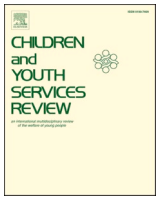
Children and Youth Services Review 168 (2025) 108035

Contents lists available at ScienceDirect

Children and Youth Services Review

journal homepage: www.elsevier.com/locate/childyouth



Decolonisation, biopolitics and neoliberalism: An Australian study into the problems of legal decision-making

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ARTICLE INFO

Keywords:
Decolonisation
Biopolitics
Neoliberalism
Child removal
Law
Australia

ABSTRACT

This paper examines the importance of decolonisation to counter the ongoing harms of state-sanctioned child removal policies that disproportionately affect First Nations families and communities in Victoria, Australia. Ongoing legacies of structural disadvantage, including drug abuse, mental ill-health, limited and conditional income support, and housing insecurity, are governed through a selective biopolitical vision that has informed child protection policies since colonisation. Family separation is assumed to protect both vulnerable children and the general community. We argue this logic reinforces structural inequalities that place unreasonable burdens on First Nations mothers to engage in 'desirable' and responsible parenting. We present current statistics on the over-representation of First Nations children in the Victorian child protection system, then describe how Western notions of biopolitics view family separation as central to protecting children. This approach now invokes neoliberal modes of governing through risk management, rather than supporting vulnerable families. We then briefly describe Victoria's child protection system, and critically examine key factual and procedural issues emerging from the application of the 'best interests' principle in four case studies documenting legal appeals instigated by First Nations families. We conclude by proposing decolonisation as a counterpoint to a governmental rationality that endorses the protection of children through state-sanctioned family separation.

1. Introduction

Decolonisation theory and methodologies challenge the dominant colonial epistemologies of governing (Agozino, 2019; Morgensen, 2011). Decolonisation is informed by a history of suppressing the perspectives, belief systems and voices of the colonised, who are often the targets of paternalistic social welfare policies aimed at protecting their best interests (Strakosch, 2024). State intervention in a child's best interests involves forced family separation when authorities identify any immediate or long-term risks that might compromise its healthy development. This paper describes four Supreme Court rulings from Victoria, Australia, that raise significant questions about the discretionary elements of the best interests test that validates family separation as a central biopolitical approach to protecting vulnerable First Nations children, many of whom experience profound systemic harms (Australian Human Rights Commission, 1997; Yoorrook Justice Commission, 2023).

Self-determination for First Nations peoples can only be achieved through a genuine political commitment to decolonisation. Nevertheless, statistics documenting family 'dysfunction' (Walter and Russo Carroll, 2021) continually depict First Nations children of all ages as a vulnerable biopolitical problem (Foucault, 2008) that can only be appropriately protected through settler-colonial governing processes (Carrington, 2011). Historically, these processes effectively abandoned the preservation of 'so-called' "full-blooded" First Nations peoples and communities by assimilating "half-caste" children[1] within state-managed missions (Hogg, 2001) that promoted settler-colonial approaches to socialisation, education and employment training (McCallum, 2017, p. 58). These policies generated profound cultural harms to First Nations communities that are reflected in contemporary child protection statistics (Krakouer, 2023a).

Between 30 June 2010 and 30 June 2022 First Nations children were

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[1] 'Full-blooded' and 'half-caste' were offensive settler-colonial terms aimed at promoting assimilation through the forced removal of thousands of First Nations children, commonly known as the Stolen Generations. The authors do not endorse these terms and only refer to them for their historical significance.

https://doi.org/10.1016/j.childyouth.2024.108035
Received 28 September 2023; Received in revised form 3 June 2024; Accepted 18 November 2024
Available online 19 November 2024

5.7 times more likely to be referred to Victorian child protection authorities, while First Nations families were 7.6 times more likely to be investigated and 8.5 times more likely to have an investigation substantiated than non-Indigenous families. First Nations children were 17.8 times more likely to be placed on a care and protection order and 17.3 times more likely to be living in Out of Home Care (OOHC) (SNAICC, 2023). Equivalent or higher rates of intervention are reported consistently throughout Australia (SNAICC, 2023). The growing number of First Nations infants entering OOHC (SNAICC, 2023; Australian Institute of Health and Welfare, 2023; Chung et al., 2023; Keddell, 2019; O'Donnell et al., 2019) highlights a biopolitical approach that views First Nations communities as inherently deficient and risky.

All Australian jurisdictions have enacted the Aboriginal and Torres Strait Islander Child Placement Principles (ATSICPP) (see *Children, Youth and Families Act* (Victoria), 2005, sections 13–14) that aim to reduce statutory intervention in First Nations communities by ensuring, where possible, children deemed to warrant separation from their nuclear families are placed with extended family and mob[2] (Krakouer et al., 2022). However, persistently high rates of child removal point to the embedded "structural factors which drive over-representation" (Blackstock et al, 2023, pp. 313-314), while decisions to place a First Nations child into OOHC often overlook the importance of maintaining ongoing connections to kinship and Country (Beaufils, 2023).

Despite the "pain and distress" emerging from intensive state surveillance (SNAICC, 2023), child removal is framed as a desirable biopolitical method of creating healthy individuals, families and communities (Collingwood-Whittick, 2018; Carrington, 2011). Settler-colonial beliefs reinforced English conceptions of family that generated a form of 'care criminalisation' (McFarlane, 2018) aimed at preventing young people transported to or born in the colonies from forging itinerant and criminal lifestyles (Jaggs, 1986). The separation of First Nations families was considered "benevolent, inclusive, and even supporting self-determination" (Blackstock, 2023, p. 313) through a Western biopolitical logic based on how white nuclear families should function without state intervention (Moreton-Robinson, 2015).

Article 3 of the Convention on the Rights of the Child validates family separation (United Nations General Assembly, 1990), despite efforts to eliminate the forced removal and assimilation of First Nations children (United Nations Declaration on the Rights of Indigenous Peoples, 2007, Arts 7 & 8). The global normalisation of child removal is now enacted through neoliberal notions of risk management (Cunneen, 2015/2016), which adds a scientific and empirical gloss to entrenched settler-colonial governing practices that validate state-sanctioned separation of the biological family. We suggest Australian legislation requiring greater consultation with First Nations communities fails to address entrenched legal approaches mandating the removal of children from their families to mitigate the risk of harm (McCallum, 2017).

2. Background: Removal in the 'best interests' of the child

Victoria's child protection legislation reinforces the state's acknowledgement of the nuclear family as the 'fundamental unit of society' (Conley Wright et al., 2022). Courts must uphold the child's best or paramount interests if state authorities uncover evidence of any actual or potential exposure to harm in the family home. This approach reflects a white colonial understanding of child removal as a viable form of state power to protect First Nations children.

2.1. Child protection policies

All formal decisions by specialist agencies, Children's Courts or appeal courts must prioritise the best or paramount interests of the child (*Children, Youth and Families Act* (Victoria), 2005, section 10). The Department of Families, Fairness and Housing (DFFH) (formally the Department of Health and Human Services)[3] oversees the procedures for responding to suspected child abuse, maltreatment and neglect, which are subject to limited factual or procedural review in the Supreme Court of Victoria (Commission for Children and Young People, 2017). DFFH must investigate reports that a child might be exposed to physical, sexual or emotional abuse and/or neglect in the home. These considerations are factored into formal legal decisions when an interested family member appeals a child removal decision authorised by the Deaprtment.

To avoid suggestions of assimilation and racism (Krakouer, 2023a), OOHC arrangements must maintain a First Nation's child's connection to community, culture and Country (Krakouer et al., 2022). This biopolitical objective seeks to 'close the gap' between settler governance (Strakosch, 2024) and First Nations populations. However:

> [c]olonisation is a … structure that created (and now supports and maintains) both the criminal justice and child protection systems in Victoria [that has] … been used to label the long-reaching and harmful State governance of Aboriginal people across three centuries (Yoorrook Justice Commission, 2023, p. 48).

Neoliberal governing philosophies also fail "to significantly shift the entrenched levels of Indigenous marginalisation and inequality" (Cunneen, 2015/2016, p. 32). This is because current public health measures focus on parental 'deficits' when determining the causes of child abuse and neglect, rather than embedded structural and socially determined risk factors that disproportionately affect First Nations families and contribute to their continued overrepresentation in the child protection ecosystem (Krakouer, 2023a).

3. Objective

Our objective is to critically analyse four Victorian Supreme Court appeal rulings instigated by First Nations peoples that challenge the legal application of the 'best interests' principle and the ATSICPP. Previous research identifies that Australian child protection and criminal laws are characterised by several neoliberal constructs:

> … the individualisation of rights and responsibilities; the extolment of individual autonomy; a belief in free and rational choice which underpins criminal liability, penality and access to welfare; a denial of welfare as a central state policy; the valorisation of a free market model and profit motivation as a core *social* value; and the denial of cultural values which stand outside of, or in opposition to, a market model of social relations (Cunneen, 2015/2016, p. 33).

A history of unethical, punitive and coercive state practices (Davis, 2019) generates a lack of trust and disengagement with the complex processes that result in placing a child in OOHC (Buchner et al., 2022). This makes it difficult for First Nations families to question formal decisions by welfare officers, police and the courts (Cunneen, 2015/2016). Our aim is to demonstrate how the protective neoliberal state acts in a child's 'best interests' through the law's framing of risk, and its failure to consider alternative knowledge systems.

4. Methods

Searches of the terms 'best interests' and 'child protection' in the open-access Austlii database and the Lexis Advance subscription

[2] 'Mob' is a colloquial Aboriginal and Torres Strait Islander term referring to complex blood and kinship relationships (Beaufils, 2023). Mob can refer to specific kinship groups or is used as a generic term to distinguish Aboriginal and Torres Strait Islander people from non-Indigenous people.

[3] Hereafter we refer to the abbreviated title DFFH or 'the Department'.

database produced a sample of 32 Victorian Supreme Court appeals examining the 'best interests' principle that were decided between January 2013 to July 2023. Four cases (12.5 %) referred explicitly to First Nations peoples. Rather than providing a rigorous empirical analysis of the entire sample, we adopt a detailed qualitative case study approach (Flyvbjerg, 2006) to examining the four legal cases involving First Nations children and their Families. Throughout, we emphasise First Nations experiences of the law in line with accepted decolonial methodologies (Tuhiwai Smith, 2013). The descriptive case narratives reveal key factual and procedural issues that inform contemporary neoliberal child protection philosophies in Australia (Strakosch, 2024). The problems we identify are strikingly common across the entire sample and in Australian (Collingwood-Whittick, 2018; Cunneen, 2015/2016) and international child protection literature (Roberts, 2022; Dettlaff, 2023).

4.1. Positionality statement

Author A and Author C are non-Indigenous socio-legal and child protection researchers. Author B is a Gundungurra man and Kanak from New Caledonia researching First Nations understandings and experiences of the OOHC system in New South Wales. Despite a deep commitment to First Nations epistemologies, the work of the non-Indigenous authors remains grounded in dominant colonial educational and research frameworks.

5. Results

Legal appeals against child protection decisions are merely one point in a family's ongoing exposure to the state's surveillance of trauma and disadvantage. Courts often feel urgent intervention will avert 'preventable illness or injury that may have lifelong consequences' on young children (Warfe v. Secretary to DFFH, 2021 (hereafter *Warfe*, 2021), para 5). In Victoria, the Supreme Court commonly defers to decisions by an 'experienced Children's Court magistrate' when determining an appropriate order in the 'paramount interests of the child' (*Warfe*, 2021, para 66; Secretary to the Department of Health and Human Services v. Children's Court of Victoria and Others, 2020a, (hereafter *Secretary to the Department*, 2020a), para 59; Sani v Secretary of DFFH, 2021 (hereafter *Sani*, 2021), para 129). Appeals examining the best interests test commonly weigh competing interpretations of the facts in each case, with a small number of cases scrutinising the procedures adopted by the Department or Children's Court.

5.1. Factual issues

Appeals examining factual issues question *why* a decision has been made. Our study found courts place considerable emphasis on the desirable responsibilities of mothers when children or infants are placed in OOHC. Two of the four cases examined here involved infants under six-months of age, with the court balancing the 'importance of the mother continuing to have care of the child' against promoting the safety, continuity and permanency of care (Secretary to the Department of Health and Human Services v. Children's Court of Victoria, 2020b, (hereafter *Secretary to the Department*, 2020b) para 16). Any chance of future reunification will depend on a mother's adherence to court-ordered conditions and evidence of her engagement with community-based or statutory services (*Warfe*, 2021, para 47).

Exposure to parental drug abuse and mental ill-health, potential homelessness and a documented history of domestic and family violence are common risk factors examined in Supreme Court appeals. Evidence of family violence includes physical threats directed at child protection staff, testimony from a child that 'daddy choked mommy' (*Secretary to the Department*, 2020b, para 6) and the imprisonment of a de facto parent for repeated breaches of intervention orders. Keeping an infant in the care of an at-risk mother is considered 'incongruent' (*Warfe*, 2021, para 76) with prior orders removing older siblings from the home that demonstrates the perceived failure of either parent to address 'any protective concerns' (*Warfe*, 2021, para 20) documented by child protection authorities. Detailed conditions are often imposed on mothers before an order is altered or face-to-face contact with her child is permitted. Despite appearing consensual, the prospect of permanent separation for breach of these conditions aims to incentivise compliance.

In *Sani*, 2021, a mother without legal assistance challenged an order restricting contact with her child to phone or video-chat. The court ruled it was in the child's best interests to be in the sole care of his biological father due to the mother's persistent failure to comply with mandatory drug testing requirements under an Interim Accommodation Order (IAO).[4] The "happy little boy" (*Sani*, 2021, para 97) was almost 6-years old and 'loves seeing his mummy and loves living with daddy' (*Sani*, 2021, para 120). However, the child's 'Aboriginal origin' (*Sani*, 2021), para 95) appeared to have no bearing on the Department's decision to grant the IAO. Despite a 'genuine and strong desire to care for and be with her son' (*Sani*, 2021 para 97), extensive 'hearsay' (*Sani*, 2021, para 28) evidence in the DFFH case files suggested contact with his mother was not considered to be in the child's 'best interests'.

DFFH files detailed the mother's long history of 'poor mental health and alcohol use in early pregnancy' (*Sani*, 2021, para 30), and her later 'methamphetamine use' and suicidal ideation (*Sani*, 2021, para 31) that contributed to the parents' separation before the child's second birthday. The Supreme Court emphasised the mother's 'erratic, paranoid and verbally aggressive behaviour' (*Sani*, 2021, para 33), which included assertions that her positive drug test results were falsified by Department staff (*Sani*, 2021, para 34), despite conflicting evidence she had 'returned negative results for illicit substances' (*Sani*, 2021, para 39) and psychiatric reports identifying 'no concerns regarding her mental health' (*Sani*, 2021, para 40).

The Supreme Court found the child faced a 'real and well-founded risk' of exposure to his mother's illicit drug use (*Sani*, 2021, para 115), even though these factual inconsistencies could result from difficulties in obtaining meaningful assistance to comply with court-ordered conditions. Further, the mother expressed concerns about the mental health of her new de facto partner (*Sani*, 2021, paras 42–43; para 52), who had been imprisoned for 8-months for 'persistent contraventions of Family Violence Intervention Orders' (*Sani*, 2021, para 94). The court found that if physical contact were permitted the mother was likely to abscond with her son (*Sani*, 2021, para 128), which was supported by descriptions of her interactions with child protection staff and the courts as 'erratic, nonsensical, disjointed and irrational' (*Sani*, 2021, para 55), 'deflective and obstructive' (*Sani*, 2021, para 69) and emotionally manipulative towards the child.

In *Warfe*, 2021 a First Nations mother challenged a condition prohibiting her contact with the child's biological father due to his well-documented history of family violence. This condition has a clear bio-political motive that validates family separation as a responsible neoliberal strategy because it is foolish to expose oneself to potential harm. Rather than offering meaningful support to limit the violence, this outcome required the mother to avoid inadvertent encounters with the father in public, despite her insistence that compliance was onerous and impractical. The Supreme Court concluded:

> … where there is a clash, a parent's interests must give way to a child's best interests. This proposed condition falls into the latter category and is required precisely because of *Ms Warfe's history of*

[4] Interim Accommodation Orders are short-term emergency care and protection orders typically granted when an immediate response is deemed necessary to prevent a significant risk of harm to a child. The child will be temporarily removed from the unsafe environment while child protection authorities investigate the reasons for removal. Orders should only last 2 months but can be extended by the Children's Court.

failing to take the necessary steps to avoid exposing herself to the risk of family violence (*Warfe*, 2021, para 92, emphasis added).

Mental ill-health is conceptualised through a mother's 'unpredictable moods', 'unpredictable behaviour' or failure to cooperate with 'authorities and agencies who (sic) are seeking to assist her and her care of the children' (*Secretary to the Department*, 2020b, para 12). Consequently, the Supreme Court considered a father's outstanding assault charges against a four-year old child, prior contraventions of intervention orders and history of illicit drug use (*Secretary to the Department*, 2020b, para 21) as an opportunity for the mother 'to consider the seriousness of the situation and to take steps to attempt to address it' (*Secretary to the Department*, 2020b, para 23).

5.2. Procedural issues

Appeals examining procedural issues question *how* state authorities decide to remove a child from the family home. The case presented here involved a disagreement between extended family members over the preferred approach to determining the child's best interests after both biological parents had passed away. This required the court to reconcile the competing interests of the child's foster carers and one paternal grandparent who sought to place 'the child with his siblings in an environment where his cultural needs … could be met' (*Secretary to the Department*, 2020a, para 16). The child was seven-years of age, had experienced custody and care plans since the age of 2-months, and was diagnosed with 'autism spectrum disorder, foetal alcohol spectrum disorder, as well as various physical issues' (*Secretary to the Department*, 2020a, para 5). The child's foster-care arrangement was reviewed annually by the Department and the Victorian Aboriginal Child Care Agency to enable gradual contact with his maternal siblings who were living in a separate foster care arrangement, although it is unclear whether whether OOHC order complied with the ATSICPP.

While rules for presenting evidence and legal arguments in child protection cases can be modified 'to reflect the procedural flexibility granted to the Children's Court … those rules cannot be done away with altogether' (*Secretary to the Department*, 2020a, para 61). Here, the Children's Court Magistrate struck out an application by the Department to extend a Care by Secretary Order[5] and preserve the child's long-term foster care arrangement. The Department claimed this decision prevented it from providing sworn evidence to support its case and left the child 'without any legal guardian … [and] no person authorised to make decisions on his behalf' (*Secretary to the Department*, 2020a, para 64). This procedural modification also potentially contravened the rules of natural justice governing the conduct of administrative hearings in Victoria. The Supreme Court granted the Department's claim, which will lead to further proceedings to determine whether the child's best interests are served by maintaining the connection with his foster parents, his siblings and their foster parents or his First Nations community.

6. Discussion

Three interrelated issues from this analysis highlight the importance of a decolonial approach to child protection in Victoria. First, these cases only scrutinise the application of the best interests test within the narrow requirements of the *Children, Youth and Families Act* (2005). Only four cases in our sample of 32 involved appeals by First Nations families. This outcome demonstrates how First Nations women are denied a meaningful voice in administrative proceedings that determine their 'capacity' as parents. There are no references to First Nations knowledges about extended family, community, culturally appropriate parenting or the significance of Country to Indigenous children. Rather, the emphasis is on how mothers experiencing substance misuse, mental health challenges and exposure to domestic and family violence should 'fix' their problems before they can directly contact or care for their children. Living in crisis is framed as an individual failure these mothers must address. These neoliberal conceptions of risk mask structural, intersectional and intergenerational inequalities involving gender, race, disability and disadvantage that underpin child removal as a form of care (Strakosch, 2024).

Second, the Supreme Court commonly defers to decisions by departmental case managers and the Children's Court. These executive decisions are also a form neoliberal governance that validate the micro-surveillance of failed, risky and dangerous parents (Roberts, 2022; Dettlaff, 2023). Therefore, according to the Supreme Court, family separation *must* be in the child's best interests because expert administrative perspectives determine that this is the case. Rather than considering a child's best interests can be met within the extended family or community, these outcomes and their rationalisation reinforce the idea that when a nuclear family is in crisis, a child's best interests can only be 'protected' by altering the rights of the biological parents. Even competent legal representatives struggle to question the records of case managers, DHHF staff and the courts. This places First Nations people in a position where "you just agree to do anything to get your kids back …" (Cunneen, 2016, p. 39).

Third, no consideration is given to cultural strategies for child care, safety or education in First Nations communities. This results in an administrative rhetoric of 'protecting and promoting cultural connection' under the ATSICPP (Krakouer, 2023b), while First Nations children continue to be removed from their families, communities and Country at alarming rates. Models of care incorporating First Nations ways of knowing, doing and being (Beaufils, 2023) remain condensed into five bureaucratic 'principles' that are never discussed in our sample. This results in limited judicial scrutiny of ATSICPP principles that are unquestioningly lauded by DHHF and tacit acceptance of established factual and procedural requirements deemed by the courts to comply with their terms. A decolonial approach should acknowledge the state can help to minimise intrusive bureaucratic surveillance by recognising the cultural significance of First Nations understandings of child-rearing, family and maintaining connection to Country that can also erode the highly gendered responsibility for addressing common risks identified in these tragic cases.

6.1. Strengths and Limitations

The number of cases described in this study is intentionally small and unrepresentative. Rather than identifying broad empirical trends, our discussion reveals common and nuanced themes emerging in these four appeals. The key strength of our qualitative case study approach highlights the embedded difficulties First Nations women experience when legally challenging decisions involving the best interests test under Victorian child protection law. Despite the small sample size, our adoption of decolonial theories and methods to analyse these cases (Tuhiwai Smith, 2013) reinforces systemic trends in the operation and application of laws identified in previous Australian (Cunneen, 2015/2016) and international literature (Roberts, 2022; Dettlaff, 2023). These trends are open to future empirical examination in Victoria and other colonised jurisdictions.

7. Conclusion

Contemporary neoliberal governance aimed at protecting children is underpinned by responsibilisation. First Nations voices and belief systems are not incorporated in established administrative processes that validate family separation in a child's best interests, while appeal courts

[5] A Care by Secretary Order places a child under the guardianship of the executive to the exclusion of all others for a temporary period of no more than 2 years while a permanent, alternative care arrangement is finalised. Contact conditions cannot be attached to these orders, which aim to ensure a child can maintain its relationship with parents and extended family.

commonly defer to the expertise of child protection agencies and their staff by placing the primary responsibility for rectifying family dysfunction on single, socially isolated women in volatile and violent relationships. Such profound disadvantage makes it difficult to comply with mandatory or 'agreed' conditions in child protection orders, while detailed surveillance remains a non-corrective form of 'slow violence' (Pagni Barak, 2023) perpetuated through official departmental and court orders. These neoliberal governing approaches are entrenched in historically embedded biopolitical structures that have always used family and community separation to order the lives of First Nations peoples.

Author statement

All authors accept responsibility for the entire content of this manuscript and have provided equal contributions on the conceptualisation, methodology and data analysis.

No generative AI platform or program has been used in any way to assist with writing this paper.

Declaration of competing interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Data availability

Data will be made available on request.

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