

Agency, Article 12 and Models for Legal Representation of Children in Australia

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Introduction

This paper examines models of legal representation of children in Australia with reference to children's participation and agency. I seek to present a critique of recent models in the family, juvenile justice and child protection jurisdictions in terms of the extent to which they fulfil their theoretical promise to facilitate participation by children. I suggest that the move to a direct representation of children in the child protection jurisdiction in New South Wales provides an important opportunity for lawyers to progress the implementation of children's participation and agency. The image of the child projected by this model is that of an active, competent participant.

Images or 'social constructions' of children underlying legal discourse help determine the extent to which children are allowed to participate in decision-making in a way which facilitates their agency.¹ 'Best interests' models of legal representation project an image of the child as vulnerable, incompetent and in need of protection from the legal process. I suggest this inevitably constrains the child's agency. However, children's participation and respect for their agency is not always ensured by the introduction of direct models of participation. What is crucial is the context in which such changes are introduced and the extent to which there is an articulated and conscious effort by legislatures, law reformers and particularly child representatives to facilitate the child client's agency.

It is important first to distinguish between participation and agency. Participation can be defined on a continuum, from consultation through to involvement as one of those actually making a decision. Agency is the extent to which the individual child is able to impact, as an individual, through their free will, choice and unique personality, on the world around them. In the context of legal representation, agency is the extent to which individual children are enabled to work with their lawyer to direct litigation.

The first part of the paper describes the influences which have led western countries to emphasise the importance of children's participation in legal decisions. The second part of the paper outlines the recent development of representation models for children in Australia. The third part critiques the models, drawing out difficulties in implementing models that support children's participation and agency.

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¹ The new sociology of childhood described in Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (1998) emphasises the importance of social constructions of the child to how we think about children. The social theory developed by Michael King and Christine Piper, *How the law thinks about children* (1995) which relies on Niklas Luhmann and Gunther Teubner's work emphasises the importance of images of children, called 'semantic artefacts' to how the law as a legal system 'thinks' about children. I suggest that these perspectives (whilst not in agreement) assist us to consider the potential and the limitations to the promise of participation which models of legal representation appear to offer children.

Part 1: Children's participation in legal decision-making

Children's participation in legal decisions which affect them has been the subject of much interest since the near universal ratification of the United Nations Convention on the Rights of the Child (The Convention).² The Convention incorporated a principle of participation through Article 12:

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Some commentators saw Article 12 as recognition of the child as an active social agent.³ This was a departure from earlier international law which viewed children as objects of concern or the subject of rights to welfare provision, but not to civil and political rights accorded to adults.⁴ Earlier international documents on children's rights did not refer to civil rights such as the right to legal representation, although rights to legal representation were extended to children in some western countries in the 1960s.⁵

Clearly international human rights law influences national law about children and vice versa.⁶ In addition, some legal theorists argue legal systems in modern societies have specific functions that influence the way the law develops and the legal image of children which is employed.⁷ I suggest that developments in representation models for

² All states with the exception of the United States and Somalia have ratified the Convention. Australia signed the Convention on 22 August 1990 and it was ratified on 16 January 1991. It entered into force generally on 2nd September 1990, and entered into force for Australia on 16 January 1991.

³ Deirdre Fottrell, 'Children's Rights' in Angela Hegarty and Siobahn Leonard (eds), *Human Rights: An Agenda for the 21st Century* (1999) 167,168; Gerison Lansdown, 'Promoting Children's Participation in Democratic Decision-making' (UNICEF Innocenti Research Centre, 2001) 1-2;

⁴ Lansdown, *ibid.* See also Geraldine Van Bueren, *The International Law on the Rights of the Child*, Volume 35, *International Studies in Human Rights* (1995) 137, ch 1.

⁵ The most important of these cases was *In Re Gault* 387 US 1 S.Ct (1967) which extended due process rights to young people appearing in juvenile courts, including the right to legal counsel: Joseph M Hawes, *The Children's Rights Movement: A History of Advocacy and Protection*, Social Movements Past and Present (1991) 129.

⁶ For instance, see Annette Kronborg and Idamarie Leth Svendsen, 'Children's right to be heard: the interplay between Human Rights and National Law' (Paper presented at the The 11th World Conference of the International Society of Family Law, Copenhagen and Oslo, 2002). See also Felicity Kaganas and Alison Diduck, 'Incomplete Citizens: Changing images of Post-Separation Children' (2004) 67(6) *The Modern Law Review* 959, 973. In the Australian context, the Convention has impacted on the *Family Law Act 1975* (Cth) through, for instance the *Family Law Reform Act 1995* (Cth) and also in section 10 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). At the international level national legislation about children clearly contributed to the construction of the Convention (see the preparatory documents, also called *travaux preparatoire*).

⁷ King and Piper, above n 1.

children are affected both by norms at the international level, derived from international human rights law, and by developments within national law and national legal systems. There is a dynamic interplay between the two which I will analyse in the next section.

Article 12 and Children's Agency

The principle of participation incorporated in Article 12 of the Convention gives the child a right to be heard in any matter, including administrative and judicial proceedings, but does not define how the child is to be heard. Article 12(2) includes reference to the child's voice being heard either directly or indirectly, through a representative (whose training and profession is not defined) or through an appropriate body, in a manner consistent with the procedural rules of national law. Clearly the child's voice can be heard in many ways. Article 12(1) leaves open the interpretation of the child's capability to form his or her own views, but links and implicitly limits the weight to be given to these views to the age and maturity of the child. It is not clear how or by whom the age and maturity of the child are to be determined, although it is implicit that a court or tribunal would play a decisive role.

Legal commentators and socio-legal theorists use many descriptors of the child said to be introduced by Article 12: these include reference to children as social actors, active social agents, and autonomous, responsible persons.⁸ Article 12 has been dubbed the "participation" principle: according to Shier it requires decision makers to listen to children, support them in expressing their views and to take their views into account.⁹ He distinguishes "active participation" (where children share power and responsibility for decision-making) from consultation (where children provide their views to aid the decision-making process).¹⁰ Article 12 only requires the consultative "weaker" form of participation, although there may be ambiguity where adversarial systems are involved and the parties to a dispute take responsibility for directing litigation.¹¹

The interesting question here is to what extent Article 12 *introduces* notions of children's agency, and what exactly is meant by agency? Kaganas and Diduck describe two images of children found in legal, socio-legal and popular discourse in family law.¹² Agency is not a feature of the first, traditional image which emphasises a vision of the child as incompetent, vulnerable and dependent. This traditional image is underpinned by ideas of the child *in the process of becoming a fully rational subject*: it incorporates older images of the child as evil, innocent or a blank slate. This "romantic, developmentalist child" draws upon socialisation theory and

⁸ Alan Prout, 'Participation, policy and the changing conditions of childhood' in Christine Hallett and Alan Prout (eds), *Hearing the Voices of children: Social Policy for the New Century* (2003) 11, 20; Carol Smart, 'Children and the Transformation of Family Law' in John Dewar and Stephen Parker (eds), *Family Law: Processes, Practices, Pressures* (2003) 223, 231; Pauline Tapp and Mark Henaghan, 'Family Law: conceptions of childhood and children's voices - the implications of Article 12 of the United Nations Convention on the Rights of the Child' in Anne B Smith, Nicola B Taylor and Megan M Gollop (eds), *Children's Voices: Research, Policy and Practice* (2000) 91.

⁹ Harry Shier, 'Pathways to participation: Openings, Opportunities and Obligations' (2001) 15 *Children and Society* 107.

¹⁰ *Ibid.*

¹¹ This is because the parties themselves delineate the nature and limits of the action within legal options available.

¹² Kaganas and Diduck, above n 6, 961-962.

developmental psychology which links age, development and competency, and is currently the dominant image of the child held by social scientists working with children in family law.¹³ Kaganas and Diduck claim sociologists have put forward a different image, seeing childhood not as biologically determined and universal, but as a socially constructed space. This has allowed the development of an alternative vision of the child as an active participant in the determination of their own lives, the lives of others around them and in society generally:

In this paradigm, children have the capacity to exercise a form of agency, a type of post-liberal autonomy and to effect and influence their environment, conditions, attachments, detachments and self-identity.¹⁴

This “autonomous reflexive child” contributes to the new ideal child of law: the amalgamation of these competing images reflects the deep ambivalence within the legal ideal.¹⁵ The second image can be supported with reference to Article 12: it is the voice of the individual child which is being expressed. There is a clear association between the child’s views and decisions made and this assumes some form of agency. However, other articles in the Convention do not adopt such an image of the child.

Article 3, Best Interests and Paternalism

The United Nations Committee on the Rights of the Child¹⁶ classifies Article 12 and Article 3, the “best interests” principle, under the theme “general principles”.¹⁷

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...

The ‘best interests’ principle can be found in much national legislation concerned with children: it has exerted and continues to exert a powerful influence over children’s substantive and procedural legal rights. The principle has a long history that predates the Convention, developing out of paternalistic concerns for children’s welfare.¹⁸ It is a pivotal legal device used to determine children’s interests in the courts, for instance in family law jurisdictions where courts must decide with whom a child will reside and have contact.¹⁹ The principle is embedded in welfare discourse which conceives of children as incompetent, dependent and vulnerable victims who are in need of protection by the legal apparatus of the state: this is the image of the “romantic, developmentalist child”. ‘Best interests’ is fundamentally about expert,

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ The Convention establishes a Committee on the Rights of the Child to monitor its implementation: Geraldine Van Bueren, *The International Law on the Rights of the Child*, Volume 35 International Studies in Human Rights (1995) 389.

¹⁷ Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 23.

¹⁸ See Robert van Krieken, 'The 'Best Interests of the Child' and Parental Separation: on the 'Civilising of Parents' (2005) 68(1) *The Modern Law Review* 25.

¹⁹ Ibid.

adult interpretations of what is best for children. This image conflicts with the image underpinning article 12 of the child as a social actor and competent being whose views are valid and important to any decisions made about him or her.²⁰ Given these tensions it is important to explore how the “best interests” principle in the Convention can or should be interpreted.

It is clear from the preparatory work of the Convention²¹ that the relationship between the best interests principle, contained in Article 3 and the principle of participation contained in Article 12 was the subject of discussion, but was not clarified in the final draft of the Convention.²² Some commentators have suggested that Article 3 should not be allowed to qualify Article 12.²³ For instance, a decision-maker should not decide prior to hearing a child that it is not in the child’s best interests to provide an opportunity to him or her to be heard. Van Bueren suggests that the traditional concept of “best interests” (which undermines the child’s autonomy) has been remoulded by being incorporated into the Convention.²⁴ It is not attuned to the purpose and intention of the Convention as a whole, and as a human rights document concerning children.²⁵ In a similar vein, Wolf comments that the “best interests” principle in the Convention exceeds traditional concepts of protection and can be interpreted from the perspective of the child.²⁶ Arguably it is possible for Article 12 to qualify Article 3, so that the child’s best interests (a primary consideration) cannot and should not be determined without allowing the child an opportunity to be heard by the decision-maker.²⁷ The Convention provides no direction on the relationship between these principles, the interpretation of the relative weight to be accorded to each or the interpretation of best interests to be adopted. These interpretations are matters for the nation implementing the Convention. National substantive and procedural laws about children therefore reflect varied interpretations of these principles.

The impact of processes of individualisation on legal images of children

Western legal systems did not until recent times recognise children as separate legal persons or legal actors with interests.²⁸ Historically children were regarded by law as

²⁰ Smart, above n 8, 234.

²¹ These are usually referred to by courts and publicists by their French name ‘*travaux préparatoires*’, including all records of the negotiations in the form of diplomatic correspondence or public pronouncements and anything which indicates the intention of the parties in the course of adopting a treaty: Stephen Hall, *Public International Law*, Butterworths Tutorial Series (2003), 96.

²² Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999), 89, 214-218.

²³ Kathleen Marshall, *Children's Rights in the Balance: The participation-Protection Debate* (1997) 7-16.

²⁴ Geraldine Van Bueren, *The International Law on the Rights of the Child*, Volume 35 International Studies in Human Rights (1995), 46.

²⁵ *Ibid.*, 104.

²⁶ Joachim Wolf, 'The Concept of the 'Best Interest' in Terms of the UN Convention on the Rights of the Child' in Michael Freeman and Philip Veerman (eds), *The ideologies of Children's Rights*, International Studies in Human Rights (1992) vol 23, 125 at 128-129. Wolf notes that this concept is open to new development and legal explanation. The child’s perspective is the converse of the State’s obligations to provide and protect the rights of the child.

²⁷ Marshall, above n 23.

²⁸ It needs to be acknowledged that limited rights for the children of aristocratic and propertied families, in the nature of expectancies, have existed since ancient times.

the property of their father. In the 20th century in international law documents they became first of all objects of the law's concerns and then the subject of welfare rights.²⁹ Notions of children as active rights bearers and social agents are very new, although there has been a clearly identifiable trend in this direction since the early 20th century, which accelerated from the 1970s and more definitively from the 1990s. Conceptions of children as rights bearers reflect the development of a children's rights movement, part of broader human rights movements.

Historically the child had no legal personality in legal discourse; being property of the father he or she was subsumed within legal notions of marriage and the family. The jurisdictions of family law and child protection law have come to involve a relationship between the State, the parents and children. This legal relationship has altered in line with significant social changes affecting the family due to the ongoing process of individualisation in society.³⁰ Changes in expectations of marriage, the increase in divorce and separation, the increased involvement of women in the labour force and decreased fertility in western societies have meant the law's approach to and construction of the family has had to change.³¹ Marriage previously provided the legal framework for family life. With the advent of no-fault divorce beginning in the 1970s in many countries, the focus of the law has moved away from the relationship between parents to a focus on welfare and the child.³² The legal discourse of the 'best interests' of the child has prevailed, with an emphasis on cooperative parenting following separation and the fragmentation of the family:

It became the challenge of the law to uphold the idea and status of family life even after a breakdown and with the family now consisting of individual family members, each with their "family identity". The dissolution of traditional norms brought about an individualization of the family, a structure of entities, each benefiting from rights based on equality, rather than as a unit. By means of this process, children became visible as one or more of these entities – they were introduced in family law as individuals.³³

This change involved the protection of the rights of each of the individuals who make up the family, including the children who, as individuals, have a (formal) right to be heard.³⁴

²⁹ Van Bueren, above n 4, ch 1; Douglas Hodgson, 'The Historical Development and "Internationalisation" of the Children's Rights Movement' (1992) 6 *Australian Journal of Family Law* 252.

³⁰ Kronborg and Svendsen, above n 6, 405; Ulrich Beck and Elisabeth Beck-Gernsheim, *Individualization: institutionalised individualism and its social and political consequences*, Theory, culture and society (2002)

³¹ Van Krieken, above n 18, 39.

³² Kronborg and Svendsen, above n 6, 407. Robert van Krieken, n 18, 45.

³³ Kronborg and Svendsen, above n 6, 408.

³⁴ *Ibid*, 415. See also in the Australian context, the House of Representatives Standing Committee on Family and Community Affairs, 'Every picture tells a story: Report on the Inquiry into child custody arrangements in the event of family separation' (Parliament of the Commonwealth of Australia, 2003). This report evinces an emphasis on parental cooperation after separation, with a much more limited emphasis on children's voices and the need to consult children about decision-making. Another influence which may be important here is that children of separated parents may simply "vote with their feet": see Kaganas and Diduck, above n 6, 974.

Part II: Models of legal representation for Children in Australia

This part of the paper begins with the development of models of representation in Australia which involve direct contact between children and lawyers. I then describe two models of representation of children which have developed recently in Australia.

Legal representation of children by lawyers

When the common law courts began to recognise children's interests (most commonly property interests or compensatory interests) judges assumed that children did not have the legal capacity to represent themselves. The courts interposed an adult between the child and his or her legal representative.³⁵ This adult was commonly a parent, but where a parent was unavailable or a conflict of interest existed between the parent and child, the court appointed a next friend to instruct the legal representative.³⁶ Children have only recently entered a direct relationship with their legal representatives and this has only occurred in some jurisdictions.

In 1997, the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission noted:

“Changes in substantive and procedural law reflect a growing appreciation that children's abilities and capacities to make decisions develop as they mature and that children should be afforded a progressive right to participate in legal processes that affect them.”³⁷

In Australia the principle of 'best interests' has dominated many jurisdictions concerned with making decisions about children. However, recent legislation, jurisprudence and models of legal representation for children have revealed more concrete manifestations of the increased emphasis on participation. Two models of legal representation follow, showing the influence of the participation principle and images of children as active social agents. The first is the model of representation for children operating in the Family Court in Australia (a federal jurisdiction) and the second is the model of representation operating in relation to child protection matters and criminal proceedings against children in New South Wales (a state jurisdiction).

Best Interests Models

The model of legal representation for competent adults requires lawyers to explain legal options to their client, then to follow the client's instructions. The relationship is a fiduciary one, only limited by professional and ethical obligations and the duty of confidentiality. The model is the same across all jurisdictions and is rooted in the

³⁵ It appears that at some time in the 17th century Guardian *ad litem*s were appointed in the Court of Chancery to take or defend court proceedings on an infant's behalf: John Seymour, 'Parens Patriae and the Wardship Powers: Their Nature and Origins' (1994) 14(2) *Oxford Journal of Legal Studies* 159, 174.

³⁶ Lani Blackman, *Representing Children and Young People: A Lawyers Practice Guide* (2002) 16.

³⁷ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, ALRC Reports (1997) 14.

adversarial model developed in western common law legal systems. Models of representation for children tend to differ according to the jurisdiction involved.³⁸

Different models of legal representation for children encompassing direct contact between a child and his or her lawyer have emerged in recent years. One of these is the ‘best interests’ model, which involves the lawyer (often with reference to child ‘experts’) making value judgments about what is in the best interests of the child and then acting upon this basis. This model adopts a protective interpretation of ‘best interests’ underpinned by an image of the child client as vulnerable, dependent and in need of protection: it may also require lawyers to seek the views of the child and to put these before the court.

The Family Court of Australia

Child representatives are appointed by the court under section 68L *Family Law Act*, 1975 (Cth) to represent and promote the best interests of a child in family law proceedings.³⁹ Representatives are funded by the Legal Aid Commission, although parents may be asked to contribute to the cost of such legal representation. Representation of children by lawyers began after the introduction of the Family Law Act in 1975. The model of representation was contested early on and has continually been refined through legislative change, the court’s jurisprudence and practice directions.⁴⁰ The more complex children’s matters in this jurisdiction tend to take place in the (federal) Family Court, although since 2000 the Federal Magistrates Court also has jurisdiction in Children’s matters.⁴¹

In 2003 the Chief Justice of the Family Court of Australia⁴² comprehensively set out guidelines for the role of the Child Representative in this jurisdiction as that of a ‘skilful, competent and impartial best interests advocate’.⁴³ The guidelines noted that:

(whilst) the best interests of the child will ordinarily be served by the Child’s Representative enabling the child to be involved in decision-making about the proceedings...this does not mean that the child is the decision-maker.... The Child’s Representative does not take instructions from the child but is required to ensure the Court is fully informed of the child’s wishes, in an admissible form where possible.⁴⁴

The guidelines require the Child Representative to provide the child with opportunities to express his or her wishes and to ensure that these wishes are fully put before the court. However, the Child Representative can make submissions to the court as to how the child’s best interests will be served which are contrary to the

³⁸ This tends to be associated with the image of the child prevailing in a particular jurisdiction. For instance, in the criminal law jurisdiction the State is both the child offender’s adversary and responsible as *parens patriae*. Children in this jurisdiction who are charged with serious offences can be demonised as “bad” and treated in ways that are not protective, regardless of their age. Children in the family jurisdiction, on the other hand, tend to be treated as highly vulnerable and in need of protection.

³⁹ The court may make this order under section 68L on its own initiative, that of the child, an organisation concerned with the welfare of children or any other person.

⁴⁰ See William J Keough, *Child Representation in Family Law* (2000) for a discussion of the development of this model.

⁴¹ S 69H *Family Law Act 1975* (Cth)

⁴² The Hon. Alastair Nicholson

⁴³ Family Court of Australia Practice Direction: No 2 of 2003: Guidelines for Child Representatives at 4.

⁴⁴ *ibid.*

child's wishes.⁴⁵ If a child of 'sufficient maturity' wishes to have a direct representative, the child representative is to inform the child of the possibility of applying to become a party to proceedings and of giving instructions to a legal representative through a next friend.⁴⁶

The appointment of a Child's Representative is one means of giving effect in family law proceedings to the United Nations Convention on the Rights of the Child (the Convention).⁴⁷ Article 3.1 'the best interests' principle and Article 12 'the participation' principle are extracted and included in the guidelines.⁴⁸ There is no guidance as to how to reconcile these two principles, although clearly the overall legislative and jurisprudential context is of fundamental importance. The *Family Law Act* itself embodies and strengthens the force of the "best interests" principle contained in Article 3.1 of the Convention, through the inclusion of s 65E which requires the court to regard the child's best interests as "the paramount" consideration (not a primary consideration) in parenting matters. The *Family Law Act* does not include a participation principle such as Article 12 of the Convention. However, s 68F(2)(a) of the Act requires the court to consider, as the first of twelve factors, any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes. Judges commonly rely on family reports, the use of experts to write reports on the child's wishes and child representatives to assist them in determining the child's wishes.

In this model the legal representative must listen to the child's views (renamed wishes) if the child chooses to express them and put such wishes before the court. The representative determines the appropriate degree of involvement of the child in the proceedings according to two factors: firstly, the child's willingness to be involved and secondly, the extent that it is appropriate for the child to be involved, having regard to the child's age, developmental level, cognitive abilities, emotional state and wishes.⁴⁹ When considering how to represent the child, the guidelines instruct the Child representative to be aware of children's vulnerability to external pressures in family law proceedings and of their differing developmental levels and family structures.⁵⁰ The representative is expected to work with experts such as Child and Family Counsellors or other external experts to promote the best interests of the child.⁵¹ The Child Representative is warned against stepping beyond his or her professional role and is encouraged to seek peer and professional support where a case raises issues beyond his or her expertise.⁵² Expert views should inform the representative's submissions as to the weight to give children's wishes.⁵³ The representative's personal views or opinions should not be brought to bear on the issues before the court.⁵⁴ The child's voice is important in this model of

⁴⁵ *ibid.*

⁴⁶ *ibid.* There is no easily obtainable information on the extent to which children are appointed as parties in Family Law proceedings. See the *Family Law Rules 2004* at Rule 6.08.

⁴⁷ Guidelines at 3: Statement of Principles.

⁴⁸ *Ibid.* These convention articles are included above in the body of the paper.

⁴⁹ *Ibid.* at 4.

⁵⁰ *Ibid.* at 5

⁵¹ *Ibid.* at 4.

⁵² *Ibid.* at 4 and 5.2.

⁵³ *Ibid.* at 5.3.

⁵⁴ *Ibid.*, at 4.

representation, but the representative plays a decisive role in interpreting the child's wishes for the court.

Direct Representation Models

Criminal Proceedings against Children in New South Wales

In theory direct representation models are identical to representation models utilized by lawyers with competent adults. Children facing criminal proceedings have been represented by lawyers on a direct basis since the 1980s in Australia. Seymour describes how the various Australian State jurisdictions changed their emphasis at this time from child-saving to justice models with an emphasis on due process safeguards for children, including legal representation.⁵⁵ However, he comments that most jurisdictions, whilst giving children the right to legal representation, did not reflect sufficiently the importance of procedural justice for children.⁵⁶

In New South Wales children are represented in criminal matters in Children's Courts either by private lawyers or by duty solicitors who are legally aided. Legislation sets out this right of children to be heard and participate in s 6(a) of the *Children (Criminal Proceedings) Act, 1987 (NSW)*:

6 Principles relating to the exercise of criminal jurisdiction

A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them.

No special model of representation similar to the one which has developed in the Family Court of Australia has emerged in the Children's Court.⁵⁷ Little research has been done into representation of children before the Children's Court and into any differences from the representation of adults in the Magistrate's Courts. The limited available research indicates that a significant number of children in Australia plead guilty to offences in court, which makes the courts mere institutions for imposing penalties rather than institutions for determining guilt or innocence.⁵⁸ One study indicated that representation often focused on guilty pleas and bail applications.⁵⁹ Problems identified in this study by young people included limited time with the duty solicitor (which hindered taking of adequate instructions and thus effective

⁵⁵ John Seymour, *Dealing with young offenders* (1988) 166-171, 311-315.

⁵⁶ *ibid* 312.

⁵⁷ There have however been two sources of support for lawyers representing children in the Children's Court: the first is the Children's Court of New South Wales Case Law News established since February 2001, the second the Children's Legal Service Bulletin which began in November 2003, with the aim of assisting practitioners to provide a high standard of legal representation to children. Both are available on the internet.

⁵⁸ Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (2nd ed, 2002), quoting N Naffine, J Wundersitz and F Gale, 'Back to Justice for Juveniles: the Rhetoric or Reality of Law Reform' (1990) 23(3) *Australian and New Zealand Journal of Criminology* 195.

⁵⁹ Youth Advocacy Centre Inc, 'Juvenile Justice: Rhetoric or reality? Experiences of young people in the juvenile justice system in Queensland under the Children's Services Act, 1965.' (Youth Advocacy Centre Inc, 1993) 38.

representation), poor communication by the solicitor and lack of clarity concerning the role of the solicitor.⁶⁰ It seems that there are very real questions about the gaps between the rhetoric and the reality of children's right to legal representation when facing criminal charges and this is a problem that requires further research.

Direct representation models have recently begun to emerge in various states of Australia in child protection jurisdictions. One such model recently implemented in New South Wales is considered below.⁶¹

The Child Protection Jurisdiction in New South Wales

In any proceedings with respect to a child, s 98 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides that children and young people have a right of appearance and a right to be legally represented. Under s 99(3) there is a rebuttable presumption that a child or young person over the age of 10 is 'capable of giving proper instructions to his or her legal representative'; s 99(2)(c) notes that the role of the legal representative includes acting on the instructions of the child or young person.⁶² If the child is under 10 or lacks capacity, there is provision for the representative to act as a separate representative, not bound by the child's instructions. In contrast to the *Family Law Act, 1975* (Cth), the *Children and Young Persons (Care and Protection) Act, 1998* (NSW) applies principles that draw on Article 12 of the Convention.⁶³ Section 10 of the Act, headed "The Principle of Participation" spells out the child's right to information and assistance to ensure that participation is possible in matters which have a significant impact on the child.⁶⁴ The section requires that due regard must be had to the age and developmental capacity of the child in the application of the principle.⁶⁵

This legislation was developed after a long and careful review of the prior legislation, including the development of a number of discussion papers, receipt of over 350 submissions and wide-ranging consultations with the public.⁶⁶ Section 10 was specifically initiated following the submission of two organisations representing children and young people in State care, and after an extensive consultation process funded by the Law Foundation of New South Wales.⁶⁷ The Review Chairperson, Patrick Parkinson, noted that the introduction of Section 10 was one reform which had

⁶⁰ Ibid.

⁶¹ This model was introduced through the *Children and Young Persons (Care and Protection) Act 1998* (NSW) which commenced operation in 2000. There has been little research done as yet into the realities of its implementation: the author is currently pursuing doctoral studies in this area.

⁶² Where the child or young person is capable of giving instructions

⁶³ See section 9(b)

"Wherever a child or young person is able to form his or her own views on a matter concerning his or her safety, welfare and well-being, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances."

⁶⁴ Section 10(3) lists the matters that the child has a right to participate in, which will have a significant impact on the child

⁶⁵ Section 10(2)

⁶⁶ Patrick Parkinson, "The child participation principle in child protection law in New South Wales" (2001) 9 *The International Journal of Children's Rights* 259, 261.

⁶⁷ Ibid 262.

been enthusiastically supported by child protection practitioners,⁶⁸ although lawyers appointed as child representatives responded in a more mixed way to this reform.⁶⁹

Legal representation of children involved in proceedings under the Act (which usually occurs in the Children's Court) is administered and funded by the Legal Aid Commission. Research remains to be done on the manner in which lawyers are implementing this direct representation model, and its effectiveness in facilitating children's participation in child protection matters.

Part 3: The Representation Models and the Promise of Agency

In this part I consider the extent to which the models reviewed are consistent with images of children as active social beings who exercise agency and are competent to instruct the lawyer. I begin with a discussion of King and Piper's theory which considers how legal systems *as systems* may constrain the images of children which develop in domestic substantive and procedural law, and constrain attempts by lawyers to 'hear' their child clients. I then critique the three models reviewed from the perspective of agency.

The Legal system, legal discourse and the legal image of children

The nature of the legal system and legal discourse itself exerts a powerful influence over images of children reflected in the law.⁷⁰ King and Piper argue that the law and legal discourse construct images or 'semantic artefacts' of the child in order to fulfil the broader roles of the law and of the State.⁷¹ The State has multiple roles in relation to children. Not only is it the role of the State to resolve disputes and maintain congruent expectations within society, the State has a special role as *parens patriae* in relation to children.⁷² This perspective suggests that it is dysfunctional for law to confront and deal with all the facts and complexities existing within the 'real' child, therefore semantic artefacts of the child are constructed. These images are not dissimilar to the images of the "romantic, developmentalist child" and "autonomous, reflective child" discussed earlier in this paper and include the child as victim, witness, bundle of needs and bearer of rights.⁷³ This perspective on the nature of how legal systems "think" about children raises important questions about the extent to which legal systems can be changed so that they are responsive to the needs of individual children.⁷⁴ More importantly, it raises questions about the extent to which

⁶⁸ It is hard to identify clearly the typical professional background of child protection workers in the NSW State Department of Community Services (DoCS). What is clear is that while many workers may have had a welfare orientation, only a minority of child protection workers in this department had a tertiary level qualification in social or welfare work at the time of the review. In 2004 DoCS made changes to ensure child protection caseworkers appointed in the future had a relevant degree level qualification.

⁶⁹ Parkinson, above n 66, 260.

⁷⁰ King and Piper, above n 1.

⁷¹ Ibid. King and Piper utilise the theoretical work of Gunther Teubner and Niklas Luhmann on law as an autopoietic system.

⁷² This is a complex jurisdiction: it is difficult to define its character and limits or to be clear about its historical origins: Seymour, above n 35, 159.

⁷³ King and Piper, above n 1, ch 4.

⁷⁴ King and Piper, above n 1.

the law and those working within a legal discourse can “hear” the voice of individual children. At another level the law may fulfil a pedagogical function, in constructing the “good” parent, norms of “good” parenting and even the “good” child who is responsible for assisting to shape the “good” post-separation family.⁷⁵ Here the law may promote the ideal of listening to children and allowing them to participate in decision-making, including legal decision-making, whilst constraining the ways in which particular children can be “heard”. The law may also construct and employ new images of children which may either emphasise or undermine children’s agency.

Critiques of the models of legal representation in relation to children’s agency

The “Best Interests” model for representation of children in the Family Court of Australia.

There is clear evidence in this model of the amalgamation of both the new image of the child as active and competent and the traditional image of the child as vulnerable and incompetent. This tension has been an impetus for the development of the very detailed guidelines for the child representative in the Family Court. It is not easy for lawyers to implement a representation model which is caught between different and conflicting images of the child as client. This can lead to significant role confusion for legal representatives which is revealed in the case law. There have been successful appeals in matters where child representatives have not met with children prior to representing them⁷⁶ and cases where representatives have attempted to represent the child on the basis of their competence to instruct.⁷⁷ The guidelines have attempted to lay down very clearly just what this role ought to be, but in the end the new image of the child as competent participant is trumped by the traditional concern of the courts in this jurisdiction to protect the child. The child does not instruct the child representative and the child’s voice is heard through the mediation of the representative, in concert with other welfare experts who are assumed to be in the best position to understand what the child really needs. Agency is sacrificed for protection in this model.⁷⁸

Direct models of representation

Direct representation in criminal proceedings against children in New South Wales

This model appears to allow the child the same form of agency which an adult would have if represented in this jurisdiction. However, appearances can be deceptive and it can be argued that merely treating a child as an adult neglects important structural direct and indirect disadvantage which children may experience in comparison with their adult counterparts. Children need more assistance in relation to communication, understanding of the legal environment and understanding of the criminal law than adults. Many will have not have the option of securing private representation and duty solicitor schemes offer very limited time to child defendants. The research

⁷⁵ Kaganas and Diduck, above n 6.

⁷⁶ *DS and DS* (2003) FLC 93-165

⁷⁷ *In the Marriage of Pagliarella(No 2)*(1993) 121 FLR 385

⁷⁸ Apart from the guidelines, there have been attempts to educate child representatives in how to properly communicate with children and to define their role in the court, including the development of a national training program for child representatives.

studies that have been done indicate that there may be role confusion for lawyers in this jurisdiction.⁷⁹ There is additional confusion here in the role of the State vis-à-vis children: the State is both the child's adversary and their protector.

The history of the jurisdictional changes introduced by the *Children (Criminal Proceedings) Act 1987* (NSW) does not reveal a strong commitment to furthering the procedural rights of children through legal representation, but instead shows a lukewarm response to filling a gap acknowledged in international research at the time.⁸⁰ The Act enunciates a participation principle but on its own this is not enough to secure the promise inherent in the provision of legal representation. The agency implied by this model is at best immanent; at worst token. Ineffective representation based on this model may harm individual children due to inadequate resources and insufficient consideration of their real needs.⁸¹ Further research needs to be done into children's experiences of representation in this jurisdiction.

Direct representation in the Child Protection Jurisdiction in New South Wales

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) develops a direct representation model which is ground breaking in the clarity with which it acknowledges the competence of children over the age of 10 to instruct their lawyer. There is a clear articulation of the principle of participation, drawn from Article 12 of the Convention which supports legal representation for the child and seeks to ensure the child is provided with the necessary information and assistance to enable participation in all significant matters. The participation principle was incorporated into the Act as a result of consultation with children and young people by those charged with reviewing and reforming the legislation. This involvement was invited, properly resourced and utilised in the reforms to the Act. The process here explicitly acknowledged the importance of involving children in law reform in matters concerning them. The image of the child as an active social agent is clearly reflected in the participation principle incorporated into the Act and the emphasis on the child's capacity to instruct their representative.

The recent commencement of the *Children and Young Persons (Care and Protection) Act, 1998*⁸² means that there has been limited time for lawyers to fully implement the model or for research to be undertaken into how it is being implemented.⁸³

⁷⁹ See Youth Advocacy Centre Inc, above n 59; Christine Alder et al, 'Perceptions of the Treatment of juveniles in the legal system' (National Youth Affairs Research Scheme, 1992).

⁸⁰ Seymour, above n 55, 312.

⁸¹ Ian O'Connor, 'Models of Juvenile Justice' in White, R and Alder C (eds) *Juvenile Crime and Juvenile Justice* (1998) Research and Public Policy Series No 14, Australian Institute of Criminology, Canberra, 4-5, notes that in moving towards a justice model from a welfare model there may be payment of lip service to due process rights.

⁸² On the 8.12.2000

⁸³ One change in this area has been the creation by the Legal Aid Commission of minimum training and experience standards required for lawyers who wish to be included on legal aid panels established to allow representation of children in this jurisdiction. These may over time change the quality of the representation experienced by children in this jurisdiction.

Conclusion

This critique of agency in models of representation has analysed the image of the child reflected by the legislation and guidelines governing the lawyer's role. It reveals that difficult issues arise when an attempt is made to implement models of legal representation of children that seek to increase children's agency. Powerful images of children as innocent victims are emphasised in particular jurisdictions such as family law. These images limit the impact of new images of children as competent actors in both substantive and procedural law. Whether the new models of direct representation are successful in supporting children's agency will depend largely on the context in which they are developed. Treating children as little adults is not necessarily the answer as there are very real differences to be negotiated by lawyers when representing children and adults.⁸⁴ Legal systems undoubtedly reconstruct, individualise and narrowly delimit the issues which children through their lawyers are able to bring before the court. The training of lawyers has not generally enhanced their ability to communicate with child clients and the legal system itself may function as a filter which limits what lawyers 'hear' when they listen to children. Lawyers in common law jurisdictions are steeped in an adversarial system which has historically made certain assumptions about children and about what it means to participate as a party in a matter. The courts in western countries either have set high standards for the level of understanding that a child needs in order to instruct a legal representative directly, or have developed models that do not allow children to be directly represented.⁸⁵ There are a myriad of issues to be considered when considering the likely effectiveness of such models.⁸⁶

Whilst these concerns are important, they should not be allowed to detract from the search for ways to assist children to participate in legal decisions that affect them. This is a basic human right accorded by the Convention. The limited research carried out with children into how they experience different models of legal representation suggests that children often wish to be given opportunities to participate in legal decisions, but that these are often not provided by their legal representatives.⁸⁷ The views of children, if articulated, can be fundamentally important in assisting the courts to reach decisions that enhance children's lives, as children have a unique perspective and access to information about their own lives. In addition, if children are not listened to for long enough, they speak with their feet. Research needs to be

⁸⁴ King and Piper, n 1, 165. See also Dr C. J. Lennings, 'Communicating with children over 10: if wishes were horses, beggars would ride.' (2004) (5) *Children's Law News* .

⁸⁵ Kaganas and Diduck, above n 6, 978: the authors note the judgement of Booth J in *Re H(a minor)(guardian ad litem: requirement)* [1994] 4 All ER 762, 765 which notes that "Participating as a party means much more than instructing a solicitor as to his own views. The child enters the arena among other adult parties". In the Family Court in Australia the preferred option has been the development of a best interests model which means children do not instruct their representative.

⁸⁶ I do not wish to ignore the work of King and Piper, above n 1, 165 which raises questions about the extent to which legal systems and representatives can ever be modified to be child-responsive. It is clearly the case that legal representation with an emphasis on agency may only ever represent one small contribution to the improvement of the lives of children in general. Social, political and economic factors are of overriding importance in this objective.

⁸⁷ Judy Cashmore and Kay Bussey, 'Perceptions of children and lawyers in Care and Protection Proceedings' (1994) 8(3) *International Journal of Law and the Family* 319; E Kay M Tisdall et al, 'Children's Participation in Family Law Proceedings: A Step Too Far or a Step Too Small?' (2004) 26(1) *Journal of Social Welfare and Family Law* 17.

directed towards the way in which children experience direct representation models. It also needs to focus on the challenges which such models pose for children's lawyers.

Finally, it is vitally important that courts and lawyers stop marginalising children from participating in decisions. The new direct model of legal representation of children introduced into the child protection jurisdiction in New South Wales is an exciting new development which deserves support. The model acknowledges and embraces the new image of the child as active social agent by highlighting the competence rather than the incompetence of children. Lawyers with a commitment to the human rights of children, who value children's agency and have the skills to communicate with children in a respectful way have an important job to do. They need to recognise and support the agency of their child clients. They also need to advocate (preferably with children and young people) within the legal system itself for changes which make the process of being involved in legal decisions in the courts an empowering rather than an alienating experience for all children.