

Ever seen or heard? The voice of children in family law

Date:

Wednesday 8 October 2014

Author

[Megan Mitchell, Children's Commissioner](#)

Area : [Children's Rights](#)

16th National Family Law Conference

Distinguished guests, ladies and gentlemen, it is a privilege to be here today at the 16th National Family Law Conference. Thank you Judge Bauman for the kind introduction.

I would like to start by acknowledging the traditional owners of the land we meet on, and I pay my respects to their elders both past and present. I would like to thank Maureen Schull, Director of the Family Law Section at the Law Council of Australia and the organising committee for inviting me to speak today. I would also acknowledge all of my fellow speakers at the Conference.

Introduction - The voice of children in family law

As National Children's Commissioner, my role is concerned with promoting the rights and interests of children and young people. My role is set out under the Australian Human Rights Commission Act.

A key focus of my work relates to child voice and participation.

In recent years we have seen an increasing acceptance in Australian law and policy that children and young people should have an opportunity to express their views in matters that affect their lives.

For example, the National Framework for Protecting Australia's Children describes children's participation as "a principle to guide our actions".(1) I am also aware that the Family Court of Australia is playing an active role in seeking to strengthen children's participation rights, for example through the Children's Committee.

In June 2012, the Family Law Act was amended to include – for the first time – reference to the Convention on the Rights of the Child, which Australia ratified in 1989, almost 25 years ago.(2) I applaud the Australian Government for this symbolic amendment. However, adding the Convention as a general object to consider is a far cry from implementing children's participation rights.

In fact, as Patrick Parkinson recently suggested – listing the Convention as an 'additional object' in the part of the Act concerned with parenting arrangements could lead to an interpretation that it is

a secondary consideration only and not relevant to the administration of the Family Law Act in its entirety.(3) But, it is a start!

Previous national inquiries into this issue, including the 1997 inquiry *Seen and Heard: Priority for Children in the Legal Process*, made multiple recommendations around children's involvement in family law.(4) But to this day, many of those recommendations have not been put into practice.

Internationally, the UN Committee on the Rights of the Child has stated that the right to be heard "continues to be impeded by many long-standing practices and attitudes", as well as legal, social, cultural, political and economic barriers.(5) These barriers include negative assumptions about children's capacities and the lack of suitable environments in which children can build and demonstrate capacities.(6)

While there is general support for giving children a voice in family law, there is a big gap between the 'principle' of participation and 'how it is put into practice'. Judges, lawyers, mediators and family report writers emphasise the importance of children's voices but differ in terms of how this can be achieved. And so child participation remains a strongly contested area.(7)

What we do know is that children still struggle to be heard even when there are initiatives in place that are intended to promote their participation.(8)

For example, in 2008 research conducted by Patrick Parkinson and Judy Cashmore, 14-year-old Rani, who was part of a lengthy dispute about parental responsibility, had an independent children's lawyer and a family report to present 'her best interests' to the judge. However she still felt totally excluded from the decision-making process.

Rani said: I don't think there is a 'too young'. I mean, even when I was three, I had pretty clear ideas of what I wanted and what I didn't, and even if they were based on completely stupid things, they should at least be considered.

Rani went on to say that: I know if I got a judgment that I wasn't completely happy with, but I had an active role in the process, I might not have resented it so much, because I would have felt, OK at least my voice was properly heard.

This articulate young woman even wrote a letter to the Chief Justice of the Family Court of Australia to express her concerns about not having a say.(9) Rani's story tells us that there is more work to be done. So today I want to discuss how we might harness and build on the positive changes that have taken place in family law to ensure that children really are seen and heard.

International and domestic law - The child's right to be heard

The right of all children to be heard and taken seriously is one of the fundamental values of the Convention on the Rights of the Child.(10) It is seen by many as the gateway to enjoying all other human rights. Children are particularly vulnerable to being overlooked in decision-making processes and for at risk children this is even more acute.

The right to be heard, which is enshrined in Article 12, is one of the four core principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests. As core principles these rights must be considered in the interpretation and implementation of all other rights in the Convention.(11)

Article 12 requires that: *A child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child and that they be given due weight in accordance with the child's age and maturity.*(12) Further, Article 12 specifically states that opportunities to be heard must be provided "in any judicial and administrative proceedings affecting the child."(13)

In addition, Article 9, which refers specifically to parental separation and a child's place of residence, states that all interested parties shall be given an opportunity to participate in the proceedings and make their views known.(14) I would hope that children are seen as parties with a keen interest in the outcome of such proceedings.

The UN Committee on the Rights of the Child has stated in General Comment 12 that while the right to be heard means that children's views must be taken into account, it does not necessarily extend to making decisions consistent with those views. This reflects the interdependent and complementary relationship between the right to be heard and the consideration of the child's best interests.(15) The UN Committee also stated that children should be given feedback about how their views have been considered in the decisions made.(16)

The Australian Family Law Act, as it currently stands, seems to undermine the relationship between these core principles by diminishing the right to be heard. In their analysis of international models of child participation in family law, Taylor et al, in line with Parkinson's views, claim that the Act is inconsistent with the intention of the UNCRC because "ascertaining the views of the child is included as one of a number of 'additional' considerations rather than a 'primary consideration'".(17) In contrast, the Convention emphasises the right to be heard as foundational, not additional to decision-making processes.(18)

Moreover, the focus on shared parental responsibility in the Act is also designed without reference to hearing the views of the child about the arrangements.(19)

The legislation also does not extend to considering the views of children in non-contested matters. In Part 7 of the Act on 'Children', the consideration of the children's views only pertains to court proceedings. In the sections of the Act that refer to 'non-court based family services', there is no obligation for the child's views to be considered. This is important given that the majority of matters are resolved outside of the courts.(20)

Child participation methods in Australian family law

In Australia, hearing directly from children in family law proceedings is rare. As you already know,

there are various methods by which the court can hear children's views - including accounts from others as to what the child has said to them, reports from a family consultant, and evidence from an Independent Children's Lawyer. However, none of these methods necessarily involve direct participation by the child. A judge can interview a child, however this is extremely uncommon.

Many of you would be aware of the Independent Children's Lawyers Study, recently conducted by the Australian Institute of Family Studies.(21) This study found that ICLs have limited direct contact with children and young people. According to the report, many ICLs indicated that meeting with children was not a routine part of their practice.(22) Many lawyers expressed that the best way to gather evidence about what was in the best interest of the child was by talking to teachers, doctors and other people who knew about the child.(23)

Even when children have had the opportunity to meet with an ICL or family consultant, many have been disappointed with the process.(24) Many children who have been interviewed about these experiences have said they were uncertain about the role of representative. Some children also said they that their views had been filtered or misinterpreted.(25)

When asked about her experience of meeting with an ICL, one girl said: *I met her once...We shook hands. She said her name and left.*(26)

Another girl said: *It was all pretty bad...Probably that she just didn't listen. Like, she would ask us questions and we'd tell her, but then she just didn't care what we said. And she ignored what we said.* (27)

There are also low levels of child consultation in family dispute resolution.(28) A 2010 study of children's participation in Family Relationship Centres showed that staff are concerned about the lack of feedback to children following mediation process. One staff member said, *My sense is, we put them in that situation, they get an hour with the child consult, they don't really know what gets fed into the mediation.* (29)

Further, there are limited avenues through which children can make complaints about negative experiences and not having their right to be heard respected within the family law system.

This is not to say that mediators, family law consultants and ICLs are not of significant value. Indeed the AIFS study demonstrated that judges find the evidence collected by ICLs to be very helpful when they make a decision about the child. Many family law practitioners do incredible work with children. However, there are significant individual and systemic barriers that are impacting the effectiveness of child participation practices.(30)

Discourses around participation – the focus on protection

To begin with, there is a dominant perception in family law that involving children in adversarial proceedings can be harmful for children. (31) The majority of practitioners are understandably concerned about protecting children from pressure and repeated engagement with multiple

professionals. (32)

Attitudes towards engaging children are also influenced by arguments around age and competency. Family law professionals are less likely to meet with younger children believing that they are incapable of forming their own opinions.(33) But just because a child is young doesn't mean that we don't have to ask them how they feel or what they think.

On this matter, the UN Committee on the Right of the Child has commented that, "Article 12 imposes no age limit on the right of the child to express her or his views, and discourages State parties from introducing age limits either in law or in practice which would restrict the child's right to be heard."(34) The Committee advises that the capability of children be assessed on a case-by-case basis.(35)

Family law professionals also express concern that children can be subject to parental coaching which may distort their views. These attitudes might be justified in some instances. Some adults may manipulate their child's voice to benefit their own case or to denigrate the other parent.

However, many practitioners, including judges and lawyers, have admitted that a big part of the problem is that they don't have adequate training to elicit and interpret children's views.(36) Dr Nicola Ross from Newcastle Law School has commented that in Australia, "lawyer's professional education tends to emphasise outcome at the expense of process."(37)

In her research on the views of Australian judges, Dr Michelle Fernando, found that judges are reluctant to meet with children largely because they feel that it is the role of the lawyer to hear the views of the child. However, judges also expressed concern about lacking the skills and ability to speak with children. One judge in the Australia Family Court said, *To my mind [the prospect of meeting with a child] is just about as scary as handing me a scalpel and saying 'just a bit of brain surgery before lunch please judge'...I'm terrified of it.*(38)

However this differs in other jurisdictions. For example, Dr Fernando found that despite a lack of regular or compulsory training, New Zealand judges "are generally confident about their ability to speak appropriately with children." (39) Also, in Scotland, "even when judges felt apprehensive about their skill and ability to speak with children, they were often committed to finding a solution".(40)

Practitioners who consult more frequently with children often tend to hold the view that the best interests of the child are allied to the child's views.(41) One lawyer commented that, *Generally speaking, in 90 per cent of cases, the views expressed by a child are directly in line with their best interests. Kids are pretty smart characters.*(42)

I can only agree with this observation. On the whole kids are pretty smart.

Interestingly, in other of areas of the law children sometimes do have a more direct role, for example in criminal proceedings and some child protection proceedings. Dr Nicole Ross has

suggested that this could be a result of “the dominance of norms valuing family integrity, meaning children in family law remain largely submerged within their families.”(43)

Approaches to hearing from children also vary across states and territories, which highlights the influence of practice context. While there are National Guidelines that provide guidance for ICLs in relation to meeting with children, some legal aid commissions more actively encourage ICLs to do so. In those jurisdictions like Victoria and NSW there is a higher rate of direct contact between lawyers and children.(44) National best practice guidelines are also available for other family law practitioners, however there are discrepancies across jurisdictions in the level of training provided to practitioners and funding appropriated to professional development.(45)

Clearly there are many challenges to developing effective child participation models in the family law system. But the good news is that children do want to be heard, and are usually pretty capable of letting you know how they feel.

Children want to have a say in family law

The desire of children to exercise their own agency in family law has been demonstrated time and time again. For example, in the 1997 Seen and Heard report, 85% of the 623 child respondents said that children should have a greater say in family law decisions. (46)

In Parkinson and Cashmore’s research, children said that it was important for them to have a say on issues that affected them. Thirteen-year-old Emma said, *I think it’s important for [children] to have a say because it’s their lives and they’re going to have to deal with it and it’s a choice that I think it’s personally up to them.* (47)

When asked about judges talking directly with children, 11-year-old Sarah said, *I think maybe they should because then the judge knows how the children would feel about the decisions.* (48)

Children have also emphasised the importance of ‘having a say’, rather than having the power to make family decisions themselves. They also want the choice not to be involved.(49) When asked about being included in a mediation process, one girl said, *Sometimes if you don’t know what you want...it’s alright if they choose...because you don’t have to make the choices yourself.* (50)

The desire of children to be heard, not just in family law, but in Australian society more broadly, was strongly confirmed for me during a listening tour that I conducted when I started my role as the National Children’s Commissioner last year. During that tour, which was called the Big Banter, I met face-to-face with over 1000 children, and heard from over 1300 children through an online survey or through the post. Many of these children, who were from a variety of ages and backgrounds, told me that they wanted to have a say and for their views to be taken seriously. They also said they wanted to be respected and for adults to respect each other.

Parents in family law disputes are also keen for their children to express their views so long as there are no repercussions for the child, for example in situations of family violence. In 2009 research,

Parkinson and Cashmore found that most parents felt it was appropriate for children to have a say. Parents commonly felt that children should be heard but should not necessarily have the right to make decisions about final outcomes.(51)

The right to be heard and the child's best interest

As I discussed earlier, attitudes towards child participation are primarily based on protectionist approaches towards achieving the child's best interest, which is enshrined in Article 3 of the Convention and more broadly referenced as a principle in the Family Law Act.

However, the relationship between the right to be heard and the child's best interest is often misunderstood. The UN Committee has clearly explained that: *There is no tension between Articles 3 and 12, only a complementary role of the two general principles: one established the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or children. In fact, there can be no correct application of Article 3 if the components of Article 12 are not respected.*(52)

While it is very important that family law professionals focus on what they believe is best for the child and take into account any risks associated with meeting with children, there is too often a presumption that meeting with children is not in their best interest. As young Max said, in research conducted by Robyn Fitzgerald from Southern Cross University: *If you give me a say...you know what I want. But if you don't give me a say...you might end up with something I don't want.* (53)

There is significant evidence that child participation is in fact crucial for child development and well-being. There is therapeutic value in giving children an opportunity to participate in decision-making processes because it empowers them to have a greater sense of agency and control over their own lives. (54)

Not enabling children to participate can also have negative implications. For example, children who have been excluded from mediation processes, have said that being kept out of a decision-making process left them feeling, and I am quoting here, "cranky and upset", "angry", "horrible", "sad and bad", "frustrated", "an outsider" and "left in the dark". (55)

Creating suitable environments for children to be heard

We need to emphasise that the best interests of children can indeed be served by privileging their voices. This means putting their voices front and centre, and providing safe and appropriate spaces where children of varied ages and backgrounds can express their views freely.

This is especially important for children with disabilities and other vulnerable children who can face additional barriers to expressing their views. Importantly, the UN Committee has advised that: *Children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognise the right to expression of views for minority, Indigenous and migrant children and other*

children who do not speak the majority language. (56)

For at risk children, it is especially important that child welfare professionals be engaged to facilitate interviews or mediation processes.

Conclusion – so what do we do next?

I am not naïve to the practical difficulties of implementing children's participation rights in family law. Clearly there are many challenges. The reality is, and you don't need me to tell you this, that our family law system operates within a context of limited resources and children's participation is affected by what is perceived as affordable, as well as doable.

So how can we create a more responsive system in which all practitioners embrace the benefits of children's participation but also manage the risks and the costs? I certainly don't have all of the answers, however we need to begin by genuinely recognising the right of children to be heard and valued as equal citizens in our society.

For this to occur we need to ensure that family law, policy, processes and guidelines are aligned to the Convention on the Rights of the Child and explicitly include the child's right to be heard.

We need to re-examine attitudes and approaches towards the significance we place on age and maturity. Our focus should be on ensuring that all children who are capable of forming their own views can express those views freely in matters affecting them.

We also need to understand the complementary nature of the child's best interest and the right to be heard and take into account evidence that shows children who have a voice often have improved physical and psychological health.

To enable effective participation we must create safe, suitable and friendly environments where children understand the processes involved, feel comfortable expressing their views, and are provided with feedback on the decisions that are made.

Training for family law professionals is vital for improving engagement with children and young people. We also need to explore alternative models of engagement such as interviews between judges and children that are facilitated by child welfare professionals.

Children and young people should also be provided with avenues to raise concerns or make complaints and seek remedy if their right to be heard, and indeed any of their other rights, is violated during the family law process. Just as we seek 'client' feedback from adults to improve our services, we should regularly do this with the primary clients of family law – children.

Children who understand that they have rights, what those rights are, and who also understand that they can rely on adults to respect these rights, are both empowered and made more capable. Having their rights recognised and realised also acts as profound safeguarding measure for children.

Any adult would expect no less than this type of treatment. So why should a child, who is much more vulnerable to being overlooked, not be afforded the right to ensure that they are treated with respect and dignity.

Put simply, children who are shielded from the family law system are usually silenced, not saved. We must find new ways of protecting children through participation, rather than through exclusion, and all of you – as champions of child rights - have a vital role to play in making that happen.(57)

Thank you.

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