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Procedural justice and the impact of court and other decision-making processes on children and families in the child protection system

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Background

In 2022–2023, 60,554 children were on a care and protection order across Australia (AIHW, 2024). These orders are made by specialist Children's and Youth Courts or by non-specialist magistrates. More than 45,300 children were in out-of-home care as at 30 June 2023 (AIHW, 2024). Nearly 40% were younger than 5 years when they entered care. First Nations children make up 43.6% of the children in out-of-home care but less than 6% of the child population in Australia, and are 12.1 times more likely than non-Indigenous children to be in care (AIHW, 2024: table 5.10). Concerns about the 'operation' of the child protection and out-of-home care systems, especially for First Nations children, have led to numerous inquiries, reports and legislative reform in each state/territory. In New South Wales, for example, the Family is Culture report (Davis, 2019) was a landmark review of Aboriginal children in out-of-home care, and there have been four separate highly critical reports in 2024 by the Auditor-General of NSW (Audit Office of New South Wales, June, 2024), the NSW Ombudsman (July, 2024), the NSW Advocate for Children and Young People (August, 2024), and the System Review into Out-of-home Care for the NSW Government (December, 2024).

The recent System Review into Out-of-Home Care for the NSW Government (December 2024) criticised the lack of 'procedural fairness' in various aspects of the governance of the out-of-home system, and 'a system that has failed to listen to the voice of parents, carers and children'. Further, 'A system that had effectively punished parents, carers and children through inconsistent decision-making, inadequate consultation and poor policy implementation … We also saw examples of children and young people not being central to decision-making, where at times decisions were made about children and young people ignoring input from key adults in their lives.' (p. 3).

There is a critical need for research to understand and critique the evidence on which these decisions are made by caseworkers and in the courts, and particularly the outcomes and the experiences of families and professional court-users (Saunders et al., 2020; Sheehan & Borowski, 2013). Data from the care jurisdiction are sparse, not fit for purpose, and hinder the capacity for research

and analysis. Decision making is opaque because the court is closed and published judgments are rare. Transcripts are not accessible unless a party appeals and very few parents are in a position to challenge the original decision. In words that resonate here and now, former Judge Lederman (2013), a judge who heard dependency or care and protection matters in Miami, stated:

> *At this time in our history, courts have become the last resort for families who have been failed by every other institution. These troubled families are pouring in the courthouse doors, many involuntarily, seeking the support they have been unable or unwilling to negotiate in their own communities. Communities have been unable to offer the kinds of social services that families need to preserve and enhance their abilities to function in the open community. The public seems to expect the courts to have answers for problems that our society has been unable to solve: substance abuse, violence, poverty, and crime. A legal institution is hardly the appropriate forum to ameliorate these societal ills …* (p. 23)
>
> *The judges must make immediate decisions based only upon the information that the parties make available to them and they must make those decisions within the time constraints of the typically short hearing.* (p. 24)

Judge Lederman went on to state:

> *Judicial leadership inspired by the desire to make meaningful, positive, and permanent changes in the lives of the people who appear in court has created changes in practice. These are the judges who do not want to be measured by how many cases they close how quickly, but by the influence they have in changing the developmental pathway of a life … This necessitates a re-evaluation of established legal practice and beliefs. The definitions and limitations of neutrality and impartiality and activism and fairness were therefore revised, by practice, not the law.* (p. 27)

In this context, the focus of this commentary is on care and protection matters and how child protection processes and the relevant courts may be able to facilitate procedural justice for children and their parents, mitigating the trauma they experience during the process and hopefully increasing the perceived legitimacy of the processes they are faced with. Procedural justice refers to the way in which decision-making processes, particularly in legal, governmental, and organisational contexts, are conducted to provide procedural fairness. As Tyler (2000), one of the key scholars in relation to procedural justice, summarised:

> *four elements of procedures are the primary factors that contribute to judgements about their fairness: opportunities for participation (voice), the neutrality of the forum, the trustworthiness of the authorities, and the degree to which people receive treatment with dignity and respect.* (p. 122)

These elements are defined in more detail, as follows.

Participation:

> *People feel more fairly treated if they are allowed to participate in the resolution of their problems or conflicts by presenting their suggestions about what should be done. Such opportunities are referred to as process control or voice.* (p. 121)

Neutrality:

> *People are influenced by judgements about the honesty, impartiality, and objectivity of the authorities with whom they are dealing. They believe that authorities should not allow their personal values and biases to enter into their decisions, which should be made based upon rules and facts. Basically, people seek a 'level playing field' in which no one is unfairly disadvantaged. If they believe that the authorities are following impartial rules and making factual, objective decisions, they think procedures are fairer.* (p. 122)

Trustworthiness of authorities:

> *People recognize that third parties typically have considerable discretion to implement formal procedures in varying ways, and they are concerned about the motivation underlying the decisions made by the authority with which they are dealing. They judge whether that person is benevolent and caring, is concerned about their situation and their concerns and needs, considers their arguments, tries to do what is right for them, and tries to be fair. All of these elements combine to shape a general assessment of the person's trustworthiness.* (p. 122)

Treatment with dignity and respect:

> *People value having respect shown for their rights and for their status within society. They are very concerned that, in the process of dealing with authorities, their dignity as people and as members of society is recognized and acknowledged. Since politeness and respect are essentially unrelated to the outcomes people receive when they deal with social authorities, the importance that people place upon this affirmation of their status is especially relevant to conflict resolution. More than any other issue, treatment with dignity and respect is something that authorities can give to everyone with whom they deal.* (p. 122)

Why does procedural justice matter – particularly for children and families in the care and protection system?

There are several reasons why procedural justice matters in child protection processes where families face power imbalances and are likely to feel they are treated unfairly. Children and families are not involved in the child protection and out-of-home care systems by choice but typically because of adverse experiences and circumstances. These can include family violence, mental health problems, substance abuse, social disadvantage and inter-generational trauma, particularly for First Nations families. The prospect and reality of children being removed from parents is traumatising for children, parents, their families and communities. These are very high-stakes decisions for children and families, particularly for children's wellbeing and development and children's relationships with their families and communities.

First, child protection interventions and decisions affect the fundamental rights of both children and families, being an intrusion into the privacy of the family. Procedural justice

emphasises the importance of respecting the rights of all parties involved, including children and parents. In child protection, this means that parents – and children – should be informed of their rights, have access to legal representation and be provided with opportunities to participate in decision making (Braithwaite et al., 2009; Cashmore, 2009). Procedural justice safeguards, including transparency and the consistent application of rules, help to promote a more ethical approach that promotes the rights of both children and parents (Venables & Healy, 2019).

Second, child protection processes and proceedings are stressful, and the parents and families involved often feel powerless or fearful about the outcomes. Feeling disempowered in such stressful circumstances is intimidating, disorienting, distressing and, often, traumatising (Ivec et al., 2012). A procedurally just approach may help to alleviate some of the stress of being involved in child protection processes by ensuring that families feel they are being listened to, that they understand the process and that they have a role in decision making. This may reduce feelings of anxiety and helplessness, especially for parents who might otherwise be defensive or combative (Cleveland & Quas, 2022).

Third, respectful engagement with parents and families in line with procedural justice principles has the potential to improve the outcomes for children and families. When families understand and feel they are treated fairly, they are more likely to engage in the interventions recommended by child protection professionals (Cashmore, 2002; Nunes, 2022; Schofield, 2005). Fostering a more collaborative, supportive approach can lead to more effective interventions, improved child safety and better family outcomes. It can contribute to reducing the need for more intrusive actions, such as removing children from their homes (Venables & Healy, 2019).

Fourth, there is a substantial body of research and literature that supports the notion that when individuals perceive these processes as fair across a range of areas, they are more likely to accept and comply with the outcomes (Mackenzie, 2020; Tyler & Meares, 2019). It may mean that they accept their own responsibility for the outcome if the outcome is a result of what they perceive to be a fair process (Bobocel & Gosse, 2015). If the decision-making process is seen to be unfair, they are less likely to feel any responsibility for the outcome (Bottoms & Tankebe, 2020; Brockner & Weisenfeld, 1996). Conversely, where the stakes of the decisions are very high, as in child protection, then the outcomes are likely to matter more to people's assessment of fairness than the fairness of the process. Further, 'if a 'fair' procedure continually delivers unfavourable outcomes, its fairness will 'ultimately' come under scrutiny (Bobocel & Gosse, 2015: p. 100; Tyler, 2006).

In summary, relational factors including the trustworthiness, perceived neutrality and dignity and respect shown to participants are integral to procedural fairness in decision making in both the court proceedings and in pre-court processes (Tyler & Lind, 2001). Other procedural aspects –transparency, consistency and evidence-based decision making – are more instrumental aspects of perceived procedural fairness, together with access to information and opportunities to have some voice in the process (Blader & Tyler, 2015).

The particular value of children having a voice in child protection processes

There is growing evidence that involving children in decisions that affect their lives and wellbeing can have significant benefits for both the children themselves and the decision-making process. The notion of giving children a "voice" in these decisions is rooted in the recognition of their rights as well as the positive outcomes that result from their participation. Recognising children as active participants in these processes respects their autonomy, and is consistent with international human rights law, particularly article 12 of the UN Convention on the Rights of the Child (UN CRC; United Nations, 1989). For children involved in the child protection system, being able to express their views – if they wish to do so – and to have them taken seriously, signifies respect and recognition that participation can have a therapeutic effect on children's emotional wellbeing. Participation processes in which children feel safe and heard and in which their interactions with adults are sincere can be therapeutic and validating for children who have previously felt victimised and disempowered (Nunes, 2022; Woodman et al., 2023). Beyond its importance in helping to improve trust in the process, meaningful and respectful participation can produce better decisions and outcomes by yielding a better understanding of the needs and experiences of children, their parents and family (Cashmore, 2002; McCafferty & Mercado Garcia, 2024; Schofield, 2005).

The value of having a voice depends on whether the decision maker or legal authority is seen to have listened to, and genuinely considered, the views presented by the participants – in essence, treated them and their views with respect. This applies to children as well as adults, and to informal, bureaucratic and formal court decision-making processes (Cashmore, 2009; Mateos et al., 2017; Tyler & DeGoey, 1995). As Tyler and Lind (2001) pointed out, 'respect goes to the heart of relational notions of justice' (p. 74).

What needs to change? The potential role of feedback loops

The focus here is on two key sets of rights for children and their families: to be informed and understand the process and why decisions are made, and to have their views listened to and considered seriously (article 12 of the UN CRC; United Nations, 1989); and for children to be able to maintain relationships that are important to them (article 9 of the UN CRC; United Nations, 1989). These rights, though not expressed specifically as 'rights', are included in care and protection legislation and policy in each Australian jurisdiction. In essence, these are relational concerns.

Despite broad acknowledgement of the importance of family inclusion and children's rights to participate in these processes – articulated in legislative requirements, policy and practice manuals – research and numerous inquiries and reports in Australia and elsewhere indicate that these principles are still not in common practice (Davis, 2019; Haarberg, 2024; Toros & Falch-Eriksen, 2024; Van Bijleveld et al., 2015, 2020).

While not including the terminology of children's rights, Australian legislation has acknowledged children's rights to participate, in line with article 12 of the UN CRC. For example, section 10 (The principle of participation) of the NSW *Children and Young Persons (Care and Protection) Act 1998* stipulates that:

1. To ensure that a child or young person is able to participate in decisions made under or pursuant to this Act that have a significant impact on his or her life, the Secretary is responsible for providing the child or young person with the following--
    a. adequate information, in a manner and language that he or she can understand, concerning the decisions to be made, the reasons for the Department's intervention, the ways in which the child or young person can participate in decision-making and any relevant complaint mechanisms,
    b. the opportunity to express his or her views freely, according to his or her abilities,
    c. any assistance that is necessary for the child or young person to express those views,
    d. information as to how his or her views will be recorded and taken into account,
    e. information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision,
    f. an opportunity to respond to a decision made under this Act concerning the child or young person.

Building in informational and feedback loops of five types might go some way to identifying and mitigating some of the problems and shortcomings in relation to family inclusion and children's participation – and improving transparency and accountability (Braithwaite et al., 2009; Cashmore, 2009; Cashmore et al., 2023; Firmin et al., 2024; McCafferty, 2021).

First, it is important for professionals to provide information to children and family members, in age and culturally appropriate language, about how the decision-making process at each stage works, what is at stake, and how information provided by children and others is used, and who will hear it. As Davis (2019) stated in her introduction to the Family is Culture report:

> *It is important for the functioning of the rule of law that parents and families understand how the child protection system works … genuine knowledge about how and why things happen at various points of the continuum of intervention and the rights and responsibilities of those involved with the system at each particular stage. It is only through this type of real knowledge that Aboriginal children, parents and families can be empowered, and other stakeholders can analyse and attempt to reform parts of the system, with a view to how it operates in its entirety.* (p. XXXII)

While imperative for Aboriginal families, this also applies broadly to parents and families, and children involved in the child protection system.

Second, in processes in which children's views are to be presented, particularly when children or parents are not able to speak for themselves, the onus is on the professionals involved to check whether the information to be presented is an accurate representation of children's, family members' and carers' views – as well as the facts of the case. Checking with children and confirming how their views are to be represented is important to reduce misunderstanding, misinterpretation and lack of accountability and to increase the transparency of the evidence and the process. For children in particular, the filtering or interpretation of their views without discussion with them about how their views will be conveyed in the decision-making process 'leaves considerable room for inaccurate adult-centric assumptions about what is important to children and what aspects of the decisions might be amenable to what children are seeking' (Cashmore et al., 2023: p. 15).

Third, it is crucial that the outcome of decisions is clearly explained to children and to their parents. So often, what is said in court or in pre-court processes is in bewildering language and at a time when those most affected, if present, are not in an emotional state to take it in. Children and parents need to be able to comprehend the decision, why it was made, and what it means for them in practical terms – information that needs to be conveyed in a sensitive way, preferably by a trusted person who has a continuing relationship with the child. Parents and family members also need to be informed about the avenues that are available to them if they wish to appeal the decision. While this is properly the job of their legal representatives, the immediate post-hearing timing is often not optimal and does not provide an opportunity for a considered discussion. As Tyler (2000) argued in relation to trust and the perceived fairness of authorities:

> *A key antecedent of trust is justification. When authorities are presenting their decisions to the people influenced by them, they need to make clear that they have listened to and considered the arguments made. They can do so by accounting for their decisions. Such accounts should clearly state the arguments made by the various parties to the dispute. They should also explain how those arguments have been considered and why they have been accepted or rejected.* (p. 122)

There are good arguments for Children's Courts and other courts, including the Supreme Court dealing with adoption matters, to publish their final judgments with reasons 'as standard practice'. As Davis (2019) argued, this is important for several reasons: to 'help ensure confidence in the independence and integrity of the Children's Court'; to inform 'the public, the media, scholars, policy makers and other interested stakeholders' as to the way proceedings are conducted and determined in the Children's Court; and 'to promote access to justice by providing precedential information to parties and legal practitioners', and to be 'an important mechanism of accountability' (p. 132). The major impediment is the Children's Court's lack of resources, time and support staff. Children's Courts have traditionally been the 'poor cousin' in the court system, with very limited resources. Children's or Youth Court magistrates have large workloads, little time and, unlike judges in higher courts, no judicial associates to provide support in writing judgments.

Fourth, children and young people need to have clear and accessible information while in care and beyond on their departmental and case files to help them to understand their own life history and make sense of their identity. This might include having accessible and readable case file summaries including 'a letter', written for children and families in a non-judgmental way that explains why decisions were made, why they entered care and when and why they moved from one home to another. As Hollingworth (2015) explained:

> *Receiving a letter specifically written to meet a child's need to know can be liberating for a young person who has hitherto felt disregarded and subject to arbitrary authority without consultation. The letter enacts the child's entitlement to personal accountability from the writer, making the child a participant in a conversation rather than the object of gossip.* (p. 14)

Fifth, there also needs to be a feedback loop for decision makers, including judicial officers, legal professionals, report writers and caseworkers, to know and understand what the impact and outcomes of their decisions are. Currently, they rarely know what happens after they have made their decision and orders and their responsibility ends, unless they require a follow-up report, like an s82 report in NSW, to bring the matter back for review and monitoring.

Active case management with the same judge overseeing a case from start to finalisation provides more comprehensive monitoring and review. As Babb (2013) argued, it:

> *facilitates more therapeutic and ecological decision-making because a judge develops a more comprehensive awareness of the family's problems, allowing for the fashioning of more effective outcomes. For example, if a judge knows that a particular intervention was not helpful or effective in the past, she will have a better idea of the types of interventions that may be better suited for the family.* (p. 78)

This is a feature of specialised problem-solving courts that take a therapeutic approach, such as the Family Drug Court and Marram Ngala Ganbu for Aboriginal children and families in Victoria. Therapeutic courts are also more likely than other courts to embody procedural justice principles (Howieson, 2023; Kruse & Bakken, 2023; Richardson et al., 2016).

Limited data are captured and rarely accessed to evaluate the quality of processes, decisions or outcomes. This means the professionals involved are making decisions without being properly informed about what the outcomes of their decisions are for children and their families in the short, medium and longer term. The children or families they may see again in the course of their work are a subset of those they deal with and provide an unrepresentative and inadequate understanding of the overall context and outcomes. Again, as the Family is Culture report points out in relation to Aboriginal children and families, those making decisions, including judicial officers, need to be able to recognise, understand and weigh the potential harm of removing and disconnecting children from their parents, family and culture in relation to children remaining with or returning to their parents, or being placed with kin or other carers. This requires sensitivity and respect for cultural differences and understanding of the impact of intergenerational trauma and of how Aboriginal parents and families respond to a child protection system that has not accommodated and respected their cultural traditions and connection to kin and country (Davis, 2019).

These issues are exacerbated by the lack of research and understanding in general terms about the effectiveness of the interventions that are ordered and the longer-term outcomes of caseworkers' decisions and court orders, including placement outside the family for children. There is little research about the quality of assessments or the effectiveness of services families undergo. Lederman (2013) expressed her concern about the lack of evidence-based psychological assessments and interventions, and the 'quality of the services and programs … families are ordered to complete as part of their case plan'. Again, in terms that resonate strongly with the situation in Australian courts, she stated:

> *Every day, judges order children and families to participate in therapeutic services, substance abuse programs, and programs designed to prevent repeated domestic violence.*
>
> *No one asks the simple question: how do we know if this service is effective? The legal requirement of reasonable efforts is not being met in our courts. A service that has no empirical basis, no empirical design, and delivered by poorly trained professionals is not going to help our families stay out of the child welfare system or get their children back.*
>
> *There are good interventions and bad interventions so that the simple act of offering a community service and requiring a family to participate in that service is no guarantee that the family will move toward a successful resolution of the problems that landed them in family court the first place.*
>
> *Another disturbing example of the failure of the child welfare system to provide the most basic service in a responsible way to families of cumulative advantage with very limited skills is a study of parent-focused interventions or what is commonly called parenting skills … Almost every parent in our country's child welfare system has a case plan that contains the task of parenting skills …*

Lederman further questioned:

> *What do child welfare professionals know about evidence-based practice?*
>
> *What is the level of awareness by child welfare system professionals regarding how evidence-based practices effect positive change in families?*
>
> *How can evidence-based practices be best disseminated by professionals and judges making referrals for services in the child welfare system?*
>
> *Even if a child or parent is in an evidence-based service, how is successful compliance measured? Judges make reunification decisions based on service completion of case plan tasks. How is successful completion of a service measured?* (pp. 28–29)

In essence, the call for better evidence, and for informational and feedback loops, signals respect and understanding of the needs of the children and families that the child protection system, including the courts, is making far-reaching decisions about. Decisions need to be tailored to 'this child' and 'this family', and to be culturally appropriate and reduce trauma, not exacerbate or cause re-traumatisation (Franchino-Olsen et al., 2024). The critical enabling factor throughout, however, is relational – meaningful, respectful relationships built on trust, and a solid research and evidence foundation.

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