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From the Front Line: The State as a Failed Parent

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The focus of this article is young women aged 16–17 years who, while in State care in New South Wales gave birth, and from whom the child was then removed by the same department that is responsible for the mother's care. This topic is rarely examined due to two constraints. One is the lack of available data about the incidence of events of this kind. The second is the confidentiality provision in the New South Wales *Children and Young Persons (Care and Protection) Act 1998* which defines the Children's Court as a closed court and prohibits the reporting of identifiable case information.
As a consequence much of this article is based on the authors' direct observation of cases involving young women of this age that they have encountered while undertaking professional duties in the Children's Court. The article also explores the further issue of the adoption of children removed from mothers who are still in State care.
Because of the lack of data this article can be classified as an opinion piece which attempts to raise awareness about an important care issue. The article has a New South Wales focus but the authors expect that the same concerns are echoed in other Australian states and territories.

Introduction

In New South Wales (NSW) lawyers practicing in the care jurisdiction and others with whom we have had discussions are concerned about the number of babies under 1 year of age, who are removed from parental care by the Department of Family and Community Services (FaCS). In 2010–11 in NSW the number of removals of babies of this age was 674, while Australia-wide the number was 1,949. Contained within the NSW number of 674 are some babies born to young women aged 16–17 years of age who are themselves still in State care. It is this subgroup that this article focuses on.

In investigating this issue the authors asked the Minister responsible for FaCS and the Department's Chief Executive for information about the number of young women who gave birth while still in the care of the department. The response indicated that 'the department does not collect the information in a reportable format. While this level of detail is recorded by caseworkers in an individual child or young person's care plan file in free text form, it is not readily extracted for reporting at an aggregate level' (personal correspondence, 2012). As the authors do not have access to Departmental case files they are also unable to provide details about the young women's care circumstances prior to their pregnancy.

The Minister on 30 May 2012 while being interviewed by Tony Jones the host of the 'Lateline' TV program stated 'We have lots of girls already who have children as teenagers in foster care. So they are babies in foster care who have their own babies. These children, boys and girls, are much more likely to go on to have children they can't care for if we don't break this cycle now' (Jones, ABC transcript, 2012). And that is all the data there is other than the author's own direct observations derived from court work.

Given our observations, and what the Minister has said, it is reasonable to advance an argument that says that the

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State has failed in its parental duty to provide these young women with a 'good enough' upbringing and sufficient reproductive health education to allow them to guard against early pregnancy. In that respect the State is a 'failed parent' a statement that has made elsewhere albeit in different ways (Dominelli, Strega, Callahan, & Rutman, 2005; Bullock, Courtney, Parker, Sinclair, & Thoburn, 2006)). These events are especially concerning as early pregnancy in itself raises the prospect of these young women struggling to progress to a satisfactory adult life (Cashmore & Paxman, 1996; 2006).

Of special concern is the absence of NSW data about pregnancy among young women in State care and the life consequences. This is in contrast with both the UK and US where there is some limited data that addresses this important issue (SCIE, 2004; Knight, Chasa, & Aggleton, 2006: Svoboda, Shaw, Barth, & Bright, 2012). Even then Svoboda et al. (2012) citing Constantine, Jerman, & Constantine (2009) and Love, McIntosh, Rosst, & Tertzakian (2005) state that:

> A common finding among studies is the lack of consistent documentation across jurisdictions and states to calculate the birth rate among youth in foster care. In addition the lack of written policies and protocols to address prevention of pregnancy was reported by child welfare workers, former foster youth and foster parents
>
> (Svoboda, Shaw, Barth, & Bright, 2012).

The Issue in Perspective

In 2009 there were 299,220 births in Australia. Of these 11,768 were to young women under the age of 20 years (AIHW, 2011). Pregnancy among young women aged under the age of 20 years is of concern due to the high association with a range of poor health and socio-economic outcomes. These mothers are at increased risk of pre-term delivery, small for gestational-age babies, and neonatal deaths. These mothers often find it difficult to complete their education, are separated from the child's father, often have less financial resources than older mothers and the health of their children is often worse (Klein and Committee on Adolescence, 2005; van der Klis et al., 2002).

In a study of 77 young people who had left care in Victoria and Western Australia (WA) in 2008 10% already had children (Mendes et al., 2011). The sample, however, was of young adults 18–25 years. In a UK study one in seven young women leaving care were pregnant or already mothers (Clare, 2006) while in NSW Cashmore and Paxman (2006) in their five-year follow up study of care leavers reported that five of the 47 young people in her sample were doing less well on key indicators of wellbeing, i.e. settled accommodation, while two of the five cases were of young women with children and no partner. In a review of the literature on early parenthood of young people in care Mendes, (2009) identifies a limited number of small Australian studies of young people who become parents while in care or shortly after leaving care. Unfortunately, only one of the studies (a study of six leavers) report the two categories of interest separately i.e. gave birth while in care and gave birth shortly after leaving care, and therefore these studies do not add a great deal to the available information.

Given that we know that at 30 June 2011 there were 895 young women aged 16–17 years in the care of the FaCS (personal correspondence, 2012) it is possible to estimate that up to 10% or approximately 90 young women still in departmental care are either already mothers or are pregnant.

Amending the Legislation

In November 2006 the NSW *Children and Young Persons (Care and Protection) Act 1998* was amended by the insertion into the legislation of a new section, s106A. This section states that,

(1) The Children's Court must admit into proceedings before it any evidence that a parent or primary caregiver of a child or young person subject of a care application
  (a) is a person
    (i) from whose care and protection a child or young person was previously removed and a court under this Act or the Children (Care and Protection) Act 1987, or by a court in another jurisdiction under an Act in 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) is a person who may have been involved in causing a reviewable death of a child or young person.

(2) Evidence adduced under (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 the child or young person concerned no longer exists; 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.

The net result of this provision is that the young women who become pregnant while in care and from whom a first child was removed may well find that a subsequent child may also be removed, frequently at birth. There is case evidence to support this claim but details cannot be disclosed due to legislative prohibition. Removal can occur even if a young woman establishes a stable relationship with a partner who

has no prior history with FaCS. Case evidence supports this assertion although again the department does not have aggregated data available in regard to such removals. When a further child is removed the clear message to these young women is that FaCS will invoke this section of the Act and prevent the mother from ever having children to care for. In effect motherhood is denied by the Department that was made responsible for the care and upbringing of these young women.

It is also worth remembering that under section 165 of the *Children and Young Persons (Care and Protection) Act 1998* responsibility is placed on FaCS for extended assistance after leaving out-of-home care. This section is as follows:

165 Provision of assistance after leaving out-of-home care

(1) The Minister is to provide or arrange such assistance for children of or above the age of 15 years and young persons who leave out-of-home care until they reach the age of 25 years as the Minister considers necessary having regard to their safety, welfare and well being.
(2) Appropriate assistance may include:
    (a) provision of information about available resources and services, and
    (b) assistance based on an assessment of need, including financial assistance and assistance for obtaining accommodation, setting up house, education and training, finding employment, legal advice and accessing health services, and
    (c) counselling and support.
(3) The Minister has discretion to continue to provide or arrange appropriate assistance to a person after he or she has reached the age of 25 years.

In effect, the Minister has the power to arrange whatever services or programmes are necessary to make it possible for a young woman who is still in departmental care and who gives birth to retain custody of her child and to learn appropriate protection, nurturing and child rearing skills. The authors do not know of any such programmes in NSW that are provided by either FaCS or the non-government sector. Elsewhere there are programmes that seek to provide foster care families for both mother and child and others that support young mothers to complete their education (Svoboda, Shaw, Bright, & Barth, 2012).

Breaking the Cycle or Repeating a Mistake?

Attempting to break the intergenerational cycle of abuse and neglect is obviously an important aim as indicated by the Minster for Family and Community Services in her 2012 comment (Jones, 2012). The removal of babies from young women who are still in the care of FaCS is one aspect of this policy (Ainsworth & Hansen, 2009; Premier of NSW, 2008). Equally obvious is the fact that no one wants a child to be left in the care of anyone who does not understand the needs of a young child or does not have the skills or patience to protect and take good care of a child.

Given that the young women in question were themselves removed from parental care and now find themselves in the same position as their own mother suggests that the practice of child removal and the placement of these women, as children, in foster care has not worked properly. The intergenerational cycle of abuse and neglect has not been altered. Moreover, the implicit guarantee (Hansen & Ainsworth, 2011) that the State gave to these young women, no matter what their age was at entry into care, namely that they would benefit from removal from parental care, and that growing up in foster care would give them a better life, has not been fulfilled.

The fact that there is an intergenerational pattern of disadvantage which may lead to intergenerational child abuse and neglect is well known and this is one of the factors examined in risk assessments (Structured Decision Making, 2009; Shlonsky & Ballan, 2011).

Of special concern is the emergence of FaCS policy (FaCS, 2011; FaCS, 2012) that endorses the practice of seeking adoptive parents for young babies, some of whom may be the babies of the young mothers who are the concern of this paper. There may be similar policies in other states and territories.

An Ordinary Family's Response to Early Pregnancy

An interesting question is – what would an ordinary family do if faced with the pregnancy of a daughter of 16 or 17 years of age? Would they seek to remove the child from the daughter's care? Would they seek to place the child in foster care with the daughter/child's mother having minimal contact with her child? Or would they consider trying to persuade the daughter to place her child for adoption?

Our experience of this event is that the parents of the pregnant young woman and the extended family would pull together and find ways to support the young mother and to help her care for her baby. They would not seek to remove the child from her care, even if the mother's capacity, due to intellectual or emotional limitations, mental illness or substance abuse is such that the young woman's parents have to assume a major role in caring for the baby. The child is seen as a child of the family who should remain in the care of the mother and extended family. This is in sharp contrast to the State's response, which sometimes is child removal, even though the child's mother is still in the State's care. This might be seen as, a further example of the State as a failed and neglectful surrogate parent and the judgement may be that the State, unlike the ordinary family, has not looked after the woman well enough.

Foster Care Outcomes

When considering the State's response to the birth of a child to a young woman still in care it is important to consider

the evidence about the outcomes of foster care which is a recommendation likely to be made in this type of case by State child protection authorities. A recent article provides this less than positive evidence about the outcomes of foster care (Hansen & Ainsworth, 2011) as did McFarlane (2010) in her study of young women in juvenile detention who grew up in out-of-home care.

Notably, the NSW Minister for FaCS, Pru Goward, in a speech at the Sydney Institute in November 2011 when asked about the outcome of foster care described them as 'shocking'. It is hard to disagree with the Minister. Her response, and the research evidence about outcomes, should make everyone cautious about placing a child in long term foster care.

Developments Elsewhere

In what some might think is a matter that is unrelated to the issue of young women in State care who give birth to a child we now turn to developments in adoption policy. We do this because of the possible long-term impact on a mother's future if a first child is removed and not returned to her care.

In England in March 2012 David Cameron the Prime Minister announced changes to adoption policy and practice. The three key measures announced were,

- Local authorities will be required to reduce delays in all cases and will not be able to delay an adoption for the perfect match if there are other suitable adopters available. The ethnicity of a child and the prospective adopter will, in most cases, come second to the speed of placing a child in a loving home.
- Proposed changes to legislation will make it easier for children to be fostered by approved prospective adopters while the courts consider the case for adoption. This means they stay in one home with the same parents, first as foster carers, and then as adopted parents if the courts agree to adoption.
- If a match has not been found locally within 3 months of a child being recommended for adoption, LAs (added *local authorities*) will have to refer them to a National Adoption Register so they can find a match in a wider pool of prospective adopters.

(Department of Education, Media release, 2012)

This policy statement from the UK is against a background where 3,050 children were adopted from care in 2011 and where 2,250 of these children were under 3 years of age (Department of Education, 2011).

Developments in adoption practice in the US have gone even further. In 2009 the US Department of Health and Human Services under the Fostering Connections to Success and Increasing Adoptions Act 2008 (P.L.110-351) awarded $35million dollars to States to increase adoptions from care. The effort is to increase the number of children adopted from care that already numbered 57,466 in 2010 (US Department of Human Services, 2010).

In addition under the Adoption Tax Credit agreement adoptive parents receive as an incentive to encourage adoption from care a tax credit of up to $13,170 per adoptee (US Department of Treasury, 2012).

No doubt FaCS and similar departments in other States and Territories in Australia, are aware of the developments in the UK and the US. Given that much of Australian child protection and adoption legislation i.e. NSW *Adoptions Act 2000* is copied from other jurisdictions the question is whether we will see similar developments in Australia. Before any such developments it is essential that the positive and negative implications of such developments are carefully considered.

Adoption Without Consent

Recently, the Senate Committee for Community Affairs issued the final report on the Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices (Senate Committee, 2012). The report firmly condemned the past practice, albeit in a very different era, of placing a young mother under duress in order to ensure that she signed papers consenting to the adoption of her baby. This is rightly described as forced adoption although we prefer to talk about 'adoption without consent' given that papers were often signed under duress.

In NSW the Supreme Court, has of course always had the capacity to dispense with parental consent. This is a rare event and in 2010–11 of the 45 approved adoptions in Australia there were only two cases where the Court dispensed with the consent of both parents (AIHW, 2011).

There is evidence as noted earlier, at least from NSW, that FaCS is placing renewed emphasis on adoption especially for young babies as a route out of State care. For example, in Care Plans presented to the Children's Court and read by the authors there has been an increase in plans which flag adoption for possible future action. Media releases from the Department are also citing adoption as part of the reform agenda to drive improvements to out-of-home care outcomes (FaCS, 2012). Notably, Aboriginal children are exempt from this drive due to the Aboriginal community's opposition to adoption. No other cultural or ethnic group has this exemption.

No doubt some of the babies for whom adoptive parents will be sought are the babies of the young women under 18 years of age who gave birth while still in State care.

Human rights and Adoption Without Consent

There are a number of issues that arise from the adoption of babies from State care both from the perspective of the young mother and her baby. For example article 25 (2) of the Universal Declaration of Human Rights (UDHR) (1948) states that

Article 25 (2)
Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection.

This raises a real question as to whether the action of FaCS in seeking to remove a baby from the care of a young woman who is still in the care of the Department is in breach of this article by failing to provide the young mother with 'special care and assistance' and 'social protection'?

We then move to the Convention on the Rights of the Child (CROC) (1989) for consideration of a number of articles from that convention. Firstly, article 7 states,

Article 7
The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible the right to know and be cared for by his or her parents.

If Australian States and Territories follow the Cameron initiative in the UK and ignore the issue of ethnicity and culture when placing a child for adoption then they would be in breach of the Convention on the Rights of the Child.

The next article 8 (1) is as follows:

Article 8 (1)
States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

This article addresses a similar concern. How can a child preserve his or her national identity if ethnicity as proposed in England comes second when placing a child for adoption? It is also worth noting that the NSW Supreme Court when approving an adoption without consent can on application allow the child's surname to be changed to that of the adoptive parents (Adoption Act, 2000).

Article 9 (3) which states that.

Article 9 (3)
States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

The issue from the UK is that there will be of a National Adoption Register that will open up the possibility of a child being placed with adoptive parents a long way from the child's birth parents. The principle of open adoption and the potential for direct contact between the adopted child, and birth parents is at risk when distance makes contact almost impossible. Indeed, the potential for a child to lose contact with their birth parents and for the adoption to revert from a model of 'open' adoption to one which is closer to being a 'closed' adoption would be a possibility.

Article 18 (2) which is as follows.

Article 18 (2)
For the purpose of guaranteeing and promoting the rights set forth in the present convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child–rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

The question in the case of a young women still in State care when they become pregnant and give birth to a child is whether they have been afforded appropriate assistance to help them in the performance of their child-rearing responsibilities as required by section 8(c) of the Act (CYP(CP) Act 1998, s8(c).

It may be said that the Universal Declaration of Human Rights (UDHR) and the Convention on the Rights of the Child (CROC) has no relevance to adoption practice in that neither the declaration nor the convention have been enacted into Australian law although Australia is a signatory to both the Declaration and the Convention. In a recent NSW Supreme Court case *Re Tracey (2011) NSWSC43* however it was found that the provisions of the Convention on the Rights of the Child (CROC) were capable of being relevant to the Court's exercise of discretion when making court orders. Potentially this includes adoption orders.

Conclusion

In this article the authors have raised the issue of young women under 18 years of age who while still in State care become pregnant, only to have their baby removed from them at birth. Of real concern is the fact that this is done by the same department that is responsible for the care of these young women until they are 18 years of age. This appears to be a major conflict of interest. Furthermore, it is suggested that the early pregnancy of these young women is evidence of the State's failure as a parent. Also highlighted is the issue of adoption from care which is a possible outcome for these babies. This leads to a series of questions about the human rights of these mothers and their babies and the possible breaches of these rights, should developments in adoption policy and practices in the UK and the US become the model for adoption legislative reform in Australia.

All of these issues deserve serious, transparent and widespread public debate before any attempt is made by governments to place draft legislation before State and Territory parliaments. Debate is urgently needed.

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