Creating care for children

Barbara Ann Hocking

Policy dilemmas and legal solutions to the 'childcare problem'.

Despite the volume of debate about working women, children remain a peripheral policy issue in the United Kingdom and Australia. One potentially detrimental effect of the marginalisation of women's issues is that for the most part childcare remains a concept limited to the relationship between work and the family: childcare is seen within the framework of allowing women to return to work. *The Children Act* 1989 which came into effect in the United Kingdom in October 1991 attempts to deal with childcare in a broad sense, in particular through the creation of the legal concept of parental responsibility and in imposing on local authorities a duty of care for children in need. The recent release of several policy documents by the left of centre Institute for Public Policy Research in London, provides valuable policy perspectives from which the new legislative initiative can be measured and outlines policy arguments in this area that are gaining increasing currency within the British Labour Party.

Some aspects of these United Kingdom initiatives are discussed within the context of the labour law entitlements in the United Kingdom. The central policy dilemma that is emphasised in this paper is that the balance between public and private responsibilities in relation to a broad concept of childcare is extremely difficult to draw and the role of the law in this area is problematic.

Creative childcare — public policy considerations

Several recently released policy documents and a new and significant piece of legislation, all dealing with the subject of childcare and children in the United Kingdom, provide valuable policy insights and initiatives for Australian consideration. Like the United Kingdom, Australia is at the cross roads, midway between the hard won gains of early feminist struggle, such as the right to work at all and the increasing realisation of exactly what that means in the current industrial arena. For many women, for the most part, the simple translation of that right to work is a marginalised existence in a labour force outside the mainstream industrial economy while, ironically, those more fortunate condemn participation in the mainstream industrial arena as meaning an impossibly burdened life. Children in the first instance are part of the reason for the economic marginalisation while in the second instance they are often portrayed somewhat graphically as working women's burdens. Cutting across these conflicts and boundaries, many women view feminist theory and argument as redundant, seeing all the battles as already won: hence the oft referred to era of post-feminism. More philosophically than politically, some perennial and articulate proponents of feminism, such as Germaine Greer, see the employer as simply the replacement for the husband in women's continuing oppression.

Nevertheless, whatever the reality of the working world, it is a reality that most women have to face for a range of reasons and it is critical that issues associated with women's employment remain connected to Australian political debate. Children are for the most part neglected in political policy and one of the most cogent criticisms of Australia's legislative concepts of discrimination is that they fail to confront the range of issues (such as broken career paths, unavailability of childcare, limited job options, lack of money, lack of suitable mentors, etc.) that contribute to women's poor career advancement. In both England and Australia, the prevailing criticism of anti-discrimination legislation is of its 'refusal to deal with inequality as a structural problem, and not one of individual complaints within limited spheres of action'.[1]

Relying on individual instances of discrimination, the legislation inevitably cannot easily challenge institutionalised industrial policies and guidelines. Indeed, it fails to ask whether particular industrial policies and practices serve to perpetuate women's industrial marginalisation: a fundamental step in challenging workplace decisions. Hunter persuasively argues that the central question the legislation should ask is that concerning gender relations.

> If anti-discrimination law enshrined the subordination principle we would simply need to ask whether a particular practice operated to maintain women's subordination. If it did it should be changed.[2]

Equally, as Burdekin's report makes clear, the institutionalisation of poverty

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among children must be seen precisely as an institutionalised problem and not simply and atheoretically in terms of isolated instances of social or parental neglect.

A range of rights: women and children first

Burdekin's Report on Homeless Children has been integral in bringing this neglected issue into the political policy arena from a perspective that breaks with the 'women and children' link. Representing a demand for a 'politics of rights' which provides a 'very powerful official text in the politics of embarrassment and rights'[3] the report could generate a public policy reappraisal and reformulation. These issues need to be addressed if the significant schisms within society that corporatism engenders — those corporatist arrangements identified by Havemann as 'the politics of official discourse'[4] — are to be halted and the prevailing orthodoxy of economic rationalism challenged. The recent initiatives undertaken in the United Kingdom have implications in these areas of public and legal policy.

To commence with, this article attempts to assess the relevance of some of the central arguments set out in some recent publications by the London-based Institute for Public Policy Research. Because it deals with another concept of childcare, the paper also considers some of the significant developments contained in the *Children's Act* 1989 which came into operation in the United Kingdom on 14 October 1991. The purpose of this article is to link the arguments in these documents together and outline both legal and policy considerations that may be of interest or relevance to the Australian reader.

The Institute for Public Policy Research (IPPR) was established in 1988 as an 'alternative to the free market think-tanks' which emerged and were developed in England under Thatcherism. The release of their Social Policy Paper *Childcare in a Modern Welfare System*[5] is particularly timely given the recent call by the British Equal Opportunities Commission for a new equality law aimed at combating discrimination against women at work[6] and the endorsement of the recently proclaimed Opportunity 2000, a business-led equal opportunity initiative, by the Prime Minister, John Major. The recently issued report by the Institute for Public Policy Research stresses the finding of their earlier publication *The Family Way*[7] that the problem is not that women do not participate in the labour force but that they participate unequally in the labour force. The fact of women's industrial marginalisation and ghettoisation is one equally stressed by Australian legal theorists and public policy analysts.[8]

Cohen and Fraser approach the issue of childcare broadly as an integral part of a welfare state which emphasises the promotion of 'greater equality in terms of life chances'.[9] Their report examines a range of possible strategies for public support of childcare in the light of the broad-based principles of a modern welfare system. Such a view sees public childcare as a response to the inadequacy of current workplace operations just as much as a part of the industrial response to women in the workplace. Nevertheless, they add the significant dimension of linking in the economic relevance of women working; there are economic benefits to be gained from public provision of childcare.

> Childcare can play a major part in increasing the supply of labour and skills, combating underlying inflationary pressures and helping to galvanise the economy.[10]

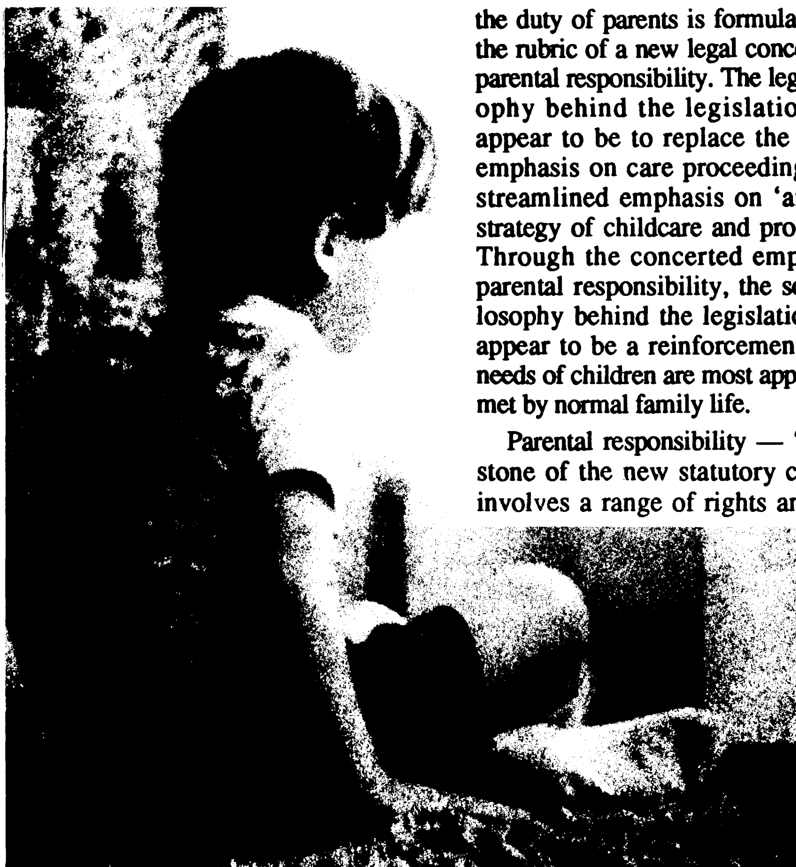
The report draws attention to the range of deficiencies and the limited public involvement evidenced in the United Kingdom in this area. They stress that the limited public involvement in relation to the provision of childcare services has been 'parallelled over the same period by limited statutory work and family employment provisions'.[11] Limited public provision of childcare has been, in effect, simply one aspect of women's 'silence' in the industrial sphere. Women in the United Kingdom are, for the most part, excluded from access to the limited maternity rights that do exist by the extreme stringency of the qualifying conditions. Encouraged by the prevailing political ethos that childcare is a private concern, local authorities have fallen into a regulatory rather than provider role and since 1980, have operated only under a discretionary duty to make provision for nursery education. Central to these limited services is the political attitude that children are primarily the mother's responsibility.

The authors of *Childcare in a Modern Welfare System* therefore challenge the prevailing and long term orthodoxy in the United Kingdom which places the responsibility for the reconciliation between work and parental responsibility with the individual family. They suggest that the narrow focus of public responsibility threatens to 'reduce public childcare to a disadvantaged and stigmatised ghetto'.[12] The narrow scope of public responsibility has, they argue, been even further undermined by the passage of the Children Act 1989 which emphasises that local authorities have a duty to protect children 'in need'. The narrowness of the 'need' requirement in the legislative context — which is governed by an overwhelming emphasis on parental rights — will, they argue, inevitably simply institutionalise the 'narrow focus of public responsibility'.[13]

The nanny state?

The basis to this political interpretation is that childcare is a matter of public responsibility and it is the responsibility of the national government to set out a national childcare policy with 'clear objectives' and to ensure that it is implemented.[14] Industrially, it is a view that sees the marginalisation of women as increasing and not decreasing, despite the high profile calls for women to gain comparable industrial status to men.

Such a view stands in sharp contrast to the provisions and implications of the *Children Act*. This view of the legislation is not necessarily one shared by all Labour Party commentators. In an article in the *Sunday Times* on 6 October 1991, the Labour MP for Middles-borough, Stuart Bell, argues in terms that parallel the Left's denunciation of the use of law as a means of maintaining public order, displacing public order however, with private order. Bell, author of an annotated version of the *Children Act*, argues that the parental British state has increasingly usurped the private rights of parents, relying in particular on the place of safety order, which represented 'an arrogant exercise of power on behalf of the parental state'.[15] The place of safety order grew out of the *Children and Young Persons Act* 1933 and 1969, which legislation sought to ensure the protection of the child by empowering a justice of the peace to sign a place of safety order in a case where any information given on oath made out that there was 'reasonable cause to suspect the child was at risk'.[16] The liberal view, presented by Bell, is that law has increasingly become part of the language within which interactions between parent and children are undertaken: this is not an appropriate place for law.



the duty of parents is formulated under the rubric of a new legal concept called parental responsibility. The legal philosophy behind the legislation would appear to be to replace the previous emphasis on care proceedings with a streamlined emphasis on 'an overall strategy of childcare and protection'.[19] Through the concerted emphasis on parental responsibility, the social philosophy behind the legislation would appear to be a reinforcement that the needs of children are most appropriately met by normal family life.

Parental responsibility — 'a cornerstone of the new statutory code'[20] — involves a range of rights and duties.

Catching them in the act

The United Kingdom's *Children Act* (1989) which has just come into operation is one of the most comprehensive pieces of legislation to deal with children. It effectively codifies the law, therefore breaking with the 'much criticised piecemeal philosophy of the old child law'.[17] The new legislation repeals the major pieces of legislation that were previously relevant in this area: the *Guardianship of Minors Act* 1971, the *Guardianship Act* 1973, and the *Children Act* 1975.[18] In creating a legal framework for care for children its legislative mandate — restating the previously decisive welfare principle — is that the interests of the child are paramount. If it shifts the balance away from the parental state, it nevertheless defines relationships far more specifically than usually associated with the family: it not only defines the relationship between children and the state but also affects the rights of parties such as parents and grandparents.

Essentially, the legislation introduces an extended concept of parenthood while attempting to enable parents to retain, indeed, to exercise, their responsibilities and to remain closely involved with their children, insofar as this is compatible with the children's welfare. The duty of the state involves an obligation of care in the event of need while

These include deciding where the child should be educated and should live and what religion the child should follow as well as protecting, supporting and disciplining the child. Section 3(1) of the legislation defines parental responsibility to include all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property. While broadening and codifying the 'old notions of parental rights and duties' nevertheless, the 'deliberately broad' definition has been called 'not particularly illuminating'.[21] However, the conceptual shift from parental rights to responsibilities implies a deliberate change in emphasis which is echoed throughout the legislation: the interventionist role of the court is correspondingly diminished. In analysing parental responsibility, Williams observes that the legislation introduces the concept because it provides:

> a means of emphasising that parents continue to have responsibility for their children even though their marriage may have broken down or their children taken into care . . . [22]

The notion of parental responsibility is one of the central themes running through the legislation. Other crucial general principles introduced in the legislation include the principle of no delay and the presumption of no order. According to Barlow, the principle of no order, 'goes hand in hand with the concept of irrevocable "parental responsibility" . . . and promotes the idea that wherever possible, decisions relating to children should be made by their parents rather than by the courts'.[23] In translating family autonomy into the legislative pivot termed parental responsibility, the Act seeks to achieve a balance previously neglected when weighing up the welfare principle.

> The Act seeks to protect children both from the harm which can arise from failures or abuse within the family and from the harm which can be caused by unwarranted intervention in their family life. There is a tension between those objectives which the Act seeks to regulate so as to optimise the overall protection provided for children in general.[24]

Children in need

The most problematic aspect of the legislation is the concept of the child in need. The central aim of this legislation is clearly to deal with family life that has broken down: in particular, to deal with children taken into care. The legal basis to local authority decisions concerning children they are looking after is proscribed in the legislation: they are to ascertain the wishes and feelings of the child, their parents or others carrying parental responsibility and other people whose wishes and feelings are considered relevant. New duties are placed on social services departments to support families with children in need: by Schedule 2, para. 3 of the Act local authorities are specifically required to 'take reasonable steps . . . to prevent children within their area suffering ill-treatment or neglect'.[25] The emphasis on prevention of harm rather than on proof of specific acts against the child is a significant departure from the previous regulatory role into which many departments have fallen.

What is not clear is how these departments, which have been so consistently deprived of resources, can now galvanise the resources to identify those children in need.[26] Nor is it clear how a legislative mandate which stresses both the primacy of the child's welfare and the rights of the family — indeed, which exhorts social workers to work within the family — can be reconciled. It is arguable that public acceptability is restrictively defined through the legislation precisely by emphasising parents' rights. Inevitably, too, while it is clear that the regulations which may be issued by the Secretary of State in