Prioritising identity and Culture for Aboriginal and Torres Strait Islander Children:

1 I would like to begin by acknowledging the Gadigal people of the Eora Nation – the traditional custodians of the land where I sit today, and pay my respects to their Elders, past, present and future.

2 In November 2019 Professor Megan Davis delivered her final report which involved an independent review into Aboriginal children and you people in out-of-home care in New South Wales aptly entitled 'Family is Culture'. The review was principally focussed upon the Children and Young Persons (Care and Protection) Act 1998 (NSW) (Care Act) and to the processes prescribed under it.[1]

3 There is an obvious overlap with issues arising under the Care Act and the Adoption Act which are apparent. For example both Acts define Aboriginal children in a substantially similar way and both have bespoke provisions dealing with the placement of Aboriginal and Torres Strait Islander Children in care or for adoption.[2]

4 Professor Davis reported on the mistrust by Aboriginal peoples' of the Department of Communities and Justice and other government systems as well as their concerns about the removal of children

[1] Family is Culture, Review Report, 2019, Independent Review of Aboriginal and Young People in OOHC.
[2] Adoption Act, 2000, s.4(1) and Children and Young Persons (Care Act) 1998, s.5 (1).

from families and their anger at the way in which many present day removals are effected in practice.[3]

5 To put those concerns into some context 1,144 Aboriginal children and young people were placed in out-of-home care between mid-2015 to mid-2016. And further she reported that on the latest government statistics released in January 2016, 39% of children in foster care in NSW were Aboriginal, 54% of children in NSW residential homes were Aboriginal and 50% of the average daily detention population of children and young people aged 10 to 17 years of age in NSW was Aboriginal. The Aboriginal population in NSW in 2016 was 3%. These figures are alarming to say the least.[4]

6 However prior to addressing the topic posed it is first necessary to consider the definition of Aboriginal or Torres Strait Islander child and what proof is required before the Court is satisfied a child should be so described. For the purpose of this paper I propose to focus on the particular provisions of the Adoption Act.

7 That Act does not treat all children alike. However in the case of a child who is placed with the view to adoption the Supreme Court is required in every case to consider the cultural heritage of the proposed adoptive parent and whether he or she will assist in the preservation of the cultural heritage of the child.[5]

8 And no matter what child is the subject of an application for adoption and what particular provisions may or may not otherwise

[3] Family is Culture, Chapter 1, Overview p.3
[4] Family is Culture, at p.7
[5] Adoption Act, ss.32 and 35

apply the primary consideration in every case is the best interests of the child which takes priority over all else.

9 In the case of an Aboriginal or Torres Strait Islander child (as defined) a matter to which I will return, in addition to having regard to the best interests of the child, the Adoption Act requires the Supreme Court to apply "Aboriginal child placement principles" (likewise in the case of a "Torres Strait Islander child", the Court is required to apply the "Torres Strait Islander child placement principles").[6] Both follow an identical protocol.

10 Broadly speaking the effect of the Aboriginal child placement principles is, for first preference to be given for the placement of an Aboriginal child with parents from an Aboriginal community to which one or both of the child's parents belong, or if that is not practicable or not in the child's best interests, for the child to be placed with adoptive parents from another Aboriginal community. If it is not practicable or not in the child's best interests, and the child is to be placed with non-Aboriginal prospective adoptive parents, the s.35(3) applies.

11 That provision mandates that an Aboriginal child is not to be placed with a non-Aboriginal prospective adoptive parent unless the Court is satisfied the prospective adoptive parent has the capacity to assist the child develop a healthy and positive cultural identity and has knowledge of or is willing to learn about and teach the child about the child's Aboriginal heritage and foster links with that heritage in the child's upbringing and further has the capacity

[6] Adoption Act, s.34

to help the child if the child encounters racism or discrimination in the wider community.

12 Special provision is made in s.35(4) for children with one Aboriginal parent and one non-Aboriginal parent. In that case the child "may be placed with the person with whom the best interests of the child will be served having regard to the objects of the Act".

13 It is obvious from the above that where the Aboriginal child placement principles apply, those principles give a measure of primacy to the preservation of the Aboriginal cultural heritage, in particular by requiring the adoptive parent to be from an Aboriginal community if that is possible. These principles were developed and first formulated in connection with the placement in care rather than adoption and no doubt as a response to the fact that many children were taken away from their homes and placed with persons who did not share that cultural heritage with the consequent likely loss of that heritage.

14 The legal test however for who is or is not an "Aboriginal child" has been the subject of some uncertainty until recently clarified by the New South Wales Court of Appeal in Hackett (a pseudonym) v Secretary, Department of Communities and Justice[7]. I should not be coy, my analysis of the legislation in an earlier case of Fischer v Thompson (Anonymised),[8] was expressly disapproved of by the Court of Appeal.

[7] [2020] NSWCA 83
[8] [2019] NSWSC 773

15 In Hackett the Court of Appeal importantly decided that to be an Aboriginal child it has to be proved that the child is either descended from an ancestor who was a member of the Aboriginal race, and identified as an Aboriginal person and was accepted by the Aboriginal community as an Aboriginal person, (s.4(1)) or the Court may determine pursuant to s.4(2) that a child is an Aboriginal for the purposes of the Act if it is satisfied that the child is of Aboriginal descent.

16 The consequence of that decision is that if there is factual basis for proving descent no other requirement will be necessary provided on the available evidence the Court can be so satisfied.

17 In addition the Court in Hackett made clear that there is no requirement in order for a child to be an Aboriginal child for the child to have a specified proportion of genetic inheritance[9].

As Leeming J.A. said in Hackett at [53]:

> If for example seven great grandparents of a child were Europeans or Chinese, and the eighth was an Aboriginal as that term is defined, then the child is an Aboriginal child as that term is defined. It is also clear that that will be so even if none of the child's parents or grandparents identified as or were recognised as Aboriginal.

18 The Court also made clear that descent is different from race. The work to be achieved by s.4(2), is to permit a Court to determine that a child even if no ancestor satisfied the three-limb definition in

[9] Hackett, at [53], per Leeming J.A.

the Aboriginal Land Rights Act is Aboriginal for the purposes of the Act.[10]

19 It must be recalled that in Hackett, the Court was satisfied that the child in that case was Aboriginal because at least the evidence according to Leeming J.A. at [90], "comfortably establishes that a man established to have been one of Belinda's great-great-great-grandfathers who was born around 1895, had been supplied rations at a reserve by a contractor retained by the Aborigines Protection Board in February and March 1919 and is recorded in a local newspaper dated 26 November 1915 as having pleaded guilty to a charge of disorderly conduct at the same reserve in 1915 ". He also observed that there was other evidence which was referred to by Basten J.A. at [163]-[167].

20 The case brought into focus the terms of S.126 of the Act permitting the Court to act "on any statement, document, information or matter that may, in it's opinion, assist it to deal with the matter of the proceedings or before it for determination whether or not the statement, document, information or matter would be admissible in evidence"[11]. Reference was also made to Practice Note SC EQ 13 which purports somewhat to qualify that section although it was observed to adopt such an approach would tend to frustrate the Aboriginal child placement principles and could lead a judge into error; see Basten J.A. at [162].

21 The Court of Appeal said that in considering whether to make a determination under s.4(2), a court is expressly empowered to

[10] Hackett at [86], per Leeming J.A.
[11] Hackett at [161], per Basten J.A.

consider a broad range of material and where appropriate draw inferences from material which may not be unequivocal. Historical material based on oral tradition rather than documentary records may well suffice and arguably does not involve a party having a burden of proof and the degree of satisfaction should take into account the purposes of the proposed determination; see Basten J.A. at [173].

22 It should also be recalled that although, s.4(2) gives the Court authority to make such a determination if it is satisfied that the child is of Aboriginal descent, the Court is not obliged to make such a determination and in that regard the power is properly to be regarded as discretionary.[12] The consequences of a determination are obvious. Leeming J.A. again makes this clear at [82]. Put another way and only by way of example even if the relevant parties agree such a determination should be made the Court whilst it would clearly take that fact into account and more importantly would wish to know the reasons for that position being adopted the Court would not in the end be bound by the parties' consent; Pantorno v R[13].

23 What all this means is that the issue needs comprehensively to be addressed at a very early stage of the adoption or care process.

24 How then can that be achieved? Clearly all relevant persons at any stage of either process should be mindful even only as a possibility of a child being either Aboriginal or Torres Strait Islander. As Basten J.A. points out in Hackett, simply answering a question on

[12] Hackett at [82], per Leeming J.A.
[13] (1989)166 CLR 466 at 473

a form which for example invites the choice of a yes/no answer is as he puts it is for many purposes misconceived. He says the question does not lend itself to a "binary answer"[14], because it requires a declaration of ethnic identity which may have far-reaching and variable consequences.

25 Basten J.A. at [152] further observed that for many their backgrounds have been obscured by reason of the shame and/or the embarrassment of previous generations denying such connections. He also observed for example that the nature of Aboriginal identity was sometimes misunderstood by "white persons" in failing to understand that a child of mixed parentage could or should identify as Aboriginal.

26 Acknowledging similar problems the President of the Children's Court, Judge Johnstone twice in 2013 criticised the conduct of some caseworkers and practitioners in their approach to the identification of Aboriginal children and hence the application of the Aboriginal placement principles.[15]

27 In her November 2019 report, Professor Davis was highly critical of the way in which the principles were being implemented. Those criticisms included observations that in some cases the principles had been ignored or applied in a narrow and tokenistic manner with often differing interpretations of the principles. She also observed that there were no sanctions if they were not complied with. This aspect of her report is discussed in the judgment of Basten J.A. in the Court of Appeal at [170].

[14] Hackett at [151], per Basten J.A.
[15] Hackett at [170], per Basten J.A.

28 The issue of identity not only needs to be dealt with as soon as possible and not just on the basis of box ticking. A comprehensive assessment needs to be made which involves deployment of resources but after all there is a good deal at stake.

29 Questions need to be posed by suitably qualified persons who may be able to detect whether for example there are factors obscuring a child's heritage and hence his or her's culture. It is an express directive of s.35(1) of the Act that Aboriginal people be given the opportunity to participate with as much self-determination as possible in decisions relating to the placement for adoption of Aboriginal children. Every stakeholder is committed by law to ensuring that the overarching legislative goal is met, namely that steps be taken and decisions made that are in the best interests of the child.

30 If any party including the Secretary has any doubt about the particular issue of identity it can and should be raised with the Court at the earliest opportunity and if a determination is sought under s.4(2) then the evidentiary basis for such an order should be as fulsomely presented as can be. In that event it may be the Court takes the view that further evidence may be required. But proactivity is required.

31 From Chapter 16 and following of her report Professor Davis deals with various aspects of placement principles. Passing reference only is made to the definition of Aboriginal child in the Care Act as clearly the Report was written before Hackett.

32 In these chapters as I have already observed there are many criticisms including a failure to implement the placement principles and the training of caseworkers. It is not the scope of this discussion for me to comment on those matters. Those issues clearly have been or are hopefully being addressed.

33 And as I have already said it is clear that the early identification of the child as an Aboriginal/Torres Strait Islander child is of course crucial in ensuring that the placement principles are to be given their intended effect. The Adoption Act in particular requires explicitly that the Secretary or principal officer make reasonable inquiries whether a child to be placed for adoption is Aboriginal[16].

34 Further to ensure that the legislation be given it's intended effect requires the careful selection and appropriate training of employees. It is to be hoped that Professor Davis's report with it's many recommendations is thoroughly and comprehensively addressed and implemented in a timely and constructive fashion.

****

[16] Adoption Act, ss.33 and 34