Permanency planning reconsidered

One step forward . . . one step back

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Placing children and young persons into substitute care raises numerous practical and philosphical issues.

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> . . . if we are to prevent the lights going out on our lives once more, we must ask ourselves crucial questions . . . Where are we? . . . How did we get here? . . . Why did we come? . . . Where do we want to go? . . . How do we want to get to where we want to go? . . . How far do we have to go before we get to where we want to go? . . . How would we know where we were when we got there? . . . Have we got a map? . . . Why did we leave places to get to where we are? . . . Where were we before that was such that we had to leave to get where we are before we got to where we wanted to be? . . . Where would we end up if we had the choice? . . . Where would we end up if we didn't have the choice? . . . What would we choose, given the choice? . . . Do we have that choice to choose? . . . Or indeed can we be choosy about the choice chosen? . . . What are the choices? . . . Do we want to stop now? . . . (rhetorical) . . . or do we want to go right back to the beginning and start all over again . . .?
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> Rowan Atkinson as Sir Marcus Browning MP in *Live in Belfast*, 1981.

The appropriateness of commencing an examination of permanency planning with such a quote is that it points to several key issues which are critical if our child welfare system is to be really child and family focused. One such issue is the need for a sense of history: policies — like children — go through developmental processes, and the attitudes, values and decisions made in the best interests of children and families in years past very directly affect where we are today. We, too, need to look critically at all the available choices for families and children, and we do need to be 'choosy' about the shape of child welfare that is deemed appropriate for our community today. Children and families are too precious a resource for an 'anything goes' approach to service development. We do indeed have a 'map', in the sense that while our understanding of children, families and their development is still growing, there is much that we do know and which can be harnessed in planning with families and children toward the next century. The critical test will be how we use the 'map' we have.

Permanency planning rediscovered?

Permanency planning is hardly a new concept.[1] Long before the term was in fashion, welfare administrators knew that children were vulnerable to uncertainty and instability of care, and our practice wisdom for decades has taught us that a series of placements interspersed with unsuccessful returns to the care of the family, can often have devastating and permanent effects on the developing psyche of the child, and in turn on the capacity as an adult to form meaningful and lasting relationships. Like the cycle of poverty, the cycle of generational family distress is well documented.

Why, then, has permanency planning moved to centre stage? It is, some argue, no more and no less than good quality casework[2] and as such ought to flow naturally from a commitment to the rights of families and children, to due process and natural justice in decision making, and to the centrality of the family in decision making about the family.

In Victoria the period since the 1980s has been characterised by a steady push, fuelled by the philosophy and enthusiasm of Labor government, towards a community and family-first focus across the spheres of community services, health and education — indeed across all areas of government influence. No longer was it sufficient for even skilled and experienced administrators, planners and caseworkers to determine the shape and nature of community services — rather the skills, ideas and resources of such personnel were laid at the feet of local communities in order to encourage the development of locally appropriate, accessible and accountable services and facilities.

The highlight in the children's services field was, for many, the Child Welfare Legislation and Practice Review, often referred to as the Carney Report, of 1984.[3] This was the first attempt in Victorian welfare history to review the overall legislation, practice and philosophy of our child welfare system. The Report raised serious concerns about many aspects of child welfare

practice in Victoria, not the least of which was the basis on which children became 'clients' of the statutory child welfare system, and the care they received at the hands of the state. The Carney Report proposed new legislation which would substantially alter practice in child welfare and, additionally and perhaps as importantly, would incorporate a legislative statement of the philosophy of care and principles of practice which would guide all those involved in the child welfare system. The legislation proposed has been passed in Victoria in the *Children and Young Persons Act* 1989 (the *CYP Act*), though many of its provisions remained unproclaimed until 1991. One wonders why, after so thorough and wide-ranging a review as the Carney Report, it took so many years to pass the enabling legislation. Perhaps the answers lie to a greater or lesser extent in the absence of votes attaching to children's issues, the reality of economic restraint and, unfortunately, the almost unending post-consultation consultation that seems now to be characteristic of service planning and development.[4]

The problem with such an approach is that it takes a very long time to reach completion, and meanwhile children and families continue to wait, while (of course) service networks continue to develop regardless.

A new philosophy and options

The Carney Report saw the central core of the debate regarding the need for stable, predictable and permanent care of children, as ' . . . the reconciliation of the goals of family reunification, timeliness of decision making, and the promotion of secure and stable environments for children in out-of-home care . . .'[5] It endorsed a more flexible approach to meeting the needs of children in substitute care,[6] one which ' . . . would expand a child's range of relationships rather than reduce them and (would) acknowledge the complexity of competing rights responsibilities and duties between children, their families and substitute families . . .'[7] For children brought to the attention of the child welfare system and where the family's capacity to care was an issue, the Report proposed the separation of the legal concepts of 'custody' and 'guardianship', a range of dispositional alternatives, and new requirements in practice for children after initial dispositions were made.[8]

The care options and orders proposed by the Carney Report and enacted in the *CYP Act* include orders granting custody or supervised custody of the child to a third party, custody of the child to the Director-General of Community Services, guardianship to the Director-General, and permanent care orders. The very notion of 'wardship' was, at least from a legislative viewpoint, to be expunged from practice and, indeed, from the vernacular. Custody and guardianship orders to the Director-General are to be for no more than two years initially. They can be extended by application to the court, but only after the court considers a series of legislatively mandated issues including the possibility of reunification of child and family at some time, the appropriateness of a more permanent order and the benefits of the retention by the Director-General of custody or guardianship, as the case may be. A permanent care order can only be made where the child has been out of its family's care for two years or a total of two of the previous three years, and consideration must be given to the welfare and interests of the child. Principles of case planning and of the preparation of case plans are legislatively prescribed for the first time in welfare legislation in Victoria.[9]

What can be said of this potentially major legislative reform in Victoria? Will it continue the trend toward more accountability in the care of children, and to increasing real participation of parents and children in the decisions which affect their lives? There are a number of issues to note.

Children and the legal system

First, the *CYP Act* anchors decision making which affects the custody or guardianship of a child squarely within the ambit of the court and the formal legal system. While the need for clear and judicious case planning reviews by the Department was recognised by the Carney Report,[10] it sought and the *CYP Act* confirms that judicial review and reconsideration of the implementation of Children's Court orders should be a cornerstone of a revitalised child welfare judicial system. There is much to be said to commend this approach. Children's Courts and their magistrates ought to be more in touch with the consequences of the orders they make. Custody and guardianship are issues of fundamental rights attaching to parenthood and too critical to be left to even well-meaning administrative processes. Decisions in such areas should indeed be bound by the rule of law and notions of natural justice and the relative powerlessness of many parents whose children are in care demands that any extension of so fundamental an intrusion into the parent-child relationship ought best be argued before an impartial and skilled arbiter. The difficulty, however, is that recourse to the court system of itself does not guarantee equity of access or participation.[11]

The adversary system, characteristic of even the Children's Courts, incorporates notions of argument, opposition and the conviction that truth emerges from ' . . . a tactical fight based on language and an abrasive question and answer dialectic . . .',[12] a dialectic which by its very process often excludes parents and children from participation or comprehension in any real sense. The legal profession, too, by its language, emphasis on procedures, predominantly upper middle-class and Anglo-Celtic origins, and its remoteness from many of the issues so critical in the lives of families appearing before the Children's Court, adds to the sense of loss of control which families can experience once the door of the court is reached.[13] Separate legal representation of the child in family matters has often been promoted but rarely achieved, and indeed some have questioned whether the adversary system is able to accommodate the representation of children at all.[14] How does a barrister take instructions from a 20-month-old child? Where parties are already on an unequal footing, the adversarial system may not only lead to an unfair result, but perhaps also accentuates in that result the relative differences in the position of the parties concerned.[15] Magistrates being 'largely conservative, monolingual and monocultural',[16] also contribute to the 'mystique' of the legal profession, which for many families in the Children's Court and elsewhere becomes synonymous with ' . . . an array of practices which resists rational systematisation or explication . . .'.[17] In short, families often do not know what is going on, or why, and are in the hands of an advocate whose training, background and philosophy may be quite at variance with families themselves.[18]

Given the reality of the experience of 'going to court' for many families and children, to place so great a reliance for the continuing welfare of children and for review of their out-of-family care on that very system, seems fraught with problems, and rather smacks of a conservative adherence to the adversary and court system as a ' . . . wonderful invention which has stood the test of time . . .' — a tendency to hold uncritically to

legal traditions.[19] Without changes in the practice, language, and training of all the players in the Children's Court arena, the rationale for its continuing involvement in monitoring and reviewing the decisions it makes, will be lost for the families involved. The court will continue to be just one more powerful and inexplicable intervenor in their lives over which they have little if any control. Worse, they will now have to go through the process every two years, or more often!

Perhaps along with a review of the training and background of legal practitioners and magistrates in this setting, the time has come to consider whether a different form of dispute resolution mechanism is more appropriate. Given the reservations many have as to the efficacy and appropriateness of traditional court-based dispute resolution mechanisms for solving intra-familial difficulties, it is perhaps surprising that the Carney Report did not give more consideration to alternative systems in its recommendations. Much could be learnt from the experience of, for example, the composition, philosophy and practices of the various Tribunals and Boards which have been established both in Victoria and federally, and which deal at times with equally critical issues of human rights, entitlements and family relationships.[20] Such bodies, no less judicially constituted than a more formal court, offer many complainants an option which is legally binding but which focuses on more investigative exploration of the problem and possible solutions, and consciously attempts to incorporate into deliberations perspectives in addition to those of the law. A multi-disciplinary and multi-skilled approach, which brings together the perspectives associated with experience in law, the community and family interrelationships, and a focus on such non-adversarial methods of dispute resolution as mediation, negotiation or arbitration, have the potential to radically transform both the practice of the Children's Court and its perception by the community.

Without changes to the philosophy, practices and training of those who fill the various roles in the Children's Court, the judicial review processes envisaged in the Carney Report as a means to ensure quality of case planning and accountability, may become an embarrassing reminder of past court appearances for the families concerned, and an administrative nightmare for caseworkers. The pressure to meet reporting requirements and to justify case planning progress (or lack of it) may end up being the focus, to the detriment of the real work alongside families and children. And while magistrates and caseworkers argue about what has or has not been done, some children who need support may slip out of the very system designed for their protection.

How long is too long?

Second, the period envisaged in the *CYP Act* before permanence can be ordered raises serious concerns. Two years is a long time for any child to be away from home — and, indeed, the Act itself envisages that the time before permanence may be considerably longer.[21] The Carney Report itself acknowledged that even an annual review of wardship ' . . . still allowed children to remain in limbo for a full year which, in the life of a child, is a very long period of time . . .'[22] and recommended that a more regular review (than annually) was desirable. Many jurisdictions have adopted much shorter time spans as appropriate in which to commence permanent planning arrangements.[23] Of course, the decision to move towards permanence is one affecting the most fundamental of human rights for those (hopefully few) families involved, but we must ask whose rights are being served by a process which builds such long periods for consideration into the life of a child whose childhood has already by definition been substantially disrupted. It is always easier not to decide than to decide. To continue to leave open the option of a return to natural family care at some 'undefined' future time avoids heartache and distress for everyone, including family, child and caseworker, but also means that children and their families are left floundering. This highlights another issue — it is not that there is too much work to do, it is that it is too hard. Making decisions about children's long-term care needs to be recognised as arduous for all concerned, which is, in part, why children in substitute care drift in limbo. Permanency planning heightens the awareness of the needs of family and child for certainty and stability, but also needs to consider the time frame and developmental stage of the child, and the effects of delay on the lives of the children concerned.

Which way now?

Third, it is important to remember, returning to the quote which began this paper, that we do from our history of child welfare have a 'map', or at least a set of directions (however rudimentary) as to where we want to go. In children's services there seems to be a preferred concentration on what we yet do not know or understand, rather than an acknowledgment of what is already understood. The Carney Report stands tribute to the wealth of knowledge across the community about what elements need to be incorporated if a child welfare system is to be accessible, appropriate, accountable and acceptable to the community it serves. While it could be argued that we do not yet have a clear vision of what good parenting is supposed to be,[24] there is arguably a much clearer perception of when parenting and care of children has demonstrably failed, and a growing acceptance that in such situations parent and community, in partnership, share a responsibility for ensuring that opportunities for change — at individual, family, community and economic levels — are taken.

Finally, the principles of case planning enunciated by the Carney Report and translated into the *Children and Young Persons Act* (ss.119-120) while laudable, need to be translated in turn from legalese into direct practice with families. In one sense it is rather a sad reflection on the state of social work practice in child welfare that such principles as 'the welfare and interests of the child must be given paramount importance', 'due consideration must be given to immediate and long-term effects of decisions . . . ', 'the case planning process must take into account the views of all persons who are directly involved . . . ' even need to be stated at all (ss.119-120). If such principles are not at the core of practice with families and children, then what is? Never-theless, stating such principles is really the easy part — putting them into practice is another thing altogether.

In developing the staff training, recruitment and supervision practices, and the case management systems which enshrine these principles, and in the very system of dispute resolution which is adopted, care must be taken to ensure that once again the child in the family is not lost in the rhetoric.

References

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2. Swain, above.

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All of its forces have to be covered by a 'status of forces' agreement (for example, how a US service person is to be tried if he or she murders a citizen of the host nation). There are also agreements between governments regarding the sale of military equipment.

A complicating factory for maritime nations is the 1982 UN law of the sea treaty. This has standardised the width of the territorial sea (12 miles) and created a new zone: an exclusive economic zone stretching out beyond the territorial sea for up to 188 miles. The US, at the last moment, refused to sign the treaty, but all the South Pacific nations are in the process of ratifying it. These nations are therefore expanding their areas of maritime control and have even impounded US civilian fishing vessels. These zones cannot be used to exclude foreign military vessels — a fact recognised by the SPNFZ treaty.

South-East Asia Treaty Organisation (SEATO)

SEATO was part of the US fashion in the late 1940s/early 1950s to create regional military alliances to encircle the USSR. The major multilateral treaties were the North Atlantic Treaty Organisation (NATO), Central Treaty Organisation consisting of the US, UK, Iran, Pakistan and Turkey (CENTO) and SEATO. Only NATO remains in force. It is now one of the longest-lasting alliances in world history. But with the ending of the Cold War, it is having difficulty justifying its continued existence.

The 1954 SEATO treaty came into force in 1955. It contained Australia, France, New Zealand, Pakistan, Philippines, Thailand, the UK and US. The idea of 'united action' in south-east Asia arose as a reaction to the French expulsion from Indo-China and the perceived 'domino effect', whereby Asian nations would succumb to internal or external communist control.

NATO is unusual because of the extent to which the forces of member-nations are integrated and have standardised equipment. SEATO (and CENTO) never acquired that status. Indeed, the participating nations were united only in their opposition to communism and had few other features in common. For example, SEATO nations could not agree if this treaty justified their entry into the Vietnam conflict from 1961 onwards (half of the SEATO nations refused to supply troops for the conflict). The relevance of SEATO gradually eroded away since it had no clear military role.

Pacific Security Treaty (ANZUS)

The 1951 treaty, better known from the initials of its three member-nations (Australia, New Zealand and US), came into effect in 1952. Its creation was an Australian initiative in response to the US's negotiating the 1951 Japanese Peace Treaty. Having fought Japan, Australia wanted an assurance that Japan would not return to militarism once the US withdrew its occupation forces.

The treaty represents about as much as Australia could gain and the US was willing to concede. It is far less than the NATO treaty, in that the security assurances in the event of an armed attack are vague. There is no specific guarantee of help — nations learned from World War I's outbreak (when nations tumbled into the conflict) that it is dangerous to give automatic guarantees to aid others when they are attacked.

The treaty has worn well. It has lasted longer than most other treaties of the same vintage. In the mid-1980s, the New Zealand Labour Government decided to exclude visiting nuclear warships from its ports. The US declared the treaty 'inoperative'. The new Government in New Zealand, recognising the popularity of its predecessor's policy, has not overturned it but it is trying to find a way of reviving ANZUS.

ANZUS has reassured Australia that it has a great and powerful friend to replace the UK. ANZUS has suited the US since the 'ANZUS spirit' has provided a foundation for treaties covering the installation of US bases ('joint facilities') in Australia. Indeed, the relationship has blossomed to such an extent that the ANZUS treaty itself could disappear overnight and no-one would notice it — the more specific treaties could exist without it.

UKUSA

One such agreement is the secret 1947 UKUSA Treaty (whose existence was not revealed for three decades). This facilitates co-operation between the intelligence services of the UK, US, Australia, Canada and New Zealand. The extent to which intelligence sharing goes on is still unclear. Despite the 'inoperative' ANZUS treaty, it appears that the New Zealand intelligence service is still co-operating within the agreement. Politicians come and go but intelligence services remain.

Conclusion

The ending of the Cold War and the disappearance of the USSR have not resulted in an outbreak of peace in the South Pacific. Western military forces are still deployed in the region. In contrast to all the upheavals in eastern Europe since 'the fall of the wall', there have been only two small moves in the South Pacific's demilitarisation: the US withdrawal from its bases in the Philippines (with the prospect of increased US naval presence at Singapore) and the April 1992 French decision to stop nuclear testing for a year. The South Pacific is still not pacific.

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