

The 'best interests of the child'

Historical perspectives

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In the middle of the nineteenth century, Australian responses to children in need were significantly influenced by the belief that such children posed a threat to society. At the beginning of the twenty-first century, child welfare legislation states that 'the best interests of the child must always be paramount' (Children, Youth and Families Act 2005, Victoria). This paper surveys some of the local and overseas influences which directed child welfare practice and policy towards a philosophy in which the wellbeing of the child is central. It suggests that the concept of the child's personal welfare influenced the understandings of welfare officials long before the term 'best interests' was widely employed, but also that this transition in thought did not necessarily correlate with marked improvements in the outcomes for children within the welfare system.

The 2004 *Forgotten Australians* Senate Report on the experiences of children in institutional or other out-of-home 'care' during the 20th century highlighted the extent to which child welfare organisations across Australia failed so many of the children for whom they accepted responsibility (Senate Community Affairs References Committee 2004). In the recent national apology to the *Forgotten Australians*, both the Prime Minister and the Leader of the Opposition called not only for these wrongs to be recognised but for we, as a nation, to ensure that such things never happen again. For scholars with an interest in child welfare, this is a particularly important point. There are other articles in this volume that will suggest how the Victorian child welfare system is, and should be, attempting to ensure positive outcomes for all children under its control in the twenty-first century. This paper offers a brief discussion of how welfare workers have conceived of and conducted their work in the past, in order to provide some historical context for current practice. Its primary focus is Victoria, but it does attempt to make Australia-wide comparisons where appropriate.

During the early years in most Australian colonies, either government or benevolent societies established institutions which would care for orphaned or abandoned children who had nowhere else to turn, but it was the middle of the nineteenth century before child welfare measures expanded beyond such minimal provision. In the 1850s most of the larger towns and cities across Australia witnessed an increased level of anxiety about the groups of apparently uncontrolled children who lingered in the streets and other public spaces. Such children were constructed as a danger to the health of society. An article in the *Argus* in 1859, for example, proclaimed Melbourne's 'street-boys' to be:

... intelligent beyond their years, comparatively untaught, eager for gain, unaccustomed to restraint, bold, subtle, selfish, sometimes acquiring in a few hours the means of extravagant

indulgence, with no motives for thrift and many inducements to improvidence ... [if] exposed to evil counsel, they lapse into crime with a fatal facility (*Argus* 1859).

If such children's behaviour remained unchecked, the author concluded, Melbourne would find itself with 'as large, as clever, as daring, and as dangerous a gang of thieves' as could be found 'in any city of twice its size' (*Argus* 1859).

In 1864 the Victorian legislature responded to this perceived threat by establishing a system of industrial and reformatory schools, a move which was replicated across the Australian colonies in this and subsequent decades. The 1864 Victorian *Neglected and Criminal Children Act* gave courts the ability to determine when children ought to be separated from their parents and to place them in institutions for training. Throughout the next century, there were growing numbers of Victorian children living under the control of institutions, some of whom had been compulsorily separated from their parents by order of the court and others who had been placed at their families' request.

Ideas about who these children were and why they were in 'care' had an impact on how that 'care' was delivered. They were seen as unwanted children and as potentially tarnished by the stain of illegitimacy or exposure to 'vice and crime'. Institutional life was, in most cases, loveless. Staff focused their efforts on the difficult task of keeping infants alive, and on providing older children with discipline, religion and a practical training that would help make them employable. Long into the twentieth century, children's institutions continued to explain the value of their services in terms of the threats unrestrained youth might pose to society. In 1954, for example, the St John's Home for Boys' *Souvenir History Book* claimed:

Deprived of parental guidance and left to fend for himself ... the under-privileged boy surely is a pitiable figure. Friendless and

poor, he looks with envy and bitterness upon those who have abundance of this world's goods, but who, he thinks, never attempt to assist their less fortunate fellows. The seeds of hatred may readily take root in his fertile mind, and he becomes a menace to his own, and the community's welfare. At this stage, false and dangerous doctrines appeal to his untrained mind – and he is on the road to disaster (St John's Home For Boys 1954).

Happily, this piece concludes, there are homes like St John's.

It is society's interests which are foregrounded here rather than those of the child, but during the same period, the concept of acting in the 'best interests of the child' was also gaining influence. In both England and the United States during the early nineteenth century, the 'best interests' principle first emerged in custody cases as a challenge to the principle that fathers automatically retained custody of their children in cases of marital breakdown. This quickly took the form of a 'tender years doctrine' which declared that a young child's best interests were served by remaining with its mother, so that by the latter part of the nineteenth century, both English and American courts were reluctant to remove young children from their mothers' custody (Stafford 2005; Wright 1999).

It is difficult to trace the particular path by which the 'best interests' doctrine made its way to Australia, but certainly by the 1850s the concept was being used to determine cases in which the custody of children inheriting estates was disputed (for example, see *Hobart Town Daily Mercury* 1859). In the mid-nineteenth century, courts in the Australian colonies regularly applied the 'tender years' doctrine in custody cases concerning illegitimate children, but were reluctant to do so when married parents were in dispute in relation to custody (*Sydney Morning Herald* 1861; Paulus 1875). In this, Australia appears to have been following the English path of being reluctant to interfere with a man's legal right to control of his legitimate children (Wright 1999).

By the early twentieth century, however, the 'tender years' principle dominated custody cases in both countries. This application of a 'best interests' principle in custody cases marked a shift away from defining custody in terms of fathers' legal rights towards one which considered the welfare of the children, but it still defined 'best interests' in rather essentialist terms. Mothers were considered the 'natural' carers of young children, and fathers who wished to counter this needed to demonstrate that the mothers of their children lacked such maternal qualities. The most effective means of accomplishing this was to accuse mothers of moral turpitude. In 1901, a Hobart man alleged that the mother of his illegitimate child was living in squalor, that she was 'addicted to profanity, and [that] the language used in the home was often immodest or profane'. Despite the mother's rebuttal, the court determined that the child should be placed

in the father's care until independent evidence could be gathered as to whether or not her residence was 'a fit home in which to bring the child up' (*Mercury* 1901).

Thus a rudimentary notion of children's 'best interests' is identifiable in custody cases from at least the mid-nineteenth century in Australia, but what of so-called unwanted children? What of children with no parent capable of sustaining them? What of children deemed delinquent? How did child welfare shift from a philosophy of disciplining children for society's sake to one in which the 'best interests of the child' is considered to be a guiding principle?

There was, of course, not one clear moment at which this change occurred. To some extent there were always people concerned with the individual welfare of children, and the notion that child welfare services were important because they worked to protect society's health persisted, even as welfare workers increasingly considered the pursuit of children's 'best interests' as an important aspect of their duties. By the end of the nineteenth century, British child rescue workers like Thomas Barnardo and Thomas Bowman Stephenson were positioning themselves as advocates of the best interests of the children under their care, and were working to establish forms of care which catered for children's best interests by mimicking the family home (Barnardo 1889: 122-6; *Spectator and Methodist Chronicle* 1882). Australian child rescuers were influenced by this British work and advocated both fostering and small cottage homes as methods of caring for children which might avoid the problems of large scale institutions and offer the advantages of a 'normal' family home. Time has shown that both of these alternatives struggled to deliver on this promise.

A detailed study of child welfare records from three Victorian organisations – the Melbourne Orphan Asylum, the Victorian Society for the Prevention of Cruelty to Children, and the government child welfare office – indicates that it was not until the very end of the 1930s that welfare workers began using the term 'best interests' in their files with any real frequency (Musgrove 2009). When they did invoke the term, it was more indicative of a new means of asserting the purpose of their work than of changed standards or goals. The phrase was used to remind single mothers that if they chose to retain custody of their children, they were expected to sacrifice all of their own desires in the 'best interests' of their children; and to persuade parents to admit their children to institutional care, or to leave them there. It also appears in the records as a summary statement recommending the removal of children from their parents' custody, though the markers of neglect that signalled the necessity for such removal remained the same as when societal interest had been the primary justification (Musgrove 2009).

In the years immediately after the Second World War, the Children's Welfare Association and the Victorian Council of Social Services both campaigned for significant reforms to the Victorian child welfare system. One of the points they argued was that existing legislation was based on antiquated definitions of neglect which were of little assistance to welfare workers in the social environment of the mid-twentieth century (Jaggs 1986). The 1954 *Children's Welfare Act* dispensed with the requirement that children be charged as neglected before a court in order to be taken into state custody and instead required that they be deemed 'a child or young person in need of care and protection'. The more substantial work of reconstructing the basic grounds on which such action might be taken remained largely untouched.

However, the 1954 legislation did mark the beginning of significant changes in Victorian child welfare, including the promotion of the idea that children's best interests could be served by working towards family reunification. The man who became head of the reformed Children's Welfare Department, J.H. Nelson, advocated actively approaching families to assess when children might be returned, rather than leaving them in 'care' until parents applied for their release. Expanded sources of financial support provided opportunities for keeping together families who in earlier times would have been forced to part with their children. Some families continued to find it difficult to get their children back because they were deemed unfit, but, at least in theory, the Department had a commitment to encouraging family unity, something it had never had before (Musgrove 2003).

The phrase 'best interest' first appeared in Victoria's child welfare legislation in the *Social Welfare Act* of 1960, and has gained increasing prominence in subsequent legislation. However, while this principle has existed in Victorian law for almost fifty years, the treatment of children has shifted dramatically over this time. Lawyers, social workers and psychologists continue to debate the meaning of the term, competing for the right to determine the 'best' outcomes for each child. Over time, experts pursuing the best interests of the child have shifted their emphasis from physical and religious grounds, to a commitment to maternal nurturing, to theories of attachment and permanency founded upon psychoanalytic theory and beyond. They have endorsed various forms of institutional care, foster care and family reunification.

When viewed from this perspective, it proves almost impossible to define what the term 'best interests' means, or what kind of policy should derive from it. Perhaps the most that can be said is that laying the best interests of the child as a guiding principle in child welfare work makes a commitment to putting the child's present and future wellbeing as a central concern. To this end, we should be continually reassessing our strategies and policies to ensure

that the desires of other interested parties do not dwarf those of the child. As other authors in this volume suggest, this is a complex process, not least because the child's connections with those interested parties are always central to the success of plans for its future. What history demonstrates is the ease with which the term can be used to include policies allegedly based on the best interests of the child which do not serve its interests at all. ■

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