Babies for the Deserving: Developments in Foster Care and Adoption in one Australian State - Others to Follow?

Frank Ainsworth[1] & Patricia Hansen[2]

1. Senior Principal Research Fellow (Adjunct), School of Social Work and Community Welfare, James Cook University
2. Head, School of Social Work, Australian Catholic University

While this paper focuses on recent amendments to the New South Wales (NSW) care and protection and adoption legislation, it is the view of the authors that the 2006 changes, and recently announced new policy directions, may have implications for other States and Territories. Indeed, given the tendency of States and Territories to copy each other's child care and protection and adoption legislation and policy, the question is who will be the first to follow the NSW lead? At the time of writing Queensland has announced a review of adopted people's and birth parents' rights (Department of Child Safety, 2008). In relation to these developments, the big question is whether the NSW proposals are a leap forward or perhaps a leap backward?

The Amendments

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 risk of harm'.

The conditions (a) to (e) are cited in full at the end of this article. The NSW *Children and Young Persons (Care and Protection) Miscellaneous Amendment Act 2006* added a new clause (f) to this section. Section 23 (f) states that a child or young person is at risk of harm if:

> (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 expands the definition of when a child is considered to be at risk of 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 is admitted to the NSW 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 is a new, and some would say worrying ground, as it means that the Department in these circumstances does not have to argue for the establishment of the case. By submission of evidence of this kind it is automatically established that the child is at risk of harm.

Adoption Amendments

In 2006 there was also another amendment. A new clause (d) was inserted into section 67 of the NSW Adoption Act 2000 (Adop-

tion Amendment Act 2006). 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 a 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 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:
>
> (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, and
>
> (iii) in the case of an Aboriginal child, alternatives to placement for adoption have been considered in accordance with section 36.

In the NSW *Adoption Amendment Act 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:

> (c) 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.

What was unclear when the amendment was passed was what 'a stable relationship' would mean and against what criteria this would be measured. Recent developments clarify these issues.

New Policy Directions

In July 2008 at a press conference, followed by a media release, the New South Wales Premier and 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 will be removed and the foster care allowance will be retained after the completion of the adoption process. This has merit and is largely in line with the subsidised guardianship approach that has been developed in some US states (Testa 2005). The Victorian Guardianship Scheme (Children, Youth and Families Act 2005) that is described as 'permanent care' is also similar with a foster carer who moves to become a permanent care family able to access some financial assistance (Department of Human Services 2008). The NSW 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.

(Premier of NSW, News release 11 July 2008)

This announcement clarifies what the phrase 'established a stable relationship' contained in the NSW *Adoption Amendment Act 2006*, section 67 (1) means and the time lines that are involved.

In late September 2008 a further *Adoption Amendment Bill 2008* was introduced into the NSW Legislative Council. This Bill confirms the two years stable relationship time period. In her speech introducing the Bill the Minister, Ms Linda Burney, stated that:

> The government also wants to make it easier for children in out-of-home care to become permanently part of their foster care family. Accordingly, the Government has made a commitment for foster carers to continue to receive the statutory allowance for children and young people that have been in their care for a minimum two years, following the making of an adoption order. This continuation of the statutory care allowance for foster carers who adopt children will be by regulation under section 201 of the Act, which is a provision that enables the Director General to provide financial assistance to adoptive parents.

At the time of writing the Bill was waiting for the Minister's second reading.

What is Happening in Practice?

In practice the 106A amendment to the NSW *Children and Young Persons (Care and Protection) Act 1998* passed in November 2006 is being used with increasing regularity to remove children from a mother soon after birth. This is being done where the mother has had another child removed or where a mother has a problem with substance abuse. The newly born child is removed as soon as possible to prevent the mother from becoming attached to her child. When previously practiced this policy was considered detrimental to both mother and child and the finding was that immediate removal of a baby did not prevent the mother from attaching to her child (NSW Legislative Council 2000). To achieve the Department of Community Services' goal it is common knowledge that the Department is placing an 'alert' notice on the medical files of some pregnant mothers previously known to the Department. An 'alert' notice indicates to hospital staff that they must inform the Department as soon as a mother is admitted to hospital pending the birth of her child. It seems that this is all done with the approval of the NSW Department of Health. Evidence exists from three independent sources that Department of Community Services personnel are then forbidding hospital staff from discussing the existence of the 'alert' with the mother as they do not want her to know that her child will be removed soon after birth (Personal communications 23 June 2008). This is a practice that leads to a climate of deception and many professionals question the ethics of such a process (AASW 2002; Bowles et al 2006).

Patients do have the right under the NSW *Health Records and Privacy Information Act 2002* section 3 to read their medical files but for this to occur they must personally make this request. Most are unaware of this right.

A New Form of Early Intervention?

Is this removal of a child soon after birth the newest form of 'early intervention'? Just imagine the following practice scenario, bearing in mind that it is easier to recruit foster carers for new babies than to recruit foster carers for older children. Over one third of local Australian adoptions are of children under 1 years of age (Hansen & Ainsworth 2006).

An hypothetical scenario

A Departmental worker on the telephone to someone interested in adoption.

Is that Mrs Hopeful. Yes it is.

Good. I'm Ms Bountiful from the Department. I have good news for you Mrs Hopeful. We have a newly born baby we would like you to foster.

Mrs Hopeful. But I'm only interested in adoption and we have been approved as potential adopters.

Yes, Mrs Hopeful, that's fine. You just have to foster this child for two years and then you can adopt the child. Mrs Hopeful, the Department will support you going to the Supreme Court to get the adoption approved.

Oh Ms Bountiful, This is so good can I collect the baby today?

This may sound like a nightmare but unfortunately it is not an entirely improbable scenario.

This approach to adoption whereby foster carers can more easily adopt a child who has been placed with them also has the potential to return us to an era of 'closed' adoption. It is unlikely that an adopter recruited in this way is going to be in favour of sharing the child with birth parent in an 'open' adoption (Alty & Cameron 1995; Segal 2003; O'Halloran 2006 p. 244). We know 'open' adoption benefits the child, the adoptive parents and the birth parents (Segal 2003) but there is no indication that Australian adoptive parents will be prepared to share the child with the birth family. It is also possible that this new policy will lead to a weakening of the Aboriginal Placement Principle. The question is whether Aboriginal children will only be placed in Aboriginal foster care and not be put at risk of adoption. Will Aboriginal children be adopted out of the kinship group again? If Aboriginal children will not be subject to this new easier adoption process, then it could be argued that non-Aboriginal parents whose parental rights are dispensed with by the Supreme Court of New South Wales in these circumstances will be victims of racial discrimination. It is possible that non-Aboriginal families will have parental rights terminated while Aboriginal parents will retain parental rights. Perhaps it is time for such positive discrimination however such an approach is unlikely to increase social cohesion and the acceptance of government policy.

Ethical Issues

The policy intention appears to be to use section 106A of the NSW *Children and Young Persons (Care and Protection) Act 1998* combined with section 67 (1) of the NSW *Adoption Act 2000* (both of which now incorporate the amendments) in an attempt to reduce the number of abused or neglected children in need of State foster care. This will be achieved by removing children from their mother at birth if another child had been previously removed and by doing so increase the number of Australian born children available for adoption. Is this the development of a policy of babies for the deserving?

In 1992 a well known UK study of birth mothers who lost their

children by adoption drew attention to their lifelong sense of grief and loss. Not surprisingly there was a scorching indictment of the practice of removing children from their mother at the moment of birth (Howe, Sawbridge and Hinings 1992). Similar evidence exists from a 1999 Australian study (Farrar, 1999). Sometime later in 2000 the NSW Legislative Council held an Inquiry into Adoption Practice between 1950 and 1998 and confirmed this fact (Releasing the Past 2000). There was condemnation of the practice of removing children from a mother at birth in order for them to be available for adoption. Alas, it seems that NSW has yet to learn from its own past experience.

There are also substantial ethical questions that have to be confronted if care and protection practice is to be taken in this old direction:

- How can it be ethical to knowingly allow a mother to carry a baby to full term when the child care and protection authority knows all along that they are likely to remove the child at birth?
- How can it be ethical to prohibit pre-natal health personnel from discussing with a mother and father the fact that they will lose the child at the moment of birth?
- How can it be ethical to allow a mother or father to think that the child they created will remain with them when the child care and protection authority intend to take the child into care as soon as the baby is born?
- Is it ethical for the State to knowingly create circumstances under which parents will be subject to the pain of loss and grief for the child they together created and bore?

Furthermore, it will gradually become known among very vulnerable families that attendance at pre-natal health services is likely to result in an 'alert' notice being placed in the medical file to facilitate early removal following birth of a child. It is possible that in time this will lead to reduced usage of pre-natal services with all the potential health risks to pregnant women and unborn children this may entail. We doubt that this is what the community wants.

It can be argued that the only ethical position for child care and protection authorities is for them to clearly tell parents from whom a child has been removed that further children are equally likely to be removed. A multi-media publicity campaign alerting everyone in the community to the facts about removal of children at birth from parents would not be out of place. The aim should be to reduce the number of births where child removal is necessary. Child care and protection authorities might even encourage these parents to seek medical help so that new pregnancies would not occur. That at least would reduce their grief and loss.

More Searches?

Australian human service personnel 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, virtually everyone is aware of the long term-consequences of unaccompanied child migration (Humphreys 1995; Sherington and Jeffrey 1998). 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 proposal that entails freeing very young children for adoption, in spite of proposals in the new *Adoption Amendment Bill 2008* which is supportive of openness, but which is not fully welcomed by the Adoptive Parents Association of NSW, may create another generation of adults who will have to engage in the search for birth family at a later date (Hodgkinson 2008).

Conclusion

The proposals put forward in NSW by the Premier and the Minister for Community Services in regard to fostering and adoption take us back to an era of misguided policy and not forward to a brighter future. There are serious ethical and philosophical issues that child care and protection authorities must consider when moving in this policy direction. Removing children from parents and families where harm has happened to a child and may happen again has widespread community support. But we do have to remember that many of these parents are living in poverty, often in public housing. A proportion has poor education and limited capacity for making positive social relationships. A few have criminal records. Among this population it seems that there is a high incidence of intellectual impairment, mental health conditions and substance abuse. These are the most vulnerable adults in the Australian population. The plan, given the emerging practice direction, appears to be to remove all children from these groups in the community. The question is whether the child care and protection authorities are part of a new eugenics movement (Lynn 2001) seeking to allow only approved people to parent. It is doubtful whether the community as a whole supports such a policy direction. Considerable debate and hard creative thinking about these issues is urgently needed. The hope is that States and Territories other than NSW will do exactly that.

Note:

1. Frank Ainsworth is a Guardian Ad Litem in the New South Wales Children's Court

Patricia Hansen is Head of the School of Social Work at the Australian Catholic University. She is also a lawyer practicing part-time in the New South Wales Children's Court.

2. The New South Wales Parliament passed the Adoption Amendment Bill 2008 in November 2008. The Act has since been assented to by the Governor of New South Wales and is now part of adoption law in that state. The Bill was passed with support from both major political parties.

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 tha jurisdiction, and

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

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

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

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

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

(b) the parent or primary care-giver concerned was nc involved in causing the relevant reviewable death of th child or young person.

As the case may require,

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

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

NSW Adoption Act 2000.

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

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

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

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

(c) if the person is a parent of or person who has paren responsibility for, the child-there is serious cause concer for the welfare of the child and it is in the best interest c

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:

(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.

(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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