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What is Voice? The Implementation of the Best Interests' Standard in an Australian Child Protection Context

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Abstract

This article has been written with the purpose of exploring how voice is represented in the application of the 'best interests' principle within child protection in Australia. It seeks to identify the connection between anti-oppressive theory and the lack of representation of voice from the families and children who are involuntarily involved with child protection agencies. In this article, I begin with a brief look at the historical use and origins of the best interests' standard in a child protection context. It identifies the current Australian legal frameworks that utilises the best interests' standard, the core foundations for the United Nations Convention on the Rights of the Child and the historical and current implications for practice. In this article, I consider the link between the use of the best interests' standard in describing what risk in child protection is, and subsequently how voice is then represented in practice and legal frameworks. I explore the barriers which adversely affect the ability of practitioners to invite, hear and understand the voice of those they work with. In this article, I conclude that the standard has been a consistently tokenistic, misrepresenting and, at times, self-serving mechanism. In Australia, the best interests' standard has not represented the voices of the people who are involuntarily involved with the system and privileges the voices of those with decision-making power. I seek to highlight that the issue is not about recreating the systems within child protection, rather meaningfully engaging the voices of the families and children who are involved with it.

Keywords: *Child protection; Voice; Best interests of the child; Out of home care; Anti-oppressive practice; Involuntary*

Introduction

The "best interests of the child" standard has been applied to the care and protection of children for over 200 years; it remains in use today and underpins the practice of child protection globally (Dolgin, 1996). However, the concept of *best interests* has been applied subjectively and has not adequately included the voices of the children, young people and families it seeks to serve. It is a powerful concept which is used to make life-changing decisions for children and families. The purpose of this article is to encourage readers to consider that the concept of voice has been used to further marginalise already oppressed groups of people. It seeks to highlight that those with the authority to define voice and best interests speak and make decisions on the behalf of largely marginalised groups of people. This will be explored in the article with reference to an anti-oppressive theory approach. This article will begin with a brief look at the historical use and origins of the best interests' standard. It identifies the current legal frameworks which utilises the best interests' standard, including one of the core foundations for the United Nations Convention on the Rights of the Child (1989). The article considers the link between the use of the best interests' standard in describing what *risk* in child protection is, and subsequently how voice is then represented in a legal framework. This is followed by discussion about how the representation of voice is impacted by concepts of privilege and values and refers to how this impacted the Stolen Generations and other oppressed groups of people. Consideration is then given to questions about complicating factors in the representation of voice, such as cultural differences and accepted child development theories. The experiences of Aboriginal children and parents of the Aboriginal children and young people who have experienced the child protection system are discussed and this is followed by an argument about the managerialisation of child protection and how this has adversely affected the ability of workers to really invite, hear and understand the voices of the children, young people and families it works with. The article concludes by demonstrating that, despite decades of implementation and invocation of the best interests' standard, it has been a consistently tokenistic, misrepresenting and, at times, has a self-serving approach. The article explores the idea that in child protection in Australia, that the use of the best interests' standard has not adequately represented the voices of the people who are involuntarily involved with the system, and privileges the voices of those with decision-making power.

History

It was the release of the first book of a trilogy called *Beyond the Best Interest of the Child* in 1973 that cemented the concept for legal and child protection practice and systems and the development of a statutory definition of abuse and neglect. Authors Joseph Goldstein, Albert J. Solnit, Sonja Goldstein and Anna Freud were known as experts in child development and were, respectively, a lawyer, a psychiatrist and a psychoanalyst (Wald, 1980). The authors followed this with *Before the Best Interests of the Child* (1979) and *In the Best Interest of the Child* (1986). The original book focused on child placement and the parent–child relationship and the implications for laws around this; the second book assesses state intervention into the lives of children at a deeper level and the third targets arguments relating to child placement, best interests, and professional roles. The best interests' standard has shaped, not only the discourse surrounding abuse and neglect, but also the placement of children following removal from their parents (Goldstein et al., 1996). It is critical to acknowledge while the best interests'

standard has heavily influenced child protection systems, it is balanced in its use with the United Nations Convention of the Rights of the Child and to which Australia is a signatory, is included in Article 12 of the 1989 Convention on the Rights of the Child.

Despite the acceptance as a standard for practice, there have been several experiences and critiques indicating an inconsistent application and has been subjectively applied based on the values of those implementing it. Andrea Charlow (1987) wrote an article over 30 years ago calling out the best interests' standard in family law proceedings as being "marred by personal and cultural bias." This was supported by Robert Van Krieken (2005), who argued the best interests' standard "... is a vehicle for welfare professionals to dominate the rest of society and is colonialism by other means...." He describes the standard as a "juristic black hole." Riggs (2006) adds that the best interests' standard is used by child protection authorities to emphasize the advantaged status of adults over children.

The acceptance and reliance of the best interests' standard is demonstrated by the difficulty in identifying any family law or child protection system in the Western world which does not currently cite it. Every state in Australia refers to the best interests' standard in child protection legislation – some providing a definition for this and others which do not. Despite its acceptance, the definition of the best interests' standard has little consensus among professionals (Hansen, 2009; Kelly, 1997; Ramsden, 2013). This is problematic, as the best interests' standard is the guiding principle over multiple state child protection jurisdictions and is utilised to justify life changing decisions for children and young people. In Australia, two states and two territories have clear definitions for what is meant by the term and these are outlined in current child protection legislation. The Northern Territory, Tasmania, Victoria, and The Australia Capital Territory refer to, and provide, definitions of what constitutes the best interests of the child, as well as providing principles which guide its application in a legislative context. For example, these states and territories draw commonalities in the definition of best interests with reference to themes such as culture, stage of development, and religion, as well as including measurements of best interests including children not being at risk of abuse or harm and the participation of the child. However, the remaining states, New South Wales, Queensland and South Australia, all use the term best interests, but without definition or guidance, nor how it should be applied (Australian Institute of Family Studies, 2018). Here, there is not a single idea of what the best interests' standard looks like and little to guide its application. This is challenging and highlights an inconsistent approach to applying the best interests' standard in a reliable way across Australia, as has been identified earlier, for many years.

Risk assessment and measurement

Values and best interests in child protection are largely centred on definitions of what constitutes risk. Swadener and Lubeck (cited in Smeyer, 2010) ask "Who is at risk?", "At risk for what?" and "Who defines risk?" They maintain children's race, gender, class, first language, family make-up and environment make them a target for being considered at risk and therefore, vulnerable to government intervention. This highlights the influence of difference in social position rather than parental behaviour in identifying what is considered as risk. Historically,

governments have defined risk with reference to what is socially acceptable in that time and what was not. For example, Ferguson (2007, p. 126) identifies social status such as unwed mothers, poverty, incarceration of a parent, family separation and one or both parents dying was once adequate justification to "commit children for their own protection" during the industrial revolution. He further notes in these circumstances there is no reference to abuse or neglect. Ferguson (p. 127) calls this "the criminalisation of the poor" where church and state intervened to remove children from their families as opposed to providing financial or any other type of support. This highlights that – despite a claim that the best interests of the child are represented – state intervention more often reflects dominant social values and has not always resulted in positive outcomes for children, young people and their families.

Privileged voices

Regardless of how the concept is defined, certain voices are privileged, and others oppressed in both the understanding and application of the best interests' standard and can be unpacked within a context of value systems. It is this author's position that normative values, religion and tradition have long been linked with government policy and this remains evident today in the liberal, western, white middle/upper-class perspective the standard has been applied in. Harry Ferguson (2007) writes about abused children being the "moral dirt" in the social order. This is familiar in the rhetoric surrounding, not only the Stolen Generations, but also the removal of Aboriginal children from their families today. Funston and Herring (2016) assert that the Stolen Generations refers to the period when, between 1910 and 1970, roughly 100,000 Aboriginal children were forcibly taken from their families by state welfare and churches for a "better life." More recently, "The Winnable War on Drugs: The Impact of Illicit Drug Use on Families" report (Murphy et al, 2009) argued recommendations for adoption should occur as a legislated default position for children removed from parents who were drug addicted. Astonishingly, the report recommended, once children are removed from their parents, child protection agencies would be required to prove adoption was *not* in the best interests of the children. The authors highlight, prior to this recommendation, adoption policy in Australia from the 1970s to the 1990s reflected a shift in adoption attitude with the acknowledgement of Stolen Generations, British children who were moved to Australia under forced migration schemes, the adopting out of young and unwed mothers' babies and other similar practices (p. 203). This speaks to the values and judgements on what Ferguson (2007) identified as *true families* and how particular voices were able to influence the circumstances in which children were assessed to be at risk, based on what was deemed in their best interest.

Anti-oppressive practice provides a useful lens to explore the best interests of the child and the concept of voice. It seeks to identify and explore the structural and institutionalised inequalities in work between clients and services, and more specifically between families and child protection agencies (Strier & Binyamin, 2014). Child protection has deep roots in poverty, with families living in poverty overrepresented in the child protection system (Stokes & Schmidt, 2011). Services such as child protection are designed to serve and support vulnerable members of the community and should recognise the discrimination and oppression experienced by its members (Ramsundarisingh & Shier, 2017). Despite this, legislation

leading to the Stolen Generation accepted Aboriginal children were better off if they were raised outside of their culture and families. Removing Aboriginal children from their families was done by framing this as meeting the need for Aboriginal children to become educated and civilised, and with the underlying premise of giving Aboriginal children a *more decent life* (Bennett et al., 2015; Smeyers, 2010). Being Aboriginal on its own was seen as neglect, regardless of the family's living situation, and the removal policy surrounding forced family separation was seen as a way of promoting the best interests of a child (Long & Sephton, 2011). Concepts such as continuity, stability and parental involvement are still used to argue the best interests of children (Kelly, 1997). This raises the question of whose voice and values are honoured enough to define terms such as *continuity, stability* and *parental involvement* and what each of these concepts looks like. For example, stability is often defined in terms of a having one home base, but stability has also been defined as continuity of relationships (Kelly, 1997). Kelly argued, while concepts such as stability are largely grounded in a physical understanding, it is imperative to acknowledge that emotional dimension of child development and notes the essential need for children to be provided with social, moral and behavioural guidance and modelling (1997). There remains a stench of institutionalised racism and classism which pervades the discussion of the removal of children, and this speaks to existing racist policies and obliviousness of the experiences of oppressed groups of people starting at colonisation. Paul Smeyers (2010, p. 282) states, "No one should have automatic priority in discussing moral issues…where rights are placed in the centre of morality, there is a danger that all other human values will be ignored." Despite this, child protection has deep roots in poverty and oppression and the discussion relating to values has demonstrated that current policy and legislation is making it difficult to hear voices that are not considered valuable or informed. However, there have been no lack of attempts and child protection in Australia has been the subject of a significant amount of review. For example, "The Family is Culture Report" (Davis, 2019) identifies that, since 1990, there have been at least six national and 18 state and territory inquiries into the effectiveness of the system, as well as 25 ombudsman reports, auditor general inquiries, commissions of inquiry, judicial reviews, parliamentary inquiries and Royal Commissions across eight jurisdictions since 2009.

Representation of voice

Current practice in ensuring the best interests' standard is applied in child protection proceedings is particularly difficult as often the voice of the child is represented or reported by a third party. It is not uncommon for parents, caseworkers, and children's legal representatives to all claim to be speaking on behalf of the child and her/his best interests. Firestone and Weinstein (2004) highlighted that there is an additional complexity with legal representatives as it is their role is to protect the rights of their clients, for example, parents or child protection authorities. The act of advocating for a parent or an authority may be contrary to the best interests of the child as the litigation is not focused on the best interests of a child. Similarly, Ramsden (2013) argued that there is a disparity concerning the language of the best interests' standards and the application of it in practice, and that, for children in care, the way the standard is understood and utilised is unsustainable. Disturbingly, decisions about individual children and sibling groups are typically made by groups of adults, some of whom have never met the child/ren. Consequently, the decisions made for children are done so to meet court

timeframes as a priority and meaningful participation (which is meant to be the vehicle for the voice for the children and families) suffers. State government agencies and Children's Courts then make unchallenged decisions in the best interests of children and young people, despite continued and consistent reports outlining the range of poor outcomes for children in Out of Home Care (OOHC) (Carter, 2002; Parliament of Australia, 2003, Barber & Gilbertson, 2004, cited in Lonne & Thomson, 2005; Sultmann & Testro, 2001). These poor outcomes range from abuse in care, multiple placement breakdowns, lower educational achievement, mental health and developmental difficulties, disrupted emotional attachments and relationships, and reduced adult and life opportunities and outcomes (Carter, 2002; Gilbertson & Barber, 2004, in Lonne & Thomson, 2005; Sultmann & Testro, 2001). These consequences continue into adulthood, with Hansen and Ainsworth (2009) reporting adults who were formerly in foster care are overrepresented as unemployed, homeless, incarcerated and experiencing higher rates of mental health issues.

Another consideration in the debate about the best interests' standard focuses on the development of children and is particularly relevant to the best interest and voice dichotomy. It is critical in discussing child development to acknowledge that the research and literature in this area is typically dominated by Western culture. Munro (2001) writes that, in early legislation relating to child protection there was the belief that children should be "seen and not heard" and thus children and young people were forced into a position of passivity. Children did not take part in decisions made for them and it was not until 1989, when Article 12 of the UN Convention on the Rights of Children was established, that the conversation around this was forced to shift. The concept of the *evolving capacities of the child* recognises children are informed and guided and can progressively manage more responsibility in matters directly involving them (2001, p. 13).

The literature on child development largely focuses on development within the confines of a *normal* home environment. However, the development for children in OOHC is often viewed through a lens of risk, leading to a different approach and outcome. For example, Hansen and Ainsworth (2009) argue the forensic approach favoured by child protection authorities in Australia has resulted in a shift from a typical development approach which identifies what children need, to prioritising what they are at risk of. Munro (2001) highlights children in OOHC reported having less opportunity than their peers who were not in OOHC to participate in decisions for them or take age-appropriate risks. This is consistent with the debate of risk aversion associated with child protection systems. In fact, Munro concluded that the children she spoke with were willing and able to describe their views in relation to decision making and noted none of the children appeared unreasonable about what they were expressing. Additionally, the accepted way of assessing child development in Australia is not culturally inclusive. For example, Long and Sephton (2011) discussed child development with Aboriginal people in Victoria. Participants in their study identified the health and wellbeing of Aboriginal people, including the physical, emotional, mental, spiritual, and cultural health needed to be recognised in both an individualist and community context, and that one cannot exist at the exclusion of the other. The authors argue the development of Aboriginal children

is an extension of their connection to land and culture and should impact the way the best interests of Aboriginal children are assessed. Nevertheless, there is little evidence of this in policy or practice (Long & Sephton, 2011).

Silencing of Aboriginal and Torres Strait Islander voices

Aboriginal children and their families have long been overrepresented in the child protection system (Davis, 2019). Regardless of this, the voice and experience of Aboriginal people continues to be silenced and oppressed. For example, the Family is Culture Report (Davis, 2019) states the Aboriginal people spoken to for the review did not trust their voices were heard by the government and referred to the previous *can kicking* which occurred with earlier reviews relating to Aboriginal people. Bindi Bennett (2015) argued you cannot work with Aboriginal families in Australia without first understanding how race functions in Australia. The continued use of the term *Best Interests* serves as a further act of colonisation with a complete disregard for what best interests look like outside of the mainstream values discussed earlier. Long and Sephton (2011) point out there has been no research in Australia that focuses on Aboriginal perspectives and experiences on the best interests' standard. This alone indicates Aboriginal voices have not been valued. However, it is critical to acknowledge the lack of research does not negate Aboriginal people's ongoing commitment and attempts over many forums to be heard in this area. Interestingly, the Aboriginal Child, Family and Community Peak Aboriginal Corporation (hereafter AbSec) have issued a statement on the use of the best interests' principle and its application to Aboriginal families involved with NSW child protection. The statement from AbSec (2016, p. 1) states:

> The principle has a chequered history with respect to Aboriginal children, being used as the basis of a range of policies and practises of colonisation, including the regulation of Aboriginal families and the separation of children from their families…There is then a need for a more robust approach…one that appreciates the social and cultural context of Aboriginal children and families, and values a child's cultural rights as central to assessments…

The statement continues with recommendations on how to implement these changes in practice, however, it is not located or referenced in any state legislation.

Throughout Australian child protection legislation there is reference to specific cultural standards that are to be adhered to by the designated statutory authority. Despite this, the experiences reported in the Bringing Them Home Report (HREOC, 1997) and the more recent Family is Culture report (Davis, 2019), indicates Aboriginal people continue to not be listened to, meaningfully engaged with or treated as experts in their own culture and families. The Family is Culture report refers to Aboriginal families resisting their children being taken from them by attempting to engage with the system which has induced fear and mistrust over many years. This highlights the complexity of expressing voice, and the considerations of the opportunity to invite people's voices and experiences, while acknowledging barriers to this, such as historical context. Aboriginal children are continuing to be victims of racism

and discrimination in a system that proclaims it is meeting the best interest for them (Davis, 2019). Bennett et al. (2015) assert Narrative Therapy is a way of moving forward to include Aboriginal perspectives and honour the acceptance that Aboriginal people are the experts in their own lives and experiences. This approach of listening to stories is empowering, non-blaming and culturally strong. It is a way of hearing the voices and experiences of Aboriginal people, and their stories of survival in the assessment phase of any social work engagement would not be lost, thus honouring more than one perspective and voice (Bennett et al., 2013).

Hearing children's and parents' voices

It has been argued a child's voice cannot be a deciding factor in decision making; however, this does not mean it is not meaningfully heard and believed (Head, 1998). Australia adopted the practice of noting a child's wishes or voice in their documentation, but what happens to these voices and perspectives is not clear. It is unknown if these voices are being recorded accurately or if the views provided by the child are influenced by the person they are giving them to. Head argued that the level of understanding a child has is critical for their legal representative to be aware of, and that being aware of context is equally valuable as the adults in children's lives can impact their understanding of what is occurring, thus influencing their voice. It is assumed when referring to adults, this includes not only parents and adult family members, but legal, community and child protection professionals. According to Munro (2001, children reported wanting practitioners to take more time to explain what is happening to them and why; to listen and respect their views; to believe what they said; to talk to people they think are important and provide them with something to remind them of what was decided. Further to this, and considering the discussion about child development, Munro (2001) argued that often practitioners demonstrated it was hard to put principles of participation into practice. Practitioners were also found to have difficulty considering age-appropriate participation as an evolving capacity and while likely unintentional, inhibiting the voice of the children they are working with.

It has been alarmingly difficult to access research directly speaking of the experience of parents with children in the OOHC system. Impacting this is the argument that, to meet the rights of children, the rights of parents must be removed (Ainsworth & Hansen, 2011). The authors argued that this is misleading, and this has supported the silence and oppression of parents experienced with child protection services. Ainsworth and Hansen cite only four Australian studies relating to parents' experience, and the overall consensus was that parents were made to feel powerless, they lacked information and understanding about processes and did not have the ability or knowledge to advocate for themselves when dealing with child protection staff (p. 11). Further, parents reported while caseworkers expressed that they had their children's best interests at heart, this upset parents and contributed to the feeling of having no respect or dignity. Remarkably, the book *In the Best Interests of the Child*, Goldstein et al. (1986, p. 224) discuss boundaries on professional relationships in areas of child custody and identifies that "They [the worker] should not confuse the child they serve with acting like the parent they are not." Child protection practitioners are not legal practitioners and not parents of the children they are working with, but given the standard is preserved within the confines of legislation

and policy, and the fact the standard is not clear allows it to be influenced by the legal and state systems. Goldstein et al. (1986, p. 153, cited in Hansen & Ainsworth, 2009) argued the best interests' standard is not being used as intended and instead invite practitioners to utilise the phrase "least detrimental alternative" as a replacement. This invitation was given over 30 years ago; however, the best interests' standard remains the dominant benchmark in child protection legislation and policy today. Firestone and Weinstein (2004) identify parents in child protection proceedings often report being frustrated due to the rules of procedure and evidence. Often parents have reported their stories, their need to feel heard and providing additional information or facts is disregarded by their legal representatives or caseworkers as irrelevant to proceedings. Further to this, judges and magistrates often rely heavily on the word of professionals when making final decisions (p. 206). The authors suggest that, to minimise the legal process impeding the rights and best interests of children, an interest-based, problem-solving system could be adopted. This would involve a system focused on participants' interests, rather than on their legal rights. This is supported by Lonne and Thomson (2005) who responded to the Review of QLD Inquiry into Foster Care and concluded the practice standards did not meet community and stakeholder expectations.

Organisational pressures and the masking of voice

The above discussion has considered some of the complexities in hearing voice and highlighted the many government reports confirming this. However, it would be careless to not acknowledge that organisational pressures undoubtedly impact on the decision making of the professionals involved in adhering to the best interests' standard. There is inherent difficulty in advocating for a child while also managing the competing, and often conflicting, responsibilities of being a statutory child protection worker. The difficulty of being able to adequately assess the individual needs of a child, consider their families and meet administrative requirements is acknowledged. Firestone and Weinstein (2004) identified a failure to recognise family relationships and dynamics at the cost of focusing on legal issues. This results in the system being restricted to fitting evidence into rigid definitions of a legislative Act and is reflected in the experiences reported by the families engaged with the Family is Culture report referenced earlier. Professionals are managing competing priorities and the application of ethical protocols (Lewis, 2010, p. 16). Specifically, how do practitioners accurately hear the voice of the child without consciously or otherwise supporting their own agency's agenda? In 2001, Professor Eileen Munro was commissioned to complete a report for a local county wanting to know the views of children in the OOHC system. Perhaps not surprisingly, Munro (2001) found a consensus of criticism being frequent social worker changes, lack of effective voice at case reviews, lack of confidentiality and sadly, a lack of someone they trusted. Ferguson (2017) recognises the increasing impossibility for workers to develop and maintain working relationships with children and families due to the excessive constraints such as high caseloads and a compliance-driven organisational culture. He further links the possibility of children becoming invisible to workers, not because of a lack of skill or knowledge, but because of organisational pressure and focus on task-driven conformity.

The managerialisation of child protection impacts the very children the state intends to support. Butler and Williamson (in Munro, 2001, p. 18) found when children were asked about their experiences of being in care, they reported they were seeking a "more emotional, empathetic level of interaction…in contrast to an almost technical, allegedly robotic nature of professional interventions…" Munro reported children describing the relationship with a child's worker was critical, while placement stability, no explanation given for changes or follow-up of complaints, having a say in only trivial decisions left them feeling frustrated and powerless. Rightly, Munro concludes empowering children is not just an ethical responsibility of workers, but a developmental task. Inevitably, the task of balancing children's voices and operational requirements is challenging, but very necessary. Given children reporting difficulties in establishing meaningful relationships with workers due to high turnover, perhaps the use of parents, family members, schools or community members may be better at encouraging children to be heard (Hart, 2002). The Family is Culture report (2019) asks the question "How do you reconcile the tensions between the rights of parents to care for their children and the rights of children to be with their parents, siblings and community?" The outcomes for children and young people in OOHC speak for themselves, and it would be worth considering legislating a more holistic approach to meeting the best interests of children by meaningfully including family, community members or other people connected to the child as suggested earlier. Integrating a system which measures the experience of families and children in being heard is crucial to agencies and government being accountable to those they seek to support.

Conclusion

A striking feature of the fact that child protection authorities appear to have the monopoly on voice for children is the fact that reviews and reports argue there is a lack of accountability by the government and management when it comes to decision making in child protection (Lonne & Thomson, 2005). This is a dangerous gap as history has shown when legislation is built on values and privilege, some will benefit, and others are more likely to be disadvantaged and oppressed. Historically, there appears to be an almost absolute acceptance of the moral authority of the decision makers and care providers in determining what was best for children in care. Munro (2001, p. 21) asks "Who has the power to listen to the child's voice?" Systems are in place to provide for families and children to be heard. It is not the systems but the process and valuing of the voice that is the problem. It is not about recreating the wheel but working in a way which meaningfully invites those involved with the child protection system to be heard and valued. For this we must acknowledge that the child protection system has not invited the most vulnerable and powerless voices in a systemic way and needs to look outside its current process and look to children and families to lead this discussion.

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