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Privileging the voice of children in family law

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1. Acknowledgments

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I would like to start by acknowledging the traditional owners of the land we meet on, and I pay my respects to their elders both past and present.

I would like to thank the Chair of the Albury/Wodonga Family Law Pathways Network, Melanie Robb, for inviting me to speak today.

I also acknowledge:

- Aunty Nancy Rooke.
- Federal Magistrate Tom Altobelli.
- Distinguished guests.
- Ladies and gentlemen.

2. Introduction

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I want to start by sharing with you the views of 14-year-old Rani who was – as part of a custody case – the subject of a lengthy dispute about contact.[1]

Rani had an independent children's lawyer and a family report to present 'her best interests' to the judge. However

[1] P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008), p 67.

she still felt totally excluded from the decision-making process.

Rani said, "*I don't think there is a 'too young'. I mean, even when I was three, I had pretty clear ideas of what I wanted and what I didn't, and even if they were based on completely stupid things, they should at least be considered.*"[2]

Rani went on to say that, "*I know if I got a judgment that I wasn't completely happy with, but I had an active role in the process, I might not have resented it so much, because I would have felt, OK at least my voice was properly heard.*"[3]

This articulate young woman even wrote a letter to the Chief Justice of the Family Court of Australia to express her concerns about not having a say.

While Australia ratified the Convention on the Rights of the Child more than 22 years ago, it was only in June 2012 that the Family Law Act was amended to include – for the first time – a reference to the Convention.

I congratulate the Australian Government for this symbolic amendment.

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[2] Parkinson and Cashmore, note 1, p 65.
[3] Parkinson and Cashmore, note 1, p 65.

However, adding the Convention as a general object to consider under the children's part of the Family Law Act is a far cry from fully implementing children's participation rights.

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As 11-year-old Nick says about making decisions in the best interests of children, "*Sometimes, lots of people don't listen to a kid because they are just a kid you know? But I think if there's a proper court where you go to court for the children's say, I think it would be much better. Then people would see it from the children's side, you know the other story.*"[4]

Article 3 of the United Nations Convention on the Rights of the Child clearly states that courts of law must make the best interests of the child a primary consideration.[5]

Article 12 of the Convention states that a child must be provided with the opportunity to be heard in any judicial or administrative proceedings affecting her or him.[6]

The best interests of children can be served by *privileging* their voices. This means putting their voices front and

[4] Parkinson and Cashmore, note 1, p 161.
[5] *Convention on the Rights of the Child,* 1989, art 3. At http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx (viewed 19 April 2013).
[6] *Convention on the Rights of the Child,* note 5, art 12.

centre, and providing a clear and safe space for their voices to be heard.

The debate about whether to include children in family law decision-making is not a new one.

In 1997, over sixteen years ago, the Australian Human Rights Commission and the Australian Law Reform Commission conducted the national inquiry "Seen and Heard: Priority for Children in the legal process".[7]

This report made 26 recommendations to the Australian Government about children's involvement in family law.

The recommendations gave government a very clear rationale for including children's participation.

It said – without qualification – that Australia's legal system had failed to recognise the voice of children.

We urged government to take immediate steps so that children could be seen *and* heard in legal processes.

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When talking about her parenting arrangements, 13-year-old Emma said, "*I think that it's important for [children] to have a say because it's their lives and they're going to*

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[7] Australian Law Reform Commission and Australian Human Rights Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997).

have to deal with it and it's a choice that I think personally is up to them."[8]

Children involved in family law – like Rani, Emma and Nick – do not want to be treated as invisible objects, unheard by adult-decision makers and left waiting for their 'best interests' to be determined.

They want to have a say because they are the experts in their own lives.

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There are different ways of hearing the voice of the child in legal proceedings and Professor Jane Fortin's ladder ranks them according to how they involve children.[9]

Fortin is an Emeritus Professor in Law at the University of Sussex in the United Kingdom and she undertook a major research project about the experience of children when parents separate.

On the bottom rung of Fortin's ladder, children have no say and there is no way for them to make their views known to the court.

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[8] Parkinson and Cashmore, note 1, p 68.
[9] J Fortin, *Children's Rights and the Developing Law* (2nd ed, 2003), p 212.

On the next rung, the views of children are represented through a family report written by a children's welfare specialist.

Fortin says that the next step up is to give children separate representation, such as through an independent children's lawyer.

And then at the very top of the ladder, children are able to initiate proceedings on their own behalf.

Beyond this analysis, however, there are other ways to give a voice to children.

Child-inclusive mediation is a very important option in the resolution of family law disputes as most disputes settle outside of court.

The practice of mediation, however, can be very different across and within jurisdictions.

As you know, this is because there is divided opinion among practitioners.

On the one hand, some argue that it is wrong to ask a child to choose which parent they want to live with.

On the other, those who champion children's participation see inclusion in mediation as critical.

Though to choose between these two opposing positions is a false dilemma, I believe.

Chid-inclusive mediation should not make children express a choice and hold them responsible for that choice. Rather, it should provide them with an opportunity to express their feelings about their own family situation.

More broadly, practitioners and experts also have different views about whether children's voices should be filtered or not.

Those who believe in the protectionist view say that children must be shielded from the conflict of family law disputes. They say that children's voices must be filtered through family reports and independent children's lawyers.

Others believe that children should be able to directly represent themselves in family law, such as through judicial interviews with children.

Patrick Parkinson and Judy Cashmore conducted some important research in this area published in their 2008 book titled, *The Voice of a Child in Family Law Disputes*.[10] They interviewed 47 children, 90 parents, 42 lawyers, 41 mediators and counsellors and 20 judicial officers.

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[10] Parkinson and Cashmore, note 1.

Most judges said they rarely or never talk directly with a child.

The majority of lawyers were also opposed to judges talking to children, mostly because they believe judges are not equipped to do so.

Most of the children that Patrick and Judy interviewed, however, who were involved in contested matters, said they wanted to let the judge know how they felt.

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When asked about judges talking with children, 11-year-old Sarah said, "*I think maybe they should because then the judge knows how the children would feel about the decisions, so yes.*"[11]

While Judy and Patrick accept that there are potential dangers with judicial interviews, they conclude that these risks can be effectively managed if strong guidelines are developed.

They recommended that a child should be able to speak with a judge if they wanted to and that the judicial interview should be facilitated by a child welfare professional.

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[11] Parkinson and Cashmore, note 1, p 161.

The child also needs to be told how the information they give will be treated and whether it will be confidential.

While 87% of parents endorsed giving children a say, only 60% of children reported that they actually had a say. [12]

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As one young child said about being included in the mediation process, "*It helped to have someone listen to what I said, for it to be confidential, but also he would pass on to the parents what I wanted them to know.*"[13]

I'm not naïve to the practical difficulties of implementing children's participation rights. Clearly there are challenges.

It is true that some judges and lawyers express concern about the problems of coaching, parental pressure and manipulation.

Some adults will manipulate their child's voice to benefit their own case or to degrade the other parent.

[12] Parkinson and Cashmore, note 1, p 217.
[13] J McIntosh and C Long, *Children Beyond Dispute*, La Trobe University (2006), p 94. At http://www.ag.gov.au/Publications/Pages/ChildrenBeyondDisputeOctober2006.aspx (viewed 19 April 2013).

Federal Magistrate Tom Altobelli – our distinguished guest and speaker – warns that children subjected to alienation syndrome may not be able to *give* an independent view.[14]

Most judges are not presently trained to interview children on their own, and so they would require help from counsellors and other specialists.

Many of these types of issues can be overcome with the assistance of appropriately trained counsellors who can focus on the children's insights into their family and their needs.

The reality is, and you don't need me to tell you this, that our family law system operates within a context of very limited resources and children's participation is affected by what is perceived as affordable.

The cost of representation for every child in every matter is contentious. Currently, independent children's lawyers are only appointed in very complex cases.

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As young Max said, "*If you give me a say … you know what I want. But if you don't give me a say … you might end up with something I don't want.*"[15]

[14] T Altobelli, 'When a child rejects a parent: Why children resist contact' (2011) 25 *Australian Journal of Family Law* 185, p 191.

Mediators and counsellors know that hearing from children in a dispute can actually shift the adversarial position of parents and bring about a peaceful settlement.

There is also therapeutic value in giving children a say because it empowers them to have a greater sense of control over their own lives.

Obviously the older and more mature a child is, the greater their capacity will be to articulate their needs and give insights into their family situation.

While there is widespread support for giving children a voice in family law, there is a big gap between the principle of participation and how it is put into practice.

Judges, lawyers, mediators and family report writers emphasise the importance of children's voices but differ in terms of how this participation can be achieved.

So how can we create a more responsive system in which all practitioners embrace the benefits of children's participation but also manage the risks?

Parkinson and Cashmore outline a number of important principles to move forward and I believe they provide a useful starting point.

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[15] R Fitzgerald, *Children having a say: a study on children's participation in family law decision making*, PhD thesis, Southern Cross University (2009), p 210.

First we need to clearly distinguish between giving children a ‘voice’ and forcing them to make a ‘choice’.

Children should have their views taken into account but they should not be made to feel as though they are choosing between their parents, or their needs.

They need to know that adults are asking for their view to get a better understanding about their best interests.

We also need to redefine the significance we place on age and maturity.

Yes, the views of children should be taken into account *according* to their age and maturity.

But just because they are young children, or immature teenagers, doesn’t mean we don’t have to ask them how they feel or what they think.

And so our focus must be on determining children’s perspectives, not their ‘wishes’.

By adopting this focus we don’t make children feel they must choose between their parents, and we learn about the developmental needs of the child, rather than simply their wants.

As I've mentioned, the practice of judicial interviews with children is not consistent and we need clear guidelines about how and when this process may be appropriate.

Surely if a child says they want to talk to the judge then we should allow them to do so with the support of suitable child specialists.

3. Conclusion

The limited measures Australia has taken do not meaningfully give effect to the child's right to be heard.

It goes without saying that our family law system must ensure the best interests of children are met.

It should also go without saying that *effective* children's participation is essential to both *determine* their best interests and to honour their own agency.

Children and young people are experts regarding their own lives.

They have a body of experience and knowledge that is unique to their situation.

We will not properly understand children unless we listen to them and encourage them to participate in decisions that affect them.

The stories of Rani, Emma, Max, Nick, Sarah and others illustrate that children themselves report that they are often unheard in family law decision-making and that their views are not taken seriously.

The evidence is clear. We need direct legislative, judicial, administrative and other measures to privilege the voice of children.

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It is the fundamental right of all children to be heard and to have their view taken into account.

By assuming children lack capacity to participate in family law decision-making we are in effect ignoring their rights.

This assumption also ignores the fact that children's capacities are always changing, as are their needs.

Put simply, children who are shielded from the family law system are silenced, not saved.

We must find new ways of protecting children through participation, rather than exclusion.[16]

Family law practitioners play a vital role in privileging the rights of children to ensure their best interests are met.

[16] Parkinson and Cashmore, note 1, p 219.

2017 will mark the twentieth anniversary of the Commission's *Seen and heard* report.[17]

By this time we will be preparing our report to the United Nations on Australia's progress to fully implement the Convention on the Rights of the Child.

It will also be the penultimate year of my term as Australia's first National Children's Commissioner.

Will my successor be debating this same issue, or will we finally build child-inclusive models into family law practice?

The answer to this question shall determine no less than the basic right of all children to have their view heard.

And without hearing the voice of children, can we really determine their best interests?

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As philosopher Paul Tillich has said, "*The first duty of love is to listen.*"

Thank you.

[17] Australian Law Reform Commission and Australian Human Rights Commission, note 7.