

LEGAL STUDIES

Evaluate the effectiveness of legal and non-legal responses regarding the care and protection of children.

The changing nature of society has prompted an increasing awareness regarding the adequate care and protection of children. There is a widely accepted consensus in Australia that all children should be entitled to sufficient care and protection. The legal system and non-legal frameworks seek to implement measures that aim to promote and ensure the optimal care and protection of children. However, what is discerned as an 'effective' response is difficult to determine as what may be considered as 'effective' by from an institutional viewpoint may not be from that of a child.

Being essentially structured on processes and formality, it is often difficult for the legal system to effectively respond, as each issue requires a sensitive solution. As stated by former Chief Justice of the Family Court, Justice Alastair Nicholson, "Family law is an area where human nature and black letter law do not necessarily combine to create harmonious outcomes¹".

The legal system has committed to improving the provisions governing the care and protection of children. Notably, the numerous amendments made to the Family Law Act 1975 (Cth) (FLA) have sought to place a greater emphasis on the 'best interests of the child' and detract from the notion of child ownership. Through the Family Law Reform Act (1995) (Cth), Australia's legal system is better aligned with the needs of society by recognising 'best interests of the child' as the paramount consideration when making any legal decision². Even in the most difficult circumstances this principle prevails, such as in the case of Baby D [2011], whereby the courts advised that it is in the baby's "best interests" for the parents to withdraw life-sustaining treatment³.

Further reforms have been promoted through the Family Law (Shared Parental Responsibility) Act 2006 (Cth), which "shifts the management of family breakdowns away from litigation and towards co-operative parenting"⁴. However, the very improvements introduced through the phased reforms of the FLA are creating protection and care issues for children, especially the presumption of equal shared parental responsibility. In high conflict situations, co-operative parenting can continue to inflame a volatile situation which can create an unsuitable and sometimes violent environment for the child⁵. According to a survey undertaken by the Australian Institute of Family Studies (AIFS), of the 10,000 couples who separated after 2006, one in five parents reported concern regarding the safety of their child when in contact with the other parent. Various commission reports by prominent institutions, namely the AIFS and Family Law Council, have conclude that the FLA reforms regarding shared care deviate from the underlying aim of the protection of children⁶.

Continuing reforms recently made through the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) seek to ensure greater protection for children vulnerable to

¹ Gleeson, Wayne . "The "Family Violence Act" 2012 Amendments." Legal Studies Assist. 2012: 1,2,3,5. Print.

² "Hot Topics: Divorce and Separation" State Library NSW. N.p., 20 Mar. 2013. Web. 5 June 2013. <http://www.legalanswers.sl.nsw.gov.au/guides/child_care_and_protection/overview.html>

³ Stewart, Cameron. "Death management and the case of Baby D." ABC News. N.p., 3 Mar. 2011. Web. 19 June 2013. <<http://www.abc.net.au/religion/articles/2011/05/03/3206276.htm>>

⁴ "Evaluation of the 2006 Family Law Reforms: Executive Summary." Australian Institute of Family Studies. N.p., 2 May 2013. Web. 7 June 2013. <<http://www.aifs.gov.au/institute/pubs/file/executivesummary.pdf>>

⁵ Sifris, Adiva. "Family Violence and the Impact of Recent Amendments to the Family Law Act | Human Rights in Australia | Right Now." *Human Rights in Australia*. Right Now, 11 July 2012. Web. 07 June 2013. <<http://rightnow.org.au/topics/children-and-youth/family-violence-and-the-impact-of-recent-amendments-to-the-family-law-act/>>.

⁶ Gander, Catherine. "Family law is failing kids - The Drum Opinion ." *ABC News*. N.p., 26 May 2011. Web. 2 June 2013. <<http://www.abc.net.au/unleashed/2732542.html>>.

violence and abuse. In essence this reform, places more emphasis on "protection from harm" when considering what is in the best interest of the child. The responsiveness of the legal system to issues in law illustrates furthers attempts to effectively respond to issues regard child protection⁷.

The individual rights of all children have been given more prominence in the past decades. In NSW, through the introduction of the Status of Children Act 1996 (NSW), all children, nuptial and ex-nuptial, have the right to be treated equal before the law. In doing so, greater protection to individual rights has been given and therefore allows courts to further intervene.

The courts also aim to ensure the protection and care of children through greater intervention in a range of social situations. For example, despite the fact that Aboriginal and Torres Strait Islander (ATSI) marriages are not recognised under the Marriage Act 1961 (Cth), the Family Law Court still recognise the rights of children of ATSI marriages and ensure their best interests when determining their status following family breakdowns⁸. These responses clearly aim to ensure the protection and care of children, whether they prove to be effective ultimately depend on the outcome they have on each case.

In NSW, the Department of Community Services responds to community issues regarding the care and protection of children. However, the child protection system struggles to respond adequately to children at risk of significant harm. Since the Children and Young Persons (Care and Protection) Act 1998 (NSW) began operation, there has been a dramatic increase in the amount of cases reported to Community Services regarding children, with one in four of all children in out-of-home care (OOHC) reported by the end of 2008/2009.

Concerns have been raised on whether the Department has sufficient resources to deal with the volume of cases. Following on from this, increases in and numerous circumstances of horrific child deaths caused by neglect and abuse, specifically the case of Ebony – R v BW & SW (2007), whereby the negligence of parents led to the starvation death of the minor, the NSW government commissioned the Special Commission of Inquiry into Child Protection Services (Wood Inquiry)⁹.

Through this inquiry, a number of recommendations were put forth which aimed to address the limited capabilities of Community Services, such as only children vulnerable to 'significant' harm should be reported and allow other initiatives to manage services such as foster care. By attempting to improve the efficiency of existing resources, it is hoped that stronger, more effective, Community Services will be delivered in the near future.

With respect to international law, having ratified the United Nation's Conventions on the Rights of the Child 1989 (CROC) in 1990, Australia has intended to commit to protecting the rights of children¹⁰. However, the extent to which the convention has effectively contributed is limited as CROC has not been directly implemented into Australian domestic law and its provisions are not enforceable by the courts¹¹. By limiting the incorporation of CROC into Australia's domestic legislation, the extent to which the convention is an effective legal measure is minimal.

This ineffectiveness highlighted through recent reviews conducted by the United Nations Committee on the Rights of the Child (CRC) in 2012, which have released a damning report expressing serious

⁷ Gleeson, Wayne . "The "Family Violence Act" 2012 Amendments." *Legal Studies Assist*. 2012: 1,2,3,5. Print.

⁸ Brassil, Belinda, and Dimity Brassil. *Excel HSC legal studies*. Glebe, N.S.W.: Pascal Press, 2010. Print.

⁹ Brassil, Belinda, and Dimity Brassil. *Excel HSC legal studies*. Glebe, N.S.W.: Pascal Press, 2010. Print.

¹⁰ "Hot Topics: Child care and protection." State Library NSW. N.p., 20 Mar. 2013. Web. 5 June 2013.

<http://www.legalanswers.sl.nsw.gov.au/guides/child_care_and_protection/overview.html>

¹¹ Brassil, Belinda, and Dimity Brassil. *Excel HSC legal studies*. Glebe, N.S.W.: Pascal Press, 2010. Print.

concern over the current status of children in Australia¹². The Committee exclaimed its dissatisfaction with Australia in failing to implement essential measures of the convention, raising concern relating to issues impacting children, such as the 51 percent increase in the number of children in OOHC care between 2005-2006¹³.

An attribute of non-legal approaches to the care and protection of children is that most are, to an extent, more effective in dealing with the emotional well-being of children, much more than the pragmatic structures and processes of the legal system.

Numerous NGOs provide support children who may be struggling with family issues. These bodies are involved in number of services regarding the care and protection of children which range from supporting daily care, childhood development, educational services and management of foster care and shelters. Many of these NGOs are affiliated with care movements which were founded to support a sector of the community or group such as Foster Parents Support Network, Child Care NSW, as well as affiliations with the church, such as CatholicCare and St Vincent De Paul¹⁴.

In recommending measures to improve the effectiveness the Wood Inquiry suggested NGOs have a greater role in the provision of OOHC and early intervention programs. Following on from the inquiry, media reports indicate that the NSW government aims to delegate the management of OOHC facilities to 95 percent of the state's NGOs¹⁵. Without these groups, the burden of assisting with the care and protection of children, especially those in lower socio-economic environments would be unachievable through the resources of governments. In spite of this however, though NGOs may be a larger resource pool, whether these measures are effective in improving care and protection of children is yet to be realised.

In some cases church-based NGOs have sparked criticism regarding the lack of intervention in matters relating to the child abuse inflicted by their own clergy. Compounding the issue, recent media reports have communicated that the Catholic Church had further attempted conceal these cases of child sexual abuse¹⁶. It circumstances as such, it is questioned as to whether the institutions like the Church who promote the well-being and protection of children are, in reality, effective in dealing with issues regarding children. Rather than helping to protect children, they seem to be aggravating situations that are already so delicate, causing life damaging traumas.

Family Referral Services (FRS) are a NSW initiative launched under the Wood Inquiry's "Keep Them Safe" action plan. These services act as means to prevent further escalation regarding children at risk of harm that do not meet the statutory threshold. Staffed with mandatory reporters from various government departments and NGOs, FRS further report instances of child abuse and neglect to Community Services. Child Wellbeing Units (CWU) are further prescribed to assist mandatory reporters in assessing these reports depending on the circumstance based on recommendations to the respective Government Department¹⁷. FRS and CWU are an important

¹² Ball, Rachel, and Schokman, Ben. "UN releases damning report on Australia." *Alternative Law Journal*. N.p., (2012). Web. 14 June 2013. <<http://www.altlj.org/news-and-views/downunderallover/duao-vol-37-3/394-un-releases-damning-report-on-australia>>

¹³ "Consideration of reports submitted by States parties under article 44 of the Convention Concluding observations: Australia." *Committee on the Rights of the Child*. United Nations Convention on the Rights of the Child, 28 Aug. 2012. Web. 5 June 2013. <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf>

¹⁴ Milgate, Paul. *Cambridge legal studies - HSC*. 2nd ed. Cambridge ; Port Melbourne, Vic.: Cambridge University Press, 2010. Print.

¹⁵ Tovey, Josephine . "NGOs agree deal to take over child foster care." *Sydney Morning Herald* . N.p., 13 Mar. 2012. Web. 19 June 2013. <<http://www.smh.com.au/nsw/ngos-agree-deal-to-take-over-child-foster-care-20120312-1uwew.html>>.

¹⁶ Andersen, Brigid. "Cardinal George Pell admits Church covered up cases of child sex abuse ." *ABC News*. N.p., 27 Apr. 2013. Web. 19 June 2013. <<http://www.abc.net.au/news/2013-05-27/cardinal-george-pell-appears-at-sex-abuse-inquiry/4714964>>.

¹⁷ "Guidelines for the referral of children, young people and families to Family Referral Services ." *NSW Health*. N.p., 2009. Web. 15 June 2013. <http://www0.health.nsw.gov.au/resources/initiatives/kts/pdf/gl_for_mandatory_reporter.pdf>

element by helping to keep the responsibility for child safety in the community. The effectiveness of such an initiative will depend on the level of collaboration and alignment of such an extensive network as that which has developed around the care and protection of children.

Both legal and non-legal systems have thus attempted to effectively reposed to issues regarding the care and protection of children. Lawmakers and government continue to strive to find a better solution, but sometimes neglect the essence of the individual family unit. Unfortunately this issue continues to be a losing battle and society at large struggles to find a holistic solution and therefore tries to find bigger and better initiatives. In the end, it is ultimately determined by the situation of each individual case as to whether these responses are effective in dealing with the care and protection of children and thus delivering justice.

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