

Contrasting children's participation through lawyers in family law and child protection proceedings

Nicola Ross

Lecturer, Child and Family Law at Newcastle Law School/PhD candidate, University of Sydney School of Law



INTRODUCTION

Article 12 of The Convention on the Rights of the Child (CRC) gives children rights to express their views and be heard in legal decision making processes when decisions are being made about their lives. Children's lawyers are one means through which participation rights may be achieved. Little is known about how children's lawyers work with children to facilitate their participation.

The study set out to understand lawyers' perceptions about their roles and practice in facilitating children's participation in legal proceedings where children were the subject of, or defendants, in such proceedings.

METHOD

An empirical study with 35 children's lawyers representing children in family law, child protection and criminal proceedings in NSW during 2006; qualitative, involving semi-structured interviews, two vignettes and an in-depth case study question.

RESULTS

The context and the lawyer's orientation to practice influences whether lawyers support children's interest in participating in proceedings by having contact with the courts.

Family Courts

- Children are not invited to have contact with the court in family law proceedings (apart from visiting Family Consultants or as part of the Child Responsive Program):
- There is no right of appearance for children in the courts.
- Family Court Judges and Federal Magistrates do not generally welcome children into the court.
- Half the lawyers (in the vignette) acted as gate-keepers by not passing on children's requests to meet the judge.

Care proceedings: NSW Children's Court

- Children were more welcome in the NSW Children's Court than in the Family Courts.
- Children have a right of attendance.
- The legislation includes a principle of participation.
- Magistrates were more welcoming of children and happy to meet with them and introduce themselves.
- Half the lawyers encouraged children to attend court.
- Some children attended less sensitive parts of court proceedings.

DISCUSSION

Research with children indicates some children and young people want the opportunity to participate more actively in legal proceedings. Some feel marginalised and not heard despite having legal representation and having their views put to judges in the form of expert reports. Some children want to have contact with the court, but this interest has not been explored to any extent in Australia.

Tensions exist for lawyers between supporting children's wish to participate in court processes (visit the court, meet the judge or magistrate, observe parts of proceedings) and the need to protect children from the harmful effects of involvement in legal disputes.

CONCLUSION

Some children will want opportunities to be more actively involved in legal proceedings and some will want more contact with the court and legal process. Whether such opportunities are made available depends on legislative requirements, judicial officers' and lawyers' support.

Legislative requirements regarding children's participation and lawyers' attitudes and commitment to facilitating participation are very varied. Some lawyers are committed to developing professional relationships with children: others are not. Concerns about legal processes being harmful to children are currently overwhelming any interest in exploring how children's desire to participate more actively in court processes might be accommodated in ways that do not harm children.

