

**Forming Partnerships:  
The Human Rights of Children in Need of Care and Protection**

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## **Introduction**

The care and protection of children who are experiencing or are considered at risk of abuse or neglect within their families is a major policy dilemma. It is also a growing problem, with increasing numbers of children in out-of home care, both in Australia and worldwide.

The evidence tends to suggest that children in the care and protection system do not fare well on a range of indicators, when compared to the overall population. Moreover, the transition to independent living is often extremely difficult for these young people (Cashmore and Paxton,1996). The care and protection of children who enter the system bearing that name is often dubbed one of social policy's 'wicked problems' – a problem for which there is no single, ready-made or obvious solution.

In this paper, we suggest that one of the barriers to building better policy responses within the care and protection system – and providing better support to individual children – is the way in which children are viewed. We suggest a reconceptualisation of the relationship between adults within the system and children as a possible way forward.

We draw on three conceptual frameworks to reconsider the status of children and young people in need of care and protection. The first is a human rights discourse similar to that proposed by Minow and drawing on the United Nations Convention on the Rights of the Child (UNCRC). The second framework focuses on the psychological needs of children. The third draws on feminist debates around normative concepts of citizenship. We then seek to synthesise these ideas into a single, comprehensive framework of partnership with children .

## **Current problems in care and protection systems**

The problems confronting children within the care and protection system are well documented (Cashmore and Paxton, 1996; The CREATE Foundation, 2004). While the discussion in this section focuses on the Australian situation, similar problems confront care and protection systems in a number of OECD countries. Inadequate resources, stigmatisation, instability and uncertainty are among the issues with which children must deal (Cashmore; Delfabbro et al, 2000; Bromfield et al, 2005). The relational dimensions of out-of-home care, in particular, often place heavy burdens on children, who are required to navigate relationships not only with their birth parents and families – relationships that are often complicated by abuse and/or neglect – but also with myriad others, including carers, workers, legal professionals and counselors. The frequency with which children in out-of-home care have their placements changed increases the burden on children (Cashmore and Paxman, 1996; Fernandez, 1996) . In the majority of cases, children have no or little say over their placement.

The problems facing children in the care and protection system are sometimes exacerbated by systemic and procedural issues, including insufficient care planning, cumbersome processes that militate against timely responses and lack of consultation with children within court processes (The CREATE Foundation, 2004; Gilbertson and Barber, 2003; NSW Community Services Commission, 2004). Current approaches to care and protection tend to be built around bureaucratic procedures and requirements on the one hand, and the scarcity of resources to care for children on the other. Approaches are also deeply imbued with a welfarist approach to children, an approach that emphasises vulnerability and need. There are few examples within the literature

of what might be described as genuinely children-centred systems of care and protection.

In recent years, there has been a marked shift in social policy for children. Increasingly, children have been defined, at least rhetorically, as bearers of human rights, rather than as recipients of welfare and protection. As part of this shift, there has been greater emphasis on the right of children to express their views. Several Australian states have adopted Charters of Rights for Children and Young People in Care, which include the right to 'have a say'.

In practice, however, there remains a large gulf between rhetoric around rights and participation and children's experiences. Figure 1 shows the flow of actions that occur from a report of possible child abuse or neglect to the establishment of care and protection orders or the placement of a child in out of home care. In developing this figure, the Australian Institute of Health and Welfare notes that while there are differences between various jurisdictions in Australia, the processes are broadly similar (2002: 2-3). What is striking about the process is the absence of any explicit step that takes account of the child's views or focuses centrally on the child.

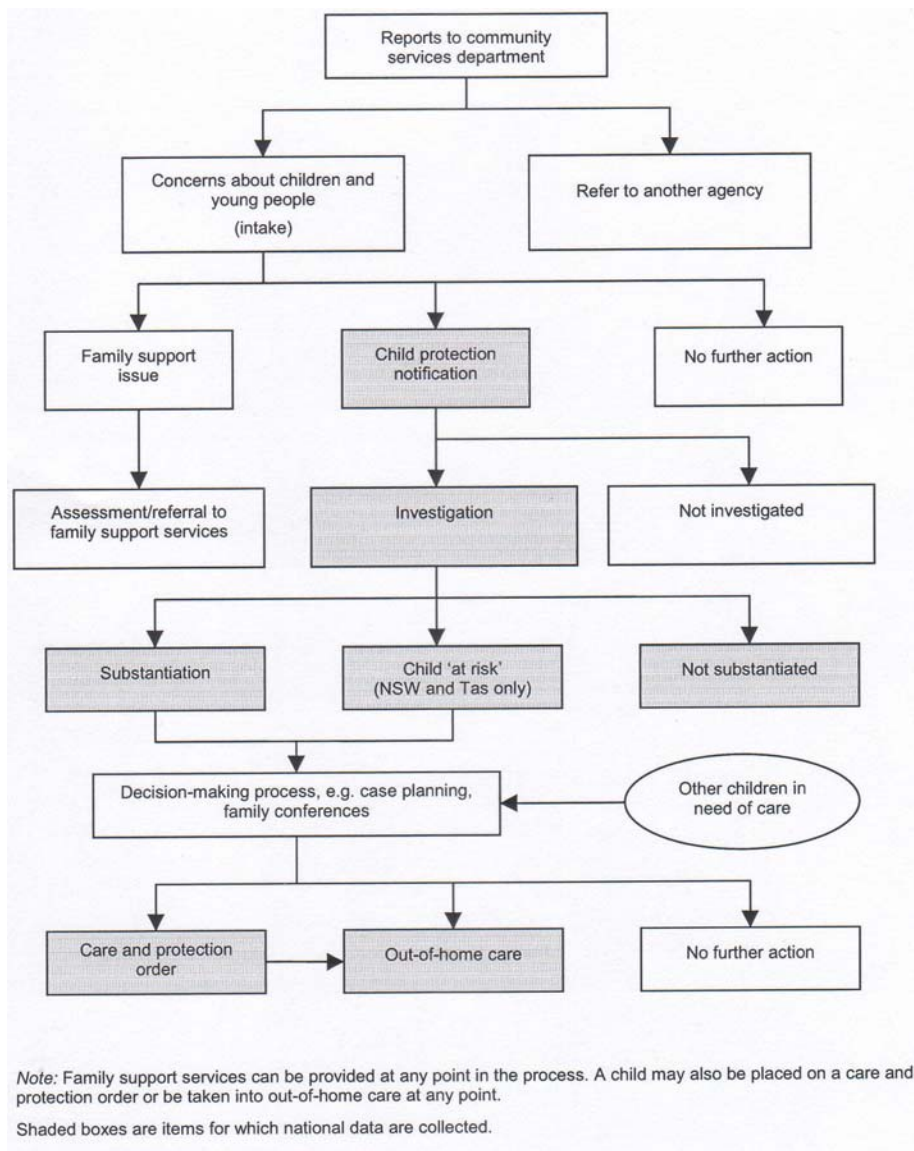


Figure 1: Australian Institute of Health and Welfare “Child Protection Australia 2000-01”, Child Welfare Series, No. 29, Canberra: AIHW, 2002

An analysis of the literature on care and protection also reveals the absence of children’s participation in decisions made about them once they enter the care and protection system. While one of the few published Australian studies of children’s views of their care placement, suggests a reasonably high level of satisfaction (Delfabbro et al, 2000), other studies identify the very low response rate of children in research as well as structural obstacles to children’s participation in both research and policy making (See Gilbertson and Barber 2002; Mason, Urquhart, and Bolzan, 2003; Gilligan, 2000).

So, despite recent changes in rhetoric, it seems that perceptions of children as needy, vulnerable and incompetent remain dominant. While such views of children permeate most areas of society (Moss and Petrie, 2002), they appear to be particularly pervasive in care and protection. Adults within or associated with the system tend to act as gatekeepers, determining when, if and how children's views might be treated seriously.

## **A Human Rights Approach**

An alternative way of perceiving children is as the bearers of human rights. The language of human rights is now commonly used in policy for children. But what does a human rights approach mean, for children generally and in relation to care and protection specifically?

Human rights can be understood at two levels: first, as the international system of treaties, visionary statements and commitments, and second as a conceptual framework that shapes action. The United Nations Convention on the Rights of the Child, discussed later in this paper, provides a foundation based in international law for a human rights approach to care and protection. As a conceptual system, a human rights approach allows us to recharacterise and guide what we do and how we do it (Freedman, 2001: 53). For children, this recharacterisation is significant. Within a human rights approach, care and protection is not provided to children as an act of adult benevolence, it is reconceptualised as an entitlement of all children, without discrimination and on conditions that are beneficial to children's well-being. This is significant in terms of challenging the sites and uses of power. From this perspective, human rights are a powerful social instrument.

Human rights are, however, contested. Objections range from the vagueness of the concept (Higgins, 1999; Klare, 1991) to the focus on the individual (Minow, 1990) and the neglect of personal responsibility and obligation (Minow, 1986; Waldron, 2000). The objection most relevant to this paper is the "*dilemma of difference*" raised by Martha Minow (1986, 1990). Minow suggests that rights rhetoric is often interpreted as offering two separate tracks – one track to freedoms and civil rights,

granted to those who are identified as autonomous, rational and capable of making independent decisions; and a second track to protection and social provision. The benefits provided by the second track, often come at the price of exclusion and disempowerment for those labelled dependent, incompetent and irrational.

While international human rights rhetoric over the past decade has emphasised the indivisibility of rights rather than the competing nature of different 'sets' of rights, the dilemma of difference remains acute in regard to children. Children's rights appeal to many, but present particular theoretical and practical difficulties that are linked to the dilemma of difference. Children do not fit into the traditional liberal theory of rights which assumes independent, rational individuals capable of making choices (Minow 1995, p. 1579, Ezer 2004). Indeed it has been argued that children cannot be rights-holders, as they are incapable of making choices and exercising, or waiving, their rights (Hart 1982). As a result, children have been largely denied the freedoms that are provided to citizens in liberal societies. Instead of rights, children are granted protections which tend to deprive them of their autonomy, assume incompetence and emphasise dependence upon adults.

### **Minow's relational approach to rights**

Addressing the dilemma of difference without abandoning rights talk, Minow suggests a broad meaning of rights which reflects both the differences between children and adults (through protection rights) and the equality of children as human beings (through legal, autonomy rights as well as social welfare and distribution rights) (Minow 1990, p. 288, 1995A, p. 296). Here, Minow's conceptualisation of rights converges with the approach embodied in the United Nations Convention on the Rights of the Child (UNCRC).

Proposing a relational model for children's rights, Minow (1995A p. 299 – 303) argues against the contention that children lack the capacity to know their own interests and to engage in an adversarial exchange. To argue that children are different from adults because they lack power, Minow contends, obscures the fact that it is the *relationship* that creates the power differences. Relationships can be changed. By recognising the socially constructed nature of power, rights discourse provides a

means by which members of a society, regardless of age, can negotiate relationships and enhance equality.

Minow further suggests taking the perspective of the other, or what Moss and Petrie (2000) call ‘otherness’. Otherness encourages people to become aware of social dynamics and injuries that were previously hidden or ignored. This approach opens the door to genuine dialogue with children as a way of understanding and valuing their perspectives and priorities. This necessitates a redesign of decision-making processes in a way that make sense for children and acknowledges their different mental, cognitive and emotional capabilities.

## **Children’s human rights**

In 1989 the adoption of the United Nations Convention on the Rights of the Child by the UN General Assembly marked a watershed in discourse around children’s rights. The Convention represents a holistic approach through its indivisible articles, which should be implemented interdependently (Van Bueren 1999). Importantly, the Convention combines the wellbeing of children and their self-determination, presenting them as complementing, rather than competing, elements. The UNCRC explicitly entitles children to civil and (some) political rights, along side social, economic and cultural rights. In doing so, the Convention introduces the *participation principle*. The Committee on the Rights of the Child, established under Article 43 of the Convention to monitor progress, identifies four articles as “guiding principles”. These are non-discrimination, best interests, survival and development and participation. Each of these principles is seen as guiding all provisions of the Convention (Hodgkin and Newell, 2002: 42). While this paper focuses on the participation principle, it is important to bear in mind the centrality of the other guiding principles in shaping, interpreting and implementing the Convention.

Article 12 of the Convention requires states parties to respect the child’s views in any decision making process that affects the child’s life. Subsection (2) of the article specifies the application of the participation principle with respect to judicial and administrative proceedings, where the child’s views should be heard either personally

or through a representative. The Convention does not include any provision that aims to treat children as adults, nor does it state that even 'mature minors' should be entitled to complete autonomy and freedom in decision—making. The Convention focuses, in this area, on the right of children to *participate* in the decision-making processes that precede any decision affecting their lives, giving gradually more weight to children's views as they mature and develop their capacities. It does not entitle children to make their own decisions.

Article 6 entitles children to survival and full development. This contributes to the understanding of the participation right as part of children's developmental needs. Facilitating children's participation in decision-making supports them to exercise the 'little power they actually have' and to develop their judgment (Rayner 2002). In addition, the right to development is interlinked with the "evolving capacities" principle set in Article 5 of the Convention. It reflects the notion that childhood is a process in which children gradually (and with practice) learn how to make decisions and exercise their rights. Accordingly, the Convention creates an obligation on state members to allow for children's participation with sensitivity to their age and developmental stage.

The principle of non-discrimination is enshrined in Article 2 of the Convention. Accordingly, any mechanism for children's participation has to be sensitive to *inequalities* and ensure that all children are able to participate equally. The principle of non-discrimination is of particular relevance to children with special needs and from culturally or linguistically diverse backgrounds. The principle is also of critical importance for children within the care and protection system who may face (often inadvertent and subtle although powerful) discrimination on at least two counts. First, children in contact with the care and protection system are likely to have experienced some form of trauma and to be angry and frightened – often interpreted as being uncommunicative and uncooperative. Adults' perceptions of children's attitudes often manifest as discrimination or exclusion. Second, children in the care and protection system are often alone and without an adult to support them or lobby on their behalf. Because adults facilitate children's participation in many situations, children without adult support face barriers that can be understood as discrimination.

The principle of non-discrimination obliges agents of the state to develop appropriate avenues through which children in the care and protection system can express their views.

The best interests principle (Article 3) is perhaps the most popular phrase in child protection terminology, yet it suffers from vagueness and implementation difficulties. Its importance is in that it creates a duty to make an individual examination of the interests of each individual child, instead of relying on general assumptions regarding children in different situations. However, when applied without understanding a child's views and experiences it can be used to contradict children's wishes and can lead to over-paternalism and adult authoritarianism. When taken within the spirit of the entire Convention, the best interests principle must be re-interpreted to embrace genuine respect for the individual child and his or her views and feelings (Hodgkin and Newell, 2002: 42).

While not a guiding principle, Article 13 is also relevant here. Essentially Article 13 requires that children are able to participate through processes and media that are meaningful to them, rather than those designed or preferred by adults.

The Convention on the Rights of the Child provides a holistic approach that defines children as social actors entitled to express their views on matters affecting them. It has been extremely successful in triggering rhetoric around children's participation. What participation means and how it can be achieved in a manner that is practically useful and meaningful for children is often unclear. Bureaucratic structures and processes often operate in ways that make children's participation difficult (Bessell, 2007). In many cases, children's participation has been translated into practice as the presence of children (or often young people) on advisory boards, at meetings and conferences. Rarely is the format of these processes changed sufficiently to ensure that children are able to genuinely participate.

Roger Hart's seminal work on children's participation (1992) remains useful here. Drawing on the work of Sherry Arnstein Hart proposes a "Ladder of Participation" (see figure 2), to help evaluate existing participatory projects and construct new ones. The ladder is divided into two broad categories of non-participation and participation. It is important to note, however, that Hart does not present these levels as being hierarchical. The level of participation chosen will depend on the children involved, the aims of participation and the situation. The aim is to make participation genuine and meaningful for children, not to reach the 'top' of the ladder. The ladder also aims to reveal tokenism, decoration and manipulation, which are all common forms of *non-participation*, which should be understood and avoided.

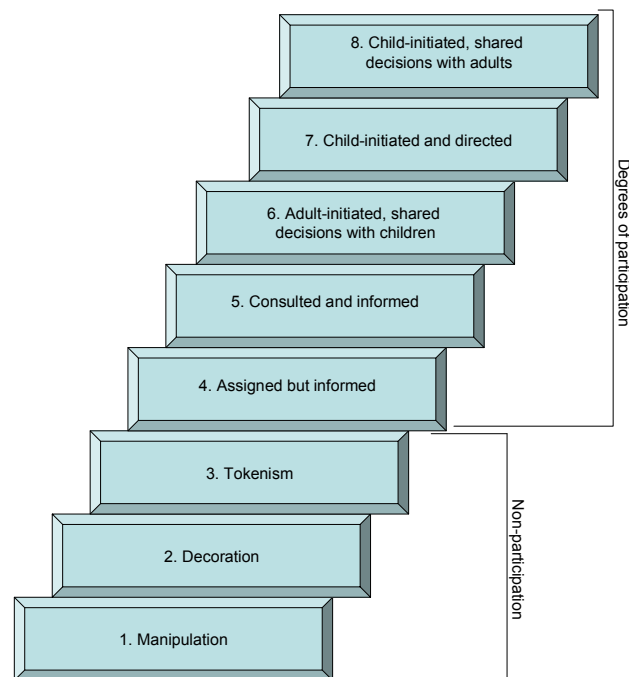


Figure 2: Hart's Ladder of Participation

In the context of child protection levels 5 and 6 of Hart's ladder are particularly interesting. Level five describes processes where children are consulted and their views are seriously considered. Level 6 however describes situations where children are *partners* in the decision making process and have equal voice to that of adults. In other words, level 6 signifies a move from an imbalanced procedure where one is the decision maker and the other can at best have an input, to an equal relationship of

mutual negotiation from the design of the process to its outcomes. Levels 7 and 8 are also useful to consider as they provide models whereby children as a group can actively initiate action.

### **Children's basic needs: the importance of empirical findings**

If a rights based approach has something useful to offer care and protection systems, where do children's needs fit? A distinction is often made between rights and needs. Needs are presented as being common to all human beings and objectively identifiable, often by professional experts (for example: a nutritionalist, a therapist) (Waldron, 2000: 120-130). Rights are more likely to be understood as 'claims made naturally in the voice of the person who in their bearer' (Waldron, 2000: 120-130). While rights and needs are often discussed as if they are opposing concepts, we suggest that this is not the case – children's rights and needs can be understood as mutually reinforcing.

While children hold a mix of self—determination, welfare and developmental rights, any children's rights discourse is inherently intertwined with a needs discourse (Feinberg 1980, Campbell 1992, Eekelaar 1992, Wolfson 1992, Minow 1995A). Basic needs identify the nature of many of children's rights. As Waldron (2000) argues, rights talk can provide an important framework to discuss human *needs* while addressing ideas of self-respect and dignity. Once a need has been diagnosed, the rights talk takes over to create an associated claim, which in turn creates an obligation by others (2000, pp. 131 – 132).

Such examination of evidence and theories on the subjective realities of children in need follows the general framework of *psychological jurisprudence* introduced by Gary Melton (1991, 1992A, Melton and Wilcox 2001). This approach calls for the integration of legal and psychological knowledge in order to better define the boundaries of individuals' fundamental rights (Melton 1991).

This exploration of evidence-based findings, Melton claims, often requires social science research. Indeed, he argues that international human rights law, and especially the UNCRC, sets the stage for the use of social studies, as it relies heavily on the

subjective experiences of people as respected human beings. The psycho-social framework then is called in to fill the human rights principles with substance, while turning the attention to specific challenges or difficulties in their implementation.

The following are some examples of findings that relate to children's participation. Several researchers have placed children's participation as one of their central needs. For example, Ochaita and Espinosa (2001, pp. 313 – 315) propose a list of 'satisfiers' for the basic needs of children, comprised of physical health and autonomy, which include active participation. The inclusion of active participation in Ochaita and Espinosa's account of satisfiers for children creates a link between what has traditionally been associated with 'self determination rights' and children's basic needs.

Other studies reveal findings that are closely linked to participation, using different terminology. For example, several studies demonstrate the importance of exerting control in controllable, yet stressful situations, for children (see Weisz and Stipek 1986, Thurber and Weisz 1997, Langer et al. 2005).

More specifically in our context, Parton's (2006) review of studies conducted about children and young people involved in child protection mechanisms in Britain shows that having control over the process, the decisions and the people they talk with are the most important issues for this population. Parton concludes that children and young people want to have opportunities to explain their individual, subjective understanding of what has happened to them and to decide what to do about it. In particular, young people regard confidentiality as central in deciding who to talk with. For example, children prefer to call anonymous help lines like Childline in Britain. Parton suggests that this gives them the ability to maintain control over what information they give and what is to be done about it.

Exploring the child-social worker relationship, Bell (2002) makes links to attachment theories. If adult—child interactions can be categorised as either supportive/companionable (SC), or dominant/submissive (DS) (Heard and Lake 1997), this can be important in understanding relationships between children and

carers in the care and protection system. Dominant/submissive patterns between a child and a social worker may reactivate feelings familiar to the child from the abuse relationship, those of powerlessness, shame and unworthiness. In Bell's study of children who have experienced child protection interventions, one of the key findings was the importance of having one social worker with whom the child has a caring, respectful relationship. When such a relationship existed, children were able to reframe their understanding of past events and many of their needs were met at that stage. The central features of supportive social workers that clearly emerged in the study were "careful listening, without trivializing or being dismissive, being taken seriously and treated with respect... good professional practice... such as regular contact and keeping appointments" (p. 8).

## **6. Children as citizens**

So then needs and rights are reinforcing and give us a new way of thinking about child protection. But what is still missing perhaps is a means of illuminating the roles children play and the responsibilities they bear. Here concepts around difference-centred citizenship can be useful – and we use them here as the third element of our partnership framework. Here, we use citizenship in the normative – rather than the formal legal – sense, whereby it signifies social membership and inclusion (Rubenstein and Adler).

Feminists have long argued for a reinterpretation of social citizenship that recognises and values a range of social service – including non-monetarised, non-militarised contributions (see Sarvasy, 1994). While much of the debate has focused on women's contribution, more recently there has been a shift towards recognising difference-centred citizenship, which has 'aimed to open up the policy making process...so that a broader spectrum of perspectives...can be heard' (Sarvey 1994: 307, see also Young 1990).

Theories of difference-centred citizenship provide a foundation for rethinking children's relationship with citizenship 'without reference to adults as a standard by which their citizenship is measured' (Moosa-Mitha, 2005: 371). Difference-centred approaches offer a way of thinking about the value of citizenship for children without

‘falling prey to the idea of children as semi-citizens, less than citizens or citizens-in-waiting’ (Bessell, 2006). What we are seeking to do here is to extend Ruth Lister’s concept of differentiated universalism to children. Differentiated universalism maintains the universal value of citizenship, while recognising that rights can be particularised to take account of the situation of specific groups.

We are suggesting that citizenship has value if applied more broadly than traditional male-centred models. But why is it valuable? Citizenship can be understood as citizenship as status, referring primarily to rights in the tradition of liberalism, or citizenship as practice, referring to the services and duties in the tradition of civic republicanism. Ruth Lister (1997) has sought to bring together these two interpretations in a critical synthesis of citizenship as status and as practice. Lister’s model enables us to reconstruct citizenship, in a normative sense, as respecting an individual’s status and human rights as a full member of a society *and* recognising and valuing their contribution to society (see Bessell, 2006).

We suggest that children’s citizenship – as outlined here – has a great deal to offer approaches to care and protection.

First, let us think about the practical implications of difference-centred citizenship. This approach is important, as it helps us to avoid thinking of children as smaller or younger versions of adults citizens and then abandoning them to that status. Difference-centred citizenship means taking account of children’s emotional, psychological and physical stage of life, thus reinforcing children’s needs and rights.

Second, citizenship as status reinforces the rights of children. This concept assists in a rethinking of the ways in which approaches to care and protection either facilitate or obstruct the entitlements that children have as a result of their status as citizens.

Finally, citizenship as practice has critical implications for the way children are perceived within care and protection systems.. When children take on responsibilities that are generally seen to be the preserve of adults, there is a tendency to ignore or undervalue those responsibilities, or to see them as incongruent with childhood. Yet, many children in the care and protection system have adopted – often from an early

age – a range of responsibilities for the well-being and care of their families, particularly their siblings (and sometimes their parents). By their very nature, situations that necessitate the State determining that a child be removed from his or her family, are often situations that have necessitated a child playing a role in their own care and protection and that of brothers and sisters. When a child enters the care system, their skills and responsibility for the provision of care are rarely formally acknowledged. The significance and maintenance of caring relationships – particularly with siblings – are rarely prioritised in a systemic way. The separation of siblings is not uncommon – often for very practical reasons around the difficulty of placing children together. Citizenship as practice would redirect our attention to the roles and responsibilities that children have played within their families. Formerly invisible roles and responsibilities would be made visible, allowing us to fully understand a child’s life in a holistic way.

### **A proposed shift in attitude: children as partners**

Finally, we will attempt to bring together children’s rights, children’s needs and children’s citizenship. What we propose here is moving from “participation” to “partnership”. Without abandoning the participation right (indeed, this is the foundation for the proposed approach), we suggest a more egalitarian terminology, one that assumes (at least) two equally respected partners.

Regarding children as partners means that processes need to be designed with the child, instead of for the child. Asking for the child’s opinion and then making a decision independent of it and without full transparency is insufficient. Despite their age, children possess unique perspectives important in making the process meet their needs and rights. Therefore, simply giving them opportunities to talk can lead to their voices being lost in the general discussion, or worse, create further frustration and stress. Instead, starting from the early stages of intervention, children and caseworkers need to engage in a partnership, in which each partner contributes according to his or her own perspective, experience and capacity, until the safety plan is implemented.

Partnership with children means that professionals value children's contribution and their understandings of their needs and wishes, even at a young age. If children’s

citizenship acknowledges their responsibilities and capacities, partnership with children in care and protection means making use of their knowledge and experiences. The Finnish Storycrafting method (Riihela 2001), where stories told by children aged 2 – 6 were written down word-by-word and then circulated across Nordic countries, demonstrates how adults can find new ways in listening to very young children and gaining knowledge about their worlds without imposing on them adult methods of communication.

Treating children as active, equally respected partners in the process does not mean that children participate in the same manner as adults, nor does it suggest that children are simply included in existing processes. To take children's lived realities seriously, it is important to consider empirical findings that suggest that children may be less experienced in group discussion, they are generally less articulate than adults, they are often not used to speaking up and making their views known – and when they do – they are often misunderstood. Children tend to regard adults, and professionals in particular, as authority figures and may find it difficult to engage in an open conversation with them. The younger the child, the greater these barriers. Therefore, to form partnerships with children in care and protection proceedings, professionals need to find ways which structurally empower children, help them overcome their weaker status and enable them to participate in adult discourse as equal stakeholders.

Following Minow's (1990) argument for 'taking the perspective of the other' and Moss and Petrie's (2002) 'otherness', it follows that only in an environment that accommodates the child's specific wishes and needs can children feel that they are listened to and fully respected. Creativity and flexibility are needed to allow for different settings and special adjustments. Communication styles, locations and methods of support may differ, and be adjusted according to the child's interests and wishes.

## **Conclusions**

What we have sought to do in this paper is to bring together several streams of recent theorising about children's place in society, which have particular relevance for the care and protection system. Rather than being an esoteric exercise, we suggest that

this is necessary to lay the foundations for a reconceptualisation of ‘the child’ within care and protection procedures. Rather than viewing children as vulnerable, needy and incompetent, children would be recognised bearers of rights who have competencies, legitimate views and experiences. Children’s right and need to protection is not discarded, but it is reinforced by the right and need to participate.

We have suggested that three concepts are particularly useful in reconceptualising children within care and protection: human rights, based on the United Nations Convention on the Rights of the Child; children’s needs; and children’s citizenship.

The UNCRC provides us with a holistic human rights framework within which to challenge and rethink the basic premises of most approaches to care and protection. A human rights framework maintains key principles that have long informed care and protection – in particular a commitment to child development, protection and best interests. However, a human rights framework brings new principles, most notably the child’s right to express his or her view on matters affecting him or her, commonly articulated as the right to participation. We suggest that the right to participation is likely to enrich the care and protection trilogy of development, protection and best interests to an extent that is impossible to achieve if children’s views are ignored. Importantly a human rights framework gives us a complex tool with which to respond to a complex and wicked problem.

As we have suggested here, a children’s needs framework reinforces, rather than collides with, a human rights framework. From this perspective, dignity, respect and having some control over one’s life are not only framed as human rights but basic human needs that are fundamental to a person’s well-being regardless of their age. Youth should not be used as a justification for the denial of basic needs. We have also tried to show that taking children’s rights seriously requires more empirical investigation into their needs and wishes. The scarcity of studies that directly seek children’s perspectives on care and protection processes is a gap that needs to be addressed.

A citizenship framework reinforces children’s human rights and basic needs through citizenship as status. Recognising children’s citizenship as practice takes us further

by focusing attention on the responsibilities and roles that many children shoulder, but which are often ignored or undervalued.

Finally, we have sought to synthesise children's human rights, basic needs and citizenship into the concept of partnership, as a means of making practical sense of complex ideas. Partnership with children is a means of redefining the relationship between children and those who hold power over them (most – and usually all – adults with whom they come into contact in the care and protection system). Partnership may provide a means of developing genuinely child-inclusive approaches to care and protection, that value children's views and experiences and engage with children on their own – rather than on adults – terms. The concept of partnership may provide a means of truly serving the best interests of the child.

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