

OUT-OF-HOME CARE, CONTACT ORDERS AND INFANT MENTAL HEALTH: RECOGNISING A UNIQUE DEVELOPMENTAL STAGE IN LAW, POLICY AND PRACTICE

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Child protection legislation in New South Wales ('NSW') has the advancement of the best interests of the child as a fundamental objective. This article argues that advancing the best interests of one group of children – infants (ie, children under 12 months of age) – involves recognising needs that are so distinct and important that infants should be treated as a discrete category of children under all legal instruments, including the Convention on the Rights of the Child and child protection legislation. The article examines how the status of 'infancy' influences contact orders for infants in out-of-home care ('OOHC') in the NSW jurisdiction and proposes law reform to recognise the unique developmental status and vulnerabilities of infants who are placed in OOHC. The lack of legal identification and regulation specific to infants as a sub-category in existing legal frameworks represents a deficit in the child protection regime; the best interests of infants require unique legal protection.

Only if the social worker, the doctor, or the magistrate has a well-considered long-term plan for the child is it permissible to remove him from his home for his own good. Without such a plan his removal is merely the creation of yet another deprived child.¹

I INTRODUCTION

Child protection legislation across the world aims to advance children's best interests as a fundamental objective,² and one important action for which such

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1 John Bowlby, 'Care of Maladjusted and Sick Children' [1951] 3(3) *Bulletin of the World Health Organization* 489, 489.

2 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 8 ('Care Act'); *Children Act 2004* (UK) s 2.

legislation provides is the placement of children in out-of-home care ('OOHC'). Such actions typically involve taking responsibility for the primary care of children away from the child's parents, potentially creating moral tension and opposition between the parents and the state.

Infants – being children aged less than 12 months³ – are arguably the most vulnerable group in society. Recent data from the Australian Institute of Health and Welfare reports 11,700 infants in Australia, or 40 per 1,000 children, received child protection services in 2020–21,⁴ and infants were also the most likely to have a notification to child protective services substantiated.⁵ Globally, there are 'long-standing concerns with the adequacy of the child welfare system's response to the distinct needs of infants, prompting calls for a more developmentally driven approach to child welfare practice, policy and research'.⁶

It is widely recognised that positive early experiences through carer-infant interactions are crucial if infants are to grow into healthy, well-adjusted adults with the ability to navigate the complexities of life.⁷ Conversely, child maltreatment

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- 3 World Health Organization, 'Consolidated Guidelines on the Use of Antiretroviral Drugs for Treating and Preventing HIV Infection: Recommendations for a Public Health Approach' (Guidelines, June 2013) 13 ('Consolidated Guidelines'); United Nations High Commissioner for Refugees, 'Infant and Young Child Feeding Practices: Standard Operating Procedures for the Handling of Breastmilk Substitutes (BMS) in Refugee Situations for Children 0–23 Months' (Guidelines, August 2015) 7 ('Infant and Young Child Feeding Practices'); Australian Institute of Health and Welfare, 'Glossary', *Australian Government* (Web Page) <<https://www.aihw.gov.au/reports-data/australias-health/australias-health-snapshots/glossary>> ('Glossary'); National Health and Medical Research Council, 'Eat for Health: Infant Feeding Guidelines' (Guidelines, Australian Government, 2012) ('Infant Feeding Guidelines').
 - 4 Australian Institute of Health and Welfare, *Child Protection Australia 2020–21* (Web Report No CWS 87, 15 June 2022) 14 ('*Child Protection Australia*').
 - 5 *Ibid* 28.
 - 6 Joanne Filippelli et al, 'Infants and the Decision to Provide Ongoing Child Welfare Services' (2017) 11(1) *Child and Adolescent Psychiatry and Mental Health* 24:1–15, 2 <<https://doi.org/10.1186/s13034-017-0162-7>>; Susan Chinitz et al, 'Improving Outcomes for Babies and Toddlers in Child Welfare: A Model for Infant Mental Health Intervention and Collaboration' (2017) 70 *Child Abuse and Neglect* 190 <<https://doi.org/10.1016/j.chiabu.2017.05.015>>; Cathy Humphreys and Meredith Kiraly, 'High-Frequency Family Contact: A Road to Nowhere for Infants' (2011) 16(1) *Child and Family Social Work* 1 <<https://doi.org/10.1111/j.1365-2206.2010.00699.x>>.
 - 7 Christina Bethell et al, 'Positive Childhood Experiences and Adult Mental and Relational Health in a Statewide Sample: Associations across Adverse Childhood Experiences Levels' (2019) 173(11) *JAMA Pediatrics* e193007:1–10 <<https://doi.org/10.1001/jamapediatrics.2019.3007>>; Bruce D Perry, 'Bonding and Attachment in Maltreated Children: Consequences of Emotional Neglect in Childhood' in *Parent and Caregiver Education Series* (ChildTrauma Academy Press, 1999) vol 1, iss 3 ('Bonding and Attachment in Maltreated Children'); Colleen Doyle and Dante Cicchetti, 'From the Cradle to the Grave: The Effect of Adverse Caregiving Environments on Attachment and Relationships throughout the Lifespan' (2017) 24(2) *Clinical Psychology: Science and Practice* 203 <<https://doi.org/10.1111/cpsp.12192>>; F Cirulli, A Berry and E Alleva, 'Early Disruption of the Mother-Infant Relationship: Effects on Brain Plasticity and Implications for Psychopathology' (2003) 27(1–2) *Neuroscience and Biobehavioral Reviews* 73 <[https://doi.org/10.1016/S0149-7634\(03\)00010-1](https://doi.org/10.1016/S0149-7634(03)00010-1)>; Kathryn MA Gudsnuik and Frances A Champagne, 'Epigenetic Effects of Early Developmental Experiences' (2011) 38(4) *Clinics in Perinatology* 703 <<https://doi.org/10.1016/j.clp.2011.08.005>>; Regina Sullivan et al, 'Infant Bonding and Attachment to the Caregiver: Insights from Basic and Clinical Science' (2011) 38(4) *Clinics in Perinatology* 643, 645–7 <<https://doi.org/10.1016/j.clp.2011.08.011>>; Urie Bronfenbrenner and Gary W Evans, 'Developmental Science in the 21st Century: Emerging Questions, Theoretical Models, Research Designs and Empirical Findings' (2000) 9(1) *Social Development* 115, 118 <<https://doi.org/10.1111/1467-9507.00114>>.

(emotional, physical, sexual abuse, neglect and exposure to domestic violence) and trauma in infancy are associated with increased likelihood of risky health behaviours, chronic medical conditions, being at risk for developmental delay, and long-term mental health problems.⁸ Furthermore, infants who grow up in OOHC are more likely than others to have subsequent contact with the criminal justice system.⁹ The removal of an infant can also have profoundly damaging physical, physiological, social and emotional effects on the birth parents.¹⁰ Birth parents who have experienced infant removal – sometimes within hours of birth – have described feeling distressed, powerless and ambushed. They have also noted the inadequacy of legal advocacy to navigate the requirements for restoration to be considered.¹¹

Ecological systems theorist Urie Bronfenbrenner states that ‘the engines of development’¹² are ‘proximal processes’;¹³ that is, the experiences and/or interactions between developing human beings and the persons in their immediate

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- 8 Ben Mathews et al, ‘The Australian Child Maltreatment Study (ACMS): Protocol for a National Survey of the Prevalence of Child Abuse and Neglect, Associated Mental Disorders and Physical Health Problems, and Burden of Disease’ (2021) 11(5) *BMJ Open* e047074:1–11 <<https://doi.org/10.1136/bmjopen-2020-047074>>; Lorraine M McKelvey et al, ‘Adverse Childhood Experiences: Screening and Health in Children from Birth to Age 5’ (2017) 35(4) *Families, Systems, and Health* 420 <<https://doi.org/10.1037/fsh0000301>>; Zehua Cui et al, ‘Child Maltreatment and Resilience: The Promotive and Protective Role of Future Orientation’ (2020) 49(10) *Journal of Youth and Adolescence* 2075 <<https://doi.org/10.1007/s10964-020-01227-9>>; Melissa Jonson-Reid, Patricia L Kohl and Brett Drake, ‘Child and Adult Outcomes of Chronic Child Maltreatment’ (2012) 129(5) *Pediatrics* 839 <<https://doi.org/10.1542/peds.2011-2529>>; Sarah Mares, Louise Newman and Beulah Warren, *Clinical Skills in Infant Mental Health: The First Three Years* (ACER Press, 2nd ed, 2011) 4–5; Robert Winston and Rebecca Chicot, ‘The Importance of Early Bonding on the Long-term Mental Health and Resilience of Children’ (2016) 8(1) *London Journal of Primary Care* 12 <<https://doi.org/10.1080/17571472.2015.1133012>>; Charles A Nelson et al, ‘Adversity in Childhood Is Linked to Mental and Physical Health throughout Life’ (2020) 371 *British Medical Journal* m3048:1–9 <<https://doi.org/10.1136/bmj.m3048>>; James G Scott et al, ‘The Association between Child Maltreatment and Mental Disorders in the Australian Child Maltreatment Study’ (2023) 218(S6) *Medical Journal of Australia* S26 <<https://doi.org/10.5694/mja2.51870>>.
- 9 Kath McFarlane, ‘Care-Criminalisation: The Involvement of Children in Out-of-Home Care in the New South Wales Criminal Justice System’ (2018) 51(3) *Australian and New Zealand Journal of Criminology* 412 <<https://doi.org/10.1177/0004865817723954>>.
- 10 Karen Broadhurst and Claire Mason, ‘Child Removal as the Gateway to Further Adversity: Birth Mother Accounts of the Immediate and Enduring Collateral Consequences of Child Removal’ (2020) 19(1) *Qualitative Social Work* 15 <<https://doi.org/10.1177/1473325019893412>>; Heather Douglas and Tamara Walsh, ‘Continuing the Stolen Generations: Child Protection Interventions and Indigenous People’ (2013) 21 *International Journal of Children’s Rights* 59 <<https://doi.org/10.1163/157181812X639288>>; regarding child welfare workers’ interaction with parents of at-risk children, see generally Øivin Christiansen and Norman Anderssen, ‘From Concerned to Convinced: Reaching Decisions about Out-of-Home Care in Norwegian Child Welfare Services’ (2010) 15 *Child and Family Social Work* 31 <<https://doi.org/10.1111/j.1365-2206.2009.00635.x>>.
- 11 Sebastian Trew et al, ‘Parents’ Experiences with Child Protection during Pregnancy and Post-birth’ (2022) 28(2) *Child and Family Social Work* 549 <<https://doi.org/10.1111/cfs.12984>>; Karen Broadhurst, Claire Mason and Harriet Ward, ‘Urgent Care Proceedings for New-Born Babies in England and Wales: Time for a Fundamental Review’ (2022) 36(1) *International Journal of Law, Policy and the Family* 1 <<https://doi.org/10.1093/lawfam/ebac008>>.
- 12 Bronfenbrenner and Evans (n 7) 118.
- 13 Ibid.

environment.¹⁴ According to attachment theory, infants in the first year of life are biologically programmed to seek these experiences and interactions (effectively ‘emotional proximal processes’) with adult caregivers to build emotional regulation, to feel understood and secure and for social communication skills.¹⁵ These experiences form an ‘internal working model’ that guides interaction – with others and self – across the lifespan.¹⁶ Sadly, many infants in OOHC have to adapt to a disrupted routine that does not promote optimal bonding and attachment, healthy development or wellbeing. Optimising stability in decision-making for infants in OOHC is, therefore, an important mechanism for protecting infants’ long-term health and wellbeing.

A recent review of the international literature reveals that there is currently a mismatch between law, on the one hand, and governing health bodies and health guidelines, on the other, as to the significance accorded to infancy as a developmental stage.¹⁷ The health perspective, as exemplified by the World Health Organization,¹⁸ the United Nations High Commissioner for Refugees,¹⁹ the Centers for Disease Control and Prevention,²⁰ the Australian Institute of Health and Welfare,²¹ and the National Health and Medical Research Council,²² defines infants as aged 0–12 months and identifies infants as a unique and distinct category, with distinct needs; yet, the legal perspective reflected in the *Convention on the Rights of the Child* (‘CRC’)²³ and New South Wales (‘NSW’) child protection legislation²⁴ does not identify them as such.

The first year of life is the most important stage for social, emotional and cognitive development. The primary concern of this article is the lack of any infant-specific criteria within the existing legal framework for the making of contact orders in the child protection setting. Although both family law and child protection law hold some similar dilemmas in relation to contact,²⁵ infants involved in family

14 Ibid.

15 Anthony Bateman and Peter Fonagy, *Mentalization-Based Treatment for Personality Disorders: A Practical Guide* (Oxford University Press, 1st ed, 2016) <<https://doi.org/10.1093/med:psych/9780199680375.001.0001>>; Laura Davies, Elizabeth Jenkinson and Andrea Halewood, ‘Attachment Theory and Social Interaction in Infants with a Congenital Facial Palsy’ (2020) 8(5) *Journal of Health Visiting* 194, 195 <<https://doi.org/10.12968/johv.2020.8.5.194>>; Mary DS Ainsworth and Robert S Marvin, ‘On the Shaping of Attachment Theory and Research: An Interview with Mary DS Ainsworth (Fall 1994)’ (1995) 60(2–3) *Monographs of the Society for Research in Child Development* 3 <<https://doi.org/10.1111/j.1540-5834.1995.tb00200.x>>.

16 Doyle and Cicchetti (n 7); Ainsworth and Marvin (n 15) 18–19.

17 Rachel Gregory-Wilson et al, ‘Infant Removal from Birth Parents: How Does Health Information Impact Court Decisions?’ (2022) 29(3) *Collegian* 379 <<https://doi.org/10.1016/j.colegn.2021.08.009>>.

18 See World Health Organization, ‘Consolidated Guidelines’ (n 3) 13.

19 See United Nations High Commissioner for Refugees, ‘Infant and Young Child Feeding Practices’ (n 3) 7.

20 Centers for Disease Control and Prevention, ‘Infants (0–1) Year of Age’, *Child Development* (Web Page) <<https://www.cdc.gov/ncbddd/childdevelopment/positiveparenting/infants.html>>.

21 Australian Institute of Health and Welfare, ‘Glossary’ (n 3).

22 National Health and Medical Research Council, ‘Infant Feeding Guidelines’ (n 3).

23 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1 (‘CRC’).

24 *Care Act* (n 2) s 3(1).

25 Cathy Humphreys and Meredith Kiraly, ‘Developmentally Sensitive Parental Contact for Infants when Families Are Separated’ (2010) 85 *Family Matters* 49.

law proceedings, where parents have separated or divorced, are differently placed compared to those taken into OOHC. For example, all children involved in legal child protection processes have been identified as at risk of significant harm; this is not the case for children in family law disputes. The aim of this article is to highlight the crucial role of bonding and attachment during infancy in children's overall development, and the need to recognise that role in decision-making regarding contact orders for infants in OOHC.²⁶ Secure attachment in infancy is a means of facilitating optimal infant development, and this knowledge from the social and health sciences should inform relevant law.

First, this article argues that the needs of infants are so distinct and important that they should ideally be treated as a discrete category of children under all legal instruments. Legislation and guidelines must recognise the unique needs of the infant in the first year of life in order to motivate infant-oriented actions and policies at both community and societal levels, and to ensure the best interests of the infant are served.²⁷ Furthermore, a consistent and clear definition of the term 'infant' will reduce confusion regarding health care access and information interpretation by legal workers and health professionals – strengthening communication between legal and health departments, facilities and families.²⁸ We shall see that infancy is sometimes captured within a category of 'early childhood', and that bonding and attachment are sometimes nominally identified as significant considerations in decision-making. However, neither of these approaches adequately recognises the unique and critical developmental needs of infants, as distinct from young children generally. Some of the dangers for infants of the law's failure to pay attention to infancy as a discrete developmental stage and provide the special protections infants need include: higher risk for relationship breakdown, drug and alcohol problems, family violence, criminal activity, juvenile delinquency, suicide, obesity, increased likelihood of having chronic medical conditions, and screening at risk for developmental delay.²⁹

Secondly, this article assesses the adequacy of the provision for the unique needs of infants, both under the *CRC* and within the NSW child protection jurisdiction. Contact orders for infants in OOHC are used as the focal point of the analysis of the NSW jurisdiction. The rationale for this is that contact provides the opportunity

26 Winston and Chicot (n 8).

27 World Association for Infant Mental Health, 'Rights of Infants' (Position Paper, Perspectives on Infant Mental Health, 14–18 June 2014) ('Rights of Infants').

28 Ramona Clark, Melissa Locke and Andrea Bialocerkowski, 'Paediatric Terminology in the Australian Health and Health-Education Context: A Systematic Review' (2015) 57(11) *Developmental Medicine and Child Neurology* 1011 <<https://doi.org/10.1111/dmcn.12803>>.

29 Australian Institute of Family Studies, 'Effects of Child Abuse and Neglect for Children and Adolescents' (Policy and Practice Paper, Child Family Community Australia, January 2014) <<https://aifs.gov.au/cfca/publications/effects-child-abuse-and-neglect-children-and-adolescents>>; Elizabeth Izett et al, 'Prevention of Mental Health Difficulties for Children Aged 0–3 Years: A Review' (2021) 11 *Frontiers in Psychology* 500361:1–24 <<https://doi.org/10.3389/fpsyg.2020.500361>>; Glenn D Walters, 'Early Attachment and Narcissistic Entitlement: Tracing the Roots of Adolescent Proactive Criminal Thinking' (2019) 5 *Journal of Developmental and Life-Course Criminology* 266 <<https://doi.org/10.1007/s40865-019-00117-4>>; Mathews et al (n 8); McKelvey et al (n 8); Cui et al (n 8); Jonson-Reid, Kohl and Drake (n 8); Mares, Newman and Warren (n 8) 4–5; Winston and Chicot (n 8); Nelson et al (n 8).

to maintain beneficial connections between parents and the infant when parental care has been temporarily or permanently suspended. Contact is strongly linked to positive outcomes for children.³⁰ Reported cases from the child protection jurisdiction, along with selected family law decisions, are considered in order to determine the extent of any judicial recognition of the connection between attachment and the best interests of the child. The lack of legal identification and regulation specific to infants as a sub-category in existing legal frameworks represents a deficit in the child protection regime. The article proposes law reform to recognise the unique status and vulnerabilities of infants who are placed in OOHC.

II INFANCY AS A UNIQUE DEVELOPMENTAL STAGE

Before discussing the legal framework surrounding children's rights and child protection in NSW, it is important to clarify what makes infancy a unique and critical developmental stage deserving of specific legal safeguards. Evidence from the health and social sciences literature establishes that infancy is a foundational developmental period, biologically, psychologically and socially.³¹ Unique considerations apply to the needs of infancy, underscoring the impact of early experience on the developing infant brain.³² Infancy is a critical stage of human development, as experiences during this stage of life are the engines of development and influence the course of all later development.³³ During infancy, every individual has the potential to thrive and grow; conversely, every infant is vulnerable to having their development path significantly affected by early trauma and deprivation.³⁴ A positive start in life promotes the infant's ability to reach their full potential, while a negative start increases the chances of adverse outcomes. Three facets of infancy as a unique developmental stage are examined below: biology, bonding attachment and vulnerability.

A Biology

At the biological level, synaptogenesis – meaning synapse formation between neurons in the brain – develops at a considerably higher rate during the first year

30 Senate Community Affairs References Committee, Parliament of Australia, *Out of Home Care* (Report, August 2015) 101.

31 Joy V Browne, 'Infant Mental Health in Intensive Care: Laying a Foundation for Social, Emotional and Mental Health Outcomes through Regulation, Relationships and Reflection' (2021) 27(1) *Journal of Neonatal Nursing* 33 <<https://doi.org/10.1016/j.jnn.2020.11.011>>; Mares, Newman and Warren (n 8); 'Rights of Infants' (n 27).

32 Annie Bernier et al, 'Mother-Infant Interaction and Child Brain Morphology: A Multidimensional Approach to Maternal Sensitivity' (2019) 24(2) *Infancy* 120 <<https://doi.org/10.1111/inf.12270>>; Perry, 'Bonding and Attachment in Maltreated Children' (n 7).

33 Bronfenbrenner and Evans (n 7); Mares, Newman and Warren (n 8).

34 M Keren and M Foley, 'Why Do We Need to Specifically Address the Rights of Infants when We Already Have the Children's Rights Declaration?', *Perspectives in Infant Mental Health* (Web Page, 10 March 2017) <<https://perspectives.waimh.org/2017/10/03/why-do-we-need-to-specifically-address-the-rights-of-infants-when-we-already-have-the-childrens-rights-declaration/>>.

of life and is significantly impacted by bonding and attachment.³⁵ Bruce D Perry describes synapses as the most ‘experience-sensitive feature of a neuron’.³⁶ During the infant’s first eight months of life there is an 800% increase in synaptic density while the developing neurons in the infant’s brain are ‘seeking’ their appropriate connections.³⁷ These synaptic connections, or wiring of the brain, create chains of neuron-to-neuron-networks allowing the brain to function properly – creating the building blocks for thought, feeling and security.³⁸ If an infant’s brain does not have all the connections needed, possible delays in developmental milestones may occur as well as long-term issues with knowledge and memory.³⁹

Therefore, while genes play an undeniable role in the initial mapping of the human brain, there is a strong body of evidence that the social and emotional environment provided by caregivers also has a powerful effect on the development of infant brains and emotional regulation.⁴⁰ A growing body of evidence in the scientific field known as ‘affective neuroscience’, which looks at the science of emotions, shows that experiences of bonding and attachment during infancy contribute to brain architecture and can have lasting impacts on people’s learning skills, relational patterns and participation in society.⁴¹

B Bonding and Attachment

At the attachment level, ‘attachment theory’ depicts a secure attachment from birth as enabling humans to function better in areas of life such as learning, exploration and even the ability to form healthy sexual behaviours.⁴² Emotional regulation is organised, in part, in the initial months of an infant’s life through

35 Perry, ‘Bonding and Attachment in Maltreated Children’ (n 7) 3.

36 Bruce D Perry, ‘Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us about Nature and Nurture’ (2002) 3(1) *Brain and Mind* 79, 84 (‘Childhood Experience’).

37 Ibid 85.

38 Ibid.

39 Bernier et al (n 32); Perry, ‘Childhood Experience’ (n 36).

40 Bernier et al (n 32); Cory Shulman, *Research and Practice in Infant and Early Childhood Mental Health* (Springer, 2016) vol 13 <<https://doi.org/10.1007/978-3-319-31181-4>>; Minhui Ouyang et al, ‘Delineation of Early Brain Development from Fetuses to Infants with Diffusion MRI and Beyond’ (2019) 185 *NeuroImage* 836 <<https://doi.org/10.1016/j.neuroimage.2018.04.017>>.

41 Allan N Schore, ‘Effects of a Secure Attachment Relationship on the Right Brain Development, Affect Regulation, and Infant Mental Health’ (2001) 22(1–2) *Infant Mental Health Journal* 7 <[https://doi.org/10.1002/1097-0355\(200101/04\)22:1<7::AID-IMHJ2>3.0.CO;2-N](https://doi.org/10.1002/1097-0355(200101/04)22:1<7::AID-IMHJ2>3.0.CO;2-N)>; Nicole L Schmidt et al, ‘Longitudinal Research at the Interface of Affective Neuroscience, Developmental Psychopathology, Health and Behavioral Genetics: Findings from the Wisconsin Twin Project’ (2019) 22(4) *Twin Research and Human Genetics* 233 <<https://doi.org/10.1017/thg.2019.55>>.

42 Bartosz Zaniewski, ‘An Exploration of Attachment Strategies among Young People Who Engage in Harmful Sexual Behaviour’ (PhD Thesis, Plymouth University, March 2015) 81, 103–10; <<https://dx.doi.org/10.24382/4209>> Judith A Feeney and Beverley Raphael, ‘Adult Attachments and Sexuality: Implications for Understanding Risk Behaviours for HIV Infection’ (1992) 26(3) *Australian and New Zealand Journal of Psychiatry* 399, 403–4 <<https://doi.org/10.3109/00048679209072062>>; Mary Dozier et al, ‘Attachment and Biobehavioral Catch-Up: An Evidence-Based Intervention for Vulnerable Infants and Their Families’ (2018) 28(1) *Psychotherapy Research* 18 <<https://doi.org/10.1080/10503307.2016.1229873>>; R Chris Fraley et al, ‘Interpersonal and Genetic Origins of Adult Attachment Styles: A Longitudinal Study from Infancy to Early Adulthood’ (2013) 104(5) *Journal of Personality and Social Psychology* 817 <<https://doi.org/10.1037/a0031435>>.

intimate interactions and engagement with the infant's care giver.⁴³ John Bowlby explains that when a person has a strong connection with a main caregiver during the first year of life, the transition into adulthood is normally built on a strong sense of self, connectedness and security which promotes a positive working model of self and others.⁴⁴ Furthermore, Kimberly Howard et al report that even a relatively brief separation within the first two years of life can have implications for child wellbeing three years later.⁴⁵

Attachment also has implications for infant mental health ('IMH'), the field of study that explores the relationship between optimal social, emotional and cognitive wellbeing on the one hand, and secure and stable relationships with nurturing caregivers on the other. All infants experience mental health on a continuum, and this continuum includes states of 'well', 'coping', 'struggling' and 'unwell'.⁴⁶ Symptoms of IMH at the 'unwell' end of the continuum include being disengaged, not wanting to be held, not crying, making few attempts to get needs met, under- or over-reacting to external stimuli, or difficulties with sleeping, feeding or eating.⁴⁷

IMH helps us understand how, during infancy, humans develop flexible strategies for coping with the instances of novelty and stress that are inherent in human interactions. It also helps us understand the direct link between the quality of attachment between caregiver and infant, and infant brain architecture and development. Infants develop a hierarchy of attachments with their various caregivers.⁴⁸ When infants are separated from their caregiver, the infant experiences emotions of stress and anxiety, which are gradually embedded into their personality.⁴⁹ They are able to anticipate specific caregivers' responses to their distress and shape their own behaviours accordingly (eg, developing strategies for dealing with distress when in the presence of that caregiver) based on daily interactions with their specific caregivers.⁵⁰ How infants navigate different types of separation can be framed in

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- 43 Brendan D Ostlund et al, 'Shaping Emotion Regulation: Attunement, Symptomatology, and Stress Recovery within Mother-Infant Dyads' (2016) 59(1) *Developmental Psychobiology* 15 <<https://doi.org/10.1002/dev.21448>>; Mares, Newman and Warren (n 8).
- 44 Jude Cassidy, Jason D Jones and Phillip R Shaver, 'Contributions of Attachment Theory and Research: A Framework for Future Research, Translation, and Policy' (2013) 25(4 pt 2) *Development and Psychopathology* 1415 <<https://doi.org/10.1017/S0954579413000692>>, discussing John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* (Basic Books, 1988).
- 45 Kimberly Howard et al, 'Early Mother-Child Separation, Parenting, and Child Well-being in Early Head Start Families' (2011) 13(1) *Attachment and Human Development* 5 <<https://doi.org/10.1080/14616734.2010.488119>>.
- 46 National Mental Health Commission, *The National Children's Mental Health and Wellbeing Strategy* (Report, 2021) 28.
- 47 Kristel Alla and Trina Hinkley, 'What Is Infant Mental Health, Why Is It Important, and How Can It Be Supported?', *Emerging Minds* (Web Page, August 2021) <<https://emergingminds.com.au/resources/what-is-infant-mental-health-why-is-it-important-and-how-can-it-be-supported/>>.
- 48 Diane Benoit, 'Infant-Parent Attachment: Definition, Types, Antecedents, Measurement and Outcome' (2004) 9(8) *Paediatric Child Health* 541 <<https://doi.org/10.1093/pch/9.8.541>>.
- 49 Kenneth Lee Raby and Mary Dozier, 'Attachment across the Lifespan: Insights from Adoptive Families' (2019) 25 *Current Opinion in Psychology* 81 <<https://doi.org/10.1016/j.copsyc.2018.03.011>>; Perry, 'Childhood Experience' (n 36); Perry, 'Bonding and Attachment in Maltreated Children' (n 7).
- 50 See generally Mary D Salter Ainsworth et al, *Patterns of Attachment: A Psychological Study of the Strange Situation* (Psychology Press, rev ed, 2015).

attachment.⁵¹ Diane Benoit provides a helpful example to understand this.⁵² An infant with three different caregivers (mother, father, and grandmother) will have a specific attachment relationship with each caregiver based on how that specific caregiver responds to the infant in times when the infant is frightened, emotionally upset, or physically hurt. If the mother mostly reacts in nurturing loving ways, the infant will develop an organised and secure attachment with the mother. That same infant could develop an organised, insecure, and avoidant attachment with the father if the father mostly reacts in rejecting ways to the infant's distress. Additionally, that same infant could develop a disorganised attachment with the grandmother if the grandmother displays atypical behaviours during interactions with the child due to unresolved grief or trauma.⁵³ In situations with multiple foster placements, neglect or institutionalisation, infants may develop disorders of non-attachment.⁵⁴

Different types of child separation have also existed under different legal mechanisms that were unethical, immoral and often illegal, such as the forced adoption of the Stolen Generations.⁵⁵ While practices have changed considerably, impacts of this type of child separation have caused intergenerational trauma and disadvantage not only for the mothers and fathers separated from their children due to these legal mechanisms, but also for the adult daughters and sons who were adopted as infants.⁵⁶ There remains an important need for quality research into the presentation of attachment disruption and historical trauma in First Nations people. Effective attachment-focused assessment and healing must be developed uniquely for Aboriginal Australian children and families, to best meet their needs and reduce the number of Aboriginal children in care.⁵⁷ Whilst this article acknowledges these types of separations and the deep psychological and emotional impacts caused to First Nations people, the focus of this article is on the sphere of child protection law.

Secure attachment in infancy is a crucial means of facilitating optimal development. Infants who experience impaired attachment due to adverse events such as abuse, neglect, maltreatment, and multiple caregiver transitions, often demonstrate compromised physical, cognitive, and psychosocial development.⁵⁸

51 Mary Ainsworth in her Strange Situation experiment identified four styles of attachment: secure, insecure-avoidant, insecure-resistant and insecure-disorganised. See Ruan Spies and Robbie Duschinsky, 'Inheriting Mary Ainsworth and the Strange Situation: Questions of Legacy, Authority and Methodology for Contemporary Developmental Attachment Researchers' (2021) 11(3) *SAGE Open* 1, 3 <<https://doi.org/10.1177/21582440211047577>>.

52 Benoit (n 48).

53 Ibid.

54 Charles H Zeanah Jr and Neil W Boris, 'Disturbances and Disorders of Attachment in Early Childhood' in Charles H Zeanah Jr (ed), *Handbook of Infant Mental Health* (Guilford Press, 2nd ed, 2000) 353.

55 Daryl Higgins et al, 'Forced Adoption National Practice Principles: Guidelines and Principles for Specialist Services' (Research Report, Australian Institute of Family Studies, April 2016).

56 Ibid.

57 Judy Atkinson, 'Closing the Gap Clearinghouse: Trauma-Informed Services and Trauma-Specific Care for Indigenous Australian Children' (Resource Sheet No 21, Australian Institute of Health and Welfare, July 2013).

58 Jacqueline Bruce et al, 'Early Adverse Care, Stress Neurobiology, and Prevention Science: Lessons Learned' (2013) 14(3) *Prevention Science* 247 <<https://doi.org/10.1007/s11121-012-0354-6>>; Katherine Pears and Philip A Fisher, 'Developmental, Cognitive, and Neuropsychological Functioning in Preschool-Aged Foster Children: Associations with Prior Maltreatment and Placement History' (2005) 26(2) *Developmental and Behavioral Paediatrics* 112 <<https://doi.org/10.1097/00004703-200504000-00006>>.

Regarding physical development the literature has identified that a large portion of children with faltering growth, previously known as ‘failure to thrive’, have clinical disturbances of attachment.⁵⁹ Reduced brain size and impairments in physical motor development and function performance are also noted.⁶⁰ Additionally, attachment impacts infants at a cellular level. Telomeres become damaged and shortened due to stressful environmental exposures. Once reduction in telomere length reaches a critical point, the cell essentially dies.⁶¹ Early life stress, including disturbances in attachment due to poor unresponsive parenting, is associated with accelerated telomere shortening which can lead to increased risk of infection, cardiovascular disease, type 2 diabetes, and cognitive decline.⁶² Important biobehavioural shifts also occur when an infant is two to three months old and eight to nine months old which affect development across domains.⁶³ Disturbances in attachment can further serve as a risk for psychopathology and attachment styles can transmit over generations.⁶⁴ Attachment is a pathway to optimal infant development, rather than being a result of good development.

Given that attachment facilitates optimal infant development, it is important to have an appreciation of IMH, not just for the infant’s immediate wellbeing but for that person’s whole future life. Environmental experience is critical to brain development, and nature’s potential can be realised and enabled only by nurture,⁶⁵ including by secure and stable relationships with caregivers to optimise IMH outcomes.⁶⁶ Developmentally, infants are best served by stability or permanency in their caregiving context – providing that context is adequate. Attachment to a professional caregiver is not necessarily different from attachment to birth parents – it is the different patterns of attachment that are significant due to the

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- 59 Mary J Ward, Shelley S Lee and Evelyn G Lipper, ‘Failure-to-Thrive Is Associated with Disorganized Infant-Mother Attachment and Unresolved Maternal Attachment’ (2000) 21(6) *Infant Mental Health Journal* 428 <[https://doi.org/10.1002/1097-0355\(200011/12\)21:6<428::AID-IMHJ2>3.0.CO;2-B](https://doi.org/10.1002/1097-0355(200011/12)21:6<428::AID-IMHJ2>3.0.CO;2-B)>; Irene Chatoor and Jody Ganiban, ‘Attachment and Feeding Problems: Reexamination of Non-organic Failure to Thrive and Attachment Insecurity’ (1998) 21 *Infant Behaviour and Development* 338 <[https://doi.org/10.1016/S0163-6383\(98\)91551-X](https://doi.org/10.1016/S0163-6383(98)91551-X)>.
- 60 Charles A Nelson, Nathan A Fox and Charles H Zeanah, *Romania’s Abandoned Children: Deprivation, Brain Development, and the Struggle for Recovery* (Harvard University Press, 2014); Panayiota Vorria et al, ‘Early Experiences and Attachment Relationships of Greek Infants Raised in Residential Group Care’ (2003) 44(8) *Journal of Child Psychology and Psychiatry* 1208 <<https://doi.org/10.1111/1469-7610.00202>>; Regina M Sullivan, ‘The Neurobiology of Attachment to Nurturing and Abusive Caregivers’ (2011–12) 63(6) *Hastings Law Journal* 6 1553.
- 61 Telomeres are specialised nucleoprotein complexes located at the end of chromosomes to promote chromosomal stability and protect the chromosome through cell divisions throughout the lifespan.
- 62 Kyle W Murdock et al, ‘Attachment and Telomere Length: More Evidence for Psychobiological Connections between Close Relationships, Health and Aging’ (2018) 41(3) *Journal of Behavioral Medicine* 333 <<https://doi.org/10.1007/s10865-017-9895-2>>; Nelson, Fox and Zeanah (n 60).
- 63 Fred Wulczyn, Kristen Brunner Hislop and Brenda Jones Harden, ‘The Placement of Infants in Foster Care’ (2002) 23(5) *Infant Mental Health Journal* 454 <<https://doi.org/10.1002/imhj.10028>>.
- 64 Yoo Rha Hong and Jae Sun Park, ‘Impact of Attachment, Temperament and Parenting on Human Development’ (2012) 55(12) *Korean Journal of Paediatrics* 449 <<https://doi.org/10.3345/kjp.2012.55.12.449>>.
- 65 Dante Cicchetti and Don Tucker, ‘Development and Self-Regulatory Structures of the Mind’ (1994) 6(4) *Development and Psychopathology* 533, 538 <<https://doi.org/10.1017/S0954579400004673>>.
- 66 Schore (n 41).

developmental impact of attachment across the lifespan.⁶⁷ The practical utility of attachment theory resides in providing evidence-based interventions crucial for building resilience in infants who have experienced attachment injuries. The specific age-related changes in attachment during the first year of life indicate that investigation processes for infants in the child protection system should be distinct from those applied to children past infancy.⁶⁸ Decision-making for the infant needs to happen without delay so that appropriate therapeutic needs can be identified. Each infant's situation and circumstances must be addressed individually with his or her best interests considered.⁶⁹

Attachment theory does have its critics. Sue White et al⁷⁰ are concerned that practitioners, such as social workers, have come to rely on it to explain all manner of behaviours rather than examining institutional systems and/or wider influencing factors (for example socio-economic) and the impact of these on 'ensuring and valuing enduring relationships for children and indeed adults'.⁷¹ They argue that focusing solely on attachment in the mother-child relationship excludes consideration of external factors that might explain attachment styles and the mother's behaviour.⁷² Without proper assessment of these wider factors, the personal inadequacies of a parent (for example, lack of confidence or knowledge around children) can be seen as a threat. While attachment theory may provide a measure of comfort to social workers balancing increasing demands for evidence-based work against higher performance targets, White et al argue that it often leaves parents, particularly mothers, in a no-win position: wide ranges of behaviour are read as pathology, which is a problem for the mother being professionally observed.⁷³

Further reservations have been expressed by Heidi Keller,⁷⁴ who describes attachment theory as a 'scientifically ambiguous and fuzzy conception',⁷⁵ and argues it is 'wrong'⁷⁶ in how it considers cultural conceptions of social relations.⁷⁷ In particular, it has been misused to draw conclusions about who should raise a child.⁷⁸ Keller's position is that attachment research should be culturally informed to allow for different interpretations. Keller is correct – one core theory cannot address the complexities of human development – but this does not make attachment theory invalid or lacking in value. Experts in the field of IMH require 'core theories' from which to tailor practice to the individual child and family. Attachment theory, when used in conjunction with other theories (for example, social learning theory

67 See Ainsworth et al (n 50).

68 Wulczyn, Hislop and Harden (n 63).

69 Mares, Newman and Warren (n 8).

70 Sue White et al, *Reassessing Attachment Theory in Child Welfare* (Policy Press, 2020) <<https://doi.org/10.1332/policypress/9781447336914.001.0001>>.

71 Ibid viii.

72 Ibid 80.

73 Ibid viii.

74 Heidi Keller, *The Myth of Attachment Theory: A Critical Understanding for Multicultural Societies* (Routledge, 1st ed, 2021) <<https://doi.org/10.4324/9781003167099>>.

75 Ibid 28.

76 Ibid 24.

77 Ibid 28.

78 White et al (n 70) 19–20.

and Bronfenbrenner's ecological biopsychosocial model) promotes cultural sensitivity, allows for the examination of wider influencing factors and is crucial in understanding IMH. An evidence-based framework for legal decision-making that includes attachment theory is required for decision-making for infants in OOHC.

An affectional bond between a caregiver and an infant is considered an essential need, and one that is directly related to the biopsychosocial development of children.⁷⁹ In contrast, if this 'safe base' is not available, infants can develop a poor attachment with their main caregiver, which in turn can create poor mental health and behavioural outcomes that follow into adulthood.⁸⁰ People who had a poor attachment to their primary caregiver as infants are more likely to worry about their social value and have a defensive/negative attitude towards others' intentions, which can lead to a negative working model of self and others.⁸¹ Furthermore, most leading causes of chronic illness and adult mental health disorders can be tracked back to poor mental health in infancy.⁸² Negative developmental outcomes of poor IMH in later adolescence and adulthood include depression, cardiovascular disease, cancer, alcoholism and drug abuse as well as encounters with the justice or legal system.⁸³ For these reasons, the needs of infants are different from those of older children.

For older children, bonding and attachment do not have the same significance because these critical developmental processes have already occurred. The infant developmental processes described above cannot occur twice – the foundational blueprint of brain architecture cannot 'happen again' in childhood. While experience may alter the behaviour of an older child, it literally provides the organising brain architecture for an infant.⁸⁴ In this sense, the brain is fundamentally a 'social organ'. Infants who have a consistent and predictable first year of life with optimal bonding and attachment will be better able to navigate difficult and stressful situations in later years; infants who have poor bonding and attachment are at higher risk for

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- 79 Maria Lidia Gerra et al, 'Early Parent-Child Interactions and Substance Use Disorder: An Attachment Perspective on a Biopsychosocial Entanglement' (2021) 131 *Neuroscience and Biobehavioral Reviews* 560 <<https://doi.org/10.1016/j.neubiorev.2021.09.052>>; Kenna E Ranson and Liana J Urichuk, 'The Effect of Parent-Child Attachment Relationships on Child Biopsychosocial Outcomes: A Review' (2008) 178(2) *Early Child Development and Care* 129 <<https://doi.org/10.1080/03004430600685282>>.
- 80 Anouk Spruit et al, 'The Relation between Attachment and Depression in Children and Adolescents: A Multilevel Meta-analysis' (2020) 23(1) *Clinical Child and Family Psychology Review* 54 <<https://doi.org/10.1007/s10567-019-00299-9>>; Nelson et al (n 8); John D Haltigan and Glenn I Roisman, 'Infant Attachment Insecurity and Dissociative Symptomatology: Findings from the NICHD Study of Early Child Care and Youth Development' (2015) 36(1) *Infant Mental Health Journal* 30 <<https://doi.org/10.1002/imhj.21479>>.
- 81 Inge Bretherton, 'The Origins of Attachment Theory: John Bowlby and Mary Ainsworth' (1992) 28(5) *Developmental Psychology* 759 <<https://doi.org/10.1037/0012-1649.28.5.759>>.
- 82 Alessandro Failo, Michele Giannotti and Paola Venuti, 'Associations between Attachment and Pain: From Infant to Adolescent' (2019) 7 *SAGE Open Medicine* 1 <<https://doi.org/10.1177/2050312119877771>>; Haltigan and Roisman (n 80).
- 83 Lane Strathearn et al, 'Long-Term Cognitive, Psychological, and Health Outcomes Associated with Child Abuse and Neglect' (2020) 146(4) *Pediatrics* 389 <<https://doi.org/10.1542/peds.2020-0438>>; J Clinton, AF Feller and RC Williams, 'The Importance of Infant Mental Health' (2016) 21(5) *Paediatrics and Child Health* 239 <<https://doi.org/10.1093/pch/21.5.239>>; Walters (n 29).
- 84 Perry, 'Childhood Experience' (n 36); Perry, 'Bonding and Attachment in Maltreated Children' (n 7).

relationship breakdown, difficulty participating in employment, drug and alcohol problems, family violence, criminal activity, juvenile delinquency and suicide.⁸⁵ For these reasons, infancy provides a crucial window of opportunity for intervention. There needs to be a significant shift in policy to address potential problems across the lifespan before they begin – in infancy.

C Vulnerability

Vulnerability is an inherent trait of an infant. Harmon defines vulnerable individuals as those ‘easily harmed, physically, mentally or emotionally’.⁸⁶ Not only are infants highly dependent on adults for the satisfaction of their important and distinct needs, but failure to meet those needs can have a significant impact on development, wellbeing and resilience throughout the lifespan.⁸⁷ For example, physical environments can have a unique impact upon development.⁸⁸ Infants learn through continuous exploration and interaction with their environments, and they therefore require safe spaces for quiet and active play. Within their environments infants also require toys and activities selected primarily to enable them to reach developmentally appropriate milestones.⁸⁹ They also experience rapid physical growth in weight, length and head circumference. To achieve these physical milestones, infants require sleep routines and have specific nutritional needs, including the introduction of solids at an appropriate time. How infants are fed can have an impact on their life course,⁹⁰ in particular, exclusive breastfeeding from birth until six months of age, and ongoing breastfeeding into the second year of life, are recommended for all children as they support optimal long-term health, growth and development.⁹¹ Infants also require regular physical activity (play time) at least several times a day through interactive floor-based play and tummy time, not being restrained for more than one hour at a time, and adherence

85 Izett et al (n 29); Walters (n 29).

86 Scott Keay and Stuart Kirby, ‘Defining Vulnerability: From the Conceptual to the Operational’ (2017) 12(4) *Policing: A Journal of Policy and Practice* 428, 429, quoting A Harmon, ‘Vulnerable Populations’ in *Salem Press Encyclopedia* (Research Starters, EBSCOhost, 2016) 1.

87 Doyle and Cicchetti (n 7).

88 See, eg, Thomas W McDade et al, ‘Social and Physical Environments Early in Development Predict DNA Methylation of Inflammatory Genes in Young Adulthood’ (2017) 114(29) *Proceedings of the National Academy of Sciences* 7611 <<https://doi.org/10.1073/pnas.1620661114>>; Sean Deoni, ‘Impact of the COVID-19 Pandemic Environment on Early Child Brain and Cognitive Development’ (2022) 91(9) *Biological Psychiatry* S26 <<https://doi.org/10.1016/j.biopsych.2022.02.082>>; Theodore D Wachs and Alice Chan, ‘Specificity of Environmental Action, as Seen in Environmental Correlates of Infants’ Communication Performance’ (1986) 57(6) *Child Development* 1464 <<https://doi.org/10.2307/1130424>>.

89 Anna-Kaisa Karppanen et al, ‘Infant Motor Development and Physical Activity and Sedentary Time at Midlife’ (2021) 31(7) *Scandinavian Journal of Medicine and Science in Sports* 1450 <<https://doi.org/10.1111/sms.13954>>.

90 Council of Australian Governments Health Council, ‘Australian National Breastfeeding Strategy: 2019 and Beyond’ (Strategy, Australian Government Department of Health and Aged Care, 2019).

91 ‘Infant and Young Child Feeding: Key Facts’, *World Health Organization* (Fact Sheet, 9 June 2021) <<https://web.archive.org/web/20210802192945/https://www.who.int/news-room/fact-sheets/detail/infant-and-young-child-feeding>>; National Health and Medical Research Council, ‘Infant Feeding Guidelines’ (n 3).

to immunisation schedules.⁹² Cathy Humphreys and Meredith Kiraly note a significant issue with environments for contact visits for infants in OOHC, finding that those environments were not conducive to feeding, sleeping or playing – all essential elements for optimal infant development.⁹³

Infant mental health and wellbeing is the term used by health professionals to describe a child's social, emotional and behavioural development. A key component of mental health is social and emotional wellbeing, which includes an individual's behavioural and emotional strengths. Social and emotional wellbeing refers to the infant's ability to form close relationships, express a range of emotions and explore their surroundings in an age-appropriate way. These can be observed objectively and so the concept of wellbeing, as applied to infants, need not rely on self-reporting.

As we cannot know the subjective world of the infant, an informed understanding of the needs of the infant is crucial in a variety of contexts, including that of decisions about OOHC. As identified in Martha Albertson Fineman's vulnerability theory, a responsive state intervention – such as OOHC – should address the range of dependencies inherent in different stages of the life course and be attentive to all stages of development and forms of need.⁹⁴ Understanding and implementing legislative frameworks that are sensitive to infants' unique stage of development would improve their health outcomes, physically, socially and emotionally.

Infancy is, therefore, a special and critically important stage of human development, and infants as a class of persons require special recognition and safeguards, including under child protection law. Infants are not little children, just as children are not little adults; they need different and unique exposures in their environments to facilitate optimum physical growth and emotional development.

D Implications of Biology, Bonding and Attachment, and Vulnerability in Infants

As infants have this array of unique needs and characteristics, the question arises of whether existing child protection regimes adequately recognise and uphold their rights. Infancy as a category is not currently recognised by NSW child protection law. When caregivers cannot or will not provide safe environments for infant development, the state is the only entity with the power to protect vulnerable infants. In child protection settings, it is necessary to strike a balance between the infant's need for immediate safety and its need for secure and stable relationships with caregivers.⁹⁵

The picture is further complicated by the existence of caregivers' competing interests in retaining parental responsibility for infants.⁹⁶ The rights of infants

92 Kylie D Hesketh et al, 'Proportion of Infants Meeting the Australian 24-Hour Movement Guidelines for the Early Years: Data from the Melbourne InFANT Program' (2017) 17 *BMC Public Health* 191 <<https://doi.org/10.1186/s12889-017-4856-9>>.

93 Humphreys and Kiraly (n 6) 2.

94 Martha Albertson Fineman, 'Vulnerability in Law and Bioethics' (2019) 30(4) *Journal of Health Care for the Poor and Underserved* 52 <<https://doi.org/10.1353/hpu.2019.0115>>.

95 Humphreys and Kiraly (n 6).

96 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 17, 23; *CRC* (n 23) art 3.

to have their special needs recognised by the child protection legal regime are intertwined, yet may come into conflict, with the adult caregiver's interests. For example, having a baby, especially a first baby, is a life-changing experience, and birth parents can be very motivated to change harmful behaviours if they are supported to do so. Studies have shown, for example, that transition to parenthood is associated with reduced drug use during pregnancy and decreased criminal offending.⁹⁷ Birth parents have emphasised the need for more supportive intervention and casework to reduce the likelihood of the infant being taken into care. If removal for safeguarding is required, birth parents have expressed the need for improved inclusive planning and preparation.⁹⁸ The birth parents' voice is vital in understanding infant removal.⁹⁹ Separating a birth parent from their infant potentially undermines birth parents' motivation to change their behaviour. This must be balanced, however, against the need to keep the infant safe. This is difficult territory that highlights the pressures surrounding the upholding of infants' rights in the context of care arrangements and contact orders. A discussion of balancing competing rights invokes consideration of relevant human rights frameworks. The next section of this article examines the human rights legal framework relevant to the specific rights of children, and the extent to which infant rights are upheld within that framework.

III THE CONVENTION ON THE RIGHTS OF THE CHILD, THE 'BEST INTERESTS' PRINCIPLE AND THE RIGHT TO DEVELOPMENT

The *CRC* as a comprehensive charter of children's rights, that has been adopted by some 200 nations,¹⁰⁰ is an appropriate starting point of analysis for any law or government action, even if the jurisdiction is not bound by the *CRC* in international law in the usual sense. The state of NSW, like other Australian states, is not so bound because it has no personality in international law – only the Commonwealth can enter into binding international agreements. However, a document that has such wide acceptance in the global community should be seen universally as a lighthouse, a starting point, to analyse justice for children.¹⁰¹ Therefore this article

97 Derek A Kreager, Ross L Matsueda and Elena A Erosheva, 'Motherhood and Criminal Desistance in Disadvantaged Neighbourhoods' (2010) 48(1) *Criminology* 221 <<https://doi.org/10.1111/j.1745-9125.2010.00184.x>>; David C Pyrooz, Jean Marie McGloin and Scott H Decker, 'Parenthood as a Turning Point in the Life Course for Male and Female Gang Members: A Study of Within-individual Changes in Gang Membership and Criminal Behavior' (2017) 55(4) *Criminology* 869 <<https://doi.org/10.1111/1745-9125.12162>>.

98 Trew et al (n 11).

99 Ibid.

100 'Status of Ratification: Interactive Dashboard', *United Nations Human Rights: Office of the High Commissioner* (Web Page) <<https://indicators.ohchr.org/>>.

101 Nico Brando, 'Universalism, Embeddedness and Domination: An Analysis of the Convention on the Rights of the Child' (2019) 15(3) *Journal of Global Ethics* 270 <<https://doi.org/10.1080/17449626.2019.1695221>>.

takes the position that reliance on the *CRC*'s precepts in the evaluation of NSW law and practice is justified.

The *CRC*'s key message is that children are holders of human rights, some of which are specific to them. In article 1, the *CRC* defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier'.¹⁰² As will be discussed, it does not systematically differentiate between age-based sub-groups of children.

The *CRC*'s provisions combine recognition of children's essential dependency and of their capacity for autonomy, treating children as interdependent members of families and communities but also as individuals with unique personalities. It identifies children as persons with emerging moral and social lives, which parents and governments are explicitly charged with respecting.¹⁰³

There are four foundational principles of the *CRC*:¹⁰⁴ non-discrimination (article 2),¹⁰⁵ the best interests of the child (article 3),¹⁰⁶ the right to life, survival and development (article 6),¹⁰⁷ and the views of the child (article 12).¹⁰⁸ Articles 3(1) and 6(2) will now be discussed in more detail.

A Article 3(1) of the *Convention on the Rights of the Child*: 'Best Interests of the Child'

The concept of the child's best interests predates the *CRC* and was already enshrined in the 1959 *Declaration of the Rights of the Child*.¹⁰⁹ In the *CRC*, the principle is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the *CRC* and the holistic development of the child.¹¹⁰ The 'best interests' principle is set out in article 3(1):

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹¹¹

The 'best interests' principle does not attempt to suggest what is best for the child in any given situation at any point in time;¹¹² rather, the principle attempts to

102 *CRC* (n 23) art 1.

103 Barbara Bennett Woodhouse, 'Talking about Children's Rights in Judicial Custody and Visitation Decision-Making' (2002) 36(1) *Family Law Quarterly* 105, 109.

104 Committee on the Rights of the Child, *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) ('*General Comment No 7*') 4–7 [10]–[14].

105 *CRC* (n 23) art 2; Karl Hanson and Laura Lundy, 'Does Exactly What It Says on the Tin?: A Critical Analysis and Alternative Conceptualisation of the So-Called "General Principles" of the *Convention on the Rights of the Child*' (2017) 25(2) *International Journal of Children's Rights* 285 <<https://doi.org/10.1163/15718182-02502011>>.

106 *CRC* (n 23) art 3; Hanson and Lundy (n 105).

107 *CRC* (n 23) art 6(2); Hanson and Lundy (n 105).

108 *CRC* (n 23) art 12(1); Hanson and Lundy (n 105).

109 *Declaration of the Rights of the Child*, UN Doc A/RES/1386(XIV) (20 November 1959) principles 2, 7.

110 Committee on the Rights of the Child, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) ('*General Comment No 14*').

111 *CRC* (n 23) art 3(1).

112 *Ibid* 5 [11].

strengthen the understanding and application of the right of children to have their best interests assessed and taken as a primary consideration. When considering the child's interests, it is relevant to have regard to other rights that the *CRC* protects, such as the child's right to protection from all forms of abuse while in the care of parents, legal guardians or others who have the care of the child as laid down by article 19(1).¹¹³ This would presumably become relevant when children are separated from parents due to abuse and/or neglect; in such situations they still have the right, under article 9(3), to 'maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'.¹¹⁴

The Committee on the Rights of the Child ('CRC Committee'), a United Nations body responsible for monitoring the implementation of the *CRC*, put flesh on the bones of article 3 in its *General Comment No 5* in 2013. It interprets the article as establishing a framework with the obligation that every legislative, administrative and judicial body or institution systematically consider how children's rights and interests are or will be affected by their decisions and actions.¹¹⁵

The CRC Committee identifies the child's best interests as a threefold concept comprising a substantive right; a fundamental, interpretative legal principle; and a rule of procedure.¹¹⁶ The concept of a fundamental interpretive legal principle provides that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be chosen. Assessing and determining the best interests of the child also requires procedural guarantees whenever a decision is to be made that will impact the child in general. The decision-making process must include an evaluation of the possible impacts (positive or negative) of the decision on the child concerned.¹¹⁷ States need to explain how the child's rights have been respected in decision-making – that is, what has been considered in the child's best interests, what criteria that determination is based on, and how the child's interests have been weighed against other considerations. This is the rule of procedure.¹¹⁸

In domestic child protection law, both in Australia and other jurisdictions, there is little consensus about what 'best interests' means as implemented into domestic legislation, and a lack of guidance as to the factors that should be weighed in the 'best interests' analysis.¹¹⁹ When included in legislation, the 'best interests' principle requires courts to make subjective decisions regarding children's welfare, and the

113 Menka Tsantefski, Cathy Humphreys and Alun C Jackson, 'Family Engagement in the Perinatal Period and Infant Rights' (2011) 90(4) *Child Welfare* 79.

114 *CRC* (n 23) art 9(3).

115 Committee on the Rights of the Child, *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5 (27 November 2003) ('*General Comment No 5*'); *General Comment No 14* (n 110).

116 *General Comment No 14* (n 115) 3–4.

117 *Ibid* 4.

118 *Ibid*; Noam Peleg, 'Reconceptualising the Child's Right to Development: Children and the Capability Approach' (2013) 21(3) *International Journal of Children's Rights* 523 <<https://doi.org/10.1163/15718182-02103003>> ('Children and the Capability Approach'); Noam Peleg, 'The Child's Right to Development' (PhD Thesis, University College London, November 2012).

119 Tamara Walsh, 'Balancing Rights in Child Protection Law' (2017) 31(1) *Australian Journal of Family Law* 47; Antoinette L Harmer and Jane Goodman-Delahunty, 'Practitioners' Opinions of Best Interests of

statutory principle has been criticised on the basis that it lacks certainty.¹²⁰ Patricia Hanson and Frank Ainsworth argue that the ‘best interests’ principle gives child protection authorities too much moral and legal power to intervene in family life.¹²¹ In particular, according to Michael E Lamb,¹²² interventions in child protection decision-making are seldom informed by reference to developmental theory or the results of scientific research. Yet as Michael Rutter, an internationally recognised British researcher, argues, ‘[n]othing that is less than top quality research should be regarded as good enough for policy and practice questions that are concerned with the future of a new generation of children’.¹²³

In the absence of a clarifying definition, it is the values, personal opinions and biases of individual lawyers, judges and social workers that influence decision-making.¹²⁴ According to Moira Rayner, first Director of the Office of the Children’s Rights Commissioner for London,

the diversity of values and circumstances which would affect decisions ... precludes any realistic expectation that decisions would not be made according to the idiosyncratic opinion of individual judges – that, in other words, using a ‘principle’ like ‘best interests’ in the exercise of a welfare power would mean there are no rules at all.¹²⁵

It has been observed that, even where guidance is provided on how to apply a ‘best interests’ test, ultimately such decisions merely reflect the values and attitudes of the decision-maker.¹²⁶ Moreover, Antoinette L Harmer and Jane Goodman-Delahunty observe that even if decision-makers are minded to apply objective, research-based criteria, there appears to be no research on the extent to which the interpretation of the ‘best interests’ principle should vary as applied to children of different ages – a significant omission.¹²⁷

the Child in Australian Legislation’ (2014) 21(2) *Psychiatry, Psychology and Law* 251 <<https://doi.org/10.1080/13218719.2013.808977>>.

- 120 Marit Skivenes and Line Marie Sørsdal, ‘The Child’s Best Interest Principle across Child Protection Jurisdictions’ in Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds), *Human Rights in Child Protection: Implications for Professional Practice and Policy* (Palgrave Macmillan, 2018) 59, 60 <https://doi.org/10.1007/978-3-319-94800-3_4>; M Rayner, ‘Protection and Promotion of the Best Interests of the Child’ (Conference Paper, Children’s Rights: The Next Step Conference, 3–5 April 1997) 9, quoted in Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 19 November 1997) [16.9].
- 121 Patricia Hansen and Frank Ainsworth, ‘The “Best Interests of the Child” Thesis: Some Thoughts from Australia’ (2009) 18(4) *International Journal of Social Welfare* 431 <<https://doi.org/10.1111/j.1468-2397.2009.00673.x>>.
- 122 Michael E Lamb, ‘Placing Children’s Interests First: Developmentally Appropriate Parenting Plans’ (2002) 10(1) *Virginia Journal of Social Policy and the Law* 98.
- 123 Michael Rutter, ‘Children in Substitute Care: Some Conceptual Considerations and Research Implications’ (2000) 22(9–10) *Children and Youth Services Review* 685 <[https://doi.org/10.1016/S0190-7409\(00\)00116-X](https://doi.org/10.1016/S0190-7409(00)00116-X)>, cited in Judy Cashmore and Frank Ainsworth, ‘Audit of Australian Out of Home Care Research’ (Audit, Association of Children’s Welfare Agencies, October 2004) 53.
- 124 Jenny Krutzinna, ‘Who is “The Child”? Best Interests and Individuality of Children in Discretionary Decision-Making’ (2022) 30 *International Journal of Children’s Rights* 120, 139 <<https://doi.org/10.1163/15718182-30010005>>; Rayner (n 120) 9.
- 125 Rayner (n 120) 9.
- 126 Krutzinna (n 124) 139; Walsh (n 119).
- 127 Harmer and Goodman-Delahunty (n 119).

Legal decision-making for infants needs instead to be supported by an infant-centred theory of rights that upholds their best interests based on the contemporary knowledge of infant health, including IMH, a factor that is not included in either legislation or the *CRC*. Experts in the field of IMH are equipped to identify the effects of maltreatment, but this is not necessarily so for legal actors.¹²⁸ An example of how health evidence can influence legal decision-makers in applying the ‘best interests’ principle for infants is in relation to ‘disorganised attachment’. According to David Wilkins, a diagnosis of ‘disorganised attachment behaviour’ in infants by child protection workers has been used to support a finding of child maltreatment, however, this is problematic as ‘attachment theory, while offering some important insights for social work, has at times been interpreted and applied in ways that cannot be justified by the evidence’.¹²⁹ Some of the interest that policy-makers and practitioners have shown in disorganised attachment seems to have been based on false assumptions:

- that attachment measures can be used as definitive assessments of the individual in child protection settings;
- that disorganised attachment reliably indicates child maltreatment;
- that disorganised attachment is a strong predictor of pathology; and
- that it represents a fixed or static ‘trait’ of the infant, resistant to development or help.¹³⁰

Pehr Granqvist et al further observe that ‘attachment’ is only validly assessed by accredited, experienced practitioners and over time; that it is specific to relationships between children and their caregivers; and that it is not static but can change over time. The example demonstrates the need for an evidence-based framework, incorporating current health and science knowledge, for the making and administration of child protection law and policy. It makes it clear how misinformation about key concepts such as attachment can result in misapplications, with potentially serious negative consequences. Moreover, it appears that such misinformation is widespread.¹³¹

Secure attachment is the optimal form of attachment, and clearly furthers the best interests of the infant. However, uncertainty in the meaning of ‘best interests’ flows through to its implementation in domestic legislation, and consequently to legal decision-making; there is discretion for legal decision-makers in determining the content of ‘best interests’ in individual circumstances, and this is exacerbated by lack of specialist knowledge about infancy on the part of legal decision-makers.

128 Evelyn Wotherspoon et al, ‘Neglected Infants in Family Court’ (2010) 48(3) *Family Court Review* 505 <<https://doi.org/10.1111/j.1744-1617.2010.01325.x>>.

129 David Wilkins, ‘Disorganised Attachment Does Not Indicate Child Maltreatment’ (2021) 35(2) *Journal of Social Work Practice* 219 <<https://doi.org/10.1080/02650533.2020.1787364>>.

130 Pehr Granqvist et al, ‘Disorganized Attachment in Infancy: A Review of the Phenomenon and Its Implications for Clinicians and Policy-Makers’ (2017) 19(6) *Attachment and Human Development* 534 <<https://doi.org/10.1080/14616734.2017.1354040>>.

131 *Ibid.*

B Article 6(2) of the *Convention on the Rights of the Child*: 'Survival and Development of the Child'

Another foundational principle of the *CRC* is found in article 6(2), which states: 'States Parties shall ensure to the maximum extent possible the survival and development of the child.'¹³²

This right must be understood in terms of the development of the individual child, rather than social and economic development.¹³³ The information in the previous section shows that the best interests of infants who are removed from their birth parent and placed into OOHC are closely linked to this right. However, the *CRC* Committee¹³⁴ has been largely unhelpful on the meaning of the right to survival and development, and how it may be invoked in a legal setting.¹³⁵ According to Noam Peleg, there is no clear understanding of 'what the right to development stands for', or 'what the right to development should stand for', 'what it protects' or 'what its aims are'.¹³⁶ This is a matter of concern, given the right's status as a foundational principle. However, Emily Buss posits that an assessment as to the meaning of a child's development must be informed by other articles of the *CRC*, by cultural perspectives, and by available evidence from relevant disciplines as to what is consistent with a child's personal development.¹³⁷ This would suggest that the evidence from health and social sciences about children's developmental needs discussed above should be systematically taken into account in applying article 6. However, the distinctive developmental needs of children in the different stages of the first eight years of life have not been explicitly recognised in the *CRC* Committee's work on the right to development under article 6.¹³⁸ Nor does the *CRC* recognise 'infants' as a distinct group anywhere in the document.

The *CRC* Committee's *General Comment No 7: Implementing Child Rights in Early Childhood* ('*General Comment No 7*') raised the concern that State parties have not given sufficient attention to young children as rights holders.¹³⁹ Given the fact that the *CRC*, as a general human rights instrument, does not fully recognise the unique and particular needs and experiences of infants, Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso see such instruments as

132 *CRC* (n 23) art 6(2). Domains of development including physical, mental, moral, social, cultural, spiritual, personality and talent are encapsulated in articles 18, 23, 27, 29 and 32.

133 Ziba Vaghri et al (eds), *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes* (Springer International, 2022) vol 25 <<https://doi.org/10.1007/978-3-030-84647-3>>.

134 *General Comment No 5* (n 115).

135 Peleg, 'The Child's Right to Development' (n 118); Peleg, 'Children and the Capability Approach' (n 118); Noam Peleg and John Tobin, 'Article 6: The Rights to Life, Survival and Development' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 186.

136 Peleg and Tobin (n 135); Peleg, 'Children and the Capability Approach' (n 118); Peleg, 'The Child's Right to Development' (n 118).

137 Emily Buss, 'What Law Should (and Should Not) Learn from Child Development Research' (2009) 38 *Hofstra Law Review* 13, cited in Peleg and Tobin (n 135) 225.

138 Peleg and Tobin (n 135) 233.

139 *General Comment No 7* (n 104).

having a corrective function.¹⁴⁰ However, the CRC Committee's comments can be seen as afterthoughts – provisions for groups of children who were not catered to specifically in the original bargain and whose rights were felt, in subsequent years, to be in need of special protection.¹⁴¹ In this sense the CRC Committee appears to have denied itself the opportunity to recognise the first 12 months as a distinct developmental stage. Specifying in legal instruments the unique needs of the infant in the first years of life is needed in order to motivate infant-oriented actions and policies at both community and societal levels, and to ensure the best interests of the infant are served.¹⁴²

The World Health Organization's ('WHO') guideline on *Improving Early Childhood Development* does identify the special needs of infants in a way that coincides with those identified in the research discussed above, including bonding and attachment, nutritional and sleep requirements, play-based learning, routine, responsive caregiving, promotion of early learning, and the support of maternal mental health.¹⁴³ From a health perspective, those needs are central in operationalising the rights to survival and development and best interests for infants. However, as will be discussed, the guideline is less than clear and consistent in the way it defines infancy.

C Non-recognition of Infants within the Convention on the Rights of the Child

There is no recognition in the *CRC* of specific 'rights of infants' or differentiation between the rights or interests of infants and those of older children. It is true that the CRC Committee recognised the significance of developmental stages in its *General Comment No 7*, a stage defined as those aged eight years and under. There it raised the concern that State parties have not given sufficient attention to this sub-group of children as rights holders and to the laws, policies and programmes required to realise their rights during this distinct phase of their childhood.¹⁴⁴ In doing so the CRC Committee recognised that 'children' are not a homogeneous group, and that measures to secure the rights of children must be sensitive to the diverse developmental needs of different cohorts.¹⁴⁵ While this is a step in acknowledging that the needs of children vary according to ages and developmental stages, we note further that *General Comment No 7* itself fails to recognise infancy

140 Mikaela Heikkilä, Hisayo Katsui and Maija Mustaniemi-Laakso, 'Disability and Vulnerability: A Human Rights Reading of the Responsive State' (2020) 24(8) *International Journal of Human Rights* 1180, 1182 <<https://doi.org/10.1080/13642987.2020.1715948>>.

141 *Ibid.*

142 'Rights of Infants' (n 27).

143 World Health Organization, *Improving Early Childhood Development* (Guideline, 5 March 2020) ('*Improving Early Childhood Development*'); World Health Organization, 'Guidelines on Physical Activity, Sedentary Behaviour and Sleep: For Children under 5 Years of Age' (Guideline Summary, 2 April 2019) ('*Guidelines on Physical Activity*'); United Nations Children's Emergency Fund and World Health Organization, *Role of the Health Sector in Promoting Early Childhood Development: A Strategic Framework* (Framework, 2011).

144 *General Comment No 7* (n 104) cl III.4.

145 Peleg and Tobin (n 135) 233.

as a distinct category, instead treating children at birth, throughout infancy, and during preschool years – as well as the transition to school – as a single cohort of ‘early childhood’ or ‘young children’.¹⁴⁶

Another example of the CRC Committee’s failure to recognise developmental cohorts is in its periodic guidelines,¹⁴⁷ which require State parties to provide relevant, up-to-date information concerning the definition of the child in their domestic laws and regulations, but not to identify whether or not legislation distinguishes ages and stages of development, such as infancy.

The CRC Committee¹⁴⁸ has recognised that children are not a homogeneous group and that measures to secure child rights, including the right to development, must be sensitive to the diverse developmental needs of a cohort which ranges from newborn, to infancy, child, and young person.¹⁴⁹ However, the Committee fails to consistently distinguish between the various stages of childhood. For reasons previously outlined in this article, there is a need to go further in differentiating cohorts. Infants’ needs are so distinct and important that they should be treated as a discrete category of children, even within ‘early childhood’, under all legal instruments including the CRC and child protection legislation. Whilst there are likely insurmountable obstacles to changing the CRC itself, the issues identified here could be addressed to a large extent by the CRC Committee building a recognition of the special nature of infancy into its processes, deliberations and findings.

The General Assembly established a narrower age-based cohort in the *Guidelines for the Alternate Care of Children* (‘*Guidelines*’), treating children aged 0–3 years as a specific category that should be provided care in family-based settings.¹⁵⁰ This is inconsistent with the approach in *General Comment No 7*, which does not make that distinction between age cohorts. The *Guidelines* make numerous references to the developing capacities of the child,¹⁵¹ suggesting that the ages and developmental stages of children are significant. However, although the *Guidelines* mention ‘babies’ once – in relation to safety, health, nutritional and developmental needs¹⁵² – and identify attachment as an important decision-making factor in alternative care matters,¹⁵³ they generally group babies in with ‘young children’ in relation to general conditions for alternative care arrangements, rather than defining them as a subset for these purposes. Nominally identifying ‘babies’ as a sub-group and making cursory references to ‘attachment’ does not go far enough to uphold the right to development of infants as a distinct group. As identified by

146 *General Comment No 7* (n 104) cl III.4.

147 Committee on the Rights of the Child, *Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child*, UN Doc CRC/C/58/Rev.3 (3 March 2015).

148 *General Comment No 7* (n 104).

149 Peleg and Tobin (n 135) 233.

150 *Resolution adopted by the General Assembly on 18 December 2009: Guidelines for the Alternative Care of Children*, GA Res 64/142, UN Doc A/Res/6.4/142 (24 February 2010) 5 [22].

151 *Ibid* 3 [6], 10 [52], 11 [57], 15 [94].

152 *Ibid* 14 [87].

153 *Ibid* 4 [12], 11 [60], 11 [62], 14 [87].

Jenny Krutzinna,¹⁵⁴ merely grouping children will not do – what is needed is clear identification of infants as a unique group of children with distinct needs.

Interestingly, while the health disciplines do somewhat better in consistently defining infancy¹⁵⁵ there is still room for improvement. For example, while the World Association for Infant Mental Health, a not-for-profit organisation for scientific and educational professionals, affirms that there is a need to recognise the specific rights of infants,¹⁵⁶ there is an inconsistent definition of ‘infancy’ in various health guidelines issued by the WHO. For example, in the HIV treatment and prevention guidelines infants are defined as ‘a child younger than one year of age’.¹⁵⁷ However, the WHO recommendations for infant and young child feeding make internally inconsistent references to ‘infants 0–6 months old’, ‘infants 6–23 months of age’ and ‘all children 0–23 months’.¹⁵⁸ The WHO does promulgate infancy as a stage with specific needs in the guideline on improving early childhood development; however that guideline is also vague as to what an ‘infant’ is, referring to ‘infants and children ... during the first 3 years of life’.¹⁵⁹

Terminology and definitions are critically important in identifying and upholding rights.¹⁶⁰ Chronological age groupings and clear paediatric definitions are essential for those involved in decision-making related to children due to the ease with which they allow legal actors, health practitioners, parents and carers to identify biological, developmental, and psychological needs.¹⁶¹ Due to their lack of clarity, consistency and precision, the United Nations and WHO instruments and documents are not equal to the task.

Lack of clarity in how terminology is used has implications for operationalising the rights of the child in domestic legislation and guidelines. Part of the solution involves a recognition and understanding of the stages of child development and, in particular (for reasons explained above), of infancy. As we have seen, infants have unique needs that require unique consideration.¹⁶² Those unique needs are relevant both to identifying ‘best interests’ and to operationalising both the right to development. When implementing infants’ rights, one must always consider the need to protect the infant from harm, to protect their rights and to promote their development including by facilitating bonding and attachment, taking into account their age and stage of development. This, in turn, suggests that distinct rules and procedures are required to operationalise those rights where infants are concerned. The next section will examine how children’s best interests are attended to within the international and NSW legal regimes.

154 Krutzinna (n 124).

155 See above nn 18–22.

156 ‘Rights of Infants’ (n 27).

157 World Health Organization, ‘Consolidated Guidelines’ (n 3) 13.

158 World Health Organization, ‘Infant and Young Child Feeding Practices’ (n 3).

159 World Health Organization, *Improving Early Childhood Development* (n 143).

160 Clark, Locke and Bialocerkowski (n 28).

161 Katrina Williams et al, ‘Standard 6: Age Groups for Pediatric Trials’ (2012) 129(Suppl 3) *Pediatrics* S153 <<https://doi.org/10.1542/peds.2012-00551>>.

162 ‘Rights of Infants’ (n 27).

IV CONVENTION ON THE RIGHTS OF THE CHILD, THE ‘BEST INTERESTS’ PRINCIPLE AND THE NSW CHILD PROTECTION SYSTEM

Today, the concept of the ‘best interests of the child’ is embedded in child protection legislation worldwide.¹⁶³ In Australia, the best interests of the child are entrenched in various legislative and policy contexts, but it is important to note that this is not necessarily the same thing as the ‘best interests’ protected by article 3 of the *CRC*.¹⁶⁴ Moreover, there is a need to determine the relationship between both versions of ‘best interests’ and the concept of ‘wellbeing’ that is used in some legal contexts.

In NSW, the protection and welfare of children are governed by the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (‘*Care Act*’). The *Care Act* aims to provide for the care of, and the provision of services to, children and young persons. Important functions under the *Care Act* include the making of care orders, providing support services, offering alternative dispute resolution and the making of care plans.¹⁶⁵ A key principle in the *Care Act* is that the safety, welfare and wellbeing of the child or young person¹⁶⁶ are given *paramount* consideration by the decision-maker.

9(1) This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.

If ‘safety, welfare and wellbeing’ are treated as equivalent to ‘best interests’, then interestingly, the *Care Act* sets a higher standard than the *CRC*, where best interests are only ‘a primary consideration’.¹⁶⁷ Unfortunately, it is not possible to make a definitive statement about this as the inconsistency between the ‘wellbeing’ terminology and that of ‘best interests’ creates ambiguity. Nor does the jurisprudence of the *CRC* provide any insights into the meaning of the term ‘wellbeing’: according to Elaine E Sutherland, ‘internationally, everyone uses the term “well-being”, but no one defines it’, and for this reason, it has been the subject of debate within the social science literature.¹⁶⁸ While ‘best interests’ and

163 Melinda Jones, ‘Myths and Facts Concerning the *Convention on the Rights of the Child* in Australia’ (1999) 5(2) *Australian Journal of Human Rights* 126; Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report 84, 29 July 2010); Jean Zermatten, ‘The Best Interests of the Child Principle: Literal Analysis and Function’ (2010) 18(4) *International Journal of Children’s Rights* 483 <<https://doi.org/10.1163/157181810X537391>>.

164 John Tobin, ‘The Development of Children’s Rights’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (LexisNexis, 2nd ed, 2017) 25, 46–8.

165 *Care Act* (n 2) s 34.

166 *Ibid* s 9(1).

167 *Ibid* ss 9(2)(d), (f).

168 Elaine E Sutherland, ‘Article 3 of the United Nations *Convention on the Rights of the Child*: The Challenges of the Vagueness and Priorities’ in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, 2016) 21, 41 <<https://doi.org/10.1017/9781316662977>>.

‘wellbeing’ are not the same, Tobin suggests that an outcome which is inconsistent with one of the rights under the *CRC* would be inconsistent with wellbeing.¹⁶⁹

Advancing the ‘safety, welfare and wellbeing’ of an infant is, unequivocally, at least part of what constitutes acting in the infant’s best interests. For infants entering the OOHC system, it is highly probable that harm, impacting upon wellbeing and almost certainly being against their best interests, has already been sustained from the maltreatment leading to removal. The harm sustained by maltreated infants is discussed in the next section as a precursor to discussing how infant rights, including ‘best interests’, are best upheld in the child protection and OOHC settings.

V INFANT MALTREATMENT AND OUT-OF-HOME CARE

Despite infancy being the time of greatest need for nurture and care in the human lifecycle, infants remain an over-represented group among children removed from their parents in Australia as a result of concerns over maltreatment.¹⁷⁰ Children under the age of one are the most likely to be the subject of a substantiated notification of risk to child protection services in every jurisdiction in Australia.¹⁷¹ Neglect is the cause of most maltreatment fatalities.¹⁷² As discussed above, infants have special needs generally; the following discussion explains the particular risks infants face as a result of maltreatment.

As identified earlier, infants who experience prolonged adversity or adverse child experiences (‘ACEs’) are at risk of developing poor mental health which can cause long-term health, emotional and social problems.¹⁷³ The Australian Child Maltreatment Study identified that sexual and emotional abuse present the highest risks.¹⁷⁴ ACEs include indicators of child abuse and neglect, as well as multiple family dysfunctions (eg, household mental illness, substance abuse, incarceration, parental separation/divorce and domestic violence).¹⁷⁵ Exposure to ACEs in infancy is also associated with increased likelihood of having chronic medical conditions and screening at risk for developmental delay.¹⁷⁶ Infant maltreatment affects all domains of development – physical, psychological, emotional, behavioural, social

169 Ibid 102.

170 Australian Institute of Health and Welfare, *Child Protection Australia* (n 4).

171 Australian Institute of Health and Welfare, *Data Tables: Child Protection Australia 2021–22* (Web Report, 19 September 2023) tbl 3.3 <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2021-22/data>>.

172 Vincent J Palusci et al, ‘Identifying Child Abuse Fatalities during Infancy’ (2019) 144(3) *Pediatrics* e20192076:1–9 <<https://doi.org/10.1542/peds.2019-2076>>.

173 Mares, Newman and Warren (n 8) 4; David Lawrence et al, ‘The Association between Child Maltreatment and Health Risk Behaviours and Conditions throughout Life in the Australian Child Maltreatment Study’ (2023) 218(S6) *Medical Journal of Australia* S34 <<https://doi.org/10.5694/mja2.51877>>.

174 Divna Haslam et al, *The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study* (Brief Report, 3 April 2023) <<https://doi.org/10.5204/rep.eprints.239397>>; Lawrence et al (n 173).

175 McKelvey et al (n 8).

176 Ibid.

– and leads to a wide range of adverse consequences for infants and families. As adults, maltreated infants are at increased risk of mental health problems, physical health problems, homelessness, depression, obesity, alcohol and drug misuse, youth suicide, and learning and developmental problems.¹⁷⁷ Early developments in infant mental health predict later disruptive and antisocial behaviour,¹⁷⁸ showing the importance of optimal infant mental health outcomes.

Extreme maltreatment and exposure to ACEs cause stress that is associated with disruption in the early brain development described earlier and impacts IMH. If maltreatment leads to an OOHC placement, the exposure to multiple strangers can contribute to poor IMH, generating ‘freezing’ in the infant. Freezing, or being motionless, is a response to threat and plays a protective role, affording the infant time to form a ‘best estimate’ of the caregiver’s current state and intentions, especially in high-risk contexts in which the caregiver’s behaviour is often ambiguous and or potentially harmful.¹⁷⁹ On the other hand, there are concerns for infants who are transported, usually by strangers, from ‘pillar to post’ for contact, thereby losing their secure base.¹⁸⁰ Humphreys and Kiraly report that one foster carer spoke of counting 46 different people over six months transporting an infant to contact visits.¹⁸¹ They also found that infants experienced distress and disrupted routines. The increased complexity of child protection cases and the requirement to work with families experiencing issues such as domestic violence, drug misuse and mental health issues further increase the risks of harm for infants.¹⁸²

When infant removal is carried out, for the reasons already discussed it can have ‘profoundly damaging physical and psychological effects on the infant’.¹⁸³ Jaap E Doek¹⁸⁴ and Tommie Forslund et al¹⁸⁵ have suggested that when children are removed, the expertise of the decision-maker should extend to child psychology, child development and parent-child attachment. There are numerous dimensions to the holistic determination of an infant’s best interests that a decision-maker must consider, including expert knowledge about infant feeding and nutrition, bonding

177 Australian Institute of Family Studies, ‘Effects of Child Abuse and Neglect for Children and Adolescents’ (Policy and Practice Paper, January 2014) <<https://aifs.gov.au/cfca/publications/effects-child-abuse-and-neglect-children-and-adolescents>>.

178 Kate Keenan and Daniel Shaw, ‘Starting at the Beginning: Exploring the Etiology of Antisocial Behavior in the First Years of Life’ in Benjamin B Lahey, Terrie E Moffitt and Avshalom Caspi (eds), *Causes of Conduct Disorder and Juvenile Delinquency* (Guilford Press, 2003) 153, 171.

179 John D Haltigan, Marco Del Giudice and Soha Khorsand, ‘Growing Points in Attachment Disorganization: Looking Back to Advance Forward’ (2021) 23(4) *Attachment and Human Development* 438 <<https://doi.org/10.1080/14616734.2021.1918454>>.

180 Humphreys and Kiraly (n 6).

181 Ibid.

182 Ines Zuchowski, ‘Five Years after Carmody: Practitioners’ Views of Changes, Challenges and Research in Child Protection’ (2019) 44(3) *Children Australia* 146 <<https://doi.org/10.1017/cha.2019.14>>.

183 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, April 2006) 716 [29.29].

184 Jaap E Doek, ‘Article 8: The Right to Preservation of Identity, and Article 9: The Right Not to Be Separated from His or Her Parents’ in André Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 1, 17–18.

185 Tommie Forslund et al, ‘Attachment Goes to Court: Child Protection and Custody Issues’ (2022) 24(1) *Attachment and Human Development* 1.

and attachment, brain development and normative growth and development requirements such as play and sleep. In an overburdened child protection system¹⁸⁶ the ‘best interests’ of the infant, both short- and long-term, can be lost, exposing infants to cumulative developmental and emotional risks over and above the impact of any earlier abuse, neglect or maltreatment, due to placement instability and exposure to multiple strangers.¹⁸⁷

The crucial need for timely, appropriate legal intervention that upholds the best interests of the infant who is experiencing or at risk of maltreatment is best met through clear rules and guidelines to be applied by decision-makers, based on the current research-based knowledge of infant mental health and situation of each infant who comes before them. The next section discusses contact orders as a specific genre of legal decision-making in the child protection system that ought to have regard to the specific needs of infants, to best protect against the potential adverse outcomes noted above.

VI REMOVAL OF INFANTS AND CONTACT ORDERS UNDER THE *CARE ACT*

As we have seen, the *Care Act* establishes the legislative framework governing child wellbeing and providing child protection and OOH services in NSW, including the key principle that the safety, welfare and wellbeing of the child or young person are given paramount consideration by the decision-maker.¹⁸⁸ An important function under the *Care Act* is the making of care orders, which includes contact orders under section 86, which was introduced in 2000. These may be made by the Children’s Court.¹⁸⁹ Sub-section (1) provides as follows:

86 Contact orders

- (1) An order may be made by the Children’s Court doing any one or more of the following—
 - (a) stipulating minimum requirements concerning the frequency and duration of contact between a child or young person and his or her parents, relatives or other persons of significance to the child or young person,
 - (b) requiring contact with a specified person to be supervised,
 - (c) denying contact with a specified person if contact with that person is not in the best interests of the child or young person.

Section 86 does not create any right or other entitlement to contact in care cases.¹⁹⁰ It is important to remember that fulfilling the need to be connected to one’s birth family is subject always to the best interests of the child.¹⁹¹

As discussed earlier, article 9(3) of the *CRC* identifies the right of children who are separated from their parents to ‘maintain personal relations and direct

186 Zuchowski (n 182).

187 Mares, Newman and Warren (n 8) 334.

188 *Care Act* (n 2) s 9(1).

189 *Ibid* s 86(1).

190 Judicial Commission of New South Wales, *Children’s Court of NSW* (Resource Handbook, 26 October 2013) [2-4000] 165 (‘*Children’s Court Handbook*’).

191 *Care Act* (n 2) s 9(2)(f).

contact with both parents on a regular basis, except if it is contrary to the child's best interests'. Contact orders are consistent with the first part of the article, in that they assist in maintaining a positive connection with family of origin; this in turn is strongly linked to ensuring positive outcomes for children.¹⁹² An emphasis on biological relationships can also help to preserve names, identity, language, culture and religious ties¹⁹³ that are connected back to the child or young person's biological heritage.¹⁹⁴ The *Care Act* contains such an emphasis,¹⁹⁵ which is of particular relevance to Aboriginal and Torres Strait Islander infants, whose overrepresentation in OOHC is alarming.¹⁹⁶ As previously noted, studies show that children who grow up in OOHC are more likely to have contact with the criminal justice system; and this overrepresentation is even greater amongst Indigenous children.¹⁹⁷ In Australia, nationally, Aboriginal children are 10 times more likely to enter OOHC than non-Aboriginal children and, according to Melissa O'Donnell et al, this disparity begins in infancy.¹⁹⁸ Given Australia's history in child protection law of forcible removal of Aboriginal infants (the 'Stolen Generations'), it is imperative that current child protection law and policy avoid facilitating further intergenerational disadvantage and trauma.¹⁹⁹ It is crucial that decision-making practices for infants respond to the intergenerational trauma that has been caused to First Nations people. To this end, court decision-making regarding contact for these children must respect and foster partnerships with First Nations community groups to promote access to culture, which is imperative for the infant's identity formation and sense of belonging.²⁰⁰

To understand the role and operation of contact orders, it is necessary first to be aware of the proceedings that precede them. Under the *Care Act*, children can be removed from birth parents, without proceedings, under an Assumption of Care ('AoC') order by the Department of Communities and Justice ('DCJ') when there are reasons to suspect that a child is at immediate risk of serious harm.²⁰¹ In relation to infants, an AoC order can be served following birth in a hospital or other premises, such as the infant's home,²⁰² then within three working days of removal

192 Senate Community Affairs References Committee (n 30) 101.

193 *Care Act* (n 2) s 9(2)(d).

194 *Ibid* ss 9(2)(e)–(f), except in the special circumstances of adoption: at s 83.

195 *Ibid*.

196 As of 30 June 2020, approximately 46,000 children were in out-of-home care and 18,900 of these children were Indigenous: Australian Institute of Health and Welfare, *Child Protection Australia 2019–20* (Web Report No CWS 78, 18 May 2021).

197 McFarlane (n 9).

198 Melissa O'Donnell et al, 'Infant Removals: The Need to Address the Over-representation of Aboriginal Infants and Community Concerns of Another "Stolen Generation"' (2019) 90 *Child Abuse and Neglect* 88 <<https://doi.org/10.1016/j.chiabu.2019.01.017>>.

199 Melissa O'Donnell, Stephanie Taplin and Rhonda Marriott, 'Preventing Another Stolen Generation in Australia: Crucial Lessons from History Are Being Ignored', *Policy Forum* (online, 29 May 2019) <<https://www.policyforum.net/preventing-another-stolen-generation-in-australia/>>.

200 Megan Davis, *Family Is Culture: Independent Review into Aboriginal Out-of-Home Care in NSW* (Review Report, October 2019).

201 *Care Act* (n 2) s 44(1)(a).

202 *Ibid* s 44. Pre-natal reports are also legislated for when 'a person who has reasonable grounds to suspect, before the birth of a child, that the child may be at risk of significant harm after his or her birth': at s 25.

the DCJ is required to make a care application to the court, which may result in the issuing of an emergency care and protection order, an assessment order or any other care order.²⁰³

An emergency care and protection order can be granted in respect of an infant who is at risk of serious harm and where the Secretary of the DCJ requires more time to assess the full extent of the risk. An emergency care order has effect for a maximum of 14 days and is different from a care order, which is made for a longer period of time.²⁰⁴ A care order allocates responsibility for the infant between the Minister for Families and Communities and the parent, and removes the infant from the care of the parent.²⁰⁵ The court must receive evidence that the infant was not being cared for, or that their physical, psychological or educational needs were not being met, or that they were subject to or under threat of neglect or abuse.²⁰⁶ If the court is satisfied that the infant is in need of care and protection it will make a care order.²⁰⁷ Other orders are also available under a care order, such as orders for supervision, support services, therapeutic or treatment programs, allocating parental responsibility and contact.²⁰⁸

There are significant substantive and procedural issues surrounding contact between birth parents and the child (of any age, but hereafter referred to as the infant) after removal where an emergency care and protection order has been granted.²⁰⁹ Contact is at the discretion of the DCJ for a maximum period of 14 days, potentially extendable to 28 days²¹⁰ – a long period in the life of an infant. This means an infant, even where there is a possibility of restoration/reunification, might not see its biological parent for four weeks. Early separation of mother and infant is clearly established to be linked to insecure/disorganised attachment and subsequent mental health problems, as discussed earlier.²¹¹ Separation can also deny the infant the opportunity to be breastfed (a human right under article 24(e) the CRC²¹² and determinant of infant health). Not only are these decisions regarding contact potentially against the infant's best interests, but there is also a serious procedural issue here. There is an opacity in the basis of decision-making because the bulk of these decisions are made at the administrative level by DCJ staff rather than by the courts and are, therefore, unreported and largely inaccessible. Certainly, it is necessary, when an infant is removed due to an immediate need for protection, to make decisions on matters such as contact in the infant's best interests without extensive, time-consuming deliberation. And yet, due to the very

203 Ibid ss 45(1)–(1A).

204 'Orders in Care and Protection Matters', *Communities and Justice* (Web Page, 10 December 2021) <<https://www.facs.nsw.gov.au/families/legal/care-and-protection-proceedings/orders>> ('Orders in Care and Protection').

205 *Care Act* (n 2) ss 60, 78.

206 Ibid s 71.

207 Ibid s 72.

208 'Orders in Care and Protection' (n 204).

209 *Care Act* (n 2) s 46.

210 Ibid ss 46(3)–(4).

211 See Howard et al (n 45).

212 CRC (n 23) art 24(2)(e).

nature of the act of removing an infant and the important interests at stake, there must be transparency and accountability for decisions.

Lack of contact between an infant and their biological parents presents a risk of serious harm to the child's mental health. This is because of the importance of attachment in child development (see above). Attachment is acknowledged as a relevant factor in the *Care Act* in the context of *rescission and variation* of contact orders, with section 90(6)(d) stating that 'the strength of the child or young person's attachments to the birth parents and the present caregivers' must be taken into consideration. However, attachments are not mentioned in section 86 as a factor relevant to the *making* of contact orders. Nor is there mention of the requirements of bonding, sleep, feeding or play – or how all these fundamental aspects of infant development are to be considered when determining what is in the infant's best interests in regard to contact. If infants were recognised as a unique category in the legislation, and if guidelines were sensitive to ages and stages of development, it would require legal actors to turn their minds to an infant's highly specialised needs.

The *Children's Court of NSW Resource Handbook* ('*Children's Court Handbook*')²¹³ does offer limited guidance to magistrates on the relevance of 'attachment theory' to decisions made in care proceedings. The *Children's Court Handbook* entry defines attachment by reference to Bowlby, and states the relevance of attachment theory to various types of care proceedings as essentially requiring a balancing exercise, weighing the risks of harm to the child from primary carers against the risks of disrupting attachment with those primary carers.²¹⁴ The *Children's Court Handbook* notes the importance of bonds between children and caregivers 'particularly before 4 years of age'; but then refers to the importance of attachment for 'infants'.²¹⁵ The *Children's Court Handbook* moves randomly between instructing magistrates on the specific needs of 'children', 'infant or young child', 'child', and 'children and infants'. There is some differentiation offered between the impacts of disruption to attachment at 6–9 months, 9–12 months, and 3–5 years. However, the discussion is cursory and offers only nominal insight into infant mental health and the critical nature of the first 12 months of development.

A recent decision²¹⁶ from the Children's Court illustrates the way magistrates are using this material from the *Children's Court Handbook*. In considering the circumstances of a 13-month-old child, the Court made reference to the *Children's Court Handbook* entry on attachment, specifically that 'a break in an attachment is distressing and can potentially place a child at risk' and that '[f]rom ages 1 to 3 years, separation is a traumatic loss and a developmental crisis'.²¹⁷ However, attachment theory appears to have been given only nominal weight and is not specifically noted as a reason for the decision – there is only an oblique reference

213 *Children's Court Handbook* (n 190).

214 *Ibid* [18-100] 537.

215 *Ibid* [18-300] 552–3.

216 *Department of Communities and Justice (DCJ) and Jamzie* [2022] NSWChC 1.

217 *Ibid* [139].

in that '[t]he Court has also balanced [risks to the child] against the possibility of benefit to [him] of being raised by a parent'.²¹⁸

The next section considers how attachment is – in a somewhat nominal manner – considered in child protection case law; the cases discussed further emphasise the need to differentiate the unique needs of infants in the child protection legal framework.

VII CASE LAW AND CONTACT ORDERS

The case law regarding contact for infants specifically, while sparse due to the inherently closed nature of the child protection jurisdiction, does provide some insight into what the court considers in its decision-making in relation to contact for infants. There are also cases about children past the infancy stage that may be instructive as to how attachment is considered more generally as a factor in decision-making.

In the case of *Re Chanlina*²¹⁹ the importance of attachment was considered in deciding whether a four-year-old child should be returned to her birth mother after being placed in OOHC when she was two years old. Chanlina's mother was sentenced to gaol for carrying a marketable quantity of heroin in her luggage when she entered Australia. The mother made an application to the court to take Chanlina back to Cambodia on her release from gaol. Evidence was led that 'according to Dr Lennings [Psychologist], if Chanlina is removed from her carers, it is inevitable that she will suffer attachment loss, possibly leading to attachment difficulties later in life'.²²⁰ This would, he thought, 'give the child a vulnerability with an increased risk of depression/anxiety should things go wrong in her life'.²²¹ The Director-General and the mother had proposed orders that Chanlina remain in the Minister's parental responsibility only until she could be safely placed on a plane with her mother and sent back to Cambodia, and that Chanlina live with the mother in detention as part of the 'Mothers and Children's Program' so that the child's attachment to the mother could be revived in order to prepare her for her new life in Cambodia with her family of origin.²²² It was held that the orders suggested were not consistent with Chanlina's safety, welfare and wellbeing. Judge Mitchell SCM noted that the breaking of attachment to Chanlina's foster caregivers had the potential to adversely affect her in the long term, in terms of depression and of her ability to form close relationships.²²³ There was also no certainty that she would successfully attach to her mother and a real prospect that she would not attach to anybody. Further risks to Chanlina were posed by the apparent criminality in the

218 Ibid [218].

219 *Re Chanlina* (Children's Court of New South Wales, Mitchell SCM, 1 May 2009).

220 Ibid [21].

221 Ibid.

222 Ibid [4].

223 Ibid [51].

biological family,²²⁴ but attachment was clearly a main consideration in this case and one which influenced the orders made.

In *Community Services (NSW) and the Knoll Children*, two children aged eight and six were under care orders, placing them under the parental responsibility of the Minister until age 18. The foster carers relocated to enhance the children's schooling opportunities, but the paternal grandmother submitted that the true focus for the relocation was to remove the birth family, and indeed the DCJ, from the lives of the children.²²⁵ Her application to the court was to mandate contact, arguing specifically that six unsupervised contact visits for the children per annum with her and the paternal aunt was in the children's best interest with a view to maintaining a relationship with them.²²⁶ Judge Johnstone identified the *CRC* as being relevant to the exercise of discretions under the *Care Act*, but no submissions were made based on the *CRC*. Judge Johnstone referred to the fact that there is a 'strong body of opinion that contact should not interfere with a child's growing attachment to the new family'.²²⁷ However, there was no description of the source of, or authority for, this body of opinion. Moreover, it remains unclear whether or how the judge assessed this attachment, and whether any assessment of attachment influenced decision-making in this case. The court referred to the NSW Children's Court's Contact Guidelines ('NSW Contact Guidelines'), but also introduced a collection of additional considerations including the degree of animosity displayed by the birth family against the carers, and the birth family's commitment to supporting the placement.²²⁸ Therefore, a question remains as to whether attachment was merely referred to as a phenomenon or assessed and considered.

In *Re Helen*,²²⁹ the issue of contact for a nine-year-old child removed from her birth mother and placed in OOHC, with no prospect of restoration, was determined. Judge Mitchell included attachment as one of the factors for the court to weigh in determining the child's best interests when making a contact order and noted that this was already largely formed due to Helen's age. Because of the link to best interests, this again provides some basis for gauging the importance of including 'bonding and attachment' as an element in decision-making under section 86. If bonding and attachment are significant for a nine-year-old, they are certainly so for an infant.

McCall v Clark ('*McCall*'),²³⁰ a family law case as opposed to the earlier mentioned care and protection cases, concerns the legal relevance of attachment theory in decision-making for children and how social science literature is positioned as evidence. This case was an international parenting dispute involving a boy aged two and a half (at the time of trial). The mother had left the relationship with the father when the boy was six months old and moved to a distant location

224 Ibid.

225 *Community Services (NSW) and the Knoll Children* [2014] NSWChC 6, [23].

226 Ibid [25]–[27].

227 Ibid [56].

228 Ibid [60].

229 *Re Helen* [2004] NSWLC 7.

230 *McCall v Clark* (2009) 41 Fam LR 483.

overseas with the child. A shared care arrangement was ordered, whereby the boy lived with the mother and spent time with the father for four periods of access per year of two weeks each. The father appealed, saying that the access was insufficient to maintain a meaningful relationship with his son. While no expert evidence on attachment was presented in this case, the judge found that while the son was comfortable with the father, the son did not have a significant emotional attachment to the father. The judge considered that the child derived his emotional security from the mother. While the Full Court of the Family Court of Australia effectively chastised the trial judge for not referring to social science literature on attachment theory, their Honours did not reach a clear conclusion about any legal basis for the introduction of such material.

Social science research is providing an evidence base that is influencing court decision-making but,²³¹ according to Zoe Rathus, ‘the nature of social science literature raises concerns about its use by judges in their decision-making’.²³² There is a lack of clarity as to the status of social science research and the proper process to adopt to ensure its fair and appropriate use by those applying family law in Australia. Judith Cashmore and Patrick Parkinson agree, recognising that while the contribution of social science has been valuable, in some respects it remains problematic.²³³ Three years on from *McCall*, the High Court of Australia heard *Aytugrul v The Queen*,²³⁴ a murder case where the trial had centred around certain technical scientific evidence regarding DNA testing. The decision potentially abolishes the possibility of judicial use of social science literature that has not been introduced by an expert witness and is disapproving of the earlier case *Roth v Roth*,²³⁵ where according to Federal Magistrate Altobelli.²³⁶

Having regard to the importance of both scientific and social science research in family law parenting matters, perhaps it can also be argued that this is of a category of its own, being neither evidence nor common knowledge? To exclude this knowledge would otherwise lead to determination of the best interest of children being entirely ‘surrendered into the hands of the litigants’. This is surely inconsistent with contemporary approaches to child-focussed decision making.²³⁷

Social science literature can provide insight into the factors that promote the best interests of infants and challenge unwarranted assumptions and beliefs that are reliant upon value positions rather than evidence.²³⁸ As we have seen in this section, Australian courts seem relatively open to considering evidence about the importance of attachment for children generally, but there is also evidence as to the special and unique needs of infants as a group. The absence of infants as a

231 Judith Cashmore and Patrick Parkinson, ‘The Use and Abuse of Social Science Research Evidence in Children’s Cases’ (2014) 20(3) *Psychology, Public Policy, and Law* 239 <<https://doi.org/10.1037/law0000010>>.

232 Zoe Rathus, ‘A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making’ (2012) 26(2) *Australian Journal of Family Law* 81.

233 Cashmore and Parkinson (n 231).

234 *Aytugrul v The Queen* (2012) 247 CLR 170.

235 *Roth v Roth* [2008] FMCAfam 781.

236 *Ibid.*

237 *Ibid* [39].

238 Cashmore and Parkinson (n 231).

recognised distinct cohort in legislation and international law is discussed in the next section.

VIII RECOGNITION OF INFANCY AS A CATEGORY UNDER THE *CONVENTION ON THE RIGHTS OF THE CHILD*, THE *CARE ACT* AND THE NSW CONTACT GUIDELINES

Infants could have greater benefit from the protection of rights recognised in the *CRC* if they were properly recognised as a subset of ‘children’.²³⁹ While the *CRC* Committee provides some guidance to ensure the best interests of the infant are met,²⁴⁰ it arguably does not go far enough. As identified earlier, the child’s best interests under the *CRC* reflect both a fundamental, interpretative legal principle and a rule of procedure,²⁴¹ so that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child’s best interests should be chosen. This makes it all the more important to be able to identify those interests with confidence and integrity.

For infants in OOHC, there are challenges associated with maintaining routines that facilitate optimal bonding and attachment, healthy development and wellbeing. As previously noted, infants have specific needs that must be provided for to ensure optimal growth and development. Nominally identifying the importance of bonding and attachment in decision-making does not go far enough. Infancy is the most foundational period in human development and maintaining the status quo can result in lifelong impairments.²⁴² It is not sufficient merely to provide basic physical care to infants²⁴³ due to the unique and time-sensitive biological, bonding and attaching and vulnerability factors identified earlier in this article. For infants’ rights to be upheld, decision-makers need to be formally and specifically required to apply infant-specific factors as a criterion, ideally a paramount one.

Currently, the *Care Act* does not provide enough guidance to ensure the best interests of infants are met. The *Care Act* contains only two instances of sensitivity to a child’s age. The first is in its reference to the need for more expeditious decision-making for children who are ‘less than 2 years of age’,²⁴⁴ which lacks the specificity and scope needed to adequately promote infants’ rights. The second relates to the timing of proceedings and rescinding of contact orders,²⁴⁵ where the *Care Act* recommends that the age of the child or young person be taken into consideration. This could open the way to consideration of the special needs of an infant, but as there are no guidelines for *how* the age of the child should be considered or what difference it should make, this cannot be taken as a given and

239 *General Comment No 7* (n 104).

240 *Ibid.*

241 *General Comment No 14* (n 110) 4.

242 Chinitz et al (n 6).

243 Sonia Jackson et al, ‘Invisible Children: The Out-of-Home Care and Education of Babies and Toddlers’ (2022) 46(1) *Adoption and Fostering* 8 <<https://doi.org/10.1177/03085759221080215>>.

244 *Care Act* (n 2) ss 83, 150.

245 *Ibid* s 90.

does not provide explicit protection for the best interest of infants. Moreover, there is still no special consideration of a child's age in relation to contact orders under section 86,²⁴⁶ nor is there any justification as to why the cut-off age for expeditious decision-making is two years rather than 12 months.

Adopting terminology that identifies infancy as a unique developmental stage – recognising and providing for the specific needs of infants – would go a long way towards ensuring that infants' rights are promoted and properly respected in child protection practice. Furthermore, such recognition and provision would have a potential positive impact on infants' current and future health and wellbeing prospects. The next section considers the extent to which infancy is recognised as a stage of human development requiring special legal recognition under the NSW child protection contact guidelines.

The NSW Contact Guidelines²⁴⁷ arose from a Special Commission of Inquiry into Child Protection Services in NSW, established in 2006, chaired by the Hon James Wood and reporting in 2008. The Inquiry's Final Report (the '*Wood Report*') contained 111 recommendations and provided the Government with a blueprint for the next stage of reform in child protection.²⁴⁸ The 2011 publication of the NSW Contact Guidelines, designed to aid judicial officers, practitioners and parties in care proceedings on appropriate contact arrangements, was one outcome of the process.²⁴⁹

The development of the NSW Contact Guidelines aimed to achieve consistency in decision-making about contact orders, which is imperative given that in many rural areas of NSW, Children's Court matters are heard in the Local Court by non-specialist magistrates.²⁵⁰ The current NSW Contact Guidelines, and the recommendations generally, overlook ages and stages of development including, relevantly, infancy. This absence in the NSW Contact Guidelines has arguably been supplemented by the courts as identified earlier in *Community Services (NSW) and the Knoll Children*, where the court referred to the NSW Contact Guidelines but introduced a collection of additional considerations. These additional considerations, such as levels of attachment, degree of animosity displayed by birth parents and the family's commitment to supporting placements, have been acknowledged in social science literature as valuable considerations.²⁵¹

Since the implementation of the NSW Contact Guidelines there has been a lack of evaluation as to what appropriate contact arrangements are for children,

246 Ibid s 86.

247 Judge Mark Marien, 'The Children's Court of New South Wales: Contact Guidelines' (Guidelines, 2011).

248 New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 March 2009 (Linda Burney, Minister for Community Services).

249 Ibid.

250 Elizabeth Fernandez et al, *A Study of the Children's Court of New South Wales: Part of a National Assessment of Australia's Children's Courts* (Report, 2014) 21.

251 Mary Dozier et al, 'Attachment for Infants in Foster Care: The Role of Caregiver State of Mind' (2001) 72(5) *Child Development* 1467 <<https://doi.org/10.1111/1467-8624.00360>>; Clare Tilbury and Sylvia Ramsay, 'A Systematic Scoping Review of Parental Satisfaction with Child Protection Services' (2018) 66 *Evaluation and Program Planning* 141 <<https://doi.org/10.1016/j.evalprogplan.2017.10.010>>; Karen Healy, 'Recognising the Caring Capabilities of Birth Families of Removed Children: Towards a Critical Policy Agenda' (2020) 40(4) *Critical Social Policy* 546 <<https://doi.org/10.1177/0261018319878011>>.

especially infants. An independent review of OOHC in NSW in 2015 made no specific mention of contact, the NSW Contact Guidelines or any review that these have undergone.²⁵² There also appears to have been no research into whether the *Wood Report* and the NSW Contact Guidelines which followed have improved contact arrangements for infants.

The child's stage of development is mentioned only once in the NSW Contact Guidelines,²⁵³ in that there is a recognition that younger children have different contact requirements from older children in order to maintain relationships.²⁵⁴ However, the NSW Contact Guidelines do not consider the research on the *types* of relationships that are necessary for healthy infant development. Federal magistrate Robyn Sexton has argued that legal decision-makers need to have a working understanding of the concept of attachment theory, as it will be used by the experts who prepare reports and appear in courts. However, there is no specific provision in the system for ensuring that such understanding is achieved.²⁵⁵

As previously discussed, infants, due to their unique context, are in vulnerable states of development during the first year of life. Infants who experience maltreatment are more likely to be struggling or unwell in regard to their overall health including their mental health. Unfortunately, infants have very low mental health service access, which means that many infants with mental health struggles are not getting the help they need.²⁵⁶ The need to recognise where on the mental health continuum the infant is, and their need to receive mental health access, are crucial, particularly for infants in OOHC. For this reason, infancy should be recognised more explicitly in the NSW Contact Guidelines so that the decision-makers are compelled to turn their minds to the mental health needs of infants in legal decision-making, including contact orders.

The precise form that such recognition should take is beyond the scope of this article. However, we would strongly recommend that the government institute a formal law reform process on the subject, for example through the New South Wales Law Reform Commission. Such a process would be able to synthesise a range of different kinds of information and knowledge, as well as perspectives of all groups whose interests would be affected by such recognition. Most particularly it should pay close attention to knowledge about child development, both from the literature and from those who engage every day with children in the OOHC system. Other research by the current authors, including interviews with legal, welfare and health professionals, has tentatively concluded that recognition of infants as a subcategory is required as well as improved communication and information sharing on infants' health needs.

252 David Tune, *Independent Review of Out of Home Care in New South Wales* (Final Report, 2018).

253 Marien (n 247) s 3.3.

254 Ibid.

255 Robyn Sexton, 'Parenting Arrangements for the 0–4 Age Group' (2012) 22(2) *Australian Family Lawyer* 30.

256 Leonie Segal, Sophie Guy and Gareth Furber, 'What Is the Current Level of Mental Health Service Delivery and Expenditure on Infants, Children, Adolescents, and Young People in Australia?' (2018) 52(2) *Australian and New Zealand Journal of Psychiatry* 163 <<https://doi.org/10.1177/0004867417717796>>.

Suggestions for reform to remedy the current deficiency in recognising infants as a subset of children would identify infants by reason of their physical and mental immaturity and absolute dependence via special legal safeguards.

IX CONCLUSION

Important decisions are made daily for infants in OOHC that impact their immediate and future lives. The *CRC* and related documents give some recognition to the importance of developmental stages but, as this article has identified, do not adequately identify and meet the unique and specific needs of infancy. The same is true of NSW domestic law and guidelines. There remains a mismatch between law and health science, with the WHO identifying infants as a unique distinct category²⁵⁷ with specific needs,²⁵⁸ while the *CRC* and NSW legislation do not. Implementing infants' rights through decision-making which is informed by legal frameworks based on the specific needs of infants would be an effective way to help prevent physical, social and emotional problems in adolescence and in early and late adulthood. In practice this means engaging with disciplines such as psychology, psychiatry, paediatrics, neuroscience, social work and education.²⁵⁹

This multidisciplinary research team is currently undertaking interview research with legal actors (including magistrates, lawyers, child protection workers, and health workers) involved in the OOHC placement system in NSW, to ascertain the extent if any to which infant mental health, and the importance of bonding and attachment, are acknowledged in care proceedings in the Children's Court of NSW and related decisions by the DCJ, and by child and family health nurses. Those decisions in care proceedings are made, as noted above, within a legal framework that does not adequately recognise the developmental stage of infancy. Our article has argued that to nurture, protect and uphold the human rights of the infant, changes to the *Care Act* and NSW Contact Guidelines are required to identify infants as a distinct category. Certainly, at a minimum, the child protection legal regime needs to recognise the unique needs of infants as a distinct category of person within the broader legal category of 'children' and, accordingly, protect their rights in a distinct way.

257 World Health Organization, 'Consolidated Guidelines' (n 3); World Health Organisation, 'Guidelines on Physical Activity' (n 143).

258 World Health Organization, *Improving Early Childhood Development* (n 143).

259 Peleg and Tobin (n 135) 226, citing Buss (n 137) [46].