Children and the law

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- Family law and welfare issues - particularly separation, divorce, guardianship, day-to-day care, contact, relocation, care and protection, and;
- The impact of legal and welfare proceedings on children and families;
- The participation and views of children in family law proceedings;
- International law and human rights issues affecting children;
- Discipline and guidance of children;
- Rural childhood;
- Citizenship and nation building.

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Inviting your Critical Engagement

Photos used throughout this publication are sourced from Shutterstock (http://www.shutterstock.com). They have been selected to highlight the diversity of ways in which children and childhood can be represented.

We encourage you to engage critically with these images as you reflect on the idea that 'childhood' is socially constructed. Ask yourself, 'What message about children or childhood is being conveyed through this image'? ‘How do these images challenge my understandings of children and childhood’?
Introduction

Learning about the law can be both fascinating and compelling.

Everyone, whether they are aware of it or not, are in some way influenced and regularly impacted upon by the law. Children and young people are no exception. Most people have some broad degree of familiarity with aspects of the law that touch their daily lives and relationships with others. Pick up a newspaper or watch television and you will find numerous issues mentioned that have legal implications.

Law is all about human relationships, and the rights, duties, obligations and freedoms that either promote or restrain our attitudes and behaviours. This is nowhere more evident than in the range of ways that the law touches on the lives of children, young people, their parents, their communities, and the people - like you – who work with children and their families.

Many children and young people live in challenging circumstances and our legal policy, in both the ‘private’ and ‘public’ law fields, needs to be responsive to their differing needs when they, or their family, are placed at risk of disadvantage or dispute. How effectively the legal system responds to these issues is a key theme of this Background Briefing paper.

Knowing a little about the law will help you in your capacity as a professional, since you are likely to come into contact with children and young people facing issues which have a legal dimension. The fundamental principles underpinning the law are fairly easy to grasp and will help you to better analyse, understand and engage with the social and legal issues facing family members today.

The really exciting thing about the law is that it is never static; rather it is constantly evolving. This means that deficiencies and gaps in both legislation and policy, and our processes for resolving disputes, can be improved or overcome. You can influence and shape the law by identifying problematic issues, advocating for the rights of our young citizens, and making submissions, for example, to parliamentary enquiries, ombudsmen, heads of government departments or children’s commissions.

By understanding the legal system, its principles and processes, you will find that you are much better informed in your work with families and you will be able to more effectively assist children and young people to have their rights respected and their well-being promoted.
Section 1 - Children and Young People in a Changing Socio-Legal Context

Children and young people have been profoundly affected by the changing nature of family life in recent times. In Australia, like many countries, the percentage of children living in nuclear families has decreased, as the number of sole-parent, step-families and blended families has increased (Australian Bureau of Statistics, 2008; Hayes, Weston, Qu & Gray, 2010). This nationwide demographic trend towards more diverse family types has led to more frequent, and sometimes more complex, engagement by parents with the family law system.

Many legal issues emerge, for example, with regards to the care of children following parental separation or divorce, remarriage or repartnering. These can include issues related to parental responsibility (for example, disputes over which school a child should attend or who can give consent to medical treatment), residence, contact, shared care, relocation, abduction, alienation, domestic violence, child support, property division and adoption. Disputes between parents over these sorts of issues can profoundly affect their children’s lives. These ‘private’ or ‘civil’ law matters comprise significant topics within the field of Family Law.

Other children and young people become involved with the ‘public’ law system, whereby the State seeks to afford them protection from child abuse and neglect. This field of law is also a significant one affecting children’s rights and well-being.

Ensuring children are safe is one of the fundamental principles underpinning family law. Legal issues associated with the care and protection system include the reporting and investigation of abuse allegations, the role of statutory and non-government child welfare agencies and the courts, and the placement of children in out-of-home care (including kinship care, foster care or residential care).

Yet another component of ‘public’ law is the field of Juvenile Justice. While the law in this sphere is rightly concerned with deterrence, reparation, diversion, restorative justice and punishment it is also concerned with a child or young person’s vulnerability and welfare needs. There are often overlaps, then, between care and protection and youth offending issues – something we will consider later in this document.

As we will see, the statutory principles and the approaches of the police and courts are guided by the age of the child and the nature of the offence. Anti-social conduct of a child or young person can have quite different consequences to that meted out to an adult offender.

In this first section of the Background Briefing, we will consider how the law evolves in response to changes in society, including changing conceptions of childhood, changing legal structures and changing understandings of what is ‘good’ for children. We will provide examples drawing from these two fields of Family Law and Juvenile Justice.
The Changing Nature of the Law

Does the law shape social life, or does social life shape the law? This fundamental question lies at the heart of our enquiry into how well a country’s legal system enhances the rights and well-being of children and young people.

Clearly the law is influenced by changes in society. For example, children born out of wedlock were once considered illegitimate (filius nullius – ‘a son of nobody’) and this had significant detrimental consequences for their legal status and entitlements (such as maintenance and property inheritance). However, that changed in the mid-1970s in Australia when each state and territory passed its own law to accord all Australian children, regardless of the nature of their birth, equal status in the eyes of the law (for example, the NSW Children (Equality of Status) Act 1976). Now, new laws have also been passed dealing with de facto couples, instead of only married couples, and older laws have been amended to take better account of the issues facing children and young people in today’s society.

The law can also help to drive changes in social attitudes and behaviour. This is particularly evident in Sweden which, in 1979, became the first country in the world to prohibit the use of physical punishment by parents when disciplining their children. Public support for, and use of, corporal punishment in Sweden (and other Scandinavian countries that followed Sweden’s lead) has declined markedly ever since (Durrant, 2003). Prosecutions for assaults and child deaths have also declined dramatically since the legislation was changed to recognise children’s right to physical integrity.

Changing Conceptions of Childhood

How children are conceived of by society has shaped the character of the laws applying to them at particular points in time (Taylor, 2005). These conceptions are socially constructed generalisations that depict the prevailing images of childhood and, not surprisingly, become reflected in our law.

Over the past two centuries, the ‘modern’ view of childhood has gained currency, and children have come to be seen as a future investment requiring proper nurture, socialisation and education (Foyster & Marten, 2010). Children are no longer perceived as just ‘little adults’ occupying an ambiguous place in society. Rather, they have come to fill a defined childhood space, the structure and boundaries of which have been shaped by psychological, legal, educational, medical and welfare professionals.

Hendrick (1990) has described a range of ‘constructions’ of childhood which have existed in society since the early 18th century. In chronological order, these are described as the ‘Romantic child’, the ‘Evangelical child’, the ‘Factory child’, the ‘Delinquent child’, the ‘Schooled child’, the ‘Psychomedical child’, and the ‘Welfare child’ (of the era just prior to World War I), the child of psychological jurisdiction, and the ‘Family child’. Thus the need for new laws catering for the changed thinking became necessary over time.

In the late nineteenth century, for example, laws were passed to protect children from exploitation in the workplace, to introduce compulsory education, and to afford them some protection from cruelty and ill-treatment. The suffragettes were fighting for
the right for women to vote around the same time, so we should not forget that women, as well as children, were beleaguered by inequality in this era. In the 21st century, these concerns for children’s protection, safety and education remain important, but Western law has also evolved to embrace children’s agency and to recognise their participation rights; concepts that were not in evidence 100, or even 50, years ago.

Smart, Neale and Wade (2001) have also explored historical constructions of childhood but take a slightly different approach to Hendrick (1990). They outline four powerful images of childhood that help to reveal the transformations that have occurred over time. As you read these, give consideration to how each image might have resonance with both the law and societal attitudes towards children today:

- children as *little devils* beset by original sin where they are regarded as inherently evil, corrupt, wilful and in need of harsh treatment;
- children as *little savages or barbarians*, implying they are innately wild and uncivilised, rather than naturally bad;
- children as *little angels* where they are presumed to be naturally good, pure, innocent and kind;
- children as *embryonic adults* whereby they are assumed to be in an emergent state with unfixed natures (neither inherently good nor evil).

These various conceptions of childhood remain quite intertwined in contemporary adult and legal thinking, and in media representations. They account for why society has felt compelled to manage, control, protect, socialise or constrain children depending on the context or the particular social problem raising concern.

The first image of children as ‘little devils’ remains embedded in public attitudes towards young offenders even today. Think back to the 1993 murder of James Bulger by two 10-year-old boys, Jon Venables and Robert Thompson, who left his body on a railway line in Liverpool, England, after abducting him from a shopping mall (Haydon & Scraton, 2000). The media coverage inflamed public reaction, portraying the boys as ‘monsters’. Venables and Thompson were tried in an adult court and the judge concluded the children had engaged in ‘an act of unparalleled evil and barbarity’ (Kehily, 2004, p. 17). In 1999 the trial was deemed unfair and a violation of the children’s human rights (by the European Court of Human Rights) because the children had not been able to understand the proceedings.

In contrast, when 5-year-old Silje Marie Raedergrd was beaten unconscious by two 6-year-old boys in Norway in 1993, and left to freeze to death in the snow, the community and victim’s family’s responses were quite different. The two boys were also regarded as victims and were counselled and re-integrated into society. ‘The crime, while shocking, occasioned no great debate about childhood’ (Kehily, 2004, p. 20).

These two cases illustrate quite different approaches to juvenile offending, depending on which conceptions of children are prevalent in a particular culture.

In contrast, when we consider the context of Family Law, the image of children whose separated parents are engaged in disputes over their care is more akin to the ‘little angels’ image described above. These children are considered the innocent victims of their parents’ conflict and the courts take great care to protect them from being ‘caught in the middle’ of the litigation (Kelly & Ramsey, 2007). One reason for not asking children’s views, however, in these circumstances is that they are seen as manipulable and also manipulating (Parkinson & Cashmore, 2008).
The Emergence of Family Law as a Jurisdiction

Over time, the very structures and processes of the law also change, and this influences how children, young people and families are dealt with by the law.

Historically, for example, family law was part of ecclesiastical (Church) law. It was not until the mid-20th century that there was recognition that family disputes were best resolved within one specialist court capable of responding to both the legal and social needs of families (Taylor, 2006a).

Previously such matters as divorce, custody, property and maintenance disputes were determined in separate courts in the full glare of the public galleries. This was not thought to be helpful in enabling a family to deal with the profoundly personal issues arising from a relationship breakdown. As a consequence, family law emerged in the form we are familiar with today.

Conciliation processes like counselling and mediation were also introduced so the Family Court could become a ‘helping’ court and provide both a judicial and a therapeutic response. Traditional adjudication (where the judge makes the decision and issues court orders accordingly) became a last resort for the minority of families unable to resolve their disputes by these other methods.

Following the establishment of the Family Court of Australia in 1976, family law gradually emerged as a specialty discipline, with a specialist bar of family lawyers and a specialist bench of judges. The recent addition of the Federal Magistrates Courts has added yet another tier to the delivery of family law services. This is a generalist jurisdiction and so magistrates are not necessarily specialists in family law, nor are they hearing exclusively family law cases. While Australia, New Zealand and Canada have Family Courts, other parts of the world, including many American states, still deal with family cases in courts of general jurisdiction.

Changing Notions of Child Welfare

While the machinery of the law (i.e. how the law works to resolve family disputes) changed with the introduction of Family Courts, so too has the content of the laws changed.

For example, parenthood rather than marital status, has now become the central focus in family law. This is reflected in more recent statutes by an emphasis on the quality of parent-child relationships (Parkinson, 2006). Smart (2003) believes there has been ‘a profound change in our understanding and our expectations of parenthood’ (p. 25) as children have become more important to both mothers and fathers, and both parents have sought close emotional bonds with their children.

The law gradually evolved throughout the 19th century to become more child-centred through the ‘welfare of the child’ principle. This has now become the key, albeit indeterminate, principle of modern family law. Interestingly, this principle was not initially developed out of concern for the needs and rights of children, but rather as a means of enhancing the rights of women in the custody and access stakes over which their husbands had had such pre-eminence.

Previously the superiority of a father’s rights over his children prevailed in English common law, accompanied by a strong bias towards legitimacy so that a legal relationship only arose between a father and his children born within marriage. A mother
could only defeat her husband’s right to custody by establishing that his conduct would gravely threaten the child's life, health or morals (Taylor, 2005).

Custody disputes were, of course, relatively uncommon during this era because of the restricted grounds and expense of divorce, and the lack of financial support from the state for separated mothers. When they did arise, the courts were primarily concerned with the enforcement of a father’s common law right to physical possession of his legitimate children and his right to control their upbringing. Mothers and children had no status in the proceedings (Maidment, 1984). Hence, in this era, the superior right of a father to his legitimate children was all the ‘explanation’ needed for the courts to make a decision in a custody dispute.

This started to change in the 1800s as the mother’s right to custody began to be acknowledged. The UK Custody of Infants Act 1839 required the court, for the first time, to keep in mind ‘the interest of the children’, although this ranked third after consideration of parental rights and marital duty. A legal milestone was reached in the UK Guardianship of Infants Act 1886 when the ‘welfare of the child’ principle was finally introduced. This was later elevated (in 1925) to ‘the first and paramount consideration.’ This fundamental change in the law’s priorities was also reflected in Australia when the welfare of the child principle was introduced.

Other important ‘rules’ also began to take hold in the latter part of the 19th century (Austin, 1994). For example, the tender years ‘rule’ – a maternal preference principle - dictated that young children of tender years (usually under the age of seven) should be in the custody of their mother who could best care for them following parental separation; the same sex ‘rule’ held that daughters should be in the custody of their mothers and sons with their fathers. The ‘tender years’ and ‘same sex’ principles had the potential to clash with each other and sometimes forced a change of custody for boys around the age of seven so they would not be deprived of the important male influence of their father.

Matrimonial guilt was yet another concept that had significant consequences for children. Immoral conduct on the part of a husband, unless of an extremely gross nature, had little or no impact on his status or rights as a father. Conversely, women who committed adultery were initially excluded from obtaining a custody or access order with respect to their children. Even when such orders did later become possible, the courts frowned upon the woman’s conduct to such an extent that no matter how good a mother she may have been, the moral welfare of the child was, more often than not, thought to be best served by giving custody to the ‘innocent parent’ (Taylor, 2005). By the late 1920s as social attitudes began changing, it was recognised that a woman’s ‘matrimonial guilt’ did not necessarily negate her competency as a mother.
The court’s willingness to alter long-standing custody arrangements in accordance with the particular ‘rule’ they were enforcing (tender years, same sex, matrimonial guilt) took little account of the impact of such dramatic changes on the child. The child’s own views about the sudden transition they faced were also irrelevant, even if they were being sent to live with a father, or his agent, whom they scarcely knew. Where any consideration was given to the distress this may cause the child, the court explained the wrench away through reference to the widely quoted explanation in a leading 1926 case:

One knows from experience how mercifully transient are the effect of partings and other sorrows and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days (In re Thain (An Infant) [1926] 1 Ch 676 at 684).

Despite its long history in family law, the welfare of the child principle remains flexible enough to yield to whichever conception of childhood is currently fashionable. Throughout the 20th century developments in the field of psychology were particularly influential (Van Kreiken, 2005). For example, in the 1970s there was an emphasis on ‘maternal preference’ (influenced by Bowlby, 1969) and decisions about a child’s welfare were influenced by theories related to a child’s attachment to, and emotional security with, their ‘primary psychological parent’ (influenced by Goldstein, Freud & Solnit, 1973) as well as the concept of a ‘clean break’ following relationship breakdown.

Nowadays, the focus is more on the maintenance of a child’s enduring and meaningful relationships with both parents (Smart, 2003). Judges take into account a checklist of several factors when determining what is in a child’s welfare and best interests. Section 60CC of the Family Law Amendment (Shared Parental Responsibility) Act 2006 divides these into ‘primary’ and ‘additional’ considerations. The two ‘primary’ considerations are the benefit to the child of having a meaningful relationship with both of the child’s parents; and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. An example of one of the ‘additional’ considerations is any views expressed by the child.

The Emerging Emphasis on Child Rights

Another significant influence on child law occurred more recently in the realm of ‘international’ law; a field of law that includes international human rights treaties.

The first convention setting out children’s protection and provision rights was adopted in 1924 following the horrors of World War One. Known as the ‘Geneva Declaration on the Rights of the Child’ it was replaced in 1959 by the Declaration on the Rights of the Child.

In 1989, after a decade of consultation following the International Year of the Child (1979), the United Nations General Assembly adopted the United Nations Convention on the Rights of the Child (UNCRC). This Convention provides an internationally agreed framework of civil, political, cultural, social, economic and humanitarian minimal standards for children below the age of 18 years (Article 1) and against which legislation, policies and practices can be measured and their ongoing compliance monitored.

Australia ratified the UNCRC on 17 December 1990, making just one reservation to Article 37(c) regarding the obligation to separate children from adults in prison. By entering a reservation the government exempts itself from having to comply with this particular requirement, although it is expected that steps will be taken to comply with it.
in the future. In terms of its legal status, the Convention cannot override domestic law unless it has been specifically enshrined in a statute by Parliament. Nevertheless government officials and the courts should interpret domestic laws in conformity with any Conventions ratified by their country.

The significance of the Convention lies in the fact that it is the first international instrument to bring together ratifying countries’ obligations with respect to the protection, provision and participation rights of children and young people. It is unique in that it addresses the legal and social status of children who both lack autonomy but are rights-holders (UN Committee on the Rights of the Child, 2009).

The inclusion of children’s participation rights has been most significant in influencing recent developments in the law. Participation rights have led to a greater emphasis on ascertaining children’s views and their engagement in legal processes. They are specifically described in Articles 12 and 13 of the Convention. However the Committee on the Rights of the Child has identified Article 12 as one of four principles of the Convention (the others being the right to non-discrimination, the right to life and development, and the primary consideration of a child’s best interests). As such, participation is viewed as more than just a right in itself, but rather it should be considered in the interpretation and implementation of all other rights (UN Committee on the Rights of the Child, 2009).

Each ratifying government is required to report to the UN Committee on the Rights of the Child (a body of 18 experts elected by the States Parties which meets in Geneva) on their progress in implementing and complying with the Convention. Non-government organisations (NGOs) can also provide an ‘alternative report’ and appear before the Committee to challenge the Government’s report. The UN Committee on the Rights of the Child publishes its Concluding Observations after considering the reports, oral presentations and other evidence.

In Australia, for example, the most recent Concluding Observations issued by the Committee echoed the concerns raised by the NGO Report (National Children’s and Youth Law Centre & Defence for Children International (Australia), 2005) and expressed particular concerned about “the special problems still faced by Indigenous children, corporal punishment, the spread of homelessness among young people, children in immigration detention, juvenile justice and the disproportionately high percentage of Indigenous children in the juvenile justice system” (UN Committee on the Rights of the Child, 2005, para 5).

At the time of writing Australia is currently in the process of producing its next Government and NGO reports.

This ongoing reporting process should lead to the regular analysis of laws, policies and practices affecting children and young people and the Committee’s feedback can be used to advocate for change where needed within a country.
Section 2 – Understanding our Legal Systems

Understanding a little of the history, structure and function of our legal systems, including where our legal principles originate from and how our laws are made, amended and interpreted can be useful.

There are three major types of legal systems in the world – Civil law, Common law and Islamic Law (the sacred law of Islam followed by Muslims who believe Sharia is God’s law).

A civil law system is based on Roman law and is the most prevalent and oldest surviving legal system in the world. European civil law has been adopted in much of Latin America, Asia and Africa. The primary source of law is the legal code, which is a codified collection of statutes arranged by subject matter. The court system is usually inquisitorial and not bound by precedent.

In contrast, the common law system originated in England in the Middle Ages and is in widespread use in nations like Australia, New Zealand and Canada – countries that trace their legal heritage to the British Empire. Common law is developed by judges through decisions of the courts (caselaw). This forms precedents that must be followed by other judges when deciding future cases with similar facts.

Each nation or state will have its own legal system. Many such systems have a lot in common, but each will also have unique features. In the following sections we will focus primarily on Australia as an example of a common law country, acknowledging that there will be some differences in legal systems in other countries.

Australia’s Legal System

Australia’s legal system is based on important principles such as the rule of law, procedural fairness, judicial precedent, the hierarchy of the courts and the separation of powers between the three branches of government. Each of these is considered fundamental to the delivery of justice in a democratic society (Department of Foreign Affairs and Trade, 2010). The sovereign, Queen Elizabeth II, is the Head of State and her representative is the Governor-General.

Four sources of law are recognised.

1. **Statute law** – these are Acts of Parliament passed via the legislative process and are considered the pre-eminent source of law in Australia. Each Act of Parliament has its origin in a Bill (a proposed law), introduced by a Member of one of the two Houses of Parliament (the Senate and the House of Representatives).

   With the exception of laws relating to revenue and taxation, which must be introduced in the House of Representatives, a proposed law can be introduced in either House. During its consideration a Bill passes through successive stages where it is scrutinised, debated and often amended. Written and/or oral submissions by individuals, professional associations and other organisations help to provide public input into this process.

   Once the Bill has passed its final reading and been assented to by the Governor-General it becomes law. The Act will then take effect immediately or on a future date specified in the statute.
A recent Act with particular relevance for children and young people was the federal Family Law Amendment (Shared Parental Responsibility) Act 2006.

2. **Common law** (or *caselaw*) forms the basis of Australian jurisprudence. This means that judges’ decisions in pending cases are informed by the decisions of previously decided cases.

An interesting example of caselaw is the 2004 decision of the Family Court of Australia concerning the rights of a transgender 13 year old to undergo a sex change procedure to transition from female to male in appearance (*Re Alex* 2004 Fam CA 297). At birth, and at the time of the case, Alex (an alias given by the Court to ensure anonymity) was a girl in the eyes of the law, but had been diagnosed with gender identity dysphoria. The key issue the Court had to decide was whether medical treatment, involving the use of hormonal therapies, should be authorised. In this landmark case on transgender youth rights, Chief Justice Nicholson allowed Alex to be administered hormone treatment until he turned 18 (when he could then make the decision himself), to change his gender and name on his birth certificate, and to enroll in school under a male name.

3. **International law** is a third source of law, of which the UNCRC (as previously discussed) is an example.

4. Finally, there is **Indigenous or customary law** which encompasses the legal practices of Indigenous peoples, especially prior to European colonisation. In Australia, the Aboriginal people had no written language so their law was communicated by word of mouth and was, and continues to be, deeply embedded in their beliefs, culture and traditions – particularly in relation to marriage and tribal lands. With so many different tribes, Aboriginal law must be considered as being specific to each tribe or region and not to the country as a whole.

In effect, Australia has nine legal systems—the eight State and Territory systems and one Federal system. The **Australian Constitution** of 1901 established the Federal system of government, which defines the boundaries of law-making powers between the Federal (national) government and the states/territories (Department of Foreign Affairs and Trade, 2010). It defined both **exclusive powers** (those where the Federal government has the exclusive ability to make laws on matters such as taxation, defense, immigration and citizenship) and **concurrent powers** (those where both tiers of government are able to enact laws).

The states and territories have independent legislative power in all matters not specifically assigned to the federal government. Where there is any inconsistency between Federal and state or territory laws, federal laws prevail. Federal laws apply to the whole of Australia. Family law, for example, is Federal, but legislation relating to child protection, juvenile justice and other areas such as child employment is state-based (Fehlberg & Behrens, 2008, 2009; Monahan & Young, 2008; Parkinson & Behrens, 2004).
The Australian Courts

With the exception of Western Australia\(^1\), family law matters are dealt with by two Federal Courts - the Family Court of Australia (established in 1976, *Family Courts Act* 1975) and the Federal Magistrates Court (established in 1999).

The Family Court of Australia is the superior court in family law and, through its specialist judges and staff, helps to resolve complex family disputes. It also covers specialised areas such as cases relating to the Hague Convention on International Child Abduction (which came into force in Australia in December 1998) and the international relocation of children by parents or guardians.

The Federal Magistrates Court conducted its first sittings in July 2000 and its jurisdiction includes family law, bankruptcy, unlawful discrimination, consumer protection and trade practices, privacy, migration, copyright and industrial law. Most of its jurisdiction is shared with the Family Court of Australia.

A range of professionals work within the courts dealing with family law matters. These include the lawyers representing each parent, children’s legal representatives (appointed by the court), counsellors, mediators, specialist report writers and judges.

Australia has always been very innovative in introducing new initiatives to improve the way families or the state resolve disputes. In recent years these have included Family Dispute Resolution (FDR), and the establishment of 65 Family Relationship Centres across the country as a source of information and confidential advice for families.

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\(^1\) Western Australia is unique among Australian states in being the only state with its own Family Court, although this is funded by the Federal Government. The Family Court of Western Australia was established by the passing of the Family Court Act (WA, 1975) and commenced operation in 1976. It deals with divorce, marital property settlements, child custody, adoption and surrogacy.
Section 3 - Theoretical Influences on Child and Family Law

To work effectively with children and young people it is essential to have a working knowledge of the various theories and concepts explaining critical aspects of children’s development and learning, and the ways these are impacted upon by social and cultural processes. In this section we will trace a number of key theories and understandings that have influenced the law across time and shaped contemporary decision-making about children’s welfare and best interests.

Theories of Child Development and Learning

Children are developing all the time. They grow out of their shoes. They acquire new skills. Their needs change along with their new experiences and abilities. Consequently, the interventions of the law into children’s lives, whether to protect or to punish, need to be made with attention to their emerging and changing abilities and needs (Lawrence, 2008, p. 83).

As the 20th century progressed, legal professionals and the courts increasingly turned to the new discipline of psychology for guidance in ascertaining how to give effect to a child’s best interests. In particular, child development research was becoming an established and highly influential field of enquiry, especially via the comprehensive theories of intellectual, moral and personal development proposed by Piaget, Kohlberg and others (Woodhead, 2009). Child development theories continue to be influential today in explaining children’s cognitive development and learning processes.

Like the conceptions of childhood, these theoretical explanations continue to evolve over time as new knowledge emerges and shapes the law’s response to child and family issues and disputes (Garber, 2009; Lawrence, 2008; Taylor, 2005, 2006b). The work of Jean Piaget has been particularly influential on the law.

Piaget (1896-1980) was a Swiss psychologist who approached children’s learning from a biological perspective focused around the universality of childhood. He theorised that children’s internal mental activities progressed through four pre-determined and sequential stages of cognitive development (sensori-motor, pre-operational, concrete operational and formal operational), to ultimately arrive at the high-order rationality and logic he deemed characteristic of adults (Smith, 1998). Piaget’s descriptions of children’s capabilities at various ages had a profound influence on societal expectations of normal development.

When concepts from developmental psychology began to influence the law, it was Piaget’s theory that dominated legislative initiatives and influenced legal understandings of children’s competence. For example:

- Juries were once warned that children were unreliable witnesses in criminal trials;
- The age of consent to medical treatment remains at 16 years in many common law countries;
- Statutory provisions regarding the ascertainment of children’s views have commonly required the court to take into account the ‘age and maturity’ of the child (as indeed does Article 12 of the UNCRC);
- The doli incapax rule conclusively presumes that a child less than ten years old cannot be held legally responsible for their actions, and so cannot be convicted for committing a criminal offence. This is a rebuttable presumption for children aged 10-14.
Vygotsky (1896-1934) was a Russian psychologist, and contemporary of Piaget’s. His work was hidden behind the Iron Curtain until its discovery in the West in the 1960s. Vygotsky’s sociocultural approach sharply contrasted with Piaget’s. He considered that “learning leads rather than follows from development” (Smith, 1998, p. 223) and proposed that a child’s mental functioning could be understood only by examining the social and cultural processes and context from which it derived. Children gradually come to know and understand the world through their own activities in communication with others (Smith, 1998).

Vygotsky regarded children as performing much more skilfully when they were collaborating with others than when they were working alone. The skilled help (‘scaffolding’) of an adult working jointly with the child can greatly extend the child’s competencies, since the child moves from being a spectator to a participant and, with the help of the adult, gradually acquires mastery over the task.

Sociocultural theory has had an important impact on family law (Cashmore, 2008; Taylor, 2005, 2006b) because it promotes a more child-centred and child-participatory approach in both the statutory law and the role of professionals working with children (for example, lawyers representing children).

From such a perspective, Piaget’s quite rigid assumptions about what children can and cannot do at different stages of development are now approached more flexibly as it is recognised that a child’s capability will depend not so much on their age as on the activities and social contexts in which they have participated. Scaffolding by parents and professionals to support, guide and assist the child can therefore enhance the expression of their views and more meaningful participation by children within legal decision-making processes.

The Influence of Neuroscience

New scientific research on infant and child brain development is increasingly helping professionals and the courts to understand the interaction between children’s genetic make-up and the environment in which they live (Harvard University, 2007, 2010a, 2010b; Perry, 2002; Shonkoff, 2010). Environmental influences can actually affect whether and how genes are expressed. Thus, the old ideas that genes are ‘set in stone’ or that they alone determine development have been disproven. The debate has moved well beyond ‘nature or nurture’ to an acceptance of the interaction between both (Rutter, 2007).
Scientists have discovered that early experiences can determine how genes are turned on and off, and even whether some are expressed at all. Experiences during the first few years of life and the environments in which children have them – good and bad - literally shape the architecture of the developing brain and strongly affect whether they grow up to be healthy, productive members of society. Stable, positive relationships with adults and growth-promoting experiences are key to the development of the architecture that forms the foundation for all future learning, behaviour, and health.

The match between children’s temperament and the kind of care they receive can have a significant impact on how they develop (Chess & Thomas, 1999). Children subjected to poverty, violence, neglect or deprivation during these early years without a supportive network of adults can experience a whole range of adverse outcomes in relation to their cognitive, social and emotional development that can have long-term consequences well into adulthood. These major adversities can weaken the developing brain architecture and permanently set the body’s stress response system on high alert.

Neuroscience can help professionals working with children and young people to better understand their patterns of behaviour and how the provision of stable, responsive environments during their early years of life can prevent or reverse these conditions. While the die once cast is not necessarily set, the capacity to ‘turn it around’ is more difficult as children get older and the longer they are exposed to such adverse environments. Neuroscience therefore has much to offer those working in the care and protection and juvenile justice systems.

As an example, the US Supreme Court have struck out capital punishment for anyone under the age of 18 years following arguments advanced in *Roper v Simmons*, based on neuroscience research which shows that brain development is not fully complete. Offenders as old as 17 are now considered ineligible for the death penalty and cannot be reliably classified among the worst offenders due to their immaturity. There is also evidence from neuroscience that the capacity to evaluate risk is not fully developed until the early 20s.

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**Other Theories of Development**

A range of other theories of children’s development and learning have also influenced the nature and practice of the law: for example theories of attachment and resilience.

**Attachment** is the affectional tie that binds children and their parents/caregivers together. Early in life infants and children form a bond with their parent(s) that serves as a model for their future relationships.

Four attachment styles have been found through the experimental study of child behaviour in stressful situations involving separation from the parent (Ainsworth, 1991; Bowlby, 1969; Main & Solomon, 1986). The four types of attachment are: Secure, Insecure Anxious-Resistant, Insecure Anxious-Avoidant, and Disorganised/Disoriented. These styles differ based on the child’s behaviour in the presence of the parent, or an unfamiliar stranger, or in response to reunion with their parent after a brief separation.
A child’s attachment to parents and caregivers is frequently assessed in specialist reports to the Family Court or the child welfare agency so that appropriate decisions can be made about who a child lives with following parental separation or care and protection proceedings. As with other areas, a little knowledge can be a dangerous thing and attachment theory is sometimes misunderstood and misapplied with unfortunate decisions both in law and in practice – for example, in the area of children’s out-of-home care (Mclean, 2010).

Resilience: There are several definitions of resiliency and subsequently several different resiliency based models, but resilience typically refers to outcomes whereby children and adults thrive, against all odds, by rising above adversity in their life circumstances or events (Gilligan, 2009; Henderson, Benard & Sharp-Light, 1999; Rutter, 2000).

This multifaceted approach challenges established modes of practice that are based on narrow, deficit oriented and problem-based models in addressing the needs of children and young people.

In the family law and juvenile justice contexts, resilience is an important concept in terms of children’s responses to parental separation, divorce, violence, crime and poverty, and can help to explain why individual children in the same family may fare quite differently from each other when confronted by challenging circumstances. Socio-legal approaches that address risk, yet recognise and build the potential for children and young people to develop additional strengths in response to difficult life experiences, can convey a sense of hope and optimism and open up many possibilities for change.

Bronfenbrenner’s (1979) ecological model of human development gives primacy to the developing person and their environment, and, particularly, the evolving interactions between these two domains. ‘The ecological environment is conceived as a set of nested structures, each inside the next, like a set of Russian dolls’ (Bronfenbrenner, 1979, p. 3). Moving from the innermost (or smallest) level to the outside (or largest) level, these structures are defined as the microsystem, the mesosystem, the exosystem, the macrosystem and the chronosystem.

Bronfenbrenner argues that the interrelationships both within and across these different systems in which people exist are critical in understanding human development (Bronfenbrenner & Morris, 1998). This theory has implications for the role of the law in shaping cultural expectations, and the ways in which individuals and families manage transitions in their lives.

These ideas have most recently been further progressed by Lerner, Lerner, Almerigi and Theokas (2006) who propose an updated model incorporating the different features of each child’s functioning (biology, intellect, personality, behaviour etc) and their interactions with the complex systems and networks (of people and institutions) that children move through. The child is conceived of more holistically as a whole person actively engaging with these immediate settings in their lives.
**Contemporary Developmental Science**

In the 1970's more radical critiques began to appear about the ways childhoods were being represented. In the area of child development ‘developmental science’ emerged as a movement with a broader understanding of developmental processes than that proposed by traditional models of child psychology.

*Inter-disciplinary at its core, and partly dissatisfied with the rigidity of child psychology, this movement sought to understand and explain how all persons live their lives as developing systems in dynamic interplay with their phenomenal and social worlds (Lawrence, 2008, p. 85).*

Developmental science proposed that researchers could not truly understand child development without drawing on research from multiple disciplines such as biology, sociology, psychology, neuroscience, paediatrics and epidemiology.

From such a perspective, a child’s development is dependent upon ‘a combination of species-wide influences and specific sets of personal and environmental factors that work upon each other dynamically’ (Lawrence, 2008, p. 89). Certain periods mark these successive transitions across the life course as a child moves to a new level of functioning.

These shifts are tied to the social institutions from which, and into which, the child is moving (for example, pre-school, school, college, sport). They are also influenced by the new responsibilities that parents and others (for example, teachers) assign to children according to culturally defined norms.

Unlike Piaget’s fixed stage model, developmental science views these transition periods not as tightly age bound but rather as extending over flexible bands of timing (Lawrence, 2008). Modern developmentalists also agree that children are much more competent at an earlier age than Piaget proposed, although there is an unevenness in children’s progressions across different bio-social-behavioural domains. Activities in one area can also affect developmental processes in another.

Developmental science thus acknowledges the more complex context within which the law must respond to children in developmentally responsive ways. Taking up this challenge is important for all professionals working to promote children and young people’s rights and well-being.

Within sociology a paradigm shift was also underway. Whilst traditionally the study of children’s lives and experiences had been subsumed by an overarching interest in socialisation (James, 2007), increasing demand for elevating the status of children saw the emergence of the ‘new sociology of childhood’. This movement, which values children’s lives and perspectives as worthy of study in their own right, has been very influential in shaping Childhood Studies (James, 2004; James & Prout, 1997).
**Childhood Studies**

*Childhood Studies* developed from a sociological movement that regards children as social actors and seeks to rethink and explore the socially constructed character of childhood (James, 2004; James, Jenks & Prout, 1998; James & Prout, 1997; Kellett, 2010; Mayall, 1994). It draws on a number of disciplines to address childhood as a complex social phenomenon (James & James, 2008).

As we have already explored, childhood has previously been regarded as a transitional state of immaturity, irrationality and incompetence on the way to a rational, competent and autonomous adulthood. Childhood studies, however, has shifted adult understandings of what it is to be a child, and how this varies across time, as well as within and across societies. The emphasis is now on childhood as a valued stage in the life course that is significant in its own right - children are not just individuals in the process of becoming the future generation! Qvortrup (1994) aptly describes this significant conceptual difference as one of dealing with children “as human beings rather than as human becomings” (p. 4).

The concept of children’s agency is a core feature of childhood studies, with children and young people recognised as participating in the construction of their own childhoods. This helps to account for the wide diversity in children’s experiences both inter- and intra-culturally. To acknowledge this diversity it has been suggested that it is now more correct to speak of ‘childhoods’ rather than the singular ‘childhood’ (James & Prout, 1997). Childhood Studies has many synergies with the sociocultural approach to child development and Articles 12 and 13 of the UNCRC (Freeman, 1998; Mayall, 2000; Smith, 2002). These combine in the socio-legal field to support children’s agency and their participation rights.

The theories relating to children’s development and learning, and the ways these are impacted upon by social and cultural processes, have been particularly significant in socio-legal contexts since theoretical perspectives and societal understandings and expectations concerning children have influenced and shaped the way the law responds, or should respond, to issues and disputes concerning children and young people. Some approaches, such as Piaget’s age and stage model, now have less explanatory power than previously, although his influence lingers on the law and the cautious attitudes of professionals towards children’s competence and agency. Other approaches can more usefully work together to provide a more relevant, cohesive and integrated approach – as is evident in both contemporary developmental science and childhood studies.
Most professionals working with children and young people face issues concerning their care within their families or by the state. An understanding of family law is therefore critical. We have already considered the historical developments that have influenced modern family law and now turn to consider the key legal domains affecting children, young people and their parents or carers in the private and public law contexts.

The concept of parental responsibility sets out the rights, duties and obligations of parents in respect of their children. The principle of the welfare and best interests of the child governs decision-making when family law disputes arise between parents over the care of their children. When parents separate then residence (who the child will live with) and contact (when the child will see, stay, or talk with their non-resident parent) needs to be determined (Kelly, 2007).

In Australian law, one of the two ‘primary’ considerations in determining a child’s welfare and best interests is the benefit to the child of having a meaningful relationship with both of the child’s parents. Research on contact schedules has shown the varied nature of post-separation parenting patterns and the association between higher levels of contact with lower levels of inter-parental conflict (Parkinson & Smyth, 2004; Smyth, 2004).

Shared care is gradually increasing (Cashmore, Parkinson, Weston, Patulny, Redmond, Qu, Baxter, Rajkovic, Sitek & Katz, 2010; McIntosh & Chisholm, 2008; Smyth, 2009), but most children continue to live with one parent (usually their mother) and have contact with their other parent (usually their father). Sometimes siblings are split between their mother’s and father’s homes, but this is not very common as families (and the courts) believe that it is usually important for siblings to be raised together.
Virtual visitation refers to the increasing use of electronic forms of communication (for example, email, skype, webcams, MSN) that enables children and parents to remain in contact indirectly. This can be especially important when relocation has occurred and the primary/resident parent has moved with the children a significant distance away from the non-resident parent. The courts scrutinise applications to relocate very carefully since the move, if allowed, will significantly impact on the child’s relationship and contact with the left-behind parent.

Two Australian studies have recently been published on family members’ experiences of relocation disputes (Behrens, Smyth & Kaspiew, 2009, 2010; Parkinson, Cashmore & Single, 2010). These have highlighted concerns about the burden of travel being placed on some young children and the financial costs being borne by some parents applying to relocate or objecting to their ex-partner’s proposed move. ‘Reality testing’ is important to ensure that what is being proposed is in fact realistic – both financially and in terms of the children’s developmental needs (Parkinson, Cashmore & Single, 2010).

Other issues that usually arise post-separation are child support and relationship property division. Parents have an obligation to meet the ongoing costs associated with raising their children (Moloney, Smyth & Fraser, 2010; Smyth, 2010; Smyth & Henman, 2010; Smyth & Weston, 2005). The Child Support Agency is responsible for administering Australia’s child support scheme. Separated parents also need to attend to the division of their relationship property (including assets like the family home, bank accounts and superannuation) so that each of them can move on with their new lives.

Sometimes children whose parents have separated can be seriously affected by a parent’s conduct. Parental alienation syndrome (PAS) was a term coined by an American child psychiatrist, Richard Gardner, in 1985 to describe what happens in child custody disputes when one parent deliberately or unconsciously attempts to alienate a child from the other parent. The campaign of denigration and hatred against the targeted parent indoctrinates the child to belittle, insult and ultimately refuse to have contact with their other parent without justification². There is considerable criticism of PAS as Gardner’s theory and related research have been extensively criticised for lacking scientific credibility (Fidler & Bala, 2010).

Another post-separation issue is that of international child abduction when a parent abducts a child and takes them to another country without the consent or knowledge of the child’s other parent. The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty that many countries, including Australia, have implemented via statute or regulation (Family Law (Child Abduction Convention) Regulations 1986).

This is a good example of when ‘international law’ becomes part of a country’s domestic law and can be enforced by the courts. The left-behind parent of a child who is abducted to a country which is a ‘contracting state’ to the Hague Convention can apply to the ‘Central Authority’ for a court order for the child’s return to their country of habitual residence. The court will not consider the welfare of the child unless the abducting parent successfully establishes one of the five defences (for example, grave risk of physical or psychological harm or if the child objects to being returned).

² PAS is not recognised as a disorder by the medical or legal communities although, controversially, efforts are currently underway to have it added to the forthcoming edition of the DSM-V, the diagnostic manual of mental disorders (Baker, Bernet, Elrod, Jaffe & Johnston, 2010).
The approach in this area of law is therefore quite different to other kinds of family law disputes since the Child Abduction Convention is premised on the belief that the welfare of an abducted or wrongfully held child is best advanced by immediate return to the country of their habitual residence. The onus is then placed on the courts in that country to resolve issues concerning parental responsibility, residence and contact.

Child abuse and neglect

The shocking realisation that parents or carers might deliberately harm children by subjecting them to physical violence first came to public attention in the 1960s when the ‘battered child syndrome’ was recognised (Kempe, Silverman, Steele, Droegemueller & Silver, 1962). Official enquiries into child homicides as a result of physical maltreatment illustrate the seriousness of the dangers posed to some children by parents and caregivers.

Emotional abuse and neglect also endanger children’s health and development and can disrupt their relationships with the people responsible for nurturing and caring for them, as well as their ability to form and maintain positive attachments long-term.

Sexual abuse became the focus of much greater public and legal attention in the 1980s. It is defined as the involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, and to which they are unable to give informed consent, or that violate the social taboos of family roles (Kempe & Kempe, 1984).

The perpetrators of physical abuse, emotional abuse and neglect are often the child’s parents or carers. However, the identification of sexual abuse offenders is more complex. As with physical abuse, the risk is greater from family members or trusted friends of the family. However recent research in Australia (Nisbet, 2010) indicates that many perpetrators of sexual abuse are children themselves. Adolescent boys are responsible for between a third and a half of all reported sexual assaults of children and sibling sexual abuse has been reported to be twice as common as father or step-father sexual abuse. There are also risks from sexual predators and paedophiles within communities who befriend children and ‘groom’ them for sexual activities.

The care and protection system, in conjunction with the criminal justice system, is therefore critical in affording protection to children from all these forms of abuse (Bagshaw & Brown, 2010; Brown & Alexander, 2007; Higgins & Kaspiew, 2008). Many professionals are required to report concerns regarding abuse to statutory agencies so a social work investigation can be undertaken into the allegations and an assessment made of the interventions needed to ensure the child’s safety. Legislation spells out the particular decision-making processes to be followed and the role of the courts. Some children will need to be placed in out-of-home care (foster, kinship or institutional care) either temporarily or permanently.

The responsibility of the state to the children in its care has been subject to considerable criticism. While some children do fare better in out-of-home care than in their parental home, out-of-home care is no guarantee of stability and security. In particular, the harm done to the ‘stolen generation’ and the over-representation of Indigenous children...
in welfare and care statistics are salutary reminders of the failure of the state to protect and nurture Indigenous children.

Children can also be affected by domestic violence. This refers to violence that occurs within a family or intimate relationship and involves behaviour aimed at controlling others using fear and force. According to recent estimates, more than 275 million children worldwide each year are exposed to violence between their parents (Shankleman, Brooks, Bryan, Davies & Webb, 2000). These children are at increased risk for an array of emotional, behavioural and cognitive problems. For example, 40% of children from families characterised as ‘domestically violent’ exhibit clinically significant behavioural problems, compared with 10% of children from families not considered domestically violent (Holden, 1998).

Most research in this field has been directed towards identifying child outcomes associated with living in a violent home rather than on the processes that explain why some children appear resilient to the trauma associated with exposure to family violence while others go on to develop serious and enduring mental health problems (Holden, 1998).

The link between domestic violence, child abuse and children’s safety and well-being necessitates close interaction between the family law and child protection systems (Chisholm, 2009). Concern with protecting children from abuse, neglect or family violence is reflected in its centrality in family law proceedings as a ‘primary’ consideration in determining a child’s welfare and best interests. Children are not placed in the care of a violent parent, nor allowed unsupervised contact with that parent – hence the growth in supervised contact centres (Fitzgerald, 2009). Where care and protection orders are in place, the Family Court will not make parenting orders.

Adoption is an area of family law that has a long history dating back to Roman times. It too illustrates how social needs and perspectives change over time – “what can be considered to be acceptable practice in one generation can be completely unacceptable in another” (New Zealand Law Commission, 2000, p. 14).

In the early 20th century adoption was regarded as a means of lightening the burden on the state of maintaining destitute persons. By the 1940s, institutions involved with the care of unmarried mothers were also encouraging adoption so the girl/woman could return to her life after the birth as if nothing had happened. Demand for babies by childless married couples, who were considered to be able to offer the child a more stable and proper family life, also contributed to single mothers agreeing to adoption as they were told this was the most responsible and less selfish choice.
However, as financial assistance began to be provided by the state, and research evidence emerged about the serious impact of closed adoption practices on the adopted child, the birth mother and the adoptive parents, attitudes and practices began to change. The climate of secrecy surrounding this issue lifted, and open adoption now enables an adopted child to retain a relationship with their birth family even though their legal status has changed.

Adoption is often referred to as a ‘legal fiction’ because it pretends the adoptive parents were responsible for the child’s birth. Adoption is sometimes also termed a ‘statutory guillotine’ since the effect of an adoption order severs any legal rights and obligations the birth parents have to the child and transfers these to the adoptive parents. The child’s original birth certificate is sealed and a new one is issued as if they had been born to the adoptive parents.

Now that so few babies are placed for adoption within Australia, most adoptions occurring in the courts involve step-parents, surrogacy arrangements or inter-country adoptions. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) was a response to international concern about practices associated with the adoption of children from one country to another. This Convention reinforces the UNCRC (Article 21) and seeks to ensure that intercountry adoptions are made in the best interests of the child, with respect for his or her fundamental rights, and to prevent the abduction, sale of, or traffic in children. This Convention was ratified by Australia in 1998.

3 Very few children in Australia (on average less than 50 per year) are adopted from care in contrast with quite large numbers in the US and UK.
Section 5 - Juvenile Justice

Responsibility for juvenile justice in Australia rests at state and territory level and there is significant variation in the legislation, policies and practices among jurisdictions (see Australian Institute of Health and Welfare, 2009, for a summary of these). All, however, recognise that, consistent with international human rights obligations, children and young people require a different approach from that of adults, and each jurisdiction has specific legislation covering their particular needs (see Australian Institute of Health and Welfare, 2009 for a summary of these).

The NSW legislation, for instance, incorporates principles that are specific to sentencing children. These are set out in section 6 of the Children (Criminal Proceedings) Act 1987 and are:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them;
(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;
(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;
(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home;
(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind;
(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties;
(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions;
(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

The key agencies involved in Juvenile Justice are the police, courts, juvenile justice departments, legal advocates and non-government organisations.

All Australian states and territories have set the minimum age of criminal responsibility at 10. A child under the age of 10 years cannot be held criminally responsible for behaviour that would constitute an offence if committed by an adult. In addition, the law in each state and territory recognises that children aged between 10 and 14 may not possess sufficient understanding of the nature of their behaviour to be held criminally
responsible. The presumption of ‘doli incapax’ (incapable of wrong) is applicable in all criminal proceedings against children of this age. To overturn this presumption, the prosecution must demonstrate beyond reasonable doubt that, at the time of the alleged offence, the child understood that what they were doing was seriously wrong and not merely naughty (Crofts, 2008).

Consistent with the UN Convention on the Rights of the Child, in all states and territories except Queensland, young people are considered to be children until they reach the age of 18 years. In Queensland the upper age is 17. In all jurisdictions, young people aged up to 21 who allegedly committed an offence before they turned 18 (or 17 in Queensland) can be tried in the Children’s Court. Since 2005, Victoria’s legislation has applied to children aged between 10–17 years. This has led to increased numbers in both secure custody and on community-based orders in that state (Australian Institute of Health and Welfare, 2007).

In NSW, children accused of a “children’s serious indictable offence” are dealt with in the adult courts. If found guilty, they may be sentenced ‘at law’, i.e. face adult penalties, or the case may be sent back to the Children’s Court for sentencing under Part 3 of the Children (Criminal Proceedings) Act 1987.

Children and young people can be held in a Juvenile Justice Centre in NSW until they turn 21. However, boys who have committed very serious offences, or have been badly behaved in a Juvenile Justice Centre, are housed in Kariong Juvenile Correction Centre, which is managed by Corrections NSW, the department responsible for adult gaols. They are not placed in adult custody until they are at least 18.

The UN Committee on the Rights of the Child (2005) has recommended that Australian jurisdictions raise the minimum age of criminal responsibility to an internationally acceptable level. Many European countries have a much higher minimum age than 10. However, the Australian Government (2008, p.52) considers the current age limit is appropriate as it ‘acknowledges differences in children’s developing capacities, allows for a gradual transition to full criminal responsibility, and protects children between 10 and 14 from the full force of the law’.

Specialised Children’s or Youth Courts that have jurisdiction over offences committed by children exist in all states and territories. The Children’s/Youth Courts in Victoria, Western Australia, NSW and Queensland are headed by a District Court Judge but are usually presided over by a Magistrate. Children’s Court Magistrates in NSW, for example, are appointed because of their ‘knowledge, qualifications, skills and experience in the law and the social or behavioural sciences, and in dealing with children and young people and their families’ [section 7, Children’s Court Act 1987 (NSW)].

The orders and services available to the Children’s Courts differ among states and territories. Before a young person appears in court for an alleged offence they may be held in either police or juvenile justice custody. Following apprehension, and between court appearances, a young person may be given unsupervised bail, or conditional bail. In NSW research has found that almost all children given conditional bail were subject to at least three sometimes inconsistent or conflicting conditions, such as a curfew, reporting to police, residing as directed or not associating with specific people or going to specific places (Wong, Bailey & Kenny, 2010), or they may be refused bail and held on remand in a juvenile justice custodial facility.

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4 A CSIO is a serious offence such as murder and sexual assault that carries a maximum penalty of 25 years or more.
The number of children being held on *remand* is a problem in some jurisdictions, because of the impact that a period in custody has on the child’s life. This is a high price to pay, particularly given that a high proportion of these children (in NSW, between 70 and 80 per cent) will ultimately receive a non-custodial order from the court. In NSW, changes to the * Bail Act* 1978 and proactive policing of compliance with the conditions attached to bail have been found to be the most significant driving factors for the huge increase in the number of children held, and the length of time spent, on remand (Vignaendra et al., 2009).

Concern about increasing remand numbers across Australia has led to expressions of concern that remand is being overly used as a ‘holding tank’ for some children. The National Children’s and Youth Law Centre and Defence for Children international argued in 2005 that:

> This violates the notions of imprisonment as a last resort, the importance of diversion, the rights of young people to adequate legal assistance and proportionality under the law. Additionally, concerns have been raised that remand is being used as a form of punishment in the first instance, instead of using sentenced detention as the punishment in the second instance. Better legal representation, and education of magistrates and judges in relation to the Convention principles, as well as active monitoring of court processes and outcomes, is essential to protect the rights and well-being of young offenders (National Children’s and Youth Law Centre & Defence for Children International (Australia), 2005, p. 61).

In NSW, an Intensive Bail Supervision Program run by Juvenile Justice NSW aims to divert young people from custody and reduce the numbers in custody on remand by supporting them to meet their bail conditions. A Bail Assistance Line has recently been established in three regions of NSW. Other jurisdictions operate similar schemes designed to ensure that children are given bail by police in the first instance, and that they can meet conditions attached to bail.

Following the finalisation of court proceedings, if a child pleads guilty or the offence is proved they may be cautioned and/or discharged without penalty, given a community based order (with or without supervision), fined, referred to a youth justice/family group conference, given a community service order, or a control/secure custody order.

A key goal of juvenile justice policy in all Australian jurisdictions is, wherever possible and appropriate, to divert children away from formal legal proceedings. All Australian States and Territories except Victoria have now legislated for police warnings and cautions, and for referrals to youth justice/family group conferences. Depending on the state or territory, this diversion may occur through the police or courts. However, such schemes are often poorly resourced in rural and remote localities (National Children’s and Youth Law Centre & Defence for Children International (Australia), 2005).

*Restorative justice* became established in the 1990s as a new diversionary approach for responding to juvenile crime (Richards, 2010). All the parties with a stake in the offence come together in ‘*victim–offender conferencing*’ to collectively resolve how to deal with the aftermath of the offending. Conferences typically involve both the victim and
young person, together with representatives from government and non-government organisations. Through this process, young offenders are offered the opportunity to demonstrate their willingness to take responsibility for their actions and to repair the harm they have caused to their victim(s) and community. Restorative justice can be a constructive intervention to prevent future offending behaviour.

Similar principles underpin circle-sentencing and victim-offender mediation schemes available to adult offenders. Richards (2010) found that, in general, young people were referred to conferences primarily for property crimes, and that Indigenous young people were more likely to be sent to court rather than to conferencing than non-Indigenous young people. In all jurisdictions apart from Victoria, referrals to a conference can be made by police or courts, and are governed by the relevant diversionary legislation (for example, the Young Offenders Act 1997 in NSW).

Operating informally for some years, using non-government organisations to administer and run conferences for young people referred by the Children’s Court, Victoria has now legislated to reserve the use of referrals to a conference as a sentencing option for the Youth Court, for children who would otherwise be facing a custodial sentence.

As we read earlier, the most recent report to the Australian government by the UN Committee on the Rights of the Child (2005) highlighted many of the issues relating to juvenile justice in Australia. While the UN Committee was pleased with Australia’s diversion options and the strategies in place to reduce the incarceration rates for Indigenous Australians, they remained concerned that ‘the percentage of Indigenous children in conflict with the law is disproportionately high’ (para 72).

Indigenous young people were 21 times more likely than non-Indigenous young people to be in juvenile detention as at June 2006 (Australian Government, 2008), and they make up 43% of the total juvenile detention population, despite comprising less than 5% of Australia’s child population (National Children’s and Youth Law Centre & Defence for Children International (Australia), 2005). These alarming statistics have worsened since that time (Taylor, 2009).
The Commonwealth Attorney-General’s Department provides funding through the Prevention, Diversion, Rehabilitation and Restorative Justice Program (PDRR) to divert Indigenous Australians away from adverse contact with the juvenile justice system. Despite these programs, the high rates of contact remain as ‘one of the most critical issues facing Indigenous Australians today’ (National Children’s and Youth Law Centre & Defence for Children International (Australia), 2005, p. 60).

The national rate at which young people are placed in custody is 31 in every 100,000 and, worryingly, three states/territories are well above this: New South Wales (38), Western Australia (56) and Northern Territory (99) (Australian Institute of Health and Welfare, 2007). Victoria, which places greater emphasis on diversionary and preventative programs, has a rate of 9 in every 100,000.

Children with mental illnesses and/or intellectual disabilities are also over-represented in the juvenile justice system. The 2009 NSW Young People in Custody Health Survey found that 13.5% of the young people in custody had a functioning IQ of less than 70. A further 32% had an IQ between 70 and 79 – by definition a borderline intellectual disability. By comparison, in the general population those scoring under 79 make up less than 9% of the population (Allerton, 2003; Muir, 2010).

The UN Committee (2005) has urged the Australian government to deal with these children with mental illnesses and/or intellectual disabilities without resorting to judicial proceedings. Many such children are not identified early enough in their contact with the agencies of juvenile justice such as the police. Their support needs often remain unaddressed until they are on a custodial/secure order.

Almost half the population of young offenders in custody in Australia report some form of serious abuse, neglect or violence in their past (Australian Institute of Health and Welfare, 2009), thus revealing the close link between child protection and juvenile justice issues.

The UN Committee (2005) has also recommended that Australia improve detention conditions, remove 17-year-olds from the adult justice system in Queensland, abrogate the mandatory sentencing legislation (the so-called ‘three strikes law’) in Western Australia, only deprive young people under the age of 18 years of their liberty as a last resort, and lift the reservation to Article 37(c) of the UNCRC so that children are always detained separately from adults.

Running parallel to such commentary, however, there is also pressure from some community groups to have ever increasingly ‘tough’ sentences for juveniles and to ‘name and shame’ them, despite the deleterious effects on rehabilitation.

It is clear that juvenile justice is a constantly evolving area, with new policy initiatives and programs being formulated to address the offending behaviour of children. With responsibility for juvenile justice resting at the state and territory level it has not always easy to monitor and compare policies, legislation and practices across and between states and territories.
Section 6 – Other Contemporary Issues for Children, Young People and the Law

Family law and juvenile justice are two large fields of law that impact on children and young people. But there are many other issues which bring them in contact with the law. You will often hear stories in the media, sometimes about controversial or cutting-edge issues, which have significant, and sometimes as yet unresolved, legal implications.

Law and Medicine

One contemporary issue is children’s legal status in relation to the use of assisted reproductive technologies (such as the use of donor sperm or eggs, surrogacy and IVF). These medical developments present a significant challenge within society as it is now possible for children to be born and raised with a variety of biological and social parents in their lives. Such technologies have significant legal implications including the legal status of a donor or surrogate and regularising the child’s legal status once born.

Sorting out how parental rights and obligations are to be distributed between birth parents, sperm, egg and embryo donors, surrogates, same sex and adoptive couples is a vital role for the law, with significant consequences for the children and adults concerned. Other issues include the child’s identity and their right to know their parental backgrounds, the storage and use of embryos, and the posthumous use of sperm to father a child. The law often lags behind what is scientifically possible and public debate is essential.

Another vexed issue relates to the consent of minors to medical treatment. The concept of ‘Gillick’ competence emanates from a famous English case where the House of Lords ruled in 1985 that:

parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child... As a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to

enable him or her to understand fully what is proposed. (Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security [1985] 3 W.L.R. 830 per Lord Scarman at 189)

This decision can be particularly relevant when a young person under the age of 16 years is either seeking or refusing medical treatment. The gender-change case discussed earlier is a good example of the effect of changing conceptions of childhood on the weight to be given to the views of a young person in medical matters (Bryant, 2009). Sometimes, though, it is parents who refuse consent for the medical treatment of a young child on religious, cultural or alternative medicine grounds. The court has power in such situations to authorise treatment if this is in the child’s welfare and best interests.

Legal issues also arise prior to a child’s birth when the rights and well-being of the unborn child clash with the principle of maternal autonomy and the mother’s right to ingest toxic substances like alcohol or illegal drugs during pregnancy or to refuse a hospital birth or caesarian section. Other prenatal legal issues involve sex selection, the termination of a pregnancy, the legal status of the foetus, conjoined twins and ‘saviour siblings’.
Law and Education

All children come into contact with the education system because of the compulsory nature of schooling. Legal issues in this domain relate to a child’s legal right to an education; the operation of enrolment and zoning schemes; how children with disabilities and special needs are catered for; early childhood education issues; and disciplinary procedures such as stand-down, suspension, exclusion and expulsion. There are also a range of human rights issues affecting students in schools including safety; bullying; respect for identity and autonomy (e.g. school dress codes); freedom of expression (opportunities for students to express their views and participate in decision-making processes); and privacy issues (such as drug testing and the disclosure of information to parents) (Butler, 2007).

Other Contemporary Issues

There are a huge number of other issues affecting children, young people and their families that have legal dimensions. Consider, for example, the following:

- **Financial Issues** such as child support and property division following parental separation; testamentary claims following death; and children’s financial status in owning property, entering contracts or making a will.

- **Child Labour and Employment** including youth pay scales; protection of children from hazardous activities; and international issues regarding working children.

- **Technology and the Law** such as the use of internet and social networking sites. For example, the practice of ‘sexting’ (taking sexually explicit photos of yourself and sending them to someone else such as a boyfriend) has resulted in some young people being prosecuted for producing and distributing child pornography and then being placed on a sex offender register.

- **Migration and Citizenship** such as the socio-legal status of children in detention centres.

- **Age of consent and forced marriage**

- **Child witnesses** such as the use of various measures like CCTV, videotaped interviews and separate child-friendly facilities to protect child witnesses and aid the reliability of their evidence, and the ‘need’ for warnings in relation to the evidence of a child.

- **Parental discipline of children** and whether children’s right to physical integrity means that smacking, the use of implements to strike children, and other coercive or humiliating forms of punishment should be banned.
Section 7 - Child Participation and Child Advocacy

Numerous studies indicate that many children want to be given the opportunity to be heard in any administrative or judicial proceedings that make decisions that affect them – either directly or through a representative (Cashmore & Parkinson, 2007; Fitzgerald, 2009; Graham & Fitzgerald, 2006; Parkinson & Cashmore, 2008; Percy-Smith & Thomas, 2010; Taylor, 2006b).

Articles 12 and 13 of the UNCRC, together with sociocultural theory, developmental science and childhood studies, provide a rights-based and theoretical underpinning for children’s voice and participation in legal processes concerning them (Taylor, 2005, 2006b). Article 12, and domestic statutory provisions (for example, s10 of the NSW Children (Care and Protection) Act 2000), provide for the ascertainment of children’s views with the courts taking these into account and giving them due weight in accordance with the child’s age and maturity. Note the concept of the child involved here.

Australia has been at the forefront of international efforts to develop child-inclusive mediation practices. McIntosh, Long and Wells (2009) conducted a study comparing child-focused dispute resolution, where parents were encouraged to consider their child’s needs (i.e. finding the child’s voice in the absence of the child) with a child-inclusive model (i.e. finding the child’s voice in the presence of the child). The latter model was found to significantly reduce inter-parental conflict and encourage settlement of the dispute. It also helped to address the child’s therapeutic needs. The children said that they liked speaking with someone outside their family. High conflict parents also felt supported and relieved that their child could discuss their feelings. Fifty percent of parents (mostly fathers) attributed a subsequent direct change in their behaviour to their child’s feedback.

When parents have been unable to resolve a dispute through counselling or mediation, and a judge will be making the decision, then children’s views are most commonly ascertained by an independent lawyer (ICL) appointed by the court to represent them (Blackman, 2002).

Specialist reports and judicial interviews are the other ways children can express their views. However, while judicial interviews are increasingly common in some countries (like New Zealand), they remain controversial in Australia where most judges are currently less willing to engage directly with children (Parkinson & Cashmore, 2008). This is to do with natural justice issues and also concerns about the skills of judges to engage with children and the purpose of doing so.

Counselling and education programmes are available for children to help support them through their parents’ separation and other transitions in their lives. Seasons for Growth (Graham, 2002), for example, is a loss and grief peer-group education program for young people aged 6-18 years (and adults) dealing with death, family breakdown, or any other form of separation.
In terms of advocacy for children and young people more generally, most Australian states and territories now have a Children’s Commissioner or Children’s Guardian or Child Safety Commissioner, but their functions and reporting conditions vary. Some are focused on child protection issues, while others have broader functions and limited reference to ‘vulnerable children and young people’ e.g. NSW (Lamont & Holzer, 2010).

Despite the above initiatives, the barriers to children’s participation remain considerable and participatory opportunities are often tokenistic, even in the legal context. Children themselves can be unsure about the purpose of their participation and broader debates suggest that participation itself is hard to define and practice (Fitzgerald, 2009; Fitzgerald, Graham, Smith & Taylor, 2010).

Concerns linger about children’s agency and competence and the risks posed by parental coaching, unskilled interviewers or the burden on the child from their engagement in interview processes with professionals. Yet many children want to be active contributors to decision-making processes concerning them and ways need to be found to achieve this more effectively within both families and the courts (Graham & Fitzgerald, 2010; Taylor, 2006b). Engaging with young children under seven years of age and those with disabilities are particular challenges facing the family law system and also the criminal justice system when children are victims and witnesses in relation to the prosecution of child sexual assault matters.
Section 8 - Future Directions

Have any issues surprised you about the law relating to children and young people? Have you found any topics particularly interesting? Why? The journey we have embarked on in this paper, from historic to modern times, has hopefully opened your mind to the enormous breadth and depth of the application of the law to children, young people and their families. It impacts on so many aspects of our lives from the cradle to the grave – and actually reaches before birth and after death as well!

It is important to always consider the adequacy of legal and judicial responses to issues affecting children and young people and the degree to which the system has attempted to include their perspectives when developing law and policy.

Consider, for example, whether children and young people, as citizens in a democracy, are likely to respect law and policy if it does not reflect their sense of reality? This will be influenced by how children and young people are conceived of by the law and how well their rights, welfare and best interests are balanced with parents'/adults’ interests.

Tensions are an inevitable part of the application of the law in the family and juvenile justice fields. To ensure that these are both explicit and acknowledged will greatly assist in enabling all relevant issues to be explored within the context of any family or court dispute or law reform process affecting a child or young person.

Comparative international approaches and empirical research findings can also alert us to ways in which taken-for-granted assumptions or vulnerabilities in our own legal system can be identified and amended. Particular challenges currently facing children and young people, and debates affecting families and the community, include violence, shared care, juvenile justice, Indigenous issues, and greater opportunities for children’s authentic participation.

For those of us working with children, young people and their families, ‘understanding how we know what we know’ (Bellefeuille & Ricks, 2010, p. 1241) should ideally include a working knowledge of the law, and the research and theory, underpinning the evidence-base informing policy and practice in this field. It is to be hoped that this paper has provided you with some insights into both the possibilities and the challenges within the legal system for advancing the rights and well-being of our youngest citizens.
References


About the Centre for Children and Young People

The Centre for Children and Young People (CCYP) was established at Southern Cross University in 2004. The CCYP works collaboratively with organisations, particularly in regional and rural areas, to enhance policy and practice related to the well-being of children and young people.

The Centre has three priority areas: Research; Education, and Advocacy.

For more information about the CCYP, visit
www.ccyp.scu.edu.au

About the Course

The Graduate Certificate, Graduate Diploma and Master of Childhood and Youth Studies are awards which have been developed collaboratively by the Centre for Children and Young People and the School of Education at Southern Cross University, Australia. The awards meet a recognised need, expressed by a range of professionals, for contemporary knowledge and skills to assist them to work more effectively with children, young people and their families.

The course seeks to be an innovative, professionally relevant, practical and interdisciplinary qualification for people working, or intending to work, with children, young people and their families. Applicants can enrol in any one of the awards or complete individual units as professional development.

Units are delivered externally so that students can successfully study at a distance. Each unit has authentic and professionally relevant assessment and the five core units involve optional but highly recommended summer/winter intensive workshops of 2 days duration. Students who are unable to attend are able to engage with workshop content and processes live online or via recorded formats.

The course incorporates innovative and appropriate use of technology to support students’ learning, opportunities for regular engagement with tutors and fellow students and (where appropriate) multimedia elements.

The course is underpinned by a deep respect and regard for children and young people and for their views and perspectives. It also incorporates an understanding that children and young people can benefit immensely from positive relationships with adults – parents, teachers and the myriad professionals with whom they may engage over the course of their childhood. The course embraces multidisciplinary perspectives in the belief this can enhance service provision and lead to improved outcomes for children and young people.

For more information about these awards, visit
www.scu.edu.au/chilhoodstudies