IN THE CHILDREN'S COURT OF VICTORIA

FAMILY DIVISION

APPLICANT: Department of Human Services

CHILDREN: K siblings

MAGISTRATE:	Belinda Wallington
DATES OF HEARING:	16, 17, 18, 19, 20, 23, 24, 25 July 2012, 3, 4, 5, 7 September 2012 and 26, 29 November 2012
DATE OF JUDGMENT:	8 February 2013
CASE MAY BE CITED AS:	DOHS and K siblings
MEDIUM NEUTRAL CITATION:	[2013] VChC 1

REASONS FOR DECISION

Catchwords: Child protection – applications to extend guardianship to Secretary orders – Aboriginal children – legislative provisions – regard to advice of relevant Aboriginal agency – maintenance of culture and identity – continuing contact with Aboriginal family, community and culture – cultural support plans.

APPEARANCES:

PARTY	COUNSEL
Department of Human Services	Ms Mendes de Costa
Mother	Ms Benson
Father	Mr Hirst
Aunty B	Mr Halfpenny
Foster carers Mr & Mrs M	Ms Jones
R	Ms Steiner

Introduction

This case involves long-term permanent planning for five very young Aboriginal children aged between two and seven years old: R aged seven, T aged six, J aged five, N aged four, and K aged two.

All five children have been on Guardianship to Secretary Orders since 7th September 2010 as a result of their parents at that time being non-contactable. The Department of Human Services has applied to extend the orders for a period of 24 months.

The children have never resided together since being placed in out of home care. After a short term placement, J and N were placed with non-indigenous carers, Mr & Mrs M. Following K's discharge from hospital after her premature birth, Mr & Mrs M took on her care as well. R and T reside in a separate non-indigenous placement with Mr & Mrs R.

R and T's placement with Mr & Mrs R is not permanent. Mr & Mrs R have always intended to offer therapeutic foster care until a permanent placement, now well overdue, is organised. If the Court extends the Guardianship Orders, the Department intends to test a transition of R and T into the care of the Mr & Mrs M. If this is unsuccessful, the Department intends to seek alternative non-family permanent carers. The children's mother supports the Department's case plan.

The children have been in their current placements for three years. Mr & Mrs M were advised very early in the children's placement with them that it was likely to be a permanent arrangement.

The children's father wishes to have all five children placed in the care of his sister (Aunty B) in Sydney, NSW. He has applied for a revocation of the five Guardianship Orders and for Supervision Orders to himself with a condition that he resides with his sister. Though the application for revocation was not formally withdrawn, it was implicit in the way the father's case was run, and confirmed in Mr Hirst's written submission, that he wished the children to be placed on Permanent Care Orders to Aunty B.

R, who is only seven but of a maturity where she may give instructions under our current system, initially told her lawyers she would like to live with all her brothers and sisters, with Aunty B. More recently she has indicated a preference to live with Mr & Mrs M.

Background

In October 2009 Child Protection workers discovered the four oldest children (K not yet having been born) alone at home, filthy and with scarcely anything to eat. It had been at least two days since they had seen their mother; their father had abandoned them some days earlier.

Once placed in care the children did not see their parents for some time. Eventually access was established but it was sporadic and it was clear that the parents were not in a position to resume care of the children.

The children's paternal aunt (Aunty B) rang Child Protection on the 21st October 2009 to offer to care for the children. She flew down from Sydney and was quickly assessed as a suitable carer.

Although the foster care agency had been unable to place all four children together, Child Protection planned that Aunty B would take all four children at

once. Given she was living in a two bedroom flat and had other family obligations, it is not surprising that she said she was unable to take them at that time.

Thereafter - despite further indications from her that she would like to be able to care for the children – the Department's attention moved away from Aunty B; so much so that a case file note in June 2010 from the then protection worker refers to her as "an aunt in Sydney – I don't know if she is a blood relative or not".

Not a lot is known about the early childhood of R, T, J and N but it is clear that they were subject to profound neglect and traumatised by their exposure to violence. R has recounted her memories of seeing her mother stabbing her father and "Dad trying to break through the door and Daddy punching Mummy's teeth and punching T". Early on in care both girls exhibited sexualised behaviour and their first placement broke down when T assaulted the carer's grand-child.

When J first arrived at Mr & Mrs M's he growled, screamed and pointed rather than spoke, and hit the walls and windows. Though he has made considerable progress over the last three years, he continues to struggle with social skills and emotional regulation and is often aggressive towards N. On access visits this aggression has at times extended to T.

By her mother's account, N spent the first nine months of her life, before she was removed from her parent's care, either in a pusher or in the cot the Department had provided for her. The mother could not recall if N had eaten any solids during those nine months. N could not sit up on her own when she arrived at Mr & Mrs M's at aged twelve months. She is still unable to maintain a seated position in a chair without the assistance of a step and falls over frequently. At nearly four she is not toilet trained and has never initiated going to the toilet on her own. In times of stress, she disassociates and is unlikely to cry or express hurt.

Contact between all five children has been chaotic and limited to short periods of time although there has been some progress recently.

The parents' contact with their children has become more consistent over time but has been restricted to one hour every two months. The mother's lifestyle is

transient and she is not seeking an increase in her current access. The father has undergone rehabilitation for substance abuse but an acquired brain injury continues to compromise his capacity to care for the children.

The Applications to extend the Guardianship Orders

Given there is no prospect of reunification of the children with their parents, and no efforts made to foster relationships with their extended family, it was no wonder that Mr & Mrs M accepted Ozchild's advice that the three children in their care were likely to be placed permanently with them. It is indisputable that Mr & Mrs M have done everything in their power to provide for the children and address their various special needs. More than that, they passionately love the children and the children are emotionally attached to them.

Unfortunately the Department of Human Services and Ozchild, the foster care agency, seem to have forgotten that the K children are Aboriginal; a matter which is not just a "factor" to be taken into account but intrinsic to the issue of the children's best interests.

Despite the existence of a "Cultural Competence Framework", the provisions in the Children, Youth and Families Act 2005 (CYFA) that have specific application to Aboriginal children have been consistently ignored. There has been no Aboriginal Family Decision Making meeting convened despite the children being in out of home care for three years, nor a Cultural Plan - legislatively mandated for Aboriginal children on Guardianship to Secretary Orders.

In September 2011, Aunty B was assisted by Mr GK, of the Victorian Aboriginal Child Care Agency (VACCA), to become a party to the proceedings with a view to caring for all five children. In order to establish a relationship with them, she has been travelling down by train from Sydney at her own expense, a twenty-two hour round trip. She offered to travel down for access on a fortnightly basis but Ozchild offered contact that was limited until very recently (it is not unfair to say at the Court's door-step) to monthly visits for an hour at a time (for all five children).

Having circumscribed her contact, the Department requested the Court to obtain a bonding and attachment assessment from the Children's Court Clinic.

In the July 2012 school holidays, between the directions hearing and the commencement of the Children's Court contest, the Department rented a Quest apartment for several days in order that Aunty B might have extended access with the children. This caused some consternation to Ozchild and Mr & Mrs M despite the Department denying it was for the purpose of assessing Aunty B as a potential carer. The reasons for this unexpected allocation of resources remain somewhat opaque. Ms AK, the current allocated protection worker, said under cross-examination that it had always been the intention of the Department to observe some of the accesses between Aunty B and the children. This had not occurred and the July access was to remedy this omission.

The Aboriginal Child Placement Principle. Why have it? What does it mean?

> "Family is the cornerstone of Aboriginal and Torres Strait Islander culture and spirituality. The maintenance of connections to family and community forms the basis of the development of the Aboriginal or Torres Strait Islander child's identity as an Aboriginal or Torres Strait Islander person, their cultural connectedness, and the emergence of their spirituality".[1]

[1] Achieving Stable and Culturally Strong Out of Home Care for Aboriginal and Islander Children, Secretariat of the National Aboriginal and Islander Child Care Policy paper, 2005 at p8.

> "The Aboriginal Child Placement Principle was established to ensure that Aboriginal children's connection to family and culture is promoted as a means of ensuring their safety and well being. However it was never the intent of the Aboriginal Child Placement Principle to place children with members of their family or community who presented a danger to them."[2]

The Aboriginal Child Placement Principle, previously accepted as policy and subject to a protocol between DHS and VACCA, was given legislative force in the CYFA. It is specifically detailed in section 13 but sections 10(3)(c),12 and 14 are also relevant.

Section 10(3)(c) acknowledges that connections with family and community **must** be considered in assessing the best interests of Aboriginal children.

> *Section 10(3): In addition to subsections (1) and (2), in determining what decision to make or action to take in the best interests of the child, consideration must be given to the following, where they are relevant to the decision or action—*
> *(c) the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;*

[2] Victorian Aboriginal Child Care Agency's submission to the Protecting Victoria's Vulnerable Children Inquiry, p 11.

12 Additional decision-making principles

(1) In recognition of the principle of Aboriginal self-management and self-determination, in making a decision or taking an action in relation to an Aboriginal child, the Secretary or a community service must also give consideration to the following principles—

(a) in making a decision or taking an action in relation to an Aboriginal child, an opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views;

(b) a decision in relation to the placement of an Aboriginal child or other significant decision in relation to an Aboriginal child, should involve a meeting convened by an Aboriginal convener who has been approved by an Aboriginal agency or by an Aboriginal organisation approved by the Secretary and, wherever possible, attended by—

(i) the child; and
(ii) the child's parent; and
(iii) members of the extended family of the child; and
(iv) other appropriate members of the Aboriginal community as determined by the child's parent;

(c) in making a decision to place an Aboriginal child in out of home care, an Aboriginal agency must first be consulted and the Aboriginal Child Placement Principle must be applied.

13 Aboriginal Child Placement Principle

(1) For the purposes of this Act the Aboriginal Child Placement Principle is that if it is in the best interests of an Aboriginal child to be placed in out of home care, in making that placement, regard must be had—
(a) to the advice of the relevant Aboriginal agency; and
(b) to the criteria in subsection (2); and
(c) to the principles in section 14.

(2) The criteria are—

(a) as a priority, wherever possible, the child must be placed within the Aboriginal extended family or relatives and where this is not possible other extended family or relatives;

(b) if, after consultation with the relevant Aboriginal agency, placement with extended family or relatives is not feasible or possible, the child may be placed with—

(i) an Aboriginal family from the local community and within close geographical proximity to the child's natural family;

(ii) an Aboriginal family from another Aboriginal community;

(iii) as a last resort, a non-Aboriginal family living in close proximity to the child's natural family;

(c) any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community.(My emphasis)

14 Further principles for placement of Aboriginal child

Self-identification and expressed wishes of child

(1) In determining where a child is to be placed, account is to be taken of whether the child identifies as Aboriginal and the expressed wishes of the child.

Child with parents from different Aboriginal communities

(2) If a child has parents from different Aboriginal communities, the order of placement set out in sections 13(2)(b)(i) and 13(2)(b)(ii) applies but consideration should also be given to the child's own sense of belonging.

(3) If a child with parents from different Aboriginal communities is placed with one parent's family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her other parent's family, community and culture.

Child with one Aboriginal parent and one non-Aboriginal parent

(4) If a child has one Aboriginal parent and one non-Aboriginal parent, the child must be placed with the parent with whom it is in the best interests of the child to be placed.

Placement of child in care of a non-Aboriginal person

> ***(5) If an Aboriginal child is placed with a person who is not within an Aboriginal family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her Aboriginal family, community and culture.*** (My emphasis)

Historically Aboriginal children have been removed from their families at much higher rates than non-Aboriginal children. The devastating effect on Aboriginal people of being alienated from their indigenous families and culture is documented in the Human Rights and Equal Opportunity Commission (1997) Bringing Them Home – The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. The Report drew on the personal stories of Aboriginal people who had been separated from their families as children, and their subsequent loss of identity; alienated from the dominant white culture but not familiar with or feeling part of the indigenous community.

This theme was effectively articulated by the Full Court of the Family Court back in 1995 in its discussion of the admissibility of evidence as to the experiences of Aboriginal children in mainstream culture:

> "It is not just that Aboriginal children should be encouraged to learn about their culture, and to take pride in it in the manner in which any other child might be so encouraged. What this issue directs our minds to is the particular problems and difficulties confronted throughout Australian history, and at the present time, by Aboriginal Australians in mainstream Australian society. T he history of Aboriginal Australians is a unique one, as is their current position in Australian life. The struggles which they face in a predominantly white culture are, too, unique. Evidence which makes reference to these types of experiences and struggles travels well beyond any broad 'right to know one's culture' assertion. It addresses the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child in the present case, a reality far deeper and more profound than the type of traditionally broad statements of principle referred to by the trial Judge."[3]

[3] B and R and the Separate Representative (1995) FamCA 104 at paragraph 26.

"The constant themes from the writings referred to above and from daily Aboriginal experience include the following:-

A. In Australia a child whose ancestry is wholly or partly indigenous is treated by the dominant white society as 'black', a circumstance which carries with it widely accepted connotations of an inferior social position. Racism still remains a marked aspect of Australian society. Daily references in the media demonstrate this. Aboriginal people are often treated as inferior members of the Australian society and regularly face discriminatory conduct and behaviour as part of their daily life. This is likely to permeate their existence from the time they commence direct exposure to the outside community and continues through experiences such as commencing school, reaching adolescence, forming relationships, and seeking employment and housing.

B. The removal of an aboriginal child from his/her environment to a white environment is likely to have a devastating effect upon that child, particularly if it is coupled with a long term upbringing in that environment, and especially if it results in exclusion from contact with his/her family and culture.

C. Generally an Aboriginal child is better able to cope with that discrimination from within the Aboriginal community because usually that community actively reinforces identity, self-esteem and appropriate responses. Racism is a factor which Aboriginal children may confront every day. Because non-Aboriginals are largely oblivious of that, they are less able to deal with it or prepare Aboriginal children for it.

D. Aboriginal children often suffer acutely from an identity crisis in adolescence, especially if brought up in ignorance of or in circumstances which deny or belittle their Aboriginality. This is likely to have a significant impact upon their self-esteem and self-identity into adult life."[4]

[4] Op cit at paragraph 38.

The Aboriginal Child Placement Principle is not just a simple hierarchy of placement options. Its underlying premise is that of "cultural safety" i.e. that the best interests of an Aboriginal child are fostered by developing and maintaining his/her relationships with their family in ways consistent with their emotional and physical safety. When parents are unable to provide this care, the Aboriginal community looks to members of the extended family such as aunties or grandmothers to do so.

The Victorian Aboriginal Child care Agency defines cultural safety as:

> "the positive recognition and celebration of cultures. It is more than just the absence of racism or discrimination, and more than cultural awareness and cultural sensitivity. Cultural safety upholds the rights of Aboriginal children to:
>
> - Identify as Aboriginal without fear of retribution or questioning
> - Have an education that strengthens their culture and identity
> - Maintain connection to their land and country
> - Maintain their strong kinship ties and social obligations
> - Be taught their cultural heritage by their Elders
> - Receive information in a culturally sensitive, relevant and accessible manner
> - Be involved in services that are culturally respectful."

It is vital that decisions made now in relation to the children in these proceedings do not sacrifice their long –term welfare.

Lakidjeka is the Aboriginal Child Specialist Advice Support Service (ACSASS) responsible for providing consultation and advice to Child Protection under the DHS/VACCA protocol. Child Protection must consult with Lakidjeka on all significant decisions including placement.

Both the previous and current Lakidjeka case managers, Mr GK and Ms LA, advocated for the children to be returned to family (i.e. Aunty B). This was the reason for their reluctance to sign off on a Permanent Care Order for the three youngest K siblings despite their current bonding and attachment to Mr & Mrs M.

The Victorian Children, Youth and Families Act 2005 does not contain the legislative equivalent of section 13(6) of the New South Wales Children and Young Persons (Care and Protection) Act 1998 which expressly states that if a child is placed with a non-Aboriginal carer the fundamental objective is to reunite them with their Aboriginal or Torres Strait Islander family or community. Nevertheless it is implicit in the Aboriginal Child Placement Principle and acknowledged in the DHS Aboriginal Child Principle Placement Guide. It is consistent with the life histories of Aboriginal children in non-indigenous care who often find their own way "home" as adolescents.

In a sense Aboriginal children in the care of non-indigenous families can only be "borrowed" if they are to grow up as strong Aboriginal children. The days of assimilation are over.

An assessment by the Children's Court Clinic was undertaken between the 30th April and 14th May 2012 by Ms AM, psychologist and family therapist. Ms AM's assessment was thorough and well-meaning but in determining what weight to place on it I also take into account that she did not address the issue of cultural safety.

Ms AM premised her assessment on the misunderstanding that the Aboriginal Child Placement Principle only applies when children are first removed from their parent's care rather than laying down principles for Aboriginal children's long -term care.

She also tried to draw a line under the past in terms of Aboriginal children's removal, and concluded that acknowledging identity is sufficient for the purposes of the protection and promotion of culture and spiritual identity as required by section 10(3)(c) of the legislation.

Mr Halfpenny, counsel for Aunty B, called evidence from Dr Y to address the cultural imbalance in the material before the court. Dr Y, who has a doctorate in psychology,

specialises in cross-cultural children's issues. Dr Y is employed by the Department of Human Services, Community Services in NSW: her role does not have a counter-part in Victoria. She is currently working on a presentation to the 2013 Secretariat of National Aboriginal and Islander Child care (SNAICC) conference in June 2013 which highlights "the importance of linking the development of a lifespan positive social emotional development to the protective factor of having a strong Aboriginal identity and argues that removing securely attached Aboriginal children to the non-indigenous carers may not have the same implications as the attachment theory indicated".

Dr Y said in evidence that research showed cultural connectiveness to be a protective factor that would reduce adolescent distress. The CYFA acknowledges this by its placement of cultural connections in the "best interests" provisions of section 10.

When the CYFA replaced the Children and Young Persons Act (1989) in 2007, it incorporated the "fast tracking" of permanency timelines. Whereas under the previous legislation a Permanent Care Order was subject to a pre-condition that a child is out of its parent's care for a minimum of two years, the timeline in the CYFA was expressed to be 6 months. However the incorporation of the Aboriginal Child Placement Principle into the legislation, and the power of veto over a Permanent Care Order given to VACCA in section 323(b) of the CYFA, reflected the recommendation of the Kirby report[5] in relation to permanency planning for Aboriginal children that, all other things being equal, the child's current bonding and attachment should not be an impediment to a reunification to the child's Aboriginal family.

There was tension between the mainstream organisations and Lakidjeka and VACCA on the issue of a Children's Court Clinic assessment. Lakidjeka and VACCA expressed their opposition to a Children's Court Clinic assessment as being culturally inappropriate.

[5] The report of the Panel to oversee the consultation on Protecting Children: The Child Protection Outcomes Project, April 2004.

I acknowledge that proper recognition of an Aboriginal child's right to cultural safety means that an assessment of the children's current bonding and attachment cannot and should not be the be all and end all in determining an Aboriginal child's best interests which must take into account his/her long-term needs in a whole of life assessment.

The need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible maintaining and building their connections to their Aboriginal family and community- section 10(3)(c) CYFA

DHS has published an Aboriginal Child Placement Principle Guide which includes a section on "How will the ACPP affect my day-to -day practice when working with Aboriginal children, young people and their families?" The answers include –

- Make all attempts to ensure the maintenance of contact with family, extended family and community for children and young people who have been placed away from their parents.

- Maximum communication and discussion with families, extended family and relevant community representatives will occur at all stages of Child Protection involvement. Any placement out of home is required to retain the child's relationships with their Aboriginal parents, siblings, extended family, community and culture, whilst ensuring the best interests of the child are maintained.

- Should an Aboriginal child require a placement with a non-Aboriginal family, a detailed Cultural Plan must be developed (as a part of the current case plan and/or placement plan) containing information around ensuring that the child maintains and strengthens their links with their Aboriginal family, extended family and community.

DHS permanent planning practices ordinarily involve a reduction of access between a child and their birth family. Section 10(3)(c) clearly circumscribes these practices when the child is Aboriginal. That this was deliberately done as an exception to the fast track

for permanency planning elsewhere in the Act is reflected in the Hansard debates at the time the Bill was before parliament.

Access arrangements for the K children reveals that section 10(3)(c) has been overlooked or misunderstood. A Child Protection case file note dated 22nd March 2011 documents the Unit Manager, Ms LS's advice to VACCA that due to the DHS permanent care case plan, frequency of access would not be high.

During the hearing Child Protection Team leader Ms MP offered to "double" the father's access which would be an increase of 12 minutes per child every two months to 24 minutes. When Aunty B offered to travel down from Sydney every fortnight to see the children, Ozchild advised that this was not possible because of the children's "commitments". Apart from access with their parents, this boiled down to R and T's weekly dance lesson.

At times during the hearing there was a disappointing undercurrent to the discussion of cultural care which appeared to underestimate the richness of contemporary Aboriginal culture and the importance of an Aboriginal child's connection to it.

Consideration to be given to the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances - section 10(3)(d) CFYA

In the past, R expressed a desire to remain with Mr & Mrs R which was consistent with her attachment to them. She appears to have now understood that Mr & Mrs R will not be her "forever family".

At the commencement of this hearing in July 2012, R instructed her solicitors that she wished to reside with her Aunty B.

On the 23rd November 2012 her solicitor, Ms Grimberg, met with R to update her instructions. At their meeting R said she didn't know where she should live. She did say she didn't want to live in Sydney because she didn't like Sydney. She knew that she had gone to Sydney when she lived with her parents. She seemed

to believe that her father resided with her Aunty B in Sydney, as they were both present together at access. She said she wanted to live with Mrs M "because they have a bigger house than Mrs R".

Her preferences as to where she wanted to reside were:-1. Mum and Dad; 2. Mr & Mrs M; 3. Mrs R; 4. Aunty B.

R is not quite eight, her birthday being the 28th February 2005. She is the child who in October 2009, at aged four and a half, was trying to feed her younger siblings Weetbix (the only food in the house) and generally look after them in the absence of their parents. She continued to feel responsible for her brother and sisters when placed in out of home care. This was a source of conflict between T and R at Mr & Mrs R's and at access when she intervened when J and T were fighting. As she has experienced stability in her care she has come to trust that the adults will look after the other children.

Apart from feeling responsible for her siblings, R wishes to be regarded as a good child and may verbalise what she perceives to be expected of her by important adults. Given her age, R is limited in her ability to weigh all the factors relevant to where she resides and to understand the nuances of the various options.

Ms OR from Ozchild is correct when she wrote in her court report of 26th November 2012:-

"If the transition involves a geographic separation from their younger siblings, it will be very important that their contact with their siblings continue to be reliable and predictable as part of what is needed to reassure them about this change. For R especially, who has felt very responsible for her younger siblings in the past, she will need the reassurance of regular and reliable contact."

The desirability of continuity and stability in the children's care- section 10(3)(f) CFYA

The three youngest children have now been with their carers the majority of their lives. J has been with Mr & Mrs M for three of his five years, N for three of four years, and in K's case from the time of her discharge from hospital after her birth two and a half years ago.

Given the continuity of their care over such a long period, it was not surprising that the Children's Court Clinic Clinician, Ms AM, assessed all three as securely bonded and attached to Mr & Mrs M, in particular Mrs M.

Evidence was given by a number of professionals about the children's "special needs". Perhaps that term has been confusing for the family given the children present as bright and energetic. The evidence is clear though that J and N require, if they are to continue to progress, care and attention of a significantly greater order than children who have not suffered the same history.

Ms JR, J's teacher from (location removed) pre-school, which N also attends, gave evidence. When J first started pre-school he did not socialise with the other children and did not handle conflicts or challenges well, becoming upset or resorting to physical means so that in the yard he needed an adult close by at all times to support him. His fine motor skills were delayed, as was his speech. Though he has made progress, he is not ready for school and a decision has been made for him to have another year at kindergarten to work, in particular, on his conflict resolution skills and his concentration. Ms JR told the hearing that J functions best in a fixed routine which indicates that major changes will be difficult for him.

J and N have been seen by psychological, speech, occupational, and physiotherapy professionals who are part of the (location removed) Health multidisciplinary team.

Ms AB, psychologist, described J's behaviours as aggressive but explained that the basis of the behaviour is an anxiety that requires specific parenting techniques

to overcome. She said that his anxiety affects his ability to learn and it was one of the reasons why a second year at kindergarten was recommended for him. She said J needed stability, structure and consistency within the home and someone who is able to understand the impact of his previous trauma.

Ms AB had also seen N whom she said had suffered similarly but tended toward disassociation rather than aggression, finding it very difficult to make social connections and appearing to live in a world of her own. N finds it hard to express her needs if she is hurt.

Ms GY has been N and J's speech therapist since mid 2010. In two and a half years J had progressed from having significant language delays to mild delays in both expressive skills and articulation. N's difficulties were a bit more complex as she had some difficulties with her receptive language e.g. understanding some questions, and at crèche and playgroup she was mostly non-verbal. Over time she has improved greatly but her articulation delay is still classified as mild to moderate in severity. In order to continue to progress, both children need to practice their language skills at home at least every second day.

Ms ES, the occupational therapist, gave evidence that N suffers from a moderate to significant sensory processing problem that requires long-term work. Though there are different causes for sensory processing problems, Ms ES explained that in the first 12 months of life children learn mostly through their senses. If they do not have a good experience, they will have problems interpreting everyday sensory information such as touch, sound and movement. This has a huge impact on developmental skills, behaviour and emotional responses and learning at school in a formal setting is made much harder.

N's sensory processing problem includes a constant craving for sensory sensations: she plays with water a lot and has been observed covering herself with creams and gels (and unfortunately on one occasion, glue). It manifests itself as well in poor coordination (slipping off chairs, falling over), and difficulties with toileting skills as she doesn't feel the sensation of needing to go nor notice when she's wet. N's auditory processing is compromised and she is more affected by

noise than most children. Visually she is easily distracted and has difficulties completing tasks with multiple steps. Her social participation is also affected.

Ms ES recommended strategies be put in place at home and pre-school to support her sensory processing with occupational therapy support during major transitions, such as starting 4 year old kindergarten and school. She too may well benefit from another year at kindergarten.

J and N have clearly been psychologically damaged by their parents' neglect and violence and traumatised by their removal from their parents (and possibly from their first short-term placement). A transition into a fourth placement in their young lives would not appear to be in their best interests in the absence of compelling reasons.

The desirability of siblings being placed together when they are placed in out of home care –section 10(3)(q) CYFA

Both Mr & Mrs M and Aunty B have offered to have all five children reside with them on the basis that the children should reside together if possible.

The reality is that the dynamics between the siblings can be quite tricky and, as a result, contact between them has been limited by the carers, with small increments in time together occurring during their time in care.

Ms AM, psychologist and family therapist from the Clinic, was asked to address the impact of a long-term separation produced by placing the two older children in a separate placement to the younger three children.

She said "being unlikely to return to live with either parent while still children, and not having established connections with any but one other adult extended family member, it would appear to be the optimal situation, if possible, for all the siblings to reside together and so be given the opportunity of forming supportive sibling bonds as they mature. Additionally, their delight in seeing each other and in spending time together, along with the comments of some of them, indicated the desirability [sic] of them to spend as much time together as practicably possible".

Ms AM noted that with the extreme and special needs of the older four it would have been unlikely that any couple could have provided for all their needs at one time, but she felt that the progress they had made was “so much that, so long as a transition was managed carefully, the eventual reunification of the children into one placement with very committed and well-resourced and supported carers could now be contemplated”.

It is unclear as to what comments were heard or observations made of the children by the clinician or whether the delight and comments attributed to the children were recounted to her by the carers.

One interaction Ms AM did observe in the Clinic was of J inflicting a minor injury to T with a knife which was being used to cut fruit. However she relayed this incident in the context of Aunty B’s ability to supervise all five children together rather than the dynamics of the sibling relationships.

The Australian Childhood Foundation and DHS Southern Region have partnered to provide the Circle programme, a therapeutic foster care programme. Dr B of the ACF has been advising the Mr & Mrs R in their care of R and T. In his evidence to the Court he spoke of how difficult the transition process will be for R and T when they leave the Mr & Mrs R’s care.

When asked if being with their siblings would ameliorate the girls’ anxiety he replied that it was hard to know. He posited the possibility that reunification might work in the opposite direction and create anxiety by taking them back to earlier experiences and that bringing the siblings together would be very challenging. Not directly in response to that question, but when talking of their past trauma being just below the surface, Dr B cited as an example the girls’ emotional response to an incident in which N bled from her head after J pushed her into a coffee table while they were having access with Aunty B. Following this incident there was for a while an increase in aggression between R and T with R being withdrawn and suffering nightmares and T having wetting accidents.

It is far from clear that reunifying the sibling group will be a panacea of any sort.

Aboriginal Family Decision Making meetings - Section 12(1)(b) CYFA

> *A decision in relation to the placement of an Aboriginal child or other significant decision in relation to an Aboriginal child should involve a meeting convened by an Aboriginal convenor who has been approved by an Aboriginal agency or by an Aboriginal organisation approved by the Secretary and, wherever possible, attended by-*
> *(i) the child; and*
> *(ii) the child's parent; and*
> *(iii) members of the extended family of the child; and*
> *(iv) other appropriate members of the Aboriginal community as determined by the parent.*

The legislation states an Aboriginal Family Decision Making meeting "should" take place "in recognition of the principle of Aboriginal self-management and self-determination". During the second reading speech on 6th October 2005, the then Minister stated:

> "A consistent theme of the reforms is to empower Aboriginal families and communities to make decisions about how best to strengthen their families, protect their children and promote their healthy development. The bill promotes the use of Aboriginal family decision making, whereby an Aboriginal convenor facilitates a meeting of family members to plan how to assure children's safety and better promote their healthy development. We want to explore opportunities to use family decision-making processes as early as possible."

There is little legislative guidance as to how sec 12 (1) (b) of the CYFA is to be implemented other than a list of people who may appropriately participate.

None of the Child Protection witnesses appeared to know the process for instigating an Aboriginal Decision Making meeting, nor why one had not been convened at any of the stages in which they had variously been involved. These children have been in out of home care for 3 years and yet no meeting has taken place. It was somewhat surprising to hear evidence in September 2012 from MW, the DHS convenor, give evidence, that an Aboriginal Family Decision Making

meeting was “premature”. When asked why he replied that a meeting could not be held until DHS was in a position to state its “bottom line”. The following question which was whether Aboriginal family decision making meetings were held to produce a pre-determined outcome appeared to be rhetorical. I appreciate that there will often be “bottom lines” relating to welfare and safety issues which must be addressed in any case planning decisions which may result from an Aboriginal family decision making meeting, but meeting bottom lines should not mean that a meeting should only be held when it is likely to sanction decisions already made by DHS.

At the request of the Court, an Aboriginal Family Decision Making meeting was convened during an adjournment in the proceedings.

The efficacy of this meeting was potentially compromised by two factors; first, the fact that it was to be held in the middle of a highly contested court case was likely to cause such a meeting to be fraught, making consensus elusive; secondly, the meeting was taking place a very long time after the children had been removed, a factor which was likely to reduce the efficacy of the process.

The meeting was held over two days on the 15th and 16th November 2012. A large number of interested family members were identified and participated in the meeting, giving several family members their first opportunity to express their opinions and to be introduced to the carers.

Kaurna and Narranga Elder Aunty HL presided over the meeting and co-facilitators were Mr RP, Aboriginal Family Decision Making Community convenor (VACCA), and Mr MW, Aboriginal Family Decision Making convenor (DHS).

The following people participated: the mother, the father, Aunty B, Ms DA (aunt), Ms TD (aunt), Ms KK (aunt), Ms MK (aunt), Ms LM (great-aunt), Ms BE (maternal adoptive grand-mother), Mr & Mrs M (foster carers), Mr & Mrs R (foster carers), Ms LA (Lakidjeka), Ms AK ,(allocated child protection worker), Mr TG and Ms SR (Ozchild), and Dr B (Australian Childhood Foundation).

It was an intensive process and I note the parents found it difficult to cope with. However, the meeting not only produced some consensus as to access needing to be open and flexible if the children were to remain in out of home care, but also provided a wealth of information about family connections vital to the production of an effective Cultural Plan. Given the maintenance/building of an Aboriginal child's connections with family/community is recognised as central to that child's welfare, it appears that the Aboriginal Family Decision Making (AFDM) process could and should inform the Cultural Plan by identifying significant family and community members and the mechanisms for their continuing involvement in the children's lives.

The carers and family members are to be congratulated on their participation in the meeting where the timing was difficult. Mr MW, the DHS convenor, and Mr RP, the Aboriginal family convenor, are to be congratulated on organising the meeting in a timely way and facilitating the involvement of the extended family.

One can only speculate as to the outcome if an Aboriginal Family Decision Making meeting had been held in October 2009.

It is interesting to compare the comments in 1997 in the Bringing Them Home report with those in 2012 in the report of the Protecting Victoria's Vulnerable Children Inquiry.

> "The timing and quality of consultations are not specified. The result is that that discussions typically occur too late in the decision-making process and in too cursory a manner to permit an effective contribution to be made." (1997)

> "The lack of adherence to, or poor progress in implementing, Aboriginal specific provisions in the CYF Act was raised in a number of contexts… Legislation that mandates consultation with an Aboriginal organisation about the protection of an Aboriginal child, adherence to the Aboriginal Child Placement Principle and development of cultural support plans for Aboriginal children in out-of-home care have not translated well into practice …Successfully involving the Aboriginal community in decision

making about Aboriginal children and young people in statutory child protection services through using the Aboriginal Family Decision Making (AFDM) program was identified as a strength that could be further developed." (2012)

Consultations with the relevant Aboriginal agency – section 12(c), section 13(1)(a) and section 323 CYFA

VACCA, an Aboriginal community controlled organisation, was established in the late 1970's to respond to the disproportionate number of Aboriginal children placed away from their families, and to provide support services to Aboriginal children and families. Lakidjeka is one of a number of programmes under the VACCA umbrella and its mandate is to provide advice to Child Protection. By law, Child Protection is required to consult with Lakidjeka on all decisions involving placement of Aboriginal children.

The VACCA file reveals numerous instances where their workers did not feel Child Protection was listening to them e.g.:

> 21st February 2011: "It was clear at the meeting on 18/2/11 that DHS and Ozchild had decided the outcome and was not interested in any input that we could provide for the children culturally."
>
> 18th March 2011: "[the child protection practitioner] does not understand Lakidjeka's role."
>
> 22nd March 2011: "VACCA feels DHS and Ozchild are not interested in anything VACCA has to offer in regards to the interests of the children."

The DHS report of 17th August 2010 refers to "updates" as the means by which adherence to the Aboriginal Child Placement Principle was implemented. When cross-examined as to what these updates entailed, the protective worker replied that they updated Lakidjeka and VACCA by email. In response to a further question as to why there no copies of emails on the DHS file, the worker said that it

was extremely hard to get hold of them so a lot of the contact "was leaving messages".

VACCA's submission to the Protecting Victoria's Children Inquiry commented on the requirement of Child Protection to consult with it as the relevant Aboriginal agency gazetted under the Children, Youth and Families Act:-

> "VACCA's ACSASS staff reports that in their consultations with Child Protection practitioners, a strong commitment to understand the child and family's issues from a cultural perspective is often absent. Sometimes there is no consultation despite the legal requirement. Sometimes advice given by ACSASS staff is ignored. Child Protection practitioners do not consult with ACSASS for a range of reasons:
>
> - Child Protection practitioners may think that ACSASS's role is to advise on culture, rather than appreciate that ACSASS provides advice on risk and safety from a cultural perspective.
>
> - Child Protection practitioners may distrust ACSASS's understanding of risk and safety for an Aboriginal child and may not respect advice given.
>
> - Child Protection practitioners may have misplaced confidence, believing they understand Aboriginal families well enough.
>
> - Child Protection practitioners may lack familiarity with the requirement to consult and their supervisors may not explain and reinforce this requirement through supervision.
>
> - The high turnover of Child Protection staff impacts on this consultative requirement as good working relationships through previous casework partnerships are more likely to lead to future consultations."

One of the difficulties in the consultation process is that despite the recognition in the CYFA of self-determination, the only section which gives VACCA any power to make decisions is section 323(b) which deals with Permanent Care Orders, i.e. at the **end** of the protective intervention process. Otherwise the Act only speaks of "consultation" and the lip-service paid to "consultation" seems to sometimes whittle down to "keep in the loop – when you remember".

Cultural Plan - section 176 CYFA

> *(1) The Secretary must prepare a cultural plan for each Aboriginal child placed in out of home care under a guardianship to Secretary order or long-term guardianship to Secretary order.*
> ***(2) A cultural plan must set out how the Aboriginal child placed in out of home care is to remain connected to his or her Aboriginal community and to his or her Aboriginal culture****.* (My emphasis)
> *(3) For the purposes of subsection (2), a child's Aboriginal community is—*
> *(a) the Aboriginal community to which the child has a sense of belonging, if this can be ascertained by the Secretary; or*
> *(b) if paragraph (a) does not apply, the Aboriginal community in which the child has primarily lived; or*
> *(c) if paragraphs (a) and (b) do not apply, the Aboriginal community of the child's parent or grandparent.*
> *(4) The Secretary must monitor compliance by the carer of a child with the cultural plan prepared for a child.*

The Department of Human Services has defaulted on its obligation to provide and implement a Cultural Plan for the K children for the past two and a half years since the children were placed on Guardianship to Secretary Orders on 7th September 2010.

As was the case in relation to the Aboriginal Family Decision Making meetings, none of the Child Protection practitioners could explain the process for obtaining a Cultural Plan. There was confusion as to whether DHS, Ozchild or Lakidjeka

was to produce the Plan, a mandatory document protecting an Aboriginal Child's cultural safety.

Mr MW explained in his evidence that it was the responsibility of none of the above. Though the legislative responsibility lies with DHS under section 176, in 2011 DHS, following an evaluation by KPMG, had provided funding for VACCA, via its Aboriginal Family Decision Making meeting convenors, to be responsible for the provision of Cultural Plans.

It makes sense that responsibility for the content of Cultural Plans had been given to a culturally appropriate organisation. It was disheartening though when Mr MW advised that not a single Cultural Plan had been produced in the Southern Region in the previous two years. This seemed to cover the period both before and after the new funding arrangement with VACCA.

The VACCA Aboriginal Family Decision Making convenor for the Southern Region is Mr RP. Though he was subject to a subpoena to give evidence in these proceedings, the Court was told that he was either in ill-health or on leave due to bereavement. Given his absence from the proceedings, it remains unknown as to whether the problem in developing Cultural Plans for the Southern Region is due to a lack of capacity, a lack of training, or some other cause. In any event the legislation places the ultimate responsibility on the Secretary of DHS to ensure the Cultural Plans are done.

During an adjournment in the proceedings, at the request of counsel for DHS, the carers of the three youngest K children, Mr & Mrs M, used the DHS Cultural Plan template to prepare a possible draft Cultural Plan.

Mr & Mrs M recorded many of the names of family members and their mobs, plans for contact, ideas for connections to those mobs by introductions to community Elders, and involvement in community activities.

These all indicate the good intentions of Mr & Mrs M in terms of the children's Aboriginal identity. The next step is a more active and demanding aspect of cultural care and involves allowing the children to be immersed in their culture

through spending time with family members: learning the lingo; where they fit in ; establishing those links which will foster a strong Aboriginal identity which in turn will protect them from racism as they grow up. As Mr GK (Lakidjeka) told the court, the Cultural Plan is all about people and is a living breathing document.

The Cultural Plan will need to be specific as to the children's contact with family and community, and contain more than an "agreement in principle to look at" financial assistance from DHS.

The options of placing R and T or alternatively all five children into Aunty B's care.

Aunty B has proved herself to be indefatigable in her efforts to develop a relationship with her Melbourne nephew and nieces. There are no protective concerns as to her capacity to care for children. Child Protection was never involved with her own two daughters. She has taken on the care of her orphaned niece, D, and her grandson, P, when his mother was incapacitated by drugs and when she was in rehabilitation.

When this court case commenced P had returned to the care of his mother after her successful rehabilitation and only 17 year old D remained in the care of Aunty B, with the possibility that she may commence at boarding school. Unexpectedly Aunty B's daughter, A, was sentenced to a term of imprisonment by the NSW District Court, and P has returned to live with Aunty B.

On 21st September 2012, Child Protection in NSW placed two great-nephews, JJ and KJ, into Aunty B's care. JJ and KJ are aged eight and three respectively and, through no fault of their own, had resided in a number of non-indigenous placements where they were separated from each other prior to moving in with Aunty B.

The NSW Family and Community Services Progress Report of 20th November 2012 on this placement described the children as being comfortable and happy at the home of Aunty B and that she was happy and welcoming towards them.

The writer, Ms TW, commented: “Aunty B and the children in her care are managing in their current accommodation but need more space, storage and a backyard.” Aunty B has been approved for a 3 or 4 bedroom house but there are only 2 bedroom places available at the moment. There are no houses with Housing NSW with more than 4 bedrooms and 4 bedroom houses are rare and unlikely to be close to the city or the Northern beaches where Aunty B wishes to reside. This may cause a difficulty because P and JJ attend (location removed) Public School which is culturally diverse and includes a number of indigenous students. Aunty B already endures a lengthy trip on public transport to get them there.

Disappointingly, though a referral has been made to Yallamundi Aboriginal Intensive Family Based Service, that service has advised of their limited capacity at present and they are yet to provide assistance to the family.

There are a number of factors, none related to her quality as a carer, which would cause concern if the five K children went to reside in Sydney with Aunty B.

First, there is no room for them in her current accommodation. The three boys in her care already share a room.

Secondly, the eight children as a group would be comprised of an eight year old, two seven year olds, a six year old, a five year old, a four year old, and two toddlers aged two.

Thirdly, having heard from the professionals who are involved with J and N, it is clear that their optimum care requires care and attention over and above the average four and five year old. Each requires weekly therapy and for practice exercises to occur in the home. Further the nature of N and J’s relationship requires constant vigilance and for each to be kept busy.

Fourthly, all five children, if or when moved from their current placements, will be suffering from some form of separation anxiety with the likely result that the behaviour of each will deteriorate.

It is impossible to envisage how any one person could manage the complexities and challenges of the care of the eight children and a teenager. This is not an indictment of Aunty B who is amazingly resourceful and has an enormous capacity for love, but simply recognition that there are limits to what any one individual can manage.

R and T's circumstances are different from their younger siblings, one important difference being their urgent need for a new, permanent placement. Child Protection NSW does not support placing any further children with Aunty B until JJ and KJ's placement is more established - although in saying this they were responding to the prospect of five more children, two of whom are quite little, and two with special needs.

There was a concern expressed by Ms TW that Aunty B felt compelled to over-commit herself and I wonder if there was some cultural misunderstanding involved. There is a strong ethos of there always being room for one more in the Aboriginal community and Aunty B is the Elder who takes care of people in her family.[6]

The discussion needs to shift from Aunty B's "capacity" to the supports Child Protection in Victoria and NSW can offer her. She has already been resourceful enough to have been placed on a priority transfer for larger accommodation. There have been no resources offered her by DHS to lighten the load – facilitating transport is the first thing that comes to mind.

Kinship care is always going to be in a child's interest unless it is unsafe and no evidence has been given that
R and T would not be safe in Aunty B's care.
Not only would they be with family in accordance with the Aboriginal Child Placement Principle but that family would include their cousins.

---

[6] See e.g. "Room for one more: the life story of Mollie Dyer", programme director of the first Aboriginal child care agency, established in 1977 (predecessor of VACCA).

The mother's instructions

Though the children's mother ceased participating in the Children's Court proceedings after a few days, she did attend the Aboriginal Family Decision Making meeting and her instructions are generally known.

She does not wish any of her children to be placed outside Victoria for fear she will lose contact with them.

Presently there is some tension between the mother and some members of the K family who have assigned the entirety of the blame for the children's removal to her and absolved the father of any responsibility.

Placing all the blame on the mother is not sustainable when examined. Though the parents were separated at the time of removal and the children were ostensibly in their mother's care on 3rd October 2009 when they were removed, their on-going difficulties indicate that the neglect and abuse they suffered was long-standing. Whether or not the children were physically abused themselves, their exposure to the violence between their parents and the chaotic and inconsistent parenting they received has traumatised them and continues to affect them.

A secondary issue in the feelings between the mother and the K family is the issue of J's name. Though his birth was not registered, J was named and known when he resided with his parents, as X, after his father. Sometime after he went into care the mother informed the Department that his name was not only "X" but "XY" (her adoptive parents' surname). He was the only one of the K children to have a different surname. The choice of name seems incongruous given the youngest child, K, is named after her mother, consistently with J/X being named after his father, and that K was given and retains the surname of K despite her paternity having been uncertain. (DNA testing has recently confirmed that the father is not the biological father of K).

J has become almost universally known as J but the history of his naming indicates a residual resentment against the K family which may possibly affect the mother's ability to be objective as to where the children are best placed.

Either way the mother has conceded that her circumstances are such that it is unlikely that her contact with the children has the potential to increase from one hour's access every two months. If R and T do go to live in Sydney with their aunt, there should be no difficulty in maintaining the mother's current access regime.

The Legal Issues

In the Children's Court only the Secretary of the Department of Human Services can apply for a Permanent Care Order in relation to people approved as suitable to have custody and guardianship of a child. This is to be compared with the Family Court system which allows persons other than the parents to file residence applications.

Similarly placement of a child under a Custody to Secretary or a Guardianship to Secretary Order is also the sole province of the Department of Human Services.

In 2006 the Family Law Act was amended and section 61F was introduced. Its import was explored by the Full Court of the Family Court in the case of **Donnell & Davey [2010] FamCAFC:**

> "In (a) applying this part [i.e. Part VII] to the circumstances of an Aboriginal or Torres Strait Islander; or
> (b) identifying a person or persons who have exercised, or who may exercise, parental responsibility for such a child;
> (c) The court must have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture.
> The Explanatory memorandum noted that the purpose of this provision is to ensure that the unique kinship obligations and child-rearing practices (**such as the involvement of extended family**) of ATSI culture are recognised by the court when making decisions about the parenting of an ATSI child. This

provision is consistent with other amendments **to facilitate greater involvement of family members in the lives of children**. (our emphasis added)".

The Aboriginal Child Placement Principle expressed in section 14 of the Children, Youth and Families Act is entirely consistent with section 61F of the Family Law Act, however there is no legislative provision which provides a mechanism for the Children's Court to place Aboriginal children into the care of their extended Aboriginal family on a protection order. Under the Children, Youth and Families Act 2005, kinship carers are no more privileged than strangers.

As His Honour Magistrate Power stated in **DOHS and The D Children (11/01/12):**

"…it follows that this court does not have the power to direct the Department how to exercise its statutory custodial and guardianship rights. So long as the children remain on Guardianship to Secretary Orders, the legal right to determine where they live is vested in the Secretary."

Magistrate Power, having noted that only the Court has the power to **extend** a Guardianship to Secretary Order, went on to say:

"I do not believe it is in the children's best interest for me to hear this case for 11¼ days and then play Pontius Pi1ate at the end by simply extending the Guardianship to Secretary Order as sought by the Department and making a non-binding recommendation……I intend to make such orders as are open to me in law to give effect to my determination that permanent care by [the previous carer] is in the best interests of these unfortunate children."

In order to formulate what order the Court could make in the best interests of the D children, His Honour explored the competing submissions of the lawyers for the children and the carer versus that of DHS as to how section 297 of the Children, Youth and Families Act should be interpreted.

Section 297 reads:

(1) If—
(a) an extension application is made in respect of a custody to Secretary order or a guardianship to Secretary order; and
(b) the order has been in force for more than 12 months and is still in force; and
(c) the Court is satisfied that it would not be in the best interests of the child to be returned to the custody of his or her parent; and
(d) the Court is satisfied that a permanent care order or similar order made by another court would be in the best interests of the child and that there is no likelihood of re-unification of the child with his or her parent—
the Court may—
(e) extend the order for a period ending not later than 12 months after the extension is granted; and
(f) direct the Secretary to take steps to ensure that at the end of the period of the order a person other than the child's parent applies to a court for an order relating to—
(i) the custody of the child; or
(ii) the custody and guardianship of the child; or
(iii) the custody and joint guardianship of the child.
(2) If the Court has given a direction to the Secretary under subsection (1)(f) in respect of an order, the Secretary cannot apply for an additional extension to that order.

The question for the Court in The D Children, as it is in this case, was whether the Court had the power when extending a Guardianship to Secretary Order to direct the Secretary to take steps to ensure that a specific person other than the child's parent applies to a court for an order that the child be in the custody of and under the guardianship of that person.

Magistrate Power found that the Court did have the power to do so (see pages 192- 199), provided that the pre-conditions in section 297(1)(b),(c) and (d) were met.

Ms Mendes Da Costa submitted to this Court on behalf of the Department that the interpretation of section 297 arrived at in DOHS and the D Children was incorrect. She said it was in conflict with section 320 which empowers the Secretary to apply for a Permanent Care Order in respect of persons the Secretary has "approved as suitable to have custody and guardianship of the child". She also pointed out that the decision is not binding on this Court.

It was curious that Ms Mendes Da Costa also submitted that the Court could make a direction in relation to DHS applying for a Permanent care order on behalf of the Mr & Mrs M with respect to J, N and K, when to do so would conflict with section 323(b). Counsel for the Mr & Mrs M, Ms Jones, similarly submitted that the court could direct that DHS make an application to the Family Court with respect to J, N and K in order to avoid the Aboriginal child placement principles in the CYFA.

In my view the decision of Power M is correct. Moreover, the argument put forward in The D Children that the interpretation of a provision of an Act requires a construction that would promote the purpose or object underlying the Act has added resonance in the case of an Aboriginal child where the Court is obliged to implement the Aboriginal Child Placement Principle and where it must be mindful that the making of a Permanent Care Order in respect of an Aboriginal child is expressly restricted by section 323 (b) to cases where

> *"the Court has received a report from an Aboriginal agency that recommends the making of the order."*

The interpretation favoured by Power M thus goes some way to filling that legislative gap between the principles laid out in section 14 requiring the Court to give effect to the Aboriginal Child Placement Principle and the dearth of protection orders in section 275 that would facilitate the Court to place Aboriginal children in accordance with section 14.

The only question for this Court is whether it is in the interests of any of the children for the Court to give a direction under section 297.

I accept, as did Mr Power that such a direction is subject to the following restrictions:

> - Evidence is put before the Court in the hearing of the dispute identifying a person(s) other than either parent who would be appropriate to have a long-term non protective order placing them in the legal position of parent and

- On the basis of the evidence before it, the Court evaluates the benefits to the child remaining in the custody or guardianship of the Secretary of DHS against the benefits of the child being in the permanent care (or similar order) of the identified person and
- The Court forms the view that it would be in the child(ren)'s best interests for the identified person to have a long-term non protection order made placing them in the legal position of parent, rather than for the child to remain on the Custody or Guardianship order sought to be extended by DHS.

Conclusion – J, N and K

What are the best interests of the children? Having had regard to sections 10 and 14, in my view it is in J, N and K's best interests to remain in the day-to- day care of Mr & Mrs M subject to a significant upgrade in the efforts made by DHS, Ozchild and the carers to maintain and promote their connections with their Aboriginal family and community. As they grow the children's Aboriginal identity and connections will become increasingly important to them and as discussed earlier[7] the foundations for their cultural safety need to be built now.

The Aboriginal Family Decision Making meeting resolved that access should be open and flexible. Ms AK, the current worker, appears to have a commitment towards this but the history of the last three years and the treatment of Aunty B by DHS do not give one a great deal of confidence that the commitment will be translated into long-term, sustained practice. In the children's best interests there needs to be substantial contact between the children and Aunty B who is the member of the children's family who has demonstrated a strong commitment to "growing up" these children and increased contact with their father who has indicated his interest in being more involved.

Though I can indicate that the guardianship orders should be extended it would be improper to formally extend them in the absence of the Cultural Plan required by section 176 Children Youth and Families Act 2005.

[7] At pages 6 to 18

The Cultural Plan should include practical arrangements for their continued connection with their Aboriginal family, most importantly their siblings, R and T. Formulation of the practical arrangements, in relation to which DHS will need to guarantee financial support for travel arrangements, will be facilitated by the convening of a further Aboriginal Family Decision Making conference.

Conclusion – R and T

R and T need a home. The major benefit to them of being placed with Mr & Mrs M would be that they would live with their siblings. The major detriment would be that they would not be placed with their Aboriginal family. The uncertainty of a successful reunification of the siblings is a significant factor. There are a number of factors that point to a placement with their Aunty B as being in their best interests including the fact that it is a kinship placement. Though the placement is an untested one, Aunty B has proven herself to be a warm and appropriate carer of children. The emphasis of the child protection authorities should be not on her "capacity" which I find proven, but on what supports she requires to manage the transition of the girls and to accommodate two extra children.

Having their older siblings living with family will assist the three youngest to connect with the family. The good will that exists (and will no doubt increase in the absence of the pressure of court proceedings) between Mr & Mrs M and Aunty B will be beneficial to all five children.

A Cultural Plan will need to be formulated which addresses the transition of R and T into the care of Aunty B with the assistance of Mr & Mrs R and the Australian Childhood Foundation, once again using the Aboriginal Family Decision Making meeting. Once this occurs the Court can sign off on an extension to the Guardianship orders and make a formal direction under section 297 of the CYFA.

Postscript

Following the decision handed down on 8th February 2013, the matter was adjourned until 5th April 2013.

In the interim a further Aboriginal Family Decision Making Conference was held on 20th March 2013 which was attended by the father, Aunty B (by telephone), all four foster carers, Ozchild, the Australian Childhood Foundation, Lakidjeka, VACCA and DHS.

Dr B from the Australian Childhood Foundation had prepared a proposed Therapeutic Transition Plan for the relocation of R and T into their Aunty B's care in Sydney. The meeting adopted this plan which included ongoing contact between the sibling group and with family members and intensive professional support for Aunty B following the transition of R and T to her care. Mr RP from VACCA undertook to provide comprehensive Cultural Support Plans for all five children.

On 6th April 2013 all five Guardianship to Secretary Orders were extended for 24 months.