What Responsibility Do Courts Have to Hear Children’s Voices?

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Introduction

No social organization can hope to be built on the rights of its members unless there are mechanisms whereby those members may express themselves and wherein those expressions are taken seriously. *Hearing what children say* must therefore lie at the roots of any elaboration of children’s rights. No society will have begun to perceive its children as rightholders until adults’ attitudes and social structures are seriously adjusted towards making it possible for children to express views, and towards addressing them with respect (Eekelaar, 1992, p. 228).

Article 12 of the UN Convention on the Rights of the Child is explicit about children’s rights to express their views and to have an opportunity to be heard in any judicial and administrative proceedings affecting them. This article will focus on the responsibility of courts, and in particular, that of the judicial officer, to facilitate children’s participation and improve their experience of the process in two important areas of law where children’s participation can have an impact on the outcome: cases involving children as witnesses in child sexual assault matters, and as informants or participants in private family law matters. While the particular focus is on two common law countries (Australia and New Zealand), similar issues arise and are relevant to other common law jurisdictions. It focuses on data from several Australian studies concerning children’s experience in criminal and family law proceedings conducted by the authors.

While the role that children play as witnesses in criminal proceedings and as the subject of family law proceedings differs in a number of ways, judicial officers in both types of matters have a responsibility to ensure that children are properly heard and respected in both processes. When children are witnesses in criminal proceedings, their evidence is either presented in person in the courtroom or by means of closed-circuit television and/or pre-recorded evidence from outside the courtroom. As the primary witness in child sexual assault matters,
children's evidence is generally crucial to the prosecution case, and the ultimate
decision of the fact-finder frequently depends on the reliability of that evidence.
The outcome, however, is not about the child—it is about the accused. In family
law matters concerning residence and contact, the outcome unequivocally con-
cerns the child but the child is the object of the court’s concern and is rarely seen
or heard in the courtroom. Rather, the child’s voice is heard via indirect means
through expert or family reports and via legal representation.

Despite the differences, in both types of proceedings, the extent to which chil-
dren’s voices are heard depends on the role the judge plays in determining how
their views are received, weighed and taken into account. There is potential in
both types of proceedings for judges to facilitate this, with encouragement in
some quarters for a more active role for judges in criminal proceedings and a more
direct role via judicial interviews and direct evidence in some family law matters.

Child Witnesses in Child Sexual Assault Prosecutions

The main reason why a more active role for judges is warranted in controlling
the proceedings in criminal prosecutions involving child complainants as wit-
tnesses relates to the continuing concerns about the fairness and appropriateness
of an adult-oriented forum for child witnesses, particularly in relation to control-
ling cross-examination. In criminal courts, child witnesses operate on a very
unequal playing field in a contest that is far from fair, despite some of the legisla-
tive and procedural changes that have been made to accommodate them. Many
child witnesses feel dissatisfied with the opportunity they have had to give a full
and fair account of what happened, especially in relation to cross examination.

With the easing of the restrictions associated with competence and corrobora-
tion requirements, children now appear more frequently as witnesses in child sexual assault prosecutions than they did several decades ago. As more children and
younger children have come before the courts as witnesses, the problems they
face in an adversarial adult-oriented system have become more evident. A multi-
tude of research studies, government reports and inquiries in Australia and other
common law countries have documented the difficulties. While there are proce-
урural and legislative differences across the various jurisdictions, the issues facing
child witnesses in child sexual assault matters are strikingly similar (Bala, 1999;
Bessner, 2002; Goodman, Bulkley, Quas, and Shapiro, 1999; Myers, 1996;
Spencer and Flin, 1993). These include children being required to answer ques-
tions from a number of different people about what happened, waiting months
and even years before the case gets to court, having to face the alleged offender,
and being asked complex and difficult questions by lawyers unaccustomed to
speaking to children in language they can understand (Cordon, Goodman and
Anderson, 2003; Australian Law Reform Commission and Human Rights and
Equal Opportunity Commission, 1997; New South Wales Legislative Council Standing Committee on Law and Justice, 2002; Sas, 2002; Spencer and Flin, 1993). Quite often children have to go through this more than once, having to testify in pre-trial hearings or when there are multiple trials, with demonstrated adverse consequences (Spencer and Flin, 1993; Quas et al., 2005).

Concerns about the stressful and potentially harmful effects on children and the possibly detrimental effect on the reliability and completeness of their evidence have led to a number of changes in investigative and court procedures to try to accommodate the needs of child witnesses while still protecting the rights of the accused. These changes fall into three categories: modifications to the court environment and innovative procedures to alleviate the main stressors for children in court, empowering children by preparing them for the court experience, and increasing the skills of the professionals involved in the investigative and court process (Cashmore, 2002). In particular, the use of technological aids in the form of closed-circuit television and pre-recorded interview evidence have allowed children’s evidence to be fully or partially presented in the form of a pre-recorded interview and allowed children to testify away from the court room itself, and the gaze of the accused.

Despite these changes, child witnesses—and for that matter, many adult complainants in sexual assault matters—indicate dissatisfaction with their experience as witnesses, reporting in particular that they feel they were not heard. In a recent study in New South Wales, for example, most children had difficulty with the questions they were asked and did not feel that they had the chance to say what they wanted to say or tell what happened in a coherent story (Cashmore and Trimboli, 2005). They felt constrained by admissibility issues and by the directions they were given about how they could answer. They also reported being cut off or interrupted by the lawyer. For example:

*Like I’d go to tell him what happened and he’d just say “No, just answer the question”. Like, you want to tell them the whole story, and they say, “No, you can’t say that. If you don’t say it this way, you can’t say it at all” (11 year-old complainant).*

*No, I had been told that I could not mention any other cases but some questions that they asked, you couldn’t answer without mentioning the other people because that’s how it worked, that’s how it happened. So I was thinking, ‘Am I going to look like I am lying because I am hesitating?’—because I didn’t know how to answer without mentioning them (15 year-old complainant).*

Consistent with the findings of numerous other studies on the difficulty of ‘legal language’, children also found the questions difficult to understand (Brennan and Brennan, 1988; Davies, Henderson, and Seymour, 1997; Henderson, 2002). For example:

*It was quite hard . . . and a bit annoying. They were speaking mumbo jumbo. Words I could not understand. (15 year-old complainant)*
Telling the Truth—If the Court Allows It

Children’s perceptions that they were not able to ‘tell the whole story’ in its proper context reflects the significant imbalance of power, language, skills, and familiarity with the court process between child witnesses and the legal professionals involved. In their comparison of adversarial and inquisitorial systems, Van Koppen and Penrod (2003) highlighted the importance of fairness and equality in the ‘contest’ inherent in adversarial systems:

> a contest is only a real contest if it is played in a fair way and the essential feature of fair play is the formal equality of the contestants (p. 2).

Child witnesses’ perceptions of the adversarial process, especially in relation to cross-examination, together with the research evidence, clearly indicate that the contest between a child and a lawyer in the court environment is not fair. The research highlights the fact that many strategies that lawyers use to cross-examine children are stress-inducing, developmentally inappropriate, suggestive and “evidentially unsafe” (Henderson 2002, p. 280). The assumption underpinning the adversarial process that ‘persistent questioning’ and challenging a witness’s account of events during cross-examination will expose the unreliability of witness evidence is invalid and unwarranted in the case of children (Carter, Bottoms and Levine, 1996; Cordon, Goodman and Anderson, 2003; Henderson 2002; Zajac, Gross, and Hayne, 2003). As Sas (2002) stated: “Lawyers skilled at discrediting child witnesses through the use of conventional strategies, can intimidate them into silence, lead to contradictions in their responses and produce emotional disorganization and distress”. Such strategies are, however, widely used and generally acceptable to lawyers and judicial officers as an integral part of the adversarial process.

Children’s perceptions that they have not been able to give full and reliable evidence is well supported by research that indicates that their emotional state and the consistency and completeness of their testimony are affected by the way they are questioned (Brennan and Brennan, 1988; Davies, Henderson and Seymour, 1997; Goodman et al., 1992; Zajac, Gross, and Hayne, 2003). Children’s frustration and dissatisfaction with the process, and with cross-examination in particular, means that the legal system does not meet their expectation that they should be able to “tell the truth, the whole truth, and nothing but the truth”; it also diminishes their faith in the fairness of that system (Quas et al., 2005).

The Importance of Judicial Leadership

Clearly, more could be done to change the culture of the courtroom, and judicial intervention and leadership may be the best bet within the existing adversarial system. Some judges clearly recognise the problems, especially those arising from the imbalance between professional lawyers and child witnesses.
For example, the Chief Justice of New South Wales in Australia, Spigelman CJ, in an appeal case [R v. TA (2003)], indicated clear approval for greater judicial intervention:

Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance.

The judicial role in the criminal trial process is pivotal. In the adversarial system, the judge is supposed to be a neutral referee who ensures ‘formal equality’ between the parties and fair process. Judges exercise considerable discretion in the use of special measures, over the admissibility of evidence, in controlling questioning, “modelling child conscious court practice”, and giving directions and warnings to the jury (Hafmeister, 1996; Hunter and Cronin, 1995). Their key role is also well accepted by children who perceive them to be the most important ‘player’ in court (Cashmore and Bussey, 1989, 1996; Flin, Stevenson and Davies, 1989; Sas, 2002).3

Several studies, however, have found that a number of judges show a marked reluctance to intervene or simply do not intervene to assist or protect vulnerable witnesses during cross-examination (Cashmore and Bussey, 1996; Cordon, Goodman and Anderson, 2003; Hafmeister, 1996; O’Kelly, Kebbell, Hatton and Johnson, 2003). For example, one judge explained his reluctance in the following way:

I think it’s very important when cross-examination is proceeding . . . to permit the evidence to be properly tested and if that means, as it inevitably does, that the child has to be distressed, I’m afraid it’s part of the system (Cashmore and Bussey, 1996, p. 325).

There is also evidence that judges vary considerably in their rate of intervention, and in their style of interaction with children and other vulnerable witnesses. In one observational study, while some judges were responsive to prosecution objections, most were not sensitive to the difficulties that child witnesses had with the linguistic style of the defence lawyer in the absence of any objection (Cashmore and Trimboi, 2005). O’Kelly et al. (2003) reported similar findings in relation to judicial intervention during the cross-examination of witnesses with an intellectual disability.

**Improving the Court Experience for Child Witnesses**

Judicial intervention to prevent inappropriate or oppressive questioning and to ensure that questioning is fair and understandable to a child is not the only way that judges and magistrates can improve the court experience for child witnesses. Importantly, they set the tone of the courtroom and can model appropriate
behaviour and ways of interacting with child witnesses that are respectful and allow children to testify in a full and fair manner.

They can also minimise delays and adjournments by appropriate case management procedures that ensure that the case is ready to proceed without unnecessary delays. They can ensure that the various parties and professionals are prepared for the appropriate use of special measures for child witnesses. They can introduce themselves and the main players in court to the child, and explain how things will be done. They can ensure that the child is able to hear properly and can see the person who is asking questions—and that they cannot see the accused, if they are giving evidence via closed-circuit television. They can explain that there may be times that the legal people in court will need to discuss some issues without the child having to be present or involved. They can monitor the child’s state and offer a break rather than requiring the child to ask for one. In short, by being sensitive to the needs of the child, they can model appropriate behaviour and set the tone of the court.

So what might be done to encourage judges to be more sensitive to the needs of child witnesses and to be more willing to intervene appropriately? One possibility is legislative reform to require judges to disallow inappropriate questioning (such as the recent amendments to the Criminal Procedure Act 1986 in New South Wales (s. 275A)) but this is not likely to be effective without some judicial education to assist judges to recognise questioning that is developmentally inappropriate, oppressive or intimidating for a child witness. In the absence of any ‘child interpreter’ who can play this role as happens in some civil law jurisdictions (Cordon, Goodman, and Anderson, 2003; Müller, 2001), judicial education is necessary to assist judges and magistrates to understand what children are capable of in relation to language and conceptual understanding. In addition, a proper understanding of the dynamics of child sexual assault would assist in formulating appropriate warnings to the jury as required by law.

**Children’s Involvement in Family Law Matters**

In contrast to the central role that child witnesses play as complainants in child sexual assault trials, children in family law proceedings that make decisions about where they will live and when they will see both parents are seldom heard directly in court. Most common law jurisdictions have taken a protective stance and are reluctant to allow children to enter the arena in terms of having any direct contact with the court itself. The normal practice in most common law jurisdictions is that a trained counsellor (Australia and New Zealand), CAFCASS officer (England and Wales) or custody evaluator (US) conveys the views and feelings of children as part of their report to the court. Where children’s legal representatives are appointed, as is the position in most cases that go to trial in Australia and in
all cases in New Zealand, the child’s representative has a clearly established duty to ensure that the views of the child are put before the court.5

In various common law jurisdictions, and in England and Australia in particular, the conventional wisdom is that these more indirect methods of informing the court of children’s views are greatly superior to the judge interviewing children directly. Not only are such professionals regarded as better able to interview children, but they are also seen as better qualified than judges to interpret their views in the light of all the circumstances (Bala, 2004; L’Heureux Dubé and Abella, 1983; Starnes, 2003). Moreover, there are due process concerns6 that judicial interviews with the child may violate “the judge’s role as an impartial trier of fact who does not enter the adversarial arena” (L’Heureux Dubé and Abella, 1983, p. 329). In the words of an English judge:

Seeing and talking to children as part of the forensic process is discouraged in English law because what the child tells the judge in private cannot be tested in court by cross-examination. English judges are very reluctant to involve children either in their parents’ disputes or in the judicial process (Wall J, 2003, p. 20).

However, those views are now being challenged and there is increasing discussion about the potential benefits of judicial interviews with children as part of the overall decision-making process in England, Australia, New Zealand and Canada (Bessner, 2002; Hale, 2006; Lyon, 2000; Nicholson, 2002; Tapp, 2006). There appear to be several reasons for this and some particular influences in different countries. Perhaps the main reason is that research has highlighted children’s wish to be more involved in the decisions that profoundly affect their lives and their dissatisfaction with the indirect processes that are available to them (Parkinson, Cashmore, and Single, 2005; Smart, Wade, and Neale, 1999; Smith, Taylor, and Tapp, 2003). There also appears to be increasing awareness of the importance of children being heard, in line with Article 12 of the United Nations Convention on the Rights of the Child, in England and New Zealand (Bessner, 2002; Chisholm, 1999; Hale, 2006; Smith, Taylor and Tapp, 2003). In New Zealand, this principle is explicitly articulated in recent legislation (Boshier, 2006). 7 In England, Hale (2006) suggests that the European Court of Human Rights, and exposure to this as standard practice in some European countries, has had an influence.8 In Australia, debate has been engendered by the development of the Children’s Cases Program (Sandor, 2004) which includes the option of judges interviewing children about whether it is appropriate to do so and under what conditions.

What are Children’s Views about Talking with the Judge?
While there may be increasing discussion among judges, academics and commentators about the value of judicial interviews, and speculation about the
impact on children (Starnes, 2003), there is surprisingly little research on this issue, at least in the English-speaking world and little indication of what children’s views might be about it (Tapp, 2006). Several studies of children’s views about participation in family law proceedings (Butler et al., 2002; Smart, Wade, and Neale, 1999; Gollop, Smith and Taylor, 2000; Smith, Taylor, and Tapp, 2003) have included some discussion of this issue arising from children’s responses about the possibility of talking directly with a judge. Lyon’s presentation (2000) is one of few papers specifically focused on the arguments for judicial interviews in family law matters, based on her analysis of English case law and children’s responses to several questions in a more general survey about effective support services (Lyon, Surrey and Timms, 1998).

Our own research on children’s participation in decision-making about residence and contact issues following parental separation also included questions to children, parents, lawyers and judges about children talking directly with the judge (Parkinson and Cashmore, 2006; Parkinson, Cashmore and Single, 2006). This study involved 47 children and young people, ranging in age from 6–18 (mean age of 11.8 years, SD = 3.1). Just over half (25/48, 53%) had experienced contested proceedings. Thirty-five children were re-interviewed 18–30 months later to explore changes in their residence and contact arrangements.

In the first interview, children were asked who they thought would be the best person to speak about their wishes. They were given a number of options that included talking to parents, counsellors and judges. The largest group of children and young people (n = 12) said that they thought that one or both of the parents would be the best people to talk with. Only three were involved in contested cases. The second largest group (n = 8) said that they thought it would be best to tell the judge directly. All were involved in contested matters. Two other children indicated, more ambiguously, that they would have been prepared to tell ‘the court’. Both were also the subject of contested cases.

The other children and young people referred variously to counsellors (n = 6), family friends (n = 3) or said they did not know (n = 6). Another group (n = 6) gave answers that were decidedly ambivalent or exhibited the ‘to and fro’ tendencies where they were clearly struggling with wanting to have their say directly but were not comfortable with the process (Graham and Fitzgerald, 2006).

In summary, all the children who indicated that it would be best to tell the judge or who otherwise indicated a willingness to speak to the court were involved in contested matters. For several of these children, their choices, to live with one parent rather than the other, or to have little or no contact with a parent, were influenced by incidents of violence that they had experienced or witnessed. Not all the children in contested matters, however, wanted to speak with the judge: some referred to counsellors or said they did not know. In contrast, most of those who said it was best to speak to parents or with someone else (trusted family
friend) were involved in uncontested matters. Some, mostly in uncontested matters, were not at all keen to get involved more directly, generally because they thought it was inappropriate in their case, it was too scary, or they preferred to keep such issues within the family. In cases that are not contested, the decision-makers are generally the parents, so it is not surprising that children and young people want to talk directly with them about the post-separation arrangements in these cases. In cases that are contested, the decision is made by a judge, generally on the basis of an expert report and often with input from a legal representative for the child. It is not surprising then that children who have been the subject of protracted and contested disputes between their parents may wish to speak directly with the person making the decision.

In the second interview, children were asked specifically what they thought of the option of talking to a judge in chambers, since this option was being considered in the Children's Cases Program. Most children (85%) said that children should have the opportunity to talk to the judge if they wished to do so. Their responses were not affected by age or gender, nor did it make any difference whether they had been the subject of a contested case.

**Children’s Reasons for Wanting to Talk to the Judge**

The obvious and main reason that children wanted to have the option of talking directly to the judge was that they wanted to have a say or at least have their views heard by the ultimate decision-maker. For example:

> It's going to affect them, and so they should have a say in it, I think (Emily, 15, not contested).

They also wanted acknowledgement and for the decision-maker to know whose lives they were affecting.

> I think that's a good idea. I think that if the judge is going to be determining something that's going to affect the child directly, then the judge should at least know the person they're going to be making a decision on and have spoken to them (Rani, 16, contested).

There were several other reasons that children and young people wanted to talk directly with the judge. The first was that they wanted to say things to the judge without one parent, or both parents knowing what they had said. This was generally because of their fear of hurting their parent if their views were known. The second reason was so that the judge would know exactly how they felt without any mixed messages or misinterpretation. They wanted the judge to hear from them directly rather than ‘second-hand’ through family report writers or child representatives. In some cases, children were quite explicit in saying they did not consider that they had had a proper opportunity to be heard through these indirect means. The third reason was that they thought the truth was more likely to
come out and a better decision would be made if the judge had a better and more complete understanding of what was really happening. For example:

So the children get more say in it. Because sometimes the decisions aren’t always right and they think it is, but it’s not (Anna, 13, in contested matter).

Because the judge doesn’t know what the child’s like with their mother and the mother might be telling lies and the same with the father. So, I reckon that the child should tell the judge what’s really going on (Harriet, 12, contested matter).

Several also cited examples of siblings or younger children in their extended families where the children were being pressured to give particular answers. For example:

. . . it’s really bad for them . . . their mum talks to them and tells them what to say, and their dad talks to them and tells them what to say, so they’re all just confused . . . I think if they did talk to the judge and the judge found out that was happening, then that would be a good thing (Terri, 16).

A few also wanted to talk with the judge because they assumed that if they did so, their wishes would prevail. For example:

So you can do what you want. Live where you want. Where you think it’s safe . . . stuff like that (Darren, 14, in contested matter).

The Importance of Hearing Children’s Voices Directly

While the rationale for keeping children out of direct involvement in family law proceedings is to protect them from the conflict, the evidence from this and other research is that this protective stance comes at a price for some. The children who went through contested proceedings had experienced in most cases being interviewed for a family report or a report by an independent expert, had had a child representative, and had been consulted in other ways in accordance with the normal processes of Australian family law. Despite this, many of these children and young people were saying that they would have liked to have been heard in a more direct manner and to know that their views had been heard. For some children, it was important to them that they could tell the judge without their parents knowing, and being upset or angry with them because of what they want to say.

There are various ways that the courts can try to meet children’s expectations and rights to be heard more directly, with the exception of complete confidentiality. Talking with the child can allow the judge to gain an impression of the child’s maturity, a factor to be considered in deciding the weight to be given to the child’s views. It also allows them to see the person they are making such an important decision about and to have a better appreciation of the depth and intensity of the child’s feelings. In addition, it may allow the judge to address
any concerns as to whether the previously ascertained views of the child remain current.\textsuperscript{10}

Confidentiality of the information obtained in an interview with a child is, however, problematic. Due process requires that judges disclose to the parties—the parents—the information relied upon in making their decision. The normal practice then would be that any such interview with a child would be taped or video-recorded and a summary at least of the outcomes of the interview presented in a report to the court.\textsuperscript{11} Not asking children to express a direct preference, and being clear that any expressed preference is not determinative should also reduce the risks to children inherent in that approach (Starnes, 2003; Warshak, 2003) while still meeting children’s wish to be heard. While wanting to be heard, most do not want to determine and be responsible for the outcome (Bretherton, 2002; Neale, 2002; Smith, Taylor and Tapp, 2003).

There are also other purposes that ‘conversations’ with the judge might serve. Again these need not and should not involve judges asking children directly to express a preference.

\textbf{Gauging the Likely Impact of the Decision}
First, before the decision is made, the judge might gauge the likely impact of going against a child’s firmly held wishes. This would involve some sensitivity and fine balancing, because the judicial officer could not indicate what his or her final decision would be in advance of making that decision and announcing it to the parties. In \textit{R v R} (2000), the Full Court of the Family Court of Australia said that counsellors should ask children how they would feel if the court went against the wishes they had expressed. While that can and should be done in the family report, it may be very valuable for the judge to talk to the child first hand before making a decision to go against his or her wishes, not for the purposes of persuading the child but to see first hand how strong their views are and to have a better sense of whether a parenting arrangement which goes against the wishes of a child or young person is likely to work. That may reaffirm the judge’s tentative conclusion or it may influence him or her to change the contemplated orders.

\textbf{Explaining the Decision to the Child or Young Person}
Secondly, talking with children after the decision is made might assist them to understand and accept the decision, thereby making it more workable. Gollop, Smith and Taylor (2000), for example, reported that “children who were not listened to, or who were forced into arrangements, which they did not like or could not change, appeared to be the most dissatisfied” and “some . . . simply refused to comply with the decisions imposed upon them” (p. 397); many, however, were
able to accept arrangements when they understood the reasons for them. This is consistent with the findings from procedural justice research that being acknowledged and being heard, even after the decision was made and could not influence the outcome, contributed to perceptions that the process and the outcomes were fair (Lind, Kanfer and Earley, 1990). This should not be a tokenistic gesture (Cohen, 1985) but a means of helping the child or young person to understand the judge’s decision, and to know that his or her views were carefully considered even when the decision had gone against the child’s strongly held view.

Explaining their decision directly to the child is a practice of one or two judges in Australia, particularly with adolescents (Parkinson and Cashmore, 2006). Tapp (2006) also cites a specific New Zealand case (A v B 2003) in which the judge delivered the judgment “orally in the presence of the children [whom she had spoken with during the proceedings] “in the form of an address to the children” saying “. . . the reason you are here today is for me to make a decision about your future. The reason I have put you in front and the adults at the back is for me to signal to you that it is your future that is in debate” (p. 18).

Any judge having conversations with children must of course be aware of the pitfalls, as well as the benefits of so doing (Warshak, 2003). Children’s views may be unduly influenced by a parent, and need to be assessed in the context of all the family relationships. Such conversations are not a substitute for expert interview and evaluation of the family dynamics. Indeed, a conversation with a child may in some situations be contra-indicated given the pressures that might be brought to bear on him or her. However, in an appropriate case where a child or young person wants to talk to the judge and this course of action is recommended by the counsellor or child representative, such a conversation may act as a useful supplement to the report of an expert assessor and a valuable means of directly acknowledging the child.

Allowing Children to give Evidence
There may also be value in calling children to give evidence in some cases in open court in family law matters (Bessner, 2002). Some judges in Australia have indicated in interviews with us that they have done this on occasions—for example, where a change of name is involved for an adolescent child and where hearing directly from the child or young person who is 15 or 16 years old would settle the matter in the minds of parents that the child has a firmly expressed view about their identity which should not be contradicted by the decision of the court. In some cases, children and young people have given evidence in trials to indicate abuse to a sibling or where their voices could not be heard in any other way.12

These examples of children and young people under 18 giving evidence in open court are not at all common but it may be better for a young person to be heard in open court than not to be heard at all (Bessner, 2002; Chisholm, 1999;
Nicholson, 2002). The benefits of seeing the court, seeing the judge, and being able to express their views directly and not through messengers may well have significant benefits for some children and young people which do not accrue from our existing protective approach to hearing their voices. Children and young people do give evidence in other contexts, particularly in criminal trials, and while it is not easy, and further measures including greater judicial sensitivity are required, it may be that the family law system has been too concerned with the detriments of hearing from children directly rather than the potential benefits for them being heard in open court—as long as it is managed well (Chisholm, 1999).

The type of arrangements used by child witnesses in criminal courts—closed-circuit television or pre-recorded evidence—could be used to allow children to give evidence in camera in family law proceedings (Bessner, 2002). In addition, the Court may well place limits upon cross-examination. Again, the judge needs to set the tone and ensure that all parties and lawyers behave responsibly and with due care and concern for the well being of the child or young person giving evidence.

Finally, whether or not judges do talk with children in family law (to explain the decision, for example), children and young people need to know early in the process, and throughout it, the manner in which their voices will be heard. The adults involved also need to listen to what would meet children’s needs—whether they wish to be heard, and if so, how. It is clear from our interviews with children that they were not confident that their voices were going to be heard in the trial. In some cases they did not understand who they were talking to and for what purposes. In criminal matters too, child witnesses have been critical of the lack of information about the process (Cashmore and Trimboli, 2005). Involving children must include appropriate information about the process, about what they can expect, and some choice about how they can be involved. It is worth noting Lansdown’s comments (cited by Gollop, Smith and Taylor, 2000), defining consultation with children as:

more than just asking them what they think. It means ensuring that they have adequate information appropriate to their age, with which to form opinions. It means being provided with meaningful opportunities to express their views and explore options open to them, and it means having those views listened to, respected and considered seriously (pp. 397–398).

Acknowledgments

Judi Single conducted the interviews with the children and parents, and their cooperation and willingness of parents and children to participate in the interviews made the study possible of Robyn Fitzgerald’s helpful comments on the draft are also appreciated.
Cases

A v. B, unreported, 5 May 2003 Judge C P Somerville FC Christchurch. 

Notes

1) The children who experience or are affected by court proceedings in criminal and family law matters constitute only a small proportion of those whose lives are affected by either child sexual assault or the separation and divorce of their parents. Their experiences as a result of these more formal processes, however, demand particular scrutiny in terms of the opportunity they have to be involved in a meaningful way (Freeman, 1996).

2) Similarly, Judge Ellis, a judge presiding over criminal trials in Sydney, for example, stated: It is a very moot point whether the presently accepted defence questioning styles and methods effectively test the efficacy of evidence. Arguably, it is more likely that it allows lawyers to unfairly discredit evidence without providing any genuine enlightenment as to the truth or otherwise of testimony (Ellis, 2005, p. 10).

3) Sas (2002), for example, states that:

Children’s feelings of goodwill and their high expectations of the adults in court are especially extended towards the judiciary. Children cannot understand how a judge will not believe them when they are telling the truth. Many children have unrealistic expectations of the judge, seeing the judge as some one who will right all the wrongs that have been committed by the accused. It is not surprising that explanations of how a judge arrives at a decision employing a standard of beyond a reasonable doubt is so hard for child witnesses to comprehend. They expect the judge to see the events from their perspective. This is one of the reasons why court preparation is so important for child witnesses.

4) In various jurisdictions in Europe, and in Western Australia, the whole of the evidence of the child is taken in advance of the trial, stored and eventually presented to the court without requiring the child to be present at trial to testify (Cordon, Goodman, and Anderson, 2003).

5) In Australia, the child’s legal representative is not bound by the child’s instructions and may convey a recommendation to the court based on his or her opinion of the child’s best interests that is different from the child’s own wishes (Family Law Council, 2004).

6) In the US “most states authorize courts to interview children in camera”, but concern has been raised about recent decisions that have strengthened parents’ due process rights to access their children’s in-camera statements, increasing the risks to children’s capacity to be heard in this way (Starnes, 2003).

7) Australia differs from New Zealand in the incorporation of Article 12 of the United Nations Convention on the Rights of the Child. Not all children involved in contested matters in Australia have a child representative, and while the Family Law Act 1975 provides that children’s views should be taken into account in judicial decision-making, there is nothing else in the Act that implements Article 12 of the Convention. In contrast, the New Zealand Care of Children Act 2004 s.6 provides that in disputes about parenting arrangements or children’s property:

(a) a child must be given reasonable opportunities to express views on matters affecting the child; and
(b) any views the child expresses (either directly or through a representative) must be
taken into account.

8) The Honourable MC Celeyron-Bouillot “The voice of the child in Hague

9) The interviews with the children were conducted as part of a wider study on children's
participation that includes interviews with parents, counsellors and mediators involved in fam-
ily dispute resolution, family lawyers, children's representatives, and judicial officers. The chil-
dren and their parents were recruited for the study through family lawyers, who were asked to
write to up to 15 former clients who had resolved matters in the preceding 12 months. The
lawyers were asked to choose a mixture of clients. The first category were those who had been able
to resolve their parenting issues with no more than counselling and mediation, either from the
Family Court’s Mediation Service, or community-based organisations. The second category
included those who had experienced a more intense level of engagement with the family law sys-
tem, and had at least had an independent expert report commissioned in preparation for a trial.

10) Nicholson CJ agreed to the children's request to see him in relation to a relocation case
and used the opportunity to check whether the children's views were still as reported in the
family report which was written some time before (ZN v YH and the Child Representative
(2002) FLC 93-101); he determined that the children's views were different from what had
previously been reported, and ordered a new family report. Tapp (2006) also cites an exam-
ple in which a seven-year-old child was able to correct inaccurate representation of his wishes
by the report writer to the court in an interview with the judge.

11) This is the practice in most states in the US and Quebec where in-chamber interviews
are conducted. The more recent situation under the recent Care of Children Act 2004 in New
Zealand, as described by Tapp (2006), is somewhat different. Tapp outlines a 'mixed system',
which has both adversarial and inquisitorial aspects, and in which judges are more likely to
speak with children, and do “not always” apprise the parties of the child’s view (pp. 17–18).


13) Nicholson (2002) states: “There may be children, who wish to give evidence and if they
do, it is difficult to see the rationale for preventing them doing so. To refuse them this right
may well be a breach of their entitlements under UNCROC and may effectively prevent the
court ascertaining their wishes.” (p. 18)

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