

Article 12 of UNCROC and the Participation of Children in Statutory Child Protection Decision-making in Australia

By

Deborah de Fina

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Abstract

This paper summarises the extent to which the child's right to participate in decisions made about them is incorporated into Australia's statutory child protection systems. There is very little research available about whether children are able to participate in child protection decisions that are made in the earlier stages of child protection systems, such as when decisions are made about whether there are grounds for the state to intervene in their families and, if so, about what kinds of intervention should be tried. Most research on children's participation in child protection decision-making appears to focus on the participation of children in child protection court proceedings or the participation of those children who are in alternate care in decision-making about their care. This research concludes that, even where legislation, policy and best practice guidelines require such participation, most children in alternate care do not feel that they are involved in the important decisions that affect them. On a higher decision-making level, there appears to be little commitment by Australian governments to children's participation in the development, monitoring and reform of child protection systems, even though promoting children's best interests is the main object of all of these systems. The paper calls for further research into barriers to participation and into issues that are raised by the participation principle when it is applied to decisions made within statutory child protection systems. The paper also highlights the need for a national approach to children's participation in Australia's statutory child protection systems.

About the contributor

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Introduction

Article 12 of the UN Convention on the Rights of the Child, the right of children to be heard and to have their views given due weight in accordance with their age and maturity in all matters affecting them (and in particular in any judicial or administrative proceedings affecting the child), has been recognised as one of the four main general principles that underpin the Convention.² Other major general principles of the Convention include the 'best interests' principle and the protection of children from all forms of violence, including abuse and neglect. In Australia, as in many countries, these principles intersect in our statutory child protection systems. Article 12 has become known as the principle of 'participation,' although that term is not used anywhere in the Convention. It is widely used to describe ongoing processes that include information-sharing and dialogue between children and adults based on mutual respect and in which children can shape the outcome of decisions and can learn how their views and those of others are taken into account.³ It is the act of taking part in and sharing in decision-making processes.

The participation of children in decision-making within child protection systems has been recognised as important for a number of reasons over and above those reasons often expounded for 'other' children. They include not only the 'child rights' arguments but also the importance of participation in promoting self-esteem, confidence and, particularly for children who may have been abused or neglected, a feeling of being respected and empowered; in reducing alienation and feelings of being an 'object of concern' rather than the person most affected by the decision; in promoting more stability in alternate care placements; and in preparing children in alternate care for future independence.⁴ Finally, the full participation of

¹ This paper was written under the guidance of Save the Children Australia. In particular, the author would like to thank Dr Annie Petit and Karen Flanagan at Save the Children Australia for their editorial assistance, as well as the librarians at Legal Aid NSW for their tireless tracking down of hard to find articles.

² United Nations Committee on the Rights of the Child, *General Comment 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, p12; C Willow, *Children's right to be heard and effective child protection*, Save the Children Sweden (2010) p51.

³ United Nations Committee on the Rights of the Child, *General Comment 12 (2009): The right of the child to be heard*, p5.

⁴ J Cashmore 'Promoting the participation of children and young people in care' 26 *Child Abuse & Neglect* 837 (2002), p 839. However, these 'extra' benefits of participation have mostly been identified in relation

children in the decisions, development, implementation and monitoring of child protection systems at various different levels is fundamental to these systems' quality and credibility as protectors and promoters of children's 'best interests'.

Statutory child protection systems in Australia

The term 'child protection systems' can be an overarching term synonymous with 'child welfare systems' and can therefore include all of those systems, organisations and individuals who undertake activities to ensure that children live, grow up, have access to development of good attitudes, knowledge and abilities, receive protection of rights and interests and are able to efficiently participate in these activities.⁵ Thus child protection systems usually include those primary universal services that are available to all children and families within a state and that promote healthy child development, as well as secondary services that are targeted at families and children at risk of abuse or neglect. These first two tiers of a child protection system are offered to children and their families in an attempt to prevent situations developing or deteriorating into those in which mandatory action may be needed to protect the child.

As in many countries around the world, child protection systems in Australia also have a third level in which the state is asked to (or decides to) intervene in the life of a child for his or her own protection, regardless of the consent of the child or his or her family. The term 'statutory child protection system' is used in this paper to describe this tertiary or 'mandated' tier of Australia's child protection systems.

In Australia's federal system, statutory child protection systems are the province of the States and Territories. Many other aspects of child protection, particularly in regards to primary universal services and some secondary services, fall within the national sphere.⁶ In recognition of these aspects, as well as of the need for a national approach to child protection in Australia, the National Framework for Protecting Australia's Children (2009-2020) was endorsed by the Council of Australian Governments in April 2009. This framework aims to deliver a substantial and sustained reduction of child abuse and neglect in Australia, not only through the reforms already occurring within the different States and Territories child protection systems, but also through better coordination of the different federal, State and Territory aspects of these systems, the development and implementation of national standards for out-of-home care, information-sharing, data collection and research and workforce development.

This paper focuses on the participation of children in decisions that are made within the statutory child protection systems of the States and Territories – that is, on children's

to children who are placed in alternate care rather than in the context of the child protection system as a whole.

⁵ C Willow, *Children's right to be heard and effective child protection*, Save the Children Sweden (2010), p30.

⁶ For example, many cases involving families with child protection issues, including some in which the statutory authority is involved, arise in and are dealt with by the Family Court of Australia. Other national measures include those being funded and promoted through the National Framework for Protecting Australia's Children (2009-2020). Finally, a number of federally funded and/or run programs, such as income support, health care and housing, provide services to families who may be at risk of involvement in the statutory child protection systems.

participation in decisions that are made about whether there are grounds for the state to intervene in their lives and that of their families for the protection of the children; about the form of that intervention; and about the ongoing care and protection of children during and after that intervention (particularly for children who are placed in alternate care as a result of the state's intervention).

The numbers of children involved in Australia's statutory child protection systems are extremely large at the entry point into these systems, reducing considerably at their most extreme end point at which children are the subject of care and protection orders by a court and/or placed in alternate care. In 2008-2009, there were 339,454 'notifications of child abuse and neglect' recorded by Australian statutory child protection authorities (the State/Territory government departments that are responsible for and authorised by law to investigate allegations of child abuse and neglect and to intervene in these families). Of these, an investigation into the notification was undertaken and completed at the time of reporting in 47.8% of the cases, or 162,385.⁷ About one in six (54,621) of the total notifications were 'substantiated', meaning that the result of the statutory authority's investigation concluded that the child has been or is being or is likely to be abused, neglected or otherwise harmed.⁸ About 28% of those children who are the subject of a substantiated child abuse or neglect notification are considered to be 'in need of care and protection' such that a court order is sought and obtained (15,509 children were placed on new care and protection orders in 2008-2009).⁹ Not all of these orders resulted in children being removed from their families and placed in alternate care: 12,883 children were admitted to out of home care in 2008-2009.¹⁰ However, the total number of children in alternate care increases yearly due to new children being placed in care and to a trend of children spending ever increasing lengths of time in alternate care.¹¹

Participation in practice

In all of Australia's statutory child protection systems, the States and Territories have incorporated the Convention's requirement that the best interests of the child are paramount in any decision that is made about the child. The Convention's principle of participation has also been enshrined in the child protection legislation of all States and Territories in Australia.¹² However, the means by which children are legislatively encouraged to 'participate' varies widely amongst the States and Territories, as do the policies that are applied by the various statutory child protection authorities and the actual implementation of these legislative and policy

⁷ Australian Institute of Health and Welfare *Child Protection Australia 2008-2009* (2010), p11, Table 2.1.

⁸ Id, Table p12, Table 2.2.

⁹ Id, p26, Table 3.3.

¹⁰ Id, p 39, Table 4.3.

¹¹ Id, p38, Table 4.1.

¹² See *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9(2)(a); *Children and Young People Act 2008* (ACT) ss 7(e)(ii);349(1)(b); *Children, Youth and Families Act 2005* (VIC), ss 11(d), (f), (g), (h); *Child Protection Act 1999* (QLD), ss 5(2)(d), (g), (h); *Children's Protection Act 1993* (SA), ss 4(4)(d), 4(6)(c) & (d); *Care and Protection of Children Act 2007* (NT), ss 9, 11; *Children and Community Services Act 2004* (WA), ss 7(f), 10; *Children, Young Persons and their Families Act 1997* (TAS), s 8(3).

imperatives by the individuals who have the day-to-day responsibility for interacting with children.

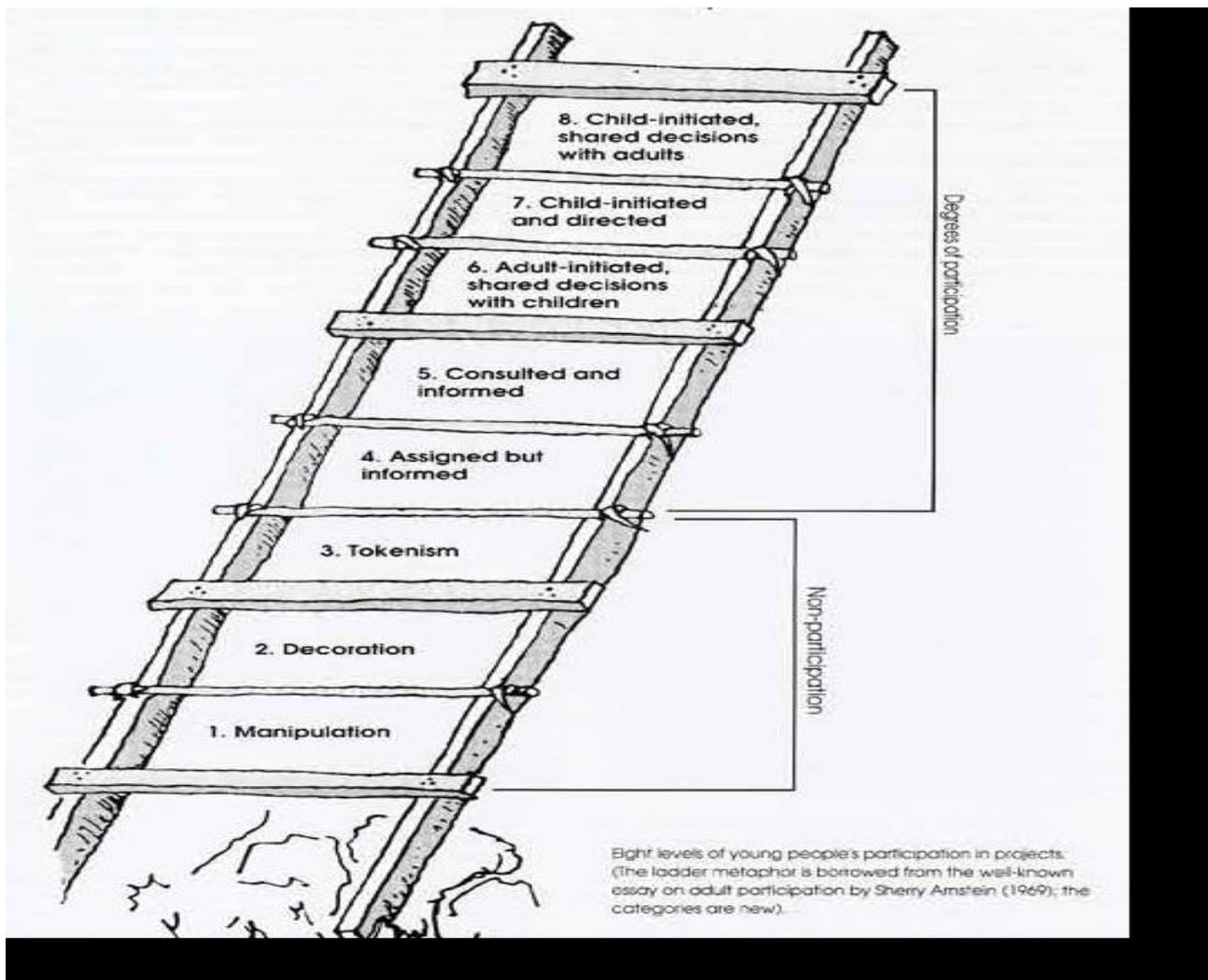
There is a dearth of research in Australia on the participation of children in statutory child protection decision-making. What little research and commentary there is has tended to focus on children's views about their participation in the resulting court proceedings or on the views of children who have been placed in alternate care about their participation in decisions made about their lives whilst in care.¹³ Therefore, the research and commentary has tended to be limited in scope and qualitative rather than quantitative. As such it is difficult to determine from this research the actual situation in regards to the participation of children in statutory child protection decision-making throughout Australia.

It has been noted in this research, however, that there is a significant difference between 'having a voice' and 'participation'. Having a voice has been described as being a one-way process where children express their views and wishes, with these being taken into account by the decision-maker. Participation, on the other hand, is a two way process where all parties express their views and decisions are made jointly.¹⁴ A ladder of youth participation, based on Arnstein's Eight Rungs of Citizen Participation, has been developed by Roger Hart to describe the continuum from non-participation to participation by children in decision-making:¹⁵

¹³ See A Osborn and L Bromfield, "Participation of children and young people in care in decisions affecting their lives", Australian Institute of Family Studies (2007); J Cashmore, "Promoting the participation of children and young people in care", 26 *Child Abuse and Neglect* (2002); J Cashmore and A O'Brian, "Facilitating participation of children and young people in care", 26(4) *Children Australia* (2001); A Tomison and J Stanley, "Alternative Care: Placement decision-making" in *Strategic Directions in Child Protection: Informing Policy and Practice* (2001, unpublished, prepared for South Australian Dept of Human Services); A O'Brian, "Consumer participation for Young People in Care", 46 *Family Matters* (1997); J Cashmore and K Bussey, "Perceptions of Children and Lawyers in Care and Protection Proceedings", 8 *International Journal of Law and the Family* (1994) .

¹⁴ A O'Brian, "Consumer participation for children and young people in care", 46 *Family Matters* 56 (1997)

¹⁵ R Hart, *Promoting Youth Participation: a rights perspective*, National Children's and Youth Law Centre (1995) cited in NSW Child Protection Council, *Having a Say: a report on the Giving Voice to Children Project*, NSW Child Protection Council 1998, p29.



In many cases where children are involved in statutory child protection decision-making in Australia, it appears from the research that their involvement more often than not can be found on the 'non-participation' rungs of the ladder, or on the 'having a voice' rungs (such as levels 4 and 5) rather than the full participation denoted in the higher rungs of the ladder.

Administrative decisions about whether there are grounds for the state to intervene in the life of a child and of his or her family for the protection of the child

In all States and Territories of Australia, children are at the heart of and therefore involved in decisions by statutory child protection authorities about whether there are grounds to intervene in the life of the child and of his or her family for the protection of the child. This is because one of the roles of statutory child protection authorities is to investigate allegations of child abuse and neglect that meet a legislatively set threshold, and to assess whether statutory intervention is warranted. In conducting these investigations and assessments, departmental policies often

require the child to be 'sighted' and in many cases also interviewed, including in regards to their views and wishes.¹⁶

However, being interviewed about 'what is wrong at home' is not the same as actually participating in, or even have a voice in, the decision about whether or not there are grounds for intervention. Indeed, in one study of children's participation in child protection systems, the adults involved in the study identified decisions about whether there were child protection concerns as one decision-making area in which children should not be involved. Tellingly, the young people interviewed for the same study included these types of decisions in their descriptions of those decisions in which they felt children should be involved.¹⁷

How children are involved in decisions about whether there is indeed something 'wrong' at home that requires attention and assistance from the state and whether their views are sought and/or heard and taken into account at this early stage of the statutory child protection system may often depend on the individual caseworker who is assigned to the case. The caseworker's ability to do this in turn depends not only on his or her training and ability to communicate with children but also on organisational support and guidance from the statutory child protection authority on whose behalf the caseworkers acts.

Some statutory child protection authorities do include a requirement of 'participation of the child and their family' as part of their best practice standards and/or policies relating to the investigation and assessment of child protection concerns. For example, NSW Community Services has a 'Best Practice Standard' for assessments that include the caseworker 'actively [engaging] the child or young person, their family and/or carers and other significant people in their lives, taking all possible steps to enable their informed participation in the assessment.'¹⁸ Further, its 'Casework Practice Tool' on 'Children and Young People Participation Rights' reiterates that 'the rights and participation of children and young people [start] from the first point of contact with Community Services and [run] throughout all program areas including Helpline, Crisis response Team, Early Intervention, Intake, Child Protection and Out of Home Care.'¹⁹ Similarly, the Western Australian Department for Child Protection's 'Casework Practice Manual' requires that, in undertaking investigations and assessments, the Department must 'enable the child to participate meaningfully in the decision-making process, having due regard to the age

¹⁶ See NSW Community Services Division, Department of Human Services "Best Practice Standards – Assessment", Element 5; Victoria Department of Human Services, "Protecting Victoria's Children – Child Protection Practice Manual", Advice No 1192, April 2007, part 3; Qld Department of Child Safety, "Child Safety Practice Manual", July 2009, Chptr 2, paras 2.1 and 2.3; WA Department for Child Protection, "Casework Practice Manual", March 2010, Chptr 5, pt 1.

¹⁷ NSW Child Protection Council, *Having a Say: a report on the Giving Voice to Children Project*, NSW Child Protection Council 1998, p71.

¹⁸ See NSW Community Services Division, Department of Human Services "Best Practice Standards – Assessment", Element 5.

¹⁹ NSW Community Services, Department of Human Services "Casework Practice Tool: Children and Young People Participation Rights", p2. Note, however, that this document appears to promote younger (aged under 9) children's participation only to the extent of 'having a voice' and to place significant weight on the age of the child when determining the extent of true participation a child should have in decision-making: Id, p3. It also appears to focus more on participation in post-intervention decisions rather than on initial investigation and assessment decisions.

and capacity of the child,' and that the assessment should 'take into account the child's perspective on their circumstances generally, and as they relate to the concern being assessed.'²⁰

It should be noted, however, that there are likely to be significant difficulties in applying these participation guidelines, where they exist, to the statutory decision about whether or not there are child protection concerns about the child or in attempting to involve children in these decisions where there are no policy requirements to do so. There are a number of issues that may detract from, compete with or even contradict the principle of full participation in decision-making at the stage when a caseworker is investigating whether there are child protection concerns about the child:

- Many children who are the subject of statutory investigations and assessments are very young and their ability to have a voice in or participate in these decisions may be, or may be seen by the caseworker and/or the statutory child protection authority to be, limited;
- Investigatory interviews with children often occur at the commencement of the caseworker/child relationship, and the relationship may therefore not be at the point where the child trusts the caseworker with his or her true views, and/or the caseworker may not know the child well enough to discern how much weight should be placed on those views;
- Involving the child in the decision could involve him or her in a dispute between other family members or place the child in a position where he or she could be subject to pressure or manipulation by an adult or place his or her safety at additional risk;
- 'Systems abuse' could result from involving the child intimately in the decision, particularly if the child ends up feeling responsible for the actions eventually taken by the statutory child protection authority, such as the possible disintegration of his or her family;
- There could be a concern about contaminating a child's evidence in the event that the allegations involve actions that could lead to criminal court proceedings;
- There could be a perception that the 'best interests of the child' either would be harmed by or are contrary to full participation by the child in the decision to be made; and/or
- There could be a perception that the child's views or wishes are not in his or her best interests.

²⁰ WA Department for Child Protection, "Casework Practice Manual", March 2010, Chptr 5, pt 1.

The extent to which these issues affect or should affect children's participation in decision-making at the entry point into the statutory child protection system does not appear to have been the subject of any specific research in Australia.

Administrative decisions about the form of intervention

When a decision is made that there is indeed something 'wrong' at home that requires the attention and assistance of the state to protect the child, a further decision needs to be made as to what form that intervention will take (the "intervention decision"). In all Australian statutory child protection systems, this intervention could include the provision of services to the family (either with the agreement of the family or otherwise), supervision and monitoring of the family by the statutory child protection authority, and/or the temporary or permanent removal of the child from the family and placement in alternate care.

Similar to the situation for administrative decisions about whether there are grounds to intervene, the extent to which children are able to participate in intervention decisions can depend on a number of factors, including:

- whether there is a need for immediate action to protect the child (ie, the 'timing' of the intervention decision),
- the individual caseworker's inclination and ability to involve the child in the intervention decision and
- the organisational support for children's participation in decision-making at this level of the statutory child protection system.

Most statutory child protection authorities in Australia do include 'participation of the child and their family' as part of their legislation, best practice standards and/or policies relating to intervention decisions. For example, in many States and Territories, the intervention decision may be referred to a Family Group Conference, at which all family members, including the child, may make this decision together. Family Group Conferences are discussed in further detail later in this section.

Even where the intervention decision is made by the caseworker alone, there are often policies requiring that s/he take care to include the child and relevant family members in the decision. For example, NSW Community Services has 'Best Practice Standards' on intervention that require the caseworker to 'actively engage the child or young person, their family and/or carers and other significant people in their lives, taking all possible steps to enable their participation in the intervention and ensuring that they are clearly informed about the purposes of the intervention, what they are entitled to expect and what is expected of them.'²¹ In Victoria, the Department of Human Services advises in its Child Protection Practice Manual that all planning

²¹ See NSW Community Services Division, Department of Human Services "Best Practice Standards – Intervention", Element 4.

must take into account the child's 'perspective.' Further, as all planning goals and actions must be in the best interests of the child and as the legislative best interests principles must underpin all child protection decisions, consideration must be given to the views and wishes of the child, and these must be given such weight as 'is appropriate in the circumstances.' Finally, the child and family should be 'encouraged and given adequate opportunity to participate fully in decision-making processes.'²² In Queensland, when deciding the form of ongoing intervention, the 'Child Safety Practice Manual' requires caseworkers to 'encourage the child to participate in decision-making relating to their own protection, based on their age and ability to understand; to keep the child informed about matters affecting them; and to involve the child's parents in every stage of decision-making concerning their child.'²³

The extent to which children participate in intervention decisions that are made by caseworkers is again not known. One study of children's participation in the child protection system revealed simply that many of the adults involved in the study (mostly caseworkers) believed that the decision as to whether or not a child should be placed in alternate care was one that should be made by the adults alone.²⁴

Barriers to the participation of children, and even their families, in intervention decisions made by caseworkers include:

- attitudinal barriers, including children being seen as 'objects of concern' who lack the capacity or competence to participate or who should not be burdened with the responsibility; parents being seen as the cause of the concern and lacking the capacity - or having forfeited the right - to be involved; and issues of control and an unwillingness of caseworkers and/or their organisations to give up control over these decisions;
- structural barriers such as a lack of policy guidance or requirements for caseworkers to involve children and families, a lack of training for workers, and families and children not knowing about the processes; and
- token participation, where it does occur, due to a failure to provide adequate preparation and information and a lack of commitment to participation by workers.²⁵

In some Australian jurisdictions, a 'case planning' meeting or case conference might be used as the forum at which the initial intervention decision is discussed and made.²⁶ These conferences often include the professionals who may be involved with the family (caseworkers, counselors, doctors, refuge workers, etc), and sometimes – but not always – the members of the family

²² Vic Department of Human Services, *Protecting Victoria's Children – Child Protection Practice Manual*, Advice No 1282, September 2007, p2-4.

²³ Qld Department of Child Safety, "Child Safety Practice Manual", July 2009, Chptr 3, para 1.4.

²⁴ NSW Child Protection Council, *Having a Say: a report on the Giving Voice to Children Project*, NSW Child Protection Council 1998, p71.

²⁵ J Cashmore, "Child Protection and Out of Home Care: The responsibility of families, community and the state" in Bowes, J. & Grace, R (eds), *Children and Families & Communities: Contexts and Consequences* (3rd ed), Oxford University Press: USA (2008) 165, p179

²⁶ Though these meetings also occur at later stages of the child protection system, where they assist in ongoing case planning decisions.

themselves. Indeed, in many cases, the involvement of adult family members is limited to being told what has been decided by the professionals and being given the opportunity to say whether they agree or not with the outcome. Failure to agree to the intervention recommended by the professionals at the meeting could have dire consequences, including being seen as 'uncooperative' and/or a more drastic action (such as the removal of the child from the family) being taken by the statutory child protection authority.

The extent to which children are involved in the case planning meetings and/or case conferences that occur at the intervention decision stage of the statutory child protection system is not known. Based on some agencies' policies on involving children in case planning decisions, it appears that there is an expectation within some statutory child protection authorities that a level of participation will be facilitated for those children whose cases get to this stage. For example, NSW Community Services' 'Casework Practice Tool: Children and Young People Participation Rights' states that 'children and young people should be made to feel that they are the centre of case planning and have a say in decisions about them.' It adds the following note, however: 'Note: Children or young people must be informed that whilst their views will be considered in decision-making, the Manager Casework will make the final decision based on the child or young person's best interest.'²⁷ Participation at this point therefore more likely involves 'having a voice' than full participation. It would fall in rungs 3, 4 or 5 of the youth participation ladder.

In Victoria, the Department of Human Services' 'Child Protection Practice Manual' reiterates the legislative requirement that the statutory best interests principles must underpin all child protection decisions, and that therefore the child and family should be encouraged and given adequate opportunity to participate fully in decision-making processes, including in meetings at which these decisions are discussed and made.²⁸

The NSW Commission for Children and Young People has developed a toolkit for caseworkers on involving children and young people in case planning meetings.²⁹ This toolkit promotes children's full participation in decisions made via case planning meetings and provides practical advice and tools on how to facilitate a high level of participation in these meetings. NSW Community Services was involved in the toolkit's development, but it is unclear whether its caseworkers are required to use the toolkit in initial case planning meetings at which intervention decisions are made. The actual extent of the toolkit's use, whether at initial case planning meetings or those that occur at later stages of a child protection case, is also unknown.

As set out above, in some Australian jurisdictions, a 'family group conference' or another form of mediation or conciliation that involves the family in the initial intervention decision might take

²⁷ NSW Community Services, Department of Human Services "Casework Practice Tool: Children and Young People Participation Rights", p11.

²⁸ Vic Department of Human Services, *Protecting Victoria's Children – Child Protection Practice Manual*, Advice No 1282, September 2007, p2-4.

²⁹ This kit appears, however, aimed more at involving those children who are already in alternate care in the ongoing case planning meetings and case reviews that occur over the course of their time in care, rather than at involving children who have yet to, but may, come into the statutory child protection system.

place.³⁰ These new models of child protection decision-making are based on encouraging the participation, engagement and empowerment of the family (and sometimes also the cultural community to which the child and family belong) at the front end of the statutory child protection system. Family group conferences, or variations of these conferences, are used in a number of jurisdictions around the world, and are either embedded in or developing in most Australian statutory child protection systems.³¹

Internationally and within Australia, whether or not children are able to participate in family group conferences, the age at which they may participate and the means by which they participate varies widely. Unfortunately, there is limited research on the extent of children's participation in Australian family group conferences, and also limited research on children's responses to their participation. There is some evidence that, where children are involved in family group conferences in other jurisdictions, they do not feel satisfied with the process;³² however, other research indicates that children respond positively to participating in family group conferences.³³

Legal proceedings

In all Australian statutory child protection systems, the child protection authority must obtain a court order if it seeks to impose, without the consent of the family, mandatory conditions on a family or to remove a child from the family (whether temporarily or otherwise) for the protection of a child. Most of these orders are sought from a Children's Court, which is usually presided over by a magistrate (although in some jurisdictions these decisions are made by judges) and which specialises in children's law (usually both care and protection law and juvenile crime). However, in most States and Territories, these specialist courts are only available in larger metropolitan centres, and many cases are therefore heard in the local magistrate's court by the local magistrate exercising the Children's Court jurisdiction.

In most States and Territories, the court has a discretion to appoint a lawyer for children who are the subjects of the legal proceedings that result when the statutory authority applies for an order.³⁴ However, whilst in some of these jurisdictions this discretion is exercised in almost

³⁰ See *Children and Young People Act 2008* (ACT), Chapter 3; *Child Protection Act 1999* (QLD), Part 3A; *Children's Protection Act 1993* (SA), Part 5, Division 1; *Children, Young Persons and their Families Act 1997* (TAS) Part 5, Division 1; Family Group Conferences can also occur in these and other jurisdictions at later stages of the statutory child protection system, such as after court proceeding have commenced or after a child has been placed in alternate care.

³¹ For a discussion of the implementation of family group conferencing in Australian statutory child protection systems, see Meyer M, "Family Decision Making and Child Sexual Abuse: Facing the challenges in this contested area of practice" PHD Thesis, University of Melbourne, (unpublished, submitted Nov 2007), Chapter 5.

³² See Huntsman L, "Literature Review: Family Group Conferencing in a Child Welfare Context", Centre for Parenting Research, NSW Community Services, Department of Human Services (2006), p9-10.

³³ See Meyer M, "Family Decision Making and Child Sexual Abuse: Facing the challenges in this contested area of practice" PHD Thesis, University of Melbourne, (unpublished, submitted Nov 2007), p61, pp208-214.

³⁴ Queensland, New South Wales, Victoria, ACT, Tasmania, Western Australia, Northern Territory.

every case (meaning that in these States and Territories, practically every child has a legal representative), in other jurisdictions, as little as 10% of the children involved in child protection proceedings are actually represented by a lawyer.³⁵ Only South Australia gives every child involved in child protection legal proceedings the absolute right to a lawyer.³⁶

A further discrepancy occurs in respect of the functions of lawyers who are appointed to represent children in child protection proceedings. In some jurisdictions, this legal representative is expected to represent his or her own views as to the child's 'best interests' regardless of the child's age or maturity (in which case the lawyer is often called a 'separate' or independent representative),³⁷ whilst in others the lawyer is expected to advocate as instructed by the child (and may be called a 'direct' representative).³⁸ In some jurisdictions whether the lawyer is to act as a separate or direct representative depends on a determination by the court, or sometimes just by the lawyer him or herself, as to the child's ability to provide 'proper' instructions.³⁹

Similar to the situation in respect of children's participation in the initial administrative child protection decisions, the extent to which children actually participate in the legal proceedings about their care and protection will also depend on their lawyer's skills, training and ability to communicate with children, as well as his or her own values, and on the practices of and expectations placed on, as well as the support available to, the lawyer by the institutions and jurisdiction in which the case has been brought. In some States and Territories, children represented by certain legal practitioners might attend court and court-based conferences whilst those represented by others might not; and in other States and Territories children might never see the inside of the courtroom or meet the magistrate who is to make the ultimate decision about their lives.

Whilst some of these discrepancies might be related to decisions by the court, the child's lawyer, the statutory authority or even by the child that participation to this extent might be detrimental to the child, there is no research on the extent to which this might be the case.⁴⁰ Of course, even were there an Australian jurisdiction in which every child has a lawyer in all care and protection legal proceedings and in which the child's full participation in the legal process is supported to the greatest extent possible, every case must turn on the individual child's own ability and willingness to participate. Therefore, flexibility in enabling participation is required in

³⁵ J McDougall, "Balancing Participation & Protection: revisiting child protection from a child rights perspective", *Protection All Children Today Conference*, Brisbane 2009, p11.

³⁶ Compare *Children's Protection Act 1993* (SA) s 48 with *Children, Young Persons and their Families Act 1997* (Tas) s 59, *Court Procedures Act 2004* (ACT) ss 74G and 74H, *Child Protection Act 1999* (Qld) s 110, *Children, Youth and Families Act 2005* (Vic) s 524 and *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99.

³⁷ Queensland, Northern Territory

³⁸ Victoria (although in exceptional circumstances, the Court may order that a child who is not able to provide instructions be separately represented). It should be noted that as a result of the expectation that the lawyer will act on a child's instructions, in Victoria only those children who are capable of instructing their lawyer are routinely appointed one. Young children, in particular, are generally not appointed a lawyer in Victoria.

³⁹ New South Wales, Western Australia, South Australia and ACT.

⁴⁰ Cf J Cashmore and K Bussey, "Perceptions of Children and Lawyers in Care and Protection Proceedings", 8 *International Journal of Law and the Family* (1994).

care and protection legal processes, and this flexibility may well be difficult to measure and/or to take into account when studies are undertaken of children's participation in legal processes.

Administrative decisions about the ongoing care and protection of children during and after intervention by the statutory child protection system

Once a decision has been made as to the form of intervention required to protect a child, whether that decision was made by the statutory child protection authority or by a court, many families and children experience an ongoing interaction with the statutory child protection system, particularly when the result of that intervention is the child's removal from the family and placement in alternate care on a short or long term basis. Decisions that are made about the life of the child during this last phase of the statutory child protection system are usually made by a caseworker from the statutory child protection authority, though might also be made by or involve non-government organisations that provide the alternate care and/or other child protective services to the child or family. They may also be referred to family group conferences or other joint decision-making facilities.

Most jurisdictions have legislative requirements and/or policy guidelines that mandate the participation of children in decisions about their ongoing care. For example, in Victoria, the Department of Human Services advises in its 'Child Protection Practice Manual' that, in best interests planning (ie, planning for children for whom a court order has been made), all planning must take into account the child's 'perspective.' Further, as all planning goals and actions must be in the best interests of the child and as the legislative best interests principles must underpin all child protection decisions, consideration must be given to the views and wishes of the child, and these must be given such weight as 'is appropriate in the circumstances.' Finally, the child and family should be encouraged and given adequate opportunity to participate fully in decision-making processes.⁴¹ In Queensland, the 'Child Safety Practice Manual' requires that children and their families be given the opportunity to fully participate in decision-making.⁴² In Western Australia, the 'Casework Practice Manual' stipulates that the care planning process should be an inclusive process in which the views and wishes of the child, the child's family and significant others are gathered and documented, and that the care planning process provides children and their families with an opportunity to participate in significant planning decisions regarding their care.⁴³

Children's participation in decision-making at this point has been most often the focus of Australian (and indeed overseas) research into children's participation in child protection systems, particularly in respect of children who are placed in alternate care and who rely on adults acting on behalf of the state to make decisions about their lives. The conclusion of much of that research is that participation by children in decisions about their ongoing care is not the norm and that most children and young people living in alternate care feel that they have had

⁴¹ Vic Department of Human Services, *Protecting Victoria's Children – Child Protection Practice Manual*, Advice No 1282, September 2007, p2-4.

⁴² Qld Department of Child Safety, "Child Safety Practice Manual", July 2009, Chptr 4.

⁴³ WA Department for Child Protection, "Casework Practice Manual", March 2010, Chptr 10, pt 1.

limited opportunities to be involved in the important decisions that affect them.⁴⁴ This is despite the inclusion in most jurisdictions of a 'charter of rights' for children in alternate care which includes a right to participate in decision-making, and accreditation and/or minimum 'standards' for those organisations that provide or arrange alternate care which require the organisation to involve children and their families in (or to promote their participation in) decisions that affect them.⁴⁵

Given that there are legislative and policy requirements for children's participation at this stage of the statutory child protection system in most Australian States and Territories, the problem appears to be one of converting these requirements into meaningful procedures that can actually be applied by caseworkers in their interactions with children. As described above, there has been some work done in Australia to address this problem, providing specific guidance and/or tools setting out how to involve children in these decisions. The toolkit developed by the NSW Commission for Children and Young People on involving children in case planning meetings, described above, is one document that may assist in translating policy into actual participation. The "Guide to Good Practice: Participation of children and young people in decisions made about their care", produced by the South Australian Office of the Guardian for Children and Young People, is another.

However, there are further factors that may prevent the translation of the legislation, policies and even these more specific guidelines into actual participation by children in decisions about their ongoing care. These include the integration of these guidelines into everyday practice; the need for variation of the practices to address the different needs of the various children, families and situations involved; and the significant and ongoing degree of change in the alternate care system (such as frequent changes of placement for individual children, high staff turnover, changing models of service delivery, changing funding, changing policies and changing legislation).⁴⁶

Participation by children as individuals in statutory child protection system decisions that affect them

The previous sections of this paper have focused on the participation of individual children in the making of individual decisions about their lives when these come into contact with Australia's

⁴⁴ See Create Foundation, *Be Heard, Southern Metropolitan Region of Victoria*, Create Foundation, December 2009, ss 3.5, 3.6, 3.8, 3.9 and 3.11; SA Office of the Guardian for Children and Young People, *Guide to Good practice: participation of children and young people in decisions made about their care*, SA Office of the Guardian for Children and Young People, February 2009, p 2; NSW Commission for Community Services *Voices of children and young people in foster care*, NSW Commission for Community Services, 2000; J Cashmore 'Promoting the participation of children and young people in care' 26 *Child Abuse & Neglect* 837 (2002), p839.

⁴⁵ See Department for Families, Housing, Community Services and Indigenous Affairs, *National Standards for Out of Home Care*, Consultation Paper, February 2010, Appendix A for a discussion of the situation in the different States and Territories.

⁴⁶ NSW Child Protection Council *Having a Say: a report on the Giving Voice to Children Project*, NSW Child Protection Council, 1998, p 83.

statutory child protection systems. They have set out some of the barriers to participation and the issues that are raised by the participation principle when it is applied to decisions made within statutory child protection systems. One of the main themes that runs through the previous sections is the need for research into these barriers and issues.

A second theme running through these sections is the need for a systemic commitment to participation within each State and Territory in Australia and for the development of a culture of participation within statutory child protection authorities, non-governmental organisations, legal processes and these child protection systems as a whole. This in turn will require each State and Territory's statutory child protection system and each agency and each organisation within each system to develop and foster:

- a long-term, institutionalised commitment to participation as a process;
- a clear sense of the need for participation;
- a view of participation as a right;
- a child-centred perspective based on the idea that adults do not speak for children and young people and that participation is a jointly negotiated process;
- support from management within organisations;
- all organisations within each system doing whatever it takes to make participation work;
- adequate resources committed to participation;
- practice and expertise in enabling participation, across the organisations and across statutory child protection systems;
- internal information sharing and communications opportunities;
- staff training and support.⁴⁷

In order to 'make participation work', research on children's participation in statutory child-protection decision-making has described what is generally required for children who are involved in the statutory child protection system to be able to effectively participate in decisions and processes that affect their lives. These requirements include:

- The opportunity and choice of ways to participate
- Access to information
- The availability of trusted advocates
- Resourcing and supporting participation by children and young people
- Availability of appropriate processes and structures which allow children contribute to service and system development
- Accessible complaints handling processes.⁴⁸

Finally, as recognised in the National Framework for Protecting Australia's Children, a national approach to promoting participation is required, so that whether or not, and the extent to which, a child is able to participate in decisions made within the statutory child protection system is not affected by a simple accident of geography. The draft National Standards for Out of Home Care, released in June 2010, have included a standard requiring the participation of children and

⁴⁷ See SA Office of the Guardian for Children and Young People, *Guide to Good practice: participation of children and young people in decisions made about their care*, SA Office of the Guardian for Children and Young People, February 2009, p 5.

⁴⁸ Cashmore J and O'Brian A, "Facilitating participation of children and young people in care", 26 *Children Australia* 4 (2001), p10.

young people in decisions that affect them, particularly in where they live. However, as this paper has demonstrated, the difficulty will lie in putting this standard into practice.

Participation by children collectively as consumers of the statutory child protection system: participation in monitoring, development and reform

One of the most important forms of participation recognised by the United Nations Committee on the Rights of the Child is participation on a wider scale than that set out in the previous sections of this paper; that is, the participation of children in the development, monitoring and reform of statutory child protection systems. The term 'institutional decision-making' will be used in this paper to refer to these higher level and/or overarching decisions that affect children in Australia's statutory child protection systems.

Whilst all of the statutory child protection systems in Australia are long standing systems that have developed over a lengthy period of time, this does not mean that there is no opportunity for children to be involved in their monitoring, future development and reform. Children, who are effectively the client base of statutory child protection authorities, can participate in institutional decision-making in a wide variety of ways, including by completing client surveys, sitting on management groups or boards at all levels of the child protection system (for example, from management groups for residential facilities, to higher level management committees for service providers, non government agencies, and government departments), participating in reference or advisory groups, and undertaking peer research.

There appears to be some level of participation, mostly by older children who are in alternate care, in these areas. Certainly, many group homes and other residential facilities often appear to include children in their management systems. However, whilst children appear to participate in management at this 'direct service provision' level, this does not occur higher up in the non-governmental agencies or statutory authorities, nor do these appear to have any reference groups made up of children to which issues affecting the child clients of the organisation may be referred for advice.

On an even higher decision-making level, there have in recent years been a considerable number of reviews, inquiries and reports into the various statutory child protection systems (and into their interaction with the federal family law and other state and federal systems). However, whilst children sometimes had a voice in these reviews and inquiries (most often via submissions made by individual advocates or peak advocacy bodies), it cannot be said that children's own participation in these reform efforts was encouraged, assisted, promoted or included to the fullest extent possible.

For example, in late 2007 the NSW Government appointed James Wood, QC to conduct a Special Commission of Inquiry into the NSW Child Protection System, in response to the deaths of two children known to be involved in that system. The "Wood Inquiry," as it became known, took place over 2008. It received hundreds of submissions, held 15 public forums around NSW and 9 issues-based forums in Sydney, and met privately with a large number of individuals.

However, the Inquiry did not have a specific 'children's reference group' to assist it in its research or in developing its recommendations, and inquiries made by this author have revealed that no NSW government department or agency set up a children's reference group specifically to provide input into their submissions to the Inquiry. A review of the transcripts of the public forums also indicates that no children or young people spoke at these forums, and a review of the written submissions to the Inquiry indicates that, other than one submission by CREATE which represents young people in care and one by the Youth Action & Policy Association (YAPA) which represents the views of youth workers and young people,⁴⁹ no child or young person appears to have made a written submission directly to the Inquiry.⁵⁰

With respect to the NSW Government's response to the Inquiry's recommendations, entitled 'Keep Them Safe', other than a representative from CREATE and a representative from YAPA, again no children and young people were included in any of the 3 advisory groups set up to assist in the development and implementation of the recommendations. Whilst the inclusion of CREATE and YAPA in these advisory groups provided representative participation for some groups of children, and whilst many of the other government and non-government agencies involved could be said to have represented the interests of their child clients, it does appear that as a whole children were not themselves involved in the development and implementation of the NSW Government's response.

The situation in regards to the development of the National Framework for Protecting Australia's Children fared slightly better. Not only was a representative from CREATE a member of expert committees and coalitions that provided advice and assistance to the government on the National Framework, but CREATE also assisted the federal Government to hear directly from young people in a focus group/consultation about in-care and leaving care issues. However, again, it would appear that children's participation in the development of national child protection system policies that affect them was limited and that only children in alternate care were able to play any role, via their CREATE representative.

The CREATE Foundation is the national peak body representing the voices of all children and young people in out-of-home care. It aims to connect children and young people in alternate care to each other, empower and resource children and young people in alternate care, and change the care system from the inside out through the participation of children and young people. As an advocate for children and young people in care, CREATE ensures that their voices are heard by key decision makers in government and out-of-home care sector stakeholders.

Whilst the involvement of and contributions made by CREATE to these reform initiatives and policy development are significant and cannot be underestimated, it appears that many Australian governments have relied on this involvement as the sole means of hearing from

⁴⁹ YAPA is a peak community group working in the interests of young people and youth services in NSW. YAPA strives to achieve social justice for young people including the appropriate provision of services for young people. CREATE is discussed later in this paper.

⁵⁰ However, it is possible that the Inquiry interviewed some children and young people privately and/or that some children may have made confidential submissions in writing; further, written submissions were made to the Inquiry by adults who had been involved in the child protection system as children.

children and young people at the higher level of institutional decision-making about their statutory child protection systems. CREATE is certainly one means by which children and young people who are or have been in care can participate in the larger development and reform of these systems; however, relying solely on CREATE leaves out the voices of the many children who are involved in these systems but never placed in care. As set out at the start of this paper, there are considerably more children who are involved in statutory child protection systems than there are children who are removed from their families and placed in alternate care.

One means of including children in high-level decisions about the development, monitoring and reform of child protection systems could be through the use of children's reference and/or advisory groups, involving a wide range of children and including children who have had or may come into contact with these systems. However, as many of the State and Territory Children's Commissioners can attest, the establishment and maintenance of children's reference or advisory groups can be challenging. The additional disadvantages faced by many children in the socio-economic groups most represented in statutory child protection systems could well mean that the development of children's advisory or reference groups for the higher level policy development, review and reform decisions that must be made for these systems would be even more difficult. Further, given the significant overrepresentation of Indigenous children at all levels of the statutory child protection system, there may be additional challenges in ensuring that Indigenous children are appropriately involved in these processes: it may be necessary to provide additional or alternative means by which Indigenous children can participate in institutional decision-making.

Regardless, all children who participate in institutional decision-making at this level of the statutory child protection system would likely require significant support and assistance in order for their participation to be possible and effective. It may well be that the Children's Commissioner's in each of the States and Territories, as well as a federal Commissioner for Children (if and when such a position is created), would be best placed to be the conduit through which such groups are established and maintained.

Conclusion – Where to from here?

Statutory child protection decisions are some of the most important decisions that may face some children and their families. These decisions can have a lasting and intergenerational impact on those involved. It is therefore essential that the children involved in these decisions – at all levels of Australia's statutory child protection systems - are able to exercise their rights under the UN Convention on the Rights of the Child to participate in these decisions to the fullest extent possible.

As detailed in this paper, there is much work to be done to facilitate children's participation in statutory child protection decision-making in Australia, in particular further research, better policies and systemic support for implementation of policies on the ground. On a national level, greater coordination of a child rights/participation approach to child protection is required. Whilst the National Standards on Out of Home Care are a start, these focus only on children in

alternate care, leaving out the vast majority of children involved in child protection systems. Finally, Australia needs to meet the significant challenges of including children in institutional decision-making about child protection systems, so as to fully meet its commitments to participation pursuant to Article 12 of the Convention.