Racial Identity in Children of Mixed Parentage*. He has studied, taught and published in the fields of complex family and community interventions, race culture and ethnicity, child protection and parenting in poor environments, and adoption.”

Professor Katz gave evidence, summarised by Justice Brereton, that:

“the research since the 1970s on trans-racial adoption indicated, first, that there was no evidence that trans-racially adopted children have higher levels of behavioural or emotional difficulties than equivalent children in same race placements, but secondly, that such children did tend to be alienated from their birth culture and community and to identify with the culture of their adoptive parents. A definitive analysis of the research commissioned by the UK Department of Health on adoption (Parker, 1999) summarised the risk factors associated with poor outcomes for adopted children, and trans-racial placement was not found to be one of them. Interestingly, however, Professor Katz added that in the case of indigenous children, there was a tendency for much poorer outcomes in adoptive placements; it is not apparent to me why there would be a difference in this respect between indigenous and other trans-racially adopted children.”

Another expert called in *Director-General Department of Community Services v D* (supra), was Ms Beverley Prevatt Goldstein whose evidence, His Honour Justice Brereton observed (and referred to the guide for best practice in the UK co-authored by her) as follows:

“...[she] has studied, taught and published on the topic of race and ethnicity in childcare and placement, including in particular adoption and fostering. She is one of the authors of *Race and Ethnicity: A consideration of issues for black, minority ethnic and white children in family placement*, a practice guide for British agencies for adoption and fostering. Its basal premises include that placements should meet the individual needs of each child in respect of health, education, identity, family and social relationships, social presentation, emotional and behavioural development and self-care skills; and that the (UK) legislative requirement to consider racial origin, culture, religion and language applies to every child in every placement. In chapter 6, entitled “Identity and Self Esteem”, the authors wrote:

‘Identity and self-esteem are not mentioned in UK legislation but have underpinned the concern with the “racial origin, culture, language and religion”. They are, however, an explicit part of the assessment framework for all children as demonstrated by the LAC materials (Department of Health, 1995), the Working Together to Safeguard Children document (Department of Health et al, 1999) and the framework for assessing children in need (Department of Health et al, 2000). The Utting Report (1997) states:

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30 *Director-General Department of Community Services v D* [2007] NSWSC 762; (2008) 37 FamLR 595, at par [63].
31 Ibid., at par [65].
32 Ibid., at par[72]-[73].
‘A positive sense of identity, of being somebody, of belonging to oneself, is an inner strength which provides the strongest personal defence against harm. Helping children achieve that identity ... ought to be the explicit objective of any organisation entrusted with the care of children. This sense of identity is derived from membership of family and other groups with similar values with which early life experience is shared. Detachment from family and culture plainly impairs its development; membership of a distinctive or disadvantaged community may compound the difficulties; in the case of black children, their situation is further aggravated by the pervasive effects of racism (p113).’

[73] In chapter 10, entitled “Placement of black children: specific guidelines”, the authors advise that a black family is more likely to provide a black child of the same ethnic background with positive black attachment figures which the child can internalise, with an environment where the black child is normal rather than exceptional, with a range of black role models coping with everyday life, and with a resource for ways of coping with and challenging racism. Additionally, such a family with similar culture, religion, language and class to the child is likely to provide continuity of some aspects of the child’s heritage; access to aspects of culture not available in the dominant society that involves ways of being and seen as well as ways of doing; access to some of the symbols which enables the child to fit comfortably if they so wish with their ethnic group; and a secure and informed framework in which to reject or adapt aspects of their heritage. On the topic of placement in a white family, the authors say:

‘There will be gaps in what most white families can offer a black child, because of dissimilarities in “racial” identity, a lack of shared experience of racism, an inability to provide black primary attachment figures as well as some of the other factors noted above. These gaps may be particularly damaging to children who will already have experienced separation, loss and discontinuity (Prevatt Goldstein, 1997). There can also be a qualitative difference between black perspectives being an integral part of the home environment and approach of the principal carer, and being only occasionally made available to the child (Kirton & Woodger, 1999).

Delay is an important factor and drift in the care system must be avoided for all children. There should be a clear plan for each child and individual time scales. Social workers, having made intensive attempts to locate a black family, and in consultation with specialist black practitioners, may deem it in the best interests of a particular black child to be placed with a white family. Adoption Now: Messages from Research (Department of Health, 1999) advocates that:

...such discretion has to be exercised within a framework of policy about what is normally expected. The question arises as to how far the reasons for failing [to observe these policy injunctions] are analysed and justified.(p116).

It is essential that such placements remain exceptional, and that the placement decisions are analysed, justified and authorised by senior management.
Kirton & Woodger (1999) and Thoburn et al (1998, p28) indicate that some white families can successfully parent black children. The available research suggests that these white families and their extended families must be able to demonstrate an active understanding of the developing needs of the black child; an understanding of racism; commitment to challenging racism and discrimination; the provisional development of networks which can include those of their own extended family or of their child’s birth relatives; and enable the child to have access to cultural frameworks which will provide continuity for the child.

Nevertheless, the task must not be underestimated as some white families may, despite their best efforts, have difficulty in sustaining these throughout their child’s childhood into adulthood. Kirton & Woodger (1999, pp 74-6) and Thoburn et al (1998, pp 34-41) provide a detailed guidance on the assessment and support needed for all families engaged in parenting black children. Kirton & Woodger (1999) warn that a one-off training program is unlikely to engender any fundamental and lasting change in attitude and the careful assessment by aware and competent workers of foster carers’ and adoptive parents’ current attitudes, with examples, is needed.”

The expert evidence in this area also includes the experiences of Australian trans-racial adoptees which His Honour Justice Brereton referred to in the following summary:33

“[79] Ms Sarah Armstrong has fifteen years’ experience in out of home placements, and nine years experience in post adoption work as the senior manager for the Post Adoption Resource Centre, a service of the Benevolent Society based in Sydney that provides counselling for people affected by adoption. She is one of the authors of a book, Armstrong & Slaytor, The Colour of Difference: Journeys in Trans-racial Adoption, which relates the experiences of 27 adoptees, then aged between 17 and 54, so as to draw together the experiences of both Australian-born trans-racial adoptees and inter-country adoptees. She summarised the main findings that emerge from that study:

· While some adoptees had experienced unkindness or abuse, the majority had been treated with love and real efforts had been made to incorporate them and their culture into the adoptive family;

· Most adoptees thought that the adoptive parents were trying to do their best;

· Most adoptees had a strong sense of the opportunities that being brought to Australia had given them in terms of education, health services, career prospects and material benefits, but for those who had come from other countries with a non-white appearance their adoptions had been a badge that they had had to wear whether they liked it or not, and their status was so obvious that strangers could see it and felt justified in commenting on it, there being “no place to hide”;

· A significant number referred to the circumstance that, based on their place in the family and society, they almost perceived themselves as white, and many trans-racial adoptees reported a negative view of their own colour and culture. The majority felt

33 Ibid., at par[79]-[80].
that they would never truly fit in their birth culture;

· There was general agreement that one’s original culture can only be learnt from someone of that culture, and that adoptive parents cannot teach what they would first have to learn themselves;

· The presence of an adopted sibling from the same culture was a positive factor;

· Almost all had experienced racism, though to varying degrees. Some learnt to cope, and the experience may have contributed to their resilience and strength as adults; for others, the experiences were traumatic and ultimately damaging to the essence of their self-esteem, and may have been impossible to communicate to the adoptive parents, or a source of shame and self-blame.

[80] Armstrong & Slaytor suggest “the fragile sense of self described by adoptees in general is perhaps further compounded by cultural differences”. From the circumstances that those adoptees who had experienced very little or no racism in Australia had generally grown up in multicultural areas where their school playground was full of children from a variety of cultural backgrounds, and that the adoptees expressed the hope that in cases in trans-racial adoption the adoptive families would see the need to base themselves in areas where their children would have opportunities to meet and get to know people of their own race, the authors posit that residence in such an area and contact with people of the adoptee’s own race are an important factor for mitigating identity issues.”

His Honour Justice Brereton also referred in the extracted paragraphs to the following evidence:

“[81] Associate Professor Green, of the University of New South Wales, is an indigenous Australian from the Wiradjuri people of western New South Wales and holds a Bachelor of Social Work with Honours from the University of Sydney. Her expertise is in the counselling and support of Aboriginal and Torres Strait Islander people. A significant proportion of her clients have been removed as children from their families and culture. She has also worked with Aboriginal women whose children have been removed, in some cases through apparently consensual adoptions. She reports that most of those who were removed as children have experienced more than usual difficulties emotionally and in developing positive relationships, and that amongst them there is a high incidence of confusion regarding identity, and frequent claims of feeling they belong neither to their natural nor to their adoptive parents. They often report little self-worth, and there is a high incidence of self-harming behaviour. She says:

‘It is essential for people to have a full and cohesive sense of self, that they are able to develop their cultural and ethnic identity as they develop their individual identity as they grow and develop from children into adults. If a person is denied access to their culture and are not able to develop that cultural identity through the process of

34 Ibid., at par[81]-[82].
socialisation which occurs within families and communities, the person will experience greater difficulties as an adult in forming a positive self identity and esteem.

It is well documented within the Aboriginal community that growing up outside of your cultural and ethnic community and/or with the family who are culturally and ethnically different has detrimental effects upon the social and emotional growth of an individual and is highly likely to result in personality and social difficulties for the individual.

The clients I work with (or are currently working with) within the university settings who were removed as children are trying to build new lives. However, this is extremely difficult and the majority suffer from regular setbacks due to the ongoing stress, sense of loss and difficulties with developing relationships. Of all the students and staff that I work with, the people who were removed from their Aboriginal families and cultures are the people who require the most intensive interventions and support of any group.’

[82] Associate Professor Green suggests that it is not unreasonable to draw conclusions for other cultural and ethnic groups from the experience with Aboriginal children. I agree; there seems no basis for supposing that children of other ethnic groups would be radically different in their response to separation from their family, culture and ethnicity.”

The evidence by Professor Katz is not consistent with the acceptance of the relevance and validity of conclusions drawn from the Aboriginal experience to other ethnic groups. This expert evidence supported His Honour Justice Brereton’s conclusion on the issue of ethnicity and culture:

“[101] Conclusion. If not brought up in, or at the very least with a very strong connection with, her ethnicity and culture of origin, [the child] is at risk of being deprived of the cultural traditions to which she is entitled but which cannot be passed down except by those in them, of the extended family and peer group with which she is visibly similar, and as a result, of having a diminished sense of identity and self-esteem, and a reduced ability to develop the more resilient defences against racism that those who have a shared experience of it can foster. To some extent, the risk can be mitigated, though not removed, by contact with [the mother] and her family and community and culture; in my judgment [the proposed adoptive parents] will be sufficiently supportive of such contact that it can be a significant mitigator of the risk.”

His Honour Justice Brereton then considered the expert evidence concerning the child’s attachment and concluded:

“[120] Conclusion. Accordingly, the effects on [the child] of being removed from the primary care of [the proposed adoptive parents] would be a certainty of a high degree of trauma and distress in the short term, a high risk for developing a depressive disorder in the future, and potential inhibition of her ability to form intimate relationships in the future, notwithstanding a reasonable prospect - but one which could not be guaranteed - that with "good enough" parenting from [the mother], she could reattach to [the mother]. This focuses attention on [the mother’s] competence as a parent.”

35 Ibid., at par [101].
36 Ibid., at par [120].
The outcome of the judicial analysis is clearly summarised by His Honour Justice Brereton’s closing paragraphs:

“...Ultimately, I agree with Dr Robinson [the Court appointed expert child and family psychiatrist] that in this case the benefits of placing [the child] with [the mother] now, which are not insignificant, do not justify the significant associated risks. Focussing on [the child’s] interests in the short term, the issue is not difficult...”

“[274] However, I am unpersuaded that this is a case in which the possibility that at some future time, perhaps in adolescence, [the child] may move into the care of [the mother] should forever be foreclosed by the making of an adoption order. The less irrevocable nature of a parental responsibility order, not involving formal severance of the parental bond with [the mother], provides a more promising environment for [the child] to deal with and resolve the inevitable identity issues in her teenage years, leaving her with some sense of control, or at least influence, in the situation, and greater scope for flexibility in the future, having regard to [the child’s] own wishes as she matures. This empowers [the child], in a context in which traditionally adopted children are ‘the most disempowered’ of all those involved in adoption.”

His Honour Justice Brereton fashioned a contact arrangement which he considered would enable the child to act upon any biological and genealogical ties, and the desire to be with her own people which may become stronger in her adolescence. The benefits of contact in reducing sense of abandonment and loss of parental care and culture of origin are the desired effects of such an arrangement.

The undesirability of the child being raised apart from the natural biological family’s culture and ethnicity, and the undesirability of disrupting secure attachments, and the significance of birth parent’s parenting capacity are placed in stark contrast by the evidence and the factual circumstances in that particular case. It is suggested this observation extrapolates generally so that attachment issues particularly in the short term tend to outweigh culture and ethnicity concerns.

There have been a number of relevant cases a review of which was undertaken by the Full Court of the Family Court (per Fogarty, Kay and O’Ryan JJ) in B & R (1995) 19 Fam LR 594. While that was in the context of Aboriginality, for the reasons expressed by Associate Professor Green (supra) it is suggested that the lessons are equally applicable to issues of trans-racial placement. It can be seen that the outcomes of those cases depend on the particular facts and circumstances of the individual case, however, the emotional and psychological benefits of being brought up in the child’s culture and ethnic group of origin have generally been judged to outweigh the material benefits offered by the alternative, the exception being where there is a very well established attachment to the non-Aboriginal carer.

37 Ibid., at par [273].
38 Ibid., at par [274].
39 Ibid., at par [243].
40 see Ex parte West (1861) 1 Legge 1475 (removal and retention by squatter of aboriginal child from parents described as an outrage and return of child directed); Sanders & Sanders (1976) 1 Fam LR 11,433; (1976) FLC ¶90-078 (on appeal,
In *McMillen v Larcombe* [1976] NTJ 1001, Forster J (as he then was) in the Supreme Court of the Northern Territory considered an application for adoption of a child, a boy of mixed aboriginal and white parentage, who was aged two years. The proposed adoptive parents were an American couple resident in the Territory but proposing to return to the USA. The child had lived with his aboriginal mother until, at 6 months of age, he was admitted to a home suffering from under-nourishment; he was declared to be a “neglected child” in circumstances that his Honour described as involving a particularly serious denial of justice, and had been in the care of the proposed adoptive parents for about 18 months. Forster J accepted that the proposed adopters were determined so far as they were able to make the child aware and proud of his origins, but that they admitted that he would probably have no contact with his mother or other Aboriginal relatives. His Honour accepted evidence that all adopted children at some stage encounter problems of identity, compounded when the child was of a different ethnic origin from the adoptive parents, which necessitated access to people of the child’s ethnic origin; and that as the child grew older in a white society he was very likely to undergo an identity crisis when he realised he was different to the people around him. Concluding that, while the adoptive parents would provide the child with all things he was likely to need and love and security, they could not satisfy his proper wish to make contact with Aboriginal people in general and his own relatives in particular - his Honour did not think that, viewed as a whole, the adopters’ proposal was “superior at all” to the mother’s proposal, refused to dispense with consent, and returned the child to the mother. However, the significance of severing an attachment of 18 months duration in a 2 year old child did not seem to have been considered.

In *Torrens v Fleming* (1980) FLC ¶90-840, Kearney J considered an application by an Aboriginal mother for custody of her ten-year-old daughter, who had been living with a white couple since shortly after birth. While acknowledging the mother’s case as a “well-recognised claim of a natural mother to the custody of a child”, strengthened by the desirability of the child having the opportunity to learn the culture of her race and establishing her identity, his Honour concluded that, the wishes of the child being to remain where she was, the critical feature was that the child was living a happy and well-adjusted life in a stable environment with a family with whom she had a very close bond and with whom she had lived for virtually the whole of her life, and there was psychological evidence that there may be long term harm to the child by forcing her to make a change of such magnitude. This reflects the significance of a well-established attachment bond.

decision placing child of mixed parentage with white father reversed for insufficient weight given to benefits to emotional development of being in Aboriginal mother’s care – including experience of discrimination, family and tribal relationships); *R & R* (1985) FLC ¶91-615 (appeal against placement of child of mixed parentage with Aboriginal mother dismissed, the judge having appropriately had regard to evidence that living in a tribal situation would better equip the child to cope with periodic visits to non-tribal societies than *vice versa*, and given weight to issues of racial discrimination and potential loss of contact with mother’s culture and traditions); *Goudge & Goudge* (1984) 9 Fam LR 500; (1984) FLC ¶91-534 (appeal against judgment placing child of mixed parentage with European father dismissed by majority on basis that judge did not fail to give appropriate weight to racial and cultural factors, but Evatt CJ dissenting on the basis that while neither culture was to be preferred, and both may be of importance, the implications of an order for the continuing connection of the child with each culture, and the consequences for the child of loss of contact with an Aboriginal parent’s traditions and culture, Aboriginal origins, and the extent of discrimination in particular situations, had been given insufficient weight); *McL & McL* (1989) 15 Fam LR 7; (1991) FLC ¶92-238 (children of mixed parentage placed with Aboriginal mother where they would be raised as tribal Aboriginals because, for reasons associated with their Aboriginality, that enhanced their prospects of growing up as well-adjusted individuals).
In *F v Langsha* (1983) 8 Fam LR 833; affirmed *Rushby v Roberts* [1983] 1 NSWLR 350, Waddell J, as he then was, considered competing claims by an Aboriginal father for custody and a white couple for adoption. In a decision that was upheld by the Court of Appeal, his Honour made an order for custody in favour of the father, giving some weight to the view that Aboriginal parents would be better placed to inculcate self-esteem in such a child.

In *Re P (a minor) (Adoption)* (1990) 1 FLR 96, the Court of Appeal of England dismissed an appeal from a trial judge’s decision refusing an adoption application in respect of an 18-month old child of part Afro-Caribbean and part white European parentage by the child’s white foster mother and her husband, preferring to place the child with a family of the same race and ethnicity. The Court of Appeal said that it was open to the trial judge to conclude that the advantages of bringing up a child of mixed race in a black family outweighed the importance of continuing a status quo for a child who was thriving in a stable home with a white foster mother, with whom she had lived since only a week or so after birth. This was a disruption of a secure attachment.

The relatively more recent decision of the Full Court of the Family Court of Australia which is respectfully submitted highlights the issue in some further detail is *Donnell & Dovey* [2010] FamCAFC 15; (2010) FLC ¶93-428. The following brief factual background is drawn from the judgment of the appellate court. This was a successful appeal by the half-sister (Ms Donnell) of the child who is also the eldest daughter of the deceased mother. Ms Donnell appealed parenting orders that the child, an eight-year-old boy, eventually leave Ms Donnell’s care in Brisbane and live with his father in the Torres Strait even though the father was largely absent from the child’s life. The child is the descendent of two indigenous groups. His father is a Torres Strait Islander and his mother is from the Wakka Wakka tribe (an Aboriginal tribe, or ‘mob’). The deceased mother and father lived together for about two years before they separated when the child was seven months old. The father returned to live in the Torres Strait and the child remained with his mother in Brisbane together with his half-brother and half-sisters from his mother’s previous relationships. The mother died in a motor vehicle accident in 2007. Ms Donnell, the mother’s eldest daughter, and her husband cared for the child since the mother died. Prior to the mother’s death, the father had only seen the child on four brief occasions.

Following a two-day trial, the trial judge decided that the child should live with the father (and his extended family) in the Torres Strait. Ms Donnell appealed the orders of the trial judge. The weight to be given to the fact that the father had been largely absent from the child’s life was clearly of considerable importance. The assertion made on behalf of Ms Donnell was that this important issue was “glossed over” by the report writer and hence his Honour the trial judge erred in accepting her recommendation. Insufficient regard was held by the Full Court to have been paid to the heritage of that part of the child’s family with whom he had lived his entire life. The Full Court also determined that s 61F of the *Family Law Act 1975* was largely overlooked. It was stated that section 69ZX(3) *Family Law Act 1975* permits anthropological evidence given in one case to be admitted in another.

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41 Section 61F provides that in: (a) applying this Part to the circumstances of an Aboriginal or Torres Strait Islander child; or (b) identifying a person or persons who have exercised, or who may exercise, parental responsibility for such a child; the court must have regard to any kinship obligations, and child-rearing practices, of the child’s Aboriginal or Torres Strait Islander culture.
This decision supports the view that the significance of attachment (to the sister) was an important factor, coupled with the Aboriginal cultural background, which was not outweighed by the Torres Strait Islander cultural issue. Indeed, the Full Court stated in their conclusion:

“342. We accept, as his Honour said, that whilst important, the issues associated with O's dual indigenous heritage should not have totally subsumed the proceedings. Nevertheless, we consider that insufficient regard was paid to the heritage of that part of O's family with whom he had lived his entire life.

343. We recognise that his Honour said that he would have arrived at the same outcome even if he had put the two reports "to one side". However, the difficulty we have in placing any significance on that observation is that the balance of his Honour's reasons does not provide adequate reasons to explain why it would be in O's best interests for him to live with his father who, for whatever reason, had been a largely absent figure in his life in preference to his sister, who had been a constant in his life and to whom he was securely attached.”

The sister gave uncontested evidence that in the Wakka Wakka tradition children are raised by a sibling when a parent dies. The Full Court observed that the Wakka Wakka people obviously then do not accept there are inherent advantages associated with children being raised by a surviving parent rather than an older sibling.

The Full Court stated in relation to the cultural aspects of attachment, with approval of seminal articles which argue the issues eloquently, only one of which appears in the extract below:

“321. Whilst we accept that the Federal Magistrate was not referred to any writing on this topic, we consider that an Australian court exercising family law jurisdiction in the twenty first century must take judicial notice of the fact that there are marked differences between indigenous and non-indigenous people relating to the concept of family. This is not to say that the practices and beliefs of indigenous people are uniform, since it is well known that they are not. However, it cannot ever be safely assumed that research findings based on studies of European/white Australian children apply with equal force to indigenous children, even those who may have been raised in an urban setting.”

“327. The article to which we refer is that of Mr Stephen Ralph, who at the time was the Director of Court Counselling in the Family Court of Australia in Darwin. He was also responsible for overseeing the Family Court's Indigenous Family Liaison program. His article, entitled "The Best Interest of the Aboriginal Child in Family Law Proceedings", was published in (1998) 12(2) Australian Journal of Family Law 140. The following are the extracts which seem to us to have particular relevance to the present proceedings (footnotes omitted):

‘Family assessment as employed generally by counsellors is stepped (sic) [?]steeped] in the traditions of western psychology, with its emphasis upon the individual, and based upon modern Anglo-European notions of social and family organisation. The prominence of
psychological theory and clinical practice based upon the study of small family groups and individual needs runs counter, however, to an effective understanding of the collectivist nature of Aboriginal family life. Of particular concern is the possibility that counsellors who have limited knowledge or experience in working with Aboriginal families may produce reports that do not adequately address the issue of the child's cultural identity and consequently the report may fail to attend to vital cultural issues affecting the child's best interests. This possible deficit in cross-cultural understanding is one of the issues that the court's cultural awareness programme seeks to address both through the appointment of Aboriginal Family Consultants and through training of counsellors in this area.

In contrast to the counsellor's view Aboriginal people are likely to argue that children have the ability to effectively attach themselves to many carers in the course of their "growing up". In many indigenous cultures multiple, serial attachments are the norm and are not regarded as necessarily harmful to the child's development and long-term adjustment.

The fluid nature of Aboriginal child-care arrangements and associated parenting practices was recently noted in an anthropologist's report to the court regarding an Aboriginal child. The report stated:

It is not at all unusual for Aboriginal children to move freely, even frequently (between kin and community). These movements ... are seen as important ways in which children acquire their understanding of the ways in which kinship and country relationships are lived out. They are thus not a sign of disruption as they might be interpreted by non-Aboriginal people but are an important factor in socialising children.

The Aboriginal perspective is based upon a collectivist view of family and social life that sees responsibility for the growing up of children invested in many people. According to this view children come to trust in the capacity and commitment of a multitude of people to care for them and nurture them through childhood and into adulthood. By this means children come to take their place in Aboriginal society where responsibilities and obligation to family and kin are deeply rooted and pervasive.

From this perspective the disruption caused to a child's primary attachment, for example, is out-weighed by the benefits arising from the child's exposure to a broader and deeper network of family and [p 84,625] kin to whom the child will eventually form strong attachments. The implicit expectation is that children will grow up with maximum exposure to their heritage and take their place within Aboriginal society. From the standpoint of a traditional Aboriginal family living in a rural or remote community this change would ensure the family's spiritual and ceremonial obligations to the country would be maintained. In this setting cultural and family considerations are highly important in determining the child's best interests. For Aboriginal people a desirable outcome of such deliberations is the preservation and promotion of Aboriginal culture, particularly its transmission to the next generation.

Consideration of the child's best interests from an Aboriginal perspective is likely to be influenced by the broader consideration of how Aboriginal culture and family life is to be promoted. That is, individual and collective needs are interdependent and as such the
needs of the individual child do not take precedence over the needs of the collective. For Aboriginal people, whose culture has been ravaged by colonisation and dispossession, the struggle to preserve and maintain cultural integrity is on-going and of the utmost importance. In many instances this may mean that the interests of the individual or child may be a subordinate consideration to that of the best interest of the collective group. This viewpoint does not sit comfortably though beside the strict adherence of the Family Law Act to the paramount consideration of the child’s best interests.’

328. Similar concerns to those expressed by Mr Ralph can be found in the decision in *In re CP* [*In re CP* (1997) FLC ¶92-741; 21 FamLR 486]. The Full Court concluded its judgment in that matter by noting (at p 83,991) that the case had "highlighted difficulties in the applicability of the Family Law Act to cultural systems of family care which, like the Tiwi way, contemplate circumstances where the child will live and be cared for within a kin network". The Full Court went on to note that "for formal legal purposes, the many non-biological mothers of a Tiwi child are invisible to the law."  

The result is that some research findings may have little relevance to the Aboriginal or trans-racial context unless those matters of culture are taken into account. Other more recent decisions are referred to in the report by the Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, February 2012, at pages 78-84.

The NSW Department of Family and Community Services is the child welfare authority in NSW with responsibility for out of home care of children. The numbers of children placed by them with indigenous carers or family members is set out in the Annual Report which says:

“As at 30 June 2012, there were 18,169 children and young people in OOHC. Aboriginal children represent 34.6 percent of children and young people in care. We aim to place Aboriginal children with extended family or members of their wider community when they cannot remain with their immediate families as we know that this gives them the best chance of feeling secure and supported in a culturally appropriate environment. This practice is also in line with the legislated Aboriginal and Torres Strait Islander Child Placement Principles. At 30 June 2012, 80.2 percent of Aboriginal children in care were placed with a relative or an Aboriginal carer. Significant capacity building for Aboriginal NGOs is required to support Aboriginal children now and in the future. Our ultimate goal is for all Aboriginal children and young people in care to be placed with Aboriginal carers and supported by Aboriginal caseworkers employed by local Aboriginal NGOs. We are steadily working towards this goal which could take up to ten years to be fully realised. Aboriginal children and young people will transfer as soon as a local Aboriginal agency has the capacity to accept them, but will remain with their current carer until then.”

As a practical manner research has been used to support conflicting positions. Some research has suggested that substantial numbers of children in trans-racial placements have become increasingly maladjusted as they grow older with higher than average rates of suicide and mental health

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problems.⁴⁶ Some other studies suggest a more favourable outcome for the adoptees.⁴⁷ An overview of the experience in Scandinavia has concluded that although 75% of the adolescents were doing well, the balance of 25% experience problems linked to learning, identity and ethnicity.⁴⁸ The research in the USA suggests that the optimal outcome is best achieved with a nurturing environment, which acknowledges physical differences, is open about the child’s origins and deals with the potential conflict of cultures.⁴⁹ This has prompted calls for further research⁵⁰ not just into issues of identity, culture and loss for the children, but also upon the plight of the families, both parents and siblings left behind, and the unique physical and psychological health issues arising from these placements. It is respectfully suggested that His Honour Justice Brereton accurately summarises the effect of the expert evidence concerning this issue.

The only empirical study in Australia that has been undertaken on trans-racial placements for adoption was by Professor R D Goldney in 1996⁵². This study was a descriptive, non-controlled study without a comparison group. There were 34 young Indonesian adolescents identified in the study. They were compared to population norms on psychological tests and no attempt was made to match the sample and no control group was used but compared to population norms (developed for Western cultures). No differences were found, therefore it was Professor Goldney’s conclusion that there were generally favourable outcomes.

A persuasive piece of research available is by Dr Hoksbergen and associates⁵³. This is the Inter Country Adoption “Coming of Age in The Netherlands” study. It was published in 1991 so it is old data. This book reviewed international research, mainly European research, on Intercountry Adoptions. The Dutch study was the largest of the studies. It tried to assess the likelihood of a child requiring welfare or institutional support. Several hundred children were involved in this study from a range of primarily Asian countries. The study concluded that after following children from childhood into adolescence, adolescents who were adopted from Asian countries compared to a similar sample of children within their host country (as non adopted children within Holland), the adopted children had a six times greater likelihood of either referral to welfare authorities for delinquency or referral for schizoid or depressive disorders. Compared to Dutch own-country adopted children, out-of-country adoptees had a three times greater risk of involvement in health and welfare services. However, as a group these casualties of intercountry adoption only made up 6% of the sample. There was a gender relationship. Boys were more likely to be referred for acting out behaviours such as delinquency and girls were more likely to be referred for behaviours such as

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⁵¹ Mather M, Intercountry adoption, Archives of Disease in Childhood. 2007 June; 92(6): 479–482.
⁵³ R. Hoksbergen, Chapter 7 in H Alstein & R Simon, (Editors) Inter Country Adoption, a Multi National Perspective.
schizoid personality disorders and depression. It was the author’s belief that there was something about the attachment process that was responsible for this significant increase in referral into mental health or welfare services, although despite one attempt at a prospective study to explore this, they were unable to be clear about what the specific mechanisms were that seemed to increase the risks. Other than this study, which was reasonably well controlled and had the advantage of being both a count back study but also included a prospective design, there is very little other research. An Israeli study in 1997 compared one hundred out of country (Jewish) children with 100 within country (Jewish) adopted children and found no meaningful differences between the samples on outcome measures, but did suggest that the then non-significant elevation in scores for the out of country adoptees might indicate a “future risk”. It is of importance and not to be forgotten that the parents of the out of country adoptees revealed better coping skills, and sought help for difficulties suggesting the families were not equivalent comparison groups. In 2003, a scoping review of research then available on adoption was published in the United Kingdom (Rushton, 2003), and included reference to the study of Parker, 1999 (supra) as quoted by Professor Katz (supra). Rushton’s research concluded:

“Thoburn, Norford and Rashid have shown that the majority of transracial placements they studied (that is, a black child or mixed race child placed with a white family) were successful, although some negative outcomes were recorded. Such studies need to clarify whether it is the ethnicity dimension itself that is related to outcome and not some associated factor like pre-placement experience or level of difficulty. Transracial placements were once more common but now, with a shift in professional opinion against them, it would be difficult to find a large enough sample of different race placements to study. Furthermore, such children would probably be different in a number of other ways in addition to race which led the placing agency to consider a transracial placement. Research interest is now more likely to focus on samples of transracially placed children and their adult adjustment and identities.”

Rushton’s 2003 paper goes on to quote studies showing that non-kin adoptions (not necessarily inter-racial) have a placement disruption rate of approximately 20% (range 10% to 50%) across 8 studies he reviewed. These adoptions were non-infant adoptions, but not “late adoptions” — that is the children were young when adopted. The older the child at time of adoption, the greater the placement disruption frequency. A risk factor for placement disruption is the status of the placement itself — a long term fostering provides higher risk of placement disruption than does adoption.

The current knowledge on breakdown or disruption of adoptions is that:

“Available information on disruptions indicates that they are more common in adoptions involving special needs children (Spark et al. 2008). Research shows the children most at risk of unsuccessful outcomes include: children adopted at an older age; children with a history of physical abuse, deprivation and neglect; children with a history of sexual abuse; and children with emotional and behavioural problems (DECD 2010; Roberson 2006). In both local and intercountry adoptions, attachment issues are considered a key contributor to the disruption of an adoption. If a sense of attachment and/or an improvement in the child’s behaviour is not detected by parents within 12 to 15 months, there is an increased risk of the adoption process ending (Clark, Thigpen & Moeller Yates 2006).”

There is a necessary qualification on some of the research studies which was observed in His Honour Justice Brereton’s judgment in Director-General Department of Community Services v D [2007] NSWSC 762; (2008) 37 FamLR 595, at par [75]-[76] as follows:

“[75] Ms Prevatt Goldstein referred to research findings that children who had been placed trans-racially were much more likely than those in same race placements to have felt different to their adoptive families while growing up, and more likely to be classified as “alienated” or “differentiated”, and less likely to be classified as “integrated”, in terms of their adoptive experience, and that intensity of identity issues was often more pronounced among those who had been in trans-racial placements, and was less likely to have been resolved by contact. She thought that this suggested that, if placed with [the proposed adoptive parents], [the child] would not be able to reconnect in the long term with her [mother’s]...culture. She accepted that some children had positive outcomes in trans-racial placements, but thought that the research (particularly Brooks & Barth, 1999, on which Professor Katz relied) overestimated the positive outcomes: first, by interviewing only the adoptive parents but not the children, or if the children were interviewed at all only while they were unable to speak negatively about the adoptive parents; and secondly, by prioritising material and educational benefits while minimising the importance of a sense of self. She observed that a positive outcome appeared more likely if the adoptive parents lived in multi-racial areas where the children became familiar with role models of their own ethnicity.

[76] It was her opinion that placing [the child] with parents who were ethnically different compounded the difficulties in adoptive parenting: to leave [the child] in the care of [the proposed adoptive parents] risked “genealogical bewilderment and trauma of separation from birth parents”. In particular, [the child] would not have the benefit of the cultural traditions to which she was entitled and which could not be passed down to those outside them; nor would she have the benefit of an extended family or peer group with which she was visibly similar, yet she would continually be identified by others as part of that group; and she was likely to encounter racism, but might feel unsupported by, or unable to share it in depth with, her adoptive parents, who would not have known the same experience. These factors would become increasingly significant in adolescence and adulthood, and

may affect [the child’s] sense of self, and would restrict the traditions that she would in turn be able to pass on to her own children.”

In summary, some of the research and the qualitative study of Ms. Armstrong and Slaytor (supra) has been interpreted to mean there is an increased risk of family breakdown in the adolescent years for out of country placements in Australia. The only empirical data of any import suggests that there is a potential problem, however, the majority of adoption placements are beneficial, although a greater number of disruptions can be expected in long term fostering compared to adoptions. However, it should be recognised that the two sources of evidence come from disparate times and the process whereby children were adopted prior to 1991 in most countries of the world has changed in the intervening years and certainly by the time of Rushton’s review in 2003. For example, since 1991 the principle that children should not know much about their biological origins has changed considerably. It is unknown what impact, if any, there might be in the behaviours such as expressed of maintaining contact between the adopted child and her birth family and her culture.

Maintaining contact with the mother and her culture may increase the likelihood that the child will feel that she has been estranged from her identity of origin. On the other hand maintaining such contact may decrease the likelihood because the child will feel less challenged and less need to go in search of her identity.

The judgment of Justice Brereton in Director-General Department of Community Services v D (supra), also referred to evidence from an African born (black) sociologist:

“[77] Ms Julianna Ampofowaa Nkrumah holds a Bachelor of Science with Honours in sociology and social anthropology, and a Masters in Sociology, from the University of Zimbabwe. She was born in Ghana and lived there until 24 years of age, when she came to Australia, where she has lived for 17 years. She has studied African ethnicities and cultures. She is now Senior Health Education Officer at the multi-cultural health unit of the Sydney West Area Health Service. In that capacity she has worked with nine African communities in Australia, including the Sudanese ..... community. She is not Sudanese, let alone [of that community], and concedes that this limits the depth of her knowledge of [that] culture.

[78] Ms Nkrumah opines that the long-term effect of [the child] being raised apart from her natural family and culture is that she will lose her biological culture and be culturally separated from her mother and extended family. She explains that to be part of an African culture one has to have a reference point back to a specific cultural group. If brought up by [the proposed adoptive parents], [the child] will have the physical appearance of an African, but will not be able to operate as an African within an African community. She says that if [the mother’s] family were aware of these proceedings, the family would find it very difficult to accept the role of adoptive parents in raising [the child] as an adopted child, and that lack of acceptance would create barriers between [the child], the adoptive parents and her family of origin.”

The culture of origin of the child and mother in that case is an ethnic group in Sudan. This evidence has relevance, and is analogous to the discussion extracted from the Full Court decision in Donnell &
Protecting the Rights of Indigenous and Multicultural Children and Preserving their Cultures in Fostering and Adoption

Mark Anderson, BA LLB


If the cultural issues take priority over the attachment to persons who are patently ethnically different to the child, and longer term issues of identity are weighted as more significant then the following extract by His Honour Justice Brereton as to what is possibly the best practice may be relevant:

“[217] As to the balance of risk between raising a child apart from her mother and culture against that of disrupting an established secure attachment, the dilemma is not a novel one. Ms Prevatt Goldstein and her co-author, in “Race and Ethnicity”, address it in chapter 11, entitled “Some Practice Dilemmas”: ’

‘The child is settled with white foster carers. Surely it will do more harm than good to remove her?

Practitioners need to strenuously avoid placing children in short term situations which do not meet their needs, be diligent and speedy in seeking appropriate long term placements, and work with short term carers and children to enable children to move on and make new attachments. Practitioners need to assess whether the quality of the attachment on the part of the carers is based on the reality of the child as a black child and if it can meet the developing needs of that child into adolescence and through to adulthood. Practitioners need to assess the ability of the carers and their extended family to provide the environment identified in section 10 (see sub-section entitled “Placement with a white family”). Practitioners need to recognise that the child’s attachment may need to withstand growing feelings of alienation and difference as the child develops into adulthood and meets institutional as well as personal racism.

Decisions need to be based on the individual situation. If the decision is that the child should stay, practitioners need to recognise the possible long term consequences for the child and ensure that the carer has the social work support and resources to meet the needs of the child as fully as possible. If the decision is to move the child, practitioners need to locate this in the social work task of removing children from environments that do not meet their basic needs, engage with the feelings of loss of both the child and the carers as well as with their own feelings of contributing to disruption and loss while acknowledging the long term benefits to the child.”

The child’s best interests may therefore be generally considered by the courts in the short to medium term to be enhanced by placement with the person(s) with whom the child has the strongest attachments. The longer term issue is more problematic and not determined with confidence.

Practical matters for preserving the child’s culture and ethnic heritage

It is suggested that the preceding discussion leads to the conclusion that it is essential in order for people to have a full and cohesive sense of self, that they are able to develop their cultural and ethnic identity while they develop their individual identity and as they grow and develop from

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62 Director-General Department of Community Services v D (supra) at par [217].
children into adults. If a person is denied access to their culture and are not able to develop that cultural identity through the process of socialisation which occurs within families and communities, the person will experience greater difficulties as an adult in forming a positive self identity and esteem. It is well documented that growing up outside of your cultural and ethnic community and/or with a family who are culturally and ethnically different may have detrimental effects upon the social and emotional growth of an individual and is highly likely to result in personality and social difficulties for the individual.

There are agencies which specialise in placement of Aboriginal children with Aboriginal authorised foster carers such as Kari Aboriginal Resources Inc (KARI\(^63\)). Additionally, specialised foster care is now able to be arranged with different ethnic groups by relevant child welfare authorities. Such resources are not unlimited, and great pressure is placed upon those organisations to find an appropriate cultural and ethnic matching for children with out-of-home carers. Examples are African carers, and Muslim carers for children from Muslim communities. These arrangements are preferred for preserving the culture of Indigenous and multicultural children in out of home care.

Based upon the preceding expert evidence and judicial findings it is suggested that a practical way to encourage preservation of the child’s culture and ethnic heritage, if placement cannot occur in the same cultural, ethnic or racial group, is summarised and paraphrased in the following paragraphs. The summary refers to a black child living in a white dominant culture, but is just as applicable for other minority culture of origin children. (The summary adopts the wording of the experts and their ideas as acknowledged during the earlier part of the paper, but any errors are this author’s.) This listed summary is not exhaustive, may overlap, and is not immutable.

1. There is agreement that one’s original culture can only be learnt from someone of that culture, and that people cannot teach what they would first have to learn themselves; a one-off training program is unlikely to engender any fundamental and lasting change in attitude and the careful assessment by aware and competent workers of carers’ current attitudes, with examples, is needed.
2. A contact arrangement which would enable the child to act upon any biological and genealogical ties, and the desire to be with her own people which may become stronger in her adolescence. The benefits of contact in reducing sense of abandonment and loss of parental care and culture of origin are the desired effects of such an arrangement. It would require openness to the child, openness to her extended family so the child has the opportunity of knowing not just one way of being black, but a range of ways so that she can develop her own way, which would be part of her wider Australian identity. In the event of the child having contact with the birth mother there would be ability throughout the child’s childhood and teenage years - when issues of identity usually become more important - to ask questions, and that would have an important bearing on the outcome of the placement. It would be very helpful for the child to have a good relationship with her birth mother,

\(^63\)The KARI OOHC Program is exclusively for Australian Aboriginal children and young people. KARI aim to provide children and young people with Aboriginal carers and families to facilitate an environment where the child or young person has a connection with their culture. KARI also provides various programs and workshops that have strong culture content. KARI prides itself on the high quality care that is provided to children and young people and the professional support that is provided to the Aboriginal carers who provide that care day to day. See http://www.kari.org.au
which would make contact and other issues about explaining culture and discovering heritage easier.

3. There should be access to positive black/non-white attachment figures which the child can internalise.

4. The child should be raised in an environment where the black child is normal rather than exceptional.

5. The child should be exposed to a range of black role models coping with everyday life.

6. There should be people or organisations that are a resource for ways of coping with and challenging racism experienced by the child.

7. There is a requirement that any carer in whose care of the child is placed must be able to demonstrate an active understanding of the developing needs of the black child.

8. The carer must have an understanding of racism.

9. The carer must have a commitment to challenging racism and discrimination.

10. The carer must be committed to the provisional development of networks which can include those of their own extended family or of their child’s birth relatives.

11. The carers should enable the child to have access to cultural frameworks which will provide continuity for the child.

12. The carers should endeavour to live in an area where there were people from the child’s background and/or from other minority groups. In other words, giving up some of the privileges of being part of the dominant culture, and openness to the minority community.

13. The carers should engage positively with the child’s family, if available in the community.

14. The carers should undertake to promote positively the child’s heritage.

15. The carers should make efforts to mix with people of different races and religions.

16. The carers should openly discuss the child’s background, and acknowledge and address racism.

17. It is important to differentiate between culture on the one hand and race on the other. Both need to be addressed by the carer, but they raise different issues. Culture refers to the practices and beliefs of the child’s community of origin, and the task for carers is to ensure that children have access to that culture and do not see it as strange or alien. Carers are not in a position to bring the child up in the child’s own culture of origin, can never substitute for that experience, but they can enhance the child’s knowledge and identification of his or her community of origin.

18. Race refers to the child’s physical characteristics – skin colour, hair type etc. The issue is that, growing up in a white society with a high level of racism, the child is very likely to encounter various forms of racism from bullying or teasing in school to perhaps discrimination in the work place. The job of carers is to help the child develop beliefs and strategies which help her to mitigate the effects of racism and address these. In particular the child needs to be encouraged to have a sense of pride in her own community and not to believe that they are inferior, and that it is the racists that are at fault. Although this task seems straightforward it can be quite complex. The child may unconsciously internalise racist beliefs, for example blaming her racial origins for failure at school or rejection by friends, and it can be difficult for parents who have not experienced racism to help her with these feelings. It is therefore important that the parents have access to advice and support in this respect.

19. The presence of a sibling from the same culture is a positive factor.