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Ross, Nicola M. (2014). Different views? children's lawyers and children's participation in protective proceedings in New South Wales, Australia. Originally published in International Journal of Law, Policy and the Family Vol. 27, Issue 3, p. 332-358

Available from: <http://dx.doi.org/10.1111/ajag.12087>

This is a pre-copyedited, author-produced PDF of an article accepted for publication in International Journal of Law, Policy and the Family following peer review. The version of record Nicola M. Ross, "Different Views? Children's Lawyers and Children's Participation in Protective Proceedings in New South Wales, Australia" International Journal of Law, Policy and the Family (2013) 27 (3): 332-358 is available online at: <http://dx.doi.org/10.1093/lawfam/ebt009>

Accessed from: <http://hdl.handle.net/1959.13/1053423>

DIFFERENT VIEWS?

CHILDREN'S LAWYERS AND CHILDREN'S PARTICIPATION IN PROTECTIVE PROCEEDINGS IN NEW SOUTH WALES, AUSTRALIA

ABSTRACT

Fierce debates about the appropriate role of children's lawyers in child protection have erupted in Australia and overseas since the 1990s, with different models of legal representation for children incorporated into legislation. Given the pace of change and the variety of arrangements in Australia, there has been surprisingly little research into how lawyers think about these roles or put them into practice. This article examines how children's lawyers in the NSW Child Protection system think about their practice and formulate their approach to the representation of children, with reference to their contact with children. It reports on the findings of a qualitative study undertaken in 2006 that asked 21 lawyers how they work with children and how they think about children's participation. Lawyers reported that they represented children in very different ways, reflecting ambiguity about how to interpret these roles and involve children as clients or the subject of best interests representation. The author argues that an integral aspect of the lawyers' role is to ensure that children are heard by the court, but that more needs to be done to ensure this is carried out in practice.

INTRODUCTION

One of the most contentious responsibilities of modern governments is protecting children who are at risk of abuse and neglect from their families. In Australia, the care and protection of children is a State and Territory responsibility and children's lawyers currently perform an

important function as part of these processes. Children's lawyers are made available to represent all children who are the subject of child protection proceedings in some states, such as New South Wales, and are appointed at the court's discretion in others. Legislation and practice standards define a different role for children's lawyers in each State and Territory, to represent children and their interests and to assist the court to determine children's care arrangements (Victorian Law Reform Commission, 2010: 488-9). These roles require lawyers to recognise children's rights to participate in processes for making decisions about children's care, which aligns with recognition of the importance of children's participation in the *National Framework for Protecting Australia's Children 2009-2020*, endorsed by the Council of Australian Governments (Commonwealth of Australia, 2009: 12).

A study of the development of these roles reveals significant tensions. In Australia, we have largely moved on from debates about whether children require separate legal representation of their interests when decisions about their care are being made. We now recognise that children's interests may differ from those of their parents and also may not be adequately represented by state authorities. Current debates reflect tensions caused by the intersection of different perspectives: a welfare discourse underpinning the child protection system; the adversarial nature of child protection proceedings; and recognition of children's human rights, including children's right to express a view and be heard as part of decision-making processes. Although legal processes are designed to protect children, they can marginalise and pose dangers to children, by damaging children's family relationships and physical and psychological wellbeing (King and Trowell, 1992; Firestone and Weinstein, 2004; Humphreys and Kiraly, 2012). Legal processes designed to ensure children's participation may also pose dangers for children (Warshak, 2003).

These tensions have caused commentators to question the framing of child protection as a shared socio-legal enterprise and to ask if lawyers are the best professionals to carry out the

role of children's advocate (Bilson and White, 2005; Walsh and Douglas, 2011; Sheehan, 2012). There is general agreement that the system needs to incorporate more non-adversarial dispute processes and to take account of children's views. Lawyers are not the only professionals who have responsibility for children's participation when decisions are made in child protection matters; social workers also have an important role (Bell, 2011).¹ For instance, an innovative participation pilot in Israel provides options for children's participation in family law matters that include meeting with 'participation social workers' and judges (Morag, Rivkin and Sorek, 2012).

However, lawyers have particular responsibilities associated with legal representation of children or their interests. Debate in the literature focuses on whether lawyers should represent children's welfare, using a 'best interests' model of representation or follow children's instructions, on a direct model (Family Law Council, 2004; Monahan, 2008). The age at which children can and should 'instruct' lawyers has also been contested. This article does not seek to address all of these questions, but instead addresses an important and related question – how do lawyers approach these roles and their contact with children? An improved understanding of practice provides the opportunity to move beyond theoretical debates. The article outlines the responsibilities of children's lawyers to support children's participation and considers previous research, before reporting on the research design and findings.

CHILDREN'S LEGAL REPRESENTATIVES UNDER NSW CHILD PROTECTION LEGISLATION

In New South Wales, the *Children and Young Persons (Care and Protection) Act 1998* (the Act) incorporates children's right to participate in decisions as a key principle.² Extensive state intervention into family life heightens concerns to ensure procedural fairness in these proceedings for all participants. Children's right at international law to be protected from harm coexists, first, with their right not to be separated from their parents unless this is carried out through the correct application of law and is in their best interests and second, with their right to express a view and be heard when decisions are made about their futures.³

These protection and participation rights are complementary. If children are to be protected from abuse, they must be able to speak about their concerns, and feel confident that their concerns will be listened and responded to appropriately (Willow, 2010). The Act imposes obligations on the Director-General of the Department of Community Services (now Family and Community Services) and on children's lawyers to ensure children's protection and participation rights are upheld in the courts, in this sensitive and complex area.⁴ Legal representation is important as children's direct involvement through giving evidence is rare. Under s 96 they are not required to give evidence or attend the court but may be required to leave the court under s 104, where the prejudicial effect of excluding them is outweighed by the psychological harm that may be caused to them if they observe proceedings. There are limited resources and no specific legislative provision for children's wishes or views to be included in independent expert reports that come before the court as evidence.⁵

The decision to introduce direct representation in 1998, along with age-based presumptions about children's competence to instruct, recognised children's right to participate in decisions made about their futures (Parkinson, 2001: 260). Currently, children are presumed to be capable of instructing a 'direct legal representative' at 12 years of age and are represented by an 'independent legal representative' if under this age. Generally, lawyers do not represent children as part of a team with a social worker or guardian ad litem. Under s 99D(a) a direct legal representative ensures that children's views are placed before the court and that all relevant evidence is adduced and tested. They act on the child's instructions. Independent Legal Representatives are best interests representatives who do not act on the child's instructions. Section 99D(b) sets out their role: to interview the child after appointment; explain their role to the child; present evidence of the child's safety, welfare, wellbeing and wishes to the court; cross-examine the parties and witnesses, and make submissions based on their assessment of the child's best interests. Further detailed guidance about how to

implement both roles is provided by Legal Aid NSW Practice Standards and Representation Principles for Lawyers who Represent Children, issued by the NSW Law Society (Legal Aid NSW, 2012; Law Society of NSW, 2007). These roles are carried out primarily by lawyers in private practice who are appointed to Legal Aid panels; a smaller number of in-house legal aid lawyers may also represent children.

Even though the legislation, practice directions and representation principles provide guidance, there is still room for discretion in the manner in which lawyers carry out these roles. At first glance the Act and models for representation are highly supportive of children's participation, but the author argues that the context of practice undermines this promise.

CHILDREN'S RIGHT TO BE HEARD AND MODELS OF REPRESENTATION IN CHILD PROTECTION

The Act incorporates as a key principle Article 12 of the U.N. *Convention on the Rights of the Child* (the Convention). This right gives children who are capable of, and wish to express a view about arrangements for their future care, the right to do so and to have this view taken into account in decisions made by the courts according to their age and maturity. In 2009, the United Nations Committee on the Rights of the Child (the UN Committee) released a General Comment on the Child's Right to be Heard in which it described practices to promote the implementation of article 12 as 'participation' (UN Committee, 2009: 5). The General Comment spells out important preconditions of children's right to be heard: adults must provide environments that enable children to exercise their right to be heard and child-friendly information about options, possible decisions to be taken and their consequences. The adults need to inform children of their right to express a view, of how their views will be expressed and taken into account in the decision-making process and of the weight given to their views. Adults need to prepare children for proceedings, listen to children and take their views seriously. In order to give weight to children's rights to protection and participation,

professionals such as children's lawyers, need to have sufficient knowledge and understanding of the decision-making process and experience in working with children.

Article 12 is a general principle of the Convention; this principle regarding participation emphasises children as active agents in their own lives. The 'best interests' principle found in article 3 is another general principle, which ensures children's best interests are a primary consideration when courts make decisions about children. Unlike article 12, the best interests principle implicit in article 3 is derived from children's vulnerability and dependency on adults. Despite this difference, the Committee stressed that there can be no correct application of article 3 if the components of article 12 are not respected. These two general principles are reflected in the two models of representation for children under the Act.

Direct models of representation give children similar, but not always the same, rights in legal proceedings to adults. Despite the model's presumption that the client instructs the lawyer, lawyers representing children in child protection must take account of the fact that clients are children – and that representing a child may be very different to representing an adult. Many children who are the subject of child protection proceedings come from backgrounds that are socially and economically disadvantaged. They may have lower social competence, poor school performance, impaired language ability and mental health problems (Australian Institute of Health and Welfare, 2009: 157). Children, as the subject of proceedings, cannot be required under the Act to give evidence or to attend court. Nevertheless, the right to participate in proceedings through their lawyer is emphasised when a child is represented directly.

PREVIOUS RESEARCH ABOUT CHILDREN'S LAWYERS IN CHILD PROTECTION

Prior research considering how lawyers work with children in child protection is limited, but profound. It suggests that lawyers do not always seek to develop professional relationships

with children and may be constrained by both protective concerns and negative views of children's need and wish to participate. Research from the United Kingdom and Australia suggests lawyers may be influenced by the welfare discourse operating in child protection. Masson and Winn Oakley in their 1999 study in England and Wales of tandem representation in child protection proceedings found that solicitors spent little time with children and worked in ways which excluded the possibility of hearing from and taking instructions directly from children even though technically they remained the child's lawyer (Masson and Oakley, 1999). In the dual representation (tandem) system operating in England and Wales, a team approach operates: representation includes a Guardian *ad litem* (GAL) (usually a qualified social worker) and a solicitor of the GAL's choosing. In the study, solicitors' practice varied according to their approach to issues such as children's capacity. Although most solicitors met with children, they rarely formed strong professional relationships with them. Solicitors tended to assume that children had neither the right nor the need to know what was happening in proceedings. There was little appreciation of children's needs for information about legal processes so that they could contribute to decision making. The researchers noted with concern the variations in representatives' practices, particularly in relation to how much they told children about their role and about court processes.

A study of the much less frequent appointment of separate representatives in contested private family law proceedings in England and Wales (Douglas, Murch, Miles and Scanlan, 2006: 200-201) sampled children's and solicitors' views about the value to children of being separately represented by guardians and specialist children's lawyers. The authors concluded that guardians and children's lawyers could work together and combine their skills for quite different but important roles: to ascertain the voice of the child to assist in the court's decision making; to assist to moderate the intractability of parental disputes; and to provide children with a source of reliable information and support during the proceedings to help

them cope with the associated anxieties and uncertainties (a ‘passage agent’ support role). They observed that children needed a professional (this could be a guardian or lawyer) to establish a positive trusting relationship with them, explain things clearly and check that they were understood and to keep them informed as the litigation developed.

Cashmore and Bussey’s 1994 study of child protection proceedings in NSW found lawyers generally failed to explain court processes to children so that children could participate and make sense of what was happening (Cashmore and Bussey, 1994: 333). Lawyers appeared to have an underlying attitude that children did not need to understand court proceedings and most lawyers did not believe that children had a right to be present or should be present at court. Where they had thought about it, lawyers generally underestimated children’s wishes to be present and to understand what was happening. It appears that even after the commencement of the 1998 Act, lawyers maintained differing interpretations of section 99(3) which imposed a rebuttable presumption of capacity for children over 10 years and prescribed direct representation for them (McLachlan, 2003: 8).

Other relevant research suggests that children’s lawyers and other professionals approach participation in a way that reflects differing values, assumptions and uncertainties about children and participation (Parkinson and Cashmore, 2008: 92-106; Archard and Skivenes, 2009). This reflects the influence of dominant discourses to be found in the jurisdiction in which the lawyer works. It also reflects the extent to which lawyers value children’s views as being as legitimate as adults’ views, as legitimate knowledge of the world, and the extent to which lawyers are able to put themselves in children’s shoes (Smart, 2002). This may be difficult, as lawyers may not only see individual children through a peculiarly ‘legal’ lens, and one which is culturally and historically specific, but may, like many adults, project onto individual children their memories of their own childhood (Smart, citing Young, 1997). This raises questions about how lawyers perceive participation, including: what does

‘participation’ mean to lawyers in the context of a jurisdiction in which a protective ‘welfare’ discourse is dominant? How is participation understood by lawyers in a ‘protective’ jurisdiction when acting on instructions or representing children on a best interests model? There is a lack of empirical research that considers how lawyers represent children in child protection jurisdictions, either in Australia or overseas.⁶ It is this gap that the research attempts to address.

THE RESEARCH STUDY

This qualitative research was undertaken with 35 children’s lawyers who represent children in family law, child protection and juvenile justice matters; 21 of these lawyers answered questions about representing children in child protection proceedings. It considered how children’s lawyers understood their role in relation to children’s participation in legal decision-making processes. Given the limited number of lawyers involved, it is not possible to generalise from the results of the study, but qualitative in-depth research of this kind has real strengths in providing deeper insights into participants’ worldviews. It can shed light on processes, complexities and multiple realities of professional relationships (Smart, Neale and Wade, 2001: 175). The study reveals the variety of ways in which lawyers construct their practice – and considers what this might mean for children’s involvement in child protection proceedings through lawyers who represent them or their best interests.

Methodology

The study is based on qualitative data collected through in-depth semi-structured interviews.⁷ New South Wales provides a particularly valuable site for contrasting lawyers’ approaches to children’s involvement in child protection proceedings, given its age-based presumptions that require lawyers to implement different forms of representation.

The sample allowed a detailed comparison between the various approaches and practices of these lawyers, and the development of theoretical propositions about their practice (Silverman, 2005). Ten of the 21 children's lawyers were accredited specialists; 7 were accredited family law specialists and 3 were accredited children's law specialists.⁸ A further 4 lawyers had a social science or research degree. They were very experienced lawyers – only 2 had less than 5 years experience and 16 had 12 to 26 years experience. While it cannot be claimed that the lawyers who were interviewed comprise a representative or randomised sample, an attempt was made to include male and female lawyers, specialists, and those who practise across metropolitan, regional and country areas.⁹ The interviews took place between April and December of 2006. The research was carried out when the legislation included a presumption that children of ten years and over had capacity to instruct: amending legislation commencing early in 2007 increased the age of this presumption to 12 years.¹⁰

Interviews explored lawyers' knowledge, beliefs, approaches and practise in relation to their role and to children's participation in child protection proceedings. Their perceptions and implementation of the two models of legal representation were also a focus of interviews. The interview format included two vignettes concerning children, asking lawyers how they approach their practice. They were also asked to discuss, in their own words, a recent matter or case involving a child. The interviews were transcribed and transcripts analysed and coded using the Nvivo7 qualitative data management software program (Bazeley, 2007).

RESEARCH FINDINGS

How did Children's Lawyers define and approach children's Participation?

Lawyers meant different things when they referred to participation. Their definitions were coloured by their perceptions of children's capacity and their beliefs about whether participation was a good thing for children. For instance, Liam's¹¹ belief that all children

were damaged and aligned with parents meant that although he went through the process of talking to children, he believed they were incapable of participating in any meaningful way. Peter thought more positively about children's capacity: he associated participation with attendance at court for older children and about being informed about core processes and having input into outcomes for younger children. Although some lawyers focused on the *outcome* of having children provide input on significant issues, others defined it as a *process*. On the whole, lawyers believed that children should be given opportunities to participate, but qualified this by reference to age (the older you are the more you should have).

Most lawyers expressed a preference for indirect participation through the lawyer that did not involve the child coming to court, although six of the 13 lawyers who provided case studies explained that they encouraged children to attend court if children expressed an interest in doing so. Emma's support for children's attendance at court was unusual:

Half the time magistrates don't even know who they're dealing with. I think you've actually got to see the person...And look them in the eye when you're making these decisions... my form usually is to have them come here at one stage to show them the building and put me in a context. Who am I? ...who's a lawyer and what do you do?

Our legal system generally allows parties to proceedings to be heard primarily through their lawyers, but adult clients observe proceedings and as such have a greater level of participation. If children are not present at any stage in proceedings, their participation is significantly different to adults, even when they are represented directly. As a result the lawyer has greater responsibility for children's participation when they represent children.

Lawyers gave two primary reasons why children's participation was important, related to the child's central role in proceedings and to better outcomes. Rose commented:

...the evidence of the last 20 years of kids in the care system is that even kids who are removed often don't end up much better than they would have had they stayed with their family. So really empowering children to know that they can have an impact on the decisions that are being made long term for them (is important)...children will often say, "Well I want to make sure Mum and Dad can get my school reports and my school photos and things."

Little decisions that children can comment on and have a role in determining are hugely important.

Few lawyers made a connection between the information they provided and children's understanding of their options in relation to participation. Mark's comment was unusual:

I don't think [children] have any [expectations]... I don't think they've got any idea about models of participation or even procedures. So it's really up to the lawyer ... to shape the child's expectations. So you would say, 'I'm here, my role, unless you really feel strongly about it there's no real reason why you should be in the courtroom, I'm happy to keep you up to date'.

Lawyers may consciously or unconsciously convey to children what participation a 'reasonable' child client might expect (Diduck, 2000: 270). Even though research indicates that some children strongly favour speaking with judges, being present at court during proceedings or visiting the court, lawyers' and judicial attitudes may discourage their attendance (McCausland, 2000: 80, 105; Parkinson, Cashmore and Single, 2007; Birnbaum, Bala and Cyr, 2011). Masson and Oakley suggest that young people's exclusion from proceedings may contribute to their disengagement from the process (Masson and Oakley, 1999: 114-5).

Challenges associated with the models of representation

Best Interests representation

Lawyers said best interests representation was very different from traditional representation and was challenging because there was no one instructing the lawyer. Although the legislation, practice standards and representation principles are clear in their intent, certain aspects of the roles that are crucial for children's participation were problematic for lawyers. In characterising their role as a best interests representative (Independent Legal Representative), some lawyers emphasized their duties to the court, but made limited or no references to the need to facilitate children's participation. For example, Ian described the purpose of the role as:

Protecting the children and trying to assist the court in placing them in something that's going to nurture them and protect them.

Although the principles underpinning this model emphasise children's protection, vulnerability and dependence on adults, it also requires lawyers to ensure children's expressed wishes are before the court. In describing the role, some lawyers emphasised the value of having an independent person involved in the proceedings, with a focus on the child's welfare but overlooked the need to ensure the child had been given the opportunity to express a wish, and to put this before the court.

(Not) Meeting with children

Not all lawyers met with children under the age of 10, despite the obligation in the legislation to do so, and practice standards that required them to meet with school aged children.¹² Three lawyers made it clear that they did not normally meet with children who had not yet turned 10; two commented that they were only obliged to meet with children they represented directly.¹³ These varied approaches suggest a need to clarify the reasons why lawyers need to meet with children above school age and a need to develop accountability mechanisms to support performance of this obligation. Lawyers who did not meet with children explained this by reference to protective concerns, or because the lawyer could not see the need to meet such children. Liam explained his decision not to meet with children under the age of 10 in case this caused further harm to already damaged and vulnerable children. Laura limited her meetings with children, or made sure they occurred very late in the process of the proceedings, as a result of similar concerns. Bill, however, did not think it was necessary to meet children under 10 and relied on the Department of Community Services (now Human Services) to ensure children's best interests were met. He asked:

[I]f the child's not capable of giving you instructions, what are you doing interviewing them?

Concerns about systems abuse and the vulnerable nature of children under the age of 10 years also led some lawyers to limit their meetings with this group.¹⁴ Rose said:

All the children we are getting in here are victims of abuse and neglect in some way...they really are at great risk of systems abuse...mostly I would see children once if they are under ten....

Although lawyers commented that they did not meet with children under five years as they were “scared they would do more harm than good” and “did not want to upset the child”, several said they liked to see younger children as it was “good to put a face on” and “have a sense of the child that you are representing”.

Provision of information, opportunities and choices to participate

Children’s ability to participate depends on whether they are provided with information, opportunities and choices about participation. Although lawyers said that they provided children with information and choices about participation, their responses indicated that they were much more likely to meet with and offer information to older children who were instructing them. Apart from noting that they met less with children they represented on a best interests model, some lawyers said they kept children they represented directly a bit more “in the loop” in comparison to those whose best interests they represented. Lawyers can scaffold younger children’s understanding of proceedings and enhance their ability to participate, if they develop a trusting relationship with them (Taylor, Gollop and Smith, 2000). However, lawyers suggested that limited time and concerns about systems abuse limited their ability to develop relationships with children. This was put most clearly by Ian:

Taking time is really hard...a lot of times you would only meet with the children once maybe twice...I don’t know if that’s a lot from the kid’s perspective, that they would actually have much of a relationship.

(Not) Connecting children's views to determination of their best interests

When lawyers were asked to describe their best interests role, slightly more than half mentioned ensuring children's wishes were put before the court. Lawyers made few references to the need to consider a child's expressed wishes when assessing what was in their 'best interests'. Peter was an exception. He said:

Given the child is 8 or 9, and has been able to articulate clearly why they want to return, I will explain to the court that: 'the child's wishes are this', and if return is not possible I will stress contact or some other arrangement to take into account the strong wishes of the child. So the orders of the court take into account the evidence presented by the Department and the parents, but I would stress to the court as a best interest rep, that the child's wishes still have to be taken into account, and must guide how the ultimate orders are formulated.

Peter and Emma connected younger children's expressed wishes to their role as advocates for their best interests. This differentiated their role as best interests representative from the role of the Department of Community Services, who has a key role in representing children's welfare. Although lawyers often saw themselves as part of the system of 'checks and balances' they did not always emphasise children's expressed wishes as part of their determinations. For instance, Susan said:

[K]ids can get lost in the system, so you need somebody who knows those sorts of background issues— because the Department just rocks up and says, "We are the Department of Community Services. Trust us. Everything will be OK." That's just pie in the sky stuff. They don't have the resources to be able to investigate. They don't have the resources to be able to finalize things appropriately and so someone needs to be there to keep them in check.

There is often no independent expert report about children's wishes: this increases the need for lawyers representing younger children to provide opportunities for children to express their wishes. If children have wishes but these are not put before the court by their independent legal representative, the court may not hear children's wishes at all. This may lead lawyers and the court to overlook the importance of some issues to children that are not seen as central by adults.

Direct representation

Lawyers expressed most concern about representing children on instructions, even though this group (at this time children over the age of 10) comprise less than one-third of children for whom care applications are made (AIHW, 2011: 35). Some lawyers reported great difficulty in implementing a direct role with children aged from 10-14 years and others reported difficulty implementing direct representation generally with children in this jurisdiction. Ian, Mark and Bill, for instance, regarded their role as primarily to assist the court, despite the model of representation. Mark commented:

The big picture would be, you're there to assist the court. You're there to ask questions that should have been asked by other people; it's like a safety net... Ultimately the court is there to do the job of what's in the best interest of the children and you play a complementary role to the magistrate.

Lawyers who balanced a focus on duties to the court and the child emphasized the key importance of developing rapport and a professional relationship with children. Trevor said:

In either role it is important to meet the child, to listen to the child and to obtain the child's views and wishes on these issues that are before the court...

Several lawyers, like Trevor, preferred the best interests model of representation. They suggested that as children got older they were essentially represented on instructions, with their views carrying more weight. They preferred the best interests model, but on the condition that experts helped to determine children's views, and the weight to be given to them, and that better training provided the 'checks and balances' lawyers needed in this role. However, apart from the fact that independent expert reports are usually not available, and training is minimal, this study and research in family law has shown that some lawyers do not meet with children whose best interests they represent (Hemphill, 2012) or meet with them less often than children they represent directly.

Seven of the 13 lawyers who answered all the questions about care proceedings combined a focus on their duties to the court and to children. They believed that to be effective as children's lawyers it wasn't enough to be a good advocate; lawyers had to be able to develop rapport with children and to see things from children's perspectives. They needed to have a good understanding of the issues that impacted on children. Rose said

The biggest thing is the commitment to building a relationship with the child and paying some attention to the needs of that child.

Lawyers who saw their relationship with the child as central to their work generally believed such a relationship could be accommodated within either model of representation. These lawyers reflected on how they worked from the perspective of the children they worked with. This approach encompasses an 'ethics of care' or relational model of ethics, that places children at the centre of any work that lawyers do with them. Vivienne said the key to children's participation was:

[It is] access to their lawyer. You're not just seeing them in one conference. So building up a rapport with a child ... you've got to be a real lawyer to them. They are your client and when they need to contact you, there's something going on, you have to see them.

Despite the strong commitment of some lawyers to children's participation, lawyers struggled with the reality of direct representation for children in this jurisdiction.

Provision of information, opportunities and choices to participate

Lawyers indicated that they provided children with information and choices about participation. However, this was not always borne out by their responses to a vignette where they directly represented an 11-year-old boy who asked to speak to a magistrate about his desire to return home to his alcoholic mother. In response to the vignette, all but two of 15 lawyers acknowledged that children had a right under the Act to be present in court. However, the gloss that lawyers put on children's attendance at court was potentially very

important. In the case studies, six lawyers said they encouraged attendance where children indicated a desire to attend, but five said they actively discouraged children from attending. For instance, Trevor advised children that going to court could be damaging; children tended to trust his advice. Rose, who was the only children's lawyer to consult research about whether coming to court could be beneficial, said:

There is some evidence that children like to eyeball the person who is making the decision. I know that children have a massively different understanding of what court is going to be, what lawyers are ... It can be quite reassuring for a lot of children to just sit and put a face on things. Some children will never want to come to court and the thought of it traumatises them....if the child has a desire to come, keeping them away will probably be more harmful than allowing them to come and just see who everyone is and see what's going on.

Most lawyers endeavoured to keep children away from sensitive parts of the proceedings, but some encouraged children's direct involvement in aspects of proceedings where children wished to be involved. This included attending court to meet the magistrate, attending a section 65 (dispute resolution) case conference or attending a hearing where final orders were handed down. Several lawyers showed children the court while explaining the legal process, but this depended on logistical issues such as the proximity of the court, and whether children visited the lawyer when the court was not in session. Magistrates' attitudes to children's attendance and lawyers' beliefs about the court environment influenced whether lawyers encouraged children to attend court. Unlike Trevor, Karl encouraged some children to attend court and to speak to the magistrate. Karl described how he encouraged a mature nine-year old boy who had been abandoned by his mother to be present to hear the final orders handed down in the Children's Court, so that the boy could feel he was part of the process. Children made comments in research into foster care in New South Wales that revealed a serious lack of information provided to them about why they had been taken into care and what planning was occurring for their futures (Community Services Commission, 2000: 46-50). Some attendance at court can ensure that children are not kept in the dark about what is happening to them.

Lawyers said that most Children's Court magistrates supported children's limited attendance at court, but two country lawyers indicated that the magistrate in their local court did not support children's attendance.¹⁵ Two regional solicitors also said they would advise the child that the magistrate in their area did not like children coming to court and might 'rouse on them for not being at school'.

Lawyers' attitudes to how much choice they allow children in guiding the lawyer's approach in court varied greatly. Emma said:

I find most lawyers get kids when you're acting on instructions through choices. So you want me to fight this hard? Do you want the Magistrate to make up their mind? Or do you want me to just let you know what's happening and you make up your mind as we go?

While a few lawyers were prepared to offer this degree of choice to children, many were not, as can be seen from lawyers' attitude to direct representation, discussed below.

Meeting with children and becoming their trusted advocate

Information by itself is not enough to ensure children have opportunities to participate. Children's access to information is enhanced through a trusting relationship with a lawyer. Although most lawyers believed they had reasonable skills to communicate with children and spoke of the need to put a child at ease and to develop rapport, they had different views of the need to develop professional relationships with children. This was influenced by their view of children's capacity, concerns about how contact with professionals could harm children and by limited time. Those lawyers who emphasised the importance of spending time to develop rapport and trust with the child, to understand their perspective, and to develop and maintain their confidence noted this required more than one meeting. They linked their relationship with a child to the ability to help them understand that they were part of the process. A good professional relationship provided an environment that allowed children to participate by expressing their views or wishes, if they so chose.

In the 13 case studies most lawyers described their relationships with older children as positive and trusting. From lawyers' perspectives, children were 'comfortable' with them, and the lawyers came to have 'good relationships' with them and got to know them 'very well' in all but three matters. In all but one case study, lawyers said they met with children at least three times, were able to determine what children's views were, and worked to ensure these were taken into account, even if they could not be fulfilled completely. This was more easily done where lawyers were confident that children were mature.

Matters were often very complex. One lawyer had safety concerns about a child, whose father had been accused of sexually assaulting her older sibling. This was a particularly difficult situation as the 11 year old girl did not want to discuss the reasons why her father had left the home, and wanted her father to return to the home. The lawyer skilfully supported her participation at court when she wished to attend, but made sure she had an option to leave the proceedings when these matters were discussed. The lawyer felt she was able to implement the child's instructions, whilst considering and implementing options for the child's safety.

Lawyers were not always able to achieve children's goals, as parents could not cope with children's behaviours, or could not care for children owing to mental health and substance abuse issues. In these situations, lawyers played an important part in explaining to children that their particular views were heard by the court and taken into account in the decisions that were made. For instance, Peter supported two children aged 9 and 12 years in speaking directly to the magistrate about their wishes to remain at home. This delayed their removal from their mother. Whilst the children were ultimately not successful in their wish to remain at home, Peter felt that being able to voice their views and be kept abreast of their situation aided the children's understanding of the matter and their adjustment to their new foster home. The children maintained contact by visits, letter and telephone with Peter over the two years it took to determine final orders and he noted how they adjusted well over time to their

new situation. Therese and Susan represented 12- and 14-year-old boys with serious behavioural and violence issues. In both cases, the boys' mothers could not cope with the boys' behaviour and the lawyer's role was to advocate for the best options available and to engage the boys in this process. Other lawyers negotiated orders for contact with siblings on children's instructions. Only one lawyer, Nicole, had a matter where a parent, in this case a father, pressured the 11, 13, and 14 year-old children to change their expressed wishes to conform to his views. Nicole's relationship allowed her to support the children's placement with their grandmother, who could support their needs, when their father could not.

In summary, the case studies suggested that even though matters were complex, many lawyers had the capacity to develop trusting relationships, at least with children they represented on instructions. However, representing children on instructions was challenging.

Working with a model that assumes the client is an adult

Common law, adversarial systems assume clients have capacity to instruct their lawyer. Traditional ideas of the client are built on binary concepts of a rational, responsible adult who can communicate clearly with the lawyer as an equal. Naomi commented on the Act's inclusion of direct representation for children:

I think that the Act was trying to cover a situation where kids weren't properly involved in proceedings concerning their lives, but in a direct representation model, you have employed the ethics and the practice standards of acting for an adult and applied that to a child. And a child of 10 hasn't got the capacity to see any further than a couple of months into their own future, because their developmental capacity is limited. They're 10. And 11 and 12 and 13 and 14...You might provide them with all the material and they might not be able to read it and you might provide them with copies of the applications and they don't understand it.

Children involved in child protection proceedings often present as developmentally younger than their chronological ages due to the disadvantages they experience in their families of origin (Blackman, 2002, 89-95). As a result, some lawyers modified the model, but others felt obliged to attempt to work with children as they would with adult clients. Vivienne said:

You have to go under instructions. ...my view is that really you must fight for what your client wants, because you must treat them like they are an adult client. I've had cases where ... I've had my concerns, but because I'm instructed I fight and I've won those cases and I often wonder whether I should have won those cases, but that's my job. I'm a lawyer first and that's what the Parliament has asked me to do through the Act, so that's what I have to do.

Despite s 93 of the Act, which notes that proceedings in the Children's Court are not to be conducted in an adversarial manner, proceedings are often hotly contested (Wood, 2008: 512-515).¹⁶ Children also instruct lawyers in the criminal jurisdiction of the Children's Court, District Court and superior Criminal Courts. However, a number of lawyers differentiated the nature of direct representation in the care protection from that in the criminal jurisdiction, noting that children in care proceedings had not placed themselves there by their own actions but were caught up in the system as a result of inadequate parenting. The implication was that participation through giving instructions was not as important or somehow different in the care jurisdiction. Emma saw it this way:

...if a child has expressed instructions, "I want to go back to Mum", that's the case you've got to run. You don't, like in a criminal case, run it on every issue. You run it on the critical issue and, the courts don't like doing that, but you still have to make the point. You pick an issue like contact or something where it advances their cause of being closer to their family. It can make a difference to the child. And you don't run it like you do in a criminal case.

One particularly difficult issue was whether it was necessary to show children sensitive documents that lawyers thought might distress them. In the case of *In the Matter of Matthias*,¹⁷ Mitchell CM held that a child over 10 years of age could not be denied access to sensitive reports when he was directly represented. Mitchell CM issued a Practice Direction in 2007 aimed at informing children about sensitive reports with the help of social scientists.¹⁸ Naomi and Trevor adapted the model.

... I think the biggest issue in care and protection is not to overdo your role in terms of consulting with the child...Some lawyers treat child representation like representing adults and show them all the material and [blaming] applications and often that's not appropriate. I'll often consult with social scientists if they're involved and see what's appropriate for that kid. (Naomi)

[W]hile you're supposed to be acting on instructions, many children don't really want to get into the nitty gritty of reading material which can itself be quite abusive...they just want to deal with issues... they want to know where they're going to live, who they're going to see; they are the fundamental issues that they want to be heard on. (Trevor)

Other lawyers showed less commitment to implementing the models in the legislation, making broad generalisations about children's limited capacity and tending to revert to a best interests model when working with children they perceived to lack capacity. Ian said:

[I]n some ways you know that the children really don't have a grasp on the issues, so you know that their instructions aren't really very clear or very legitimate I think if you can't really get instructions you're probably just then acting on their best interests and you've just got to ...give them some understanding...that people are there trying to help them.

The challenge of taking and acting on instructions

Lawyers experienced difficulty with taking instructions from children. Barriers included developmental limitations and problems with communication - often, but not always, seen in isolation from the lawyer's own communication skills and ability to engage the child in a relationship. Nicole said:

[y]ou've got all sorts of different kids that are involved. You might have older kids that have mental health issues. You've got to really be concerned about how you're communicating with them and making sure that they can actually understand you. And so you might have their carer with them or maybe even a teacher if they're traumatized because of abuse... with communication you've really got to find out who you're dealing with first and then aim it to that particular child.

Conflict between children's expressed views and lawyers' assessment of best interests caused tension for some lawyers, as Warren explained:

[The age of 10] binds our hands in ways that are even more inappropriate in care and protection than in family law because of the huge issues in their life. The child can be burnt or beaten by their parents and still want to go back and live with them, and yet they are over 10 and you have to run a case for them to be returned to their parents. It's just nonsense.

These tensions led some lawyers to effectively abandon the direct model. Rose noted:

We had a conference on Thursday and it became really obvious that a lot of people are not acting on instructions of kids over 10. They said things like, "But come on, sometimes it's not in their best interest." [They have] an ideological view, that talking to this 10 or 11-year-old child about these things is not in their interest and therefore they are not going to do it.

Lawyers expressed different views about the age at which children were generally competent to give instructions. Six lawyers thought 10 years was appropriate, eight thought 12 to 14

years or above was preferable and seven lawyers, including Mark, did not believe that this could be or should be assessed by reference to age as the sole criterion. Mark commented:

It's crazy to suggest that by a certain date they're competent and the day before they're not competent and the day after they are. It's not like the age of consent or driving a car, or voting; it really depends on the child's maturity and I think that's why the legislation in all jurisdictions talks about the child's age, level of understanding, level of maturity. I think it's a hallmark of the jurisdiction that you must treat each child individually and make an assessment for that child.

Marguilies, an American legal academic, links children's competence to lawyers' actions (Marguilies, 1996: 1477):

Competency is contingent. Lawyers do not discover competence: they make it. A lawyer representing children can enhance or injure competence.

The case studies illustrated nicely how lawyers found ways to effectively represent even younger children on a direct basis, regardless of how difficult they said this could be. Children aged 9 to 14 years were represented directly in the case studies discussed above.¹⁹

Where lawyers had concerns about children's capacity to instruct, or thought children younger than 10 years had capacity, they could rebut the presumption of capacity or incapacity under s 99(4) of the Act.²⁰ However this section was used sparingly.

Difficulties with rebutting the presumption of capacity/incapacity

Less than half of the lawyers who answered a question about this provision had actually used it. Of those nine lawyers who had used it, most had rebutted the presumption of capacity for children with significant disabilities, where there was evidence that children were functioning at a much lower level than that of the average 10-year-old. In most cases, lawyers had only made one or two applications of this nature. Several lawyers mentioned making applications for children younger than 10 years to be represented on a direct basis, as the matters had arisen shortly before the child's 10th birthday, and this was better as a matter of convenience and continuity.²¹ Only Therese had made frequent and successful applications, six in the past 18 months, to be appointed as a best interest representative for children over 10 years of age.

Lawyers indicated that they would only make such an application in the most extreme cases, as the available case law set a very low threshold of cognitive capacity and understanding for the court to recognise the child as competent.²² Some lawyers thought it was unethical to make an application to be appointed as a best interests representative for a child over 10 years, whom the Act presumed was competent to instruct them. They preferred that other people make the application. Concerns about younger children's competence, combined with limited use of s 99(4) of the Act, created significant tensions for some lawyers. The amendment in 2006 increasing the age of the presumption of capacity to 12 years is likely to have somewhat ameliorated these concerns.

McLachlan argues that where children are instructing their lawyers, the lawyer should not continue to act in their best interests where the views or instructions of the child are in conflict with the lawyers' assessment of best interests (McLachlan, 2003:8). Ian, Nicole and Neville all made comments that suggested that they led evidence in relation to their determination of children's best interests when this conflicted with the instructions of children over 10. It can be argued that as a matter of professional ethics, children's instructions should trump the lawyer's assessment of the child's best interests, where these conflict. Where there is no clear conflict, given the nature of this special jurisdiction and inquiry, the lawyer may continue to perform his or her duty to the court to adduce all evidence relevant to the proceedings that otherwise may not be before the court (Blackman, 2002:228). Although lawyers struggled with the direct model's application to children, not all reverted to a best interests model as a result of these difficulties. Variations in practice such as this are likely to be affected by the preparation, training and recompense lawyers receive for these roles. This is explored further below.

The need for training

Lawyers had access to an annual daily conference organised by NSW Legal Aid, but suggested there was a need for more comprehensive training. Lawyers generally agreed training in child development, communication with children, and in developing rapport was necessary. Effective representation of children required different skills and knowledge from those required for representing adults. Karl expressed a common view:

The hardest part is communicating with the child. And the best training they do is about communicating with the child.

Lawyers suggested that effective representation of children required a combination of innate, personal qualities and training. Lawyers commented that effective children's lawyers had natural warmth and a capacity to listen. They commented on the lack of training for lawyers working in child protection. Nicole said:

I think the two day course in Family Law was really good and effective in making you think about the representation of children and looking at it from their point of view. They've got nothing like that in Care.

Naomi commented on the link between training and practice:

In terms of developing rapport, I've been trained and I find that training invaluable in terms of tools to use, my training in developing protocols, my training in helping me to understand where my boundary is, what I won't go beyond and what to say to a kid who raises a really critical issue. How not to shut them down and leave it open, give them direction, acknowledge what they're saying. And that's all training.

Lawyers thought that experience with and exposure to children was valuable and complemented by training. Lawyers believed that funding arrangements also directly influenced the quality of the representation children received.

The need for adequate funding

Eight of the 13 lawyers who answered all the questions in child protection said limited funding influenced how often or where they saw children. Trevor said:

It's my preference to meet children at least once. Funding shouldn't be the be-all or end-all and it used to be properly funded so that you were able to go and see the children in their

family home or in foster care and I used to find that very helpful and I still try and do it. You learn a lot more about them than in an office. And I think it is one area that the whole process is deficient and because it's resource driven to some extent you don't have that opportunity.

Therese commented:

I think it's important that (children) feel free to communicate with you, but ...[y]ou're restricted because of the nature of your grant. I would like to see it extended to allow for more contact with children... I don't like the children to come to my office because most of them are a bit apprehensive. And it's a bit artificial. I like to see them at home.

There was limited funding for lawyers to travel to meet with children. If children lived far away, they had to depend on the Department of Community Services to arrange for children to visit, which did not always occur. Lawyers raised concerns that inadequate funding discouraged experienced practitioners from doing this work, and small firms from allowing employed solicitors to do it.

Specific funding allocations for visiting and spending time with children may increase the extent to which lawyers interact with children and facilitate their participation in proceedings. International studies strongly suggest that a combination of poorly defined roles, inadequate funding and inadequate training is likely to lead to mediocre child representation (Glesner Fines, 2008).

DISCUSSION

The ability to facilitate children's participation requires specific attitudes, beliefs and commitment to this goal. Douglas, Murch, Miles and Scanlan's research into private family law proceedings found that representation of children requires experienced practitioners who have 'rather special qualities in being able to relate to children'; and that 'training which increases skill and understanding can reinforce such qualities'(2006, 195).

Lawyers who emphasise children's vulnerability and the need to protect them from the legal process without balancing this with an appreciation of the benefits of participation are unlikely to offer children meaningful choices to participate. It is easy for lawyers to become

enmeshed in the overall protective orientation of this welfare jurisdiction. The other key players such as the welfare authority, the magistrate, child protection workers and experts all have aims associated with the child's safety, welfare and protection. Under s 10 of the Act the Director-General of the Department of Family and Community Services has specific responsibilities to ensure children can participate in decision-making processes, but there is limited research into how this is put into practice. The research presented in this article raises the need to develop a clear framework in NSW for children's participation, which clarifies how participation is defined and how professionals can collaborate to meet the Act's objectives in a way that is aligned with the *National Framework for Protecting Australia's Children*. In Australia the children's lawyer is in a unique position to assist the child to contribute to the court's determination. It is important that this facet of their role is not lost in the broader welfare context of the jurisdiction.

According to Parker and Evans, lawyers adopt different ethical approaches to their work, including a 'relational lawyer' and 'responsible lawyer' approach (Parker and Evans, 2007: 21). A 'relational lawyer' approach orients lawyers towards their responsibility to clients, client's relationships and to the community. In comparison, 'responsible' lawyers, focus on the needs of the court. If lawyers had a relational approach this predisposed them to value and consider children's perspectives and to work closely with individual children, regardless of the model. The research presented in this article finds, like the research carried out by Masson and Winn Oakley, that lawyers' attitudes to children and their ethical orientation to their work are powerful determinants of how they put the models into practice with children.

The model of representation exerts a heavy influence on how lawyers relate to children: lawyers may minimise contact with children under a best interests model and find taking instructions from children challenging under a direct representation model. However, the American academic Koh Peters suggests that if lawyers maintain a focus on children as

people who can lead the lawyer's advocacy to a greater or lesser extent, they can still be 'instructed' (Koh Peters, 2001: 66). She argues that there is no dividing line or 'competency switch' which determines when children are able to contribute to their own representation: each child is able to contribute either more or less. The lawyer may need to take on a more comprehensive role when counselling children, and will need to be sensitive to the pitfalls which may befall children as a result of the legal process, children's lack of experience and ongoing development. As one participant suggested, lawyers are in a powerful position to shape children's expectations. Although lawyers expressed concerns about implementing direct representation with children, the case studies suggested a significant number of lawyers were doing so in a very sophisticated manner, which led, in lawyers' views, to children being heard in the proceedings. This provides a basis for optimism about what may be achieved when lawyers directly represent children.

CONCLUSION

This research suggests that many lawyers have relational approaches that are more likely to meet children's expectations, made visible in research with children, for lawyers who listen to them and ensure their views are correctly imparted to the court (Cashmore and Bussey, 1994; Taylor, Gollop and Smith, 2000; Masson and Oakley, 1999). Relational lawyers are more likely to have the commitment and to develop skills to support children's participation in proceedings through either model. Selection processes for appointing lawyers to work in these roles need to emphasise this approach as an essential criteria.

More attention needs to be paid by policy makers to tensions that lawyers experience when they attempt to support children's protection and participation rights. Lawyers may not adhere to legislative directions about representing children, where their values, beliefs and understanding about what is best for children clash with the dictates of legislation. If lawyers

have concerns that their contact with children may be harmful they may reduce their visits, or avoid meeting children altogether. Appropriate training may ameliorate some of these concerns. What appears to be missing at present is a professional and organisational culture in which the need to support children's participation is articulated and reinforced. Methods to evaluate the overall success of programs in supporting children's participation are needed. There is room for creativity about how training, screening and funding processes might be re-envisaged to provide incentives to lawyers to develop this facet of their practice. These factors are as important as the legislation or practice standards in determining how lawyers work with children.

New training could draw on current research literature and best practice models in relation to work with children. It could be undertaken with professionals from other disciplines who also work with children in this sector. This may support collaboration between professionals from diverse disciplines, which can lead to improved outcomes for children. A solid foundation for such initiatives has been built with the development of the National framework, NSW legislation, practice standards, representation principles and child law accredited specialisation, which all recognise the importance of children's participation. The challenge we now face is how to take such initiatives forward.

¹ In NSW under s 10 of the Act.

² Section 9(2) and see s 10.

³ Articles 3, 9(1), 12 and 19 Convention on the Rights of the Child 1990.

⁴ Under s 10 the Director-General has obligations to support children's participation. .

⁵ Most Children's Court Clinic reports assess parenting capacity for children aged less than a year: Wood (2008:406).

⁶ This gap may be addressed in future by research carried out by Briony Horsfall, a PhD candidate at Swinburne University of Technology in Melbourne. She is conducting research into children's lawyers' interactions with children and how voices of children then feature in decision-making in child protection proceedings in the Victorian Children's Court. She is currently in the process of analysis and writing up her results.

⁷ 13 lawyers answered all questions about child protection and a further 8 answered some questions.

⁸ The Law Society of NSW offers specialist accreditation to experienced lawyers who complete assessment including mock files; take home exams, written assessment, a resume of work, a simulated client interview, a peer interview and a mock hearing.

⁹ The sample included 12 male and 9 female lawyers, 8 lawyers from the Sydney metropolitan area, 11 from regional areas and 2 from country areas. Two were Legal Aid lawyers and the other 19 lawyers were on specialist Legal Aid panels.

¹⁰ The *Children and Young Persons (Care and Protection) Amendment Act 2006* (NSW) commenced on 1.1.2007. The increase in age is likely to decrease the difficulty which some lawyers said they experienced when they represented children directly. Despite this change, the interview data remains relevant as it draws together broad themes about lawyers' practice that continue to have salience.

¹¹ All names used are pseudonyms.

¹² See s 99(6)(a) and (b) of the Act prior to the commencement of the 2006 amendments, and 99D(b)(ii) and (iii) after this. Legal Aid Practice Directions (2012: 2.3.2 (i)).

¹³ $n=3/21$ who answered this question. Of the remaining 18 lawyers, one met with children over seven years, three lawyers met all children, eight met children from age three to four and six met children from age five up.

¹⁴ Systems abuse has been described as 'preventable harm [that] is done to children in the context of policies or programs which are designed to provide care or protection. The child's welfare, development or security are undermined by the actions of individuals or by the lack of suitable policies, practices or procedures within systems or institutions.': Cashmore, Dolby and Brennan (1995:11).

¹⁵ In the country a Local Court is constituted as a Children's Court to hear matters that involve children.

¹⁶ Wood (2008: 512-515).

¹⁷ Children's Court of NSW, No. 203 of 2003, per Mitchell CM.

¹⁸ Children's Court Practice Direction No 28 (2007).

¹⁹ The case studies included children aged 8 (1) 9 (2), 10 (2), 11 (3), 12 (2) 13 (2) and 14 (1). In three cases children of 10, 11 and 12 years were represented together with siblings two or more years older.

²⁰ Prior to the 2006 amendments: today these provisions are found in sections 99B and 99C of the Act.

²¹ See Representation Principles (2007: 11).

²² In the matter of JS, 21 December 2001 Children's Court of New South Wales, Mitchell CM.

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