

# CHILDREN IN COURT

## A PERSPECTIVE FROM AUSTRALIA

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Understanding that Timor-Leste has one of the youngest populations of any country in the world brings with it the realization that large numbers of children probably experience (or at least could experience) contact with the justice system in this country one way or another on a regular basis. As a first time visitor to the country I come with no experience of my own of the Timor-Leste justice system and very little knowledge of the way in which children are treated in and by the courts here. It was suggested to me that I present today on the subject of how children are treated in and by the courts of Australia so that those who work within and around the Timor-Leste justice system might have something to compare and contrast with their own experiences here.

In my own experience, children come into contact with the justice system in four main ways. They can be the subject of parenting disputes between their parents in the family law courts in which I am a judge. They can be victims of sexual or physical abuse and thus complainant witnesses in the criminal trials of their abusers and they can be the perpetrators of crime themselves and thus defendants in the criminal courts. Finally, they can be the subject of welfare intervention by the State if it is considered there is no parent capable of properly caring for them. Of course, in each of those settings children have certain inalienable rights. Those rights gain their best known expression in the United Nations' Convention on the Rights of the Child (UNCROC as we call it).

Australia is a signatory to that Convention as is, I think, Timor-Leste. In my country, we have developed and introduced laws and procedural measures to ensure children's rights are properly respected in each of those areas of the justice system with which children come into contact. To fully explore those with you, would take far too long, so in this presentation I simply propose to introduce some critical features for your consideration.

**(1) How are Children's voices heard in Parenting Cases under Family Law?**

Children are generally not directly involved in court proceedings between their separated parents or other adults in their lives where the parenting of those children is disputed, although the law does allow for it in exceptional cases. In my 27 years in family law I do not know of any such cases.

However, the *Family Law Act* does mandate the Court's consideration of any views expressed by the child about the matters in issue in the case, with the Judges having the discretion to give appropriate weight to those views having regard to the child's age and level of maturity. Although lawfully we could, as a matter of general procedure judges in our family courts do not meet with and talk to children to ascertain any views they might have. This is principally because we have another means of doing this.

Judges in parenting cases have the power to order the appointment of an Independent Children's Lawyer to represent the best interests of the child or children before the Court. That lawyer works for or is paid by the legal aid office and has a lawful duty to act to the best of his or her professional ability to further the best interests of the child before the court – to act impartially and without prejudice or favour towards the parents of the child and to put all relevant evidence before the Court.

Usually, the Independent Children's Lawyer will engage an expert social worker or psychologist to meet with parents and with the children and to talk to the children about

any views they might have and then to write a report about that, including opinions about family dynamics. That report is put into evidence in the case. The Independent Children's Lawyer usually also talks with the children and ascertains any views they have and tells them about the case and what is happening and what he or she is doing in the case on the children's behalf. They do not have to talk to the children and the decision is a matter for them, but they are generally encouraged to do so.

Judges generally do not consider it appropriate to speak directly with the children of the cases they are deciding because of our lack of training and expertise in talking with children when there are others who have that training and expertise and it can be done by them in a more effective manner with appropriate respect for the needs of the child to be shielded as far as possible from the negative effects of their parents' dispute.

The expert social worker or psychologist who sees the children and writes a report for the court must make herself or himself available to be cross-examined by the lawyers for the parents in the Court case or by the parents themselves if they do not have lawyers (and many do not have lawyers because they cannot afford to pay one and there is not enough legal aid money). They can be asked any questions about the child's views and any expert opinions they express about that.

Also, Independent Children's Lawyers generally put evidence before the Court from the children's schools, doctors, police and government welfare departments and witnesses such as police officers, teachers, doctors and child welfare officers are also often called to give evidence so that the judge can get a real picture of how the child's life might be progressing, to assist in making the decisions about the child's parenting arrangements.

At all times, the judge is bound to place the best interests of the child as the paramount consideration and balance up any need to protect the child's safety and emotional well-

being against the benefit the child is considered to get from continuing to have a meaningful relationship with each of its parents when making the appropriate parenting order for which parent the children live with and what time they spend with the other parent.

We are told through research and surveys that children want to know more and more that their rights and their views are being appropriately considered by the judges. We rely on the Independent Children's Lawyers and the expert report writers for this, but we are also responsible for including acknowledgement in our written reasons for judgment that we must give in every case that we have taken children's views into account without those children ever having to come near our court rooms.

**(2) Children as witnesses when they are victims of criminal physical or sexual assault**

Children must be protected from sexual and physical abuse. This is because their right to a healthy and safe childhood is an inalienable human right and also because abuse does immeasurable damage to their developing mental and emotional health. All of the organs of the State, particularly the justice system, must ensure children are protected from such abuse. It is not enough to have laws that prohibit things like incest and sexual abuse of children. It is equally important to do everything possible to bring the perpetrators of such abuse of children to justice and to punish them appropriately. Another important aspect of this is ensuring that children are not re-traumatised by the process of bringing the perpetrators to justice.

There are a number of critical things that we, in Australia, do in our justice system to try and protect children whilst bringing perpetrators of child abuse to justice.

When first presenting to the authorities with complaint (via a parent, a teacher, a doctor or some other notifier whose identities are protected and kept secret) children are interviewed by police and/or State welfare officers who are expertly trained in the process of interviewing children for this purpose. These interviews are generally video recorded where the video recording facilities are available. The police stations with the expertly trained units have a child friendly interview room. Children are made feel comfortable. The police do not wear uniforms or weapons and are often women. They build rapport with the children and carefully ask non-leading questions of the children in an effort to get disclosures from them to assist prosecution. They generally do not interview in the presence of the mother or other family member so that defence lawyers do not have more chance to argue that the child has been coached to make up false allegations. The interviewers do not generally press on with the interviews if the child is becoming uncomfortable or distressed by the process.

The recordings are retained by police and prosecutorial authorities and they are usually admitted into evidence at any subsequent criminal trial of the abuser without the child having to go through that process of questioning again in the court. Sometimes there are more than one such video recorded interviews over a period of months.

Next, when the defence lawyer for the accused abuser wants to cross-examine the child witness, that is done on a day before the trial actually starts in the courtroom with the child being in a special room with a support person. The child is not in the same room as the judge, the prosecutor, the defence lawyer and the accused, and the child cannot see the accused but can only see the judge and the lawyers on a video screen in the room the child is in. The defence lawyer asks the child questions and the judge is very careful not to let the defence lawyer ask any questions that are not appropriate. If the accused does not have a lawyer (some choose not to in Australia) he is not allowed to cross-

examine a victim himself but must have a lawyer appointed from legal aid just to ask questions of the victim.

All of that questioning is also video recorded and the recording is played in Court at the trial of the accused abuser so that the child does not ever have to see the abuser. There are special rooms at the court houses for the children to be in when they do go to the court house. It is very important that children and victims are not exposed to the accused his family members or his defence lawyers.

Children victims are also usually given a lot of support with counselling by trained expert counsellors and can generally have access to a State run victims' compensation fund for some money to compensate them for the damage the abuse has done to them. If the abuser has property or assets, the State can recover that money from them.

The Government Child Safety departments would generally not allow a child to go back to live in the same household as the abuser and would encourage mother's to take the child away if the abuser is the child's father.

### **(3) Children as perpetrators of crime**

For children up to 17 years of age who commit crimes, there is a special court called the Children's Court with specially trained Judges who hear and determine the cases. The prosecutors are usually given special training too. Of course, determining whether a child can be held criminally responsible for his or her actions will be a matter of necessity in each case. There is generally a certain age children have to reach before they can be.

The children will always have a defence lawyer, with a legal aid defence lawyer being provided if the child's family cannot afford to pay for a private lawyer. All of these

proceedings are undertaken in a court closed to the media and the public too. Children are subjected to a different punishment regime, usually involving restorative justice measures like case conferences with victims being involved. Of course, children are only sent to special State run children's custodial institutions in really serious cases.

#### **(4) Children who might have to be removed from their parents' neglectful care**

Proceedings brought by the State welfare or child safety authorities are generally also brought in the special Children's Court so that they are also heard by the same specially trained judges. These cases are also held with the court closed to the public and the media. They are also usually held in stages over a staggered period of time so that parents can be carefully assessed and monitored, even assisted by the government departmental authorities to improve their parenting to either retain their children in their care or have them returned to their care. There are many types of government intervention in families, but all have to be sanctioned by court order and repeatedly reviewed by these specialist courts.

In these cases too, the judges can direct the legal aid office to provide a lawyer to represent the child's best interests in these cases on an ongoing basis until the case is finalized. These lawyers, called the Child's Representative, again can talk directly with the child, engage experts to talk to the child and write written reports for the court. They can engage specialist barristers to appear in the case and argue for the child. The parents are, of course, entitled to have their own legal representation, too, and can sometimes be given legal aid to pay for this to happen.

All of these parts of the justice system are now designed to place the child's rights front and centre and to be the most important part of the process. As you would already be aware, many of the particular measures, like independent legal representation children,

are expensive. They require great commitment of monetary and human resources directed to the task. This can happen in wealthy countries, but even there such money can be severely restricted and standards allowed to slip.

Our children are our future and they deserve to have their rights taken seriously and to be properly protected from abuse and neglect. If their parents cannot do that then, of course, the State and civil society must step in and do the best they can with whatever resources they can muster.

There are many experts in these areas in Australia, and as close as Darwin. Reach out to them if you need to and some might very well be able to come over here and offer you some help.

I am very grateful to JSMP, Alfela and the Asia Foundation for inviting me to make this presentation today. I will be in Timor-Leste until 18 July and will be happy to help any of you in any way consider useful until that date. Tomorrow, I walk for five days into your beautiful mountains, visiting villages along the way. I will be particularly looking out for how children are living and being raised and educated with great interest.