



CHILDREN and **THE LAW**

A lawyer's role

By James McDougall and
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Nearly 20 years after Australia ratified the United Nations Convention on the Rights of the Child, our legal system continues to fail to provide for the voices of children and young people to be heard (Article 12). When will we recognise this right that, as adults, we take for granted? >>

In November 2009, the international community celebrated the 20th anniversary of the adoption by the United Nations General Assembly of the Convention on the Rights of the Child (the Convention).¹

Australia is a signatory to the Convention.² In a significant step towards recognising the importance of providing for the rights of children and the responsibility of the legal system in ensuring this recognition, the *Seen and Heard: Priority for Children in the Legal Process* report was published jointly by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in 1997 (the Report).³ The Report outlined the failures of the Australian legal system to adequately address children's legal needs and recommended avenues for reform to ensure that children's voices would be heard in the legal process, in accordance with the rights afforded by the Convention.

Since 1997, successive federal and state governments, and the legal profession in general, have largely ignored the Report's recommendations. The mechanisms currently available in the legal system to provide representation and advice for children remain woefully inadequate.

The recognition and implementation of children's rights to be heard and participate in decisions that affect them continues to offer a significant challenge to the Australian legal landscape. The structural barriers that prevent a child from being heard are often compounded by the barriers that exist as a result of their situation. Often these are children most in need of an effective justice system – indigenous children, children experiencing poverty, family conflict and/or violence, children with a disability, children from regional, rural and remote communities and from culturally and linguistically diverse communities.

We renew the call of the Report some 12 years ago to develop models of advocacy that recognise the barriers to access and provide both practical support and appropriate advocacy. These models are necessary if children and young people are to be heard in their own right and be able to access justice effectively.

Much work remains to be done in the field of representing and facilitating the participation of children and young people in the legal system, including in developing and making available appropriate training for their advocates.

What are some of the tools that we can use to contribute to this work?

A CHILD-RIGHTS APPROACH

A child-rights approach recognises that the child is a legal citizen and is entitled to specific human rights. There are some recognised⁴ guiding principles from human rights law generally that underline a child-rights approach.

Accountability

Although the Australian government bears the ultimate responsibility, as signatory to the Convention, the family and the community at large also share responsibility in realising children's rights.

Universality

Our understanding that human rights are innate to all people, irrespective of their age, remains under-developed. The opportunities to extend our understanding are significant, and the challenge is to recognise the need to secure the individual rights of every child.

Interdependence and Indivisibility

The child-rights approach is not built on a hierarchy of rights, nor on the arbitrary or subjective use of a 'best interests' catchphrase. It calls for careful and ongoing analysis that recognises the interdependence of rights.

The steadily developing international jurisprudence of child rights (particularly by the United Nations Child Rights Committee) has identified four specific principles of a child-rights approach,⁵ which draws on the Convention for its foundation:⁶

1. **Participation:** Children have a right to be heard and to be involved in decisions regarding matters affecting them. This involvement need not be determinative, but should ensure that due consideration is given to a child's view and a child's interests.
2. **Non-discrimination:** Measures dealing with children must be applied without discrimination on the grounds of race, gender, disability, religion or ethnicity.
3. **Best interests principle:**⁷ An assessment of the best interests of a child based on all the available evidence must be a primary consideration in all actions concerning children.
4. **Survival and development:** This is to be interpreted in the broadest sense as a holistic concept embracing the child's physical, mental, spiritual, moral, psychological and social development.

The implementation of a child-rights based approach is a process rather than a definitive legal formula. A rights-based approach must be multi-sectoral and interdisciplinary, locally owned and culturally sensitive, and will often require the reallocation of power and resources.⁸

For lawyers working in Australia today, a child-rights approach calls for the legal profession not to classify children as clients with 'special needs' but as humans with the same rights as all others, but for whom special attention must be given and often special measures developed in order to adequately provide for, and protect, their rights.

The measures developed need to be exercised in light of the principles set out above and with care and critical thought. We have seen in the last 20 years several token efforts to invoke the language of child rights, without using a genuinely child rights-based approach.

For example, the 'best interests' principle has often been used in a selective rather than a holistic manner, both in legislation and in policy and practice in Australia. Similarly, the so-called 'protection of children' has been invoked to justify actions that clearly fall outside a genuine child-rights framework.

Recent examples include the controversial intervention in the Northern Territory with respect to indigenous children,⁹ and the changes made to the formula used in the

Family Law Act 1975 (Cth)¹⁰ to 'frame' the 'best interests' of children.

SEEN AND HEARD

In the 12 years since the *Seen and Heard Report* was published, the Australian legal system has continued to fail children and young people.

At the time of its publication, the Report provided a comprehensive summary of the law and a clear framework of issues to be addressed, so that children could be adequately represented and participate in the legal decisions that affect them. The Report's findings and recommendations provided benchmarks for research and reform,¹¹ and guidance for all jurisdictions to implement change.

Despite this development, the situation has in many cases deteriorated – either by inaction or, in some cases, with the introduction of measures that have been inconsistent with international child-rights principles.

There have, however, been some positive reforms and developments – for example, the Children's Cases program of the Family Court, and the introduction of more sophisticated approaches to the taking of evidence of children in some jurisdictions.

Unfulfilled recommendations

A quick glance at the progress at a federal level in

implementing the Report's recommendations reveals:¹²

- No establishment of a national Children's Commissioner position;
- No establishment of a specialist children's rights unit;
- No implementation of the recommendations for children's access to the Commonwealth Ombudsman;
- No additional support had been provided for a network of community-based advocates for children since 1997;
- No specific acknowledgement of children's rights as consumers;
- No development of national standards for representing children in family law and youth justice proceedings;
- No implementation of the recommendation that a legal representative should conduct proceedings in accordance with the child's directions, so long as the child is able and willing to give directions;
- No national standards for youth justice; and
- No national recognition of the primacy of the principle of rehabilitation in youth justice.

REPRESENTATION

Effective legal representation has the potential to allow children to be heard and enforce their legal rights.¹³ The fact that children can and do have the capacity to participate in legal processes to enforce their rights¹⁴ is recognised expressly in Article 12 of the Convention.

A child-rights approach calls for recognition of the >>

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universality of the concept of human rights. So, if we acknowledge that children have inalienable rights, we move beyond the 'interests' of children. We can also then look beyond issues of capacity and agency and see our professional obligations as including the facilitating of children's participation to the maximum extent possible. We can challenge ourselves every time a decision is made on behalf of a child to ask whether we have enabled the child to express his or her views and to participate in the decision-making process.

The relationship between the advocate and the child often raises vital issues that can determine the advocate's professional obligations and how best to fulfil them. It often involves a consideration of fundamental questions, such as: Is the child your client? If not, what is the relationship? Assuming the child is your client, how do you effectively represent his or her views?

Many lawyers and advocates around Australia take the representation of children seriously and recognise the importance of child rights in their own professional development. Some legal professional associations have also committed to recognising their particular responsibilities towards children as clients. Nonetheless, there are very few training resources available for advocates. Organisations (including universities and professional associations) should consider this deficiency and give greater attention to the skills required for working effectively with children.

As we are all duty-bearers for children, we will consider some changes that could be made by lawyers who are involved with children to help fulfil our duties and implement the Convention in Australia today.

THE UNHEARD VOICES OF AUSTRALIAN CHILDREN AND YOUTH – A LAWYER'S ROLE

Empowering children in the legal system

A widespread view, shared by many legal professionals, is that children are best protected by not being involved in, or informed about, the legal proceedings that affect them.

The National Children's and Youth Law Centre (the Centre) is regularly in contact with children and young people through its Lawstuff website (www.lawstuff.org.au) and its email advice service (Lawmail). For many years now, the most common complaint we hear from children is their lack of voice in decisions made about their living arrangements – usually in a family setting, or in the context of disputes on family breakdown. It is clear that children want to have a say in these decisions.

We also note the finding in the *Seen and Heard* report that 'an overwhelming complaint children make is that neither the processes nor the outcomes of litigation are properly explained to them'.¹⁵

The traditional view, embodied in the rules of evidence, that children's testimony is inherently unreliable, is now recognised as unsound.

Here are some quotes from children themselves:
'I am writing because I would like to know how old I need to be before I can choose all by myself where I can live (mum or dad's)... My mum and my dad went to court about it which I also took part by talking to the court counsellor and I told her that I wanted to live with my dad but she didn't think that I really did and said

that I should live with my mum. My mum tells me that I am too young to make a decision like this and she doesn't want me to move away from her. My dad thinks that I know what I want and that I should be allowed to make my own mind up, especially as I am older now. So how old do I have to be, and who can help me to get my opinion heard and believed?... Can I get my own lawyer to help me, and do I need my parents' permission to have one? Thank you.'

11 year old, female.

'How can I stop my mom from abusing me? The family court and the child advocate do not let me have a say, so nobody knows, except me and my dad.'

16 year old, male.

'My family has been involved with a court case involving me and my brother going to live with my father (which we don't want to do) and this morning a man came and told us we had to live with him because a judge has ruled it. I'm scared and don't know what to do can you please help me ... please let me know, thanks.'

13 year old, male.

Children not only have a right, but also often express a clear desire, to be better informed about and involved in the decision-making processes that impact on their lives. While systemic reform is also required, legal professionals can take specific steps to help to address a child's right to be heard and participate.

CHILDREN AS CLIENTS

There are two main approaches to the legal representation of children and young people: 'direct' representation (where lawyers acts on the instructions of the child) and 'best interests representation' (where the lawyer acts separately upon an assessment of the child's best interests or receives instructions from a responsible adult).¹⁶

The direct representation model establishes a lawyer-client relationship and is built on the model used by lawyers with competent adults. This includes fiduciary, ethical and professional obligations, including the duty of confidentiality.¹⁷

We endorse the use of the direct representation model in all cases and all jurisdictions where the child is capable of giving instructions.

Geoff Monahan has noted that while direct representation applies to both civil and criminal matters involving

adults (unless the adult is not mentally competent), contemporary Australian law continues the use of best interests representation in civil law (including family law) and child welfare proceedings. Direct representation is generally limited to criminal proceedings (although there is limited application in child welfare proceedings in specific circumstances).¹⁸

A child's apparent lack of co-operation with a process is no justification for abandoning efforts to provide representation (including direct representation). Lawyers have to deal with recalcitrant clients and draw on their skills in negotiation and communication. It should make no difference if the client is a child.

In all circumstances, lawyers need to focus on their communication skills, knowledge and understanding of children's perspectives and situations, and develop their ability to build trust with children. These factors will allow for effective interaction between practitioner and client and, in turn, facilitate children's participation.

General factors to consider for the legal representation of children

The factors that affect children and young people in a legal setting are complex and often inter-related. These can include the child's own communication skills; the impact of family and relationship conflict, cultural or language difficulties; the experience of youth homelessness; consumer and debt issues; alcohol and drug dependencies; interactions with education, criminal justice and welfare systems; and discrimination or disadvantage on the basis of race, cultural difference, age, mental illness, intellectual disability, physical disability and sexuality.

Lawyers should consider these factors when dealing with a child, as they will often place children at a greater disadvantage within the legal system. Advice and assistance can be sought from other professionals (such as paediatricians, child and adolescent psychologists) to understand and address the relevant factors.

Communication with young clients¹⁹

Communication with children requires respect for and understanding of the child's development. A child may have little experience in communicating with adults outside the settings of family and school. Unfamiliar and intimidating settings, and the association of lawyers with authority, will impact on a child's ability to interact and communicate. Consider whether the child has ever visited a courtroom, or even an office building before.

Other factors that can affect a child's ability to express their views include their ability to monitor and communicate incomprehension,²⁰ and their interpretation of language. Words familiar to us such as 'court' may be unfamiliar in context or misunderstood (a reference to a basketball court!)²¹ A failure to consider such things may mean that a lawyer is contributing to, rather than overcoming, the barriers facing children.

Lawyers should be encouraged to use language that is clear, and find ways to reframe concepts in order to allow

for and encourage understanding. Meetings with children should occur in circumstances that are comfortable for the child (rather than for the lawyer).

Children as witnesses²²

Historically, the rules of evidence have treated children's testimony as inherently unreliable. This is now recognised in developmental terms as unsound. Assumptions based on concerns with regard to memory and susceptibility to influence and suggestion are being re-examined in the light of improved knowledge and understanding.²³

A child's capacity and the reliability of their evidence are also related to how competently they are questioned, and involve a consideration of each child's specific circumstances.

There is no reason to assume that children are inherently less honest than adults. Many problems for children as witnesses stem from the fact that children are not familiar with court processes, the complexity of the language used, and with the stressful (and sometimes harmful) nature of cross-examination.

We now recognise the value of the use of video testimony, which is increasingly being used in Australian courtrooms. It is also increasingly being acknowledged that a child's emotional state, and the consistency and completeness of their evidence, are affected by the way they are questioned. While judges also have a role in controlling children's >>

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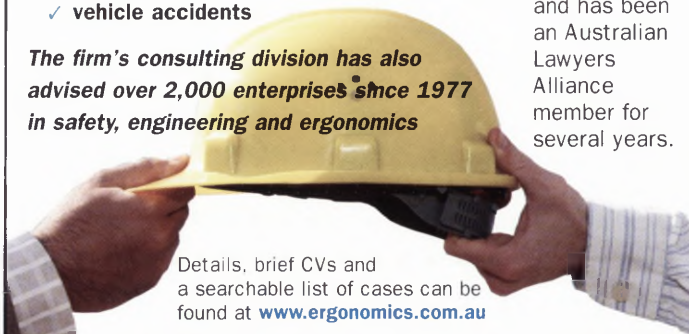
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experiences as witnesses, there needs to be greater awareness by lawyers of the need to adapt their style when dealing with children.

Lawyers should use appropriate language and style when dealing with child witnesses. Make sure that the child is familiar with the process. Attend training that will develop understanding of the linguistic and power differences, and develop appropriate communications skills.

This article addresses just a few of the steps that children's lawyers and advocates can take to make the Australian legal landscape a more child-friendly and inclusive environment. Fundamental systematic and structural change in the Australian legal system is also required. ■

Notes: **1** The Convention was adopted by the United Nations General Assembly on 20 November 1989 and came into force on 2 September 1990. **2** Australia signed the Convention on 22 August 1990 and, ratified it on 17 December 1990. It came into effect on 16 January 1991. **3** Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997) accessed at <http://www.austlii.edu.au/au/other/alrc/publications/reports/84/ALRC84.html> on 21 December 2009. **4** United Nations, 'The Human Rights Based Approach to Development Co-operation Towards A Common Understanding Among UN Agencies', accessed at http://www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf on 27 November 2009; John Tobin, 'The development of children's rights', in G Monahan and L Young (eds), *Children and the Law in Australia*, Butterworths (2009) pp23, 39. **5** Committee on the Rights of the Child, General Comment No. 5, *General Measures of Implementation for the Convention on the Rights of the Child*, CRC/GC/2003/5 at [12] cited in John Tobin, 'The development of children's rights', in G Monahan and L Young (eds) *Children and the Law in Australia*, Butterworths (2009) pp23, 43. **6** John Tobin, 'The development of children's rights', in G Monahan and L Young (eds) *Children and the Law in Australia*, Butterworths (2009) pp23, 43. **7** *Ibid*, pp23, 45. **8** John Tobin, 'Beyond the Supermarket Shelf: Using A Rights Based Approach to Address Children's Health Needs' (2006) 14, *The International Journal of Children's Rights*, pp275-306. **9** Terry Libesman, 'Indigenous Children and Contemporary Child Welfare' and John Tobin, 'The development of children's rights', in G Monahan and L Young (eds), *Children and the Law in Australia*, Butterworths (2009), pp329, 344 and 23, 45. **10** 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*, Can

Print Communications Pty Ltd, Canberra, 2003, cited in John Tobin, 'The development of children's rights', in G Monahan and L Young (eds), *Children and the Law in Australia*, Butterworths (2009), pp23, 45. **11** James McDougall, Tiffany Overall and Peter Henley, 'Seen and Heard revisited', (2008) 92 *Reform* 9. **12** *Ibid*. **13** Nicola Ross, 'Legal Representation of Children', in G Monahan and L Young (eds), *Children and the Law in Australia*, Butterworths (2009), pp544, 51. **14** Geoff Monahan, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) 8(2), *Queensland University of Technology Law and Justice Journal*, p393. **15** Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997) at 13.123, accessed at <http://www.austlii.edu.au/au/other/alrc/publications/reports/84/13.html#Heading330> on 21 December 2009, citing Berry Street *IP Submission 159*; Alice Springs Focus Group, 19 July 1996. **16** Geoff Monahan, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) 8(2), *Queensland University of Technology Law and Justice Journal*, p392. **17** Nicola Ross, 'Legal Representation of Children', in G Monahan and L Young (eds), *Children and the Law in Australia*, Butterworths (2009), pp544, 552. **18** Geoff Monahan, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) 8(2), *Queensland University of Technology Law and Justice Journal*, pp392, 393. **19** Summarised from Lani Blackman, *Representing Children and Young People: A Lawyers Practice Guide* (2002), p4. **20** Judy Cashmore, 'Child Witnesses' in G Monahan and L Young (eds), *Children and the Law in Australia*, Butterworths (2009), p523. **21** Lani Blackman, *Representing Children and Young People: A Lawyers Practice Guide* (2002), p44, citing Poole and Lamb, *Investigative Interview of Children*, p168. **22** Judy Cashmore, 'Child Witnesses' in G Monahan and L Young (eds), *Children and the Law in Australia*, Butterworths (2009), pp523, 524. **23** *Ibid*.

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