

Agency, Article 12 and models of legal representation of children in Australia

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Introduction

- Images of children underlying legal discourse help determine the extent to which children are allowed to participate in legal decisions: best interest and direct models of representation reveal different images of children.
- Differentiating participation from agency: agency as individual child's ability to impact on the world around them. In this context it is the extent to which the child can direct litigation.

Structure of Paper

I: influences leading common law countries to emphasise participation

II: models of legal representation in Australia

III: Critique of models in relation to agency

Part One: Children's participation in legal decisions

Article 12: United Nations Convention on the Rights of the child (UNCRC) recognises the child as an active social agent, with a civil/political right to legal representation

- Requires consultation, not active participation (Shier*)

Contrasting images of children

- Kaganas and Diduck's** two images of children in legal, socio-legal and popular discourse
 - Traditional image: the romantic developmentalist child
 - New image: the autonomous reflexive child (reflected in Art 12 and includes a capacity to exercise agency)
- * Harry Shier, Pathways to participation: Openings, opportunities and Obligations' (2001) 15 Children and Society 107
- **Felicity Kaganas and Alison Diduck, 'Incomplete Citizens: Changing images of Post-Separation Children' (2004) 67(6) *The Modern Law Review* 959, 973.

Article 3: best interests and paternalism

The ‘best interests’ principle: traditionally about expert determinations of what is best for children.

- Embedded in welfare discourse, conceives of children as incompetent and dependent.
- Conflict with image of child in Art 12
- Relationship between Art 12 and Art 3 in UNCRC

Influence of individualisation on legal images of children

Historically, children had no separate legal personality

- Notions of children as active rights bearers very new
- Family law and child protection law in particular involve a relationship between the State, parents and children
- Significant changes in the family and marriage due to individualisation have effected legal relationships and images
- Focus of law on welfare of children not parents
- Legal discourse of best interests of child has prevailed, with an emphasis on cooperative parenting following separation, protection of rights of individuals making up the family, including children who have a formal right to be heard.

Part Two: models of legal representation of children in Australia

- Traditional assumption children did not have legal capacity to represent themselves: adult interposed between child and lawyer
- Children recently entered direct relationships with lawyers: 1997 ALRC and HREOC report noted changing assumptions

Best interests models:

- Lawyers make value judgments about what is in a child's interests; Child does not instruct lawyer
- Adopt a protective interpretation of best interests which perceives child as vulnerable and dependent
- Lawyer may put child's view before the court
- In the Family Court of Australia guidelines issued by the former Chief Justice in 2003 set out the role of the child representative (developed as a best interests model)

- Child does not instruct but lawyer must ensure court is fully informed of child's view (renamed "wishes")
- Lawyer can make submissions contrary to child's wishes
- Gives effect to Art 3.1 and Art 12
- No participation principle, but child's expressed wishes one factor in determining best interests under s 68F(2)(a) *Family Law Act 1975* (Cth)
- Best interests principle strengthened in s 65E of Act.
- Representative determines appropriate degree of involvement of child depending on their willingness to be involved and developmental factors
- Representative is to work with family and child counsellors to determine developmental factors and what is in child's best interests

Direct representation models

- In criminal proceedings against children in NSW [s 6 *Children (Criminal Proceedings) Act 1987* (NSW) sets out a right of children to be heard and participate in decisions]
 - In theory identical to adults
 - Children represented by lawyers since 1980s in most Australian states when there was a move from welfare to justice models
 - No special model for children
 - Limited research suggests a gap between rhetoric and reality of this right to legal representation

Child Protection jurisdiction in New South Wales:

Children and Young Persons (Care and Protection) Act 1998 (NSW): Sections:

9 Principles to be applied in administration of Act

10 Principle of participation (both 9 and 10 modelled on art 12)

98 Right of appearance

99 Legal representation:

(3) There is a rebuttable presumption that a child who is not less than 10 years of age, and a young person, is capable of giving proper instructions to his or her legal representative. This presumption is not rebutted only because a child or young person has a disability.

- Importance of process of reform

Part Three: representation models and the promise of agency

- Legal systems and legal discourse construct images of the child to fulfil broader roles of law and state (King and Piper)*Michael King and Christine Piper, How the Law thinks about Children, 1995
- This perspective raises questions about how the law ‘thinks’ about children and how legal systems can be changed to be responsive to the needs of individual children
- How can lawyers ‘hear’ children?
- Legal images can emphasise or undermine children’s agency

Critique

- **Best interests model in FCA** amalgamates images of children. Difficult for lawyers to implement; leads to role confusion. Image of child as competent is trumped by traditional concern of courts to protect the child. Agency is sacrificed for protection
- **Direct representation model used in criminal proceedings** against children: principle of participation but no strong commitment to children's procedural rights. This does not secure effective representation and may harm children.
- **Direct representation model in child protection in NSW:** clearly acknowledges competence of children over 10 to instruct. Clearly articulates principle of participation. Reflects image of child as active social agent. Emphasises child's capacity to instruct their lawyer.

Conclusion

Difficulties should not detract from our search for ways to assist children to participate in legal decisions.

- This is a basic human right given by UNCRC
- Research indicates children often want to participate, but lawyers do not provide them with opportunities to do so
- Children's views are very important to the courts in ensuring they reach the best decisions about children.
- The model provided in the child protection jurisdiction in NSW deserves support.