

Editorial

A Continuum of Protection to Empowerment: The Evolving Legal Landscape of Decision-Making for Children and Adolescents

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1. Introduction

In 2020, the United Kingdom's Divisional Court made international headlines for their decision in *Bell v Tavistock* (2020). The Divisional Court determined court approval was required before trans and gender diverse youth could commence hormonal treatment to block the progression of puberty according to biological sex assigned at birth; such treatment is an initial stage of medical treatment for gender dysphoria. There was widespread concern over the ruling, given it declared all children under 16 to be incapable of providing their own informed consent in relation to this medical treatment; the asserted justification was that puberty blockers were 'experimental' and it was appropriate for a court to determine a child's best interests in these cases. Previous case law had found mature children could make medical decisions for themselves, including in relation to the receipt of puberty blockers by trans and gender diverse youth (Chua 2023), being those individuals whose gender does not align with their sex assigned at birth. Such an outcome removed decision-making autonomy from these children. One year later, the controversial decision was overturned in the Court of Appeal (*Bell v Tavistock* 2021), on the basis that well-established health law principles had not been given due consideration; specifically, there should be no minimum age applied to the mature minor principle, known as "Gillick competency" in the UK and in many common law jurisdictions.

The law on consent to medical treatment for trans and gender diverse youth, though, is far from settled and the *Bell v Tavistock* case highlights some key considerations for general legal principles about children's decision-making: children and adolescents have developing attributes that influence their capacity to provide their own consent and to make their own decisions; changing societal standards require the law to evolve; children have an interest in decisions which affect them; and the law is gradually shifting away from controlling children and instead preferring to adopt more nuanced positions as appropriate to strike a balance between protection and empowerment. When superior courts have difficulties determining how much autonomy children should be given in decision-making, it is no wonder the law, in general, can be confusing, chaotic and erratic.

There is a spectrum of childhood and adolescence, and a continuum of protection to empowerment which is explored in this Law and Children's Decision-Making Special Issue of *Laws*. The law overwhelmingly seeks to protect children or act in their best interests because of their inherent vulnerability. Many approaches in the literature are used to justify such a response, including those based on rights, parental responsibility, paternalism and best interest approaches. However, all of these approaches sometimes



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fail to consider a child's wishes and may exclude a child from decisions about themselves. Underlying such exclusion is the common law's historical treatment of children as chattels, or items of property (Butler and Mathews 2007). While children may often need protection because of their vulnerability, the law does not always allow for children to contribute to decisions affecting them, or recognize their capacity to make decisions autonomously and the desirability of their involvement in such decisions. Thus, protecting children from harm, while also encouraging autonomy, can be challenging for government departments when creating policy, for parliaments and the legislative frameworks they create, and for the judiciary when making decisions in cases before the court.

A significant challenge for law, when governing children's agency and decision-making, relates to the time span of "childhood". "Childhood" spans a large and dynamic period of human life and therefore of capacity and attributes, i.e., from birth through to the age of 18. This is a key consideration because the diversity of situations and capacities across the span of "childhood" is a major reason why legal systems and legal principles find it challenging to grapple with approaches to decision-making authority, and identify sound solutions. Often, legal principles reflect the stage of childhood or adolescence involved in a particular individual decision-making setting, or more broadly in a policy context in relation to which a legislature or common law principle is required to set down a principle guiding legal entitlements, and may be primarily concerned with: (1) defining rights to participation, and the mechanism for this; (2) the capacity-based requirements that must exist in order to be able to provide independent consent; and (3) lawful decision-making authority. The ways in which legal principles consider children's agency and decision-making are multiple and complex.

As we explore in this Special Issue, children's legal agency sits on a continuum from protection to empowerment. There is a clear and crucial paradigm shift in children's utility, worth and personhood demonstrated in the new and emerging law and literature. The law can facilitate or hinder the progression of autonomous decision-making in children. A fundamental understanding in the law and literature is that "each child is different" (Bridgeman 2007, p. 35). However, the law often seeks to mandate a universal approach to be applied to all children, through the establishment of age demarcations for decision-making capacity in various domains; this "bright line" approach may achieve administrative convenience to avoid problems of practicability in assessing each individual child's capacity, but it will sacrifice accuracy and justice in many cases, and will contradict developmental evidence about capacity. The collective treatment of children as a homogenous population may at times protect them, but it does not always empower them. At the same time, the extent which the law should empower children is not necessarily susceptible to a simple solution, given the law also has to protect their interests.

While some legal principles such as the mature minor principle attempt to acknowledge the complexities of the cross-disciplinary nature of children's decision-making, progress can still be made in many areas of the law for children's decision-making. In this editorial, we examine the salient features which should guide legal strategies pertaining to children's decision-making using key examples arising from the publications featured in this Special Issue. Namely, we consider children's rights, ethics and developmental perspectives. This editorial will introduce and conceptualize the evolving legal landscape of children's decision-making arising from the Special Issue, highlighting cross-jurisdictional and interdisciplinary examples from the Australian and British law and literature to demonstrate shortcomings, challenges and success.

2. Children's Rights of Participation and Decision-Making

Children's law spans many areas of law which often intersect, crossing disciplinary and jurisdictional boundaries. The law is continually responding to new challenges relating to children presented by emerging scientific evidence and contemporary life. A legal strategy to encourage a child's contribution to their decision-making will often require consideration of evidence from multiple disciplines. Legal developments should be properly informed by

scientific evidence from multiple domains of knowledge, ethics, and an understanding of the law's historical development and limitations. A psychological approach, for example, might be needed to provide context to the law. It is evident, though, that the law all too often fails to consider essential interdisciplinary perspectives. Such interdisciplinary perspectives are an essential feature of our Special Issue.

Because each individual child develops different attributes through childhood and adolescence, and because children develop at different rates, policy decisions about how law should enable their involvement in decisions affecting them can be difficult. Yet, developmental evidence in cognitive, psychosocial and neurobiological domains has shown adolescents of a certain age and stage of development have the capacity to make their own decisions, especially in situations allowing cognitive deliberation unaffected by heightened emotional arousal (Steinberg and Icenogle 2019). This is discussed further in Section 3.

Children's rights are an important tool in understanding and navigating the evolving legal landscape that is children's decision-making law. International norms prescribe rights and responsibilities for governments when legislating issues related to children. The United Nations Convention on the Rights of the Child ("the CRC") explicitly recognizes children as subjects of rights (United Nations 1989). Specifically, human rights stipulate children's rights to freedom of expression (art 13); dignity (art 23); and parental direction and guidance according to their evolving capacity (art 5). The right of participation is an essential component of the UNCRC: art 12(1) establishes 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". In addition to explicit recognition of the visibility of children under the law, human rights implicitly recognize the importance of collaborating with children to exercise their rights, both as individuals and collectively (Goldhagen et al. 2020; Mauras 2011).

Legal developments should also be consistent with international norms expressed in instruments including the United Nations Convention on the Rights of the Child, and the United Nations Sustainable Development Goals. Human rights should provide a universal, minimum standard of treatment and entitlement for children. The reality, though, is that despite a state party's intention to attain those international norms as a signatory, international laws are not binding at a domestic level without an enforceable statement of rights or enactment in Australian statutes (Kirby 2011). As such, children's decision-making laws are inconsistent cross-jurisdictionally and fall short of the international norms. We discuss this further in Section 4.

Human rights impose universal, minimum standards for nation states to achieve. Specific instruments, such as the CRC, prescribe human rights' principles applicable to societal groups like children. The reality, though, is that domestic laws often fail to adopt those rights and responsibilities despite acknowledging the importance as a signatory. For example, the Committee on the Rights of the Child (2007) states that the minimum age for children's criminal responsibility should be at least 12 but preferably 14–16 to account for emotional, mental and intellectual maturity. Many nations impose criminal responsibility on children younger than 12, including Australia and England (Davis 2022; Crofts 2018) which is inconsistent with international norms. This is significant to children's decision-making because the CRC acknowledges how developmental considerations affect children's behavior; holding children criminally accountable for behavior without considering the reactive nature of their offending is problematic (Steinberg and Icenogle 2019).

Importantly for human rights, children are rights holders themselves. Their rights are not contingent upon anyone else, especially parents or carers. Children are not the property of their parents, they are separate entities to their parents and the CRC has assisted in reframing historical understandings of children as controlled by their parents (Polonko et al. 2016). However, parents still have considerable influence over and control of children's decision-making. While children's rights might remind adults how they should include children in decisions, adults (by nature of the law) control the amount of autonomy children

are entitled to in making decisions for themselves (Cherney et al. 2008). Bridgeman (2007, p. 19) cautions that “rights-influenced welfare determinations are made in abstraction from the lived reality of parent and child”. In the same way that interdisciplinary perspectives are important to law, so too are they important to rights, so rights should be one of many considerations in the scope of children’s decision-making.

Scholarship pertaining to the involvement of children in decisions which affect them identifies three key areas of involvement: children’s views, participation and full agency (Kosher 2018). Human rights recognizes the importance of all perspectives in appropriate circumstances. Ultimately, views and participation are distinct, albeit related, concepts. Children’s views relate to the opportunity for children to communicate their perspective while participation is more active involvement in the decision. Full agency means children can make the decision for themselves irrespective of their parent/carer’s wishes. Views and participation create different outcomes for children.

Children who are capable of communication can communicate their views at any age. The level of understanding and nuance depends upon age and maturity. In fact, children should be able to “express views freely... in accordance with the[ir] age and maturity” (CRC, art 12). Children expressing their views does not guarantee adults will listen to, accept or implement the child’s views in decisions about the child. Alderson et al. (2022, p. 10) found children as young as six are capable of making health decisions about congenital heart surgery because they have the life experience, even at that age, to be “highly aware and informed” due to their ongoing medical issues; children being involved in decisions is part of “effective humane care”. It follows that even very young children can express their views in any setting that involves them. The more pertinent consideration, though, relates to what the adult decision-maker does with a child’s views. Expressing views is empowering for children but it is not always enough. Expressing views stops short of participation.

Participation, then, provides a broader scope for a child’s involvement and is central to rights for children. We consider participation to go beyond a child expressing their views; participation relates to children being involved in making the decision, providing perspective and persuading the adult decision-makers to act in a particular way. Such considerations are reflected in the research outlined in this Special Issue. There is no minimum age for children’s participation in decisions which affect them (Inter-Agency Working Group on Children’s Participation 2007). The CRC considers participation as an underlying concept shaping children’s decision-making (Lansdown et al. 2014). Participation sits on a continuum between protection and empowerment because, like children’s views, participation does not extend to full decision-making autonomy. While children can be an active participant in a decision-making process, power to make the decision often still lies with an adult.

Views and participation, then, fall short of full agency. Full agency occurs when children have been granted the authority to make their own decisions; such an authority exists regardless of a parent or carer’s views about the child’s circumstances. This is usually afforded when the law or policy recognizes children’s capacity to provide their own consent. To have the functional cognitive capacity to be able to provide consent in various settings, an individual must have sufficient ability to: understand the relevant information; retain the information; weigh the information in order to make a reasoned choice; and make voluntary and autonomous decisions (Alderson 2007). However, it is clear that even when children or adolescents have this capacity, the law does not confer full agency or decision-making authority on them in all appropriate settings.

A particularly important setting in which socio-legal policy on adolescent capacity and decision-making authority assumes prominence is suffrage. In many countries, adolescents aged under 18 are denied the right to vote and participate in the formation of government and social policy, while simultaneously being compelled to live within the laws and social conditions under the ruling polity. This is particularly salient when youth have such a potent stake in social policy and the future of society in a contemporary setting

characterized by the existential threat of climate change, and other serious social challenges such as economic policy, housing policy, employment policy, artificial intelligence and other technological challenges, racial and gendered discrimination, and gendered violence. Notably, many countries have recently lowered the voting age from 18 to 16 and debates continue around this core decision-making issue (Loughran et al. 2022; Oosterhoff et al. 2022).

There tend to be few examples of full agency for decision-making, and those examples are limited to older children nearing the age of majority, which is 18 in all states and territories in Australia, and in the United Kingdom (Mathews and Smith 2023). In South Australia, for example, adolescents who are 16 years or over have the same medical decision-making authority as adults and so are entrusted with full agency (Consent to Medical Treatment and Palliative Care Act 1995, s 6). Such a progressive approach is far from the norm. Instead, Lansdown et al. (2014, p. 4) argue participation “provides a balance between. . . the engagement of children as active agents in their own lives and. . . their entitlement to additional protection during the period of childhood”. Hanson (2016, p. 471) cautions that children’s agency is often considered in relation to assessing whether children have acted in a way that is “right or wrong” as opposed to their “actual degrees of capacity. . . in practice”. Children’s degrees of capacity, then, are highly relevant to the law’s response, are founded in ethical considerations, and are crucial to the discussion within this Special Issue.

3. Ethical Considerations

Inconsistencies and outcomes in decision-making according to age or attribute can offend core ethical principles. These ethical principles should guide legal principles and can yield significant insights into how we consider children’s decision-making, and the legitimacy of intrusion into domains of participation, consent and decision-making. Known, generally, as “principlism”, there are four principles of bioethics: autonomy, beneficence, non-maleficence and justice (Beauchamp and Childress 2018). In simple terms, the concept of autonomy honors a person’s control over their own bodily integrity and decisions affecting them. Those who possess autonomy should have their rights to participation, consent and decision-making safeguarded. Autonomy relates to participation in decisions because children have involvement in the outcome of decisions which affect them. However, participation falls short of autonomy. Participation does not mean full control of a decision; children can express their views which can influence an adult’s decision, yet the decision remains the responsibility of the adult.

Beneficence refers to the concept that medical treatment or other decisions should benefit the patient or the subject of the decision. The “best interests of the child” concept is crucial to how the law addresses many issues involving children, especially when the child is young and clearly does not have capacity to make their own decisions, but also in complex cases where the presence of such qualities is uncertain, and in other cases where decisions are made in relation to family matters that affect the child. Children’s best interests have been enshrined within Australia’s Family Law Act (1975) (Cth), for example, in orders made relating to children and the requirement that they be in the child’s best interests. The best interests concept arises from the principle of beneficence and overlaps with human rights considerations: a child’s best interests are to be a “primary consideration” for parents, courts, legislative bodies and welfare institutions in decisions in matters affecting the child’s interests (UNCRC arts 3, 9 and 18). A child’s best interests can conflict with their autonomy, especially where they refuse medical treatment which might be beneficial to them (Moritz and Ebbs 2021).

Non-maleficence prioritizes avoiding harm to a person. Decision-making for children usually favors the avoidance of harm and so non-maleficence aligns with beneficence to ensure decisions about children benefit them while minimizing harm. Importantly, Page (2012, pp. 5–6) found avoiding harm to be the most important ethical principle for decision-making, especially when non-maleficence conflicts with other principles. When

children are not included in the decision-making process, decisions made about them are not necessarily free from harm.

Justice requires individuals who are the subject of a decision about health or other interests to be treated in a just manner. Balancing the needs of an individual and the needs of society, as well as ensuring non-discrimination and cost-effective healthcare, are relevant considerations here (Cookson 2015). Lindridge (2017) argues justice should take priority over the other principles where they conflict, and in urgent situations, to ensure fairness.

In medical settings, the four principles provide a decision-making framework for health practitioners independent of their own personal beliefs (Beauchamp and Childress 2018). However, the principles are reflected beyond a healthcare context as well, and those concepts could be applied generally to children's decision-making. Ethical principles closely align with rights. Children's rights are vital to their participation and decision-making.

4. Developmental Perspective and Consequences

As our Special Issue explores, legal frameworks confer decision-making authority by age or attributes. In most jurisdictions, age of majority legislation typically sets a general age of adulthood that is applied to a range of settings, often including domains such as voting. This baseline legislative age of adulthood is often supplemented by other statutes setting specific ages of consent for designated purposes, and these ages can differ from the age of majority. In other domains, there may be no legislative principle establishing the age at which a child or adolescent can provide their own consent, and in these settings the application of the Gillick competency was neither anticipated, nor is it readily applicable.

Non-legislated settings leave a lacuna of uncertainty for children's issues. Social forces, then, provide chaotic and piecemeal authority using a mixture of administrative convenience, parental power, institutional power, or misguided (if well-intentioned) fears about the consequences of permitting children's participation, consent, and/or decision-making authority. This can result in the unwarranted and dangerous exclusion of children from important decisions in relation to themselves, including medical care decisions; in addition, it can exclude youth from broader participation in social policy issues of significant importance. Other perverse results from these different ages of capacity and decision-making authority can readily ensue. Young people aged 17 or under in Australia cannot vote in elections because they are deemed lacking in sufficient capacity, but a 12 year old is considered to have sufficient capacity and decision-making autonomy to be imprisoned for a criminal offence. Where a child or adolescent does not have lawful power to make their own decisions, issues arise concerning the nature and extent of their participation in decisions, of their capacity to provide consent, and whether this consent can be overridden.

Developmental factors affect children's responses to situations and decision-making processes meaning they may respond differently to an adult in a situation. Children may also respond disparately from each other due to factors such as age, maturity, upbringing, schooling and intelligence. The body of research in this area is vast and there is a clear understanding which arises from that research: children develop at different rates and many factors influence that development (Marion's Case 1992). As such, definable ages cannot be attributed to developmental stages. Understanding the adolescent brain's response is crucial to understanding why they behave the way they do and how it affects their decision-making.

Developmental considerations are recognized by and built in to the fabric of international norms in human rights' instruments. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (United Nations 1985) suggests "emotional, mental and intellectual" maturity should be considered when determining the age of criminal responsibility, for example. Most significantly, the right of participation, being a fundamental tenet set down in the UNCRC art 12(1), requires state parties to "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." (authors' emphasis). Stages of children's decision-making development affects all aspects of their decision-making including understanding, capacity and interactions with others. The way the law considers children's development can empower them or protect them; it can also do both or neither.

Children respond to situations in different ways. Their cognitive development can influence their behavior and affect their decision-making responses. There are a range of cognitive development factors occurring in children including logical thinking and problem solving (Lamb and Sim 2013). Cognitive decision-making capacities do not develop until later in adolescence which means children have difficulties properly assessing the risks and benefits of their decisions prior to that age (Corrado and Mathesius 2014). Children are highly susceptible to psycho-social factors at all ages which result in being influenced by others, are likely to minimize consequences, lack self-regulation abilities, cannot future orient and are highly motivated by short-term rewards (Steinberg 2009). Later in adolescence, children may have developed more advanced cognitive capacity to undertake a risk and benefit assessment but their psycho-social characteristics remain underdeveloped until well into adulthood (Steinberg 2009). There are several developmental factors that are particularly pertinent to a child's behavior which can affect decision-making.

Firstly, children are highly susceptible to the influence of others. It is during adolescence when children transition from being self-oriented to socially oriented, which assists with forming relationships (Crone and Dahl 2012). Children undergo a transition from obtaining approval from parents to receiving gratification from their interaction with peers which can influence how they behave (Lamb and Sim 2013). Young people's social influences can be an "opportunity for promoting social adjustment" but those without positive peer and family influences may not develop constructive responses to inappropriate peer group behavior (Telzer et al. 2018). Children are more amenable to peer influence than adults (Blakemore and Robbins 2012; Steinberg 2007; Reyna and Farley 2006). Peer pressure, then, can lead to criminal behavior because children can influence each other (Monahan et al. 2009; Leverso et al. 2015).

Secondly, adolescence is a period characterized by heightened vulnerability because adolescents engage in risk-taking behaviors (Telzer et al. 2018). The brain's control mechanisms develop after the reward system, meaning that children are susceptible to unencumbered decision-making which can lead to harmful consequences for them or others (Grootens-Wiegers et al. 2017). Adolescents are not always able to emotionally regulate causing greater risk-taking in "hot contexts", those situations demanding immediate or "spur of the moment" responses (Mathews 2023; Steinberg and Icenogle 2019; Blakemore and Robbins 2012).

The cognitive and developmental considerations affecting children's decision-making are particularly significant given the impact they can have on how children respond to certain situations and the consequences for those responses. Steinberg and Icenogle (2019) distinguished between decision-making settings that are "cold" and those that are "hot". Cold decision-making settings are those allowing "unhurried deliberation in the absence of emotional arousal", where the adolescent both has ample time to make the decision and is not subject to immediate emotionally arousing factors that may influence the decision. Hot decision-making settings, in contrast, are those which demand a decision quickly, on the spur of the moment, and contain a significant element of external pressure. In their authoritative review of developmental evidence in cognitive, psychosocial and neurobiological domains, Steinberg and Icenogle (2019, p. 34) concluded that:

"[f]or legal matters that permit unhurried deliberation in the absence of emotional arousal, and where adolescents can be encouraged to think through their decisions before acting on them, it would be reasonable to set an age boundary around 16, because decision making in this context relies mainly on various aspects of so-called cold cognition, which is mature by this age."

Steinberg and Icenogle (2019, p. 34) considered how "mature cold cognitive abilities" could allow some young people to make decisions including voting, research participa-

tion, and medical and legal decision-making. Young peoples' normative developmental cognitive characteristics are typically sufficiently developed, such as working memory (which facilitates analytical thinking); response inhibition, cognitive flexibility and features of higher order cognitive thinking are also mature by this age (such as perspective-taking, logical reasoning and planning). This can be contrasted with psychosocial characteristics that are typically still developing (such as impulse control; self-regulation; resistance to external pressure, especially from peers; and delay of gratification). It is important to note that this general conclusion about 16-year-olds is conservative, and does not rule out even younger children having sufficient cognitive capacity in such settings. [Steinberg and Icenogle \(2019\)](#) observed that two of the three analytical models they reviewed in relation to cognitive capacity supported a general population demarcation point as age 15; they observed that many adolescents would reach this stage earlier than the age cut-off.

Failing to consider consequences of a decision is a developmental outcome which the law uses to either protect or punish children. Many examples reflect how courts have overruled children's health decisions because the judiciary are concerned children have been unable to appreciate the consequences of their decisions. A 17-year-old's decision-making capacity was overruled in [Mercy Hospitals Victoria v D1 and Anor \(2018\)](#) because the Court was not satisfied she understood the consequences of refusing treatment, namely the likelihood of a life threatening outcome. Courts will regularly use the child's best interests as justification to override their autonomy in medical decisions whilst also actively espousing the importance of ascertaining a child's wishes in relation to the health treatment ([Re W 1992](#)).

The consequences of responding to the developmental perspective of children's decision-making, from the plethora of existing research, are two-fold. The differing stages of children's development could influence the way children make decisions, including how they process information. Children will also attach differing subjective values to information than adults, causing them to possibly act in a way different to adults. Whether children are making decisions relating to gender-affirming medical treatment, consenting to participate in scientific research or engaging in behavior which results in criminal consequences, the developmental science demonstrates how children think differently to adults, therefore, the law should reflect that.

Gillick competency, or the mature minor principle, is the outcome of a notable case acknowledging the importance of considering developmental principles ([Gillick v West Norfolk and Wisbech Area Health Authority 1986](#)). It is an English precedent, adopted under Australian law ([Marion's Case 1992](#)), which considers children's capacity to make decisions. Gillick competency applies in healthcare treatment situations to determine the role children should play in decision-making related to healthcare treatment. Health practitioners (and courts, where relevant) assess whether children have reached a level of understanding and intelligence to comprehend the risks and benefits of a medical decision. Where the child is sufficiently mature to satisfy the requisite level of capacity, their parent/carer's decision-making responsibility for them diminishes (in relation to that healthcare treatment decision only), allowing the child autonomy to consent to their healthcare.

The Gillick case is relevant to discussions of developmental principles. Gillick allows for the child's stage of development to be assessed, inviting health practitioners to consider the child's understanding of the medical treatment. Gillick does not prescribe a fixed age for decision-making; it accounts for children to develop at different stages, acknowledging that some older children will not have decision-making capacity while some younger children might.

The challenge for children's decision-making law relates to how adults expect children to behave. Children's logical reasoning maturity might be at an appropriate level, so they are deemed competent to make a decision and accept the consequences. However, they are then held accountable for decisions which reflect their psychosocial immaturity which is underdeveloped and inhibits an adult's level of decision-making ([Moritz and Christensen](#)

2020). The law can penalize children for responding to “hot” contexts yet fail to empower them to make decisions in “cold” contexts. While the legal landscape is evolving, there are many pertinent and significant legal issues affecting children’s decision-making.

5. The Evolving Legal Landscape

In preparing this Special Issue, we sought to synthesize new and emerging perspectives about children’s decision-making and their interaction with law. We invited cross-disciplinary contributions that advance knowledge about children’s participation, consent and decision-making authority, and point to beneficial reforms spanning a range of relevant areas including criminal law, child protection, forensic interviewing, sexual consent, healthcare law, developmental evidence and human rights approaches. A recurrent clear theme emerging from the combined scholarship featured in this Special Issue is that human rights, developmental perspectives and bioethics provide an important foundation for *understanding* children’s decision-making. The law facilitates the regulation, restrictions and implementation of children’s decision-making. Unfortunately, the law does not always defer to human rights, developmental perspectives or bioethics when ascribing the level of involvement for children in decisions which affect them. Very important suggestions for reform have arisen from this Special Issue.

The common law principles governing healthcare decision-making can cause significant challenges for children, their families and health practitioners. This Special Issue identified some pertinent concerns with how the current law operates in children’s decision-making. Uncertainty in the law has caused volatility for children, especially for trans youth and decision-making for gender-affirming medical care. When legislation is absent, and the law is unclear about the parameters of children’s capacity for decision-making, a court response becomes necessary. In this Special Issue, the analysis by [Jowett et al. \(2022\)](#) emphasized the harms which a court intervention in decisions about consent to gender-affirming medical treatment can cause for trans youth, including health, wellbeing and financial implications. [Jowett et al. \(2022\)](#) identified the widespread concern about these matters shared amongst the legal fraternity, judicial officers and health practitioners. [Jowett et al. \(2022\)](#) suggested legislative reform is needed for adolescents’ healthcare decision-making and that 16 years of age was an appropriate threshold for consent to healthcare. More specifically, they argued that a statutory presumption of capacity should be set at 16 years of age for medical decision-making; a legislative test could replace the common law mature minor principle; or a specific provision for gender-affirming care should be included in a relevant statute. Such approaches move away from a welfare-based approach and align with a rights-based approach.

Also considering this setting, the analysis by [Smith \(2023\)](#) found that courts are no longer interpreting the mature minor principle in *Gillick* consistently with its original reasoning or its judicial application in the broader contemporary context. [Smith \(2023\)](#) outlined how, despite the authority of *Gillick* competency that a minor with capacity can consent to treatment, a cascade of gender-affirming treatment cases have instead applied a best interests approach, and preferred parental involvement, to refuse gender-affirming treatment for those minors despite acknowledging they were *Gillick* competent. Smith’s analysis concluded that this departure from the well-established common law principle “destroys a fundamental and underlying basis of the *Gillick* decision itself” ([Smith 2023](#), p. 23). In addition to the challenges that can be created by court involvement, the family’s role, then, creates an added layer of difficulty for children. Family members may not always support children’s decision-making, especially in trans and gender diverse cases; parental support may not be available; and requiring parental involvement in children’s healthcare decision-making violates the mature minor principle itself ([Smith 2023](#)). Ensuring children are supported in decision-making, empowering their autonomous decision-making in appropriate circumstances and protecting them from the consequences of significant decisions is an ongoing challenge.

The consequences of decisions are highly influential on the level of decision-making ascribed to children. It is in the decision's consequences that we see a clear separation between protection and empowerment of children. Australian and British courts are very reluctant to extend autonomous decision-making to children in circumstances of refusal of treatment and where the child's decision could result in a significant and irreversible health outcome (*X v Sydney Children's Hospital Network* 2013). In this Special Issue, [Moritz \(2023\)](#) considered developmental capacity considerations across health law and criminal law, finding that the approaches conflict; health law does not permit children's autonomy to conflict with their best interests because of their inherent vulnerability while criminal law assumes that when children reach a certain age, they should be held fully accountable for decisions they make. The literature is clear that children and adolescents lack the capacity to be held accountable in emotionally reactive situations ([Steinberg and Icenogle 2019](#)). The law should consider the consequences of young people's behavior in emotionally reactive situations. [Moritz \(2023\)](#) suggested a criminal law approach which aligns with healthcare law principles that acknowledges developmental immaturity and does not hold children accountable for criminal consequences when they make decisions in "hot" contexts and would address the challenges of reactive decision-making. As such, the protection from the consequences of their decisions we see in health law could be extended to criminal law aligning with children's developmental growth.

Despite developmental growth being fluid for children, there is strong evidence that adolescents over 16 years of age should be given more responsibility and agency in some circumstances. Further, domestic legislation is the best way to ensure health practitioners, policy makers and organizations understand and can facilitate children's rights to participation and expression when interacting with them or making decisions relevant to them. [Mathews \(2023\)](#) conducted a multidisciplinary review of evidence from developmental science, social science, law, human rights, and bioethics about decision-making capacity and entitlements in the context of research participation, and an updated evidence-based analysis of adolescents' capacity to provide their own consent to participate in social-, humanities- and health-related research. Through this synthesis and analysis, [Mathews \(2023\)](#) considered existing gaps in legal principles and national ethics guidelines about children's and adolescents' participation in research, and proposed legislative reform to confer capacity to provide independent consent on all those aged 16. [Mathews \(2023\)](#) identified the urgent need to enable adolescents to more actively participate in knowledge generation and public policy, and found compelling evidence from developmental science, together with human rights principles and bioethics, that gave overwhelming support to this legislative development. [Mathews \(2023\)](#) also recommended reforms to national ethics guidelines to support such participation.

There are different approaches to conceptualize children's decision-making. [Tobin \(2023\)](#) conducted an important comparative analysis of 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. [Tobin \(2023\)](#) critically analyzed contemporary legal practices that regulate children's decision making against the standards required under a rights-based approach, spanning legislative "bright line" minimum age standards, presumptive age standards, and individual decision making involving interplay between Gillick competency and courts' *parens patriae* jurisdiction. [Tobin \(2023\)](#) concluded that a rights-based approach tolerates minimum age rules and presumptive age limits under certain conditions; moreover, it aligns with the principle of Gillick competency but offers a deeper and more nuanced understanding of how to enable and support decision making with children across the span of childhood. Finally, [Tobin \(2023\)](#) found a rights-based approach offers deep insights into how the courts' *parens patriae* jurisdiction can develop to better protect children's rights and decisional autonomy.

Rights, then, can and should underlie all decision-making frameworks for children. [Cashmore et al. \(2023\)](#) considered children's participation in child care and protection

matters. Legal and policy frameworks provide a range of mechanisms aiming to involve children who are the subject of child protection processes and care proceedings to express their views about decisions that affect them. [Cashmore et al. \(2023\)](#) considered the extent to which these mechanisms facilitate children's involvement and whether they result in children's views being heard and given due weight in accordance with the child's age and maturity, as required by the UNCRC art 12. Through a review of existing work, and a novel analysis of law, policy and practice in New South Wales, Australia, [Cashmore et al. \(2023\)](#) identified how children want to be involved in decisions which affect them. This analysis also demonstrated how the integrity of the process through which children's participation is secured is so important: trust in caseworkers, advocates and decision-makers, including courts, goes a long way to empower children. Cultural practices, backgrounds and perspectives are not always considered in facilitating children's involvement in decision-making, but are essential considerations. [Cashmore et al. \(2023\)](#) concluded that both in Australia and other jurisdictions around the world, much work remains to be completed in order to listen to children's views and comply with art 12 in this context. Current mechanisms often do not provide children with the information they require to understand the nature of the court process. Moreover, there is a significant problem in a lack of trusted advocates who can facilitate children's participation and convey children's views to those making the decisions. Overall, there is a worrying lack of clarity about how children's views are heard, interpreted, and weighted in these extremely significant decision-making processes that affect fundamental dimensions of the child's relational world and daily safety and existence.

Empowering children, even when they are very young, is also important when they are the victims of crimes. [Holder et al. \(2023\)](#) considered how children claim justice in forensic interviews when they report sexual victimization, using interview transcripts. Forensic interviewing of children in sexual abuse cases is highly complex and demands special expertise to enable children to relate in their own words what happened. Successful interviewing not only advances the right of children to participate in processes and matters regarding their interests; it is critical for facilitating successful criminal prosecutions, health rehabilitation for the child, and protection of the child and potentially other children. This innovative, rigorous and in-depth study conducted an exploratory analysis of 300 transcripts of interviews with child complainants aged 3 to 15 years (60 boys and 240 girls, with a mean age of 10 and with almost half being aged 8–11). [Holder et al. \(2023\)](#) explored what goals these children articulate in relation to the involvement of police and the criminal justice system, the timing of the articulation of these goals in the interview process, and the interaction of such engagement in relation to interviewer prompts. In this way, [Holder et al. \(2023\)](#) approached each of these children as an "agentic child"; importantly, the authors found the children reported wanting validation for the wrongdoing against them, confirmation of the harm they experienced, and—significantly—to be believed. They also frequently expressed justice goals in relation to themselves, but also in relation to the protection of others. Moreover, such views were typically expressed spontaneously and without prompting. In honoring the agency of these children, despite the span of their ages and developmental stages, [Holder et al. \(2023\)](#) identified how children are capable of claiming justice for themselves, and, significantly, how forensic interviewers and adult-centered institutions need to position themselves to support children in claiming that justice.

6. Conclusions

A significant challenge for policy-makers, legislators and judges is to balance competing legal and social principles. The legal landscape does need to provide principles to achieve an appropriate balance between, on the one hand, protecting children who are very young, more vulnerable to harm, and unable to consent for themselves or make their own decisions and, on the other hand, conferring power on older children and adolescents to participate in, consent to and provide independent autonomous decisions where they have

the necessary qualities. In all instances, a unifying principle must be to comply with the right to be heard, identified in 2009 by the United Nations Committee on the Rights of the Child in its General Comment on art 12 and the right to participation (United Nations 2009). The Committee declared that this right is a cornerstone of the UNCRC and its primacy has a cascading effect through the other Convention rights.

Childhood and adolescence is a particularly important period of dynamic growth and development; among other shifts, children and youth generally move from a self-oriented perspective to an other-oriented perspective (Crone and Dahl 2012). This has major implications for legal principles concerning participation in decisions, the provision of consent, and the possession of independent decision-making authority. Adolescents' participation in society is essential to ensure just treatment of this important social group (Patton et al. 2016, 2018; Sawyer et al. 2012). As shown by many of the articles in this Special Issue, ensuring greater participation by children and adolescents is essential for best practice and good outcomes in a range of settings spanning child care and protection decision-making (Cashmore et al. 2023); medical decision-making (Jowett et al. 2022); and forensic interviewing in child sexual abuse investigations (Holder et al. 2023). Enhanced participation also boosts civic engagement, and will enhance social policy, and ensure pressing social issues are more fully understood and can be remediated by appropriate social policy.

It is time to shift from an overreliance on a centuries-old model of the child as a chattel. Greater participation by youth in decisions across a range of settings is warranted scientifically, ethically and relationally. Legislatures are best placed, and are charged with the duty, to show leadership in considering the need for reform of legislative principles to clarify laws about the appropriate age at which children and adolescents can participate in decisions, or make their own decisions, or do both. Such legislative leadership is long overdue, and there is enough accumulated scientific evidence to guide such decisions, as exemplified by the conclusions of Steinberg and Icenogle (2019). Such reforms can enhance the process and outcome of decisions at the individual level. In addition, from a future-oriented social perspective, the greater involvement of youth in decision-making about major social issues may be a key weapon in society's armory to respond to some of the most pressing issues of our time.

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