

# Systemic Barriers Call for Systemic Change

## A Time to Explore Alternative Child Representative Models in the NSW Care and Protection Jurisdiction

Judge Peter Johnstone\*

\* I acknowledge the considerable help and valuable assistance in the preparation of this paper by Dominique Ferreira.

1 Nelson Mandela, 'Address by President Nelson Mandela at the Launch of the Nelson Mandela Children's Fund' (Speech, Pretoria, 8 May 1995).

2 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.

3 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 10 ('Care Act').

4 Australian Institute of Family Studies, 'Children in Care', *Child Family Community Australia* (Web Page, September 2018) <<https://aifs.gov.au/cfca/publications/children-care>>.

5 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, November 1997); James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Report, November 2008) vol 2.

### I Introduction

The great humanitarian, Nelson Mandela, once said '[t]here can be no keener revelation of a society's soul than the way in which it treats its children'.<sup>1</sup> His philosophy has encapsulated the very essence of what I have strongly advocated for in my eight years as President of the Children's Court of New South Wales.

A child's right to participate in decisions that affect them is recognised in international<sup>2</sup> and New South Wales ('NSW') law<sup>3</sup> as society acknowledges the value children and young people can add when they are empowered to do so. Yet the question remains: does participation in principle equate to participation in practice?

This article does not propose in any way to reinvent the wheel but rather to build on what we have and what we know. The number of children in care continues to remain high in Australia<sup>4</sup> and with continuing scientific, psychiatric and sociological advancements, it is time that there is a discussion of alternative models for involving children in the decision-making process.

### II Child Representation Models in the Care and Protection Jurisdiction

The Children's Court of New South Wales is one of the oldest Children's Courts in the world. It is a specially created stand-alone jurisdiction whose origins can be traced back to 1850. Since its inception, the idea of a separate specialist jurisdiction to deal with children has prospered and developed until the present time.

The Children's Court deals predominantly with youth crime and the care and protection of children and young persons.

Over time, the legislation that governs the way in which the Children's Court deals with cases has become more complex but the fundamental principle upon which the Court was established remains the same: that children should be dealt with differently, and separately from adults.

Proceedings relating to the care and protection of children and young persons in NSW, including first instance matters before the Children's Court and appeals from its decisions, are public law proceedings. They are governed, both substantively and procedurally, by the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ('Care Act').

The *Care Act* endorses strong participation principles as enshrined in the United Nations *Convention on the Rights of the Child* and prescribes two models of participation of a child or young person. This occurred following reports which highlighted children being marginalised and effectively excluded from being heard and participating in decisions that affect them.<sup>5</sup>

Representation models include an independent legal representative ('ILR') or a direct legal representative ('DLR').<sup>6</sup> An ILR is appointed to act as the representative for a child under 12 years.<sup>7</sup> Otherwise known as the 'best interests' lawyer,<sup>8</sup> they must consider the child's views whilst maintaining an overarching commitment to safeguarding the child's interests. The ILR should consult with the child, but their overriding duty is to the Court and to act in accordance with the safety, welfare and wellbeing of the child.

In contrast, a DLR is appointed for a child 12 years old or above who is capable of giving proper instructions.<sup>9</sup> The DLR must then advocate as instructed by the child. Both roles are critical to ensuring that the participation principles of the *Care Act* are adhered to.

In addition to these provisions, the Law Society of New South Wales has prepared the *Representation Principles for Children's Lawyers*<sup>10</sup> and Legal Aid New South Wales has prepared the *Care and Protection Practice Standards*.<sup>11</sup> These guidelines set out a number of important duties and obligations that children's representatives should adhere to.

### iii The Relevance of Brain Science

Children and young people that come before the Children's Court are amongst the most vulnerable, socially and economically disadvantaged members of society. They experience higher rates of mental illness, behavioural problems, disability and instability in care and education than the general community.<sup>12</sup>

Often these serious and complex problems result from the cumulative effects of exposure to adverse and traumatic events such as violence, maltreatment, substance abuse and instability.<sup>13</sup> It is common ground that traumatic events experienced early in life can be damaging to the developing brain which may result in children and young people presenting as developmentally younger than their chronological age.<sup>14</sup> Conversely, a child's demeanour may imply a greater level of understanding or ability than they actually have, due to their lived experiences,<sup>15</sup> an attribute often seen with children who have been parentified.

The growing recognition of the relevance of brain science has driven the need for policy and legislation to match the research. Evidence and neurobiological data from studies of Western adolescents that suggests biological maturation of the brain begins and continues much later in life than was generally believed.<sup>16</sup> Neuroimaging studies mapping changes in specific regions of the brain have shown that the frontal lobe (which is responsible for 'higher' functions such as planning, reasoning, judgement and impulse control) only fully matures well into the 20s, with some even suggesting that they are not fully developed until halfway through the third decade of life.<sup>17</sup>

The expectation that children from all walks of life have the same cognitive function and capacity to make a wise choice about their life is idealistic. Research suggests that children have difficulty in differentiating between their own feelings and needs against the wishes of others, which makes them more susceptible to influence.<sup>18</sup> I accept this proposition is not the same for all children, however, it is plausible in the care jurisdiction and is a view recently endorsed by the High Court regarding a family law matter involving children aged 17 and 15 years.<sup>19</sup>

Whilst much of the research around brain science remains in its infancy, one cannot ignore the reality that children's capacity to understand and foresee consequences is variable and that a systemic and developmentally informed understanding of children that enter the care jurisdiction needs to be applied.

### iv Direct Representation Model

The debate on whether lawyers act in what they perceive to be the best interests of a child or on direct instructions is an old one which has been 'extensively canvassed'.<sup>20</sup> Since the inception of the direct representative role in NSW (over 20 years ago), there have been mixed views and yet few inquiries which look at whether the model achieves its stated purpose.

Unsurprisingly, an area of contention is the blanket assumption that children upon turning 12 years of age are competent and capable to instruct. Essentially, the existing model provides these children with the same entitlements and responsibilities to participate as adults. Having regard to the brain science, the concerns surrounding age-based competency are compelling.

- 6 *Care Act* (n 3) s 99A.
- 7 *Ibid* ss 99A(2)(a), 99B.
- 8 This is a colloquial term used within the legal profession. Law Society of New South Wales, *Representation Principles for Children's Lawyers* (Representation Principles Report, August 2014), 8.
- 9 *Ibid* s 99C.
- 10 Law Society of New South Wales (n 8).
- 11 Legal Aid New South Wales, *Care and Protection Practice Standards* (Practice Standards Report, June 2017).
- 12 Sara McLean, *The Effect of Trauma on the Brain Development of Children: Evidence-Based Principles for Supporting the Recovery of Children in Care* (Child Family Community Australia Practice Resource, June 2016).
- 13 See *ibid* See also Australian Institute of Health and Welfare, *Australia's Children* (Report, 18 March 2020) 222, 307–17, 321–2, 327–54.
- 14 Lani Blackman, *Representing Children and Young People: A Lawyer's Practice Guide* (Victoria Law Foundation, 2002) 89–95.
- 15 C J Lennings, 'Communication with Children over 10: If Wishes Were Horses, Beggars Would Ride' [2004] (August) *Children's Law News* 8.
- 16 Justice Andrew Becroft, 'Principal Youth Court Judge of New Zealand, "From Little Things, Big Things Grow": Emerging Youth Justice Themes in the South Pacific' (Conference Paper, Australasian Youth Justice Conference, 21–2 May 2013). For further information on adolescence brain development see [www.brainwave.org.nz](http://www.brainwave.org.nz).
- 17 Sara B Johnson et al, 'Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy' (2009) *Journal of Adolescent Health* 45(3) 216–21.
- 18 Lennings (n 15) 4. See Patrick Parkinson and Judith Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 3–4.
- 19 In *Bondelmonte v Bondelmonte* [2017] HCA 8, 10 [41], the High Court unanimously held that the trial judge was correct in giving limited weight to the children's wishes as their stated preferences were influenced by the father.
- 20 Patrick Parkinson, 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9(3) *The International Journal of Children's Rights* 259, 268.

- 21 Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Final Report, June 2018) 50–68, 89, 92–3, 96. See also Nicola Ross, 'Different Views? Children's Lawyers and Children's Participation in Protective Proceedings in New South Wales, Australia' (2013) 27(3) *International Journal of Law, Policy and the Family* 332, 346–8.
- 22 Megan Mitchell, *Children's Rights Report 2019: In Their Own Right* (Report, 28 October 2019).
- 23 Rae Kaspiew et al, *Independent Children's Lawyer Study* (Final Report, June 2014) 36–40.
- 24 Felicity Bell, 'Facilitating the Participation of Children in Family Law Processes' (Discussion Paper, Centre for Children and Young People, 2015) 18–20. See also Judith Cashmore and Kay Bussey, 'Perceptions of Children and Lawyers in Care and Protection Proceedings' (1994) 8(3) *International Journal of Law and the Family* 319, 334.
- 25 See Bell (n 24) 13–24. See also Ross (n 21) 354.
- 26 See also Cashmore and Bussey (n 24) 320. See Kaspiew et al (n 23) 55. See especially Ross (n 21) 341–8.
- 27 The court is required to avoid adjournments, complete 90% of cases within nine months of commencement and 100% of cases within 12 months.
- 28 Kaspiew et al (n 23) 87–91; Ross (n 21) 352–3.
- 29 Kaspiew et al (n 23) 92–5; Ross (n 21) 342.
- 30 Judy Atkinson, *Trauma-Informed Services and Trauma-Specific Care for Indigenous Australian Children* (Closing the Gap Clearinghouse Report No 21, July 2013) 2. See also Liz Wall, Darryl Higgins and Cathryn Hunter, *Trauma-Informed Care in Child/Family Welfare Services* (Children Family Community Australia Paper No 37, February 2016) 9.
- 31 Bell (n 24) 33–6.

There have been decades of both empirical and interdisciplinary studies on child representation and participation. The message from children is unequivocal: a child inclusive approach where there is direct contact, transparency and a trusted advocate is pivotal in facilitating child participation.<sup>21</sup> Being included and empowered to participate in a meaningful way was a consistent theme found by the National Children's Commissioner.<sup>22</sup>

Whilst studies consistently reiterate that children wish to participate directly and DLRs have a duty to obtain instructions, it is not necessarily realised in the court room and judicial expectation is often not met.<sup>23</sup> I do not wish to speculate as to the inconsistent practices I have observed, but note that far too often I have had to delay proceedings or remind a DLR of their duty to obtain instructions. Similarly, I am being told from the bar table that a child 'does not wish to be heard', nor file evidence regarding their position nor attend court to voice their views. The lack of direct participation is a disappointing one and appears contrary to research.

The richness of children's insights and experiences should not be undervalued. Whilst the Secretary of the Department of Communities and Justice updates the Court as to interim placements, family contact and the general wellbeing of children, there is no greater evidence of the impact of the Court and the Department's decisions upon a child than hearing from the children themselves. Accordingly, the Children's Court of NSW launched a new website in August 2020 which sends a message from the Court that child participation is encouraged and thus expected.

The conundrum for lawyers, when their instructions are contrary to what they perceive is in a child's best interests is a palpable one. Far too often has a case come before the Children's Court following a disclosure by a child which precipitated the proceedings, and which was subsequently retracted or disavowed.

The struggle of the legal representative to submit to the Court a wish or desire which they perceive is not in their client's interests, and which is possibly influenced, is apparent.

I accept that in some circumstances lawyers may feel a reluctance to facilitate a level of participation that is contrary to their client's interests due to the protective nature implicit in the child representatives' role.<sup>24</sup> However, the DLR role is not to assess capacity or determine whether a view is genuinely held or being influenced in some way, as this is for the Court to decipher.

The decisions made in the care jurisdiction have profound and far reaching consequences for children and their families. More often than not, the circumstances in which children find themselves before the Court are out of their control and therefore empowering a child to actively participate and have their voice heard is pivotal.

## v Barriers to Effective Participation

Explicit in a child's ability to meaningfully participate is the approach taken by their legal representative.<sup>25</sup> Studies continually highlight effective representation consisting of a number of variables. This includes the need for rapport building and developing a relationship that instills trust which realistically involves face-to-face contact and more than one meeting, providing an opportunity and choice on how to participate, and for information sharing.<sup>26</sup> I accept that the *Care Act* is not always conducive to meeting these necessary requirements, as time is of the essence,<sup>27</sup> and inadequate funding and professional training are a reality for lawyers.<sup>28</sup> However, the implication that the participation principles mandated in the *Care Act* are not always adhered to is troubling.

Studies suggest that lawyers themselves feel they do not necessarily possess the skills and knowledge to interview children, especially children from a trauma background or at risk of harm.<sup>29</sup> The risks associated with not using a trauma-informed approach to service delivery have the potential to inflict further harm and trauma.<sup>30</sup> However, it is apparent that the risks associated with silencing a child are just as prevalent and may result in the child or young person disengaging.

Concerns around systems abuse and causing further distress to children<sup>31</sup> in the care jurisdiction are understandable and apparent. Whilst I accept the dilemmas faced by legal representatives, they are often a conduit of information which assists the court in making decisions ensuring the safety, welfare and wellbeing of a child. Accordingly, it is essential to the efficacy of the role that lawyers receive ongoing specialised training which includes childhood development, trauma informed approaches and age appropriate communication techniques.

Given lawyers and children are cognisant of these issues and the gaps within the system continue to widen, perhaps trialling a multi-disciplinary approach, akin to the British or Pittsburgh model of KidsVoice is likely to be more effective.<sup>32</sup>

<sup>32</sup> See Kylie Beckhouse, *To Investigate Legal Representation Schemes for Children in the US, Canada and the UK: Administration, Delivery and Innovation* (Final Report, 6 July 2015) 61–71.

## **vi The Way Forward**

Given the limited studies which have evaluated the DLR model and whether it has achieved its purpose, I am of the view that an empirical study which looks at children's experiences of the child representation models in NSW would be invaluable.

Whilst there are many variations to the child representative model in Australia, it seems logical to me that a national model which incorporates both best interests' principles and an opportunity for a child to directly instruct is the way forward. I have significant reservations about our existing DLR model being age-based, as brain science and my observations in court have persuaded me to consider alternate models to enhance the participation of children.

The international research surrounding a multi-disciplinary or dual approach is compelling and I consider there is value in trialling a model given its reported benefits.

Finally, the research which consistently highlights the lack of training, professional development and review mechanisms regarding child representatives is of concern. Given the pivotal role child legal representatives play in the care jurisdiction of the Children's Court, I would support a discussion to address the issue.