

Best Interests Principle

Introduction

The principle of best interests is central to the rights of the child, and therefore plays a central role in decision making in the child protection sector. This policy brief outlines the best interests' principle, present under the UN Convention on the Rights of the Child (CRC), and seeks to provide guidance to the child protection sector in NSW on the application of this principle when making decisions about the safety, welfare and wellbeing of Aboriginal children and young people.

The Best Interests Principle in the NSW Child Protection Sector

The principle of best interests is a central tenet to understanding the rights of children and young people. As stated in the CRC, "in all actions concerning children... the best interests of the child shall be a primary consideration"¹, and is reflected in other articles related to parental responsibilities and separation from parents. This principle emphasises the interrelatedness of all articles of the CRC, such that any understanding of the best interests of a child must be "consistent with the spirit of the entire Convention", reflecting both immediate and long-term considerations². That is, a full understanding of best require "assessment appropriate to the specific context."³, including consideration of the child's views, culture and identity, safety and the preservation of family environment and relationships.

The interrelated nature of rights in considerations of best interests is reflected within the principles for the administration of the *Children and Young Persons (Care and Protection) Act 1998*, as well as sections relating to placement decisions, the making of orders by the Children's Court, emphasising the need to consider and apply the principle of best interests in all decisions.

AbSec's position on Best Interests

The principle of best interests is a broad principle guiding all decision making within the child protection sector, and is of particular importance to Aboriginal communities given the ongoing over-representation of Aboriginal children and young people across the child protection sector. Further, the principle has a chequered history with respect to Aboriginal children, being used as the basis of a range of policies and practices of colonisation, including the regulation of Aboriginal families and the separation of children from their families that arguably have not yet been fully relegated to the past⁴. There is then a need for a more robust approach to considerations of best interests for Aboriginal children and young people; one that appreciates the social and cultural context of Aboriginal children and families, and values a child's cultural rights as central to such assessments.

In Practice

In recognising that different cultures operate within different concepts of what exactly is in a child's best interests, a move toward a more specific application of the principle in policy is the best approach. The

¹ Article 3, UN Convention on the Rights of the Child

² UNICEF (2008) Implementation Handbook for the Convention on the Rights of the Child 3rd Edition

³ Committee on the Rights of the Child (2013) General comment No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration

⁴ This idea has previously been addressed in literature, in particular that by Cripps (2012), who explains that too often the nation state's own ideologies of parenting and the best interests of the child conflict with certain Indigenous standpoints and confusion arises surrounding whose rights have primacy (Cripps, 2012: 25).

adoption of a more well-rounded, rights-based approach that is holistic and comprehensive in theory and in practice would better equip child protection services with the knowledge and competency to act in the best interests of the child at all times and in all contexts.

- Develop frameworks that support and record how the various elements have been considered when assessing a child's best interest and its application in decision making. This must include the prioritisation of the child's cultural rights, and the views of the child, their Aboriginal family, kinship group and community. However, it must be noted that culture should not be used as an excuse or justification for the denial of other rights under the CRC, including a child's right to safety.
- The best interests of the child should be assessed on the individual elements of each case, at that point in time, with consideration of both the immediate and long term impacts on the child. For Aboriginal children, such assessment should be considered through a cultural lens, and include the full participation of Aboriginal families and communities.
- To support practice with respect to decision making, allocate a member of the team to focus on the interrelated rights of the child and to speak for them in deliberations, ensuring an explicit focus on the rights of the child in decision making.
- Ensure that Aboriginal children and young people are appropriately engaged and given the opportunity to make their views known, with their views given due weight. Culturally sensitive practice is important in facilitating young people to freely share their views
- Promote Aboriginal community control of policy design and implementation processes regarding the safety, welfare and wellbeing of Aboriginal children; this would allow for a more culturally-significant and efficient decision-making platform and in turn a better application of the best interests principle
- A need for greater cultural competence and respect for cultural rights across the sector

*"The right of our children to their culture, along with the other core human rights of children – to life, to family, to protection – are non-negotiable. A child's cultural rights directly impact on their ability to meaningfully enjoy every other human right and freedom. Like all human rights, they are universal, indivisible and interdependent. Our children's rights as for all children are mandatory and sacred. These are not discretionary rights. They are not debatable. Although some rights may be subject to reasonable limitations, they cannot simply be forfeited altogether when a child is removed from home. A child's core human rights cannot be subject to available resources. Unfortunately this is the case for many of our children. I am regularly told that demand over supply equals the need for flexibility in pursuing our children's rights. The rights to full time education, to a cultural identity and to practice culture empower our children to build their resilience, strength of character and success are non-negotiable. **The protection and promotion of these rights is our children's best interests.**"*

Andrew Jackomos, Family Matters Gathering, Old Parliament House, 10 Feb 2016