

NEURODIVERGENCE IN FAMILY LAW: A DISCUSSION BETWEEN A JUDGE AND AN EXPERT



**THE HONOURABLE
JUSTICE TOM ALTABELLI AM**

Dr Tom Altobelli was first appointed to the family law bench in 2006 and then elevated to the Federal Circuit & Family Court of Australia (Div 1) in 2020 based in Sydney. He graduated Bachelor of Laws in 1980, Master of Laws in 1986 and Doctorate in Juridical Science in 2000. Tom also has a Graduate Diploma in Divinity and Graduate Certificate in Chaplaincy. He is an Adjunct Professor in the School of Law, Western Sydney University. Tom has authored 4 books on family law and dispute resolution as well as over 50 articles in Australian and international journals. Tom is the Vice-President of the Association of Family and Conciliation Courts (AFCC) and is Chair of the International Committee. In 2023 Tom was appointed as a Member of the Order of Australia in recognition of significant service to the law and legal education.



**STEPHANIE
LAU**

Stephanie Lau is an Educational and Developmental Psychologist, Expert Witness and Board Approved Supervisor who works in the intersection between neurodevelopmental conditions and Children's and Family Court matters. With lived experience as the child of former Chinese-Vietnamese refugees, she has a vested interest in advocating for the positive developmental outcomes of vulnerable children and families. Stephanie consults across a range of settings in an assessment, therapeutic and teaching capacity, including as a Senior Psychologist in the Specialist Autism Team at the Royal Children's Hospital, the Children's Court Clinic, and the Federal Circuit and Family Court in Melbourne, Australia. She is a family report writer in private practice at Vincent Papaleo and Associates and can be found at www.vincentpapaleoassociates.com.au and www.stephanielau.com.au.

Interview

Stephanie, thank you for agreeing to have this conversation with me about neurodivergence in family law. I believe it is one of the great access to justice issues of our time. My fear is that we don't know what we don't know. We talked about calling this article neurodiversity in family law and neuroaffirming approaches in family law practice. Could we start please by exploring the difference? You mentioned to me that it has something to do with the medical model, as opposed to the social model of neurodiversity. Please explain briefly how is this relevant to those in family law practice?

Tom, it is a pleasure to discuss this incredibly important topic with you. The terms 'neurodiversity' and 'neurodivergence' have been well integrated into popular culture and our social discourse. We have a shared language, affording us the opportunity to explore and discuss how each of our brains have strengths, preferences and differences.

Neurodivergence relates to a particular 'neurotype' of brain development, inclusive of conditions in the *Diagnostic and Statistical Manual of Psychiatric Disorders – Fifth Edition* ('DSM-5'), such as autism, attention and learning difficulties, and cognitive and speech/language differences. These conditions are heterogeneous—that is, *there is no 'one size fits all'*.

Neurodiversity refers to the idea that all humans present with inherent differences in our brains and how they function.

The **medical model of disability** has traditionally adopted a deficits approach to what might be seen as typical vs atypical. Treatment and intervention has centered on/around a person's 'deficits' when assessing a person's functional capacity. The **social model of disability** challenges this approach by necessitating inclusive practices to support the community participation of individuals living with a disability. It views disability as the interaction between people living with impairments and barriers in the physical, attitudinal, communication, and social environments.

Rather than viewing differences as *deficits*, a **neuroaffirming approach** necessitates inclusive practices to mitigate barriers to accessibility and community participation, so that all individuals (regardless of their neurotype) can actively contribute in society and live healthy, happy lives. This approach requires us to critically assess and adapt how we view the world and disability from a neurotypical lens and consider how this has been deleterious to the wellbeing and functional capacity of neurodivergent individuals.

There has been a substantial increase in the diagnosis of neurodevelopmental conditions globally. Increasingly, we are seeing neurodivergent children and adults present in Family Court matters: these matters are often highly complex, fraught and present significant overlap with other complex social issues. These cases are anxiety inducing for families and professionals and there is often uncertainty about how to best navigate and support this vulnerable population.

There is a need for professionals working within the Family Court to understand how to support children and families where someone may present with neurodevelopmental differences, as the likelihood of this will be high and will continue to increase.

It sounds to me as if the social model is more relevant to practising family lawyers. Let's have a conversation about practical issues, but just before we do so, I think we need to zoom out somewhat and gain a broader understanding of what neurodivergence is, and why this has become so visible in society in recent years. Can you help us understand this please?

There are several contributing factors that have led to an increase in the visibility of developmental conditions. Firstly, there is a greater understanding amongst medical, educational and allied health professionals regarding the heterogeneity of

neurodevelopmental conditions. There have been continued changes to the diagnostic criteria which has required professionals to adapt how we conceptualise and assess neurodevelopmental conditions.

Secondly, there has been a much needed and welcome movement towards the destigmatisation of disability and mental health. Community discourse has adapted to include both 'visible' and 'invisible' presentations of disability. These changing societal attitudes are embracing neurotypes that differ from traditional social norms. Social media, popular culture and progressive young people have been part of that shift.

On a structural level, there have been policy reforms such as early intervention funding for children with developmental delays, the introduction of the National Disability Insurance Scheme (NDIS), and changes to funding in public education.

Our neurodivergent peers require our support to create neuroaffirming, emotionally and psychologically safe spaces. It is about adapting our approach to be flexible to the needs of neurodivergent children and families in order to respond to their psychological, social and physical needs. When I reflect on what has been helpful, curiosity and empathy has been key. I do this by asking simple questions such as, 'What do you need?', 'What can I do to help?' We need to demonstrate genuine curiosity and care; we need to look to our clients and respect that they are the experts on their own individual experiences and lives. It is important that we create psychological safety and space for people to have difficult conversations where they can be vulnerable and authentic.

Stephanie, do we know much about prevalence in Australia? Are we more likely to see neurodivergence in family law? Am I correct in thinking that a lot of 'masking' goes on i.e. neurodiverse people are not necessarily open

about this? Indeed, isn't it possible that even not masked it is not discerned by family law professionals including judges?

According to the Australian Bureau of Statistics, in 2022, there were 290,900 (1.1%) Autistic Australians, a 41.8% increase from the 205,200 (0.8%) Autistic Australians in 2018. Autism prevalence was higher for males (1.6%) than females (0.7%). Autism prevalence was higher for people aged under 25 years (3.1%) than people aged 25 years and over (0.3%); 4.3% of people aged 5–14 years were autistic, up from 3.2% in 2018. Almost three quarters (73.0%) of Autistic people had a profound or severe disability.¹ Approximately one in ten children in Australia meet criteria for a neurodevelopmental disorder. The most common of these are Autism, Attention Deficit Hyperactivity Disorder, Cerebral Palsy, and Tourette's Syndrome. Over 80% of these children will meet criteria for multiple diagnoses, and there is a high degree of comorbidity between these conditions.²

There is likely to be underreporting in these statistics and prevalence has generally increased over time. The likelihood of us working amongst neurodivergent colleagues and clients is therefore high and, on this basis, I envisage that we are absolutely more likely to see neurodivergence in family law.

The concept of 'masking' is a controversial one. **Autistic masking**, also known as **camouflaging**, refers to the conscious or unconscious efforts by neurodivergent individuals to hide or suppress social communication differences and behaviours to fit in with neurotypical societal norms or expectations. This can include the suppression of repetitive behaviours such as self-regulatory behaviours (i.e. flapping, stimming) and adopting verbal and non-verbal behaviours to mimic neurotypical social communication patterns (i.e., maintaining eye

1 Autism in Australia, 2022, Australian Bureau of Statistics, <https://www.abs.gov.au/articles/autism-australia-2022,11/10/2024>.

2 'Game changing national summit for children with neurodevelopment disorders', Sydney University, <https://www.sydney.edu.au/brain-mind/news-and-events/news/game-changing-national-summit-for-children-with-neuro-development.html#:~:text=Approximately%20one%20in%20ten%20children,meet%20criteria%20for%20multiple%20diagnoses>.

contact even though it may be uncomfortable; engaging in conversation using social scripts).

This is both adaptive and maladaptive: in order to *fit in*, neurodivergent individuals have been expected to repress parts of themselves deemed by society as atypical to avoid judgement and social ostracisation.

We now acknowledge that masking is detrimental to neurodivergent individuals: it is physically and emotionally taxing when one is required to conceal parts of themselves or their 'true self'. There have been incongruencies and perhaps underlying pejorative attitudes in how society genuinely perceives, embraces and accepts difference, and the value of our neurodivergent peers.

An affirming approach is necessary to facilitate the development of professional spaces and environments which are authentically inclusive of neurodivergent social, communication and behavioural differences. It is important that as a society, we re-conceptualise that *difference does not equal deficiency or inferiority*.

Children and their safety are the central focus of family law. Stephanie I know about your passion for neurodivergent children and ameliorating their experience of the family law system. I want to give you the opportunity to say a few things about this.

Thank you for acknowledging this, Tom. We have a duty as professionals (and mere mortals) to do no harm and protect the most vulnerable. Children, particularly neurodivergent children, require our continued protection and advocacy.

Children are at the mercy of the systems they are born into: they can only grow as much as their immediate environment can nurture and as much as their caregivers can protect, advocate and attune to their needs.

When children are exposed to adverse events—such as family violence, poor parental mental health, displacement or interparental conflict—they are at risk of cumulative harm, neglect in multiple forms and toxic stress. This has immediate and long-term implications for a child's developmental trajectory, physical and mental health, social-emotional growth and academic achievement.³

Co-parenting complexities encountered through the family law system are unpleasant but often avoidable and not insurmountable. While family law matters are challenging for caregivers, the child's experience of the dissolution of a family unit and their parents' relationship should always be paramount.

When caregivers are in situations of high stress, this undoubtedly has direct implications on their parenting capacity and ability to prioritise and meet their children's care, developmental and social-emotional needs. It is known that children with developmental differences require greater time, physical, financial and emotional resources; it is therefore critical that caregivers continue to support each other, as this will be central to the child's developmental trajectory, as well as the well-being of each caregiver.

So let's take the first practice issue: how does a family lawyer know they have a neurodivergent client? How then does one take instructions and prepare correspondence and affidavits for neurodivergent clients? You have mentioned to me about the importance of environmental considerations with these clients. Please explain that and how that is relevant in this context?

The way we relate to one another is through both spoken and unspoken forms of communication—everything we do as humans in our adaptive functioning is social. This begs the question: what does the world look like for an individual with cognitive, language, and social communication differences?

³ ACEs and Toxic Stress: Frequently Asked Questions (2024), <https://developingchild.harvard.edu/resources/aces-and-toxic-stress-frequently-asked-questions/>

For example, you may have a client who presents with attention and language differences. They may struggle to follow instructions due to comprehension and working memory difficulties. They may be distracted by external stimuli in the environment, as well as internal distractions, such as repetitive thoughts and their own preoccupations. They may have difficulty with remaining seated during a one-hour meeting, seek movement and appear disengaged.

How do we support their participation in the family law context? If we expect them to conform to neurotypical social norms, are we doing them a disservice, and is that a fair and equitable experience of the legal system? What then, is their experience of the Family Court?

What I'm hearing is that effective communication is critical—with all clients of course, but particularly with neurodivergent clients. So, what practical strategies could family lawyers use in this context, especially to ensure that the client has both been understood, and affirmed, as well as understands the advice that has been given?

We want to encourage clients to express their genuine thoughts, feelings and needs by building trust. We want to create space for vulnerability: we can do this through reassurance, maintaining calm and checking in; however, in order to do so, we need to operate in psychologically safe workplaces to model a culture of healthy communication amongst our peers—we must lead by example.

Adopting a neuroaffirming approach does not need to be burdensome, however, it requires consideration and planning. Regarding strategies, multi-modal methods of information dissemination are important, such as, visual and verbal modes of information sharing. Use

plain and simple language and minimise the use of abstract and metaphorical language. Use visual/concrete measures to manage time (i.e., visual schedules, timers) and limit the length of long appointments. It is important to check for comprehension—this responsibility sits with us.

Environmental accommodations can include the provision of a quiet room with minimal distractions and visual stimuli, low lighting, using simple concrete language, and creating structure and predictability.

Does this mean that a family lawyer's communication with a third party such as the court, or another lawyer, on behalf of a neurodivergent client would be different, and if so how? Indeed, should the court be advised as early as possible about the needs of a neurodivergent client?

I hope Family Court processes continue to evolve and that there is a consistent approach to understanding the strengths and differences of each family. For this to be possible, the court needs to be made aware of a child and family's neurodevelopmental needs as soon as is practicable. Such information needs to be communicated in a timely manner so that the court can allocate appropriate time and resources to make reasonable adjustments.

In saying this, I am cognisant of the limitations of the court and judicial staff: the needs and functional capacity of each child or adult will vary greatly and these considerations will require time and collaboration between judicial staff, family lawyers, and professionals involved in each family's care.

Inclusive adaptations to support neurodivergent individuals are not meant to be burdensome, and my hope is that over time, neuroaffirming practices will become the 'new normal'. This is necessary and will be beneficial to all children, families and professionals in the Family Court.

Evidence in court is given in the form of an affidavit, and then for those few cases that go to hearing, there is cross-examination. What needs to be considered in this context?

Submitting evidence, whether in the form of an affidavit or in person via cross-examination is without question, a highly stressful process. Clients are required to recount distressing experiences and traumatic events; this can include content pertaining to criminal offences and safety risks. We ask clients to dredge up painful memories and experiences, often unresolved, both historical and/or present.

This places vulnerable children and families at risk of further harm and re-traumatisation, particularly if they do not have adequate emotional/psychological resources, or professional/personal supports.. This would be challenging for any child and family without the overlay of neurodivergence and poor mental health.

We know that stress, even mild acute stressors, can be detrimental to our brain and our body's capacity to remain regulated. Stress activates the body's sympathetic nervous system, resulting in physiological stress symptoms and the release of cortisol, which has been linked to alterations in executive control functions and impaired cognitive flexibility. We know that there are structural impairments to the prefrontal cortex and this presents direct consequences on our cognitive capacity, such as our problem solving, ability to access language, communicate our needs and regulate our emotions.

The process of submitting an affidavit and/or cross-examination presents a multitude of additional stressors and barriers for neurodivergent individuals. The experience of recounting distressing events in an unfamiliar social context will be challenging and present unique complexities for each client. There needs to be greater cross-sector collaboration between clinicians involved in a family's care (such as psychologists, social workers) and family law professionals where possible; the presence of an existing therapeutic relationship will assist clients to better engage. In addition, professionals involved in a mutual client's care may have relevant information and can assist by providing scaffolding and structure, increasing the likelihood of obtaining a more detailed and accurate narrative. This will reduce duplication and mitigate further harm to clients by minimising the need to re-live traumatic experiences. Similarly, with regards to cross-examination, it is important for clients to have access to professionals in their care team who understand their needs, can provide therapeutic support and assist the court when clients cannot engage under high stress.

Stephanie, what you are saying is very important for all judicial officers who assess evidence. I am hearing the need for not just awareness, but continuous training.

Family Court decisions have direct implications on the future outcomes of vulnerable individuals and communities that can change the trajectory of children's and families' lives. The judiciary holds an important role in influencing societal attitudes, community confidence and expectations in and around matters of intersectionality, such as how we view and value disability, mental health and the rights of children and families. With such privilege and authority comes responsibility to ensure that we facilitate change that is inclusive and fair. There is a responsibility for the judiciary to promote and establish systems and structures in society that is inclusive and celebrates diversity in all forms.

This evolution in family law begins with us: there is a duty of care to do no harm by ensuring that we engage in regular professional development. We need to understand the judicial experience from the lens of neurodivergent clients if we are to successfully implement accommodations that are genuine and meaningful.

Let's move away for a moment from the neurodivergent child and client to the neurodivergent lawyer. What about working constructively and collaboratively with neurodivergent family law professionals such as lawyers? Any suggestions?

We need to champion vulnerable and sensitive conversations around diversity (both visible and invisible) by creating psychologically safe workplaces. We have a moral duty to model healthy relationships amongst our esteemed peers. We cannot authentically practice neuroaffirming approaches with clients if we cannot be an example of this within our own profession.

It is important that a culture of psychological safety is cultivated to encourage legal professionals to share personal vulnerabilities in the workplace: this should include honest conversations around mental health, personal stressors and neurodivergence.

My view is that when we go to work, we bring all parts of ourselves—warts and all. It is impossible to separate the 'personal self' from the 'professional self'.

There is a bilateral relationship between our personal and professional identities and both will have direct outcomes on the quality of our professional practice and the quality of our relationships.

We each have a personal responsibility in how we conduct ourselves and contribute to culturally

safe workplaces that support honest and open conversations about our personal vulnerabilities. It is important that we examine our expectations and adapt how we communicate and engage with one another.

I hope that we can be allies to our neurodivergent colleagues by showing care, compassion and flexibility. We must acknowledge that they are operating within the social mores of a neurotypical world when they have social communication, thinking styles, interests and behavioural preferences which may not align with what we are familiar with. Understandably, these differences may at times cause distress, which will likely have negative implications for their wellbeing, professional practice and sense of psychological safety. However, these inherent differences should be respected and championed—the lived experiences of neurodivergent lawyers working in this space will provide the court a unique experience when working with neurodivergent families.

Stephanie, I'm worried about the risks of failing to identify neurodivergence in the courtroom and the procedural and substantive unfairness that may flow from that. Is there such a thing as judicial best practice for facilitating evidence by neurodivergent witnesses and to having a neuroaffirming courtroom? Any thoughts?

The judicial system is geared towards well-resourced neurotypical native language speakers, who are educated, cognitively able and have sound social, emotional and psychological skills to manage under high-stress situations. These pressures can be extremely unsettling for most, let alone neurodivergent clients with intellectual, language and social-emotional processing differences. Witnesses cannot be expected to express themselves coherently or be of any assistance to the court if they are in a hyperaroused state. We want the court to be inclusive and affirming of individual differences and these adaptations need not be burdensome to be effective.

For example, before court proceedings, information about the structure of the day, the setting, and schedule could be shared with clients. Avoid ad hoc changes to scheduling, as spontaneous changes may lead to apprehension and distress. Concrete measures of time and information should be readily accessible in addition to forewarning about transitions (i.e., provide sufficient warnings before physical movements and prior to starting or ending sessions)—structure and predictability will reduce anxiety and create a sense of safety.

Multimodal resources (i.e., visual schedules, images of the courtroom, or a video of proceedings) may be helpful. A **social story**, that is a standardised script and images specific to legal processes and the setting, could form part of a bank of resources provided to clients.

Relevant documentation such as assessment and diagnostic reports will provide the court critical information about a child and adult's adaptive functioning, their cognitive abilities and speech or language level. For example, the results of a cognitive assessment (that is, an IQ test) will speak to an individual's verbal comprehension, problem-solving skills, memory and information processing speed. Speech/language assessments will provide insight into an individual's receptive language capacity (that is, their comprehension of both written and spoken language) versus their expressive language skills (their ability to express their thoughts and feelings). These developmental strengths and differences will have profound implications for how a child and adult engages in court proceedings and how the court may wish to consider their future outcomes.

Neuroaffirming accommodations for witnesses could include environmental adaptations, such as the creation of new spaces like separate waiting areas and

interview rooms. This will make it easier to manage sensory-specific modifications to the physical environment, like softer, natural lighting to manage light sensitivity, controlling unexpected sound and movement which may cause distress and/or distraction.

Managing interruptions (including announcements and minimising legal theatrics) while a neurodivergent client is giving evidence may also be necessary to prevent disrupting their train of thought, which may cause mental disorganisation, dysregulation and anxiety.

Access to sensory-soothing materials (like movement cushions or fidget materials) may help individuals regulate themselves physiologically and mentally. Movement breaks (for example, adjournments at regular intervals) may support neurodivergent witnesses to remain regulated. Movement-seeking behaviours should not be penalised; oftentimes, neurodivergent individuals will seek movement whilst also maintaining focused attention. Simple language delivered in a calm tone and volume is critical.

Lastly, social communication differences (such as averting gaze or seeking movement) should not be interpreted as a reflection of disinterest, disrespect or nonchalance. Rather, it is important for us to reinterpret these social communication differences: this may instead indicate a stress or anxiety response and attempts to self-soothe. In such circumstances, regular breaks are advisable to provide clients the opportunity to remain calm and regulated.

Stephanie, evidence about neurodiversity, whether of an adult party, or a child, can only be given by a treater (who hopefully has expertise) or an independent expert. Three things come to mind:

finding the right expert, and cost, and timeliness of this evidence. Any suggestions about these issues? For example, is there such a thing as a rapid or short-form neurodiversity assessment?

Neurodevelopmental assessments are a niche area of paediatric, psychological and psychiatric practice. Quality assessments include the examination of an individual's development across the lifespan which requires substantial time, cost and collaboration. This requires nuance, flexibility and adaptation to a child/adult's individual differences and the complexities that present for both intact and separated families.

There are challenges in this space due to inconsistent approaches to assessment, diagnosis and treatment. There are complex diagnostic considerations that must be disentangled by seeking detailed collateral information by caregivers, health and education professionals, in addition to direct clinical assessment and observation of a child or an adult. A quality neurodevelopmental assessment will include a comprehensive developmental history; however, this is not without its challenges, such as: caregiver availability, reliability of retrospective reports and the considerable amount of time and limited resources available to private practitioners working in the community. Each professional is also constrained by their own clinical expertise: a best practice assessment relies on sound clinical judgment and experience which requires years of training and clinical practice. The impact of developmental trauma in addition to an individual's adaptive and intellectual functioning must be considered and often requires additional assessment which may not be accessible and/or possible due to cost and time.

The consequence of a poor-quality assessment may result in diagnostic inaccuracies (i.e., missed, wrong or delayed diagnosis), which may present implications for children and families, such as delaying supports and missed opportunities for early intervention.

A poor-quality assessment lacks sensitivity, specificity and omits pertinent details regarding an individual's early developmental experiences, such as history regarding developmental milestones, early relational experiences and attachment. Childhood trauma and disrupted attachments can result in social-emotional differences which may appear similar to neurodevelopmental differences.

Due to long waitlists, some clinicians may conduct a 'single clinician diagnosis' to fast track a neurodivergent child's access to funding and supports where their presentation is clear. However, this diagnostic approach relies on a highly experienced clinician, who can consider differential diagnoses and complete a robust assessment independently. For some complex children and families this may not be appropriate, as they require the supports of a comprehensive multidisciplinary team in a wraparound service (such as a tertiary hospital), where resources, time and multiple professionals (i.e., paediatrician, psychologist, psychiatrist, speech therapists) are available to provide best practice assessment and short-term therapeutic support.

My approach to developmental concerns for children in Family and Children's Court matters is simple: neurodivergent children and families are a vulnerable population—they require advocacy and their needs must be prioritised. The developmental needs of neurodivergent children must be prioritised—there are sensitive and critical periods for children to acquire specific developmental skills and early intervention is key to future proofing a child's trajectory.

In my reports, I provide advice tailored to a child's short and long-term developmental priorities. Depending on the context and nature of the referral, informal or formal assessments are conducted: these outcomes assist with planning and recommendations regarding a child's global

development. Where there is undiagnosed or possible neurodivergence, I provide direction regarding further assessment and short-term goals for caregivers and the court. It is important that the court receives guidance regarding both immediate and long-term priorities for a child, so that decisions can be made to prioritise their optimal development. This will assist the court in understanding the level of care a child is likely to require, their developmental trajectory, and help balance expectations for caregivers, ultimately supporting the court in making decisions about parenting capacity and the ability to meet the needs of a vulnerable child.

Just thinking out loud now Stephanie.... maybe if a judicial officer declines an application for an assessment this could be an error of law. Family law professionals might have a look at a decision of the English Court of Appeal in *Re E (A Child)(Care & Placement Orders)* [2024] 1 FLR 47.

Stephanie, any last suggestions or thoughts?

Managing parenting stress is critical for the wellbeing of all children and is challenging even in the absence of navigating a family law dispute. I encourage family law professionals to refer families to suitably qualified professionals to seek information and therapeutic support for themselves. We want to minimise the impact of interparental conflict on children and encourage role modelling around good mental health. There are many great resources available to families and professionals, such as [The Raising Children's Network](#) and [Royal Children's Hospital](#). Information is power and this will help alleviate anxiety for professionals and parents.

I encourage family law professionals to be vulnerable, curious and seek professional supervision and peer support. It is important that we can acknowledge limitations in our knowledge base and professional practice. By seeking

guidance, we will be better placed to support vulnerable children and families so that they can avoid the complexities of the Family Court.

Lastly, consistent self-care, self-compassion and professional boundaries are critical for the longevity and wellbeing of all family law professionals. We need to be well-regulated in order to hold space for vulnerable families who are in high conflict. A healthy workforce is key to a sustainable profession which will ultimately present better outcomes for families. While there is room for improvement in how we embrace diversity and neurodivergence in family law, I am hopeful that these discussions are moving us in the right direction. ●