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ARTICLE

Children's rights in adoption from out-of-home care: how well do legislative frameworks accommodate them?

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ABSTRACT

This paper focuses on the Australian legislative, policy and procedural framework regulating adoption from out-of-home care (OOHC) and the relationship to children's rights. As a signatory to the United Nations Conventions on the Rights of the Child, Australia has agreed to respect, protect and fulfil children's rights. However, because child protection is a State and Territory responsibility, these frameworks lack consistency in the way that decisions are made or how children's interests are protected. We draw on findings from a qualitative study that examined Australian adoption laws and policies and consider how these align with a rights-based approach to adoption from OOHC. These were examined through the lens of values perspectives, which helped clarify how children's rights including birth family relationships, identity and participation were represented. The results highlighted that some rights were treated in a discretionary manner, key differences in the extent to which jurisdictions protected, respected and fulfiled these rights and the conditions that determined when they were carried out. Notably, some jurisdictions were not adequately adhering to rights related to children's participation in the adoption process or protecting and respecting rights to identity, culture and family relationships, especially in the context of Aboriginal and Torres Strait Islander people. The findings confirm the need to uphold children's rights through policy and in practice.

KEYWORDS

Adoption; out-of-home-care; foster care; permanency; children's rights; United Nations Convention on the Rights of the Child

Introduction

For children in out-of-home care (OOHC) who are unable to be reunified with birth parents, adoption can be a viable option for a safe, loving and stable home. This option is emphasised in the UNCRC (1989), where it states that when a child cannot be cared for by their parents, alternative care should be provided, which may include adoption (Article 20). Australia is a signatory of the UNCRC and although rates for adoption in the OOHC context have increased over the last decade, there are very few when compared to other long-term care options (AIHW 2018a).

There are many reasons for this situation, one of which is variation in the legislative frameworks that exist in different jurisdictions. Whilst the Federal government is a signatory to the UNCRC, its application within child protection and adoption legislation

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and policy laws are State based. This paper explores how different rights are interpreted within adoption legislation and policy across Australian States and Territories based on results of an exploratory study. This makes a unique contribution as an Australian cross-jurisdictional study, whereas other studies have predominately examined a single jurisdiction (Hallahan 2015; Victorian Law Reform Commission 2017). Additionally, it takes a child's rights perspectives in the context of adoption from OOHC, which has been given limited consideration in current Australian research. Using Fox Harding's (2013) values perspectives, the study sought to clarify how birth family relationships, identity and participation were represented in policy and legislation. This paper focuses on the child's right to information and to have a voice in any matters that affect them (UNCRC Articles 12, 13) prior to adoption and their right to maintain a relationship and contact with their parents (UNCRC Article 9) and to preserve their identity, including their name, nationality and family relationships (UNCRC Article 8), culture (UNCRC Articles 20, 30) and access information after an adoption.

History of adoption in Australia

This paper begins with a brief exploration of adoption law, policy and practice in Australia and the implications and challenges of applying rights-based approaches to adoption practice. International research had documented the dark side of adoption (Pringle 2004). In Australia, adoption was part of the systematic colonisation of Indigenous Australians, widely known as the Stolen Generations (HREOC and Wilson 1997) and, within the broader community, was also used to address social problems such as illegitimacy, poverty and infertility (Cole 2009; Farrar 1997; Higgins 2010; Pringle 2004). These practices were based on the theory that knowledge of family origin was of little importance to adoptees and that early and lifelong separation, known as the 'clean break', was in the 'best interests of the child' (Farrar 1997; Higgins 2010). Evidently, policy and practice had little regard for children's right to know and be cared for by their parents (UNCRC Article 7), maintain their identity (UNCRC Article 8), practice their culture and religion (UNCRC Article 30) and did not consider the continuity of children's cultural and linguistic background when finding alternative care (UNCRC Article 20).

The social work profession was also instrumental in implementing these policy objectives, which upheld life-long secrecy around the baby, birth and adoptive parent's identities (Cole 2009; Higgins 2010) and little or no recognition and support for children and birth families to deal with their loss (Farrar 1997; Higgins 2010). Ongoing debate continues to exist around adoption as a permanency option, owing to differences in opinion about what serves children's best interests and who should hold decision-making powers during the adoption process (Cole 2009).

Currently, adoption is one permanency option available for children in OOHC when the legal decision to rule out restoration has been reached. Adoption from care was first legally recognised in Western Australia (WA) in the 1920s as a means of providing support and security for long-term foster care and today, and currently, legislation exists in every jurisdiction for adoption from OOHC (AIHW 2018; Standing Committee on Social Issues 2000). Despite this, the numbers of adoptions in Australia remain relatively low with 171 compared to alternatives such as guardianship with 1,200 in 2019-20 (AIHW 2021) Unlike

other long-term alternative care options, which do not require parental consent, such as guardianship or permanent care orders, adoption is a fixed, enduring arrangement that does not expire when the child turns 18, changes a child's legal identity and remains in place for life (AIHW 2018a; Victorian Law Reform Commission 2017).

Given the history and impact of the Stolen Generations on Aboriginal communities, it is not surprising that adoption is only considered as a last resort for Indigenous children (AIHW 2018) and that Aboriginal communities continue to strenuously oppose adoption of their children despite the significant overrepresentation of Indigenous children in national OOHC statistics (AIHW 2018; AISF (2018); McQuire 2018; Longbottom et al. 2019). This is because the concept of raising children involves the broader community and severing parental ties is not accepted in Aboriginal culture (HREOC and Wilson 1997); therefore, communities hold concerns of permanently separating another generation (Longbottom et al. 2019). Torres Strait Islander communities practice a form of traditional adoption (Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020), whereby children are raised by family or wider kinship groups. However, until very recently, this was not recognised in law (O'Neill, Ban, and Gair 2009). Given this context, it is particularly important to understand if and how the rights of Indigenous children and notions of family are protected in law and policy.

The Aboriginal Child Placement Principle was designed to provide national coherence on how to preserve and strengthen the cultural connections of Indigenous children (Secretariat of National Aboriginal and Islander Child Care 2017). This is established through recognition of Aboriginal and Torres Strait Islander children's right to be raised in their own family and community; partnering with Aboriginal communities in child welfare matters; prioritising placements with family or community; and supporting children in OOHC to maintain connection to 'their family, community and culture, especially children placed with non-Indigenous carers' (CFCA 2015, para. 15). However, recent evidence from a review of the statutory system in New South Wales (NSW) demonstrates that there are serious deficiencies in the implementation of the Aboriginal Child Placement Principle in practice including a lack of consultation with the child's family prior to being assumed into care or refusing to assess fathers or other birth family members as possible placement options due to predetermined views on their suitability (Davis 2019). Similar problems with upholding the Principle are likely to exist in other Australian jurisdictions.

A rights-based approach to adoption in Australia

Adopting a rights approach to OOHC practices influences how State bodies structure and operationalise social welfare functions, particularly for highly vulnerable or excluded members of society, so that child welfare 'is not simply the result of a gift, an act of charity, or even a smart policy blueprint' (Uvin 2004, 53). According to the UNCRC (1989), children have the right to maintain a relationship and contact with their parents when they are separated from them (Article 9) and to preserve their identity, including their name, nationality and family relationships (Article 8) and culture (Articles 20 and 30). Children are also entitled to information and a voice in any matters that affect them

(Articles 12 and 13). However, in reality, child welfare systems exist to protect vulnerable children and this may mean that the importance of child participation in decision-making is minimised or overlooked (Grace et al. 2018).

Child participation in the context of a welfare setting can involve a number of barriers where protection and involvement are considered to conflict (Garcia-Quiroga and Agoglia 2020; Grace et al. 2018). Children may be considered vulnerable recipients of welfare and adult stakeholders such as parents or State representatives may be viewed to represent the child's interests and preferences in relation to adoption (Dwyer 2006; Grace et al. 2018). However, this is problematised if there are conflicting ideas between representatives or legislation and practice about children's participation in the adoption process. In contrast, participation has been shown to have a protective effect by increasing children's confidence, sense of empowerment and respect (Garcia-Quiroga and Agoglia 2020). However, workers may be unsure how to support children to participate in a meaningful way and ensure that their views impact decisions (Vis, Holtan, and Thomas 2012). Furthermore, welfare agencies need to acknowledge the difference between children attending meetings and actual participation (Grace et al. 2018). For adoption workers, this complexity arises in practice when they try to navigate these varied and different perspectives (Vis, Holtan, and Thomas 2012).

Australia currently has an 'open' adoption model, which means that there is openness both in terms of providing children with information about why and how they came into care and supporting their relationships with birth relatives, both of which assist with positive identity development (Office of the Children's Guardian 2009). However, there are still challenges with identity development for many adopted people. For example, some are faced with incomplete information about their life history due to being adopted when very young or due to traumatic events, limited involvement with birth relatives who hold this information or when the adoptive family is unwilling to discuss these matters (Atwool 2017; de Rosnay, Luu, and Wright 2016). Research suggests that adopted children frequently raise questions about why they were adopted and their connection to their adopted and birth family (Atwool 2017; de Rosnay, Luu, and Wright 2016). Given that a 'sense of belonging' is essential to a child's identity formation, adoptees need ongoing access to reliable information from trustworthy sources (de Rosnay, Luu, and Wright 2016). Whilst adoptees in Australia are able to access some information about their adoption once they reach 18 years, de Rosnay, Luu, and Wright (2016) highlighted the importance of them having continual access to information and open communication throughout their life. For this reason, further research is needed to investigate the different types of information that legislation allows access to and what is actually needed to support identity development (de Rosnay, Luu, and Wright 2016).

Involving children's birth and adoptive families in the adoption processes introduces challenges especially when the dynamics between them at contact have not been positive. Birth parents, for example, may bring complex feelings of grief and loss to contact, making it difficult to engage with carers and workers (Collings, Neil, and Wright 2018) or adoptive parents may have preconceived ideas about birth families, which impacts the potential to build a meaningful relationship (Collings, Neil, and Wright 2018). Notably, within Australia, there is currently little professional instruction for practitioners on how to support birth and adoptive families to build a positive relationship (Wright and Collings 2020). In the United Kingdom, rigid, procedure-driven systems have

been found to make it difficult for caseworkers to support the relational needs of families. Logan (2010) found that most contact plans had limited flexibility and failed to take account of the changing needs of birth family relationships or the impact of contact plans on children. Neil (2007) argues that adoption professionals hold responsibility for contact plans, but lack understanding as to how arrangements impact birth parents, children and adoptive families (Neil 2007). A top-down approach to contact arrangements is contrary to the fundamental principles and spirit of the UNCRC (1989) because, by excluding the voices of children, there is no way of determining how these arrangements would serve the ongoing interests of children.

Australia has agreed to respect, protect and fulfil the rights of children in accordance with the UNCRC; however, there is no consistency in how children's interests will be protected because the concept of rights is influenced by cultural values and norms (Connolly and Ward 2010). In Australia, adoption is a State matter and each jurisdiction has its own legislation and policies, which guide adoption practice. Legislative and policy frameworks provide an environment in which ideas are sanctioned and supported in practice (Hetherington 2002).

The United Nations Guidelines for the Alternative Care of Children (United Nations General Assembly 2010) set out that when children cannot return to their parents 'to find another appropriate and permanent solution, including adoption and kafala of Islamic law' (Guideline I.2.(a)) and if this is not possible or in the best interest of the child, 'most suitable forms of alternative care are identified and provided' (Guideline I.2.(b)). In Australia, adoption only becomes an option if the court has first ruled out restoration and a separate court makes a determination on an adoption application (Wright, Luu, and Cashmore 2021). Legislation in every jurisdiction in Australia sets out that adoption could be considered as a long-term care option, with both Victoria (VIC) and NSW setting out a hierarchy, which preferences adoption over remaining in long-term foster care. However, the number of adoptions remains low compared to other alternative forms of care (AIHW 2021). Adoption from OOHC has increased over the last ten years from 53 in 2009-10 to 171 in 2019-20, with 99% taking place in NSW (AIHW 2021). One of the reasons for higher rates of adoption in NSW than other Australian States may be the requirement set out in the *Child Protection Legislation Amendment Act* 2014 (NSW), which sets out that if restoration is not a realistic possibility, permanency planning must consider if adoption is the preferred option. In contrast, there are very few adoptions occurring in VIC. Notably, strong emphasis on birth parents' rights demonstrated in the Review of the *Adoption Act* 1984 (Vic) (Victorian Law Reform Commission 2017) may account for why birth parents' decision-making is the major determining factor in the acceptance and use of adoption in VIC.

Adoption is a highly contentious permanency option. It is arguable that, in current political context, national permanency debates have become focused on fears about repeating past mistakes in adoption practices and oppose the use of adoption (Victorian Law Reform Commission 2017) or focused on ideals about solving the problem of high numbers of children in OOHC (Sammut 2018). Fronek and Cuthbert (2016) suggest that there is danger in widely promoting a pro-adoption stance or making the adoption process easier for potential adoptive families. Pro-adoption ideology could lead to decisions that compromise the child's right to express his/her views or to maintain connections to birth family or culture (Fronek and Cuthbert 2016). However, in Australia, adoption only becomes an option where the courts have ruled out restoration and

made a determination on an adoption application (Wright, Luu, and Cashmore 2021). In any case, these concerns are worthy of careful consideration, but ideological opposition to adoption should not outweigh a fair assessment of what constitutes the best chance of a permanent and secure home for an individual child. In summary, what is needed in this troubled and contentious legal and policy space is a nuanced and case-by-case analysis.

Fox Harding's (2013) values perspectives are a useful framework to understand the competing values that contribute to variation in adoption policies and legislation in the eight State and Territory jurisdictions in Australia and to consider the impact of this variation on children. Fox Harding (2013) explains that different views on the importance of family relationships and identity and of how children and parents are socially perceived have impacted welfare policy approaches to serve children's best interest. The application of a child rights-based framework to understand the implication of OOHC adoption legislation and variations across jurisdictions is yet to be fully explored. This study contributes to addressing this gap.

Method

In order to address the identified gaps in knowledge, this study aimed to establish the extent to which adoption legislation and policies in Australia included reference to children's rights and the conditions upon which these rights were enacted. To achieve this aim, content analysis was conducted on publicly available documents, such as protocols and frameworks, to compare approaches taken to uphold the principles in the UNCRC. The research asked the questions: how are children included and supported to participate in the adoption process; how are children's identities and family connections protected and preserved and how are the rights of Aboriginal and Torres Strait Islander Children people upheld? The research used only publicly available information and did not require ethical approval.

Selective sampling was used to determine data sources that met inclusion criteria (Gentles et al. 2015). The documents were included in the data set if they contained information related to the key research questions on the process and implementation of adoption from OOHC. The sampling period was from 2008-April 2018 with the aim of providing the most up-to-date information for this study. Searches of Hansard and AustLII were completed and relevant publicly available documents were retrieved from the websites of each State and Territory's statutory child protection department. After reviewing initial documents collected, gaps in information were identified. Subsequent telephone or e-mail contact was made by the first author with the statutory adoption unit in each State and Territory to ascertain if missing or additional information was available and, where possible, this was obtained and reviewed. Two jurisdictions (Australian Capital Territory (ACT) and Queensland (QLD)) did not respond to requests for information, meaning that there were less data available about some jurisdictions than others. A total of 69 documents were included in sample data, shown in Table A1. The coding process involved scanning each document to gain familiarisation with the content while keeping the research questions in mind (Erlingsson and Brysiewicz 2017). A deductive approach informed by Fox Harding's (2013) values perspectives was used where relevant data were identified, condensed and assigned a code (Bengtsson 2016; Erlingsson and Brysiewicz 2017). Codes were reviewed and put into categories based on their relationship to different aspects of adoption from OOHC. The process was repeated several times to ensure that the codes

reflected the core meaning and categories were adjusted to ensure that they were accurately grouped (Bengtsson 2016; Erlingsson and Brysiewicz 2017). Finally, content analysis was used to discern underlying meanings in relation to the strengths and limitation of the policy and legislation and how these impact children and birth parents experiencing the adoption processes (Bengtsson 2016; Erlingsson and Brysiewicz 2017).

The first author had primary responsibility for collecting, coding and interpreting the data. The supervisory team frequently reviewed the data, the methods for investigation and analysis to ensure that the study was carried out in a systematic and rigorous manner and that findings and conclusions were based on evidence.

Results

Whilst rights are deemed as universal, the results demonstrate that some children's rights were treated in a discretionary manner. Children's rights were not equally respected and protected across Australian jurisdictions and variations existed in what is a requirement in the adoption process or in making of an order. In this section, this will be demonstrated in relation to participation and consent, identity and family connections, and cultural connections. The results show that a child right's framework was not equally applied across all jurisdictions, highlighting the importance of taking a child right's perspective to examining adoption law and policy.

Participation and consent

Participation in care planning

In principle, there was consensus across jurisdictions that children in OOHC should be involved in care planning to determine the best long-term care option, yet there was variation when the decision-making was done in relation to adoption. This is exemplified in South Australia (SA) and Northern Territory (NT), where the researcher was advised by the child protection department that there was no policy to support adoption from OOHC, and there had not been any adoptions of this kind from SA for ten years and for eight years in the NT (personal communication with NT Adoption Unit – Territory Families, April 4, 2018; personal communication with SA Department of Child Protection, March 14, 2018). The extent to which children were involved in discussions prior to a decision also varied. In Tasmania (TAS), policy stated that children are not involved until a decision about whether adoption would be pursued had been reached (Disability Child Youth and Family Services (Tasmania) 2009) and in VIC, policy stated that children were consulted about an adoption application; however, whether adoption was considered as a long-term care option remained the decision of birth parents (Department of Health and Human Services (Victoria) 2004).

Adoption application and consent

In relation to children's voices being heard in the consent process prior to adoption, there was again considerable variation. In NSW, NT, WA and SA, legislation set out that children over the age of 12 years were required to give consent to their adoption. In these jurisdictions, there was also a requirement to provide children with written information to ensure that consent was informed. However, searches for information, as well as follow-up emails and phone calls with statutory departments confirmed that neither the NT and

SA had documented policies to support this (personal communication with NT Adoption Unit – Territory Families, 4 April, 2018; personal communication with SA Department of Child Protection, 14 March, 2018). In practical terms, this means that children's informed consent to adoption for children over 12 years was only enacted in NSW and WA.

Whilst there was consensus that children's wishes regarding the adoption should be sought, how this was to be achieved varied. For example, four jurisdictions required children to be involved in decisions about ongoing contact with family members (NSW, VIC, QLD and ACT) and two in decisions about maintaining connection to culture (NSW and QLD) but only children in VIC and QLD were involved in the decision to dispense with birth parent consent to adoption. Only SA, NSW and WA specified that children over 12 years must consent to any name changes, whereas VIC, TAS and NT said that the court must seek the child's wishes. No specific provisions for seeking children's views or consent for change of name existed in either QLD or the ACT.

Legal proceedings

There was also variation in children's legal representation in adoption proceedings. For example, all jurisdictions except TAS and SA outlined when children required legal representation. The other States (TAS and SA) did not make any provisions for legal representation. In addition, NSW was the only jurisdiction that specified that a 'suitably qualified' Aboriginal or Torres Strait Islander person may give advice to families or kinship groups during the court process (*Adoption Act* 2000 (NSW)). As Aboriginal and Torres Strait Islander people are best positioned to give advice to members of the community in child welfare matters, there needs to be greater consistency for their involvement in the adoption process.

Identity and family connections

Children's rights to identity and connection were consistently addressed in legislation, but there was inconsistency in how these rights were to be protected. Typically, jurisdictions took culture and religion into account when making placement decisions and assessed adoptive parents on their attitude towards children maintaining their cultural heritage. There was also broad consensus that adoption of Aboriginal and Torres Strait Islander children should adhere to the Aboriginal Child Placement Principle. However, only four jurisdictions (NSW, VIC, QLD and ACT) required that a plan is developed to outline how children's cultural identity would be maintained after adoption.

Every jurisdiction explicitly addressed ongoing contact with birth parents and all but SA and TAS assessed prospective adoptive parents on their willingness and capacity to facilitate contact with birth family. In the ACT, NT and WA, this assessment was only included for adoption of Aboriginal and Torres Strait Islander children. Surprisingly, given the recognition of a need to preserve family connection, only two jurisdictions included reference to the priority of co-placement of adopted siblings (QLD and WA).

Most jurisdictions (NSW, VIC, QLD, ACT and WA) had established formal post-adoption contact arrangements as a requirement to be stipulated in the adoption order, which could be enforced in every State except QLD. In contrast, TAS, NT and SA did not require ongoing contact to be stipulated in an adoption order but permitted ongoing arrangements to be agreed upon between birth and adoptive parents. In these jurisdictions, ongoing contact arrangements were not required to be addressed at the time of adoption and the decision

to uphold a child's right to family relationships was left to birth and adoptive parents. Despite taking a less formal approach to contact, SA joined most jurisdictions (NSW, VIC, ACT and WA) in including a review process to vary contact arrangements.

In the important area of the child's name, further lack of consistency was evident. Legislation stated that children must retain their given name in most jurisdictions (NSW, QLD, ACT, WA and SA) and NSW specified that this applied to children over one year. In contrast, VIC, TAS and NT made provision for children's given names to be changed at the time of adoption order. In terms of the child's surname, most jurisdictions (NSW, VIC, QLD, ACT and TAS) left the decision to be made at the time of adoption and provided options for an adopted child to retain their original surname or take on the adoptive parents' surname.

After an adoption, children and birth parents had access to some types of information about the adoption yet, despite the universal policy of 'open' adoption in Australia, WA was the only State not to include age restrictions on when adoptees could access information. Children's access to information in all other States and Territories required birth and/or adoptive parents' permission until they reached adulthood (or in NT, 16 years). Presumably to increase 'openness' in record keeping, SA has introduced integrated birth certificates, which include adoptive and birth parent's details, and this option is being actively considered in ACT.

Cultural connections for Aboriginal and Torres Strait Islander children

In recognition of the importance of ongoing cultural connections, all jurisdictions required that placement of Aboriginal and Torres Strait Islander children followed the Aboriginal Child Placement Principle and that adoption applications were undertaken in consultation with the child's community and relevant organisations. However, TAS omitted any specific references to Torres Strait Islander people. Every jurisdiction except TAS and NT stated that adoption is a last resort for Aboriginal children. Only NSW and QLD acknowledged that Torres Strait Islander communities have a traditional form of adoption.

This legislative and policy analysis examined whether Australian children's rights to be heard in adoption and to have family and cultural identity supported after adoption was upheld. Overall, the results show that significant jurisdictional differences exist between which children's rights are protected and where, and how extensively, these rights are upheld.

Discussion – implementing a rights-based approach for permanency planning

The findings contribute to better understanding of how variations in State-based law and related policy challenge Australia's ability to meet its commitments to children's rights under the UNCRC. The inconsistencies outlined above are reflective of the contentious nature of children's rights (Tobin 2017). What we have seen is that, far from the UNCRC being a definitive document, it is subject to different interpretations within legislation and policy. Whilst there appears to be some agreement on the general principles of children's rights, the details are informed by differing value positions in relation to what it actually means for a child to participate in decision-making and to maintain identity and connections with family and

culture once a permanency decision has been established. For example, whether a child is included in the process of decision-making or whether they are involved in the process after a decision has been made is indicative of different perspectives on how the child's voice is valued and how much weight it should be given relative to other stakeholders. For children in OOHC, these issues are exacerbated by other complex factors including the divergent views of parents, judicial decision makers and workers charged with responsibility for upholding the best interests of the child. In some cases, the worker may hold a negative value position on adoption or may not be aware that adoption is an available permanency option (personal communication with NT Adoption Unit – Territory Families, 4 April, 2018; personal communication with SA Department of Child Protection, 14 March, 2018). It is also possible that workers may feel uncomfortable about exploring adoption as an option due to the complex and fraught nature of adoption history in Australia, marred by terrible mistakes and damaging practices (Higgins 2010; Luu, Wright, and Pope 2018). In this context, children in OOHC are more vulnerable to workers' interpretation of what is in their 'best interests'.

So, what does this mean, when it comes to implementing a rights-based approach to permanency planning in in OOHC? In this section, we explore some of the complexities surrounding this question. Connolly and Ward's (2010) integrated framework for implementing rights-based ideas informs this discussion. First, we will explore change to permanency planning at the policy level before turning to discussion of implementing change in practice. Because rights in OOHC practice require a careful and considered analysis of the specifics of any given case, there needs to be an integrated framework from the highest levels of government down to the level of the everyday practitioner.

Policy context

The inconsistencies within the legislation and policy could suggest that policy guidance falls short in some jurisdictions. This is problematic for two reasons. First, it has the potential to significantly impact children's rights in decisions about their welfare and well-being. Second, it suggests that some Australian children's rights are more protected than others depending on the jurisdiction in which they reside (Keddell 2014; Uvin 2004). For this reason, policy needs to be further developed so that it consistently supports rights-based approaches for all Australian children.

A national legislative and policy framework, such as that proposed by the Standing Committee on Social Policy and Legal Affairs (2018), could contribute towards achieving this end. However, issues may arise with how such a policy instrument is calibrated so that it aligns with principles within the UNCRC (1989) and United Nations Guidelines for the Alternative Care of Children (United Nations General Assembly 2010) as opposed to meeting the requirements of a political agenda (Connolly and Ward 2010). Focus needs to shift instead to children's rights devoid from any political or practical agenda. This issue was raised by NSW Supreme Court, Justice Brereton, who stated that the concept of adoption should be seen as 'a service for the child' upholding the principle that decisions are determined by what will serve the child's interest, not the interests of other parties (Association of Children's Welfare Agencies 2015).

Creating a consistent rights-based framework requires dialogue at a national and State level within the context of an increased sensitivity to the overarching spirit of the UNCRC. Once a shared understanding of children's rights has been established, the resulting

framework will need to undergo regular reviews to consider whether this reflects a rights-based approach (Connolly and Ward 2010). Importantly, legislative reviews must include the voices of children impacted by such policies and work is needed to enable their effective participation in this process (Tobin 2017).

Practice context

Policy and legislation are an essential mechanism for ensuring that children's rights are valued and respected. Yet, regardless of how well it is designed, the context in which these mechanisms exist is affected by social and political factors and subject to the individual interpretation of those charged with upholding children's rights. Thus, even with the most coherent and consistent framework in place, there will still be room for variation in practice, especially in such a complex area as OOHC. For this reason, a rights-based approach relies on the mutual reinforcement of rights by legislators, policymakers, service providers and practitioners (Connolly and Ward 2010; Tobin 2017). For practitioners, rights-based practice means recognising their clients as having agency and expertise for self-determining solutions and that respect for culture and family relationships is critical in fair and transparent decision-making processes (Connolly and Ward 2010).

In order for practitioners to uphold this approach, they need to be supported to understand the UNCRC and the challenges to implementing its principles in practice. Universities and professional training organisations can support this end by facilitating learning for students around UNCRC and consideration for what children's rights mean for all children in practice (Connolly and Ward 2010).

In an educational context, learners also need to be made aware of the challenges involved in implementing a rights-based approach to practice. These include practitioners being expected to adhere to organisational policies or initiatives that are not consistent with the principle of the UNCRC; negotiating with multiple rights holders and with different value positions on children's rights in permanency planning processes, such as how the child's voice is heard in the planning process. In addition, workers also deal with contentions about adoption, where it may be seen as inherently problematic owing to the abuse of power that occurred in past adoption practices. Workers need to be cognizant of the lessons learnt from past practices so as not to repeat these abuses. The development of a rights-based practice framework could provide an ethical base from which to guide students and workers to manage these conflicts (Connolly and Ward 2010).

Workers will also need to be supported to enact culturally competent practices and understand how to respond sensitively to the needs and perspectives of Aboriginal and Torres Strait Islander people in a context where a Western, colonial worldview dominates (Patil and Ennis 2018). Traditional approaches to ethical practice have focused on defining cultural groups as 'other' and understanding their values and practices as deviations from mainstream society, but examination of the Western power position remained unexamined (Patil and Ennis 2018). In order to demonstrate true cultural respect and competence, practitioners need to be supported to critically examine their own assumptions and beliefs and the way that values are operationalised in policies, in order to help recognise their position of power and the ongoing impact this has on communities they work with (Patil and Ennis 2018).

State regulatory bodies and organisations can also play a role in supporting practitioners to uphold the principles in the UNCRC. In States where legislation does not provide an adequate response to supporting children's rights, OOHC agencies would need to establish their own processes, such as a requirement for cultural plans to be developed for all children and for co-placement of siblings to be the first priority. Organisations can also support rights-based practice by creating service models that support client participation and maintain high levels of accountability and transparency (Connolly and Ward 2010).

Practitioners can also play a role in ensuring that children are aware of their rights under the UNCRC and seek guidance from State-based Office of Children's Guardians. Clarity about what rights look like in practice could be openly communicated with children using age-appropriate language (Phillips et al. (2016)). This practice is supported by the widespread availability of child-suitable versions of the UNCRC and agencies can access assistance from the Australian Human Rights Commission.

All carers and adoptive families could also be better supported to uphold children's rights throughout the permanency planning journey and beyond. If adoption is the chosen permanency option, all families need to be supported to understand the implications of the decision and to maintain children's identity and relationships with birth family. Whilst generally adoptive parents have the legal responsibility for upholding children's rights after an adoption, contact and cultural plans depend on the active involvement of birth families in supporting connections to family and culture and providing information, so they have a clear understanding of their own history and adoption (Sen and Broadhurst 2011).Without assurance as to how children's identity will be maintained, there is a chance that the mistakes of past practices that devalued family and culture will be repeated (Collings, Neil, and Wright 2018; Logan 2010; Neil 2007).

The process for implementing a rights-based approach is complex and thus requires an integrated approach, where the principles within the UNCRC are embedded in legislation and realised in practice. This is not an easy undertaking. It requires ongoing dialogue, reflection and review and leadership within the services sectors that engage with children in OOHC. To varying degrees and in some jurisdictions more than others, this project is already being undertaken (Office of the Children's Guardian 2020).

Limitations

A study limitation is that the collection, coding and interpreting of data were completed by a single researcher; however, this process was overseen and managed by the supervisory team to ensure that this was carried out with integrity. This study also sourced only publicly available data over a ten-year period. Statutory departments might have been selective with the information they supplied or excluded. Additionally, some statutory departments advised the most recent policy had been retired and was no longer in use and these documents were not included, which also limited the study. Policy and legislation in the area of adoption is undergoing substantial review across Australia, which may limit the currency of findings. This leads to a need for further research, which could explore whether up-to-date information and accurate understanding of current practices could influence public opinion and acceptance of adoption from OOHC.

Conclusion

This paper has considered how variations in legislation and policy for adoption from OOHC have the potential to undermine children's rights and contribute to inequality across the nation. Generally speaking, it is accepted that children's rights are essential for their welfare and well-being. However, just how to fulfil them is highly contested. With variations in adoption legislation and policy across jurisdictions, Australia—a signatory to the UNCRC—is, in effect, failing to comply with its obligations to protect, support and fulfil children's rights. Rights are not discretionary and we have argued that in order to uphold rights in practice, there needs to be a mutual reinforcement of rights-based concepts across legislation and policy, service provision, practice and within children's families. This is particularly salient in relation to the urgent need to preserve culture and identify for Aboriginal and Torres Strait Islander children.

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Appendix

Table A1. List of documents included in sample data

New South Wales
Adoption Act 2000
Adoption Regulation 2015
Children and Young Persons (Care and Protection) Act 1998
Child Protection Legislation Amendment Act 2014
Permanency case management policy - Family and Community Services, 2017
Safe home for life child protection reforms – Family and Community Services, 2014
Registration of adoption plans fact sheet – Family and Community Services, 2017
Out-of-home care adoption allowance fact sheet – Family and Community Services, 2017
Mandatory written information on adoption - information for parents of a child in out-of-home care. Family and Community Services, 2016
OOHC adoption fact sheet for caseworkers- Family and Community Services, 2016
Adoption Act 2000: How it affects you – Family and Community Services, 2016
Thinking about adoption – Family and Community Services, 2017
Guide to drafting an adoption plan - Family and Community Services, undated
Charter of rights of children in out of home care – Family and Community Services, 2015
Participation in case planning – Family and Community Services, undated
Victoria
Adoption Act 1984
Adoption Regulations 2008
Children, Youth and Families Act 2005
Review of the Adoption Act 1984 – Victorian Law Reform Commission 2017
Child protection manual - advice and protocols – Department of Health and Human Services, 2015
Adoption and permanent care - procedures manual - Department of Health and Human Services, 2004
Information for parents considering adoption of their child - Department of Health and Human Services, 2008
Permanency fact sheet – Department of Health and Human Services, 2016
Queensland
Adoption Act 2009
Child Protection Act 1999
Open adoption - Department of Communities, Child Safety and Disability Services, 2013
Payment of financial assistance to adoptive parents - Department of Communities, Child Safety and Disability Services, 2016
Supporting a child to participate in adoption processes - Department of Communities, Child Safety and Disability Services, 2013
The well-being and best interests of the child in adoption - Department of Communities, Child Safety and Disability Services, 2013
Develop the case plan - Department of Communities, Child Safety and Disability Services, 2017
Case planning policy - Department of Communities, Child Safety and Disability Services, undated
Permanency planning policy - Department of Communities, Child Safety and Disability Services, 2012
Western Australia
Adoption Act 1994
Family Court Act 1997
Permanency planning policy – Department of Child Protection, 2017
Care planning policy - Department of Child Protection, 2016
Adoption of children policy – Department of Child Protection, 2011
Permanency Planning: Identity and long-term stability - Department of Child Protection, undated
Considering adoption for your child - Department of Child Protection, 2016
Carer adoption - Department of Child Protection, 2017
Past adoption information and services - Department of Child Protection, 2018
South Australia
Adoption Act 1988
Adoption Regulations 2004
Adoption (Review) Amendment Act 2016
Children and Young People Safety Act 2017
Children's Protection Act 1993
Changes to the adoption act – Department for Child Protection, 2017

(*Continued*)

Table A1. (Continued).

Standards of alternative care – Department for Families and Communities, 2008
Who can say ok? Making decisions about children in care – Government of South Australia, 2016
Australian born child: Local adoption – Department for Child Protection, 2016
Review of the Adoption Act 1988 (SA) - Hallahan 2015
Tasmania
Adoption Act 1988
Adoption Regulations 2016
Children, Young Persons and Their Families Act 1997
Advice: The adoption of children who are under the guardianship of the Secretary – Disability Child Youth and Family Services, 2009
Placing a child for adoption – information sheet - Children and Youth Services, undated
Transferring guardianship to a third party – Children and Youth Services, 2017
Australian Capital Territory
Adoption Act 1993
Adoption Regulation 1993
Children and Young People Act 2008
Government response to the review of the domestic adoption process in the ACT – Community Services, 2017
Final report: review of the domestic adoption process in ACT – Community Services Directorate, 2017
Adopting a child from out of home care – Community Services, 2017
Out of home care adoption process – Community Services, 2017
Northern Territory
Adoption of Children Act 2011
Adoption of Children Regulations 2016
Care and Protection of Children Act 2007
Care and protection policy and procedures – Department of Children and Families, 2014
Charter of rights for children and young people in care in the Northern Territory – Northern Territory Government, undated