



Children's direct participation and the views of Australian judges

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Children's proceedings are unlike any other civil litigation in this land. I mean, where else do you have the principal party, about whom the action is and the orders will affect, who doesn't have an audience? (Family Court judge in interview, 2009)

In Australia, hearing directly from children in family law court proceedings is very rare. There is a perception that involving children closely in adversarial proceedings between their parents can be harmful for children (Chisholm, 1999; Bryant, 2006). A meeting between a judge and a child is, perhaps, the most appealing mechanism for children to participate directly, because the meeting occurs in private and the child does not give evidence in open court and is not cross-examined. Even so, of the hundreds of children's matters decided in the Family Law Courts around Australia each year, there are only a couple of cases (literally one or two per year) in which a judicial officer will meet with a child.

This article discusses the issue of children's direct participation in family law matters by examining why some judges, in Australia and

more commonly in other jurisdictions, choose to hear directly from children. The article discusses judges' views on meeting with children, drawing on results from the author's survey of Australian family law judicial officers about their experiences and attitudes to meeting with children. It examines why meetings between Australian judges and children are so rare and makes recommendations for how children can better be heard. These issues are discussed in the context of the literature on children's views about their level of participation in family law proceedings.

It is necessary to make two qualifications before proceeding. First, while the author promotes direct participation by children, it is not advocated that judges meet with children in every case. A judge should be satisfied that meeting with a child is in the child's best interests and this would include considerations such as whether the child had expressed a wish to meet with the judge, the age and maturity of the child and what might be gained by meeting with the child. Second, this research adheres

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to a particular model of judicial meetings with children which some judges have utilised in the past. Features of the model include the meeting taking place in the presence of a family consultant (a child welfare expert) who reports back in open court on what transpired, the child consenting to the meeting at all times, and it being explained to the child that anything they say may be recounted to their parents and that confidentiality cannot be guaranteed.

Children’s views about their level of participation

Despite the view that children should be protected from the harmful effects of family separation, a wealth of research conducted in Australia and elsewhere has consistently found that children want to have more of a say in decisions that affect them. In a survey distributed to young people in schools and detention centres and reported in the Australian Law Reform Commission and Human Rights and Equal Opportunities Commission (ALRC and HREOC) *Seen and Heard* report, 85% of the 623 child respondents were of the view that children should have a greater say in family law decisions.¹ Children have emphasised the importance of “having a say” rather than having the power to make family decisions themselves (Morrow, 1998).

Children appreciate having their views sought (Gollop, Smith, & Taylor, 2000), and involving them directly makes them “feel respected, valued and involved” (Hale, 2006, p. 124). There is evidence that the increased sense of control felt by children who are able to participate effectively in decision-making processes concerning their family separation is strongly related to children’s psychological and physical health (Kelly, 2001).

Many children have expressed a particular desire to speak directly with the judge who is to make decisions on their parenting arrangements after family separation (Nicholson, 2002; Cashmore, 2003). Children are able to understand that it is the judge, and not the child, who has the responsibility for making decisions about their parenting arrangements. However, as Raitt (2007, p. 217) described:

Children who do wish an opportunity to express their views have sometimes talked to researchers about the importance of having access to the ultimate decision-maker. This might be because they lack confidence that anyone else was paying attention to them, as well as the affirmation that can be conveyed by a judge being willing to see them.

In an Australian study by Parkinson, Cashmore, and Single (2007), the authors interviewed children who had been the subject of parenting matters. Eighty-five per cent of the 35 children interviewed said that children should have the opportunity to talk to the judge in chambers if they wished to do so.

The main reasons children gave for wanting to speak directly with judges were wanting to have a say in decisions and wanting to have their views heard by the decision-maker. They wanted to have themselves and their views acknowledged and thought that this would result in better decisions being made. Interestingly, only a minority assumed that by talking to a judge a decision would automatically be made that accorded with their views. Most expressed a fair level of trust and hope that the judge would do what he or she thought was best and right for the child.

Limitations of other methods of hearing children’s views

The various methods by which the court receives evidence of children’s views are well known and widely used. These include accounts from others, including the child’s parents and other witnesses, as to what the child has said to them, reports from a family consultant who has met with the child and evidence led by the Independent Children’s Lawyer. The Chief Justice of the Family Court said:

It is apparent from countless judgements delivered by the Court over its thirty year history that the Court does take children’s views into account. However available research tends to suggest that this is not well understood by children and young people. (Bryant, 2006, p. 137)

Even when children are aware of the methods by which their views are heard, many are dissatisfied with them. None involve direct participation by the child. Studies have shown that children are unhappy about a process that requires them to express their views to a third person who subsequently includes those views, among other matters, in a report to the court. Children have said that they are not happy with the techniques employed by report writers, including the use of what they consider to be “trick” questions (Trinder, 1997), the lack of confidentiality, the feeling that their views are not properly understood or taken seriously and their views being filtered and reinterpreted by the report writer (Cashmore, 2003; Henderson, 2000).

Similarly, children often feel marginalised by the role of the Independent Children’s Lawyer (ALRC and HREOC, 1997), who is a

“best interests” advocate. This contradicts the understanding of many children, who expect that “their lawyer” will represent their views and not their “best interests” (Family Law Council, 2004). In light of this understanding about what children feel about their current level of participation in family law matters, perhaps it is time we seriously consider how children’s voices can better be heard.

Why judges meet with children

The view of judges internationally who are in support of judicial meetings with children is that meeting with a child allows the judge to hear direct evidence of children’s views without filtering by a third party (Hale, 2006; *Reynolds v Reynolds* (1973) 47 ALJR 499 at 503 per Mason J). Having the opportunity to see and interact with a child may better equip judges to focus on the individual child’s needs (Kelly, 2002; Boshier, 2005) and make a decision that promotes the child’s best interests, as required by the *Family Law Act 1975* (Cth). The judge can explore options that the judge is contemplating with the child, to discover what arrangements may best suit the child (Parkinson & Cashmore, 2007; Carl, 2005).

Many judges see meeting with a child as an important recognition of the child’s right to be heard. They see it as the judge’s responsibility to meet the person for whom they are making a decision and to explain that decision to the child directly once the decision has been made.²

One district judge from the United Kingdom, when reflecting on a child protection matter, observed:

Shanika’s presence did not add to my knowledge of her case nor did it assist in a decision which was agreed in any event. However, ... I hope and believe that when she looks back on the awful events which changed the course of her life she will feel that she was acknowledged and respected by the family justice system. (Crichton, 2006, p. 850)

In the New Zealand case of *SvS* [2009] NZFLR 108 a 9-year-old child expressed very strong views that she wanted to move to live with her father (who lived a short plane flight away). The child requested to meet with the judge and he agreed to do so. Upon speaking with the child, it became apparent to Murfitt J that the child was not unhappy with either parent but that she wanted a more balanced experience of life with both of her parents. She wanted to be able to spend “normal” time with her father, with whom she had previously spent only school holiday time. Orders were made for the child to spend one school term with



her father, holiday time with both parents, then to return to her mother for one school term. The matter would be reviewed once the child had an opportunity to experience a more balanced life with both parents. This is an example of a creative solution being found as a result of meeting with a child. It is doubtful this solution would have been pursued had the matter simply proceeded to a hearing without a judicial meeting.

Meeting with children lets the judge know what is important to the child, which may not otherwise be apparent. In one case recounted by an Australian Family Court judge in an article titled “Judges Receiving Evidence Directly From Children” (Benjamin, 2012), a group of about five children aged between 8 and 16 had parents who had been involved in litigation for about eight years. Benjamin J was very concerned about the current living arrangements, which had the elder children travelling to school every day by catching two buses and then walking several kilometres. His Honour decided to meet with the children before making any changes to their living and transport arrangements. Benjamin J recounted his interaction with the 14-year-old child:

Mate, are you thinking of changing how I get to school?
I replied: The thought had crossed my mind, why what do you think?

The child said: That’s the best part of my day, that’s when I have got my friends, I do my homework and it is really good, plus I carry a bit of weight and [pointing at my stomach] you know what I mean.

From my perspective, I thought this transport arrangement had been a burden for the children, but for the children it was actually a very good part of their day. By taking this evidence, the court had a better understanding of the impact of an order which I had considered would have on the children and as a result I did not change the transport arrangements. (Benjamin, 2012, p. 101)

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In these two cases the views expressed by children were not controversial or difficult to interpret. Anyone in the position of the judge would have found the process helpful and been pleased that they had agreed to meet with the child. It is clear that the children in these cases would also have benefited from the experience. Despite this, judicial meetings with children in Australia are few and far between. The author conducted a study to find out why.

What Australian judges think about meeting with children

In-depth interviews were conducted with four Family Court judges, following which a survey was distributed to all family law judicial officers in Australia. The survey asked respondents about their experiences of meeting with children and their views about the practice. Copies of the survey and invitations to participate were sent to the Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia, which all approved the survey and undertook to distribute it to all judges, federal magistrates and magistrates working in those courts (collectively termed “judges” in this article for ease of reference). Respondents were given the option to participate anonymously, and responses were returned by mail. Of the 92 judicial officers hearing children’s matters at that time, 44 responded, constituting a response rate of nearly 48%. The results of the survey have previously been published in an article by the author titled “What Do Australian

Family Law Judges Think about Meeting with Children?” (Fernando, 2012b).

The results confirmed that the incidence of meetings between family law judicial officers and children is very rare. Only six of 44 respondents had ever met with a child for the purposes of hearing the child’s views, meaning that 86% had never met with a child for this purpose. Of those who had met with children in the past, most had done so only once or twice. This differs remarkably from judges in New Zealand. In a study by Caldwell (2011) of New Zealand Family Court judges in 2009, 65% of judges who responded said that they often, very often or always meet with a child who is the subject of a parenting dispute.³

Australian judges were also not very likely to meet with children in the future. Only eight of 42 respondents (19%) agreed that they would meet with a child to hear the child’s views in the future. Twenty-six respondents (62%) disagreed that they would be likely to meet with a child, and eight indicated that they were undecided. Further, there didn’t appear to be a correlation between judges who had spoken with children in the past and those who said they may be likely to do so in the future. There was also no apparent correlation between respondents’ stated likelihood to meet with a child in the future and those who had been more recently appointed or those who had previously been Independent Children’s Lawyers.

One interesting finding was that nearly half the cohort (21 out of 44) thought that meeting with children could provide judges with



useful evidence of children's views. This is significant, because although judicial meetings are very rare in Australia the results showed that many judges think that such meetings may be useful. Further, 39% (17 out of 48) agreed that meeting with a child may give judges greater understanding of children's needs and best interests than other methods of hearing children's views. Therefore, many Australian judges are of the view that meeting with children can have significant benefits. Perhaps it is curious, then, that more judges do not take the opportunity to meet with children.

The results conveyed that judges may not be able to overcome some concerns about the practice. The majority (55% or 24 out of 44) believed that judges lack the skills and/or training to speak with children and interpret their views. This is so even under the model, which includes the presence of a family consultant to assist with the meeting and with speaking with the child. This result is consistent with the view generally accepted by those working in the Australian family law system that judges lack the expertise to speak with children (Chisholm, 1999) or to draw out and interpret their views (Cashmore, 2003).

Again, this differs from other jurisdictions. Despite a lack of regular or compulsory training, New Zealand judges are generally confident about their ability to speak appropriately with children concerning their views (Mill, 2008). Similarly, in Scotland, Raitt (2007) found that even when Scottish judges felt apprehensive about their skill and ability to speak with children, they were often committed to finding a solution. It is suggested that judges in New Zealand and Scotland may believe that the benefits of meeting with a child outweigh any limitations on the capacity of judges to conduct the meeting.

The views of judges in New Zealand and Scotland about their ability to meet with children can be contrasted with the attitude of one Australian Family Court judge:

To my mind, [the prospect of meeting with a child] is just about as scary as handing me a scalpel and saying "Just a bit of brain surgery before lunch please, Judge". It almost gets into that realm for me. I'm terrified of it. (Judge B, Family Court judge, in interview with the author, 2009)

A vast majority of Australian judges expressed concern that judicial meetings may encourage parents to manipulate or pressure their children, with 84% or 37 out of 44 agreeing or strongly agreeing with this proposition.

It is notable that judges were not overly concerned with two other difficulties

commonly associated with judicial meetings with children, being adherence to due process and requests for confidentiality from children. The majority of respondents were satisfied that the proposed model, whereby the family consultant is present and reports back to the parties, satisfied the principles of due process and natural justice. This was particularly so in circumstances where the parents receive a recording or transcript of the meeting in addition. Most also said that they would be able to deal with a situation where a child makes a disclosure and then requests it be kept "confidential" in the sense that it not be disclosed to their parents. The vast majority of respondents (86%) were of the view that an allegation of abuse disclosed by a child during a judicial meeting must be treated in the same way as a disclosure of abuse made in any other setting. This was said to include referring the matter to the family consultant for mandatory reporting to the relevant child protection agency, informing the parties of the disclosure, referring the matter for expert assessment and ensuring the safety of the child.

For disclosures that do not contain an allegation of abuse, respondents' views were more varied. Some judges were of the opinion that the disclosure should remain confidential. Others said that they would keep the confidentiality unless the disclosure was relevant to the court's decision-making. In those circumstances, the parties would have to be informed of the disclosure. Over 40% of respondents noted that the child would have been told, prior to the meeting, that nothing they said would remain confidential. So long as it would not put the child in a situation of danger, these respondents were of the view that the disclosure would need to be revealed to the parties.

One of the most interesting aspects of this research is that it uncovered wide discrepancies in Australian judges' views on direct participation by children. Some Australian judges have, in the past, made thoroughly positive statements about meeting with children, such as:

I'm a strong supporter ... of the participation of children in proceedings affecting their interests, and as part of that the idea of judicial interviews with children ... Even ... that brief exposure ... where I did [speak with a child] had an impact on me, that I had the opportunity to see and speak to the children about whom I was making a very important decision. (Stephen O'Ryan, former Family Court judge, Radio National Law Report, 26 June 2012)

Listening to a child on that one occasion had an amazing therapeutic effect on the entire family, and I felt so good.

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We need to find ways to increase direct participation of children in family law matters. One way is to encourage judges to consider whether to meet with a child in every case that comes before them.

I mean, my associate was in tears, my wife who'd come on circuit with me walked into the back of the court, and she was in tears, I was holding back tears. It was a very fulfilling experience. (Judge quoted by Parkinson, and Cashmore, 2007, p. 173)

Meeting with a child gives a judge a much higher empathy for [a child] because you have got that child in your eye. Not only a mental vision because you can sometimes get that from a photograph. But ... you have got an actual experience of having interacted with that child. And that is a lot more compelling than a photograph. (Judge C, Family Court judge, in interview with the author, 2009)

In stark contrast, there are a number of Australian judges who are completely opposed to judicial meetings with children in all but the most extreme of circumstances. One judge said:

If the family consultant is going to be there anyway ... then you may as well have the family consultant do it and tell you what happened rather than be involved in the process ... If all I am doing is seeing the child and knowing what their face looks like, I don't need to do that. (Judge D, Family Court judge, in interview with the author, 2009)

Eleven judges who answered the author's survey (25% of respondents) included written comments indicating that they were not in favour of judges meeting with children:

They ... should not undertake speaking with children.

They shouldn't do it, trained or untrained.

Judicial officers should *not* speak with or to children.

I am opposed to children speaking to the judge who is to decide.

A judge should not have access to material different from all parties.

Meetings with children should not occur.

You don't conduct interviews with children as a judicial officer.

[Judicial meetings] should not occur.

I do not think it is a desirable practice ... The practice is inappropriate.

I do not agree with [judicial] meetings.

I do not agree with speaking with children.

Recommendations and conclusion

There is a significant body of research that suggests that we need to find ways to increase direct participation of children in family law matters. One way is to encourage judges to consider whether to meet with a child in every case that comes before them.

There are guidelines for judges meeting with children in New Zealand (Family Court of New Zealand, 2007), and guidelines have also recently been promulgated in England and Wales (Family Justice Council, 2010), where judicial meetings with children do not often occur. The guidelines for England and Wales are "to encourage Judges to enable children to feel more involved and connected with proceedings ... and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the Judge's task" (p. [1]). A majority of the respondents to the author's survey (65%) were in favour of guidelines being promulgated to give some direction on how judicial meetings should be conducted. It is hoped that this may encourage judges who may otherwise be uncertain to consider meeting with a child. The author has drafted guidelines, which have been published in an article titled "Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings" (Fernando, 2012a). The proposed guidelines encourage judges to consider factors a judge may consider in deciding whether to meet with a child, how a meeting should be conducted, who else may be present and how the outcome of a meeting may be reported back to the parties in the proceedings, including whether a recording or transcript should be made available.

In *ZN v YH and Child Representative* (2002) FLC 93-101, former Chief Justice Nicholson recommended that training for judges in meeting with children be added to regular judicial training. A strong majority of respondents to the author's survey (83%) agreed that training should be offered. However, some respondents to the survey were vehemently opposed to further training for judges in meeting with children, demonstrated by the following comments:

Judges cannot be social workers and psychologists as well! In the rare case of a judicial meeting, the judge's own experience and instinct should suffice.

Judges are appointed on the basis that they are able to do the job for which they are appointed and can decide what they need to learn to do it properly as well as the method by which they can learn. To dictate to a judge [that they should undergo training before speaking with children] is not only improper, it is impractical. One cannot make somebody conform to the beliefs and attitudes of others.

Children have a right to participate in judicial and administrative proceedings, which is enshrined in the *United Nations Convention on the Rights of the Child*. Children have expressed that they are dissatisfied with the ways in which their voices are currently

heard in family law proceedings. Better acknowledgement of children's right to be heard in family law processes may be as simple as a judge listening to what a child has to say. This ensures at once that the child's voice has been heard and, importantly, that the child is aware that their voice has been heard. Judges have indicated support for the idea of hearing from children directly but are held back from meeting with children because of concerns about the practice. While initiatives such as the promulgation of guidelines and judicial training may go some way to alleviating these concerns, it is unlikely that the incidence of meetings between judges and children in Australian family law proceedings will increase in the near future.

Endnotes

- 1 Around 2000 surveys about children and legal issues were distributed as part of the ALRC and HREOC inquiry into children and the legal process, and 843 responses were received.
- 2 See, for example, comments made by Mullane J in *N and N* (2000) FLC 93-059.
- 3 The survey was sent to 45 judges, being the entire complement of Family Court judges at the time. It yielded a response rate of 71%. It is argued, therefore, that Caldwell's findings were fairly representative of the Family Court of New Zealand judiciary.

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