

Legislative Responsibility for Child Protection and Human Rights in Queensland

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Abstract

Since the emergence of child abuse as a phenomenon of public concern, legislative responsibility for child protection as a human right has become a leading motif within the international human rights discourse and a major policy issue within social institutions such as schools. This paper canvasses significant legislative initiatives in child protection and human rights in Queensland and argues for heightened understanding of the social and political contexts in which child protection responsibilities are enacted.

Children: A State Responsibility

The advent of child abuse as a discrete social phenomenon and the identification of educational institutions as possible sites of child abuse (Helfer & Kempe, 1974; Kempe & Kempe, 1978) have highlighted child protection as a premier policy issue for teachers of children and young people (Briggs & Hawkins, 1997; Costin, Karger & Stoesz, 1996; David, 1993). Once enlisted as agents in child protection, teachers, in many cases, are inducted *en masse* into child protection programs and their work is circumscribed under the aegis of identifying, reporting and remediating child abuse and of supporting and teaching about protective behaviour (Tite, 1994; Watts, 1997a, b). Moreover, their world of work in educational institutions is increasingly framed by legislation and mandate. In Queensland, it includes child protection legislation such as the *Child Protection Act 1999* (cf *Child Protection Amendment Act 2000* for relevant amendments and *Child Protection Regulation 2000*)¹ and the *Commission for Children and Young People Act 2000*. The nexus between legal regulation and professional ethics in education has also been the focus of wider legal debate. For example, Lindsay (1999) provided a legal critique the relationship between child-focused legislation in New South Wales (developed in response to the Wood Royal Commission)² and the professional conduct of teachers.

On a global scale, a landmark manifestation of responsibility for children was the *United Nations Convention on the Rights of the Child (UNCRC) 1989* (Balke, 1992; UNICEF, 1990). The *UNCRC 1989* marked a conceptual watershed in its articulation of children's rights within the family and beyond in settings such as schools and early childhood centres (Farrell, 1998). Under the aegis of the *UNCRC 1989*, children were to be no longer seen as possessions, chattels or appendages of their parents, nor subordinate to adult authority (Funder, 1996). Hart and Pavlovic (1991) use the term 'person status' (p.345) to describe the identity of children as humans in their own right and to whom human dignity is accorded. Within the Convention, children have the right to be protected from all types of abuse, including abuse that may occur in their families, and to live

in settings other than those provided by their families. Gil (1991) argues that the *UNCRC* is an important symbolic event,

It affirms the rights of parents with respect to children, and of children with respect to parents in the context of the best interests of the child. The Convention promulgates standards and goals of equal rights for all children to life, liberty, dignity, and personal and cultural identity; to optimum development, health, education, care and protection; to freedom from exploitation and neglect; and to civil and political rights (p.393).

While successive Australian governments since 1992 have acknowledged the *UNCRC 1989* provisions concerning “protection, provision and participation” as fundamental human rights, there has been considerable criticism of Australia’s reluctance to adopt the Convention as part of Australian law (Department of Attorney-General, 1997; Muscroft, 1999; Single, 1999).

To move from the international to the Australian legislative context, significant initiatives in child protection mentioned earlier are Queensland’s *Child Protection Act 1999* and the *Commission for Children and Young People Act 2000*. Based on the principle that every child has a right to wellbeing and protection from harm, the *Child Protection Act 1999* defines the role of government and its agencies in protecting children and supporting families in their responsibility to protect and care for their children. Both pieces of legislation (*Child Protection Act 1999* and *Commission for Children and Young People Act 2000*) adopt a nomenclature similar to that of the *UNCRC 1989* in invoking “the best interests of the child” as the prime principle underscoring children’s human rights.

This observation is corroborated in Knott and Stewart’s (2001) examination of the *Commission for Children and Young People Act 2000* accounting for children’s best interests and their fundamental rights to privacy dignity and justice. They note a resonance with the *UNCRC 1989* with respect to the best interests of the child, emphasizing that “the language of the statute is strikingly similar to that of the United Nations Convention of the Rights of the Child (p.12). This is seen most clearly in the Object of the *CCYP Act 2000* sec 5 “to promote and protect the rights, interests and wellbeing of children in Queensland”. Within its “Principles involving children” [sec 6(1) (a) and (b)], there is unequivocal commitment to children as valued and respected members of society and to processes that have regard to the age and maturity of children and young people.

The *Child Protection Act 1999* and the *Commission for Children and Young People Act 2000* are part of Queensland’s one hundred and fifty year history of legislation around children. In the 19th century, for example, various pieces of legislation were administered to provide for the education and care of children (CCH, 2001). For example, the *Deserted Wives and Children Act 1840* provided maintenance payments to destitute mothers and their children; the *Industrial and Reformatory Schools Act 1865* established schools for neglected children and young offenders; the *Offences Against the Persons Act 1985* established penalties for child stealing and indecent assault of girls younger than 12 years; and the *Orphanages Act 1879* permitted homeless children under the age of 12 years to be cared for in state/parent subsidised orphanages such as those in Brisbane, Rockhampton and Townsville.

Prior to WWI, the *State Children Act 1911* established the State Children Department and this was followed more than 50 years later by the *Children's Services Act 1965*, designed to protect children from neglectful parental acts and unacceptable living conditions. Still within the corporate memory of current policy-makers, the 1960s approach to child protection often meant removal from parental care, with some children remaining in state care until they reached the age of 18 years.

Children now are removed from parental care in a minority of child protection cases (Department of Families, 2000) and the thrust is to protect children by supporting and assisting their families and teachers to ensure that the child's protective needs are met. Currently, 3,306 children (1690 males: 1616 females) are on protection orders in Queensland, that is, .09% of the total population of children in the state (Department of Families, 2001).

Further, the *Child Protection Act 1999* recognizes the needs of Indigenous children, their families and their communities in the light of their history as Indigenous Australians and their over-representation in child protection (22 % of all children under child protection orders are Indigenous) (Department of Families, 2001). The *Child Protection Act 1999* is the first child protection legislation in Australia to include a Charter of Rights for a Child in Care (95 % of children on protection orders are in care), recognizing the obligations of the state to children in its care. As such, it reflects recommendations of Australia's seminal report into children and the legal process, the *Seen and Heard Report* (1997), produced by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC).

The *Seen and Heard Report* (1997) was the culmination of a comprehensive inquiry into children and legal processes in Australia and found that Australia's legal processes had ignored, marginalized and mistreated children involved in those processes (cf Rayner, 1997). It noted also that, for many children, the first experience of the legal processes occurred within the school setting and/ or whilst they were school students. The report advocated change across all levels of government and across all jurisdictions to give full effect to the rights of children to be both seen and heard.

While children may be regarded as vulnerable and lacking in power in economic, social and political spheres of society (ALRC/HREOC, 1997), there is also evidence that children are active participants in the Australian economy and significant consumers of goods and services including media and information services (Farrell, 1999; Cultural Ministers' Council & Australian Bureau of Statistics, 2000). Scott (1995) estimated that 10 to 17 year olds represent a possible commercial market of \$3.9 billion per year and children in this age group were found to have a weekly expenditure of approximately \$37. Similarly, children are consumers of mass media by virtue of their immersion in mass culture. This is seen acutely in the toy market where commodified products and services are packaged and standardized for ease of consumption by children and young people (Willis, 1991). It is ironic that the participation of children as consumers and the employment of clever strategies to attract their spending are occurring at a time of unprecedented portrayal by the mass media of the privations experiences by children, as victims of adult activity (Farrell, 1999).

Children: A Shared Responsibility

While it is socially accepted that families have the primary responsibility for child rearing (eg *Child Protection Act 1999*), there is a case for the vested interest of the state in children as potential citizens (Cashmore, 1999). Acceptance of a role for the state in child rearing within family law and child welfare law has led to a broader definition of rights and responsibilities of parents to their children (Dingwall, Eekelaar & Murray, 1995; Fox Harding, 1991). Also, it is noted here that the state's duty of care towards children undergirds legislative initiatives such as screening, recruitment and probity checks of people who care for children and young people (*Commission for Children and Young People Act 2000*; Knott & Stewart, 2001; Royal Commission into NSW Police Service, 1997).

A major recommendation of the *Seen and Heard Report* (1997) (cf. Defence for Children International, 1998) was the establishment of an Office for Children to be located in the Department of the Prime Minister and Cabinet. While this is yet to be achieved at the Federal level, states including Queensland and New South Wales have established respective state Children's Commissions. The Children's Commission Queensland (now the Commission for Children and Young People Queensland), for example, was established in 1996 with bipartisan support of *The Children's Commissioner and Children's Services Appeals Tribunal Act 1996*. Children and young people are a significant constituency and represent 26.2% of Queensland's total population (Children's Commission Newsletter, 2000). The first independent Government body in Australia committed to promoting the welfare of all children (birth to 18 years) in Queensland, the Children's Commission serves to protect and promote the well being of all children and young people in the state.

The brief of the original Children's Commission Queensland was:

- to monitor and review, in collaboration with relevant entities, the provision of children and young people's services, to propose improvements and to provide an appeal mechanism for reviewable decisions;
- to foster a community culture that focuses on children and young people's interests, needs, rights and responsibilities;
- to enhance informed decision making through research into and evaluation of issues involving the well being of children and young people;
- to promote knowledge of and confidence in the role and functions of the Children's Commission; and
- to develop and maintain a client focused organization with efficient and effective work practices and service delivery

(Children's Commission Interim Strategic Plan, 1999).

In 1999, the state Government gave authority for the Commission to prepare new legislation in order to widen its operational scope and the *Commission for Children and Young People Bill 2000* established the Commission for Children and Young People in 2000 as an independent statutory body within the Premier's portfolio, incorporating the extended functions of

employment screening for child-related employment, investigation of complaints about children's services and review of laws, policies and practices relating to children's services. This framework locates the Commission within a set of strategic alliances in maintaining its mission to protect and promote the wellbeing of children and young people.

As well as the Commission for Children and Young People in Queensland, other organizations such Queensland's Child Protection Council (CPC) have been established to inform the Queensland community of child protection issues. An advisory body to the Minister for Families, Youth and Community Care Queensland, the CPC was established in March 1999 to advise the Queensland Government on issues relevant to the protection and care of children and young people. Council members drawn from a variety of professions, government departments, community agencies and cultural groups provide wide-ranging advice and leadership in the development, planning and implementation of improved, co-ordinated services for Queensland children and families. Specific matters include policy and legislation, initiation and coordination of cross-sector initiatives, overseeing standards for provision of services and auspicing research with children and their families involved in schools and other institutions.

In keeping with the spirit of such initiatives, Cashmore (1999) has argued that children are a community responsibility requiring whole-of-government and inter-agency collaboration to ensure that they are protected from abuse and neglect and that those who are in the care of the state are properly provided for. It is clear that such initiatives are value-laden, residing within a defined value stance, yet enacted in contested sites of production and articulated in the language of the public good (Bowe, Ball & Gold, 1992; Farrell, 2001; Taylor, Rizvi, Lingard & Henry, 1997).

While legislative initiatives are giving expression to the protective needs and human rights of children, there remains equivocal support and, in some cases, resistance, to such approaches (Muehlenberg, 1994; Myers, 1994). An argument mounted by opponents of human rights for children is that decisions affecting children are the province of the family and that children's rights, in effect, subordinate parental child-rearing prerogatives (Maley, 1998). Cashmore (1999) submits that, within this framework, children are socially constructed as 'objects of concern' who lack the competence to participate and should not be burdened with the responsibility. Two antithetical co-existing positions are: on the one hand, that children require protection because of their innocence and, on the other hand, that they require firm coercive control because of their aberrance.

Other analyses of child protection policy include Marxist views (Mendes, 1999; Frost & Stein, 1989; Jamrozik & Nocella, 1998; Jamrozik & Sweeney, 1996) and feminist critiques (Lewis, 1998; Orme, 1998; Pascall, 1997) of child protection. Mendes (1999) noted that the macrostructural social agendas of these positions tend to eclipse the needs of individual cases. Despite the range of ideological stances on child protection, it is arguably a core responsibility of statutory systems such as the education system to protect children and their rights. To this end, the New South Wales Inquiry into Children's Advocacy (1996) noted that children require formal mechanisms to assist in promoting their best interests and protective needs given their position in the prevailing power structures. Legal theorists such as Kairys (1990) and Michaelis (1998) have critiqued such power structures within the legal system as perpetuating exclusion, if not marginalisation of certain people and groups.

While the human rights rhetoric may be applied to children, there is, however, a serious disjunction between legislative intent and institutional practice. Formative research of children's experiences of governance (Farrell, Danby, James, James & Leimener, 2001) is concerned with children's own accounts of governance in their everyday lives as a result of pervasive influence, control and regulation by child-focused legislation and policy. While children's human rights have made a foray from the domestic to the public sphere, there is residual adherence to patriarchal approaches in areas such as schools, the courts, health and law enforcement. In such sites of production, the performance of children remains peripheral to that of adult performance.

No social organization can hope to be built on the rights of its members unless there are mechanisms whereby those members may express themselves and wherein those expressions are taken seriously. Hearing what children say must, therefore, lie at the root of an elaboration of children's rights. No society will have begun to perceive its children as right holders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express their views, and towards expressing them with respect. (Eekelaar, 1992, p. 228)

It is arguable that we need a balance between the rights of children and young people and the duty of care and human rights of teachers and care providers. Cashmore (1999) notes the priority of workers' civil liberties over the protective needs of children in a safe and secure environment. This resonates with the work of policy theorist, Deborah Brennan (1999) who critiques the emergence of workforce-oriented, market-drive approaches to children's services. Concomitant to pervasive industrial change is the marginalisation of the rights and needs of children and a sharp focus on the need of adults in children's service and education. Changes to labour and industrial policies in contemporary Australia have impacted significantly on the resources, opportunities, constraints and choices available to family members. So too, Irwin (1999, p.43) discusses the 'new market family' where employment and family appear to be increasingly economized and marketised. Such endemic social, economic and political change is construed by Gee, Hull and Lankshear (1996) as emblematic of 'new times' in societies fuelled by escalating competition and unprecedented mass technology. In the light of pervasive social flux, Brennan (1999) argues for reinvigorated public debate about the relationship between children, families and communities so that human rights can be realized for children and adults alike.

It has been argued here that contemporary child protection laws drawn strongly on human rights norms in their development and drafting. (eg *Child Protection Act 1999*; *Commission for Children and Young People Act 2000*; *UNCRC 1989*). The effective promotion of such rights and responsibilities requires systematic examination of the societal conditions that prevent children from being seen and heard and that prevent adults, such as teachers, from realizing their protective obligations to children and young people whilst maintaining their own human rights. It requires, moreover, sustained educative work toward the development of democratic communities in which people can feel free and capable of participation (Dewey, 1958); communities in which responsibility for children and young people is shared.

Keywords

Child protection; protective needs; human rights; teachers; Queensland

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Endnotes

1. The *Child Protection Amendment Act 2000* addresses matters such as interstate transfer provisions and obligations to report harm to children in residential facilities in response to the Forde Inquiry.
2. *Children and Young Persons (Care and Protection) Act 1998, Commission for Children and Young People Act 1998, Child Protection (Prohibition Employment) Act 1998 and Ombudsman Amendment (Child Protection and Community Service) Act 1998*.