



“Stay in Your Own Lane” the Inherent Flaws Undermining Children’s Rights Within Australia’s Family Law System: A Perspective from the Field

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Abstract

The social scientists and legal professionals who work in family law in Australia should be recognised for working tirelessly in a complex, overworked, and archaic system. A system that underserves their capacity to maintain integrity, expertise, and ethical diligence in the professions they are assigned. In this perspective piece, we acknowledge the innovative work being done within this system to strive to meet the best interests of the children they serve, whilst highlighting the fundamental flaws of an adversarial system that breeds acculturation across disciplines and disables the practitioners who operate within these systems from legitimately performing their duties and championing the human rights of children.

Keywords Family law · Child’s rights · Acculturation · Adversarial system · Expert evidence · Social work

Purpose Statement

Collectively authors one and two have over 45 years of experience as expert witnesses in the social science field within Australia and internationally. Similarly, authors three and four have extensive experience in social work education and research. The purpose of this perspective article is to call on the Australian Association of Social Workers to take the lead in developing a regulatory structure for child expert witnesses within Australia’s family court system. Furthermore, we advocate for a broader system overhaul to support a collaborative practice approach of experts to hold shared decision-making for children’s parenting matters within Australia.

Background

Currently, parenting matters in dispute for a child in Australia are determined through an adversarial judicial-led process. In some of these cases, single experts are sought to provide a professional assessment of the child and their family. It is well established that the existing judicial processes in Australia’s family

law systems are inadequately meeting the needs of children and families accessing these systems (Australian Law Reform Commission, 2019; Wise, 2017). It is without dispute that this system continues to face significant challenges and that substantial reforms, new initiatives, and funding continue to be prioritised, yet public, service-user, and professional criticisms of the system remain enduring. The shortcomings identified in independent reviews and parliamentary inquiries maintain the emphasis on practice change and innovation within the existing system, but are we overlooking the obvious barrier to achieving children’s best interest-led principles: the design of the system itself?

Legal Context

Internationally, the United Nations Convention on the Rights of the Child (CRC) views the child’s best interests as the primary consideration in legal-making decisions about children. In Australia, the Family Law Act 1975 (Cth) positions the child’s best interests as the paramount consideration within their legal framework guiding decision-making. There has been much research nationally and internationally about the notion of best interests regarding decision-making for children (Daly, 2018; Fluke et al., 2020; Harmer & Goodman-Delahunty, 2014; Keddell, 2016; Melinder et al., 2021; Otieno Ngira, 2021; Sheehan et al., 2012; Strømmland et al., 2019), with the large consensus being that the term is ambiguous, ungrounded in empirical research, and lacking clear definition.

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The Current Research Landscape

Significant research gaps exist within the nexus between legal and social science discourses in the decision-making processes and existing judicial system and what impact this has on children's rights being met (Amundson & Lux, 2019; Ratus, 2021; Robertson & Broadhurst, 2019). An understanding of the influence of legal and social science discourse in the context of the judicial system is essential, as decision-making regarding vulnerable children continues to be led by a legal discourse despite the context, complexity, and emphasis of determining a child's needs and best interests, arguably being a predominately social science matter (Robertson & Broadhurst, 2019). Furthermore, there is limited understanding about the existence, impact, and influence of acculturation of both social scientists and judicial officers in informing best interest principle outcomes in decision-making. This, arguably, further contributes to the ongoing systemic shortcomings of identifying, assessing, and implementing best interest principles. To this end, questions must be asked:

- How do the existing adversarial systems within Australia enable the legal and social scientist professionals to stay in their own lanes?
- Moreover, how are the rights of the child being met when the system fails to enable the experts within these systems to do what they are trained to do?

There is an abundance of research identifying and discussing the shortcomings and criticisms of an adversarial system in serving the rights and best interests of children (Amundson & Lux, 2019; Chisholm, 2007; Firestone & Weinstein, 2004; Ratus, 2021; Robertson & Broadhurst, 2019; Schepard, 2004; Weinstein, 1997). This raises concern about the legalisation of human, and specifically, children's issues within such systems which sees a strong focus on finding and applying a legal perspective to issues that are arguably complex social, psychological, sociocultural, and legal problems. In this context, whilst the findings of fact remain integral in upholding a child's human rights focus, there are a multitude of psychosocial and emotional factors that sit outside of this legal sphere that are equally integral in ensuring a child's human rights are espoused.

The Policy/Practice Issues

The Social Work Context in a Legal Discourse

Social workers are key players in the effort to overcome the structural shortcomings inside this "legal system" since they are experts in social science with an emphasis on psychosocial, psychological, and emotional issues. Possibly

one of the most important roles in trying to advance the current system belongs to the social work profession. The significance of this matter is inextricably tied to the key principles of social justice, professional integrity, and respect for individuals held by the Australian Association of Social Workers (Australian Association of Social Workers, 2020).

Social Justice as a Core Value

Fundamentally, the social justice values for which social work strives cannot be upheld in a system that underserves its experts, professionals, and clients. Current practice in Australian family law courts highlights this issue, as the judiciary has no clear criteria for whether social science participation for a child should occur. As a result, legally educated specialists are making psychosocial decisions for children. These decisions are made outside of the scope of their legal training. In addition, when social scientists prepare family reports, these assessments are made before the court determines the findings of fact (including risk). Placing this psychosocial evidence before the court to determine its relevance and weight is unethical and detrimental to the child. Moreover, decisions for the child post findings of fact regarding parenting competency, risk, and capacity are not redirected to child experts but remain with the judicial officer. For example, the primary author undertook a family assessment of family A, where it was assessed that the infant child's developmental needs did not align with the applicant father's proposal for an equal time care arrangement. Where the court found that the mother's allegations of family violence were unsubstantiated, the judicial officer made final parenting orders for the child to live equally between their parents. Reasons for the judgement explained that the lack of findings of the alleged risk supported the suitability for this child to live equally between their parents because it was practicable, and no parenting concerns were found by the court. The child's developmental vulnerabilities were not prioritised in the judicial decision, which failed to centre the rights of the child in this outcome. The underserved capacity of social workers to advocate for and promote the child's social justice opportunities is also highlighted in this process. The authors posit that this primarily relates to the lack of power social workers hold and the dominant legal discourse within the existing system.

Professional Integrity as a Core Value

A professional integrity bind for social workers within the existing system is also highlighted. Social workers' ability to maintain professional integrity in their competence, qualifications, and studies is jeopardised within the current system. Child custody or single expert witnesses

are appointed to assist in judicial decision-making on child-related parenting matters in family law jurisdictions worldwide. There is, however, a lack of consistency globally regarding the competency, guidelines, and regulation of such experts, with competing views within the psychology/social work profession about the level of qualifications, training, and competency measures that should underpin this role (Freckelton, 2020). Within Australia, there remains a lack of regulatory systems around single expert witnesses. Such roles are held by psychologists, psychiatrists, and social workers who are not always concurrently appointed under Regulation 7 of the Family Law Regulations 1984. In essence, the current practices within Australia provide for an assessment to be undertaken of a child and their family by anyone asserting to have the qualifications and expertise to do so. Growing criticism is occurring, more specifically about the validity of social workers in undertaking this work, with mounting pressure being made for such evaluations to be undertaken by psychiatrists. There is a need for professional recognition of Australian social workers and for the profession to concurrently take a lead role in establishing a regulatory system for child experts.

Respect for Persons as a Core Value

The value of respect for persons is also identified as being unattained in the existing policies within the system. Respect for persons relates to the children and families involved in these systems and the professionals who fulfill roles within these systems. Presently, there is no explicit Australian policy outlining the appropriate time and manner in which a child's perspective should be considered and represented in parenting matters concerning them. The social work profession must enhance its advocacy efforts on this matter. Furthermore, implementing broader policy changes that aim to challenge the prevailing legal discourse surrounding children's parenting matters in Australia will align more closely with the profession's fundamental value of respect for persons. For example, the primary author worked with child B, aged 11 years, who was subsequently not given the opportunity or right to share their views and wishes about their parenting arrangements. The child subsequently expressed their experience of feeling unheard, devalued, and invalidated in a process that espouses to centre their best interests as paramount.

A Human Rights Focus

As emphasised, where the decision-making in child custody disputes relates to a child and their best interests, a human rights focus requires the experts to understand, assess, and determine a child's emotional, psychological, cultural, social,

and developmental needs. Relying on a judicial-led adversarial system to make these determinations inherently fails a child's rights to have their needs assessed within these psychosocial domains. The authors position that where the law requires determinations to be made about the child's *best interests*, therefore, a broader, psychosocial assessment which also factors in the strengths of the child's relational attachments and their caregivers' capacity to parent as well as the suitability of the parties vying care environments to meet the child's daily care needs is required. Therefore, the ideology, education, and knowledge of the judiciary to make parenting orders that relate to these development and relational factors for the child, raises serious questions.

Exploring Acculturation

A recent study of family experts in the Australian family law system undertaken by Rathus (2021) contributes to a growing dialogue and identification of the existence of acculturation to law by social scientists undertaking family assessments within the family law setting. Where Amundson and Lux (2019) also take a firm focus on the risks associated with child custody experts being acculturated into a legal sphere, Bala (2005) takes a more balanced perspective identifying the mutually disparate variations of experience and expertise of judges who make best interest decisions. Arguably, this topic must be a primary focus of further research to explore the roles of experts involved within the existing systems within Australia, and whether this is aligned or nonpartisan with the human rights of the children subject to these systems. In this context, the question of a child's best interests within such proceedings requires knowledge, determinations, and factors over and above legal statute and law.

Further knowledge around the existence of acculturation between psychological and legal discourses is required to inform greater knowledge and understanding of the skills, expertise, and processes within the existing judicial-led systems within Australia for children. The nucleus of this research should pivot on how collaboration can best be integrated into a decision-making system that upholds a child rights approach to determining their needs and best interests. In this context, the current systems exist in a process where social work/psychology/mental health trained practitioners undertake assessments of children's needs and best interests which are consequently interpreted and weighed by legally trained professionals. The burdens of proof, determinations of fact, and the nuances of children's needs become conflated. Consequently, the decision-making process largely requires judicial officers to make final determinations about matters that extend outside of findings of facts and the legal training they have diligently gained. One could, and must, ask:

- In the absence of evidence-based disputes, on what legal basis are decisions informed about a child’s parenting arrangements?
- How are we valuing the time and skills of the social scientist who is asked to assess allegations of risk when the findings of fact regarding the allegations are yet to be even made?
- Once the findings of fact are made surrounding incidents of abuse/risk, what professional expertise does a judicial officer draw from to make determinations around a child’s developmental, emotional, psychological, socio-cultural, and psychosocial needs?

Contextually, the emerging literature (Amundson & Lux, 2019; O’Neil et al. 2022; Rathus, 2021) suggests that Australia’s current judicial-led systems require legal experts to attempt to interpret, understand, and make determinations about social science matters (in addition to legal matters), and contrariwise, child welfare experts are required to interpret, understand, and have their assessments determined in a legal landscape. How the expertise of either discipline can be championed to ensure the fundamental human rights of the child are met in these systems seems an obvious systemic failure, yet to be genuinely acknowledged, let alone addressed.

Child’s Rights

Current research in child welfare processes more broadly transcends the debates of interdisciplinary knowledge in child-related decision-making and argues for a shared human rights standard being adopted by those involved in these systems (Daly, 2018; Leviner, 2019; Vandenhole et al., 2015). The United Nations Committee on the Rights of the Child affirms that “the child should be viewed as a rights holder, not a beneficiary of the adults’ benevolence” (no.13, 2011). Consequently, further research is needed to ensure that Article 3 of the CRC regarding the best interests of the child can inherently be a primary consideration within the existing adversarial system, with specific regard to whether this system enables the experts to *stay in their own lanes*. Arguably, the social work profession is in a key position to centre the child within its advocacy role for ongoing systemic changes to family law. In this context, the authors have worked with countless children and young people who have had decisions made “for” them, without the opportunity to be involved in decisions about their own life. This practice can easily occur within the existing system where there are no mandatory requirements for a child expert to be appointed to enable a child’s views and wishes to be asserted, and where the primary “parties” in the court process remain being viewed as the adult caregivers.

Implications for Practice

- Strengthening advocacy efforts: A social work-led examination and dismantling of the existing adversarial structure that governs decision-making within the Australian family law system should occur to provide greater knowledge on the rights and needs of children and to implement a system that enables child experts to significantly contribute to decisions that directly affect them. A call for action is made to the Australian Association of Social Workers to prepare submissions to Government as part of ongoing family law reforms.
- Practice reform: The prevalence of acculturation between legal and social science discourses fundamentally undermines the child best interest’s principle from being materialised within the existing adversarial family court system in Australia. This calls into question how their human rights are operationalised. The nexus between legal and social science discourses within this system needs greater scrutiny to enable the child’s best interests and rights to be paramount. A system that enables a collaborative multidisciplinary expert team to assess and determine children’s best interest outcomes in parenting matters should be further researched to consider how experts’ decisions can be determined within their professional expertise.
- Integrating evidence-based practices: Australian social workers can take a lead role in establishing competencies for regulation and registration of expert witnesses within the existing family law court system in Australia.

Conclusion

Notwithstanding the innovative projects being trialled, along with the tenacious efforts, expertise, and commitments of the professionals involved within the existing systems, the landscape for service delivery for children requiring parenting order assessment and intervention within Australia requires urgent review. The paradigm, discourse, and processes of the existing judicial-led system should be deconstructed and re-established, with the rights of the child being the foundation upon which new processes and service delivery models are built. Further research is required to specifically explore social workers’ competency, training, and expertise requirements to undertake assessments and inform decision-making for children in this practice area. The absence of a regulatory body for child expert witnesses disables the capacity for the existing role of “expert witnesses” to ethically, educationally, and legitimately reach outcomes that attain the child’s best interests.

The authors' practice experience reinforces their call to action for the Australian social work profession to take on the role of establishing, endorsing, and overseeing this regulatory structure.

For the social work profession, the flaws disabling the social scientists and judicial officers within Australia's family law system is a concern that speaks to core social work values. The failings within the current system present an opportunity to establish a stronger social work presence in this space and to extend our accreditation efforts to ensure that specific training, experience, and regulatory requirements are established and met for practitioners who seek to undertake this specialised work. The profession is also being called on to challenge the existing adversarial system more broadly, to establish a decision-making system that ensures the human rights of children are being prioritised and the experts championing these rights are enabled to stay in their own lane.

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Declarations

Competing Interests The authors declare no competing interests.

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