

Reconceptualising child rights

Guest author series



Children's voices in a legal context

by Dr Georgina Dimopoulos

The dominant conception of 'the child' in Australian family law has been of a vulnerable, passive 'object of concern' and protective adult intervention. In this paper, I seek to reconceptualise children as active legal subjects with distinct rights and interests. I argue that children themselves can, and should, play a meaningful role in decision-making about their own best interests. The key question I am asking is: how can we more fully embrace children's right to express their views and to be heard in family law proceedings?

Children's best interests and children's rights under the Family Law Act

The Family Law Act 1975 (Cth) is a primary piece of legislation affecting children's lives in Australia. Part VII of the Family Law Act deals with children's matters, including the making of parenting orders and orders relating to the welfare of children. The principle of 'the best interests of the child' as guides decision-making under Part VII.

In 2012, an 'additional object' was inserted into the objects of Part VII of the Family Law Act: 'to give effect to the Convention on the Rights of the Child'. Its purpose is to confirm, in cases of ambiguity, the obligation that decision-makers have to interpret Part VII consistently with Australia's obligations under the United Nations Convention on the Rights of the Child, the 'Convention'.

The Full Court of the Family Court of Australia has said that the provisions of the Convention 'are not enshrined as operative principles of law' in Australia, and that 'the Convention is applicable only to the extent that it has been incorporated by specific provisions of the Family Law Act'.

Even so, this addition is important, because it reflects an express legislative commitment to make the Convention relevant to judicial decision-making in Australian family law.

Children's right to express their views and to be heard

Article 12(1) of the Convention, gives children who are capable of forming a view the right to freely express their views in all matters affecting them, with those views being given due weight in accordance with the child's age and maturity. Article 12(2) gives children the opportunity to be heard in judicial and administrative proceedings affecting them, either directly or through a representative or appropriate body.

Relevant Articles from the United Nations Convention on the Rights of the Child

Article 12: Children have the right to express their views freely in all matters affecting them.

The UN Committee on the Rights of the Child has emphasised that the best interests principle in Article 3(1) of the Convention and the child's right in Article 12 have 'complementary roles': the former 'aims to realise the child's best interests' and the latter 'provides the methodology' for hearing the child's views and including those views in the assessment of the child's best interests.

But the issue of children's participation in family law decision-making in Australia remains highly contested. The concern, put simply, is that involving children in proceedings exposes them to conflict and harm, particularly in the context of parental separation. This concern is reflected in the provisions of the Family Law Act that regulate children's participation in Part VII proceedings.

Children's participation in Part VII proceedings

When a court is determining what is in a child's best interests in Part VII proceedings, it must consider a list of 'primary considerations' and 'additional considerations'.

The first additional consideration reflects the child's right under Article 12 of the Convention: the court must consider any views 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 views.

The court can inform itself of the child's views :

- by having regard to a family report
- by making an order for independent legal representation of the child's interests or
- 'by such other means as the court thinks appropriate'.

But nothing in Part VII of the Family Law Act allows the court or any other person to require the child to express his or her views in relation to any matter. Children can't give evidence or be present in court during proceedings, without the court's permission.

A recent study by the Australian Institute of Family Studies into the experiences and needs of children and young people whose parents had separated and had accessed the family law system found that most were 'dissatisfied with either their level of input, or awareness, of the decision-making process or the final parenting arrangements'. The key message of this study was 'the loud and clear calls from participating children and young people to "give children a bigger voice, more of the time"'.



So how can we ensure that children get 'a bigger voice, more of the time' in Australian family law proceedings?

Reconceptualising the child, reframing the debate

To more fully embrace children's right to express their views and to be heard in Australian family law proceedings, we need to reframe the debate: from 'protection from participation' to 'protecting.[children] in participation'. We need to appreciate that a child's best interests can in some cases be served by enabling the child to participate, meaningfully and actively, in the determination of those best interests.

But reframing the debate comes with a major conceptual challenge. The dominant conception of 'the child' in Australian family law has been of a vulnerable, passive 'object of concern' and protective adult intervention. The challenge lies in reconceptualising children as active legal subjects with distinct rights and interests, and so re-thinking the role that children themselves can, and should, play in making decisions about their best interests.

The Australian Law Reform Commission, in its final report upon its inquiry into Australia's family law system, recommended the establishment of a Children and Young People's Advisory Board, to provide advice and information about children's experiences of the family law system to inform policy and practice. This Advisory Board would enable children to participate in the 'governance', 'development and oversight' of the family law system more broadly, to contribute to more child-centred family law policy and practice. Such a body would go some way towards encouraging adult decision-makers to understand issues from children's own diverse perspectives.

Children as 'active shapers of their own lives'

In 2004, the Family Court of Australia said (W and G (2005) FLC 93-247, 80,053 [108]. No 1) that:

The law relating to children in this country now unequivocally and unapologetically treats children as active shapers of their own lives and able to make decisions independently of adults.

Over 15 years on, it would be optimistic, even naïve, to claim that this currently is, or has ever been, the case in Australian family law.

But my humble hope is that it might be one day, because as John Eekelaar has argued ...

...no society will have begun to perceive its children as rights holders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views and towards addressing them with respect.



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Prior to joining Swinburne, Georgina was a Teaching Fellow at Melbourne Law School and a sessional lecturer and subject co-ordinator at La Trobe Law School, and a research assistant to academics at Melbourne Law School, the Melbourne School of Government, RMIT University and the Monash Department of Business Law and Taxation.

Georgina was admitted to legal practice in 2010 and practised at Allens Arthur Robinson (now Allens Linklaters) in Commercial Litigation and Dispute Resolution and in Mergers and Acquisitions. Georgina has worked as Senior Associate to the Honourable Justice Emilios Kyrrou at the Supreme Court of Victoria, and as a Senior Legal Policy Officer in the Civil Justice Division of the Victorian Department of Justice and Community Safety. She has also been engaged as a legal consultant to the Victorian Family Law Pathways Network and Women with Disabilities Victoria.

Georgina has completed a PhD at Melbourne Law School. Her thesis developed a theory of children's decisional privacy in the context of Australian family law. She also holds a Bachelor of Laws (First Class Honours) and a Bachelor of Arts (Media and Communications) from the University of Melbourne.

Further readings

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Parkinson, P. & Cashmore, J. (2008) *The Voice of a Child in Family Law Disputes* Oxford University Press p. 219

Tobin, J. (2015) 'Understanding Children's Rights: A Vision beyond Vulnerability' *Nordic Journal of International Law* 155, 171, 176, p.84.