

~~Should Children be Heard?~~

Can we make the correct and
preferable decision without them?

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Scope of discussion

- ◆ Limited to decisions that relate to children or directly impact on children
- ◆ As family and care litigation lawyers limited experience with tribunal work – our solicitors may have experience with NCAT – guardianship and occupational divisions and potentially AAT (much less so).
- ◆ Most of our experience as child representatives arising from our work in the Children's Court, the Federal Circuit and Family Court of Australia and the Supreme Court Equity Division (Adoptions and *parens patrie*)

Should children be involved in Tribunal Matters?

UNCROC Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Principles of Natural Justice – *Kioa and West* 159 CLR 550.

Mason J set out what has come to be the guiding principles of natural justice:

- ◆ It is a fundamental rule of the common law doctrine of natural justice ... that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given the opportunity of replying to it. ... The reference to “right or interest” in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.

Further guidance

CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998 - SECT 87

Making of orders that have a significant impact on persons

- ◇ (1) The Children's Court must not make an order that has a significant impact on a person who is not a party to proceedings before the Children's Court unless the person has been given an opportunity to be heard on the matter of significant impact.
- ◇ (3) The opportunity to be heard afforded by this section does not give the person who is heard the status or rights of a party to the proceedings.

Why should children be heard?

- ◇ If the correct and preferable decision impacts a child and young person then
- ◇ ART Act Section 9- a) is fair and just decision; which (b) ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits; should include the impact of that decision on the person most affected
- ◇ CAT ACT Section (3) - (d) to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and
- ◇ (e) to ensure that the decisions of the Tribunal are timely, fair, consistent and of a high quality, and

How can children participate in Tribunal proceedings

- ◇ Capacity – in jurisdictions where children are parties the issue of capacity determines the nature of representation
- ◇ There are presumptions with respect to capacity – Care & Protection – 12 years – adoption 10 years – criminal capacity is presumed at 10 doli incapax applies until 14
- ◇ EXCEPTION – family law jurisdiction – Children can make application as parties with leave however most children participating the proceedings through ICL involvement

68LA The independent children's lawyer: (a) is not the child's legal representative; and (b) is not obliged to act on the child's instructions in relation to the proceedings.

Models of representation

- ◇ Capacity is important because it can determine the nature of representation.
- ◇ The two traditional models are
 - ◇ Best interests – ILR, ICL, Separate representative.
 - ◇ On instructions – DLR
- ◇ Cannot comment on AAT procedure but it does seem that s17(3) a child affected by a decision could become a party and if so would have the same representation rights as any other party (ie direct instructions) – Only time child is mentioned in the act relates to child support

NCAT

- ◆ Does contemplate child representation s45(4A)(b) and appointments are frequently made
 - ◆ Best interests representation – regardless of the age
 - ◆ Child's views are heard and submissions are made in relation to the weight to be placed on the child's view; however
 - ◆ Evidence gathered and presented which may be inconsistent with those views
 - ◆ Information presented is filtered by the legal representative view in relation to best interests
 - ◆ The legal representative have the right to make submission inconsistent with the child's view with the child not being given the chance to be heard against those submissions and the tribunal generally will place significant weight on those submission as the sep rep is independent from the parties in dispute this is appropriate)

Direct representation in NCAT

- ◇ Is contemplated –
- ◇ (4A) In proceedings that directly or significantly affect a child (that is, a person under the age of 18 years) who is not a party to the proceedings – meaning
 - ◇ The child first needs to be a party
 - ◇ Representative not appointed by the tribunal but arises from the child joining the proceedings.

Benefit

- ◆ Direct evidence of the child's view
- ◆ Onus is on the legal rep to provide advice to the child about the consequences of that view – including it may not be the correct and preferable decision.
- ◆ Allows the tribunal to understand the real issues in dispute from all perspectives – the applicant, the respondent and the child who is affected by the decision
- ◆ Affords children natural justice and procedural fairness potentially enhancing not just the quality of information informing the tribunal's decision making but also may result in increasing trust and confidence in the tribunal's decision making – because a piece of the puzzle is not missing.