Parliament of Australia

Senate Community Affairs Committee

Commonwealth contribution to former forced adoption policy and practice

Submission from the

Family Inclusion Network – New South Wales Inc.

January 2011

About the Family Inclusion Network

The Family Inclusion Network in New South Wales (FIN-NSW) was incorporated in 2008. The Family Inclusion Network exists in Queensland, Northern Territory, Western Australia, South Australia, Tasmania, Australian Capital Territory and New South Wales. The Family Inclusion Network Australia (FINA) is currently being incorporated.

The Family Inclusion Network -NSW aims, as with other FIN bodies, to 'promote family inclusive child protection practice' by:

- Providing parents of children in care with a voice;
- Offering education, information and advice to parents about;
    - Child protection legislation;
    - Children's Court processes;
    - Community Services working practices.
- Providing support groups for parents of children in out-of-home care:
- Providing educational input into other community based organisation in regard to the prevention of child abuse and neglect and other child protection issues;
- Making submissions to relevant Commonwealth, state and territory inquiries and commissions;
- Advocating for reform in relation to child protection legislation and legal processes.

Senate Committee terms of reference:

Commonwealth contribution to former forced adoption policy and practice – includes the role, if any, of the Commonwealth Government, its policies and practices in contributing to forced adoptions; and the potential role of the Commonwealth in developing a national framework to assist states and territories to address the consequences for the mothers, their families and the children who were subject to forced adoption policies.

Past policy and practice

In late 2000 the NSW Legislative Council released *Releasing the past* the final report into almost 50 years of adoption policy and practice. The report condemned the practice of removing a child from the mother as soon as possible after birth. It was said that this practice, which aimed to prevent a mother from becoming attached to the child, was detrimental to the mother and child. The finding was that that immediate removal of the child did not prevent the mother from becoming attached to the child (Hansen and Ainsworth, 2008). This finding is hardly surprising given that the attachment process between mother and child is a process that commences not at the moment of birth but while the child is in the uterus.

The outcome of these practices was ‘forced adoption’ because a mother had little or no choice due to social and financial factors that made it impossible for her to retain the care of her child. Fortunately, we have moved away from these practices and most mothers now retain the care of their child.

Recent international evidence

As a result of the Adoption Research Initiative (AR*i*) in England that was funded by the former Department of Children, Schools and Families there are a series of contemporary studies that examine adoption, including what the English described as 'compulsory' adoptions. These are adoptions that are granted without parental consent, in other words 'forced' adoptions.

In 2010 Dr Elsbeth Neil and colleagues from the University of East Anglia published *'Helping birth families. Services, cost and outcomes'* which contains graphic quotations detailing the life long emotional distress that parents experience when their child who had been removed from their care is made the subject of compulsory or forced adoption. The paradox is that child protection authorities in seeking compulsory or forced adoption for a child invariably imagine that they are 'doing good'. Given this evidence from parents whose child is placed for adoption they are at the same time 'doing harm' as the reported parental emotional distress shows. The difficult ethical question then is, should 'doing good' outweigh 'doing harm'?

What this publication shows is that forced or compulsory adoption practices that existed in the period 1950-1998 and were the subject of stern condemnation in the NSW Legislative Council report *Releasing the past* have not disappeared. In fact they shape adoption practice internationally and are now buttressed by the *' the best interests of the child'* thesis (Hansen and Ainsworth, 2009).

The re-emergence of past policy and practice in New South Wales

The Family Inclusion Network - NSW wishes to draw to the attention of the Senate Committee on Community Affairs to amendments to the NSW child protection and adoption legislation that took place in 2006 that reintroduces 'forced adoption' for some mothers.

The NSW *Children and Young Persons (Care and Protection) Act 1998* in section 23 sets out the circumstances that must be present if a child is to be considered 'at significant risk of harm'. The conditions (a) to (e) are cited in full at the end of this submission. The later *Children and Young Persons (Care and Protection) Miscellaneous Amendment Bill 2006* added a new clause (f) to this section. Clause 23 (f) requires mandatory reporters to notify Community Services if concerns arise for the foetus prenatally. The clause is as follows:

> (f) the child was subject of a pre-natal report under section 25 and the birth mother did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

This expanded the definition of when a child is considered to be at risk of significant harm and what constitutes child abuse or neglect.

A new section 106A was also introduced and is as follows;

> (1). The Children's Court must admit in proceedings before it any evidence adduced that a parent or primary care-giver of a child or young person the subject of a care application:
>
> (a) is a person;
>
> (i) from whose care and protection a child or young person was previously removed by a court under this Act or the Children (Care and Protection) Act 1987, or by a court of another jurisdiction under an Act of that jurisdiction, and

(ii) to whose care and protection the child or young person has not been restored, or

(b) is a person who has been named or otherwise identified by the coroner or a police officer (whether by use of the term 'person of interest' or otherwise) as a person who may have been involved in causing a reviewable death of a child or young person.

(2) Evidence adduced under subsection (1) is prima facie evidence that the child or young person the subject of the care application is in need of care and protection.

(3) A parent or primary care-giver in respect of whom evidence referred to in subsection (1) has been adduced may rebut the prima facie evidence referred to in subsection (2) by satisfying the Children's Court that, on the balance of probabilities:

(a) the circumstances that gave rise to the previous removal of a child or young person no longer exist, or

(b) the parent or primary care-giver concerned was not involved in causing the relevant reviewable death of the child or young person.

This section of the Act was enacted to ensure that evidence of the previous removal of a child from a family, and not restored, is admitted to the New South Wales Children's Court. Under section 106A (2) this evidence becomes 'prima facie' evidence that a child or young person who is the subject of the care application is in need of care and protection. This means that in these circumstances Community Services (formerly the Department of Community Services - DoCS) does not have to argue for the establishment of the case. Community Services submission of evidence of this kind automatically establishes that the child is at risk of significant harm.

Adoption amendments

In 2006 there was an amendment to the *NSW Adoption Act 2000.* Clause (d) was inserted into section 67 of that Act. Before the amendment section 67 of the Adoption Act 2000 read as follows.

67 When can Court dispense with consent of person other than child?

(1) The Court may make consent dispense order dispensing with the requirement for consent of a person to a child's adoption (other than the child) if the Court is satisfied that:

(a) the person cannot, after reasonable inquiry, be found or identified, or

(b) the person is in such a physical or mental condition as not to be capable of properly considering the question of whether he or she should give consent, or

(c) if the person is a parent of or person who has parental responsibility for, the child-there is serious cause concerns for the welfare of the child and it is in the best interest of the child to override the wishes of the parent or person who has parental responsibility.

In the *Adoption Amendment Bill 2006* section 67 (1) (c) was altered by omitting 'the parent or guardian' and inserting instead 'the parent or person who has parental responsibility for'. More importantly, clause (d) was inserted into section 67 and is as follows.

(d) if an application has been made to the Court for the adoption of the child by one or more persons who are authorised carers for the child:

(i) the child has established a stable relationship with those carers, and

(ii) the adoption of the child by those carers will promote the child's welfare.

(iii) in the case of an Aboriginal child, alternatives to placement for adoption have been considered in accordance with s36.

When the amendment was passed it was not clear what ‘a stable relationship’ would mean and against what criteria would that be measured.

New policy directions

In July 2008 in a media release the New South Wales Premier and the Minister for Community Services made an announcement, claiming to have listened to foster carers and adoptive parents. The Premier indicated that the ‘system needed to be fairer and streamlined’ and that they would be ‘delivering changes that make adoption simpler’. As a way of encouraging foster carers to adopt children who have been placed in their care much of the $3,000 adoption application fee was to be removed and the foster care allowance was to be retained after the completion of the adoption process. The Premier indicated that other changes would include,

- Simplifying eligibility to increase the focus on parenting capabilities;
- Allowing women to apply for adoption while trying to have their own children through fertility programs;
- Reducing to two years the time step parents and other relatives need to have had a relationship with a child prior to adoption.

(Media release, 11 July 2008)

This clarifies what the phrase ‘established a stable relationship’ contained in section 67 (1) the amended *Adoption Act 2000* means and the time lines that are involved. It is two years.

Since that time legislation has also been passed that makes same sex couples who were already eligible to be foster carers eligible to be adoptive parents. The *Adoption*

Amendment (Same Sex Couples) 2010 Bill was the instrument that facilitated this change. While an act of social justice this has enlarged the pool of potential adoptive parents, and some may become a party to a 'forced adoption'

There is also a question as to whether forced adoption is in contravention of article 21 of the United Nations Convention on the Rights of the Child. Article 21 states:

> (a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parent's, relatives and legal guardians and that, if required, the persons concerned have given informed consent to the adoption on the basis of such counselling as may be necessary.

This article does not seem to allow for the dispensation of parental consent and therefore does not sanction compulsory of forced adoption.

What is happening in practice?

In practice the 106A amendment to the *Children and Young Persons (Care and Protection) Act 1998* Act passed in 2006 is being used with increasing frequency to remove children from a mother soon after birth. In 2009-10 in New South Wales 746 children under the age of one year were removed from parental care. The national figure is 2,051 (AIHW, 2011). It is also clear that Community Services in NSW is supporting foster carers to seek adoption of a child, invariably a very young child, once a child has been in their care for the two year period. This is taking place, in some instances, against the wishes of the natural parents. The Family Inclusion Network - NSW argues that this practice constitutes the re-emergence of 'forced adoption'. The recent Caroline Overington's (2010) story of 'Bella' confirms this approach to adoption practice. The

Supreme Court also has the power to grant an application for a child's surname to be changed to that of the adoptive parents (*Adoption Act 2000, section 101).* When this occurs the child's true identity is lost forever.

More searches?

Australians are well versed in terms of the social problems that arise for adults, who as children, have been separated from their families. As a migrant community there is general awareness of the long term-consequences of unaccompanied child migration (Humphreys, 1995; Hill, 2007). The impact on the Aboriginal community of the forced separation of children from family, community and culture has also been vividly documented in the stories of the Stolen Generation (HREOC, 1997). There are also many studies of children who were adopted but who as adults have engaged in the search for their family of origin (Triseliotis, Feast and Kyle, 2005). Yet the New South Wales developments that free very young children for adoption will almost certainly create another generation of adults who will want to engage in the search for family once they are of an age to do so. To be knowingly promoting a policy of 'forced adoption' that will inevitably result in this outcome suggests that New South Wales care, protection and adoption authorities have much to learn. In fact, these policies and practices take us back to the past and not forward to a brighter future.

The potential role of the Commonwealth

Given the developments in NSW there may be a potential role of the Commonwealth in developing a national framework to assist states and territories to address the consequences for the mothers, their families and the children who are currently subject to

forced adoption policies. It could well be an extension of the Council of Australian Governments 'National Framework for Protecting Australia's Children 2009-2020' (CoAG, 2009).

Consideration also needs to be given to Article 8 (1) of UN Convention on the rights of the child (1989) that states;

> 'State parties undertake to respect the rights of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference'.

The Family Inclusion Network - NSW takes the view that while the Supreme Court is acting within its power when it sanctions forced adoption and when it sanctions the changing of the child's surname to that of the adoptive parents this represents a breach of the spirit of the Article 8 (1) of the UN convention. There is no good reason, other than the vanity of the adoptive parents, that a child's surname should be changed. On the contrary, there is good reason why it should not be changed because the child has a right to retain the surname of their birth parents. The NSW Adoption Act 2000 needs to be amended to remove this power from the Act.

Conclusion

Child protection services continue to remove a significant number of children from parental care and place them in foster care/kinship care. In New South Wales this was 9.9 children per 1,000 in 2009-10 (AIHW, 2011). Given the New South Wales development in relation to adoption law it is from this group of children that many of the future New South Wales adoptions will be drawn. Many of these adoptions will be without the consent of birth parents.

Child protection and adoption should not be viewed as totally separate issues. Instead, they need to be seen as two closely related way of ensuring that children's safety and well-being is assured.

The Family Inclusion Network - NSW urges the Senate Community Affairs Committee to seek to incorporate any national framework that may be developed to assist states and territories to take account of the consequences for mothers, fathers and family members and children of forced adoption practices into the National Framework for Protecting Children 2009-2010 (COAG, 2009).

The statutes

NSW Children and Young Persons (Care and Protection) Act 1998

Section 23 Child or young person at risk of harm

For the purposes of this Part and part 3, a child or young person is **at risk of harm** if current concerns exist for the safety, welfare or well-being of the child or young person because of the presence of one or more of the following circumstances:

(a) the child or young person's basic physical or psychological needs are not being met or are at risk of not being met,

(b) the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical attention,

(c) the child or young person has been, or is at risk of being, physically, or sexually abused or ill-treated,

(d) the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm,

(e) a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm.

(f) the child was subject of a pre-natal report under section 25 and the birth mother did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

106A Admissibility of certain other evidence

(1). The Children's Court must admit in proceedings before it any evidence adduced that a parent or primary care-giver of a child or young person the subject of a care application:

(a) is a person;

(i) from whose care and protection a child or young person was previously removed by a court under this Act or the Children (Care and Protection) Act 1987, or by a court of another jurisdiction under an Act of that jurisdiction, and

(ii) to whose care and protection the child or young person has not been restored, or

(b) is a person who has been named or otherwise identified by the coroner or a police officer (whether by use of the term 'person of interest' or otherwise) as a person who may have been involved in causing a reviewable death of a child or young person.

(2) Evidence adduced under subsection (1) is prima facie evidence that the child or young person the subject of the care application is in need of care and protection.

(3) A parent or primary care-giver in respect of whom evidence referred to in subsection (1) has been adduced may rebut the prima facia evidence referred to in subsection (2) by satisfying the Children's Court that on the balance of probabilities:

(a) that the circumstances that gave rise to the previous removal of the child or young person no longer exist, or

(b) the parent or primary care-giver concerned was not involved in causing the relevant reviewable death of the child or young person.

As the case may require,

(4) This section has effect despite section (93) and despite anything contrary in the *Evidence Act 1995.*

(5) In this section, **reviewable death of a child or young person** means a death of a child or young person that is reviewable by the Ombudsman under Part 6 of the *Community Services (Complaint, Reviews and Monitoring) Act 1993.*

NSW Adoption Act 2000.

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(a) the person cannot, after reasonable inquiry, be found or identified, or

(b) the person is in such a physical or mental condition as not to be capable of properly considering the question of whether he or she should give consent, or

(c) if the person is a parent of or person who has parental responsibility for, the child-there is serious cause concerns for the welfare of the child and it is in the best interest of the child to override the wishes of the parent or person who has parental responsibility, or

(d) if an application has been made to the Court for the adoption of the child by one or more persons who are authorised carers for the child:

(iv) the child has established a stable relationship with those carers, and

(v) the adoption of the child by those carers will promote the child's welfare.

(vi) in the case of an Aboriginal child, alternatives to placement for adoption have been considered in accordance with s36.

(2) The Court must not make such a consent dispense order unless satisfied to do so in the best interest of the child.

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