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Child consultation and the law in the Northern Territory of Australia

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Article

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Abstract

Consultation with children is a delicate art, and consultation with vulnerable children, even more so. Experienced clinicians believe best practice in undertaking such work requires tertiary studies in social work or psychology combined with extensive supervised clinical experience. The current pathways to becoming a children's lawyer in the Northern Territory do not involve mandatory training in child well-being, and yet lawyers are asked to consult with highly traumatised children and bring the voices of children into the courtroom. Lawyers for young children are additionally required to provide an opinion as to what they believe to be in the best interests of the child, without a social work or psychology-based qualification, training or in-depth guidelines to support their position. This article looks at what the law says about child consultation, what child development research says about child consultation and child consultation in practice in a Northern Territory child protection setting. At its conclusion, the author discusses potential pathways forward for lawyers and clinicians to work together in safe practices of child consultation.

One who knows and knows that he knows . . .
His horse of wisdom will reach the skies.
One who knows, but doesn't know that he knows . . .
He is fast asleep, so you should wake him up!
One who doesn't know, but knows that he doesn't know . . .
His limping mule will eventually get him home.
One who doesn't know and doesn't know that he doesn't know . . .
He will be eternally lost in his hopeless oblivion!
Thirteenth-century Persian poet, Ibn Yamin ربی چی ابن یومحفر
– There are four types of men

Introduction

When Territory Families (the Northern Territory Government department responsible for protecting children) is looking to remove a child from family, or has already done so on an urgent basis, the Department must apply to the Court for an order declaring that the child is 'in need of protection' (*Care and Protection of Children Act 2007* (NT) ss. 53–54, 103–105).

The Court hearing offers an opportunity for people who are of significance to the child to tell the judge what they think of the application. This opportunity to be heard is sometimes called natural justice, or procedural fairness (*RG v DG & Ors*, 2013). The presumption that the parents of a child are significant to the child (*Care and Protection of Children Act 2007*, ss. 8(1), 94(1)(b), 125(1)) in many families and in many cultures – and in the Northern Territory in particular – several people other than the parents may play a pivotal role in the child's world.

According to the United Nations *Convention on the Rights of the Child* (1989), the voice of a child is important among the voices to be heard and can be expressed either directly or through a representative in proceedings about the child (art. 12). Similarly, Northern Territory laws state that 'decisions involving a child . . . should be made with the informed participation of the child' (*Care and Protection of Children Act 2007*, s. 9(c)). This sentiment is echoed in other Australian jurisdictions.

The UK decision of 'Gillick' in 1985 (*Gillick* v. *West Norfolk and Wisbech Area Health Authority* (1986)) and the Australian decision of 'Marion' in 1992 (*Department of Health & Community Services* v. *JWB & SMB* (1992)) established that, when a child 'achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed', the child should be given the opportunity to participate in decisions being made about him or her.

Currently, under Northern Territory law, a judge may appoint a lawyer to represent a child in child protection proceedings, but it is not mandatory (*Care and Protection of Children Act 2007*, s. 143A). The *Royal Commission into the Protection and Detention of Children in the Northern Territory* [RCPDCNT] (2017) recommended that all children and young people be legally represented in care and protection proceedings (Recommendations, Recommendation 25.30, p. 44).

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This article poses the question: What skills and tools does a lawyer need in order to represent children in a safe and meaningful way? Does a law degree alone sufficiently equip lawyers to represent children? What other training and supports might be required to allow for children to be represented well?

We look first at what the law requires a lawyer representing a child to do, then at what developmental psychologists recommend as the skill set for child consultants. We then look at the pathway to becoming a children's lawyer, issues in practice, and finally, where we might go from here.

From time to time we refer to jurisdictions other than Northern Territory child protection law, including family law and other child protection jurisdictions. While child protection law looks at situations in which the State intervenes in the life of a child, Federal Family Law looks at situations in which private citizens, most often parents, seek legal help when making decisions about children. It is important to note that the jurisdictional references used in this article are called upon to provide context for Northern Territory observations. Decisions in other jurisdictions are not binding, but they can be relevant and helpful, as demonstrated by Northern Territory Supreme Court Judge Hiley, when he referred to federal family law case law in the Northern Territory child protection decision of *BJW* v. *EWC & Ors* (2018). Though inclusive of references to other jurisdictions, this article is embedded in the Northern Territory child protection context and is a reflection of contemporary circumstances and potential evolutions in that landscape.

This article is based upon the author's paper presentation at the *International Child Trauma Conference* in Melbourne in August 2018.

The role of a lawyer representing a child – according to the law

In the Northern Territory, there are two ways in which children can be represented by lawyers in child protection proceedings: 'On instructions' or 'in the best interests of the child' (*Care and Protection of Children Act 2007*, ss. 143B).

On instructions implies that the lawyer is a direct representative of the child and takes instructions from the child in a similar way to how they might take instructions from an adult.

The Australian Institute of Family Studies (AIFS) *Independent Children's Lawyer Study* (ICL Study) (2013) explored the role of children's lawyers in a family law context.

The ICL Study lends insight into the role of a lawyer acting in a best interests capacity. The ICL Study stated that the role of a children's lawyer acting in the best interests of the child is threefold, wherein the lawyer:

- gathers evidence and presents that evidence to the Court;
- acts as an honest broker between the other parties; and
- facilitates the participation of the child.

According to the *Family Law Act 1975* (Cth), in addition to facilitating the participation of the child by ascertaining the wishes of the child and presenting those wishes to the Court, the lawyer must also form an independent view, based on the evidence available, of what is in the best interests of the child and present that view to the Court (s. 68LA).

By contrast, in the 2012 Northern Territory Supreme Court case *CEO Department of Children and Families* v. *MGM & Ors* (2012), Judge Kelly said that 'the principal role of the children's representative . . . is to present the views and wishes of the children to the Court.' (para. 62) and that 'It is not appropriate for the child's
representative to simply express his or her own views to the court' (para. 63).

As such, in 2012, the position of the Northern Territory child protection jurisdiction was different to that of federal family law; in that a Northern Territory lawyer acting in a best interests capacity was not required to form an independent view about the child's well-being nor present that view to the Court.

In 2013, the Northern Territory law changed (*Care and Protection of Children Amendment (Legal Representation and Other Matters) Act 2013* (NT)), so that now a child of 10 years and over is presumed to have capacity to give instructions (*Care and Protection of Children Act 2007*, s. 143B(3)). This is a rebuttable presumption, which entails a lawyer appointed for a child having to make an assessment as to the child's capacity.

In 2018, Northern Territory Supreme Court Judge, Justice Hiley, said that 'the child's representative has a greater role now, following the amendments, than was the case when Kelly J expressed her views in MGM' (*BJW* v. *EWC & Ors* (2018), para. 90). That greater role includes, in a best interests capacity, forming a view as to the child's welfare based upon proper material and making submissions in accordance with that view (*BJW* v. *EWC & Ors* (2018), para. 86, citing *Duffy* v. *Gomes* (2015)).

Thus, in a current Northern Territory context, a lawyer acting for a child is required to assess whether the child has sufficient understanding and intelligence to enable him or her to understand fully what is proposed, to obtain the views and wishes of the child or instructions from the child, and, when acting in a best interests capacity, to form a view as to what will be in the best interests of the child and present that view to the Court.

The question then arises—Are lawyers equipped to fulfil these obligations?

Child consultation best practice

Dr Jennifer McIntosh is a strong advocate for child inclusion in legal matters about children. Her work informs many of the standards informing Australian family law.

In 2007, Dr McIntosh wrote:

> In light of the complexities that necessarily accompany protracted disputes in family law, the child consultant must be equipped with an adequate social science background. Substantial formal training in developmental, attachment, trauma and family systems theories and experience in the clinical application of these theories is requisite. A postgraduate qualification in counselling, psychology or psychotherapy is recommended as a minimum benchmark for formal qualifications, coupled with two years' experience in working with children, adolescents and their families in a mental health or community health setting. (McIntosh, 2007).

In the same article, Dr McIntosh distinguished the provision of clinical child consultation from legal representation, saying that if the purpose of the child consultation:

> is to meet children's socio-legal rights to have their opinions heard, then welfare and legally trained staff working within child representation models may be adequate (though this work too presents challenges not always adequately understood in those contexts). (McIntosh, 2007)

Let us compare and contrast the detail of what Dr McIntosh raises, with the pathway a person treads in order to become a lawyer for a child.

Pathway to becoming a lawyer for children

A law degree typically consists of several core subjects including evidence, criminal law, constitutional law, legal research and legal ethics and then elective subjects, such as jurisprudence and human rights. Depending upon the institution, most subjects are theoretical in nature. Students are taught to understand the law, analyse fact scenarios and apply the law to the facts. Before migrating to practicing law, a law graduate must also undertake a graduate diploma in legal practice, which carries the three elements of: core practice subjects (e.g. civil litigation), electives (e.g. family law practice) and work experience. The final steps in becoming a legal practitioner are to seek admission as a lawyer to the Supreme Court of the relevant state or territory, and apply for a practicing certificate from the state or territory Law Society. The first practicing certificate issued will be restricted, requiring a junior solicitor be supervised, generally for a period of two years.

In order to represent children in child protection matters in the Northern Territory, a legal practitioner must be eligible to practice law in the Northern Territory and must be included on the Northern Territory Legal Services List (NTLSL) under the category of 'Child Welfare and Vulnerable Persons'. The application for the NTLSL contains a part in which each proposed practitioner is required to describe their relevant experience, including examples.

The NTLSL is managed by the Legal Services Coordination Unit of the Department of the Attorney-General and Justice (AGD) and consists of a list of private practitioners pre-approved to provide services to the Northern Territory Government in specified categories of law. The appointment of children's lawyers in child protection matters on a case-by-case basis is managed by the Solicitor for the Northern Territory (SFNT), the Northern Territory Government's in-house legal practice.

In 2014, the main requirement stipulated by the SFNT for practicing as a children's lawyer in child protection matters was attending a three-day ICL Training course run by the Family Law Council, designed primarily for ICLs intending to practice federal family law.

The 2015 ICL training explored the findings of the ICL Study (AIFS, 2013) and encouraged practitioners to follow the findings closely; conducted guided group analysis of case studies; and provided several targeted presentations on child well-being including on the topics of overnights for under three years olds, autism spectrum considerations and the impact of domestic violence.

A particular element of the ICL Study (AIFS, 2013), and one highlighted in the ICL training, was the experience of children involved in family law cases where an ICL had been appointed. Many children expressed disappointment and at times betrayal at the failure of the ICL to facilitate their participation. Children said that they 'were uncertain about what the ICL did ... disappointed by having little or no contact with the ICL, and ... uncertain as how their views fed into the decision eventually made' (AIFS, 2013, p. xiv). Further to this, several children felt that, 'their perspective was not important and their honesty and intelligence was in question' (AIFS, 2013, p. 162). The ICL Study noted that 'engagement with the legal system produced feelings [in children and parents] of marginalisation, potentially compounding the trauma of abusive experiences within their families' (AIFS, 2013, p. 162).

Presenters at the ICL training emphasised the importance of being cognizant of the children's concerns, but the training as a whole did not offer tools or guidance as to how to bridge that gap. Specifically, the training did not teach lawyers how to engage with children, how to assess the lawyer's own capacity to engage with children, how to access support and information to engage with children, nor how to assess the capacity of a child to engage with the lawyer.

During the conference workshops, discussion arose among senior practitioners about whether or not to enlist the aid of a clinician to support child interviews. Practitioners from Queensland said that they always engaged the aid of a clinician, such as a social worker or a psychologist, while practitioners from New South Wales said that they never did. This same distinction in practice between the states was highlighted in the ICL Study (AIFS, 2013).

The family law system and some state-based child protection systems, including New South Wales and Victoria, have the benefit of clinicians who work in a clinic attached to the Court, which can also at times assist parties and lawyers. Unfortunately, the Northern Territory has no such equivalent entity or designated place that lawyers can go to for clinical insight.

In 2017, the Law Society of the Northern Territory (LSNT) released the *Protocols for Lawyers Representing Children* [The Protocols] (LSNT, 2017). The Protocols (LSNT, 2017) provide the current framework for how lawyers are expected to engage with children in a Northern Territory context. Supreme Court Judge Hiley confirmed this expectation in the case of *BJW* v. *EWC & Ors* (2018), referred to above. No training in relation to the Protocols has yet been provided to lawyers.

Issues in practice

The lawyer who was the subject of Judge Hiley's reflections in *BJW* v. *EWC & Ors* (2018) said that there was not much point in talking with a child of a very young age, in that case two years old, with which the judge agreed. The lawyer for the child further said that Territory Families had already submitted a substantial body of evidence, and not much further was required of the children's lawyer, with which the judge disagreed. The judge, in line with the Protocols (LSNT, 2017), required that the children's lawyer make submissions as to the adequacy of the care plan, independent of the views of Territory Families. The lawyer had not made any such submissions, and Judge Hiley, on appeal, found that the original judge had erred in proceeding without that information.

Assessing the adequacy of a care plan requires analysis of social, psychological, emotional, cultural, sexual, and physical health and well-being factors. Within the Protocols (LSNT, 2017), emphasis is on the lawyer to meet the child, assess the child's capacity, ensure that the child understands what is happening and facilitate the child's ongoing instructions in the proceedings in a way that avoids fatiguing the child with 'systems abuse'. The Protocols (LSNT, 2017) say that if the child presents as difficult, or trauma affected, the lawyer should reschedule the interview to another time. The lawyer is also required to assess what further referrals a child might require.

No guidance is given as to how to assess a child's level of trauma, or how to appropriately respond. No guidance is given as to how to assess what referral pathways a child might need. No note is made that elements other than delay may be required for the child to be able to engage at all. How to conduct a child interview constitutes a page and a half of wide spaced bullet points.

The Protocols (LSNT, 2017) say to give a child the chance to talk openly, but warn not to become a social worker, or a witness. Engaging a counsellor is suggested if a child is about to make a disclosure. However, how can a lawyer ask a child to talk openly and establish trust by that frame, and then cut the child off if they are

about to disclose harm or potential harm? Only when a child might give evidence directly to the Court is engaging a psychologist suggested.

The author of this article has worked as a lawyer for children in the Northern Territory since the Protocols came into play (LSNT, 2017). The author is also currently included on the Legal Services List for Child Welfare and Vulnerable Parties. In every case in which the author has represented children, the support of clinical and cultural experts has been engaged to provide insight specific to the children and the children's circumstances as to how to engage with them in a safe and meaningful way.

No funding is available for this type of support and so the support has been provided on a pro bono basis. The insights of the clinicians and cultural experts have been invaluable in developing approaches, structures and tools for engaging with the children and being able to hear their voices.

However, complications have also frequently arisen at which time it would have been incredibly useful to either have greater skills as a clinician or have a clinician available to provide insight in the room. One such complication was a disclosure of harm by a child. Another complication occurred when the children were above 10 years of age, and therefore presumed to be able to provide instructions but were only able to provide instructions on some points in the case at certain times during the case. One clinician said that the younger children are, the less an interview is about direct questions, and the more it is about observations. How then, is a lawyer to determine what to observe, what questions to ask at different ages and how to translate that information back to the Court?

Where to now?

Reflect for a moment on the minimum training for consulting with children recommended by Dr McIntosh: A postgraduate qualification in counselling, psychology or psychotherapy and two years' experience in working with children, adolescents and their families (McIntosh, 2007). Compare that with the reality described above, that some lawyers may come to the children's lawyer role with social work or psychology knowledge and experience, but many will not, and there is no mandate at this stage for those skills to be acquired.

The *Royal Commission and Board of Inquiry into the Protection and Detention of Children* (2017a) recommended that lawyers appearing in the Children's Court be accredited as specialists in 'child and adolescent development, trauma, adolescent mental health, cognitive and communication deficits and Aboriginal cultural competence' (Recommendation 25.31), referring to the UN *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2013, guideline 11(58(d)) (RCPDCNT, 2017b, Vol 2B, Chapter 25, pp. 312–313):

> Legal aid providers representing children should be trained in and be knowledgeable about children's rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding. All legal aid providers working with and for children should receive basic interdisciplinary training on the rights and needs of children in different age groups and on proceedings that are adapted to them, and training on psychological and other aspects of the development of children, with special attention to girls and children who are members of minority or indigenous groups, and on available measures for promoting the defence of children who are in conflict with the law.

Justice Hannam, formerly the Chief Magistrate of the Northern Territory, and Judge Johnstone, President of the Children's Court of New South Wales, told the Royal Commission that specialisation was 'critical to the successful operation of the Court' (RCPDCNT, 2017, Vol 2B, Chapter 25, p. 312).

Judicial officers, ICLs and other professionals who participated in the ICL Study described the importance of ICLs having social science qualifications and experience. One judge suggested that a graduate diploma or a graduate certificate, with an option to progress to a Master of Laws (AIFS, 2013, p. 105) would be the most appropriate level of qualification.

One clinician, who has worked closely with the author to engage with children in various child protection cases, suggested that brief training of lawyers will not suffice and that in the absence of more substantive training, lawyers for the child should both receive ongoing clinical supervision and work closely with clinicians on a case-by-case basis, including involving the clinician directly in liaising with the child.

The author notes that, by the time this article is published, the Inaugural Children's Court Practitioner Training Conference will have taken place in Darwin. The two-day conference is intended to address the topics of trauma, aboriginal cultural competence, child and adolescent development, adolescent mental health, and cognitive and communication deficits. The author will be excited to see what learnings and developments may come from the training. The two-day training is designed for all children's law practitioners, not just children's lawyers, and will consider the landscapes of both child protection law and youth justice.

In adversarial proceedings, where every party seeks to put their own truth forward, the role of a children's lawyer is pivotal to gathering child-focused or child-directed evidence and ensuring that the evidence is heard by all parties and the Court. In the wake of the Royal Commission into the Protection and Detention of Children, now is a time for reflection.

There may come a time when Northern Territory lawyers have sufficient knowledge and skill about the well-being of children to manage and develop safe practice of their own volition. For the time being, an acknowledgement is required that lawyers need the help of clinical specialists to build their knowledge base and to develop a frame of collaborative practice, until such time as the clinicians indicate that lawyers are ready to practice on their own.

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