

Article

Law and Children's Decision Making: What Is the Rights Approach?

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Abstract: This paper outlines three broad models that have informed the relationship between the law and children's involvement in decision making—the property/instrumentalist approach, the welfare approach, and a rights-based approach. It identifies and critiques contemporary legal practices that regulate children's decision making against the standards required under a rights-based approach. The focus is on three contexts—(i) statutory bright line minimum age rules; (ii) presumptive age limits, and (iii) individual decision making involving children where there is often an interplay between the principle of Gillick competency and the *parens patriae* jurisdiction of a court. The key arguments advanced are that a rights-based approach tolerates minimum age rules and presumptive age limits under certain conditions. A rights-based approach also aligns closely with the principle of Gillick competency but offers a deeper and more nuanced insight into how to enable and support decision making with children across childhood. Finally, a rights-based approach also offers novel insights into how the *parens patriae* jurisdiction of common law courts, with its historical emphasis on the protection of children, could be developed to better protect children's rights and decisional autonomy.

Keywords: children; decision making; human rights; Gillick competency; rights-based approach



Citation: Tobin, John. 2023. Law and Children's Decision Making: What Is the Rights Approach? *Laws* 12: 71. <https://doi.org/10.3390/laws12040071>

Academic Editors: Dominique Moritz and Ben Mathews

Received: 23 January 2023

Revised: 3 July 2023

Accepted: 10 July 2023

Published: 15 August 2023



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1. Introduction

'The sanctity of life in the end is a more powerful reason for me to make the orders than is respect for the dignity of the individual.'¹

This was the conclusion of a trial judge in the Supreme Court of New South Wales in 2013 when upholding a request from a Sydney hospital to provide a blood transfusion against the will of a 17-year-old male who had been found to be competent. If the old boy/young man had been 8 months older and turned 18 years of age, the hospital would have had no legal basis to insist upon the treatment and the Court would have had no jurisdiction to make such an order. Indeed, the dignity and the autonomy of the individual would have been paramount and any forced treatment would have been an unlawful assault. Moreover, rather than being determinative, concerns about the sanctity of life would have been simply a personal reflection for the judge that had no place in the adjudication of the dispute. This is because in common law systems, eighteen is a transformative number. It represents the point at which people are no longer subject to the 'theoretically limitless'² and inherent powers of a Court under its *parens patriae* jurisdiction—a jurisdiction that currently allows judges to hold the ultimate power to determine what they consider to be in a child's best interests.

Unsurprisingly, the young man appealed the decision of the trial judge but he found no solace in the finding of the Court of Appeal, which upheld the original order on the basis that '*Principle as well as authority is against acceptance of the applicant's proposed limitation on the scope of the Court's jurisdiction*' (emphasis added).³ The members of the

¹ (*The Sydney Children's Hospital Network v X* 2013, para 49).

² (*Re W (a minor) (medical treatment)* 1992) cited in (*X v The Sydney Children's Hospitals Network* 2013, para 32).

³ (*X v The Sydney Children's Hospitals Network* 2013, para 45).

Court of Appeal based their reasoning on a long list of authorities from various jurisdictions from around the world. All of these cases were said to affirm the *principle* that the *parens patriae* jurisdiction gives a judge the power to effectively say to a young person, 'I know you may be competent and understand what is being proposed but this really doesn't matter because you are still a child and the law says that as an adult I have the ultimate power to determine what is best for you and you must do as I say.'

Let us pause here for a moment to consider what *this principle* means for children and their involvement in decisions about matters that affect them (and not just medical decisions but any decisions that affect them). Age, not competency and understanding, determines when the views of a young person can be denied by an older, more powerful adult. Is this really *the principle* that should inform the law's response to decision making concerning children? Of course, the ubiquitous principle of *Gillick competence* tempers this broad paternalistic stance. This principle provides that when a child with 'sufficient understanding and intelligence' is able to 'understand fully what is proposed,'⁴ their competency rather than their age, will enable them to consent to medical procedures. But this concession comes with a caveat—if the treatment in question is life saving and the potential consequences of refusal are catastrophic, then the commitment to *Gillick* competency will tend to waiver as the stakes become too high, at least as adjudged by adult decision makers.

Discussions about the scope and limits of *Gillick* competency and, to a lesser extent, the *parens patriae* jurisdiction have filled academic journals and books. This is to be expected given that within common law systems, they reflect the twin pillars of how the law tries to address the tensions that arise in the context of children and decision making—on the one hand, there is a need to protect children due to their vulnerability (enter stage right in the 13th century ([Brereton 2017](#)), the *parens patriae* jurisdiction) and, at the same time recognise their evolving capacity (enter stage left several centuries later in the 1980s, in the form of the principle of *Gillick* competency). I do not intend to embark on a detailed discussion of these concepts or how they apply in a particular context.

Instead, my reference to these concepts is intended to promote a broader reflection about what a 'principled' approach to the relationship between the law and children's decision making should entail—not just in the context of medical decision making but *any context* whether it be a child's participation in care and protection proceedings, or their ability to get married or drive a car. In terms of my contribution to this challenge, my aim is to explain what it means to adopt a *principled approach* that is grounded, not in a concept that finds its origins in the 13th century or the authorities of other jurisdictions, but rather the idea of a child as a beneficiary of human rights, the so-called rights-based approach. I seek to identify and draw together the principles that inform this approach and then demonstrate the consequences that follow from its application to common practices concerning the way in which laws seek to regulate, recognise, or indeed deny the capacity of children to make or be involved in decisions about matters that concern them.

To achieve these aims, my paper consists of two parts. First, I briefly compare three broad models that have informed the relationship between the law and children's involvement in decision making about matters that affect them. These models are the property/instrumentalist approach, the welfare approach, and the rights-based approach. Second, I identify legal practices that are commonly used to inform and regulate children's decision making in a range of contexts. I then consider whether these practices stand up to scrutiny when reviewed against the standards required under a rights-based approach. The focus and originality of my analysis involves a consideration of three contexts (rather

⁴ Lord Scarman in (*Gillick v West Norfolk and Wisbech AHA* 1985; (1986) 1 AC 112 at 188). This case concerned health department advice in the UK that allowed for doctors to proscribe contraception to children under 16 without parental consent. A mother wanted a guarantee that her daughters would not have access to such a service without her knowledge and consent. When this guarantee was not forthcoming, she commenced legal proceedings which were unsuccessful and led to the adoption of the standard known as *Gillick* Competence which extends beyond medical treatment to any treatment of children.

than discrete practices concerning children): (i) statutory bright line minimum age rules, (ii) presumptive age limits, and (iii) individual decision making where there is an interplay between the principle of Gillick competency and the *parens patriae* jurisdiction of a court.

The key takeaways are, first, that minimum age rules and presumptive age limits regarding children's participation in decision making in matters that affect them can be compatible with a rights-based approach when certain conditions are satisfied. Second, the values that underpin a rights-based approach are closely aligned with the principle of Gillick competency. However, a rights-based approach offers a deeper and more nuanced insight into how to enable and support decision making with children across their childhood. Finally, a rights-based approach also offers novel insights into how the *parens patriae* jurisdiction, which is grounded in a welfare model could, and indeed should, evolve to reflect a model that is consistent with children's rights.

2. Understanding a Rights-Based Approach

There are three broad models that can be used to describe the treatment of children under the law and their capacity for decision making—the proprietary/instrumentalist model, the welfare model, and the rights-based model (Eekelaar 1986). Each of these models is informed by a particular conception of children that, in turn, influences their treatment and status under the law, including the extent to which their views are taken into account in decision making about matters that affect them.

(a) Children as property

Historically, children were regarded as the property of their parents and, more specifically, their fathers (Ibid., p. 162). This conception of children was derived from the Roman doctrine, *patria potestas* (Ibid.). As Eekelaar has explained, such was the influence of this principle that 'early law viewed children primarily as agents for devolution of property within an organised family setting' (Ibid., p. 163) and that 'the social role of children was primarily seen as furthering the interests of the family group . . . by maintaining and perhaps extending the family's landholding.' (Ibid.) For Eekelaar, this relationship between children and their parents was instrumental, in the sense that 'the child is perceived as an instrument for furthering the interests of the adult or adult community.' (Eekelaar 1998, p. 207). Under such a model, a child has no independent interests deemed worthy of protection and certainly no entitlement to have any role in decisions concerning them.

Sadly, examples of practices that reflect this proprietary conception of children, such as unlawful adoptions, forced or arranged marriages, and various exploitative labour practices, persist in some jurisdictions. In common law jurisdictions, there is no longer an explicit endorsement of the idea that children are the property of their parents. That said, it would be wrong to assume that the remnants of this conception of children have been completely purged from the law and its treatment of children.

Take, for example, the following statement by Justice Gummow of the High Court of Australia in 2004:

The starting point is the proposition that, at common law, a right of a parent or parents to custody of children who had not reached the age of discretion (14 for boys and 16 for girls) incorporates a '*right of possession*' of the child which includes the right to exercise physical control over that child (emphasis added).⁵

Consider the implications of this sentiment for the status of a practice such as corporal punishment of children, within Australia. It is a fundamental legal principle that any interference with the bodily integrity of an individual will, *in the absence of their consent*, constitute an unlawful assault. This protection, however, does not extend to children who can be subject to physical chastisement within the home irrespective of their views, where the chastisement is considered reasonably necessary (as assessed by an adult) to

⁵ (Re Woolley; Ex parte Applicants M276/2003 2004, 7 October 2004, para 157).

discipline a child. This position is maintained in jurisdictions throughout Australia⁶ (and other common law jurisdictions such as Canada⁷ and England⁸) contrary to the views of children and despite the fact that the evidence indicates that physical chastisement is ineffective and harmful to children.⁹

Consider also disputes concerning the treatment of children upon separation of their parents under family law. In Australia, there is currently a shared parenting presumption that informs the division of a child's time between their parents.¹⁰ However, is this presumption designed to reflect and protect the interests of children *or* their parents? Certainly, children's views played no role in the adoption of this presumption by the Federal Parliament that was influenced by the advocacy of fathers' groups (Smyth et al. 2014). Moreover, recent research suggests that children are actually more concerned with the quality rather than quantity of the time they spend with their parents (Campo and Fehlberg 2021). However, Australia still has a legal principle that overlooks children's views and tends to conceptualise their lives as something that can be broken into units and allocated to serve the interests of adults. Although this issue deserves more consideration than can be allowed in this paper, the key point is that under a property-based conception of children, the law will never recognise the importance and relevance of children's views in the determination of issues concerning children.

(b) A welfare approach

The *propriety or instrumentalist* approach, whereby children are seen principally as a means to satisfy the interests of adults, remained the dominant conception of children until the emergence of what has been described as the *welfarist* approach (Eekelaar 1986). Central to this approach is the recognition that children have interests that are independent from their parents and that such interests must be the paramount concern in any matter concerning a child. The key feature of this approach is the ubiquitous *best interests principle*. Historically, it emerged as a response to 'the severest deprivations of child labour' and was expanded by the Chancery courts in England within the scope of the *parens patriae* jurisdiction (Ibid., pp. 167–68). The principle was first recognised in legislation in England under the (*Guardianship of Infants Act 1925*) and reflected a change in the conception of children as merely an extension of their parents' interests (Ibid.). It was, and often remains, the dominant principle in legislative schemes dealing with children within common law systems.

The adoption of a welfare approach and the embrace of the best interests principle demand a reorientation of adult agendas, from self-interest to an obligation to promote and protect a child's best interests—it severs the assumption that children are merely instruments for the realisation of adult interests (Eekelaar 1998, p. 207). This model is grounded in the idea that children are vulnerable and in need of protection. This protection must be provided in the first instance by a child's parents, but also by the state when a child's parents fail to perform their protective obligations. This focus on the vulnerability of a child, however, obscures the recognition of the evolving capacities and expertise of children. Although well intended, a welfare approach therefore focusses on the deficits of

⁶ See (Australian Institute of Family Studies 2021).

⁷ (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) 2004*) (upholding the defence of reasonable chastisement for parents).

⁸ (*Children Act 2004*, section 58) (provides parents with the defence of reasonable punishment).

⁹ See e.g.: (Heilmann et al. 2021).

¹⁰ (*Family Law Act 1975*, section 61DA). At the of writing, there was a bill before the Australian Parliament to delete this presumption of shared parenting due to its harmful consequences: (*Family Law Amendment Bill 2023*, (Cth)). Children's views were not sought during the drafting of this amendment. This is despite a recommendation from the Australian Law Reform Commission in 2019 that a Children and Young Person's Advisory Group be established to advise the Government on potential changes to the family law system: *Family Law for the Future: An Inquiry into the Family Law System*, 'ALRC Report No 135' (Australian Law Reform Commission 2019, para 13.41). Ironically, the Bill proposes the inclusion of a new s61CA which will encourage parents to consult with each other about long term issues concerning the child *but makes absolutely no mention* of the need for parents to consult with their child.

children rather than their strengths (Tobin 2021a, p. 689). Under a classic formulation of this model, there is no requirement for the law to involve children in decisions affecting them, because they are presumed to lack the capacity to contribute to such decisions in any meaningful way. Children must be seen but there is no requirement that they be heard.

Under some contemporary illustrations of this model, there may be an acknowledgement that children's views *should* be taken into account (Gillam et al. 2012). But this commitment is invariably weak and adults are still given the ultimate power to determine what is considered to be in the child's best interests irrespective of the child's views. A good illustration of this approach is the decision referred to in the introduction to compel a competent 17-year-old to undergo a forced blood transfusion against his wishes. Another example is the current treatment of children's views under the *Family Law Act* in Australia. Such views are listed not as a primary or core consideration when determining the best interests of a child but merely an 'additional' consideration.¹¹ Such an approach treats children's views as a secondary and residual consideration when making assessments about what is in their best interests, thus marginalising their impact on decision making in matters affecting their lives.

(c) A rights-based approach

So, how does a rights-based approach to children's views differ from an instrumentalist or welfare-based approach when dealing with children? In the first instance, it rejects any conception of a child as an extension of their parents' interests or a means to serve the interests of other adults. Instead, it proclaims that children have a wide range of interests that deserve to be recognised as rights (Tobin 2013). In turn, the elevation of children's interests to the status of rights means that a state has an obligation to ensure the protection of children's interests. The realisation of these interests, now recognised as rights, is not subject to the discretion, charity, or good will of a state—children have an entitlement to claim and enjoy their rights (Ibid.).

Of critical importance to this discussion is the right contained in article 12 of the UN Convention on the Rights of the Child, which provides that:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Although this provision has been examined in detail elsewhere,¹² five key points need to be highlighted here. First, as summarised in Table 1, the requirement that states that parties 'shall assure' imposes a positive and mandatory obligation to consider children's views. This contrasts with the exclusion of children's views under the proprietary and classic welfare model and the discretionary approach regarding children's views, that informs contemporary applications of the welfare model.

Second, the obligation to 'assure' also requires states to create age-appropriate systems and processes that enable children to express their views in matters that affect them. Traditional adult-centric methods to facilitate participation in the decision-making process will not always be accessible or appropriate for children to express their views. To adapt the words of Iris Young, the 'terms of the discourse' may make 'assumptions' that children do not share, and the interactions may privilege adult styles of expression to the exclusion of children's modes of expression (Young 2010, p. 53). Thus, article 12 demands new conceptions of participation that have the capacity to transform the decision-making process and make it more *inclusive* by bringing into play views that would otherwise go unheard (Thomas 2007).

¹¹ (*Family Law Act 1975*, section 60CC(3)(a)). At the time of writing there was a Bill before the Federal Parliament to delete this unhelpful distinction and replace it with a list of 6 considerations, which includes the views of a child, that must be taken into account when determining a child's best interests: (*Family Law Amendment Bill 2023*, Schedule 1, 6).

¹² See e.g.: (Lundy et al. 2019).

Table 1. The status of children’s views under the 3 models.

Instrumentalist/Proprietary Approach	Welfare Approach	Rights-Based Approach
Children’s views irrelevant under the law as the decision maker has an exclusive focus on the interests of adults—children neither seen (as individuals) nor heard	<p><i>Classic formulation</i>—children’s views irrelevant under the law as children not considered to have the capacity to form views and offer insight into decisions concerning them—children seen but not heard</p> <p><i>Contemporary formulations:</i> may encourage a consideration of children’s views but often only an ancillary or tokenistic consideration with the final determination of a child’s best interests subject to the discretion of adults</p>	Mandatory requirement recognised in law that children’s views be heard and taken into account in all matters affecting them—children seen, their views are heard, and taken seriously

Third, article 12 extends to all children ‘who are capable of forming’ their own views on matters affecting them. The assessment of a child’s capacity to form a view must not be determined through an ‘adult-centric prism’ (Lundy et al. 2019, p. 402). Instead, article 12 ‘demands a reversal of the historical presumption’ that children lack the capacity to form views on matters that affect them (Ibid.). It also requires an ‘understanding that the views of a child can be expressed in a variety of forms’ (Ibid.) beyond the written or oral form—drawing, art, music, dance, physical gestures—and that ‘the onus rests on adults to identify, encourage and value . . . the different ways in which children express their views.’ (Ibid.) Moreover, the concept of *capacity* to express views under article 12 is not the same as *competency*. A child is not required to ‘demonstrate a comprehensive understanding of the relevant issue affecting them,’ (Ibid.) to invoke article 12. It is sufficient that a child demonstrates a capacity to express their views on a matter affecting them.

Fourth, the scope of the phrase ‘matter affecting them’ is to be understood broadly (Committee on the Rights of the Child 2009, para 26). As such, it is not limited to matters that affect an individual child specifically or exclusively (such as medical treatment or contact and residence when parents separate) or those matters that affect children as a class specifically (such as school policies). It extends to all matters that do or will have a real impact on children’s lives irrespective of whether the impact is direct, indirect, specific, or incidental (Ibid., p. 403).¹³

2.1. The Weight to Be Accorded to Children’s Views

Finally, article 12 acknowledges that children’s capacities are evolving. This is reflected in the requirement that the views expressed by a child must be given *due weight* in accordance with *their age and level of maturity*. This gives rise to a question as to the meaning of the phrase ‘due weight.’ For its part, the Committee on the Rights of the Child has indicated that article 12 ‘stipulates that . . . the views of a child have to be seriously considered’ (Committee on the Rights of the Child 2009, para 12). But what does this actually require in practice? The Committee has explained that, ‘[c]hildren’s levels of understanding are not uniformly linked to their biological age [and] [r]esearch has shown that information, experience, environment, social and cultural expectations and levels of support all contribute to the development of a child’s capacities to form a view.’ (Ibid., para 29) Thus, while age may be an indicator of a child’s presumed level of understanding, an assessment of his or her maturity must be undertaken on a case-by-case basis (Ibid.).

With respect to the concept of maturity, although the Committee has acknowledged that it ‘is difficult to define,’ (Ibid., para 30) it has explained that maturity ‘refers to the ability to understand and assess the implications of a particular matter’ and ‘the capacity of a child to express her or her views on issues in a reasonable and independent manner.’

¹³ See also article 12(2) of the Convention on the Rights of the Child which states that ‘the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

(Ibid.). With respect to the *ability* of a child to understand a matter affecting him or her, this will be influenced by a range of factors including the child's own lived experiences, his or her level of education, intelligence, and empathy, and the information available to the child. Critically, this ability will also be influenced by the child's social context and the level of direction, guidance, and scaffolding provided to a child by his or her parents and other persons such as teachers, social workers and health professionals in their interactions (Rogoff 1990; Nutbrown 2006).

With respect to an assessment of a child's *actual* level of understanding, the Committee's comments indicate that their level of insight into the *implications* of their views will be critical. In practice, I have argued in other work with colleagues that this must require an assessment of the extent to which the child's views have been formed after giving consideration to the following factors:

- The impact that the implementation of their views would have on *their own short-, medium-, and long-term interests*;
- The impact that the implementation of their views would have on *the rights of other persons* or other legitimate public policy considerations such as public health and security;
- The feasibility or workability of their views in light of any relevant resource constraints (Lundy et al. 2019, p. 412);
- Under this model, the greater the level of understanding demonstrated by a child with respect to these issues, the greater the weight that should be accorded to their views (Krappman 2010). Thus, *understanding* for the purposes of article 12 is not a 'binary' concept in the sense that a child will either have or lack understanding of a matter affecting him or her (Parkinson and Cashmore 2008, p. 4). Moreover, it is not to be equated with competency in the sense that children's views should only be given weight when they demonstrate a level of understanding that is equivalent to that expected of an adult.

2.2. Can Children's Views Be Determinative of Their Best Interests?

Under a welfare-based approach, a child's views can never be determinative, as adults will always hold the ultimate power to determine a child's best interests. In contrast, a coherent and substantive application of a rights-based approach anticipates that there will be occasions when a child's views will be determinative of their best interests. Let me explain. A rights-based approach in matters concerning children seeks to balance two objectives. First, the need for the law to recognise children's vulnerability and protect them from harm. This is reflected in the requirement under article 3 of the CRC that a child's best interests must be a primary consideration in all matters concerning them. Second, the need for the law to recognise children's evolving capacity and autonomy, which is reflected in the right to express their views in matters affecting them under article 12. According to the Committee, 'there is no tension between articles 3 and 12, only a complementary role. . . one establishes the objective for achieving the best interests of the child and the other provides the methodology for reaching that goal of hearing . . . the child' (Committee on the Rights of the Child 2009, para 74). Listening to children is not only considered to be in their best interests—their views are also a critical factor to be taken into account in the determination of their best interests.

Indeed, when the views of a child reach a level of competency equivalent to that which would be expected of an adult to enjoy their autonomy, their views are not merely indicative but determinative of their best interests. Under a rights-based approach, a child's lack of capacity relative to adults will only justify substitute decision making for a child when their capacity fails to reach the threshold required of adults. Once this threshold is achieved, there is no moral or legal justification under a rights-based approach for an adult to impose their perception of a child's best interest on a child (Tobin 2013). In the absence of any difference between the capacity of a child and the standard expected of adults, there can be no moral basis for the differential treatment of a child's views. Indeed, as the

Committee has explained, if article 12 ‘provides the methodology’ for assessing a child’s best interests *and* ‘there can be no correct application of article 3 if the components of article 12 are not respected,’ (Committee on the Rights of the Child 2009, para 74). It follows that a child’s views, if sufficiently mature, will be determinative of their best interests (Lundy et al. 2019, p. 413).

3. Applying a Rights-Based Approach in Practice

The preceding discussion outlined the features of three different models concerning children to demonstrate their implications for the treatment of children’s views under the law. I revealed how a property or instrumentalist approach has no regard for children’s views, whereas a welfare approach *might* consider children’s views but would never entertain the possibility of these views being determinative of a child’s best interests. In contrast, I explained how a rights-based approach mandates the development of appropriate laws and procedures to recognise and enable children to express their views in matters concerning them. In part 2 of this paper, I offer a novel contribution to the scholarship by considering whether three common legal practices that regulate children’s decision making are compatible with a rights-based approach. These practices are *bright line minimum age rules* that preclude children from engaging in certain behaviour; aged-based *presumptions* regarding children’s capacity; and *individual decision making* as informed by the principle of *Gillick competency*.

(a) Bright line minimum age rules

States invariably set bright line minimum age rules that restrict children as a class from the enjoyment of certain practices to which adults are automatically entitled by virtue of their age. Within Australia, for example, children are denied the right to vote, to purchase alcohol and/or cigarettes, or get married until they are 18 years of age. States also impose restrictions on the ability of children to work or obtain their learners’ permit and driving licence based on their age. Typically, in each of these scenarios, the relevant legislation makes no allowance for a consideration of a child’s views or any assessment as to the capacity and competency of a child to participate in the practice being regulated.

A question arises then as to whether these bright line minimum age rules are consistent with a rights-based approach.¹⁴ Is it not incoherent to define a child as a human being under the age of 18 but then deny children various entitlements on the basis of ages *other than 18*? The short answer is no. In its original *Guidelines for Periodic Reports*, adopted in 1991, the Committee requested information with respect to the minimum legal age for issues such as the end of compulsory education; admission to work; marriage; sexual consent; and voluntary enlistment in the armed forces (Committee on the Rights of the Child 1991). The Committee therefore recognises the need to set minimum age requirements in a number of areas to ensure protection against the potential harm of a practice to children. The question is whether the age set for these exclusionary rules can be justified in light of the commitment to recognise children’s evolving capacity under the Convention and a rights-based approach.

When undertaking an assessment of the legitimacy of a minimum-age-based rule, the presumption is that such a rule will *prima facie* constitute *interference* with a child’s right (and, more specifically, differential treatment with respect to a child’s enjoyment of a particular right on the basis of their age). However, differential treatment alone does not constitute a *violation* of a right. On the contrary, and broadly speaking, an interference with a right will be justified where it is *reasonable*. This standard will be satisfied where the treatment is (a) consistent with a valid law, (b) pursues a legitimate aim, and (c) the measures used to achieve the aim are proportionate (Archard and Tobin 2019, p. 30). When assessing the proportionality of an age-based restriction, there must be a rational connection between the aim sought and the measure used *and* there must be no other alternative

¹⁴ This discussion is drawn heavily from my work in (Archard and Tobin 2019, pp. 29–30). For a more detailed discussion of this issue see: (Todres 2022; Herring 2022).

measures reasonably available that would have also achieved the same aim and minimised the interference with a child's right (Ibid.).

In practical terms, if a state wished to prohibit children from driving cars until they reached 18 years of age, it would need to (a) establish a legitimate aim, (b) provide evidence that the age-based restriction was necessary to achieve that aim, and (c) that no other reasonably available measures would be effective. In this example, the aim of such a rule would be to protect not only children but also other drivers and pedestrians. It is also well accepted that there is strong evidence to support restrictions on children's ability to drive because of their physical and neurological development. Thus, an age-based restriction on driving would be justified. Moreover, the fact that one state may adopt 18 as the minimum age for driving, whereas another state adopts 17, would also be justified as being within the discretion afforded to states with respect to such matters provided the exercise of this discretion was informed by the available evidence (Ibid.).

A question arises as to how to deal with a child who produces evidence that he or she personally had the requisite capacity and maturity to drive a car at an age earlier than the proscribed legislative minimum. The answer to this question depends on the extent to which it would be reasonable to accommodate individualised assessments of children's capacity with respect to those activities that were subject to minimum age requirements (Ibid.). With respect to minimum-age-based rules for practices such as driving, employment, and the consumption of alcohol or tobacco, where many children could potentially seek an exemption from these laws, a state could make a strong argument that individualised assessments of capacity in these instances would be administratively unworkable and contrary to the 'the [state's] economic and social priorities and needs' (Lansdown 2005, pp. 49–53) and therefore unreasonable.

With respect to other practices, where individualised assessments are less likely to be sought by children, it would be more difficult to justify a bright line rule. For example, it would be relatively easy to allow for individualised assessments in the case of marriage as there are unlikely to be many children seeking to get married. Within Australia, the *Marriage Act 1961* does not actually impose an absolute prohibition on child marriage, which can be allowed in exceptional circumstances for children aged 16 years but not yet 18.¹⁵ This same flexibility, however, is not present under the laws within Australia that regulate voluntary assisted dying. This practice is restricted to persons aged *at least 18 years* of age who satisfy several eligibility requirements including the capacity to consent to such a procedure.¹⁶ Implicit in this position is an assumption that children lack the capacity to consent to a procedure that would end their life. Moreover, even if they were competent, it would not be in their best interests to end their life before they reached adulthood. This represents a classic welfare approach. In contrast, a rights-based approach anticipates that age alone cannot be used to justify the denial of a practice for a child who is able to demonstrate the competence required of an adult to consent to such a practice. In the context of assisted dying, this is undoubtedly a challenging position that requires more sensitive discussion than this chapter can allow. At the same time, it is important to note that in jurisdictions such as the Netherlands and Belgium, children are able to obtain

¹⁵ (*Marriage Act 1961*, section 12). The views of a child however are not determinative as to whether such a marriage will be permitted and this remains a matter for the discretion of the judge:

The Judge or magistrate shall, subject to subsection (4), hold an inquiry into the relevant facts and circumstances and, if satisfied that:

(a) the applicant has attained the age of 16 years; and

(b) the circumstances of the case are so exceptional and unusual as to justify the making of the order;

the Judge or magistrate may, in his or her discretion, make the order sought, but otherwise the Judge or magistrate shall refuse the application.

See also: (Hoirl 2022). (examining the tension between protecting children and recognising their agency when regulating child marriage).

¹⁶ (*Voluntary Assisted Dying Act 2017*, section 9(1)(a)).

permission for voluntary assisted dying where they are competent to consent to such a procedure and have parental consent.¹⁷

(b) Age-based presumptions regarding children's capacity

States often adopt age-based statutory presumptions regarding the treatment of children's views in decisions affecting their lives. These presumptions can take various forms. For example, the *Family Law Act* when first adopted in 1975 included a provision that where a child was 14 years of age, the court could not make a 'custody order' contrary to the wishes of the child unless 'special circumstances' required the court to do so (this provision has since been repealed). In South Australia, section 6 of the (*Consent to Medical Treatment and Palliative Care Act 1995*) provides that, 'A person of or over 16 years of age may make decisions about his or her own medical treatment as validly and effectively as an adult'. Under both these models, the presumption favours recognition of children's capacity and competency upon reaching a certain age. But are such presumptions compatible with a rights-based approach? The inclusion of an explicit age-based presumption may operate to challenge and reverse traditional presumptions that children lacked the capacity to make any meaningful contribution to decisions concerning their lives. This is clearly a positive outcome. At the same time, if the age is set too high, this may entrench a perception that children below this age are incapable of demonstrating competence and/or expressing views that need to be taken into account consistent with a rights-based approach.

This is precisely the problem that arose in the English case of *Bell v Tavistock*,¹⁸ which was concerned with whether a child under 16 could seek gender affirmation treatment. At first instance, the Divisional Court in England found itself drawn into the trappings of a classic welfare approach when seeking to resolve a claim from a parent that any child under 18 must seek court approval before commencing such a treatment. The Court declared that 'The conclusion we have reached is that it is *highly unlikely* that a child aged 13 or under would ever be Gillick-competent to give consent to being treated with [puberty blockers]'. It further explained that 'in respect of children aged 14 or 15 we are also very doubtful that a child of this age could . . . consent.' (Ibid., para 145). Fortunately, the UK Court of Appeal rejected the guidance and assumptions made by the Divisional Court with respect to children under 16 and affirmed the need for an individualised assessment of a child's capacity to consent to treatment consistent with the principle of Gillick competency.¹⁹ I will examine this approach below. But the point to make here with respect to generalised presumptions regarding children's capacity is that phrases such as 'highly unlikely' and 'very doubtful' reflect assumptions that adults typically make about the capacity of children in a whole range of contexts, not just gender dysphoria. They do not sit comfortably with a rights-based approach and its commitment to recognise and affirm, rather than doubt, children's capacity. Does this mean, however, that legal presumptions regarding children's capacity based on their age will always be incompatible with a rights-based approach?

In short, the answer is no and there are two ways to address the dilemma caused by such presumptions. The first is to create a rebuttable or flexible presumption that allows for a child who is *under* the specific age where competency is presumed, to establish on the facts of their case that they have the capacity to express their views on the matter under consideration and/or competency to consent to the relevant procedure. The *Consent to Medical Treatment and Palliative Care Act 1995* in South Australia accommodates this possibility but only to a certain extent. It provides that even in the absence of parental consent, medical treatment can be administered to a child under 16, if the child consents and is capable of understanding the nature, consequences, and risks of the treatment *and*

¹⁷ In The Netherlands assisted dying is lawful for children aged 12 and over where the child and their parents' consent. There is also a proposal to allow for euthanasia for terminally ill children aged between one and 12. In Belgium there is no age limit on access to assisted dying which is determined by a child's 'capacity for discernment' which essentially means their competency: (White and Wilmott 2014).

¹⁸ (*Bell v Tavistock* 2020).

¹⁹ (*Bell v Tavistock* 2021).

the doctor determines that the treatment is in the best interest of the child's health and well-being (s12(b)).

Let me unpack this provision. The first limb of the test aligns with a rights-based model—if a child demonstrates competency, then just as would be the case with any adult, the child can consent to medical treatment. However, the second limb of the test imposes an additional requirement that a doctor must also be satisfied that the treatment is in the child's best interests. This reflects an illustration of a *contemporary* form of the welfare model whereby the need to hear from children may be acknowledged; however, the ultimate decision-making authority remains with an adult who can apply their own determination of a child's best interests. Such an approach is difficult to reconcile with a rights-based approach because it allows for the views of a competent child to be trumped by an adult decision maker.

One way to address the risks associated with specific aged-based statutory presumptions is to create a statutory presumption that *all children* have the capacity to express views that are relevant to the issue under consideration. This is precisely what Scotland has done. In 2020, the *Children (Scotland) Act* was amended to remove a presumption that a child aged 12 or over was considered mature enough to provide their views to the Court. The Act now requires that 'a child is to be presumed to be capable of forming a view unless the contrary is shown.'²⁰ Such a model creates a positive obligation on decision makers to take seriously the views of all children irrespective of their age and avoids the risk that decision makers will presume without evidence that a child is too young to express their views or consent to a practice. This is clearly consistent with article 12 of the Convention and indeed was adopted by the Scottish Parliament to ensure such consistency.

(c) Individual decision making

In the absence of a specific legislative scheme, decision making by children in Australia (and other common law countries) is regulated by both the common law principle of *Gillick competency* and in the event of a dispute, the *parens patriae* jurisdiction of superior courts, or the special jurisdiction of the Federal Circuit and Family Court of Australia. Let me briefly explore the extent to which the treatment of children in these contexts is consistent with a rights-based approach.

(i) *Gillick competency*

Gillick competency provides that where a child has 'sufficient understanding and intelligence to understand fully' what is being proposed by way of treatment, the child has the capacity to consent to that treatment irrespective of parental wishes.²¹ On its face, this principle is consistent with the rights-based approach outlined above in that it recognises and gives effect to children's evolving capacities. It accepts that at a certain point, a child may have the maturity and understanding required to establish the competency required to consent to medical treatment irrespective of their parents' wishes. This is precisely the approach that was adopted by the English Court of Appeal in *Bell v Tavistock* when it rejected the presumptive age limits set by the Divisional Court and held that the question of whether a child was entitled to gender affirmation services, was to be determined by an individualised assessment of their competency to consent to such a treatment as opposed to the application of age-based presumptions.

In theory, an application of *Gillick competency* should produce the same outcome as a rights-based approach in contexts beyond gender affirmation, such as access to reproductive

²⁰ (*Children Scotland Act 2020*, section 2(b) (1C)); 11ZB(3). A similar approach has effectively been achieved in Victoria under the (*Mental Health Act 2014*). Section 68 of this Act provides that a person's capacity to consent to given informed consent will be determined by a range of factors. Critically, ss68(2)(c) provides that 'it should not be assumed that a person does not have the capacity to give informed consent based only on his or her age ...'.

²¹ Lord Scarman in (*Gillick v West Norfolk and Wisbech AHA 1985*; (1986) 1 AC 112 at 188). This principle was affirmed by the High Court of Australia in (*Secretary, Department of Health and Community Services v JWB and SMB 1992*) ('Marion's case').

health services for children, or access to vaccination services in circumstances where a child's parents refused to consent to such services. Indeed, in a recent decision of the Supreme Court of Queensland concerning access to gender affirmation services, the judge declared that

Once it is concluded that the child is Gillick competent, the question must be asked why is it that a child who is almost 17 years of age, is Gillick competent and is firm in the view of which treatment they would like, should be denied the opportunity to do so without the consent of both parents. Such a conclusion would be inconsistent with the human rights of a child and a recognition of the importance of Gillick competence and its effect as a matter of law.²²

On this account, *Gillick competency* and a rights-based approach are essentially synonymous.

However, what about the treatment of children's capacity to demonstrate competency in the *future* when assessing whether a certain practice should be performed on them in the *present*? Does Gillick competency still stand up to scrutiny? Under a rights-based approach, wherever possible, the assessment of a child's best interests should be deferred until such a time as the child can make this determination for themselves (Eekelaar 1994; Eekelaar and Tobin 2019). Thus, for example, in the context of a child born with variations in their sex characteristics, a rights-based approach would favour deferral of any medical intervention until the child can assess what, if any, intervention he/she/they wishes to undertake (Tobin 2021b). This contrasts with a classic welfare approach that has tended to favour early intervention to normalise a child's gender on the basis that this was in the child's best interests. Interestingly, in *Marion's Case*, which affirmed the principle of *Gillick competence* within Australia, Justice McHugh also affirmed an approach to the future capacity of a child that aligns with a rights-based approach when he proclaimed that

If there is any real possibility that, *at some future time*, the child will acquire the capacity and maturity to choose whether he or she should be sterilized, the carrying out of that procedure *cannot be in the best interests of the child* unless, of course, protection of the child's health urgently requires that the procedure be carried out during incompetency.²³

This invites a question as to whether a rights-based approach is nothing more than a restatement of *Re Gillick*. The answer is no for at least three reasons. First, as noted above the obligation 'shall assure' imposed on states under article 12 of the Convention requires the adoption of positive measures to scaffold and support a child's ability to express their views. Article 13 of the Convention also imposes a positive obligation on states to ensure children are able to seek and receive information. These provisions combine to impose a more proactive duty on states to take steps that will enable children to participate actively in decisions affecting them relative to a basic application of Gillick competence.

Second, *Gillick competency* is a binary concept—a child is either Gillick-competent or not. It is reduced to a narrow legal question and says little about the treatment of children in the entire decision-making process. In contrast, a rights-based approach is far more expansive and seeks to engage children as early as possible in enabling them to express their views. It is concerned with how this process is designed to support children at all stages of the decision-making process. It requires decision makers to engage with and explain to children even at an early age how decisions are being made along a continuum that is consistent with children's evolving capacities that gradually transitions from *substituted* decision making to *collaborative* decision making to *supported* decision making and ultimately *independent* decision making.

Third, article 5 of the Convention provides a more nuanced explanation of the role of parents in the decision-making process relative to the test of *Gillick competence*. This

²² (*Re A* 2022, para [24]).

²³ (*Secretary, Department of Health and Community Services v JWB and SMB* 1992) (emphasis added) [320].

provision recognises the rights and duties of parents to provide direction and guidance to children in the exercise of their rights consistent with their evolving capacities. This provision creates a fiduciary or trusteeship type relationship whereby parents are required to act in ways that enable their children to transition toward the independent exercise of their rights consistent with their increasing maturity (Tobin and Varadan 2019, p. 161).

(ii) *Parens patriae*

Within Australia (and indeed other common law jurisdictions), superior courts enjoy the *parens patriae* jurisdiction that empowers them to ‘act as the supreme parent of a child’ in what is ‘a broad and potentially unlimited jurisdiction’ (Breerton 2017, p. 8)²⁴ The guiding principle to inform the exercise of power within this jurisdiction is the welfare and best interests of the child (Ibid.). Traditionally, the assessment of a child’s best interests in this context has reflected a welfare approach whereby children’s views may be acknowledged but are never determinative. An example is the 2013 decision I referred to in the introduction of this chapter whereby an NSW judge acknowledged the capacity and competency of a 17 year old male but still determined that it was in his best interests to undergo a blood transfusion. The judge explained:

in respect of older children, or young persons, sometimes described as “mature minors”, it has been held that, whilst the fact of such child or young person refusing to consent to treatment is a relevant and important factor, it does not prevent the Court from authorising medical treatment where the best interests of the child or young person require it . . .²⁵

The judge declared of the young man that, ‘He is clearly a mature minor’ (Ibid., para 39.) but ‘it may be appropriate to suborn an informed decision of a minor if the circumstances demand such a course.’ (Ibid., para 40) The relevant circumstances in this case were that the young man was a Jehovah’s witness who had ‘been cocooned in that faith.’ (Ibid., para 41) As such, the judge determined that the young man’s views did not align with what the judge determined to be in the young man’s best interests and ordered the transfusion. There is no mention in the decision of the child’s human rights, his right to express his views under article 12 of the Convention or indeed the Convention.

This approach is to be contrasted with the 2022 decision of the Supreme Court of Queensland under its *parens patriae* jurisdiction concerning access to gender affirmation services. Here, we see a very different method of reasoning. The following passage has already been cited above but it deserves to be recited again:

Once it is concluded that the child is Gillick competent, the question must be asked why is it that a child who is almost 17 years of age, is Gillick competent and is firm in the view of which treatment they would like, should be denied the opportunity to do so without the consent of both parents. *Such a conclusion would be inconsistent with the human rights of a child and a recognition of the importance of Gillick competence and its effect as a matter of law* (emphasis added).²⁶

On this account, the *parens patriae* jurisdiction is to be exercised in a way that is consistent with both Gillick competency *and* a child’s human rights. What remains missing from this decision is an explanation of which human rights are considered relevant and why. However, it certainly implies that the exercise of the *parens patriae* jurisdiction should align with a rights-based approach when making decisions with and about children.

This is a significant development and represents a departure from the welfarist approach adopted by the NSW Court a decade earlier. It also invites the question—does the progressive approach adopted by the Queensland court in 2022 represent the future direction of judicial decision making in matters concerning children when exercising the *parens patriae* jurisdiction? This approach would certainly allow for recognition of the

²⁴ (Re A 2022, para [8]).

²⁵ (The Sydney Children’s Hospital Network v X 2013, para 15).

²⁶ See footnotes 22 above.

rights and decisional autonomy of children. The reality, however, is that, at present, the ability of child to benefit from this method of reasoning will depend on where their case lands within the legal system in Australia. Allow me to explain.

(iii) *The special jurisdiction of the Federal Circuit and Family Court of Australia and the Family Court of Western Australia*

The common law principle of *Gillick competence* and the *parens patriae* jurisdiction of courts will always remain subject to legislative override. Within Australia, Part VII of the *Family Law Act* provides the Federal Circuit and Family Court of Australia with the jurisdiction to make orders for the care and welfare of children in Australia. When making such orders, the best interests of the child must be the paramount consideration. Moreover, the Act proscribes those factors that must be taken into account when making a determination of a child's best interests.²⁷ The 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.²⁸ At present, children's views are relegated to the list of additional considerations:

Any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views (s60CC(2)(a));

This is a classic illustration of a contemporary welfare model—yes, we will listen to children if we think they have something relevant to say, but at the end of the day, we will decide what we consider to be in the child's best interests.

The consequences of this model and its shortcomings are illustrated by the case of *Re Imogen*.²⁹ Over the past 20 years, the Family Court (as it was known until 2021) delivered a number of decisions regarding the treatment of children seeking gender affirmation services.³⁰ There was an increasing move to recognise the evolving capacity of the children in these cases and the need to align the decision-making process of the court with the principle of *Gillick competence* and the rights of children under the Convention.³¹ After *Re Kelvin*³², the impression created was that the Court had no role to play when a child seeking such services has been adjudged by medical professionals to be competent—an approach that aligned with the traditional understanding of *Gillick competence* and a rights-based approach.

However, this position dissolved with *Re Imogen* that determined that where one or both parents refused to consent to the treatment, this created a 'controversy' that invoked the jurisdiction of the court. Moreover, once the court had become seized of the matter, the court rather than a child had the ultimate responsibility for determining whether the treatment should occur even if the child had been assessed to be competent.

Commentators have been quick to condemn this approach and for good reason ([Dimopoulos 2022](#); [Jowett and Kelly 2021](#)). It is discriminatory against children seeking gender affirmation services—children seeking less controversial treatment would not be subject to such a paternalistic process—once assessed as being *Gillick-competent*, their decision would not be subject to judicial oversight and there would be no capacity for their parents to challenge their decision. It is also potentially harmful to their health and well-being as the delay in treatment caused by the judicial dispute can increase their anxiety

²⁷ (*Family Law Act 1975*, section 60CC).

²⁸ (*Ibid.*, section 60CC(2)).

²⁹ (*Re: Imogen* (No 6) 2020).

³⁰ See (*Re Alex* 2004; *Re Jamie* 2013; *Re Kelvin* 2017). For a detailed analysis of these cases see ([Dimopoulos 2022](#)).

³¹ See for example the comments of Chief Justice Bryant in (*Re Jamie* 2013, paras 122–34) ('In my view, it would be contrary to the Convention on the Rights of the Child, and to the autonomous decision-making to which a Gillick competent child is entitled, to hold that there is a particular class of treatment, namely stage two treatment for childhood gender identity disorder, that disentitles autonomous decision-making by the child, whereas no other medical procedure does': para 134).

³² (*Re Kelvin* 2017).

and undermine the effectiveness of the treatment. Puberty blockers will only be effective if a child has not yet reached puberty. Ultimately, it reflects a welfare approach to decision making by vesting decisional authority in a court despite the decisional autonomy of a child—an approach that is also inconsistent with the ‘*ratio decidendi*’ of *Gillick* that it was for the doctors and not judges to decide on the capacity of a person under 16 to consent to medical treatment.³³ It is true that the Court in *Re Imogen* acknowledged the importance of taking into account the views of the child but it was the court that enjoyed the ultimate power to determine what it considered to be in the child’s best interests. A substantive rights-based approach would not subject a child to such an infantilising ordeal. Once the child was assessed by medical practitioners as being competent to consent to gender affirmation services, the need for judicial and parental intervention evaporates.

The welfarist approach reflected in *Re Imogen* is also present in the judicial reasoning of the Family Court of Western Australia in the 2022 decision of *Clay v Dallas*.³⁴ In this case, a mother objected to her 15-year-old daughter receiving a COVID vaccination. The child did not actually appear before the court (itself an issue for another paper). Instead, her views were conveyed via a Family Consultant and Independent Children’s Lawyer, both of whom indicated that she was a ‘mature and considered young woman’ (Ibid., para 47) who wished to receive the vaccination (Ibid. para 48). The judge concluded that ‘her views were shaped by her own observations and inquiries, together with information provided to her [by her] school and her treating GP.’ (Ibid. para 48). Notably, none of the adult actors—the ICL, Family Consultant, or Judge—declared the child to be *Gillick*-competent although it is clear from the evidence that she would have satisfied this threshold.³⁵ Instead, they simply declared that the child’s ‘view should be given significant weight.’ (Ibid. para 48.) This is because the family law jurisdiction within Australia maintains a welfarist model. The legislative framework is such that children’s views can never be determinative in an assessment of their best interests—they remain simply an *additional consideration* to be factored into the decision-making matrix of a judge when assessing a child’s best interests. What this effectively means is that within Australia, the respect accorded to a child’s views in matters affecting them will depend not just on their age and level of maturity (as required under part 12 of the Convention) but also the jurisdiction in which they find themselves. A *Gillick*-competent child seeking gender affirmation services in the Queensland Supreme Court will have their autonomy rights respected, whereas if the same child were before the Family Court, their views will be but one factor to be considered in the reasoning of a benevolent court.

4. Conclusions—The Need for Adults to Evolve Their Capacities

I commenced this paper with a quote from a judge that failed to respect the decision of a young man to refuse a blood transfusion—‘The sanctity of life in the end is a more powerful reason for me to make the orders than is respect for the dignity of the individual.’ The motivation of the judge was undoubtedly benevolent. But is benevolence a sufficient justification to override the will of a competent young man? Under a rights-based approach, the answer is no. Age alone cannot be used as the sole basis to justify the differential treatment of children relative to adults. The *capacity of adults* to recognise the *evolving capacities of children* must evolve. A rights-based approach demands that decisions involving children must actually involve children in the decision-making process in a way that respects their evolving capacities.

This sentiment is not new. Indeed, it was captured in the decision of the House of Lords nearly 40 years ago when it established the principle of *Gillick* competence. Once a child was recognised as competent by a medical practitioner, there was no further role for the courts or the child’s parents. However, far from there being a linear trajectory in the

³³ (*Bell v Tavistock* 2021, para 76).

³⁴ [2022] FCWA 18.

³⁵ See (Ibid., para 47) where the court acknowledges that the child has a strong understanding of risks and benefits associated with the vaccine.

application of this principle in all matters concerning children, adults have continued to underestimate the evolving capacities of children. As a result, there has been a struggle within legal systems to become decoupled from a welfare approach. Too often children remain subject to laws that are underpinned by a vision of children that fails to recognise and properly respect their capacity for competency and decisional autonomy.³⁶

Article 12 of the Convention is central in understanding a rights-based approach to decision making with children. It represents a re-conceptualisation of the traditional instrumentalist and welfarist models that have informed the way the law regulates (or more often, accurately ignores, silences, marginalises, or devalues) children's involvement in decision making about matters concerning them (Lundy 2007). It is easy to fall into the trap of assuming that long-standing laws and practices concerning children's involvement in decision making are principled especially if the motivations for those practices are benevolent. However, a rights-based approach demands a much stronger alignment with Iris Young's assertion that 'the normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes and have had the opportunity to influence the outcomes' (Young 2010, pp. 5–6). It is this idea that lies at the heart of how a rights-based approach should inform the law's approach to children's involvement in decision making about matters that affect them.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: Not applicable.

Acknowledgments: Special thanks to Justine Raczkowski and Michelle Telfer for their thoughtful and helpful comments on earlier drafts of the paper. Any errors and omissions remain my own.

Conflicts of Interest: The author declares no conflict of interest.

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