What do children need from their Lawyer?
Representation of children in child protection proceedings in NSW

Full Text: http://lawfam.oxfordjournals.org/cgi/content/full/ebto09?ijkey=CopGuuVcLjsOg&keytype=ref&siteid=lawfam

See also:
Lawyers listening to children?

The need to listen to children has been reinforced by the Royal Commission...

- Children’s lawyers - part of state child protection processes
- Need to move beyond debates (role; representation models)
- Different legislative and practice models across Australia
Prior research

Prior research into lawyers’ practice suggests lawyers do not always seek to develop professional relationships with children; constrained by both protective concerns and negative/incorrect views of children’s need and wish to participate:


*Douglas* (2006) noted children’s need for a ‘passage agent’, a professional to establish a positive trusting relationship with them, explain things clearly, check they were understood and keep them informed.

*Bala, Birnbaum and Bertrand* (2013): children’s lawyers had limited regard for policies in relation to representation: need for better supervision of lawyers and feedback from children.
Children’s ‘participation’ rights

- Convention on the Rights of the Child 1989

- General Comment No 12: UN Committee on the Rights of the Child – “The Right of the Child to be Heard”.
  - Spells out preconditions for implementing children’s right to be heard – very valuable

- National Framework for Protecting Australia’s Children
  \(\text{COAG}\)

- Research: children’s perspectives on legal representation in child protection
The models of representation incorporated into the Children and Young Persons (Care and Protection) Act 1998 (NSW) are highly supportive of children’s participation. They include a direct model of representation and detailed principles supporting children’s right to participate in legal proceedings. These are supported by Legal Aid NSW Care and Protection Practice Standards (2012) and NSW Representation Principles for Children’s Lawyers (2007).

Yet significant variations exist in reported practice.
Empirical study

- Qualitative study
- 35 children’s lawyers in NSW (Australia) 2006
- family law, child protection and criminal proceedings (21 represented children in care proceedings)
- Semi-structured interview format, vignettes and in-depth case studies
Defining and approaching participation

- Coloured by perceptions of capacity and if participation is “good” for children

- **Liam**: children were damaged/aligned with parents; he talked to children but believed they were incapable of meaningful participation.

- **Peter**: associated participation with court attendance for older children and about being informed about processes and having input into outcomes for younger children.

- Some focused on participation as an *outcome* of having children provide input on significant issues, but 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*.
Challenges associated with the models

Best Interests representation: a participation focus?

- When asked to describe their role, some lawyers did not discuss children’s participation at all;

- Not all met with children under 10 (protective concerns) and unclear how/if lawyers gave information to younger children.

- Time/protective concerns: limited professional relationships

- Few referred to the need to consider children’s expressed wishes when assessing what was in their ‘best interests’;
Direct representation: A central focus on the court, the child or both?

Mark:
“‘I see the role as to assist the court rather than a partisan advocacy sort of role...you’re there to assist the court....it’s like a safety net... Ultimately the court is there, the magistrate’s there to do the job of what’s in the best interest of the children and you play a complementary role to the magistrate...”

Rose:
“The biggest thing is the commitment to building a relationship with the child & paying some attention to the needs of that child...”

Trevor:
“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...”
Provision of information, opportunities and choices to participate

Discouraging court attendance

- Most lawyers did not think that it was good for children to be at court, although half the lawyers interviewed explained that they encouraged children to attend court if they expressed an interest (Similar to Masson & Oakley; Cashmore & Bussey)
- Half actively discouraged court attendance in vignette response, although most acknowledged children’s right of appearance
- Few strongly supported children’s right to attend court but some said they prepared children to come to court
- Only Rose consulted research about benefits of attending court
- Magistrates attitudes were influential.
Mark said lawyers shaped children’s expectations in line with what they understood to be ‘reasonable’:

“I don’t think they have any [expectations]...usually, the first time they’ve been to court is when it’s their parents in court and they’re in court...So it’s really up to the lawyer ...to shape the child’s expectations. So you would say, you know ‘I’m here, [this is] 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.”
Meeting children: time & funding limits

- Funding and limited time governed decisions about where and for how long lawyers met children.

- Many stressed the importance of spending time to develop rapport, to understand children’s perspectives, and to develop and maintain their confidence. This required more than one meeting. By developing a relationship with children, lawyers helped them to understand that they were part of the process and had a right to be heard. This allowed them to participate by expressing views or wishes, if they so chose.
Variations in practice: Scaffolding

Lawyers varied in preparing the environment for contact:

Vivienne:

Before you even have an interview you have to be prepared, ...because you have to structure the interview to that client... You've got to really work hard to make sure you are getting their instructions and not what you would like them to say....

Emma

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?
The need to modify the direct model?

Lawyers interpreted acting on instructions differently...

Vivienne:

“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'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.”

Emma:

“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.”
Adapting the model

Naomi:
“... I think the biggest issue in care and protection is not to overdo your role in terms of consulting with the child. These kids have often been removed from homes, been traumatised, they may have been subject to either neglect or abuse...Some lawyers treat child representation like representing adults and show them all the material and its [blaming] applications and often that's not appropriate. I'll often consult with social scientists and see what's appropriate for that kid...”

Trevor
“[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 & want to be assisted on.”
Ian:

“[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 instructions.... I think probably 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.”
Difficulty applying direct models?

The model assumes the client is an adult...

Naomi

“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 ten 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 ten. And eleven and twelve and thirteen and fourteen... you might provide them with all the material and they might not be able to read it.”
Discourses evident in lawyers’ responses. Dominance of:

- *Child development*
- *Welfare/protective approaches*

In comparison to a discourse of:

- *Children’s rights*

- Naomi: “often children will come up with great solutions for their own lives...”
- Peter: “It is critical that children are involved in proceedings; the UN Convention Article 12 mandates our funding for representing children...”
Relational approaches

- Children’s access to information is enhanced through a trusting relationship with a lawyer. Lawyers’ had different views of the need to develop rapport/professional relationships.
- ‘Relational’ lawyers (focused on their responsibility to children and their relationships) rather than ‘responsible’ lawyers (focused on the needs of the court) were predisposed to value and consider children’s perspectives and work closely with them. (See Parker and Evans for typology of orientations, 2007).
- Relational approaches that combine recognition of children’s rights with a focus on their relationships, needs and interests may hold the key to helping lawyers to start their advocacy with the individual child and to develop greater comfort with direct models.
Case studies

- **Peter’s matter**: application for the removal of 2 children (10 and 12) tly – mother a sex worker/abusing substances.
- **Vivienne’s matter**: 11 year old girl, youngest of 3, oldest daughter (15) made allegations that father had a sexual relationship with her – 11 year old girl wanted to be part of matter but not to know why father had left the house...
- **Trevor’s matter**: oldest of three children removed...
- **Karl’s matter**: Supported a 9 year old abandoned child to meet Magistrate/observe final orders being handed down
Messages from previous research...

- **Douglas** (2006: 195) 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’;

- **Koh Peters** (2001: 66) ‘Lawyers need to maintain a focus on children as people who can lead their advocacy to a greater or lesser’.
Messages from this research
Preparing lawyers for work with children

Support & training required to develop:

- Shared understanding of children’s right to participate *and* to be protected; appreciation of rationales for children’s participation and research about participation and how this applies to practice;
- Appreciation of ethical approaches (responsible, relational)
- Development of best practice principles to guide lawyers’ interaction with children and training to support skills development in areas such as communication with children

Selection and accreditation of lawyers with commitment and skills to develop professional relationships with children

My thanks to those lawyers who participated in this study and to Legal Aid NSW.