



Australian Government  
Family Law Council

# Support for children and young people (children) and strengthening their voices

Family Law Council Report TOR2, 2024

ISBN: 978-1-921357-40-4 (on-line)

© Commonwealth of Australia 2025

With the exception of the Coat of Arms and where otherwise stated, all material presented in this publication is provided under a Creative Commons Attribution 4.0 International licence

([www.creativecommons.org/licenses](http://www.creativecommons.org/licenses)).

For the avoidance of doubt, this means this licence only applies to material as set out in this document.



The details of the relevant licence conditions are available on the Creative Commons website as is the full legal code for the CC BY 4.0 licence ([www.creativecommons.org/licenses](http://www.creativecommons.org/licenses)).

#### **Use of the Coat of Arms**

The terms under which the Coat of Arms can be used are detailed on the Department of the Prime Minister and Cabinet website ([www.pmc.gov.au/government/commonwealth-coat-arms](http://www.pmc.gov.au/government/commonwealth-coat-arms)).

## The Family Law Council

The Family Law Council is established by appointments made by the Attorney-General under section 115 of the *Family Law Act 1975* (Cth) (*'Family Law Act'*). Its functions are set out in subsection 115(3) of the Act, as follows:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

On 13 September 2022 the Attorney-General, the Hon Mark Dreyfus KC MP, endorsed the current terms of reference and requested the Family Law Council consider and provide recommendations on specific matters. A list of current Council members is provided at **Appendix A**. The Council is due to provide advice on the below terms of reference on or before 2 December 2024.

## Term of Reference

This report is provided pursuant to the following term of reference:

*Recognising the benefits of a family law system that actively supports the safety and wellbeing of children and provides them with opportunities to be accurately heard in terms of achieving safe outcomes that promote their best interests.*

*Also acknowledging children's rights under Article 12 of the UN Convention on the Rights of the Child to be heard in any judicial and administrative proceedings affecting them. The Council will consider:*

- a. *How best to support children to participate in family law processes and freely express their views and be accurately heard, including children who may be affected by trauma due to circumstances of family violence, abuse or neglect. Including consideration of:*
  - *Ways to enhance the capacity of professionals, such as Independent Children's Lawyers, Court Child Experts, family report writers, judicial officers and Family Dispute Resolution Practitioners to support children to participate in family law processes.*
  - *Ensuring that children are given an opportunity to express their views and be accurately heard whenever appropriate, including when the court is hearing contravention matters, and for those views to be given due weight and consideration by decision-makers.*
- b. *How to ensure that children, including those who are not independently or separately represented, are informed about family law processes (including court proceedings) concerning their best interests and the outcomes of those processes.*
- c. *Ways to improve the therapeutic support available for children and their families going through family separation and how the family law system could better facilitate children and their families' access to appropriate and timely support.*
- d. *Ways to improve the drafting of parenting orders and parenting plans in addressing the changing developmental needs and views of children.*
- e. *Ways to identify and address final parenting orders and parenting plans that no longer meet the children's best interests or developmental needs.*



# Contents

<b>TERMS OF REFERENCE</b>	<b>iii</b>
The Family Law Council	iii
Term of Reference	iii
<b>ABBREVIATIONS</b>	<b>3</b>
<b>EXECUTIVE SUMMARY</b>	<b>7</b>
<b>1. Introduction</b>	<b>9</b>
<b>2. Current international structures and frameworks relevant to the participation of children and young people</b>	<b>11</b>
2.1 United Nations Convention on the Rights of the Child	11
2.2 Children’s right to <i>meaningfully</i> participate	12
2.3 Interpretation of the Convention in Australian law	13
<b>3. Current Australian policy frameworks and principles relevant to the participation of children and young people</b>	<b>17</b>
<b>4. Current Australian legal frameworks relevant to the participation of children and young people</b>	<b>19</b>
4.1 How the Australian system currently operates in practice	21
4.1.1 Role of Court Child Experts	21
4.1.2 Role of the Independent Children’s Lawyer (ICL)	22
4.1.3 ‘Other means as the court thinks appropriate’ – including meetings between judicial officers and the relevant child/young person	26
4.2 Judicial approach to considering views of the child	26
<b>5. What do children and young people say that they need?</b>	<b>28</b>
5.1 The provision of child safe information to children and young people	31
<b>6. Relevant research, commentary and case law: ‘Protection through participation’</b>	<b>33</b>
<b>7. Securing children and young people’s participatory rights</b>	<b>40</b>
7.1 Potential developments to participation approaches – participatory models considered by Council	42
7.1.1 Participatory models considered by Council	44
<b>8. Placing a greater emphasis on the rights of the child</b>	<b>52</b>

<b>9. Practical considerations for how to take account of voices during proceedings</b>	<b>53</b>
<b>9.1 Enhancing the existing role of ICLs</b>	<b>53</b>
9.1.1 When should an ICL be appointed?	53
<b>9.2 Does the involvement of an ICL lead to better outcomes for children and young people?</b>	<b>55</b>
<b>9.3 The funding and “demographics” of ICLs</b>	<b>55</b>
<b>9.4 Competence</b>	<b>56</b>
<b>9.5 Issues to be addressed in the proposed model</b>	<b>58</b>
<b>9.6 Training and development of ICLs</b>	<b>59</b>
<b>9.7 The requirement that an ICL meet with the relevant child</b>	<b>59</b>
<b>9.8 Establishment of a Children’s and Young People’s Advisory Board</b>	<b>60</b>
<b>9.9 Measures to support participation that are designed with children and young people and to address their post separation needs</b>	<b>63</b>
<b>10. Utilising direct representation as an option when appropriate</b>	<b>64</b>
<b>11. Supporting the participatory rights of Aboriginal and/or Torres Strait Islander children and young people</b>	<b>68</b>
<b>12. Supporting research and evaluation</b>	<b>72</b>
<b>13. Ways to identify and address final parenting orders and parenting plans that no longer meet the children’s best interests or developmental needs</b>	<b>73</b>
<b>14. Ways to improve the drafting of parenting orders and parenting plans in addressing the changing developmental needs and views of children</b>	<b>74</b>
<b>CONCLUSION</b>	<b>75</b>
<b>BIBLIOGRAPHY</b>	<b>76</b>
<b>Appendix A: List of Council Members</b>	<b>87</b>
<b>Appendix B: Council’s Letter of Advice, July 2022</b>	<b>88</b>
<b>Appendix C: Demographics of participants in Family Law Council Stakeholder Survey</b>	<b>92</b>
<b>Appendix D: List of stakeholders consulted, and further explanation of Youth Consultation session</b>	<b>93</b>

## ABBREVIATIONS

<b>ABA</b>	American Bar Association
<b>ACCO</b>	Aboriginal Community-Controlled Organisation
<b>ADR</b>	Alternative dispute resolution
<b>AIFS</b>	Australian Institute of Family Studies
<b>ALRC</b>	Australian Law Reform Commission
<b>ALS NSW</b>	Aboriginal Legal Service (NSW/ACT)
<b>The Amendment Act</b>	Family Law Amendment Act 2023 (Cth)
<b>ATSILS</b>	Aboriginal and Torres Strait Islander Legal Service
<b>CCEs</b>	Court Child Experts
<b>CAFCASS</b>	Children and Family Court Advisory and Support Service (UK)
<b>CALD</b>	Culturally and linguistically diverse
<b>Coalition of the Peaks</b>	Coalition of Aboriginal and Torres Strait Islander Peak Organisations
<b>the Council</b>	Family Law Council
<b>the Convention</b>	United Nations Convention on the Rights of the Child
<b><i>Family Law Act</i></b>	<i>Family Law Act 1975</i> (Cth)
<b>FCFCOA</b>	Federal Circuit and Family Court of Australia
<b>FCWA</b>	Family Court of Western Australia
<b>FDR</b>	Family dispute resolution
<b>FDSV</b>	Family, domestic and sexual violence
<b>FJYPB</b>	Family Justice Young People’s Board (UK)
<b>FRC</b>	Family Relationship Centres
<b>ICL</b>	Independent Children’s Lawyer
<b>IPV</b>	Intimate partner violence
<b>LAC</b>	Legal Aid Commission
<b>LMS</b>	Learning Management System

<b>Mundy Report</b>	<i>Independent Review of the National Legal Assistance Partnership Final Report</i> by Dr Warren Mundy
<b>National Agreement</b>	National Agreement on Closing the Gap 2020-2030
<b>National Framework</b>	<i>Safe and Supported: The National Framework for Protecting Australia's Children 2021-2031</i>
<b>NATSILS</b>	National Aboriginal and Torres Strait Islander Legal Services
<b>NLA</b>	National Legal Aid
<b>RAV</b>	Relationships Australia Victoria
<b>UN</b>	United Nations
<b>UNCRC</b>	United Nations Committee on the Rights of the Child
<b>UNICEF</b>	United Nations Children's Fund
<b>VoC</b>	Voice of the Child (NZ)
<b>YPFLAG</b>	Young Peoples Family Law Advisory Group (South Australia)

## EXECUTIVE SUMMARY

The Attorney-General, the Hon Mark Dreyfus KC MP, has requested the Family Law Council provide advice aiming to improve support for children and young people in accessing appropriate support services and participating in the family law system. The report outlines the history and current understandings of the application in laws, policy and practice of children's rights, including Article 12 of the *UN Convention on the Rights of the Child*.

Council is asked to consider whether children's rights are being respected and supported in Australia's family law system and make recommendations for improvements.

The report emphasises that it is no longer acceptable, if it ever was, for children and young people to be "*passive objects of more or less paternalistic parental or judicial... decision-making*".<sup>1</sup> Children and young people should have agency in decisions that are made about them after their parents separate.

The reflection of those rights, and the exercise of that agency, cannot be achieved by a singular step in the decision-making process. We recommend that children and young people are able to access information about how decisions relevant to them will be made, and are provided the opportunities to have input into those decisions. As the decision-making process unfolds, they must be kept informed in a manner suited to their individual circumstances and maturity, and mindful of their psychological and emotional wellbeing. Once decisions are made, they must be informed of those decisions in the same manner.

It is important to note that this report and these recommendations provide the foundation for improved support and participation of children and young people in family law processes affecting them. The recommendations seek to ensure that improved therapeutic supports are provided for children and young people and that the 'voices' of children and young people are appropriately facilitated at every stage and in every part of the family law system.

These recommendations should be regarded as a unifying theme that intersects across the measures recommended in all *2024 Family Law Council Terms of Reference Reports*<sup>2</sup> by ensuring that the voice of the child is heard in all areas and at all stages of the broader family law system.

Council's terms of reference recognise that children and young people have rights. In consideration of whether those rights are being respected and supported in Australia's family law system, and to make recommendations for improvement, Council provides these recommendations:

### **Recommendation 1:**

Council recommends that the 2023 amendments to s 68LA of the *Family Law Act 1975* (Cth) that are directed to ensuring that, other than in exceptional circumstances, 'children must be provided with an opportunity to express their views before final parenting orders are made' be extended to apply to all parenting proceedings, whether or not an Independent Children's Lawyer is appointed.

### **Recommendation 2:**

The option of a judicial officer meeting a child in chambers should remain available.

### **Recommendation 3:**

The Attorney-General's Department consult with stakeholders with a view to developing guidelines for judicial officers meeting with children and young people including the circumstances where a meeting may take place, the purpose of such a meeting, procedural fairness requirements and circumstances where it may not be appropriate to meet a child or young person, including the child's/young person's views about a meeting.

<sup>1</sup> *CF v Secretary of State for the Home Department* [2004] 2 FLR 517, 578 [158] ('CF').

<sup>2</sup> See Family Law Council, *Family Violence and Systems Abuse Report* (Report, Term of Reference 1a and 1b, 2024); Family Law Council, *Family Violence and the Hague Convention Report* (Report, Term of Reference 1c, 2024); Family Law Council, *Access to Justice Report* (Report, Term of Reference 3, 2024).

#### **Recommendation 4:**

That Government commission the development of a website (and associated social media content) specifically for children and young people to explain their rights in family law matters in child-friendly language.

- The website (and any associated social media content) should clearly explain the decision-making process after parents separate providing information about what the law says about decisions about children and young people and how they can participate in the process.
- The website should be designed with different ages of children in mind, explaining children and young people's rights, not just in the family law context but in relation to a range of laws that affect them.
- Children and young people, including from the Children and Young People's Advisory Board when established (Recommendation 11), should be consulted about the development and content of the website.
- Child-friendly documents that have been produced by a range of relevant organisations in Australia and overseas should be used to inform the website content.

#### **Recommendation 5:**

That Government commission the development of a children's and young persons' information and education package about the family law system, **co-designed** with children and young people, that can be accessed and used wherever they are, including but not limited to schools, sports clubs, and other places for children and young people, such as youth detention centres.

#### **Recommendation 6:**

That s 69ZN of the *Family Law Act 1975* (Cth) be amended to include, as an additional principle for conducting child-related proceedings, the following:

*The second principle is that the court is to consider the needs of the child concerned to be informed as to the decision-making process, to have the opportunity to express any views in relation to the matters to which the proceedings relate, and to receive an age-appropriate and culturally appropriate explanation of parenting orders made and the reasons for them.*

#### **Recommendation 7:**

That s 60D (1) of the *Family Law Act 1975* (Cth) be amended to insert the following as an obligation of those providing advice and assistance in matters relating to children –

- (c) advise and assist in a manner consistent with the principles for the conduct of child related proceedings set out in s 69ZN.

#### **Recommendation 8:**

That enhanced financial resources be provided to family relationship services and Legal Aid Commissions to provide child inclusive mediation.

### **Recommendation 9:**

That the *Family Law Act 1975* (Cth) be amended as follows:

1. Amend paragraph 43(1)(c) to read:

“the need to promote and protect the rights of children;”

2. Insert a new paragraph directly below paragraph 43(1)(c) which reads:

“the need to promote and protect the welfare of children;”

3. Amend section 4 of the *Family Law Act 1975* (Cth) to include the following additional definitions:

“the rights of children” includes the rights set out in the Convention on the Rights of the Child done at New York on 20 November 1989

“the welfare of children” includes matters impacting upon their physical, emotional and psychological safety, security and well-being in the immediate, medium and longer term.

### **Recommendation 10:**

That Government facilitate the implementation of the following measures to enhance the existing role of the Independent Children’s Lawyer:

(a) provide additional funding to Legal Aid Commissions to enable the hiring of more in-house Independent Children’s Lawyers.

(b) encourage talented young lawyers to engage in employment as an in-house Independent Children’s Lawyer within Legal Aid Commissions by providing incentives such as the waiving of HECS-HELP debt on a basis that is proportionate to years of service.

### **Recommendation 11:**

That the Council’s recommendation for the establishment of a Children’s and Young Person’s Advisory Board be implemented (see Council letter of advice dated 28 July 2022 at Appendix B).

### **Recommendation 12:**

That a co-design process with children and young people be implemented to make recommendations to Government to ensure that the family law system is appropriately addressing their post-separation needs, including for psychosocial support, for advice and representation, and to facilitate safe and effective options to participate in post-separation decision-making including, where appropriate, through an appropriately qualified children’s advocate.

### **Recommendation 13:**

Children and young people should be informed about their options for participation in family law proceedings. The information should relate to the availability of counselling and their options for more direct participation in family law proceedings including their rights to seek legal advice or initiate proceedings.

Electronically accessible brochures and other appropriate mediums should be produced to provide this information and should be directed to at least two developmental and literacy levels of children and young people. The brochures should be provided to both the applicant and the respondent at the early stages of the proceedings to be passed along to the children and young people concerned.

***Recommendation 14:***

Council further recommends that the Attorney-General's Department prepare an electronically accessible brochure to provide information regarding options for participation and direct representation to children and young people, Independent Children's Lawyers and other family law professionals.

***Recommendation 15:***

Council is of the view that as a priority, professionals involved in delivering services to Aboriginal and/or Torres Strait Islander people as an Independent Children's Lawyer should be educated and trained in culturally safe and culturally appropriate practices, with the voices and perspectives of Aboriginal and/or Torres Strait Islander children central to the development of this education and training and that National Legal Aid be funded to develop the required mandatory training module for Independent Children's Lawyers in partnership with Aboriginal and/or Torres Strait Islander Community-Controlled Organisations.

***Recommendation 16:***

That Government invest in Aboriginal and/or Torres Strait Islander Legal Services long-term organisational capacity to play a leading role in the provisions of culturally safe services for Aboriginal and/or Torres Strait Islander children and young people in the family law system including as the Independent Children's Lawyer.

***Recommendation 17:***

That Government commission longitudinal research into postseparation outcomes for children and research drawing on a national minimum dataset from courts and government-funded agencies, to evaluate the impact of litigation and interaction with family law services.

# 1. Introduction

The Family Law Council's terms of reference require Council to consider how best to support children and young people to participate and be represented in family law system processes, and to facilitate access to timely and appropriate support services.

This specific term of reference requires consideration of existing and potential mechanisms to facilitate the participation of children and young people across legal and non-legal family law system processes. Council's consideration of these mechanisms is based on relevant empirical research and commentary, together with stakeholder consultations and submissions.<sup>3</sup> Drawing on this evidence base, Council's discussions and subsequent recommendations in this report are informed by an evolving understanding of child development that acknowledges children and young people's agency and capacity as active social actors in our families and communities.

Australian and international research that has focused on, or is conducted with, children and young people in relation to family law system services, evidences the need to provide them with safe and effective options to participate in post-separation decision-making that affects them. The research also identifies that critical to this process is the provision of independent and accurate information about the decision-making process and the outcomes of this process.

The *United Nations Convention on the Rights of the Child* articulates the participatory rights of children and young people.<sup>4</sup> Although it has been in place for nearly 35 years and has 196 signatories, there are varying views regarding how, and the extent to which, children and young people should be involved in post-separation decision-making processes. These variations are indicative of the range of perspectives and of the challenges to implementing children's rights in practice – challenges that are not unique to the Australian context.

Currently, the Australian family law system operates on a historical model which primarily regards the adults as the 'clients'. This model allows limited scope for the agency and voices of children and young people, appropriate to their evolving capacities.

## Report structure

Council has taken a thematic approach to reporting on this term of reference. This approach acknowledges the overlap in the material that relates to support for children and young people to participate across the range of court-based and non-court based post-separation processes. This approach is also taken to avoid the repetition of material covered in reports from other inquiries conducted by parliamentary and law reform commissions.

The first substantive section of this report presents the current frameworks relevant to children and young people's participation. It commences with relevant international and national structures and frameworks. This is followed by a discussion of the domestic legal framework in family law matters primarily focussing upon the approach taken by the Federal Circuit and Family Court of Australia. The Family Court of Western Australia ('FCWA') adopts a number of different processes, but these differences are highlighted where necessary or where these are of significance and worthy of separate consideration.

The report then outlines the research and commentary regarding what children and young people say they need, in the context of post-separation decision-making – followed by research, commentary and case law on protection of children and young people through participatory approaches.

<sup>3</sup> See Appendices B, C and D.

<sup>4</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, UNTS 1577 [entered into force 2 September 1990] (the 'Convention').

This discussion focuses on two key themes and elements of participation:

1. access to safe and effective options for children and young people to participate in post-separation decision-making affecting them and to be accurately heard in this process, and
2. access to independent information about the decision-making process, the decisions made and how the views of children and young people informed these decisions.

The report then examines options for securing children and young people's participatory rights. The discussion considers a range of participatory approaches, models, and developments that have been considered by Council to inform the subsequent recommendations. This includes a focus on practical considerations to take into account the views and experiences of children and young people, and enhance the role of Independent Children's Lawyers in this process. It also includes recommendations for a co-design process with children and young people to identify feasible options for children and young people to safely and effectively participate, and which accommodates the multifaceted nature of participation. More specific developments are then discussed, including a discussion of suggested amendments to the *Family Law Act 1975* (Cth),<sup>5</sup> measures to enhance the existing role of Independent Children's Lawyers, and recommendations to utilise direct representation of children and young people, where appropriate.

The final sections in this report present considerations specific to supporting the participatory rights of Aboriginal and/or Torres Strait Islander children and young people, and regarding support for further research and evaluation to enable evidence-based reform. The report concludes with a discussion of ways to identify and address final parenting orders and parenting plans that no longer meet the needs and best interests of the relevant children and young people, and to improve the drafting of parenting orders and parenting plans to address changing needs and best interests.

---

<sup>5</sup> *Family Law Act 1975* (Cth) s 60B ('*Family Law Act*').

## 2. Current international structures and frameworks relevant to the participation of children and young people

### 2.1 United Nations Convention on the Rights of the Child

Australia ratified the United Nations *Convention on the Rights of the Child* ('the Convention') on 17 December 1990, which came into force for Australia on 16 January 1991. Article 12 of the Convention sets out the right of children to be provided the opportunity to be heard in respect to judicial and administrative proceedings affecting the child, providing:

1. 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.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>6</sup>

Council notes that this wording is significant, and that it is not qualified by the selection of an arbitrary age.

Article 13, concerning the freedom to seek, receive and impart information and Article 17, concerning the right to access information, have been recognised as two 'crucial prerequisites' for children to exercise their right to effectively participate in legal proceedings that impact them.<sup>7</sup>

Other articles of the *Convention* directly relevant to determining matters affecting children and young people in family law proceedings include:<sup>8</sup>

- Article 3, which requires the best interests of the child to be a primary consideration.
- Article 5, which recognises children's evolving capacities.
- Article 7, which acknowledges children's rights to a name, nationality, and to know their family.
- Article 9, which provides that children should not be separated from their parents unless it is unsafe.
- Article 19, which requires state parties to take appropriate measures to protect children from violence and abuse.

The Convention has been regarded by courts in all jurisdictions of Australia as having particular significance to proceedings involving the welfare or best interests of children.<sup>9</sup> In *B & B*, the Full Court of the Family Court expressed the opinion that, by virtue of its widespread international acceptance, and noting that the fact that it is referred to as a Schedule to the Human Rights and Equal Opportunity Commission Act, the Convention may hold "special significance in Australian law".<sup>10</sup>

<sup>6</sup> The *Convention* [n 4] (emphasis added).

<sup>7</sup> Referred to in Georgina Dimopoulos, 'Writing Judgments for Children: How Might Australian Family Law Judicial Officers Do It (More Often)?' *Melbourne University Law Review* 29 [forthcoming]; Committee on the Rights of the Child, *General Comment No 12: The right of the child to be heard*, 51st Sess, UN Doc CRC/C/GC/12 (20 July 2009) ['*General Comment No 12*'].

<sup>8</sup> The *Convention* [n 4].

<sup>9</sup> See, eg, *Re B* [1997] 140 FLR 11 ('*Re B*'); *Director-General, Department of Community Services; Re Thomas* [2009] 41 Fam LR 220, 232 [37] ('*Re Thomas*').

<sup>10</sup> *Re B* [n 9] 83.

Specifically, facilitating children and young people's participation in decision-making about post-separation arrangements relevant to them is critical from a rights-based perspective, as it gives effect to the participatory rights enshrined in the Convention. However, concerns have been raised regarding the extent to which the Australian family law system is complying with its obligations as a signatory to the Convention (see further in section 4.1.2).<sup>11</sup> Council notes that this issue is not unique to Australia.

## 2.2 Children's right to *meaningfully* participate

Importantly, the United Nations Committee on the Rights of the Child ('UNCRC') performs a monitoring function with respect to the implementation of, and compliance with *the Convention*. State parties, including Australia, have reporting obligations to the UNCRC. The UNCRC also issues *General Comments* providing guidance with respect to specific aspects of the operation of *the Convention*.

Significantly, the *UN Committee on the Rights of the Child, General Comment No 12: The Right of the Child to be Heard ('the General Comment')*<sup>12</sup> sets out requirements for children and young people's participation, and specifically observes that the obligation created by Article 12 applies in family law mediation processes, as well as in judicial proceedings.<sup>13</sup>

The *General Comment* at [134] recommended that a number of principles be applied in facilitating the voice of the child, and urges States to avoid tokenistic approaches for children and young people's participation.

These principles are relevant, especially because it is the minority of cases that actually end up in court. The principles also require the views of children and young people to be ascertained and considered from the outset of the family dispute resolution process. Relevantly these principles require processes to be:

- (a) **Transparent and informative** - children must be provided with full, accessible, diversity-sensitive and age-appropriate information about their right to express their views freely and their views to be given due weight, and how this participation will take place, its scope, purpose and potential impact;
- (b) **Voluntary** - children should never be coerced into expressing views against their wishes and they should be informed that they can cease involvement at any stage;
- (c) **Respectful** - children's views have to be treated with respect and they should be provided with opportunities to initiate ideas and activities ...;
- (d) **Relevant** - the issues on which children have the right to express their views must be of real relevance to their lives and enable them to draw on their knowledge, skills and abilities. In addition, space needs to be created to enable children to highlight and address the issues they themselves identify as relevant and important;

<sup>11</sup> See, e.g., Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84, November 1997) ('ALRC 1997 Report'); Australian Child Rights Taskforce, *Listen to Children* (Report, 2011); Rae Kaspiew et al, *Independent Children's Lawyers Study* (Report, 2014) ('Kaspiew et al 2014'); Rachel Carson et al, *Children and young people in separated families: Family law system experiences and needs* (Research Report, Australian Institute of Family Studies, 2018) ('Carson et al 2018'); Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (Report 135, ALRC, 2019); Commonwealth of Australia [Joint Select Committee on Australia's Family Law System], *Improvements in family law proceedings* (Interim Report, December 2020) [*Joint Select Committee First Interim Report December 2020*]; Commonwealth of Australia [Joint Select Committee on Australia's Family Law System] *Improvements in family law proceedings* (Second Interim Report, March 2021a) [*Joint Select Committee Second Interim Report March 2021*]; Commonwealth of Australia [Joint Select Committee on Australia's Family Law System], *Improvements in family law proceedings* (Final Report, November, 2021b) [*Joint Select Committee Final Report November 2021b*]; Georgina Dimopoulos, *Decisional Privacy and the Rights of the Child* (Routledge, 2022); ('Dimopoulos 2022'); Stephanie Beckwith et al, *Coercive Control Literature Review* (Final Report, 2023).

<sup>12</sup> *General Comment No 12* [n 7].

<sup>13</sup> *Ibid* [51]-[52].

(e) **Child-friendly** - environments and working methods should be adapted to children's capacities. Adequate time and resources should be made available to ensure that children are adequately prepared and have the confidence and opportunity to contribute their views. Consideration needs to be given to the fact that children will need differing levels of support and forms of involvement according to their age and evolving capacities;

(f) **Inclusive** - participation must be inclusive, avoid existing patterns of discrimination, and encourage opportunities for marginalized children, including both girls and boys, to be involved ...;

(g) **Supported by training** - adults need preparation, skills and support to facilitate children's participation effectively, to provide them, for example, with skills in listening, working jointly with children and engaging children effectively in accordance with their evolving capacities ...;

(h) **Safe and sensitive to risk** - in certain situations, expression of views may involve risks. Adults have a responsibility towards the children with whom they work and must take every precaution to minimize the risk to children of violence, exploitation or any other negative consequence of their participation...Children must be aware of their right to be protected from harm and know where to go for help if needed ...;

(i) **Accountable** - a commitment to follow-up and evaluation is essential. For example, in any research or consultative process, children must be informed as to how their views have been interpreted and used and, where necessary, provided with the opportunity to challenge and influence the analysis of the findings. Children are also entitled to be provided with clear feedback on how their participation has influenced any outcomes.<sup>14</sup>

## 2.3 Interpretation of the Convention in Australian law

Section 60B of the *Family Law Act* signals that the provisions in Part VII of the Act are to be interpreted as having regard to the obligations under the Convention.<sup>15</sup> Section 60B(4) was inserted into the *Family Law Act* by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) as an additional object to give effect to the Convention. Significantly, this reference to the Convention refers to the entirety of the Convention, not simply the most well-known Article 12.

The explanatory memorandum to the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (Cth) states that the provision (which is now s 60B(b)) is not equivalent to incorporating the Convention in domestic law.<sup>16</sup> Specifically, children do not have any enforceable rights under the Convention.<sup>17</sup>

<sup>14</sup> Ibid [134] [sections of quotation omitted for brevity].

<sup>15</sup> *Family Law Act* (n 5).

<sup>16</sup> Explanatory Memorandum of the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (Cth) 6, [23].

<sup>17</sup> *Zammit v Zammit* [2020] FamCA 950, [23]-[24].

Significantly, the *Family Law Amendment Act 2023* (Cth) has reduced the objects section of Part VII of the *Family Law Act* to just two objects:

- (a) to ensure that the best interests of children are met, including by ensuring their safety; and
- (b) to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.<sup>18</sup>

Whilst the recent amendment increases the visibility of the Convention and gives greater emphasis to its significance, it does not provide any guidance as to how to “give effect” to the Convention in practice. The purpose of retaining reference to the Convention is to assist with interpretation where there are ambiguities, but it still does not have the effect of incorporating the Convention into domestic law.<sup>19</sup>

The principles reflected in the Convention help to inform the contextual approach to statutory interpretation of the new provisions and their application. The reference to the Convention in s 60B(b) is also appropriate because it reflects the position at common law.

This was explained by Brereton J in *Re Thomas*, as follows:

First, Australia’s ratification of [the Convention] creates a legitimate expectation that decisions will be made having regard to the principles espoused in [the Convention];

Secondly, the existence of a treaty obligation alone (that is, without legislation implementing it locally) allows a court to take such a treaty into account in the development of the common law;

Thirdly, where a convention has been ratified by Australia but has not been the subject of any legislative incorporation into domestic law, its terms may be resorted to in order to help resolve an ambiguity in domestic legislation, and in a case of ambiguity, a court should favour a construction of a statute which accords with Australia’s obligations under an international treaty ...;

Fourthly, in the exercise of a discretion, regard may be had to an international obligation or agreement which has been ratified by Australia, though not otherwise incorporated into domestic law – unless the domestic law prohibits it ...;

Fifthly, in so far as the *parens patriae* jurisdiction overlaps the welfare jurisdiction of the Family Court of Australia, it is material that Family Law Act, s 43(c), provides that the court, in the exercise of its jurisdiction, must have regard to the need to protect the rights of children and to promote their welfare ...<sup>20</sup>

That analysis has subsequently been adopted and applied in a number of decisions.<sup>21</sup>

<sup>18</sup> *Family Law Amendment Act 2023* (Cth).

<sup>19</sup> See Explanatory Memorandum of the *Family Law Amendment Bill 2023* (Cth) 18.

<sup>20</sup> *Re Thomas* [n 9] [37] (sections of quotation omitted for brevity).

<sup>21</sup> See, eg, *Re Tracey* [2011] 80 NSWLR 261, 269 [35]–[42] Spigelman CJ and Beazley JA agreeing at 272 [50].

Most recently, in *Inwood v Brock*, Riethmuller J made the following statement when considering an appeal where the appellant made extensive reference to the Convention, observing at [13]:

Ground 2 makes lengthy references to the United Nations Convention on the Rights of the Child (1989). The Convention does not form part of the domestic law in Australia: the domestic law is that set out in the sections of the Family Law Act 1975 (Cth). Whilst one of the objects of Part VII of the Act (s 60B(4)) was to give effect to the Convention, the relevance of the Convention is limited as the Convention itself has not been enacted into local law. In *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [29], Gleeson CJ explained that “where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia’s obligations.” As there was no ambiguity in the legislation that the primary judge was applying, which arose from the circumstances of this case, the Convention was not relevant to the determination of the matter.<sup>22</sup>

A similar approach is taken in other comparable jurisdictions.<sup>23</sup>

In *Baker v Canada (Minister of Citizenship and Immigration)* the Supreme Court of Canada observed that the principles set out in the Convention are central in determining whether the decision of a court, concerning matters relevant to the welfare of a child, was a reasonable exercise of judicial power, stating at [71]:

The United Nations Declaration of the Rights of the Child (1989), in its preamble, states that the child “needs special safeguards and care”. The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights.<sup>24</sup>

The Convention is made up of 54 articles relevant to the welfare of children. Those articles are both protective and facilitative. In that respect, for instance, in terms of protection, Article 19 requires State parties to take all appropriate measures ‘to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’.<sup>25</sup>

<sup>22</sup> *Inwood v Brock* [2024] FedFamC1A 72, [13].

<sup>23</sup> See, eg, *Tavita v Minister of Immigration* [1994] 2 NZLR 257, 266 (Wellington Court of Appeal, New Zealand); *Vishaka v Rajasthan* (1997) 3 LRC 361, 367 (Supreme Court of India); *R v Keegstra* [1990] 3 SCR 697 (Supreme Court of Canada).

<sup>24</sup> *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 861 [71] (Supreme Court of Canada).

<sup>25</sup> The Convention (n 4) art 19(1).

The UNCRC has recommended that Australia enact comprehensive national child rights legislation providing clear guidelines as to how children's rights are to be upheld.<sup>26</sup> The UNCRC has also recommended that the *Family Law Act* be amended to provide that all children have the right to be heard with respect to decisions affecting them including in non-court-based processes.<sup>27</sup> The UNCRC referred to Article 19, noting that, in order to fulfil all the rights of the Convention, child protection approaches need to move away from perceiving children as objects that need help, rather than rights holders.<sup>28</sup>

Our ability to translate children and young people's rights from theory to practice is, as yet, underdeveloped. Much has been written about children's rights since the Convention was ratified - the challenge is translating theory of children's rights into practice. It is a challenge that many common law countries face.

Unlike many other countries, Australia does not have a federal human rights instrument nor domestic legislation that incorporates the Convention. This topic has become increasingly visible in public discussions as a result of the work of the Australian Human Rights Commission being the "*Free and Equal: An Australian Conversation on Human Rights*."<sup>29</sup> There is increasing pressure for member countries of the European Union to incorporate the Convention into domestic legislation, given these states are signatories to the European Convention on Human Rights, and have the ability to take human rights complaints to the European Court of Human Rights.

Council understands that children and young people feel valued when they are listened to and their safety and wellbeing is enhanced, and note that the wording of the Convention is clear in this respect: every child has the right to be heard. A child's capacity to exercise that right is a separate matter.<sup>30</sup> It is hoped that, with the passage of the *Family Law Amendment Act 2023*, there will be a renewed focus on children's rights that will accelerate the general appreciation that children are people with rights, and not simply "an object of concern" of the proceedings.<sup>31</sup> This would also accord with the approach already being adopted by courts in comparable jurisdictions internationally. For example, in *CF v Secretary of State for the Home Department*, Sir James Munby stated that a child is as much entitled to protection as anyone else. Specifically, at [158], he stated children are not merely "passive objects of more or less paternalistic parental or judicial ... decision-making".<sup>32</sup>

26 United Nations Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, CRC/C/AUS/CO/5-6 [1 November 2019] 2, [7]-[8] (*UNCRC Concluding Observations*).

27 *Ibid* 5, [22(a)].

28 *Ibid*.

29 See Australian Human Rights Commission, *Free and equal: A Human Rights Act for Australia* (Summary Report, 2022); Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 2023).

30 Charlotte Mot, *The Child's Right to Participate in Family Law Proceedings: Represented, heard or silenced?* (Intersentia, 1<sup>st</sup> ed, 2022) 2-3.

31 Elizabeth Butler-Sloss, *Report of the Inquiry into Child Abuse in Cleveland 1987* (Report, His Majesty's Stationery Office, 1988) 245.

32 *CF* [n 1].

### 3. Current Australian policy frameworks and principles relevant to the participation of children and young people

In considering measures to give greater weight to the voice and views of children in family law processes, it is significant to note the greater prominence that is now being given to the voice of children and young people in other areas of public policy. This includes, for instance, *The National Plan to End Violence against Women and Children 2022–2032* which provides that ‘Australia is a signatory and is committed to upholding the rights of children’, including their right to be protected from violence under Article 19 of the Convention.<sup>33</sup>

Also relevant is the *Safe and Supported: The National Framework for Protecting Australia’s Children 2021–2031* (*‘National Framework’*).<sup>34</sup> This framework has been identified as ‘help[ing] children express their views in developing and implementing activities’, which is said to be ‘consistent with [the Convention] and its [four] core principles’, including ‘respect for the views of the child and devotion to the best interest[s] of the child’.<sup>35</sup> It is also notable that the *National Framework* is underpinned by the guiding principle, amongst others, of ‘[l]istening and responding to the voices and views of children and young people...’, who ‘have the right to participate in decisions that affect them’.<sup>36</sup>

Critical also to the consideration of Council’s terms of reference are the *National Principles for Child Safe Organisations*. These principles were developed to provide a ‘nationally consistent approach to embedding child safe cultures within organisations that engage with children’.<sup>37</sup> The principles provide that children and young people should be kept informed about their rights, be able to participate in decisions affecting them and be taken seriously.<sup>38</sup> In some states and territories, these principles have been translated into legislation with positive legal obligations for certain sectors. The identified action areas provide for:

- programs and resources for children regarding their right to safety and to be listened to
- age-appropriate forums to seek children’s views and participation in decision-making that are documented and regularly reviewed
- staff with training regarding children’s developmental needs
- an environment that is welcoming for children.<sup>39</sup>

The sharing of information promoting child safety and wellbeing is embodied in *National Principles 3 and 4*, with action areas and indicators that include the provision of clear and accessible information about policies, record keeping and complaints practices, including child-friendly and child inclusive materials, and which respond to the needs of families, including in relation to cultural safety, facilitating opportunities for feedback.<sup>40</sup>

Relevant to the discussion in this report, *National Principle 1* provides for child safety and wellbeing to be embedded in organisational leadership, governance and culture, with governance arrangements that support the implementation of child safe policies and practices.<sup>41</sup> The action areas and indicators for this principle also encourage policy and practice guidelines such as risk management strategies and codes of conduct, together with staff review processes, staff training and professional development to embed the child safe practices.<sup>42</sup>

<sup>33</sup> Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022–2032* (Report, 2022) 103.

<sup>34</sup> Department of Social Services (Cth), *Safe and Supported: The National Framework for Protecting Australia’s Children 2021–2031* (Report, 2021).

<sup>35</sup> *Ibid* 14.

<sup>36</sup> *Ibid* 36.

<sup>37</sup> Australian Human Rights Commission, *National Principles for Child Safe Organisations* (Report, 2018) 3.

<sup>38</sup> *Ibid* 6.

<sup>39</sup> *Ibid* 10.

<sup>40</sup> *Ibid* 11–12.

<sup>41</sup> *Ibid* 9.

<sup>42</sup> *Ibid*.

More specifically in relation to skills and training, *National Principles 5 and 6* provide that people working with children and young people are to be both suitable and supported to reflect child safety and wellbeing values in their practice.<sup>43</sup>

The relevant action areas and indicators include recruitment and onboarding policies, practices and screening protocols that support the recruitment of child safe staff, organisational guiding documents and ongoing support, supervision and performance management processes for staff that focus on child safety, as well as organisational tools to monitor and mitigate risk.<sup>44</sup> The *National Principles* articulate the need for people working with children to be equipped with knowledge, skills and awareness to keep children and young people safe through ongoing education and training in relation to child safety and wellbeing, and for staff to respond effectively to issues of child safety and cultural safety as they arise and for there to be a safe and supportive environment for staff disclosing harm or risk of harm to children.<sup>45</sup> Relatedly, *Principle 4* also articulates the need for staff training to support staff to respond effectively to children and young people with diverse needs including First Nations children, children with a disability and CALD children.<sup>46</sup>

Although relevant institutions and organisations within the system seek to apply these principles<sup>47</sup>, there has not been a holistic and deliberate adoption of legislation, policies and procedures that are consistent with the principles that has been implemented across the family law system as a whole. Measures to address this will be discussed in this report.

---

43 Ibid 13-14.

44 Ibid 13.

45 Ibid 15.

46 Ibid 12.

47 For example, the FCFOCA applies the 'Commonwealth Child Safe Framework', *Federal Circuit and Family Court of Australia* (Web Page) <<https://www.fcfoa.gov.au/commonwealth-child-safe-framework>>.

## 4. Current Australian legal frameworks relevant to the participation of children and young people

The provisions of the *Family Law Act* that relate to parenting matters are contained primarily in Part VII of the Act. The ‘paramountcy principle’ underpinning these provisions is a longstanding principle aimed at prioritising the best interests of children and young people in family law proceedings. It does so by requiring the best interests of the child<sup>48</sup> (previously described as the welfare of the child), to be the paramount consideration when making post-separation orders for parenting and care arrangements (s 60CA; previously s 65E).<sup>49</sup>

Legislative guidance for determining the best interests of children and young people is provided in s 60CC(2), s 60CC(2A) and s 60CC(3).<sup>50</sup> As of 6 May 2024, the list of best interests considerations set out in s 60CC(2) of the *Family Law Act* was reduced to six considerations, which are:

(a) what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect, or other harm) of:

(i) the child; and

(ii) each person who has care of the child (whether or not a person has parental responsibility for the child);

**(b) any views expressed by the child;**

(c) the developmental, psychological, emotional and cultural needs of the child;

(d) the capacity of each person who has or is proposed to have parental responsibility for the child to provide for the child’s developmental, psychological, emotional and cultural needs;

(e) the benefit to the child of being able to have a relationship with the child’s parents, and other people who are significant to the child, where it is safe to do so; and

(f) anything else that is relevant to the particular circumstances of the child.<sup>51</sup>

Although any views expressed by a relevant child are specified as a best interest consideration, importantly, children and young people cannot be compelled to express a view in the context of Part VII *Family Law Act* proceedings (s 60CE).

<sup>48</sup> *Family Law Act* (n 5) [s 60CC(2)] (emphasis added).

<sup>49</sup> *Re Bennett* (1991) 17 Fam LR 561 (*Bennett*); *DS v DS* (2003) 32 FamLR 352 (*DS*); *R v R* (2000) 155 FLR 29 (*R v R*); *H v W* (1995) 126 FLR 159 (Fogarty and Kay JJ) (*H v W*).

<sup>50</sup> Prior to 6 May 2024 and the commencement of amendments introduced by the *Family Law Amendment Act 2023* (n 18), there were two primary considerations stipulated in the *Family Law Act* (n 5); namely, the benefit to the child of having a meaningful relationship with both parents [s 60CC(2)(a)] and the need to protect the child from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence [s 60CC(2)(b)]. Section 60CC(2A) previously provided that where these considerations were in conflict in a given case, the protection from harm consideration in s 60CC(2)(b) was to be prioritised over the meaningful relationship consideration. Additional considerations were also outlined in s 60CC(3) and including the requirement to consider ‘any views expressed by the child and any factors [such as the child’s maturity or level of understanding] that the court thinks are relevant to the weight that it should give to the child’s views’ [s 60CC(3)(a)]. An examination of the application of these amended provisions is required, and specifically whether the removal of these qualifiers will make a practical difference to the court’s assessment of a child/young person’s views in relevant family law proceedings.

<sup>51</sup> *Ibid* (emphasis added).

The *Family Law Act* provides that the court may inform itself of any views expressed by the relevant child or young person through:<sup>52</sup>

1. input from a court appointed **court child expert**, including through a **child impact report** or a s 62G **family report** or from either a court child expert or a single expert selected jointly by the parties<sup>53</sup>
2. the appointment of an **independent children's lawyer (ICL)** to represent the best interests of the child/children (*Family Law Act* s 60CD(2)(b); s 68L)
3. 'by such **other means as the court thinks appropriate**', subject to the rules of the court (*Family Law Act* s 60CD(2)(c)), which may involve meetings between judicial officers and the relevant child/young person.

The current operation of these options is considered below. Before moving to that consideration, Council notes an apparent anomaly which we suggest warrants further examination.

The 2023 amendments to the *Family Law Act* introduced a specific requirement that ICLs meet with the child, and provide the child with an opportunity to express their views. The requirement is subject to very limited exceptions. Importantly, the amendments require the Court to oversee compliance with that requirement before making final orders (*Family Law Act* s 68LA(5D)).

The intention of that amendment was clear, and appropriate – to ensure that in the cases to which it applies, children must be given an opportunity to express their views, and the Court must actively oversee that.

The anomaly is this – the amendment applies only to cases in which an ICL is appointed. Thus, it applies to roughly 40-47% only of parenting matters.

In that respect we can think of no policy reason why that appropriate safeguard to ensure that children and young people's voices are supported to be heard by an ICL should apply only to a limited cohort of the children for whom parenting orders are made.

#### **Recommendation 1:**

***Council recommends that the 2023 amendments to s 68LA of the Family Law Act 1975 (Cth) that are directed to ensuring that, other than in exceptional circumstances, 'children must be provided with an opportunity to express their views before final parenting orders are made' be extended to apply to all parenting proceedings, whether or not an Independent Children's Lawyer is appointed.***

As set out later in the report, Council is firmly of the view that outcomes for children and young people are enhanced by the involvement of competent ICLs. Recommendations directed to the involvement of ICLs in a higher proportion of cases appear in section 9 of this report.

<sup>52</sup> *Family Law Act* [n 5] (emphasis added).

<sup>53</sup> In the FCWA, Family Consultants perform a similar role to that undertaken by Court Child Experts in FCFCOA. For simplicity, reference is made only to Court Child Experts.

## 4.1 How the Australian system currently operates in practice

### 4.1.1 Role of Court Child Experts

Court child experts ('CCEs') (with a similar role called family consultants in the FCWA)<sup>54</sup> play a critical role within the Australian family law system. They are qualified psychologists or social workers who have specialist knowledge in child and family issues after separation and divorce. Their key responsibilities are to:<sup>55</sup>

3. **Conduct assessments:** CCEs conduct assessments of children and families involved in family law proceedings. They use a variety of methods to gather information, such as interviews, questionnaires and observations. In Western Australia, family consultants undertake some assessments (e.g. of safety and risk issues), while more extensive forensic family assessments and reports that are required as evidence for hearing are generally completed by Single Experts funded by Legal Aid WA in proceedings in which ICLs are appointed.<sup>56</sup> Parties in WA may also appoint and pay for Single Experts.
4. **Prepare reports:** about six weeks after the commencement of parenting proceedings the matter may be referred to CCEs for the preparation of a child impact report ordered by the Court. These child impact reports typically include information about the children's physical and emotional health, their educational needs, their relationships with their parents, and the parents' parenting capacity. In the FCWA, a similar outcome is derived from a reportable Case Assessment Conference conducted by a Family Consultant, with access to third-party information from police and child welfare authorities.
5. **Identify potential risk factors to the child:** such as, relevant issues related to substance use, mental health issues, and the existence of family violence. If a matter proceeds to hearing, a more detailed family report will generally be provided. Family reports involve a much more comprehensive assessment of the circumstances of the child. Typically, the expert will review relevant court documents and conduct interviews of significant persons in the child's life.
6. **Provide recommendations:** CCEs make recommendations about the type of parenting arrangements that may be in the children's best interests. These reports are not binding on the judicial officer, but they are valuable and can be persuasive. It is generally considered appropriate for a judicial officer to explain why they have departed from the recommendations of a family report writer.
7. **Participate in family dispute resolution conferences:** increasingly, CCEs participate in family dispute resolution conferences that are chaired jointly with a judicial officer. There are, however, limitations on that occurring - particularly in circumstances where the CCEs already have a busy schedule conducting interviews and preparing reports. CCEs can also offer court-based mediation services to families involved in family law proceedings where ordered by the court.
8. **Provide advice:** CCEs provide advice about potential parenting or therapeutic programs that might assist the parties and/or the child involved in the proceedings.

<sup>54</sup> CCEs are family consultants under the *Family Law Act*, but also hold authorisations as family counsellors. Family consultants in the FCWA do not perform this dual function.

<sup>55</sup> Federal Circuit and Family Court of Australia, *Court Child Experts – FAQ* (Web Page) <<https://www.fcfcwa.gov.au/fl/pubs/court-child-experts-faq>> (*FCFCOA – Court Child Experts*).

<sup>56</sup> A Single Expert is a professional (such as a social worker or psychologist, or psychiatrist) who has been appointed under the Family Law Rules (either by court order or by the agreement of the parties) to be involved in the case.

CCEs cannot undertake the role of a family consultant and a family counsellor in the same case. Anything said to a court child expert undertaking the role of a family consultant is not confidential and is admissible as evidence, while anything said to a court child expert undertaking the role of a family counsellor or mediator is confidential.<sup>57</sup>

#### 4.1.2 Role of the Independent Children's Lawyer (ICL)

Appointed under s 68L of the *Family Law Act*, an ICL represents the best interests of the child in family law proceedings. Other than in certain limited circumstances, an ICL is required to meet the children aged 5 years or older whose best interests they represent to ascertain their views, but they are not obligated to act on their instructions. In that respect, as the High Court pointed out in *Bondelmonte v Bondelmonte*,<sup>58</sup> the ICL represents the child's interests and 'the ICL is not the child's legal representative, and is not ... obliged to act on the child's instructions'.

In undertaking this role, an ICL is expected to provide independent and impartial assistance to the court in determining the arrangements that will serve the child's best interests. That involves three broadly overlapping functions:

1. facilitating the participation of the child in the proceedings, including by ensuring their voice is heard,
2. evidence gathering, and
3. litigation management.<sup>59</sup>

The litigation management function involves an ICL acting as an "honest broker", both in case management generally, and in efforts to settle the proceedings short of a judicial determination.<sup>60</sup>

More specifically, some the key responsibilities of ICLs include:<sup>61</sup>

- Representing the child's best interests: the primary role of an ICL is to represent and promote the best interests of a child in family law proceedings.
- Gathering evidence: ICLs are responsible for arranging necessary evidence, including expert evidence, to be obtained and put before the Court.
- Facilitating the child's participation: ICLs facilitate the participation of the child in the proceedings in a manner which reflects the age and maturity of the child and the nature of the case.
- Expressing the child's views: ICLs are to ensure that any views expressed by the child are fully put before the Court.
- Acting as an honest broker: ICLs act as an honest broker between the child and the parents and facilitate settlement negotiations where appropriate.
- Minimising trauma: ICLs are trained to endeavour to minimise the level of trauma to any children associated with the proceedings.

<sup>57</sup> *FCFCOA - Court Child Experts* (n 55).

<sup>58</sup> 259 CLR 662 (Kiefel, Bell, Keane, Nettle and Gordon JJ) at [47] (*'Bondelmonte'*).

<sup>59</sup> *Kaspiew et al 2014* [n 11]. See also other research noting the different functions of the ICL role, including described as "a welfare role, a counsel assisting role and a role in giving the child a voice in the proceedings" in Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 51 (*'Parkinson and Cashmore 2008'*). Nicola Ross referred to three aspects of the role of ICLs: a counsel assisting role, a child participation role and a dispute resolution role in Nicola Ross, 'The hidden child: How lawyers see children in child representation' (Unpublished doctoral dissertation, University of Sydney, 2012) 148-151.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

We will subsequently make recommendations to strengthen the role of the ICL.

#### **4.1.3 'Other means as the court thinks appropriate' – including meetings between judicial officers and the relevant child/young person**

##### **In the Australian context**

Australian judges rarely meet with children and young people in parenting matters, and there are polarised views with respect to this approach. For the purposes of this report, it is important to draw the distinction between a judge meeting a child for the purpose of obtaining the child's views, to explain the process and outcomes, and a judicial officer meeting with a child for the purpose of conducting a forensic interview for evidentiary reasons. Australian academic Dr Michelle Fernando has undertaken research on this subject and has proposed draft guidelines for judges meeting with children/young people.<sup>62</sup> She has also undertaken comparative work with respect to approaches in Australia, the United Kingdom, New Zealand and Canada.<sup>63</sup>

Former Family Court Justice the Honourable Robert Benjamin SC is supportive of judges meeting with children and young people in parenting matters, as it is a mechanism for the judge to hear the child/young person's view directly and unfiltered.<sup>64</sup> Justice Benjamin provided practical examples where these meetings have proven useful both as a means of obtaining updated information and upholding the right of the child/young person to be heard.<sup>65</sup> Justice Benjamin acknowledges that it is important to ensure that the process is transparent, and that the parties are accorded procedural fairness. He also acknowledges that while there is a risk that a child may make a disclosure, that same risk exists when a court child expert or an ICL meets with a child. Further, he recognises that involving a child in this way may expose them to greater conflict or pressure from a parent.<sup>66</sup>

Professor Parkinson, Judy Cashmore and Judi Single interviewed children and young people and found that most of those interviewed wanted to speak with judges. Where there were contested proceedings, children wanted to speak with the judge directly so they could express their unfiltered views and feel seen.<sup>67</sup>

##### **In the international context - Canada**

Consideration may also be given to the experience in other jurisdictions. In the Canadian context, Nick Bala and colleagues argue that judges meeting with children can be beneficial for both the relevant child and the court. They further suggest that it is generally accepted that such meetings should not be forensic. Some Canadian judges have expressed concerns about their lack of training and skills in talking to children, and that these meetings may be traumatising for children. Concerns have also been expressed that engaging in these meetings is not part of the traditional judicial role and may undermine the appearance of justice.<sup>68</sup>

##### **The United Kingdom**

In the UK, guidelines for judges meeting with children and young people were published in 2010.<sup>69</sup> However, in practice, it is rare for English Judges to meet with children and young people.

<sup>62</sup> Michelle Fernando, 'Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings' [2012] 2 *Fam L Rev* 21.

<sup>63</sup> Michelle Fernando, 'Children's voices in family law proceedings in Australia, the United Kingdom, New Zealand and Canada' in *Exploring Norms and Family Laws Across the Globe* [Lexington Books US, 2022] 207.

<sup>64</sup> Robert Benjamin, 'Judges Receiving Evidence Directly from Children' [2012] 2(2) *Family Law Review* 99.

<sup>65</sup> *Ibid* 99-102.

<sup>66</sup> *Ibid* 103-4, 106-7.

<sup>67</sup> *Parkinson and Cashmore 2008* [n 59] 160.

<sup>68</sup> *Ibid* 140-144, 153.

<sup>69</sup> *Family Justice Council, Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (Guidelines, April 2010).

## **New Zealand**

In New Zealand, it is common for judges to meet with children and young people. In consultation with Council, New Zealand judges discussed how this occurs in practice.<sup>70</sup> Judge Mahon advised that he typically meets with children/young people three to four times a year, and other judges meet with them more regularly. Judge O'Dwyer describes that it is usual practice to provide children with the opportunity to meet with, and directly express their views to, the decision-maker. In her experience, it increases parents' confidence in the decision when the judge has met with the children. Importantly, these New Zealand judges characterised these meetings as distinct from forensic interviews, with these meetings commonly occurring after the decision has been made so that the judge may explain the decision to the child. Judge Mahon states that children can often feel burdened and think they are responsible for resolving the parental dispute. It can help them when the judge explains to the child that it is not their responsibility to resolve parental disputes, and that this is instead the responsibility of the judge.<sup>71</sup>

In New Zealand, judicial guidelines outlining procedures and standards for meeting with children were published in 2007. The *Care of Children Act 2004* (NZ) placed greater emphasis on child participation. Interest in judges meeting with children increased.<sup>72</sup> It is ultimately up to the discretion of the judge as to whether they meet with the relevant child or young person. New Zealand academic John Caldwell referred to various research projects about the benefits of child participation. This research indicates that children benefit psychologically by feeling valued and acknowledged. It also suggests that children are eager to participate in proceedings, but do not want to make decisions about matters.<sup>73</sup>

When discussing experiences in other jurisdictions, it is important to acknowledge the differences in legislation, practice and culture. The *New Zealand Family Court Practice Note 'Lawyer for the Child: Selection, Appointment and Other Matters'*, refers to the judge settling the brief to the lawyer and setting out a timeframe for reporting to the court.<sup>74</sup> Council were provided with samples of reports prepared for the court by lawyers for the child. The reports range in detail and complexity depending on the circumstances of the case.

In one matter, the lawyer for the child submitted four reports to the court. One of these reports details the interactions the lawyer had with the child. This included the lawyer confirming with the child that what they had reported about their discussion in a previous report was accurate. The lawyer also spoke to the child about her experiences of supervised visits that had occurred to date. Importantly, the lawyer for the child also discussed the judge's role and the child's previous meeting with the judge.<sup>75</sup> In another matter, the lawyer for the child met with the child (aged 11) to discuss the proposed consent orders her parents had agreed to. The lawyer discussed the proposal with the child and relayed the child's views and concerns about the proposal to the judge, who then amended the agreement to reflect the child's views.<sup>76</sup>

## **Germany**

In Germany, judges regularly meet with children and young people in parenting matters.<sup>77</sup> However, it must be acknowledged that a civil law system applies rather than common law system, with judicial training on how to perform this role. Council considered a survey of German judges that found 90.4% referred to the advantages of engaging with children and young people as a means of discovering how the child is coping.<sup>78</sup> 77.7% of judges reported that this engagement supported them to get to know the child/young person. Meeting with children was also found to better support judges to determine the best interests of the child and achieve a settlement. A majority of judges surveyed stated they interview children from the ages 3 or 4, which is the age that developmental psychology suggests children are able to communicate what they want and express their wishes.<sup>79</sup> The judges surveyed also identified

70 Discussion with Judge Anthony Mahon and Judge Mary O'Dwyer with Council Member Judge Alexandra Harland.

71 Ibid.

72 John Caldwell, 'Judicial interviews of children: some legal background' (2007) 5 *New Zealand Family Law Journal* 215.

73 Ibid 217.

74 New Zealand Family Court, *Practice Note [2020] NZFC 3346*: 19 June 2020.

75 Redacted material provided by Judge O'Dwyer and Judge Mahon to Council Member Judge Alexandra Harland.

76 Ibid.

77 Michael Karle and Sandra Gathmann 'The state of the art of child hearings in Germany. Results of a nationwide representative study in German courts' (2016) 54(2) *Family Court Review* 167-185.

78 Ibid.

79 Ibid 167.

challenges associated with judicial interviews with children and young people. 56.5% of the judges felt that children/young people were unable to express themselves, and 50.6% thought that judicial interviews placed too much strain on the child/young person.<sup>80</sup> The authors conclude that their study challenges the view that children are placed under too much stress when involved in judicial interviews and furthermore that quite young children can be effectively and safely interviewed by judges.

This issue was also considered by the Australian Law Reform Commission (ALRC) in its 1997 Report *Seen and Heard: priority for children in the legal process (ALRC Report 84)*<sup>81</sup> where it was stated at 16.61:

The judicial interview is another mechanism by which children may be heard in family law proceedings. Judicial officers rarely interview children in this way. It has been noted that ‘... this practice, never widespread, has (thankfully) all but vanished’.<sup>82</sup> This opinion expresses the almost universal advice given to the Inquiry concerning the practice and there has been at least one case where the Full Court criticised the use of the option.<sup>83</sup> National Legal Aid noted that all evidence should be heard in open court and that judges in any event may not have the necessary expertise for interviewing children. The option of a judicial officer speaking to a child in chambers is quite rightly used very sparingly. However, in the interests of flexibility, the option should remain available.

In *Re JJT; Ex Parte Victoria Legal Aid* (1998) 195 CLR 184 the High Court referenced the ALRC Report observing that the practice of judicial officers interviewing children, in Australia, can now be regarded as out-dated. Gummow J stated at [43]:

The “old system” for ascertaining the interests of children of a marriage being dissolved sometimes included a private judicial interview of the child to ascertain its wishes. This procedure had many defects.<sup>84</sup> It was little used once the *Family Law Act* commenced.<sup>85</sup> It enjoyed little favour.

While not enjoying widespread favour in the legal profession and judiciary, Council is of the view that, for flexibility, the ability for judicial officer to meet with children should be retained - but that there should be specific guidelines to assist judicial officers and to set parameters for any such meeting. There are several factors that need to be considered including issues of procedural fairness versus confidentiality, the circumstances where it might be appropriate for a judicial officer to meet with the child, the timing of such a meeting, the location of the meeting, who should be present and how the meeting should be conducted.<sup>86</sup>

<sup>80</sup> Ibid 172.

<sup>81</sup> ALRC 1997 Report (n 11).

<sup>82</sup> I Coleman, *Children and the law: The Family Court Experience and the Criminal Law Experience* (Seminar Paper, NSW Bar Association, 9 September 1996).

<sup>83</sup> *Re Marriage of Demetriou* (1976) 27 FLR 93 (*Demetriou*).

<sup>84</sup> *Sargeant v Watkins* [1965] NSWLR 132 (*Sargeant v Watkins*); see also *ibid*.

<sup>85</sup> ALRC 1997 Report (n 11) [16.61].

<sup>86</sup> For a detailed discussion of these issues and the experience in New Zealand, see Ian Mill, ‘Conversations with children: a Judge’s perspective on meeting the patient before operating on the on the family’ [2008] 6 *New Zealand Family Law Journal* 72; John Caldwell and Nicola Taylor, ‘Natural Justice and Judicial Meetings with Children: Documenting Practice within the New Zealand Family Court’ [2013] 7 *New Zealand Family Law Journal* 264; Usha Patel et al, ‘Child Law I: Care of Children Act 2004’ in *Brooker’s Child Law: Child’s Views* (Thomsen Reuters New Zealand, 2014); Nicola Taylor and John Caldwell, ‘Judicial Meetings with Children: Documenting Practice Within the New Zealand Family Court’ [2013] 3 *New Zealand Law Review* 445.

Consistent with recommendation 153 of the ALRC Report,<sup>87</sup> Council recommends:

**Recommendation 2:**

***The option of a judicial officer meeting a child in chambers should remain available.***

**Recommendation 3:**

***The Attorney-General's Department consult with stakeholders with a view to developing guidelines for judicial officers meeting with children including the circumstances where a meeting may take place, the purpose of such a meeting, procedural fairness requirements and circumstances where it may not be appropriate to meet a child or young person, including the child's/young person's views about a meeting.***

## 4.2 Judicial approach to considering views of the child

Guidance about the weight to be accorded to any expressed views (previously 'wishes')<sup>88</sup> of children and young people when determining their post-separation parenting arrangements is available from a long history of case law.<sup>89</sup> In *H v W* (1995), the Full Court of the Family Court of Australia outlined certain factors as being of assistance to the court in assessing the weight to be placed on a child's views, such as the strength, duration and basis of the child's/young person's views, and their maturity, including their understanding of the implications of the relevant issues. Fogarty and Kay JJ identified that the weight to be given to a child's views "will depend upon the children's cognitive age and level of maturity in each particular case", and that this exercise was subject to the best interests of the child principle (in s 60CA). However, the court also stated that "the research supports a rebuttable presumption that children of the age of 7 are capable of making a considered decision, a decision in which reason is employed".<sup>90</sup> This was never taken up. More generally, the importance of giving appropriate and proper consideration to a child's/young person's wishes/views was clearly expressed in this case such that they:

must not only be considered, but must be shown to have been considered, in the reasons for judgment of the trial judge. Furthermore, if the trial judge decides to reject the wishes of a child, then clear and cogent reasons for such a rejection must be given, particularly if the separate representative submits that the Court should give effect to such wishes. The wishes of the children should not be discounted simply because they are expressed by children. (Baker J)

<sup>87</sup> ALRC 1997 Report [n 11] Recommendation 153.

<sup>88</sup> Prior to the 2006 Family Law Act amendments, the equivalent section 68F(2)(a) referred to 'any wishes expressed by the child ...'. The Explanatory Memorandum to the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) stated that the change in terminology was consistent with Article 12 of the UNCRC and reflected a broader understanding of a child's 'perceptions and feelings', which may not necessarily relate to (but does not otherwise exclude) a wish as to which parent the child wants to live with or spend time with [see also Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009) ('The Chisholm Review'). See also, *Mestronov v Mestronov* [2007] FamCA 1627 ('Mestronov') per Bennett J at [60] – [67]. The Chisholm Review has also described the purpose of the change from 'wishes' to 'views' as to encourage the consideration of children's experiences in addition to wishes. Nevertheless, *The Chisholm Review* identifies the emphasis on maturity and the court's discretion as to the weight to be placed on the child's views, as still suggesting a narrow focus on the desired outcomes rather than a more holistic determination of parenting arrangements and assessment of the best interests of a child.

<sup>89</sup> *P v P* (1995) 19 Fam LR 1 ('P v P'). See also *Bennett* [n 49]; *DS* [n 49] and *R v R* [n 49] and Fogarty and Kay JJ in *H v W* [n 49].

<sup>90</sup> *H v W* [n 49] 173.

These seminal cases, together with more recent case law,<sup>91</sup> reflect s 60CC(2), in that the views of children/young people are ‘one consideration of a number to be taken into account in the overall assessment of a child’s best interests’, and are not otherwise determinative of the outcome. This has more recently been confirmed by the High Court of Australia in *Bondelmonte* where at paragraph 41 the plurality (Kiefel, Bell, Keane, Nettle and Gordon JJ) stated:

Section 60CC(3)(a) requires that the court take into account not only the views expressed by the child, but also “any factors ... that the court thinks are relevant to the weight it should give to the child’s views”. The factors that the provision gives as relevant are the child’s maturity or level of understanding, but plainly the court may consider other matters to be relevant. The factor that the primary judge identified as relevant was the extent to which the boys’ views had been influenced by the father, clearly a matter going to the weight to be given to their stated preferences.<sup>92</sup>

Considerable weight may be accorded to the views of pre-teen children. For example, the Appeal Court in *Haward v Haward* [2023] 67 Fam LR 1 acknowledged that a primary judge had correctly applied the principles set out in *Bondelmonte* when making orders consistent with the 12-year-old child’s views, in circumstances where the weight accorded to these views was consistent with the expert evidence in that case – that if they remained unchanged, substantial weight should be accorded to them.

<sup>91</sup> See, e.g., *ZN v YH* [2002] 167 FLR 366; *R v R* [n 49]; *C v C* [2003] FLC 93-159; *DS* [n 49]; *VW v J* [2004] 34 Fam LR 499; *VW v J* [2006] 34 Fam LR 499; *M v S* [2006] 37 Fam LR 32; *Mestronov* [n 88]; *Dennett v Norman* [2007] FamCA 57; *Eddington v Eddington (No 2)* [2007] FLC 93-349; *Trahn v Long (No 2)* [2008] FamCAFC 194; *SS v AH* [2010] FamCAFC 13; *RCB v The Honourable Justice James Forrest* [2012] 247 CLR 304; *Maldera V Orbel* [2014] FamCAFC 135; *Lotta v Lotta* [2017] FamCA 50; *Bondelmonte* [n 58]; *Kulat v Azzarudin* [2018] FLC 93-838; *Grainger v Grainger* [2019] FamCA 56; *Zammit v Zammit* [2020] FamCA 950; *Bergmann v Bergmann* [2022] FedCFamC1A 38 (*‘Bergmann’*); *Haward v Haward* [2023] FedCFamC1A 99; *Ferrucci v Kovak (No 4)* [2024] FedCFamC1F 413; *Remellis v Moneas* [2024] FedCFamC2F 450; *Eckhardt v Eckhardt* [2024] FedCFamC2F 271; *Wilburn v Quinton* [2024] FedCFamC2F 42; *Halligan v Weldon* [2024] FedCFamC2F 164; *Otmar v Mack* [2024] FedCFamC2F 37; *Wordsworth v Wordsworth* [2021] FedCFamC1A 28 (*‘Wordsworth’*).

<sup>92</sup> *Bondelmonte* [n 58] [41]. See also *Bergmann* [n 91] [55] and *Wordsworth* [n 91] at [39].

## 5. What do children and young people say that they need?

Australian and international research undertaken with, or focusing on, children and young people's views and experiences of the family law system, identifies the need to better support their participation in post-separation decision-making.<sup>93</sup> Specifically, Australian research indicates that children and young people seek and need professionals to listen more effectively to their views and experiences, to provide independent information relevant to the decision-making process, and to have the opportunity to be safely and accurately heard in this decision-making process.<sup>94</sup>

Children and young people articulate multiple reasons for wanting and needing a voice in disputes, including the need for their views and preferences to be represented in discussions about their living arrangements, personal autonomy, fairness, being acknowledged within the dispute, achieving more informed decisions and better outcomes, and understanding decisions made.<sup>95</sup> Participants of Council's consultation with the Department of Social Services and Office for Youth's *Safe and Supported Youth Advisory Group* (see **Appendix D**) advised that in order for children and young people to provide their views appropriately, they must already have an understanding of the system, and their individual situations. This group also identified the impact of intergenerational outcomes – noting that, if one didn't understand the family law system through experiencing it as a child, then they still wouldn't be able to understand it as a young parent.

It is important to stress that participation does not require children and young people to choose between their parents or to have sole responsibility for the decisions made.<sup>96</sup> Many parents in post-separation parenting matters have also agreed that children should have a say.<sup>97</sup>

Research in the Australian context, including the AIFS *Children and Young People in Separated Families: Family Law System Experience and Needs* project (2018),<sup>98</sup> provides insight into the nature of the participation in post-separation decision-making processes sought by children and young people.

- <sup>93</sup> Kylie Beckhouse, *To investigate legal representation schemes for children in the USA, Canada and the UK: administration, delivery and innovation* (Report, The Winston Churchill Memorial Trust of Australia, 2015b) ('*Beckhouse 2015b*'); Kylie Beckhouse, *Laying the guideposts for participatory practice: Children's participation in family law matters* (Family Matters Research Report 98, Australian Institute of Family Studies, 2016) 26-33 ('*Beckhouse 2016*'); Felicity Bell, 'Barriers to empowering children in private family law proceedings' [2016a] 30(3) *International Journal of Law, Policy & the Family* 225-247 ('*Bell 2016a*'); Felicity Bell, 'Meetings between children's lawyers and children involved in private family law disputes' [2016b] 28(1) *Child and Family Law Quarterly* 5-24 ('*Bell 2016b*'); Rachel Birnbaum and Nicholas Bala, 'Views of the Child Reports: the Ontario Pilot Project – Research Findings and Recommendations' (Legal Research Paper No. 2017-092, Queen's University, 2017) ('*Birnbaum and Bala 2017*'); Carson et al 2018 (n 11); Rachel Carson et al, 'Compliance with and enforcement of family law parenting orders: Final report' (Research Report, ANROWS, 2022) ('*Carson et al 2022*'); Belinda Fehlberg et al, 'Exploring the "best interests" principle: "Home" after parental separation for children and young people who have experienced domestic abuse' [2023] *Australian Journal of Family Law* 36(1), 23-37 ('*Fehlberg et al 2023*'); Pamela Henry and Karine Hamilton, 'The inclusion of children in family dispute resolution in Australia: Balancing welfare versus rights principles' [2012] 20(4) *International Journal of Children's Rights* 584-602 ('*Henry and Hamilton 2012*'); Kaspiw et al 2014 (n 11); Rae Kaspiw et al, *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report* (Research Report, ANROWS Horizons 04, 2017) ('*Kaspiw et al 2017*'); Rae Kaspiw et al, *Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers* (Research Report, ANROWS 01, 2022) ('*Kaspiw et al 2022*'); Gillian Macdonald, 'Hearing children's voices? Including children's perspectives on their experiences of domestic violence in welfare reports prepared for the English courts in private family law proceedings' [2017] 65(1) *Child Abuse & Neglect* 1-13 ('*Macdonald 2017*'); Independent Panel, *Ministry of Justice (New Zealand)*, Te Korowai Ture a-Whanua: The final report of the Independent Panel examining the 2014 family justice reforms' (Final Report, 2019); *Parkinson and Cashmore 2008* (n 59); Michael Saini et al, 'Understanding pathways to family dispute resolution and justice reforms: Ontario court file analysis & survey of professionals' [2016] 54(3) *Family Court Review* 382-397 ('*Saini et al 2016*'); E. Kay Tisdall, 'Subjects with agency? Children's participation in family law proceedings' [2016] 38(4) *Journal of Social Welfare & Family Law* 362-379 ('*Tisdall 2016*')  
<sup>94</sup> *Beckhouse 2015b* (n 93); *Beckhouse 2016* (n 93); *Bell 2016a* (n 93); *Bell 2016b* (n 93); *Birnbaum and Bala 2017* (n 93); *Carson et al 2018* (n 11); Rachel Carson et al, 'Evaluation of the Children's Contact Service Activity: Final report' (Research Report, Australian Institute of Family Studies, 2023) ('*Carson et al 2023*'); *Dimopoulos 2022* (n 11); *Fehlberg et al 2023* (n 93); *Henry and Hamilton 2012* (n 93); *Kaspiw et al 2014* (n 11); *Kaspiw et al 2017* (n 93); *Kaspiw et al 2022* (n 93); *Parkinson and Cashmore 2008* (n 93).  
<sup>95</sup> Rachel Birnbaum and Michael Saini 'A Qualitative Synthesis of Children's Participation in Custody Disputes' [2012] 22(4) *Research on Social Work Practice*, 400-409 ('*Birnbaum and Saini 2012*').  
<sup>96</sup> Ibid; Judy Cashmore and Patrick Parkinson, 'Children's "wishes and feelings" in relocation disputes' [2008] 28(2) *Child and Family Law Quarterly* 151-173 ('*Cashmore and Parkinson 2008*'); Gail Friedly, 'An Exploratory Study of Adolescents' Experiences with their Divorced Parents' Parenting Plans' (Doctoral Dissertation, Capella University, 2009); Graham et al, 'Australian children's perspectives on rights, responsibilities, and citizenship: Implications for teacher practice and citizenship education' in *Children as Citizens? International Voices* (Otago University Press, 2009); Bren Neale and Carol Smart, 'Agents or Dependents? Struggling to listen to children in family law and family research' (Working Paper 3, Centre for Research on Family, Kinship & Childhood, Department of Sociology and Social Policy University of Leeds, UK, 1998); *Carson et al* (n 11); Monica Campo et al, 'Shared parenting time in Australia: exploring children's views' [2012] 34(3) *Journal of Social Welfare and Family Law* 295-313 ('*Campo et al 2012*').  
<sup>97</sup> See for example, *Cashmore and Parkinson 2008* (n 96); *Kaspiw et al 2014* (n 93); *Carson et al 2018* (n 93); *Carson et al 2022* (n 93); *Carson et al 2023* (n 93).  
<sup>98</sup> *Carson et al 2018* (n 11).

This research, drawing primarily on 61 interviews with children and young people whose families had accessed family law system services, shows that participation as conceptualised by children and young people is multifaceted, but involves two key elements that involve the provision of access to:

1. safe and effective options to participate in the post-separation decisions affecting them and to be accurately heard in this decision-making process, and
2. independent information relevant to the decision-making process and about the decisions made about their post-separation arrangements and feedback about how their views informed the decisions made.<sup>99</sup>

The features of effective professional practice that emerged from this research data from children and young people provides insight into characteristics that they valued in their interactions with family law professionals and family law practices and processes.

The participating children and young people indicated that professionals needed to:

- be 'genuine' and 'good listeners', who are approachable and take the time to build rapport and trust with the child/young person
- demonstrate the qualities of patience, empathy and respect, and who avoid partisan language, interrogative approaches
- actively listen and show children and young people that they are being heard.<sup>100</sup>

The participating children and young people sought professionals whose practices and processes involved:

- providing a physically and emotionally safe space for children and young people to speak and to process events, and taking flexible approaches to engaging with children and young people
- facilitating safe and effective opportunities to participate that support the child/young person to be accurately heard as part of the decision-making process, requiring the accurate collection and communication of their views and experiences
- taking a proactive and protective approach to participation that involves taking action to address safety concerns raised by children and young people

<sup>99</sup> For example, 'Give children a bigger voice more of the time: Children and young people's experiences of the family law system', *Child Family Community Australia Webinar* (Rachel Carson and Norma Williams, AIFS, 27 September 2018) <<https://aifs.gov.au/webinars/give-children-bigger-voice-more-time-childrens-and-young-peoples-experiences-family-law>> [*Carson and Williams Webinar, 2021*]; Rachel Carson, 'Give children a bigger voice, more of the time: Findings from the Children and Young people in Separated Families Project' (Presentations to the Family Law Pathways Network, 14 November 2019 and 20 May 2021) [*Carson Presentations to FLPN, 2021*]; Rachel Carson, 2021 'What is effective professional practice from the perspective of children and young people: Findings from the Children and Young People in Separated Families Project' (Presentation, Child Inclusive Practice Forum, 7 June 2021) [*Carson Child Inclusive Practice Forum 2021*]; Kaspiew et al 2014 (n 11); Anne Smith, Nicola Taylor and Pauline Tapp, 'Rethinking children's involvement in decision-making after parental separation' [2003] 10 *Childhood* 201-216 [*Smith and Taylor 2003*].

<sup>100</sup> Carson et al 2018 (n 11); See also for example Carson et al 2022 (n 93); Carson et al 2023 (n 94).

- facilitating open, honest and ongoing communication that keep the child/young person clearly, accurately and independently informed, including through the provision of:
  - accessible explanations of the decision-making process, its progress and of the decisions that are made
  - a feedback loop with an opportunity for the child/young person to ask questions and to see how their views were considered in the decision-making process
- facilitating access to support services should the child/young person need them.<sup>101</sup>

More recent research with 25 children and young people aged 10-19 years undertaken by Dr Georgina Dimopoulos and colleagues observes children’s conceptualisations of their participatory rights as ‘embracing three practical dimensions – feeling listened to, heard and understood’ and with trust being a ‘core value shaping their family law system engagement’.<sup>102</sup>

Building flexibility into parenting arrangements has also been identified by children and young people as important. Research in the Australian context has identified that orders applying to children and young people until they are 18 years old can be problematic with children who are Gillick competent<sup>103</sup> but who have no mechanism for changing or discharging those orders.<sup>104</sup> In their submission to the consultation on the Family Law Amendment Bill 2023 (Cth), Youth Law Australia included several quotes from children and young people who had sought advice from them, including from a 16 year old young person engaging with them who stated:

I’ve never liked living with my dad and I don’t want to live there anymore. He knows that I’m dealing with stuff at school but he never listens. I spend half the time at Mum’s house and the other half at Dad’s. I want to live at Mum’s full time and visit Dad instead. Mum said I can’t because there is a Court Order and they have already been back to court once. I don’t understand why other people my age can leave home if they have somewhere safe to go, but I’m not allowed? When does the order stop? Will I get into trouble if I ignore it?<sup>105</sup>

As will be discussed in further detail in section 7 of this report, a preference for child-inclusive ‘participatory’ processes over child-focused processes (in which a child’s/young person’s best interests are inferred) is also supported by research evidence that suggests it matters how directly children can make themselves heard in the making of post-separation parenting arrangements.<sup>106</sup> Children and young people want to have ‘their own words and views heard by decision makers’, rather than having ‘their words interpreted by adults and translated into what was thought to be their best interests’.<sup>107</sup>

<sup>101</sup> Carson et al 2018 [n 11]; See also, Dimopoulos 2022 [n 11]; Kaspiew et al 2014 [n 11]; *Emerging Minds*, ‘In Focus: Supporting your child’s wellbeing during separation or divorce’, (Web Page) <<https://emergingminds.com.au/resources/in-focus-supporting-your-childs-wellbeing-during-a-separation-or-divorce/>> (*Emerging Minds*); Tim Moore, *Protection through participation – Involving children in child-safe organisations* (Research Report, Australian Institute of Family Studies, 2017) (*Moore 2017*).

<sup>102</sup> Georgina Dimopoulos et al, ‘“Talk to us, not about us”: Children’s understandings and experiences of participation in Australian family law’ (2024) *Child & Family Social Work* (under review) (*Dimopoulos et al 2024*).

<sup>103</sup> ‘Gillick competent’ is a term used in law to represent whether a child can consent to their own medical treatment without needing parental permission or knowledge. This concept originated from a 1985 legal case in England, known as *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 712. To be considered Gillick competent, a child must demonstrate sufficient understanding and intelligence to fully comprehend the proposed medical treatment, including its nature, purpose, and potential risks.

<sup>104</sup> See for example, Carson et al 2018 [n 11]; Carson et al 2022 [n 93]; Carson et al 2023 [n 76]; Campo et al 2012 [n 96].

<sup>105</sup> Youth Law Australia, ‘Submission to the Senate Legal and Constitutional Committee into the Family Law Amendment Bill [2023]’ (Submission, June 2023) (*Youth Law Australia Submission*).

<sup>106</sup> Kaspiew et al 2014 [n 11]; Jennifer McIntosh, Catherine Long and Yvonne Wells, *Children beyond dispute: A four year follow up study of outcomes from child focused and child inclusive post-separation family dispute resolution* (Research Report, Attorney-General’s Department, 2009) (*McIntosh, Long and Wells 2009*); Carson et al 2018 [n 11]; Dimopoulos 2022 [n 11].

<sup>107</sup> Office of the Children’s Commissioner (England), ‘Do more than listen. Act: Consultation response to the Family Justice Review undertaken for the Family Justice Council’s Voice of the Child sub-group’ (Report, 2011).

Participatory approaches have also been identified as supporting the development of more sustainable post-separation outcomes, particularly where there is some scope for flexibility to adjust the outcomes as their needs change over time.<sup>108</sup> Recent AIFS research regarding compliance with, and enforcement of, family law parenting orders identifies both the facilitation of participation in the initial and any subsequent decision-making processes as supporting more effective operation and durability of postseparation parenting arrangements.<sup>109</sup>

## 5.1 The provision of child safe information to children and young people

The provision of clear, authoritative and independent information, in child-friendly language, throughout the decision-making process is an essential element of participation, with children and young people indicating that they needed to be kept informed of the decision-making process, its progress and of the decisions made.<sup>110</sup> This need was highlighted by Youth Law Australia, who stated that their organisation is frequently contacted by children and young people seeking advice and support about parenting matters, identifying various forms of harm.<sup>111</sup> The submission made by Youth Law Australia as part of the Government's consultation process in relation to the 2023 family law amendments, recommended the development of a section of the Federal Circuit and Family Court of Australia ('FCFCOA') website for children and young people which would include information about parenting matters, any overview of children's rights including a child-friendly version of the Convention, referral options for counselling and legal advice, details of what they may expect from the professionals they come into contact with, and how they may make complaints.

The provision of a feedback loop was also identified as particularly critical to demonstrate to children and young people that their views and experiences are important, that they have been heard, and to show how they have been considered in the decision-making process. Consistent with the AIFS 2018 research, Moore and colleagues' research<sup>112</sup> with children and young people emphasises the importance of providing sufficient information to children and young people to reduce their fear associated with safety issues so that they are not reliant on drawing assumptions to 'fill in the gaps' themselves.<sup>113</sup> Moore also emphasises that as children and young people 'understand and experience safety differently from adults, adults and organisations need to understand what safety means to kids and act to respond to their fears'; and to involve children and young people 'in the development of strategies and responses for their own safety results in a greater likelihood that children will utilise and feel positive about them'.<sup>114</sup>

Dr Dimopoulos, drawing on her research examining judges' engagement with children's rights,<sup>115</sup> similarly recommended that resources be developed to provide children and young people with age-appropriate information, that they be supported to understand how the information that they provide will be used in the decision-making process, and that they receive feedback and an explanation about how their views were considered in that process. In other research, Dr Dimopoulos has also considered child-friendly judgments.<sup>116</sup> Some judicial officers have included child-friendly explanations of their reasons for decision, a measure supported by Youth Law Australia, where they recommended that child-friendly summaries of parenting orders be provided to all children and

<sup>108</sup> See e.g. *Campo et al 2012* (n 96); *Carson et al 2018* (n 11); *Carson et al 2022* (n 93); Judy Cashmore, Patrick Parkinson and Ruth Weston, *Shared care parenting arrangements since the 2006 Family Law Reforms: Report to the Australian Government* (Research Report, Attorney-General's Department, 2010) [*Cashmore et al 2010*]; Jane Fortin, Joan Hunt and Lesley Scanlan, *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth* (Report, Sussex Law School, 2012) [*Fortin et al 2012*]; Jody Lodge and Michael Alexander, *Views of adolescents in separated families: A study of adolescents' experiences after the 2006 reforms to the family law system* (Commissioned Report, Australian Institute of Family Studies, 2010) [*Lodge and Alexander 2010*]; Grania Sheehan et al, *Children's contact services expectation and experience: Final report* (Research Report, AIFS, 2005) [*Sheehan et al 2005*]; Liz Trinder, 'What might children mean by a meaningful relationship' (2009) 15(1) *Journal of Family Studies* 20–35 [*Trinder 2009*].

<sup>109</sup> *Carson et al 2022* (n 93); *Kaspiew et al 2022* (n 93).

<sup>110</sup> *Carson et al 2018* (n 11); *Carson et al 2022* (n 93); *Carson et al 2023* (n 76); *Kaspiew et al 2014* (n 11); *Kaspiew et al 2017* (n 93); Jon Symonds et al, 'Separating families: Experiences of separation and support' (Report, Nuffield Family Justice Observatory, 2022) [*Symonds et al 2022*].

<sup>111</sup> *Youth Law Australia Submission* (n 105) [61].

<sup>112</sup> See Tim Moore et al, *Taking us seriously: Children and young people talk about safety and institutional responses to their safety concerns* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, Institute of Child Protection Studies, Australian Catholic University, August 2015) and *Moore 2017* (n 101).

<sup>113</sup> *Carson et al 2018* (n 11).

<sup>114</sup> *Moore 2017* (n 101).

<sup>115</sup> Georgina Dimopoulos, 'The right time for rights? Judicial engagement with the UN Convention on the Rights of the Child in Part VII proceedings' (2023a) 36(1) *Australian Journal of Family Law* 64 [*Dimopoulos 2023a*].

<sup>116</sup> Georgina Dimopoulos, 'Re-reading court judgments from a children's rights perspective' in *Decisional Privacy and the Rights of the Child* (Routledge, 2022).

young people, together with information on seeking support and advice.<sup>117</sup> A recent example was undertaken in the FCWA where Justice O'Brien included a child-friendly explanation of the reasons, which he directed be prepared by the ICL with the input of the child's therapist and the Court Expert psychologist.<sup>118</sup> In a different case involving a younger child, a court child expert prepared a child-friendly explanation of the orders which included pictures. In some instances, judges have written letters annexed to judgments, although this has received greater traction in the UK.<sup>119</sup>

UNICEF ('United Nations Children's Fund') has published a child-friendly version of the Convention.<sup>120</sup> There are many other child-friendly resources prepared overseas and locally. 54 Reasons (formerly known as Save the Children), has several child-friendly resources including a child-friendly explanation of the UNCRC. They actively seek the views of children and adapt their work in accordance with feedback from children. Work could be done with 54 Reasons to adapt their resources to create child-friendly resources in the family law space.<sup>121</sup>

#### **Recommendation 4:**

***That Government commission the development of a website (and associated social media content) specifically for children and young people, to explain their rights in family law matters in child-friendly language.***

- ***The website (and any associated social media content) should clearly explain the decision-making process after parents separate providing information about what the law says about decisions about children and how they can participate in the process.***
- ***The website should be designed with different ages of children in mind, explaining children and young people's rights, not just in the family law context but in relation to a range of laws that affect them.***
- ***Children and young people, including from the Children and Young People's Advisory Board when established (Recommendation 11), should be consulted about the development of and content on the website.***
- ***Child-friendly documents that have been produced by a range of relevant organisations in Australia and overseas should be used to inform the website content.***

#### **Recommendation 5:**

***That Government commission the development of a children's and young persons' information and education package about the family law system, co-designed with children and young people, that can be accessed and used wherever they are, including but not limited to schools, sports clubs, and other places children and young people frequent, together with youth detention centres.***

<sup>117</sup> *Youth Law Australia Submission* (n 105) [Recommendation 9].

<sup>118</sup> *Worrall v Bartley* (2023) FCWA 2, see Annexure A. See also *Gaylard v Cain* [2012] FMCAfam 501 where Federal Magistrate Altobelli wrote a letter to the children aged ten and six – ordering that it be given to the children to read when they reach the age of fourteen. See also *Lavigne v Gavin* (No 2) [2024] FedCFamC2F 737 where in an interim decision Judge Harland included a one-page explanation to the children at the end of the reasons. She directed the ICL to provide it to the children.

<sup>119</sup> See, for example, *A Letter to a Young Person, Re (Rev 1)* [2017] EWFC 48 [26 July 2017] and *Ms D v Mr D* 2022 EWFC 164.

<sup>120</sup> UNICEF, *The Convention on the Rights of the Child: The Children's Version* (Web Page) <<https://www.unicef.org/child-rights-convention/convention-text-childrens-version>>.

<sup>121</sup> *54 Reasons*, 'Kid's Corner' (Web Page) <<https://www.54reasons.org.au/kids-corner>>.

## 6. Relevant research, commentary and case law: 'Protection through participation'<sup>122</sup>

Concerns about the participation of children and young people in post-separation decision-making are longstanding. These concerns have centred on a reluctance to include children and young people for a variety of reasons, including based on the harm that is associated with a conceptualisation of participation that shifts the responsibility in the decision-making processes, that it unsafely involves children and young people in their parents' litigation, or that is considered to require children and young people to give evidence in a court setting.<sup>123</sup> In addition to protective concerns, concerns have also been raised about the potential for children to be manipulated and there are concerns about children and young people's capacity to participate.<sup>124</sup> Council heard from stakeholders holding concerns of this nature.<sup>125</sup> In common law countries, family law proceedings take place in adversarial settings designed by adults for adults. Concerns regarding barriers to participation in these settings were also raised with Council, including practical barriers and challenges to participation being effectively realised in practice, adult gatekeeping, and a lack of training of professionals in talking with children and young people.

On the other hand, Council heard from stakeholders and received submissions from a range of family law practitioners and academics that identified this protective approach as underestimating children and young people's capacities and treating them as passive objects in need of protection, rather than independent rights holders and autonomous beings with views and interests of their own. Some of these stakeholders described the exclusion of children and young people from participation as outdated and as inconsistent with contemporary understandings of child development. In their consultation with Council, the *Safe and Supported Youth Advisory Group*<sup>126</sup> observed that the best interests of children and young people cannot be determined without hearing from them, and if children are not made aware of a potentially dangerous situation, they might not necessarily be aware of the risks they might be exposed to, which could put them at further risk of harm.

Professor John Tobin, a children's rights academic, said that Australian family law professionals tend to see children as vulnerable and in need of protection, and that they marginalise their voices by focusing on children's deficits not their strengths.<sup>127</sup> Dr Dimopoulos referred to her recent study of judges' engagement with children's rights which found that children's rights are not a way of thinking for judges, with some judges referring to children and young people as being of limited assistance to the decision-making process.<sup>128</sup> Dr Dimopoulos, together with Professor Tobin and Dr Michelle Fernando commented that the 2023 amendments to the *Family Law Act* are positive in placing more focus on children and young people rather than the parents, but that a requirement for ICLs to meet with the child/ren unless there are exceptional circumstances, does not equate to the child/young person having a right to express a view. In this way, Part VII of the *Family Law Act* steps towards child participation, without guaranteeing it.

Council acknowledges the challenges for judicial, legal and non-legal family law system service providers to protect and support the agency and participatory rights of children and young people, without exposing them to harm that may arise from participation including in circumstances involving family violence and/or abuse. Participatory processes must not re-traumatise children and young people, for example, from continuing exposure to parental conflict,<sup>129</sup> from the multiple interviews effect,<sup>130</sup> or by enabling parents to involve their children in the misuse of legal processes.<sup>131</sup>

<sup>122</sup> Moore 2017 (n 101).

<sup>123</sup> See for example Kaspiew et al 2014 (n 11); Carson et al 2018 (n 11).

<sup>124</sup> Kaspiew et al 2014 (n 11); Carson et al 2018 (n 11). See further for example, Aisling Parkes, 'Implementation of Article 12 in the Family Law Proceedings in Ireland and New Zealand Lessons Learned and Messages for going forward' in Tali Gal and Benedetta Duramy, *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (online ed, Oxford Academic 2016). See also Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge, 1<sup>st</sup> ed, 2015).

<sup>125</sup> See list of stakeholders consulted at Appendix D.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Dimopoulos 2023a (n 115).

<sup>129</sup> For example, Carol Smart, Bren Neale and Amanda Wade, 2001, *Changing Experience of Childhood: Families and Divorce* (Polity Press, 2001) ('Smart, Neale and Wade 2001').

<sup>130</sup> The multiple interviews effect may arise where children are questioned multiple times or have had contact with multiple services, see Kaspiew et al 2014 (n 11).

<sup>131</sup> Carson et al 2022 (n 93); Bell 2016a (n 93); Henry and Hamilton 2012 (n 93); Kaspiew et al 2017 (n 93); Macdonald 2017 (n 93); Victorian Government, *Royal Commission into Family Violence Report* (Final Report, March 2016); Tisdall 2016 (n 93).

Acknowledging that these concerns are important, they must be considered in light of circumstances where these children are, or have already been, exposed to their parents' conflict or violence or abuse. Hearing the views and experiences of children and young people has been identified as particularly critical in these circumstances, from a children's rights perspective, from an evidentiary perspective, and because it is consistent with what children and young people want and feel they need.<sup>132</sup> Children and young people are increasingly being recognised (including in legislation and in practice) as experiencing domestic and family violence in their own right, rather than as secondary victims and survivors as an extension of their parent.

Australian and international research identifies that adults need to provide children and young people with 'safe and effective options to participate',<sup>133</sup> expressing their views and experiences to inform the decision-making process, and to be kept informed about the outcome and how their views have been taken into account.<sup>134</sup> To do so, it is imperative to have the necessary mechanisms or, as Dr Briony Horsfall has described, the 'scaffolding' in place to support this participation.<sup>135</sup> Drawing on the discussion in the previous section regarding the provision of information, it is also imperative that children and young people are given the information to support them making informed decisions about whether they want to participate and how they may wish to do so, in order that they can do so safely and effectively.

The implementation of participatory approaches has been informed by an evolving understanding of child development that acknowledges their agency and that they are active social actors.<sup>136</sup> Relevant research considered by Council emphasises the importance of improving these participatory approaches, including in cases involving high-risk and complex family circumstances. Improving access to safe and effective options for children and young people to participate in decision-making processes about their living and care arrangements, are identified as protecting children and young people through their participation, and as supporting their wellbeing and facilitating safe and informed decision-making.<sup>137</sup> This is because having options to safely and effectively participate are identified as being:

1. consistent with the rights of children and young people enshrined in the Convention,
2. consistent with children and young people's best interests/wellbeing as this supports their agency and self-efficacy, and
3. critical to making safer post-separation parenting arrangements from an evidentiary perspective by better enabling informed decision-making and more durable outcomes.<sup>138</sup>

132 See list of stakeholders who consulted Council at Appendix D.

133 *Carson et al 2018* (n 11) 50; *Carson and Williams Webinar, 2021* (n 86); *Carson Presentations to FLPN, 2021* (n 86); *Carson Child Inclusive Practice Forum 2021* (n 86).

134 See for example, *Carson et al 2018* (n 93).

135 Briony Horsfall, 'Breathing life into children's participation: empirical observations of lawyer-child relations in child protection proceedings' (2013) 3(3) *New Zealand Law Review* 429-444 ('Horsfall 2013'). See also *Carson et al 2018* (n 11); *Tisdall 2016* (n 93). See more recently, *Dimopoulos 2022* (n 11).

136 See for example, Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report 135, March 2019) 19 ('ALRC 2019 Report'); see also Kath Orr, Annette Dickinson and Elizabeth Smythe, 'The lived experiences of children/young people in the Aotearoa-New Zealand family court system' [2024] 62(1) *Family Court Review* 176-193 ('Orr et al 2024').

137 *Carson et al 2018* (n 11) 50; *Carson and Williams Webinar, 2021* (n 86); *Carson Presentations to FLPN, 2021* (n 86); *Carson Child Inclusive Practice Forum 2021* (n 86). See also *Dimopoulos 2022* (n 11), Georgina Dimopoulos, 'Children's Participation in Family Law Proceedings: Are We (Still) Not Listening?' [2023b] 32(1) *Australian Family Lawyer* 33 ('Dimopoulos 2023b').

138 *Carson et al 2018* (n 11); *Carson and Williams Webinar, 2021* (n 86); *Carson Presentations to FLPN, 2021* (n 86); *Carson Child Inclusive Practice Forum 2021* (n 86).

Participatory approaches are also consistent with the views expressed by children and young people in research conducted with them, which has highlighted the importance of providing safe and effective opportunities to participate in and contribute their views, perspectives and experiences to, decision-making relevant to their care.<sup>139</sup>

Critiques of the perceived dichotomy between protection and participation have been identified in Australian and international research, and in Council's own consultations with children and young people, with Children's Commissioners, and among a range of family law system professional stakeholders.<sup>140</sup> These critiques show that children and young people are aware of, exposed to, and potentially involved in, the issues characterising their parents' separation; and as such, children and young people provide critical evidentiary insight into their needs and best interests, which is particularly important to enable safe decision-making in cases characterised by risks such as domestic and family violence.

As observed earlier in this section, in these circumstances, concerns about further exposure to parents' disputes should be considered in light of the exposure already experienced, and/or experiences of their violent and abusive behaviour. Without facilitating options to participate in these circumstances, children and young people's lack of visibility and awareness of, and involvement in their families' post-separation decision-making processes, can be contrasted with their awareness of, and involvement in their parents' separation issues, including the domestic and family violence they may experience.<sup>141</sup> Affording children and young people the opportunity to participate in the decision-making process in these circumstances has been identified as particularly critical to informing safe and appropriate decision-making and as more protective than keeping them 'in the dark'.<sup>142</sup> International research has also challenged the marginalisation of children's voiced experiences of domestic and family violence through 'adult gatekeeping' and presumptions in favour of facilitating parenting time.<sup>143</sup>

In circumstances that are not characterised by domestic and family violence or other risk issues, children and young people nevertheless pick up on and are affected by the unspoken tensions between their parents. Although dispute resolution processes are inherently stressful, and court proceedings more so, challenges can be minimised with appropriate scaffolding. The alternative of not providing children and young people with options to have a voice in the decision-making process or informing them of what is going on, can contribute to children feeling anxious, stressed, unheard and unimportant, and may mean that decision-making takes place without relevant evidence from

139 Dale Bagshaw et al, 'Family violence and family law in Australia: The experiences and views of children and adults in families who separated post 1995 and post 2006' [2010] 21 *Australian Family Lawyer* 1-219 ('Bagshaw et al., 2010'); Bell 2016a [n 93]; Rachel Birnbaum 'Views of the child reports: Hearing directly from children involved in post-separation disputes' [2017] 3 *Social Inclusion* 148 ('Birnbaum 2017'); Rachel Birnbaum and Nicholas Bala, 'The child's perspective on legal representation: Young adults report on their experiences with lawyers' [2009] 25 *Canadian Journal of Family Law* 11-71 ('Birnbaum and Bala 2009'), Birnbaum and Bala 2017 [n 93]; Campo et al 2012 [n 96]; Carson et al 2018 [n 11]; Carson et al 2022 [n 93]; Robyn Fitzgerald and Anne Graham, 'The changing status of children within family law from vision to reality [2011] 20(2) *Griffith Law Review* 421-448 ('Fitzgerald and Graham, 2011'); Anne Graham and Robyn Fitzgerald, 'Taking account of the 'to and fro' of children's experiences in family law' [2006] 21(2) *Children Australia* 30-36; Anne Graham and Robyn Fitzgerald, 'Exploring promises and possibilities for children's participation in Family Relationship Centres', [2010] *Family Matters*, 84, 53-60; Kaspiew et al 2014 [n 11]; Lodge and Alexander 2010 [n 108]; Jennifer McIntosh, 'Four young people speak about children's involvement in Family Court matters' [2009] 15(1) *Journal of Family Studies* 98-103 ('McIntosh 2009'); Jennifer McIntosh et al, 'Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post separation adjustment' [2008] 46(1) *Family Court Review* [2008] 105-124 ('McIntosh et al 2008'); Bren Neale, 'Dialogues with children: Children, divorce and citizenship' [2002] 9(4) *Childhood* 455-475 ('Neale 2002'); Parkinson and Cashmore [n 93]; Lixia Qu and Ruth Weston, 'Children's views about parental separation' in *The Longitudinal Study of Australian Children Annual Statistical Report 2014* (Research Report, Australian Institute of Family Studies, 2015) 13-37; Catherine Quigley and Francine Cyr, 'Children's perspectives on parenting coordination: Insights from the Montreal parenting coordination pilot project' [2017] 14(2-3) *Journal of Child Custody: Research, Issues, and Practices* 151-174 ('Quigley & Cyr 2017'); Grania Sheehan and Rachel Carson, 'Protecting children's rights in contact disputes: The role of children's contact services in Australia' [2006] 44(3) *Family Court Review* 412-428 ('Sheehan & Carson 2006'); Smart, Neale and Wade 2001 [n 129]. See also: Judy Cashmore 'Children's participation in family law decision-making: Theoretical approaches to understanding children's views' [2011] 33 *Children and Youth Services Reviews* 515-520 ('Cashmore 2011'); Cashmore and Parkinson 2008 [n 96]; Patrick Parkinson, Judy Cashmore and Judi Single 'Adolescents' views on the fairness of parenting and financial arrangements after separation' [2005] 43 *Family Court Review* 429-444 ('Parkinson, Cashmore and Single, 2005'); Sheehan et al 2005 [n 108].

140 See Appendix D.

141 Carson et al 2018 [n 93]; Carson Presentations to FLPN, 2021 [n 86]; Carson Child Inclusive Practice Forum 2021 [n 86].

142 Carson et al 2018 [n 93]. See also Felicity Bell, 'Facilitating the Participation of Children in Family Law Processes' [Discussion Paper, Legal Aid NSW, 2015] ('Bell 2015'); Bell 2016a [n 93]; Bell 2016b [n 93]; Carson et al 2018 [n 11]; Michelle Fernando, 'Children's direct participation and the views of Australian judges' (Family Matters Research Report 92, Australian Institute of Family Studies, 2013a) 41-47 ('Fernando 2013a'); Michelle Fernando, 'Express recognition of the UN Convention on the Rights of the Child in the Family Law Act: What impact for children's rights to be heard?' [2013b] 36(1) *University of New South Wales Law Journal* 88-106 ('Fernando 2013b'); Michelle Fernando and Nicola Ross, 'Stifled voices: Hearing children's objections in Hague child abduction convention cases in Australia' [2018] 32(1) *International Journal of Law, Policy & the Family* 93-108 ('Fernando and Ross 2018'); Kaspiew et al 2014 [n 11]; *Emerging Minds* [n 101]; Parkinson and Cashmore 2008 [n 93]; Qu and Weston 2015 [n 139]; Sheehan and Carson 2006 [n 139].

143 Macdonald 2017 [n 93]. See more generally Saini et al 2016 [n 93].

children as experts in their own lives.<sup>144</sup> In this way, rather than there being a tension between protection and participation, taking an approach to decision-making that involves listening to children and young people is identified in the empirical research literature to be protective; whereas *not* listening to children is inconsistent with the practice of the child safe principles and may be associated with experiences of harm. This may range from feelings of powerlessness where children and young people have agency and capacity to participate but are not afforded the opportunity to do so, through to the making of unsafe orders that are not informed by the relevant child/young person's views and experiences.<sup>145</sup>

The National Workforce Centre for Child Mental Health identifies that 'when done well, child participation can be an empowering and even healing process',<sup>146</sup> and that it promotes resilience for children in these circumstances characterised by risk, who have 'unique knowledge and skills as well as a desire to participate'.<sup>147</sup> Australian research provides illustrations of positive experiences of participatory approaches in the family counselling and child inclusive family dispute resolution/mediation services, together with family law court processes involving ICLs and family report writers taking a child safe approach to facilitate participation in the decision-making process.<sup>148</sup>

Once it is acknowledged that children and young people are rights holders with agency and not simply the object of litigation, it is imperative that their views are taken into consideration by the Court in a meaningful and not just a tokenistic way. As noted earlier, this is consistent with Article's 12, 13 and 17 of the Convention and is consistent with the case law on children's views outlined in section 6 of this report. There is much legal and academic commentary about the benefit of hearing the voice of children in family law proceedings both in Australia and in comparable jurisdictions.<sup>149</sup>

It is instructive to observe how these principles have been applied in other comparable jurisdictions.

The Canadian experience provides helpful insight. In the 2010 decision of the *Supreme Court of Yukon G (BJ) v G (DL)*,<sup>150</sup> Martinson J identifies the importance of giving effect to children's 'legal rights to be heard' and observes the 'key premise' that it is in their best interests to be heard:

... in my respectful view all children in Canada have legal rights to be heard in all matters affecting them, including custody cases. Decisions should not be made without ensuring that those legal rights have been considered. These legal rights are based on the United Nations Convention on the Rights of the Child, ("the Convention"), and Canadian domestic law.

The Convention ... says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings. In addition, it provides that they have the legal right to have those views given due weight in accordance with their age and maturity. There is no ambiguity in the language used. The Convention is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high-conflict, including those dealing with domestic violence, parental alienation, or both.

144 See Appendix D. See also *Kaspiew et al 2014* (n 11) and *Carson et al 2018* (n 11).

145 See *Carson et al 2018* (n 11); *Carson Presentations to FLPN, 2021* (n 86); *Carson Child Inclusive Practice Forum 2021* (n 86); *Moore 2017* (n 101); *Emerging Minds* (n 101).

146 See Commission for Children and Young People Victoria, *'In our own words': Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system* (Report, 27 November 2019).

147 *Ibid* 3.

148 See e.g. *Carson et al 2018* (n 11); *Kaspiew et al 2014* (n 11).

149 See *Children's Aid Society of Algoma [Elliot Lake] v PC-F 287 ACWS* (3d) 496 (Ontario Court of Justice) (*'Elliot Lake'*); *Libke v Sunley* 2013 SKQB 109 at [4] (*'Libke'*); *N (JK) v R (WF)* 213 A.C.W.S. (3d) 135 at [200] (British Columbia Supreme Court) (*'JK'*); *Jarvis v Landry* 199 A.C.W.S. (3d) 841 (Nova Scotia Supreme Court – Family Division) (*'Jarvis'*).

150 324 D.L.R. (4th) 367 (Yukon Supreme Court).

A key premise of the legal rights to be heard found in the Convention is that hearing from children is in their best interests. Many children want to be heard and they understand the difference between having a say and making the decision. Hearing from them can lead to better decisions that have a greater chance of success. Not hearing from them can have short and long term adverse consequences for them. While concerns are raised by some, they can be dealt with within the flexible legal framework found in the Convention.<sup>151</sup>

Martinson J noted at [23] – [24]:

[23] Excluding children and adolescents may have immediate adverse effects such as: feeling ignored, isolated and lonely; experiencing anxiety and fear; being sad, depressed, and withdrawn; being confused; being angry at being left out; and having difficulty coping with stress.

[24] Further, longer-term adverse effects of not consulting children and adolescents may include: loss of closeness in parent-child relationships; continuing resentment if living arrangements don't meet their needs in time or structure; less satisfaction with parenting plans, less compliance, more "voting with their feet"; and longing for more or less time with the non-resident parent.

Consistent with the observations outlined earlier in relation to Australian case law, in *LCT v RK*<sup>152</sup> at [34] the Court stated:

The weight given to the child's views should be in accordance with their age and their maturity. This includes their ability to understand and assess the implications of a particular matter. Recently, in a Hague Convention proceeding, the Supreme Court of Canada held that determining sufficient age and maturity of children when considering their views is a "matter of inference from the child's demeanour, testimony and circumstances": *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 at para. 79. If the child is forming a view in a reasonable and independent manner, then the views must be considered as a significant factor in family cases.

<sup>151</sup> Followed in: *Elliot Lake* (n 149); *Libke* (n 149); *JK* (n 149); *Jarvis* (n 149).  
<sup>152</sup> [2018] BCSC 1016.

Although the views of children are often communicated to the court and the parties by way of an ICL, expert report or report from a CCE, the absence of such report does not mean that the views of children can be ignored. In the Canadian case *Thompson v Thompson*<sup>153</sup>, the Court found error on the part of a trial judge in declining to consider the 'wishes' of the child. At [17] the Court stated:

The chambers judge held that expert evidence was required before he could exercise his discretion on this basis, regardless of the age or apparent maturity of the child. With respect, this is an error. At a certain age, the need for expert evidence to determine a child's level of maturity diminishes or is eliminated entirely. Absent evidence to the contrary, it is reasonable to assume that a child of 14 is sufficiently mature to express a view as to why he objects to being returned. While that view is not determinative of the outcome, it is a relevant and important consideration ...<sup>154</sup>

In the Australian context, Dr Dimopoulos' empirical study of family law first instance judgments identified a role to be played in the court process through greater application of the Convention. The findings indicate that children's rights 'are not yet a way of thinking' for family law judicial officers, but that increased judicial engagement with Article 12 may improve children's 'meaningful, safe participation' in parenting matters.<sup>155</sup> Dimopoulos observes that this increased judicial engagement would require challenging the perceived tension between what Dimopoulos has elsewhere described as an 'unhelpful dichotomy'<sup>156</sup> between protection and participation, and implementing mechanisms that support children and young people's participation.<sup>157</sup> Dimopoulos also acknowledges the resource challenges associated with according greater 'practical commitment' to children's participatory rights through greater engagement with ICLs.<sup>158</sup>

Trauma-informed service provision is essential to the facilitation of safe and effective participation of children and young people, especially in circumstances characterised by family violence, child abuse and/or neglect, and it requires knowledge and understanding of the effects of trauma on people's lives and their service needs in this context.<sup>159</sup> Key principles of a trauma-informed approach include:

- taking a strengths-based approach and empowering the voice and decision-making of the client
- ensuring their physical and psychological/emotional safety
- trustworthy and transparent services and collaborative service provision that reduces power differentials between service staff and clients.<sup>160</sup>

153 [2017] ABCA 299.

154 *Thompson v Thompson* [2017] AJ 950 (Alberta Supreme Court).

155 *Dimopoulos 2023a* (n 115).

156 *Dimopoulos 2023b* (n 137).

157 See also Francesca Dominello and Amanda Head, 'Children's Access to Justice: An Examination of a Child's Right to Participate in Parenting Decisions in Australian Family Law' in *Human Rights and Legal Services for Children and Youth: Global Perspectives* (Springer, 2023) 151-174; and Dominique Moritz and Ben Mathews, 'A Continuum of Protection to Empowerment: The Evolving Legal Landscape of Decision-Making for Children and Adolescents' [2023] 12(6) *Laws* 89.

158 *Dimopoulos 2023a* (n 115); *Dimopoulos 2023b* (n 154) 33.

159 Liz Wall, Daryl Higgins and Cathryn Hunter, *Trauma-informed care in child/family welfare services* (Policy and Practice Paper, AIFS, 2016).

160 *Ibid.*

Participatory approaches do not need to involve direct engagement in court proceedings, nor do they impose decision-making responsibility on children and young people. Options for participation instead require the measures that Dr Horsfall described as ‘scaffolding’ to support children and young people’s safe and effective participation in decision making.<sup>161</sup> This involves engagement with family law system professionals who have expertise in child safe and trauma informed practice. In addition to ensuring safe arrangements to participate, professionals who genuinely and actively listen and apply techniques, such as repeating statements back to the child to ensure that they have been accurately understood, enable children and young people to participate in a manner that builds trust and reassurance.<sup>162</sup>

Internationally, Professor Tisdall has recommended the broader adoption of participatory approaches in response to the undermining of children’s views by concerns about child manipulation or distress.<sup>163</sup> Tisdall recommends that the ‘thin’ agency experienced by children in circumstances characterised by family violence, could be ‘thickened with support for their views to be developed, heard and understood’.<sup>164</sup> Identifying appropriate means by which children and young people can safely and effectively participate has also been identified in the context of children with disabilities or with diverse cultural backgrounds or linguistic capacities, with a view to ensuring that the voices of these children and young people are not marginalised.<sup>165</sup> This adoption of a strengths-based approach that facilitates the protection of children’s safety through the thickening of agency by ‘scaffolded’ or supported participation is consistent with the *Safe and Supported: The National Framework for Protecting Australia’s Children 2021-2031*,<sup>166</sup> and the National Principles for Child Safe Organisations described in the previous section of this Report.<sup>167</sup>

The principles enshrined in these documents provide important guidance for service provision that meets the requirements of child safe practice and inform processes to best to support children and young people’s participation in post-separation decision-making. The application of these principles supports the making of post-separation parenting arrangements through the lens of children and young people, and is underpinned by an acknowledgement of their agency and capacity to participate in decision-making relevant to their care.<sup>168</sup> Guidance to support the facilitation of children and young people in decision-making is also provided through, for example, co-produced materials by the National Workforce Centre for Child Mental Health, Emerging Minds and AIFS.

<sup>161</sup> Horsfall 2013 (n 135). See also Carson et al 2018 (n 11).

<sup>162</sup> Carson et al 2018 (n 11).

<sup>163</sup> Tisdall 2016 (n 93).

<sup>164</sup> Ibid 374.

<sup>165</sup> See e.g. Sarah Dobinson and Rebecca Gray, ‘A review of the literature on family dispute resolution and family violence: identifying best practice and research objectives for the next 10 years’ (2017) 30(3) *Australian Journal of Family Law* 180–204 (‘Dobinson and Gray 2017’); Family Law Council, *Improving the Family Law System for Culturally and Linguistically Diverse Clients* (Report, Family Law Council, 2012); Michelle Harris, *An Evaluation of Victoria Legal Aid’s Kids Talk Program 2007–2010* (Research Report, Victoria Legal Aid, 2012) (‘Harris 2012’); Kaspiew et al 2014 (n 11); Julie Taylor et al, *Deaf and disabled children talking about child protection* (Research Report, National Society for the Prevention of Cruelty to Children, University of Edinburgh, 2015) (‘Taylor et al 2015’).

<sup>166</sup> *Safe and Supported* (n 34).

<sup>167</sup> *National Principles for Child Safe Organisations* (n 34).

<sup>168</sup> Carson et al 2018 (n 11); Carson et al 2023 (n 76); Dimopoulos 2022 (n 11); Fehlberg et al 2023 (n 93); Michelle Fernando, ‘Hearing children in family law proceedings’ [2014] 124 *Precedent* 38–41; Fitzgerald and Graham (n 117); Kaspiew et al 2014 (n 11); Kaspiew et al 2022 (n 93); Nicola Ross, ‘Different views? Children’s lawyers and children’s participation in protective proceedings in New South Wales, Australia’ (2013) 27(3) *International Journal of Law, Policy and the Family* 332–358 (‘Ross 2013’).

## 7. Securing children and young people's participatory rights

For more than 20 years in Australia, concerns have been raised in family law research and commentary about the extent to which existing legislative and practice measures outlined in sections 3 and 4 of this report, are sufficient to ensure that children and young people participate in and inform postseparation decision-making relevant to their care.<sup>169</sup>

In 2023, Council undertook a survey of stakeholders working in the family law system about a range of aspects of the operationalisation of children and young people's rights in the Australian family law system [see **Appendix C**]. In relation to whether the Australian family law system is meeting its obligations under the Convention, most participating stakeholders either disagreed (35%) or strongly disagreed (13%) with this proposition (cf. 33% either agreeing or strongly agreeing and 15% responding neutrally).

When asked for their views on whether the Australian family law system upholds the rights of children and young people to receive information about the decision-making process and outcomes in family law matters, the majority of respondents to the Council stakeholder survey disagreed (41%) or strongly disagreed (25%) with this statement, with only 19% agreeing and 3% strongly agreeing that children and young people received this information in the Australian family law system.

When asked whether the Australian family law system upholds the rights of children and young people to participate in the decision-making process in parenting proceedings, a majority of participating stakeholders answered in the negative (53%), with the remaining 30% agreeing (25%) or strongly agreeing (5%) that the participatory rights were upheld and a further 15% neither agreeing or disagreeing with the proposition.

When asked for their views on whether the system protects children and young people from physical and psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence when making parenting orders, more than half of participating stakeholders of the Council survey (53%) disagreed or strongly disagreed with this proposition, and just over one quarter agreed or strongly agreed that the system provided this protection (29%). This contrasted with the response pattern in relation to whether the system upheld the rights of children and young people to spend time with each of their parents and other people significant to their care (62% agreeing or strongly agreeing and 15% disagreeing or strongly disagreeing, although nearly a quarter of participants (22%) neither agreed nor disagreed with this proposition).

Open text responses to this question identified the critical role of ICLs in upholding the rights of children/young people and recommended increased support for ICLs to undertake their demanding and complex workload. For example:

...we must ensure that there is sufficient funding for ICLs and that the best of the practitioners working in parenting matters feel able to undertake ICL work (at the moment, fewer practitioners will take this on given increasing cost pressures... It is important and complex work and it is not sufficiently remunerated under existing legal aid grant schemes [Lawyer (solicitor), private practice]

Legal Aid rates for ICLs are too low for effective engagement, there is too much reliance on the ICL to coordinate "the answer" and the court abrogates its responsibilities in that regard. Often the ICL is "blamed" and then abused for bias/opinion by the parties and/or their solicitors... There is a significant lack of experts that are willing to engage with families for legal aid rates [Lawyer (barrister), private practice]

<sup>169</sup> See, for example, *ALRC 2019 Report* (n 120); *Joint Select Committee Final Report November 2021b* (n 10); *Carson et al 2023* (n 94); *Carson et al 2018* (n 11); *Dimopoulos 2022* (n 11); *Dimopoulos 2023a* (n 95); *Dimopoulos 2023b* (n 133); *Kaspiew et al 2014* (n 11); *Parkinson and Cashmore 2008* (n 93).

Systemic changes were identified as critical to facilitating the safe and effective participation, including in entrenched disputes:

The difficulties arise in the failure of the system to provide an avenue for children to express their views or do so in circumstances where the parties are entrenched in long, conflict laden proceedings exposing the children to the conflict and where conciliation is not appropriate or available. The family law system should offer more access to family consultants or social work/psychologists at an early stage with interventionist strategies to protect children from the adverse impacts of litigations. The waiting periods for trial are too long - children's voices are lost in the system. [Lawyer (barrister), private practice]

Another lawyer highlighted the importance of elevating the voices of children and young people from the earliest stage of the litigation process and identifies the potential for a greater role of ICLs in facilitating children's access to therapeutic supports:

There should be greater accessibility to child inclusive mediation for older children, and greater judicial training and support for the profession about perpetrators of family violence who weaponise children aged 10 - 14 to 'turn against' the primary carer. This is a pattern we constantly see and potential intervention measures to be able to support children and their involvement early on in court processes (i.e. when orders are initially made) may lead to better outcome later down the track when families find themselves before the court. The independent children's lawyer could play a greater role in ensuring children are accessing therapeutic supports and relay to the court if a parent is blocking access to these supports. A systems view is required so children can access supports - this is one of the biggest barriers where children are denied therapeutic support due to availability and noncompliance by another parent. [Lawyer (solicitor), public practice]

Low levels of child participation have been reported in direct consultations with, and submissions to, Council as well as in Australian empirical research and commentary,<sup>170</sup> with concerns about the processes being designed for adults, with reports of children and young people whose families have engaged in the family law system feeling unheard and ignored.<sup>171</sup> For example, Dr Michelle Fernando's research in the Australian context indicates that although children and young people's views are routinely taken into account and there have been improvements in how this is done, many children and young people are still dissatisfied with their involvement and feel unheard. Australia's family law system was not designed with the inclusion and participation of children and young people in mind, and the measures as implemented are insufficient to enable Australia to realise the imperative laid upon it by Article 12 of the Convention.

<sup>170</sup> Carson et al 2018 (n 11); Carson et al 2022 (n 93); Carson et al 2023 (n 76); Kaspiew et al 2014 (n 11); Kaspiew et al 2017 (n 93); Parkinson and Cashmore 2008 (n 93); Don Saposnek, 'Working with children in mediation' in 2004 in Jay Folberg, Anne Milne and Peter Salem, *Divorce and Family Mediation: Models, Techniques and Applications* (Guildford Press, 2004) 155-179; Lorri Yasenik and Jon Graham, 'The continuum of including children in ADR processes: A child-centered continuum model' (2016) 54(2) *Family Court Review* 186-202.

<sup>171</sup> See for example, Felicity Bell, Judy Cashmore and Joe Harman, 'Australia' in Wendy Schrama et al, *International Handbook on Child Participation in Family Law* (Intersentia, 2021) 89-102.

The Australian Child Rights Taskforce ('the Taskforce') published a report for the UNCRC in 2018.<sup>172</sup> The report addresses children and young people's views on a range of issues affecting them including discrimination due to racism, gender, sexuality and disability. They talked about not feeling safe and not being listened to. They included handwritten quotes from children throughout the report, gathered from their consultations with children. One child insightfully said: '*children and young people need to be a priority to have their rights upheld - but first of all they need or be informed what the rights are.*'<sup>173</sup>

Another young person said: '*if your family (parents) are going for full custody you should have a say. It ruined my childhood and I would like to be heard in an issue which is affecting my life forever.*'<sup>174</sup>

The Taskforce makes several recommendations including that the Commonwealth, in cooperation with states and territories, take a proactive approach to children's rights by including a range of measures, including by enacting a federal charter of human rights or a comprehensive national children's act providing full and direct effect of the provisions of the Convention and a range of funding measures.<sup>175</sup>

## 7.1 Potential developments to participation approaches – participatory models considered by Council

Stakeholders participating in Council's 2023 survey were asked for their views on whether the family law system upheld the rights of children and young people, and regarding a range of potential changes that may improve Australia's ability to meet its obligations under the Convention.

In relation to the specific question of whether the Australian family law system upheld the rights of children and young people to make their views known in parenting proceedings, just over half (52%) disagreed or strongly disagreed with this proposition, with just under one-third agreeing or strongly agreeing (30%).<sup>176</sup> More specifically, stakeholders were more likely to report FDR ('Family dispute resolution') processes for parenting arrangements as meeting *Convention* obligations (43%) than court processes in parenting matters (38%).

In relation to potential changes involving greater use of child inclusive (participatory) practices in FDR, the vast majority of participating stakeholders strongly agreed (43%) or agreed (38%) that these mechanisms would improve Australia's ability to meet these obligations.

A similar although not as strong response pattern was observed in relation to the enshrining of guidelines for ICLs in legislation, with 32% strongly agreeing and 34% agreeing with this proposition and 16% either disagreeing or strongly disagreeing.

In relation to whether establishing a new professional role in the family law system would support the participation of children and young people, a strong majority answered in the affirmative (42% strongly agreeing and 22% agreeing) with 21% either disagreeing or strongly disagreeing with this proposition.

As noted earlier in this report, Council has had the benefit of meeting with children's rights academics Professor John Tobin, Dr Michelle Fernando and Dr Georgina Dimopoulos. In Council's view, there is merit in work currently being undertaken by these academics that has highlighted the need to take a more substantive children's rights approach, in the determination of family law disputes, underpinned by an evolving and increasingly understood and respected conceptualisation of children and young people's capacities,<sup>177</sup> and an acknowledgment of children and young people as individual, autonomous beings with interests separate to those of their parents and other adults.

<sup>172</sup> Australian Child Rights Taskforce, *The Children's Report: Australia's NGO coalition report to the United Nations Committee on the Rights of the Child* (Report, UNICEF Australia, November 2018).

<sup>173</sup> *Ibid* at 8.

<sup>174</sup> *Ibid* at 17.

<sup>175</sup> *Ibid* at 9.

<sup>176</sup> There were 17% of participants providing a neutral (neither agree nor disagree) response.

<sup>177</sup> Laura Lundy, John Tobin and Aisling Parkes, 'Art.12 The Right to Respect for the Views of the Child' in John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford Academic, online ed, 2019) 399; Georgina Dimopoulos, 'Reconceptualising child rights: Children's Voices in a legal context' (Guest Author Series, *Institute of Child Protection Studies*, Australian Catholic University, 2020); John Eekelaar, 'The Importance of Thinking that Children have Rights' (1992) 6 *International Journal of Family Law* 221; John Tobin 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) *Nordic Journal of International Law* 155.

These academics emphasise the importance of seeing Article 12 of the Convention as an end in itself, as well as a means to an end. Professor Tobin, Dr Fernando and Dr Dimopoulos commented positively about the 2023 amendments to the *Family Law Act* as placing the focus on children rather than the parents. However, they argue that the amendments do not go far enough as they do not take a children's rights approach. The new amendments also do not refer to what weight is to be given to children's views, and again, this is filtered through an adult lens.<sup>178</sup>

The amendments do not, and for obvious reasons cannot, address children's rights to participate and have their views heard with respect to all matters dealt with outside of the court system. While legislation can regulate the delivery of defined Family Dispute Resolution services, that can only go so far.

When considering potential developments in participation approaches in the Australian context, assistance may be drawn from the principles of effective professional practice from the perspective of children and young people as outlined in section 5. These principles of effective professional practice indicate that participation should be understood to be a process rather than a one-off arrangement. For participation to be effective, children and young people must first be informed about the process, and its voluntary nature. They must be kept informed of the progress and ultimately the outcomes of the decision-making process which affects them. The onus is on adults to build up children and young people's capacities in their engagement with them,<sup>179</sup> and is also on adults to ensure that children are informed of the outcome of any dispute resolution process that impacts children, including the outcome of any court proceedings.

The appropriate approach to meeting those obligations to children and young people in individual cases will necessarily vary. A prescriptive approach may not be sufficiently flexible to meet the needs of the individual child.

Council accordingly recommends legislative amendments that will ensure that courts, lawyers, family dispute resolution practitioners and others providing assistance in post separation parenting disputes are required to consider, and meet, those obligations across the board.

The *Family Law Act* already sets out principles for the conduct by courts of child related proceedings. At present, those principles include a requirement to consider the needs of the child and young people and the impact that the proceedings may have on them.

That principle only goes so far. The inclusion of an additional principle requiring courts to consider the child's need to be informed as to the decision-making process, have an opportunity to express views, and receive an appropriate explanation of the outcome would enhance both the quality of decision-making and the experience of the relevant child/young person. Importantly, it would represent a significant step towards meeting obligations under the Convention.

The inclusion of that additional principle would apply directly only to matters before a court. The extension of the principle to services outside the court system would have the same benefits but expand the reach of those benefits to the majority of families and children and young people involved in disputes which never reach court.

Again, the *Family Law Act* already sets out a series of obligations which apply to all persons providing advice and assistance in matters relating to children and young people. Those obligations presently require the advice and information provided to be directed towards parents acting in the best interests of the child. Again, those obligations only go so far.

The inclusion of an additional obligation requiring advisers to advise and assist parents in a manner consistent with the principles required to be applied by courts in conducting child-related proceedings would extend the recommendation outlined above to apply to all matters, not just those in the court system.

---

<sup>178</sup> See also Georgina Dimopoulos and Michelle Fernando, Submission 19 to the Senate Legal and Constitutional Affairs Committee on the Family Law Amendment Bill 2023 (Cth), *Strengthening Children's Rights and Participation in Family Law* [22 June 2023].  
<sup>179</sup> *General Comment No 12* (n 7).

The combined effect of the two proposed amendments would thus require all parts of the family law system to consider the needs of children and young people to be informed, afford them the opportunity to express views, and pay attention to the need for them to receive an appropriate explanation of outcomes.

**Recommendation 6:**

***That s 69ZN of the Family Law Act 1975 (Cth) be amended to include, as an additional principle for conducting child-related proceedings, the following:***

***The second principle is that the court is to consider the needs of the child concerned to be informed as to the decision-making process, to have the opportunity to express any views in relation to the matters to which the proceedings relate, and to receive an age-appropriate and culturally appropriate explanation of parenting orders made and the reasons for them.***

**Recommendation 7:**

***That s 60D(1) of the Family Law Act 1975 (Cth) be amended to insert the following as an obligation of those providing advice and assistance in matters relating to children –***

***(c) advise and assist in a manner consistent with the principles for the conduct of child related proceedings set out in s 69ZN.***

### **7.1.1 Participatory models considered by Council**

(a) *Lundy model*

Irish academic Professor Laura Lundy developed a child participation model over 20 years ago as a practical tool to build children and young people's capacity to exercise their participation rights under Article 12 of the Convention.<sup>180</sup> Adults believed they were hearing children's voices but children said they were not asked for their views, were not listened to and/or it was unsafe for them to express their views. The Lundy model indicates that it is not enough to ask the children for their views; rather, it is necessary to create an environment to enable children to express their views freely.

The Lundy model outlines four factors needed to create those conditions, being:

- space,
- voice,
- influence, and
- audience.<sup>181</sup>

These factors or preconditions require adults to create a safe space for children and young people to express themselves because if they do not feel safe, they will not feel able to express their views. Children and young people need to be provided with information that will assist them express their views, including an explanation that expressing a view is voluntary. Children and young people's views must be communicated to the right audience, that is, someone with responsibility to listen to and make the decisions relevant to them. Children and young people should also be advised of who their views are going to be communicated to, and whether that person has power to make decisions. The factors also require the child/young person's voice to be influential, with their views taken seriously by people who have power to influence change.

<sup>180</sup> Laura Lundy, "Voice" is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33(6) *British Educational Research Journal* 927-942.

<sup>181</sup> *Ibid.*

Additionally, the provision of feedback about how their views were considered, what decision has been made and why, is also identified as a factor in this model of participation. Professor Lundy observes that Article 12 applies to all children and not just those who are seen as being mature. Children and young people's capacity to participate and exercise their rights is identified in this model as a separate issue, with the process of participation identified as valuable, even where it involves very young children.

The Irish Government has adopted the Lundy model for its *National Framework for Children and Young People's Participation in Decision-making*,<sup>182</sup> and it is used in contexts other than family law proceedings, including child-inclusive mediations. Relevantly, the Irish National Framework provides tools to assist children's participation. These tools include feedback forms developed with children and young people,<sup>183</sup> with the European Commission also adopting child-friendly versions of the documents.<sup>184</sup>

In England, Dr Jan Ewing has conducted qualitative research into child inclusive mediation,<sup>185</sup> and observes the challenges to implementing child participation in practice. Together with Professor Anne Barlow, she has observed how the Lundy model of child participation supports the creation of safe spaces for children to feel comfortable in expressing their views and contributing to the decision-making process. The research identified that for some children/young people, the mediator did not provide a choice about the way in which they would be heard (i.e., online or in person) but they were asked about their views in a therapeutic setting. The research also identified the challenge for children and young people when they were not provided with sufficient post-separation information regarding the process and the practicalities of who they speak to, what support is available and how they can access that support. Accessing this information from the mediator rather than their parents and having access to it prior to the mediation was identified as important.

It was also identified as important that children and young people are told the process, who is going to be informed of their views, and who will be making the decisions in relation to their family. The research indicated that the children/young people appreciated having somebody who could filter their views to their parents, and parents indicated that they appreciated the reality check and described it as constructive to have their views filtered through a third-party. The researchers found that an important role for the mediator is to discuss with parents about how they respond to their children's feedback. This would be intended to avoid circumstances as reported in one mediation where the children were unhappy with their father because he ignored what they said, dismissing them and saying, "I am the adult."<sup>186</sup>

It was reported that most children and young people only saw the mediator once and they were not given written feedback about how their views were received by their parents. It was also identified that, in many instances, it was mediator rather than the parent who was the gatekeeper and that there was also no consensus amongst the mediators as to the purpose of this child inclusive model of mediation. The research recommended that there needed to be systemic change so that the question becomes how can children and young people participate, rather than when or if they should participate. Another recommendation was that mediator should be required to record how they heard the child's/young person's views, and if they did not, why this was not facilitated; and that this mediation should be guided by a code of practice with the Lundy model at the forefront.

#### (b) CAFCASS – England and Wales

In the United Kingdom, the Children and Family Court Advisory and Support Service ('CAFCASS') represents the interests of children in public law (child protection proceedings) and private law (family law proceedings). Its main responsibilities include safeguarding and promoting the welfare of children involved in family court proceedings, providing independent advice to the courts on what is safe for children and in their best interests, ensuring children are represented in court, and offering support and information to children and their families during court proceedings.

<sup>182</sup> Irish Government Department of Children and Youth Affairs, *National Strategy on Children and Young People's Participation in Decision-Making, 2015 – 2020* (Report, 2015) 21-23.

<sup>183</sup> *Ibid* 22.

<sup>184</sup> European Commission, *Creating child-friendly versions of written documents: A guide* (Guide, 2021) <<https://cp4europe.org/child-friendly-info-guide>>.

<sup>185</sup> 'The Lundy Model of Child Participation: space, voice, audience and influence for young people in decision making when parents separate',

*Cambridge Family Law Webinar* (Laura Lundy, Anne Barlow and Jan Ewing, 7 March 2024).

<sup>186</sup> *Ibid*.

CAFCASS provides access to professionals, known as Family Court Advisers, who work exclusively in the family courts to ensure children's voices are heard and their needs are prioritised. Typically, initial contact and safeguarding inquiries are conducted with the police and local authorities to identify any immediate risks to the child. Family Court Advisers conduct interviews and observations to understand the child's perspectives, needs, and wishes. Based on their findings, Family Court Advisers prepare detailed reports for the court, which include their recommendations on what arrangements would be in the best interests of the child.

CAFCASS may appoint a Children's Guardian to represent the child's interests in court. While they do not directly represent the child, they ensure the child's voice is heard during proceedings.

### (c) *Scottish model*

For more than 25 years, Scotland has had a 'what I think' form, which must be sent to all children and young people whenever parenting proceedings are commenced and is intended to ensure that their views are heard in the decision-making process. The form informs children that they have the right to express their views and invites them to complete and return the 'what I think' form. It also provides information on who children and young people can contact for assistance and support. The original version of the form was not written in a child-friendly way, and there was a low uptake. Although a child-friendly version of the form was developed in 2019, concerns have been raised that because the form is sent to children's homes, parents may intercept the form or place pressure on the child/young person to complete it a certain way. The current form meets the requirements of s 11(7)(b) of the *Children (Scotland) Act 1995*, which obliges the Court to, so far as practicable, provide children and young people with the opportunity to express views if they want the decision-maker to have regard to those views.

In considering the applicability of the 'what I think' form, it is relevant to note that in Scotland, social science reports are rarely used in family law proceedings unless child protection has previously been involved with the family,<sup>187</sup> with solicitors preparing child welfare reports. Also of relevance, the European Convention on Human Rights is incorporated into UK and Scottish law and the *Children of Scotland Act 2020* recognises the rights of all children to participate and have influence in proceedings affecting them.<sup>188</sup> Nevertheless, some provisions of the Act are yet to come into force as the mechanisms to implement them are yet to be determined and funding allocations are required.<sup>189</sup>

The *Safe and Supported Youth Advisory Group*<sup>190</sup> also considered the use of a form such as the Scottish example above. Throughout discussion, they identified concerns on what children and young people would do if they couldn't communicate through writing, and concerns for circumstances in which a child would complete such a form. The advisory group also recommended that, in order to minimise potential pressure on a child, children should be assisted to complete the form by an independent party, rather than their parents.

### (d) *New Zealand model*

In New Zealand, a child's right to participate in family dispute proceedings under the Convention is given effect under New Zealand's *Care of Children Act (COCA) 2004*. The *Family Court (Supporting Children in Court) Legislation Act 2021* (NZ) reinforces New Zealand's commitment to the participatory approach, referring to the child's right to participate at both the court and FDR mediation stages of dispute resolution.<sup>191</sup>

The 'Lawyer for Child' is a court-appointed role, frequently used in proceedings relating to the care and contact of children. The Lawyer for Child has duties to their client(s), the child(ren) involved in the dispute, as well as duties under the law and codes of conduct. The Lawyer for Child provides regular reports to the court and for parties to the proceedings.<sup>192</sup>

<sup>187</sup> Discussion with Lesley-Anne Barnes Macfarlane and Council Member Alexandra Harland.

<sup>188</sup> Lesley-Anne Barnes Macfarlane, 'Reflections on Children's Rights – Based 'Modernisation' of Scottish Family Law and Policy' [2024] 1 *Juridical Review* 1-15.

<sup>189</sup> Discussion with Lesley-Anne Barnes Macfarlane and Council Member Alexandra Harland.

<sup>190</sup> See Appendix D.

<sup>191</sup> Virginia Bonanni, 'A child's right to participate in family dispute proceedings', *Family Dispute Resolution Centre* (Blog Post, 2 December 2021) <<https://www.fdrcc.co.nz/a-childs-right-to-participate-in-family-dispute-resolution-mediation/>> ('Bonanni').

<sup>192</sup> *Ibid.*

Unlike the LoC, the parallel 'Voice of the Child' (VoC) role in FDR mediation is not specified in legislation, though FDR providers have a statutory duty under amendments to the *Family Disputes Resolution Act 2013* (NZ) to "ensure that the children who are the subject of the dispute are given any reasonable opportunities to participate in decisions affecting them that the FDR provider considers appropriate". The use of a VoC in FDR disputes is offered and recommended, but not compulsory.

Consent must be given by both parents, and the child is also able to consent, or not consent, to being included in the FDR mediation process.<sup>193</sup> As a result, "the VoC role is largely a creation of contract, set up and scoped by the FDR suppliers and providers".<sup>194</sup> The VoC involves the appointment and use of a child specialist (a professional who is specifically trained and experienced in child-inclusive practice) as the child representative, to convey children's feelings and wishes and to help them understand the process. However, different FDR providers may use different processes.

The VoC role in New Zealand is under-utilised in FDR mediation compared to the use of the statutory equivalent in court, and is viewed as a missed opportunity by expert practitioners.<sup>195</sup> As one commentator explains, 'one of the biggest barriers to use of the VoC service is that – just like mediation itself – it is entirely optional.'<sup>196</sup>

### **Example 1: FDR Centre, Auckland, NZ**

The FDR Centre in Auckland uses a collaborative, in-person model of child representation. Once there is agreement to appoint a VoC, the specialist consults with parents, the child, lawyers and mediator to establish the best way forward. In most cases, the VoC will meet with both parents and the child, often using a playbased method of discussion, before mediation begins. The VoC will also attend mediation to provide feedback to the parents and mediator and to advocate for solutions that will best meet the child's needs. In some cases, the VoC will again meet with the child following the mediation to explain how their voice was heard and understood, particularly where the parenting arrangements may not be what the child wanted.

Although it involves advocacy, the VoC is not seen as an adversarial role; rather, practitioners at the FDR Centre understand their role as a collaborative one, in which they work with all parties to achieve the best outcome for the child.

Both the possibilities for representation in New Zealand, and the barriers to uptake there, are instructive. Children and young people's participation in family law processes, including mediation, is usually subject to the consent of both parents. This prerequisite, coupled with the influence of legal practitioners and welfare workers, often inhibits children's ability to participate.<sup>197</sup> Advocacy for children must become obligatory and normalised in order to remove this persistent barrier to participation.

In the FCFCOA, a "child impact report" will usually be ordered at the first court event which occurs approximately 6 weeks after a matter is commenced. The report is typically prepared by a CCE, who is a qualified psychologist or social worker specialising in child and family issues. An important function of the Child Impact Report is to advise the court of issues of risk and to communicate the wishes of children who are interviewed as part of the process. Although it has not been included as a specific recommendation, it would be appropriate for this important role to be specifically referred to in the *Family Law Act*.

<sup>193</sup> *Family Dispute Resolution Centre (New Zealand), Family Dispute Resolution Centre* (Web Page) <[www.fdr.co.nz](http://www.fdr.co.nz)> ['NZ Family Dispute Resolution Centre'].

<sup>194</sup> *Bonnani* (n 189).

<sup>195</sup> *Ibid.*

<sup>196</sup> *Bonnani* (n 189).

<sup>197</sup> See, for example, Adrian James et al, 'The voice of the child in family mediation: Norway and England' [2010] 18(3) *The International Journal of Children's Rights* 313-333.

In the FCWA, a different approach is taken, grounded in initiatives introduced in 2011. At the outset, when commencing an application or filing a response, the parties must file a Case Information Affidavit. That document was designed as an inquisitorial self-assessment risk screening tool, and to elicit in one document the key information required for individual case management. There is a dedicated Child Related Proceedings list to which all first hearing dates in parenting cases are allocated. The first hearing is conducted by a Family Law Magistrate with the assistance and input of a Family Consultant (similar to a CCE). The Family Consultant provides case management assistance, including as to the timing of a Case Assessment Conference to assess risk, and advises the Magistrate of any relevant information available through cooperative arrangements with the Department of Communities, and access to state databases as to criminal charges and convictions, and Family Violence Restraining Orders. With the input of the Family Consultant, the Magistrate is able to consider at that initial hearing whether an ICL should be appointed, and what steps should be taken both to ensure safety and to ascertain the views of the children.

(e) *Israeli model*

Israel has adopted a Children's Participation Model operated by a Child Participation Department staffed by specialist Participation Social Workers. Judges must refer children and young people aged 6-18 to this Department unless contraindicated (i.e. the judge considers this may cause more harm than benefit). Children and young people on this model receive an age-appropriate explanation about their right to be heard and choose whether they wish to speak directly to the judge or have their views conveyed by the Participation Social Worker. If they wish to speak to the judge they will meet with the judge and Participation Social Worker together. If they elect to speak to the Participation Social Worker only, the Participation Social Worker provides a written record to the court. The court may disclose some or all of the child's statement if the child consents. When ratifying an agreement that involves a child or young person, the judge ascertains whether the parents have heard the child/young person and may refer them to a welfare unit for guidance. When making their decision, the judge will explain to the child/young person the main points of relevance. An evaluation of the Children's Participation Model found that not all these principles were followed, with some judges not referring relevant cases to the Department, and many children/young people were reported as not receiving any information about the decision. However, many children reported feeling respected and appreciated that their views had been considered. Some judges reported gaining complex insights from hearing children, while others felt the model benefited children more than the court.

(f) *Australian models of child-inclusive FDR and mediation*

Empirical research relating to participatory processes in FDR and mediation in Australia provides insight into the adoption and expansion of child participation practices. Both 'child-focused' and 'child-inclusive' mediation have been identified as leading to reduced acrimony in families. However, child-inclusive mediation has been shown to lead to superior outcomes in terms of family relationships and contentment with post-separation arrangements,<sup>198</sup> with parents in child-inclusive mediation half as likely to instigate litigation over parenting matters than the child-focused cohort.<sup>199</sup> McIntosh and colleagues have identified 'an enduring level of relationship repair unique to the [child-inclusive] approach'.<sup>200</sup>

Their research shows that a majority of parents who engaged in the child-inclusive practice in their sample went on from mediation to build more stable patterns of parenting, and when compared to 'child-focused' interventions, the statistically significant outcomes for child-inclusive families in the 4 years after mediation included:

<sup>198</sup> McIntosh et al 2008 (n 139).

<sup>199</sup> Jennifer McIntosh, *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors* (Research Paper, AFRC Issues Paper No. 1, 2007). The difference in rates of litigation after child-inclusive or child-focused mediation is supported in the U.S. context using random assignment.

<sup>200</sup> McIntosh et al 2008 (n 139) 121.

less legal action over care and living arrangements, lower rates of return to mediation ... greater stability of care and contact arrangements, higher satisfaction with living arrangements (fathers and children), greater reduction in parent acrimony ... children feeling less caught in the middle between their parents and children feeling less distressed about their parents' conflict.<sup>201</sup>

Several models of child-inclusive FDR utilise a child specialist of some kind in obtaining and conveying children and young people's views and experiences:

- **Representation:** a child has an advocate or lawyer who speaks in mediation on their behalf in order to have their views heard and considered<sup>202</sup>
- **Consultation:** a child expert interviews the child to ascertain their views and wishes, then relays the child's views to the parents and/or mediator, in writing or in person, to inform the decision-making process<sup>203</sup>
- **Collaboration:** mediators collaborate with professionals working with children (e.g. counsellors, social workers) in external agencies.

### ***Example 2: Child-inclusive FDR at Relationships Australia Victoria***

At Relationships Australia Victoria ('RAV'), it is considered important to include children's perspectives, opinions and experiences in the FDR process, where it is safe and practicable to do so. To this end, RAV provides child-inclusive FDR, which enables school-aged children to talk to a trained child consultant about their situation and experiences during a significant period of change and adjustment. RAV offers Enhanced Child Focus FDR where decisions are being made for children under 4 years of age, or when child-inclusive practice is not appropriate.

In child-inclusive FDR, children meet with a child consultant on their own in a safe environment. Children are encouraged to express themselves by talking, drawing, playing, telling stories, or participating in other activities as developmentally appropriate. The child consultant is trained to understand children's feelings and views. During a separate FDR appointment, the child consultant meets with parents to help them understand their children's hopes, worries and needs. This helps parents make decisions in FDR that take into account the child's perspective.

<sup>201</sup> Ibid 9-10.

<sup>202</sup> E.g. New Zealand's *Family Dispute Resolution Act 2013* (NZ) allows for the use of a child representative or 'Voice of the Child', *NZ Family Dispute Resolution Centre* (n 191).

<sup>203</sup> Although mediators themselves speak to children under other consultation models, the use of a child specialist under these models enables the mediator to maintain a neutral stance.

Dr Machiko Hodge (2023) in her PhD study titled “*Facilitating Children’s Effective Participation in Alternative Dispute Resolution Processes*” examined the operation of effective participation in alternative dispute resolution forums through an examination of the Kids Talk FDR program at Victoria Legal Aid and the conciliation conference process at the Victorian Children’s Court.<sup>204</sup>

Hodge’s research is important as being the first Australian study to compare these alternative dispute resolution (‘ADR’) models involving children and assesses their compliance with Article 12 of the Convention, which focuses on children’s participatory rights in decision-making processes.<sup>205</sup>

Hodge made several key findings:

- **Children’s Voices in ADR:** The study found that children’s voices are often underrepresented in ADR processes. Both the Kids Talk family dispute resolution program and the Victorian Children’s Court Conciliation Conference showed varying degrees of effectiveness in incorporating children’s perspectives.<sup>206</sup>
- **Compliance with the Convention Article 12:** The research highlighted that while both ADR models aim to comply with Article 12 of the Convention, which emphasises children’s participatory rights, there are significant gaps in practice. The study identified areas where these models could improve to better align with the principles of the Convention.<sup>207</sup>
- **Factors Influencing Participation:** Several factors were identified that either support or constrain children’s effective participation in ADR. These include the training and attitudes of facilitators, the presence of child-friendly environments, and the availability of support services for children.<sup>208</sup>

Hodge made several recommendations for improvement, including better training for facilitators, creating more child-friendly spaces, and ensuring that children have access to appropriate support services throughout the ADR process.

204 Machiko Hodge, ‘Facilitating Children’s Effective Participation in Alternative Dispute Resolution Processes’ (Doctoral Thesis, Monash University, 2022).

205 Ibid.

206 Ibid.

207 Ibid.

208 Ibid.

### ***Example 3: Victoria Legal Aid Kids Talk Program***

Victoria Legal Aid runs a program called Kids Talk as part of its legally-assisted FDR service. An assessment for suitability for the program is undertaken by a case manager, with consent from both parents. A lawyer confirms suitability before progressing. Children are interviewed in person by a specialist child consultant (a social worker or psychologist) who then prepares a written report for the parents, lawyers and the chairperson, about a week in advance of an FDR conference. The child consultant assures children that responsibility for decisions and outcomes does not rest on their involvement and input, and that final decisions around parenting arrangements are ultimately made by the parents. Adults have time to discuss the consultant's report with their lawyers. Children do not attend the mediation. The chairperson considers the child consultant's report when drafting the conference agenda and in facilitating the mediation to help adults make good decisions for their children. Evaluation shows that the program is successful in bridging impasses to agreement; producing parenting agreements that reflect the developmental and psychological needs of children; providing children a direct voice; deescalating conflict and improving the post-separation parental relationship in some cases.

Council received submissions and heard consultations outlining a range of challenges to participatory models in family law system/post-separation services. These included costs associated with implementing models that involve a more time-consuming service that enhances the FDR process. Service providers are required to balance the need for participatory models with the needs of parents seeking to achieve a timely resolution of their parenting disputes. There are also logistical challenges of matching suitability, parental consent to use participatory models and the availability of specialist practitioners.

#### ***Recommendation 8:***

***That enhanced financial resources be provided to family relationship services and Legal Aid Commissions to provide child inclusive mediation.***

## 8. Placing a greater emphasis on the rights of the child

Section 60B of the *Family Law Act* provides that the objects of Part VII relating to parenting orders are:

- (a) to ensure that the best interests of children are met, including by ensuring their safety; and
- (b) to give effect to the Convention done at New York on 20 November 1989.

Family courts in Australia have, however, taken a conservative approach to the significance of that object with the Full Court of the Family Court of Australia stating in *Langmeil & Grange*<sup>209</sup> at [25]:

Whether, as the mother contends, [the object] requires the Court to give effect to the Convention on the Rights of the Child in an application for parenting orders or does no more than confirm, in cases of ambiguity, the obligation to interpret Part VII of the Act to the extent its language permits, consistently with the Convention, does not require determination by us.

This ambiguity should, in the view of Council, be resolved in the affirmative. Council therefore recommends that, in addition to the referring to the Convention in s 60B(b), that s 43 of the *Family Law Act* should be amended to specifically require the Courts to have regard to the Convention when exercising jurisdiction under the *Family Law Act*. The section currently provides that, when exercising jurisdiction under the *Family Law Act*, the Court must have regard to a number of significant matters including in s 43(c) “the need to protect the rights of children and to promote their welfare”.<sup>210</sup>

### **Recommendation 9:**

**That the Family Law Act 1975 (Cth) be amended as follows:**

**1. Amend paragraph 43(1)(c) to read:**

**“the need to promote and protect the rights of children;”**

**2. Insert a new paragraph directly below paragraph 43(1)(c) which reads:**

**“the need to promote and protect the welfare of children;”**

**3. Amend section 4 of the Family Law Act 1975 (Cth) to include the following additional definitions:**

**“the rights of children” includes the rights set out in the Convention on the Rights of the Child done at New York on 20 November 1989**

**“the welfare of children” includes matters impacting upon their physical, emotional and psychological safety, security and well-being in the immediate, medium and longer term.**

<sup>209</sup> [2013] FamCAFC 31.

<sup>210</sup> *Bielen v Kozma* (2022) 66 Fam LR 59 at [24].

## 9. Practical considerations for how to take account of voices during proceedings

### 9.1 Enhancing the existing role of ICLs

#### 9.1.1 When should an ICL be appointed?

The *Family Law Act* provides limited guidance as to when an ICL should be appointed. Section 68L(2) of the *Family Law Act* provides that “if it appears to the court that the child’s interests in the proceedings ought to be independently represented by a lawyer, the court... [may appoint an ICL]”.

This Council’s report of June 1989, *Representation of Children in Family Law Proceedings*,<sup>211</sup> indicated that at the time, while there were dramatic variations across the country, approximately 2% of parenting cases nationally saw an ICL appointed.<sup>212</sup> The report went on to recommend the following criteria as identifying cases in which an appointment should be made:

1. where child abuse is an issue;<sup>213</sup>
2. where there is manifest continuing hostility between the parents, particularly where the children are being weaponised;
3. where one of the parties is not a natural parent of the child, or the children are ordinarily being cared for by a non-parent;
4. where there are real issues of cultural or religious difference;
5. where (in more modern parlance) the children are at risk of harm from exposure to sexual, antisocial, or violent behaviour or there are significant mental health issues in play;
6. where the children have been the subject of repeated litigation;
7. where it appears that the children are having difficulty adapting to a new family situation; or
8. where both parties propose arrangements which will separate siblings.

Government did not act on that recommendation. Notably, the Family Court of Australia did not support the recommendation, expressing concern on one hand as to the potential fetter on judicial discretion to appoint an ICL in an appropriate case, and on the other hand on the possible ‘unnecessary proliferation of such appointments with a subsequent blowout on the demand for limited Legal Aid funds’.<sup>214</sup>

<sup>211</sup> Family Law Council, *Representation of Children in Family Law Proceedings: A Report to the Commonwealth Attorney-General* (Report, June 1989).

<sup>212</sup> *Re K* (1994) 117 FLR 63 (Nicholson CJ, Fogarty and Baker JJ) (*‘Re K’*).

<sup>213</sup> Note that this has been paraphrased for brevity.

<sup>214</sup> *Re K* (n 208) at 80.

The Full Court of the Family Court of Australia considered the issue in some detail in *Re K* (1994)<sup>215</sup>. The decision established further guidelines (“the *Re K* guidelines”) as to when appointments of an ICL should normally be made:

1. in cases involving allegations of child abuse, whether physical, sexual or psychological;
2. cases where there is an apparently intractable conflict between the parents;
3. cases where the child is apparently alienated from one or both parents;
4. where there are real issues of cultural or religious difference affecting the child;
5. whether sexual preferences of either or both of the parents or some other relevant person are likely to impinge upon the child’s welfare;
6. whether conduct of either or both parents, or some other relevant person, is alleged to be antisocial to the extent that it seriously impinges on the child’s welfare;
7. where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either parent, the child, or other relevant person;
8. any case in which neither parent seems ‘a suitable custodian’;
9. any case in which a child of mature years expresses strong views, where giving effect to those views would involve changing a long-standing parenting arrangement or an outcome where the child would spend no time with one parent;
10. where one or both parents propose that the child will be relocated so as to in a practical sense exclude time with the other parent;
11. where it is proposed to separate siblings;
12. where none of the parties are legally represented; and
13. cases in the courts’ welfare jurisdiction relating in particular to medical treatment for children where the child’s interests are not adequately represented by one of the parents.

Legal aid funding has never been adequate to enable the appointment of an ICL in all or even many of the cases which meet one or more of the criteria set out in the *Re K* Guidelines. Accordingly, Legal Aid Commissions (‘LACs’) in some states have made it clear that funding will only be granted for the appointment of an ICL in cases meeting what may be regarded as the most serious of those criteria – allegations of family violence, child abuse or neglect, a high level of conflict and dispute between the parents, the presence of serious medical or mental health issues, or inherently difficult and complex issues.<sup>216</sup> In some states and territories, the criteria are even more restricted.

That, combined with other factors discussed below which limit the number of legal practitioners available and willing to undertake ICL work, means that ICLs are simply not appointed in many cases where an appointment would clearly be warranted, and of benefit to the child and the Court.

<sup>215</sup> *Re K* (n 208) at 82-3.

<sup>216</sup> *Kaspiew et al 2014* (n 11) 14-15. Victoria Legal Aid is more restrictive and requires there to be family violence or abuse in order to appoint an ICL.

While matters have improved significantly since this Council's report of June 1989, the most recent available statistics indicate involvement of ICLs in only around 40-47% of parenting proceedings.<sup>217</sup>

## 9.2 Does the involvement of an ICL lead to better outcomes for children and young people?

In short, the answer to this question is "yes".

The involvement in proceedings of a competent ICL enhances the prospects of an agreed resolution of the proceedings, ensures that adequate evidence is presented if a judicial determination is to be required, and ensures independent advocacy for a child-focused outcome.

When surveyed in 2013 for the *AIFS Study of Independent Children's Lawyers (2014)*, 89% of judicial officers strongly agreed with the proposition that "having an ICL involved in a case improves outcomes for children/young people". Of the lawyers not practising as ICLs who were surveyed, 62% agreed with the same proposition. Of the non-legal professionals surveyed, 83% agreed.<sup>218</sup>

That statistic is particularly telling when considered together with the matters raised above. ICLs are not appointed in cases meeting many of the criteria according to which the court would say they should be appointed. Their involvement leads to better outcomes for children, but they are involved in only about 40-47% of all cases.

The conclusion that better outcomes would be achieved for more children and young people if competent ICLs were appointed in a higher proportion of cases is readily reached. We turn now to consider factors other than simple funding constraints which present as obstacles to that goal.

## 9.3 The funding and "demographics" of ICLs

Almost all ICLs are appointed under a grant of Legal Aid and selected and assigned by the relevant LAC. The number of privately funded ICLs, selected and appointed without the involvement of Legal Aid is negligible.

Broadly, ICLs fall into 3 categories:<sup>219</sup>

1. Those who are employed in-house by a LAC, and for whom a significant portion of their workload is as an ICL;
2. Private practitioners specialising in family law, and who are prepared to take on a limited number of Legal Aid grants to act as an ICL; and
3. Other private practitioners, who rely on Legal Aid grants (including as an ICL) for a significant proportion of their work and thus their income.

In 2020-21, less than half of the ICLs nationwide were employed in-house by a LAC. That figure varied in different states and territories, from a high of 60% in South Australia to a low of 20-25% in Victoria and Queensland.<sup>220</sup>

<sup>217</sup> Ibid 28. The statistics from 2014 indicate that the corresponding proportions were similar in the Federal Magistrates Court (now Federal Circuit Court) (22%) and the Family Court of Western Australia (23%).

<sup>218</sup> *Kaspiew et al 2014* (n 11) 105, Table 7.2.

<sup>219</sup> Federal Circuit and Family Court of Australia, *Independent Children's Lawyer* (Web Page) <<https://www.fcfoa.gov.au/fl/children/icl>>.

<sup>220</sup> Legal Aid Commission data as supplied to the Attorney-General's Department (Cth).

While in-house ICLs are appointed under grants of Legal Aid and are obliged to ensure the efficient use of limited Legal Aid resources, they are salaried. Their income is not directly tied to limits on grants, nor to the hourly rates paid under grants. In addition, they work in a team environment with other in-house ICLs. That has clear advantages, as discussed further below.

The current hourly rate paid to private practitioners under Legal Aid grants varies from jurisdiction to jurisdiction but is generally below the Court scale. Even then, limits are set on payments by reference to particular tasks and stages of litigation. Where the number of hours of work implicit in those limits is insufficient to properly complete the work, private practitioners who meet their obligations to the Court and to the child/young person do so at an effective discount to that hourly rate.

Experienced private practitioners specialising in family law, and who are known to be highly competent, can attract private clients paying significantly above the court scale. Those practitioners have no shortage of work at that level of remuneration – where they take on grants of Legal Aid to act as ICLs they knowingly forego income to do so. The number of highly competent private practitioners willing to do so has diminished and can be expected to further diminish; in any event, any system dependant on altruism is inherently unstable.

When surveyed in 2014, 70% of judicial officers and 68% of private practice ICLs considered the remuneration available to ICLs to be inadequate.<sup>221</sup> This was also identified as an issue of significance in Dr Warren Mundy's *Independent Review of the National Legal Assistance Partnership (NLAP)*,<sup>222</sup> which was released in May 2024. Dr Mundy compared grant fees for ICLs against the scale of costs allowable in family law and child support matters,<sup>223</sup> and found that, on average, grant fees would need to double to achieve parity with court scales. As noted by Dr Mundy, scale rates for legal fees are often about two-thirds of prevailing market rates.<sup>224</sup>

The National Legal Aid ('NLA') Private Practitioner Census Survey conducted in August 2024, which received over 1,000 responses Australia wide and is due to be published by the end of 2024, will also be informative in this context.<sup>225</sup>

## 9.4 Competence

As noted, the involvement of a competent ICL has been identified as enhancing outcomes for at-risk children. From the opposite perspective, ICLs lacking the requisite skills and practices can negatively contribute with the prospect of an outcome that is in the best interests of the child being diminished. This is because the independent evidence gathering role may be poorly or superficially performed. The practitioner may have limited skills in meeting with children and affording them the appropriate opportunity to express their views. Workloads, particularly of sole practitioners, can cause delays. Poor advocacy, including in the difficult task of cross-examination, may obscure rather than illuminate. All of those matters are exacerbated where, as in many cases, one or both of the parents is unrepresented. Experienced and highly skilled private practitioners willing to act as ICLs do so with a high degree of competence. They are, however, limited in number and in their ongoing willingness to take on poorly remunerated work, when ample other work is available to them.

<sup>221</sup> Ibid 115, Table 7.4.

<sup>222</sup> Warren Mundy, *Independent Review of the National Legal Assistance Partnership* [Final Report, March 2024] ('Mundy Report').

<sup>223</sup> Federal Circuit and Family Court of Australia, *[Family Law] Rules 2021*, Schedule 3.

<sup>224</sup> *Mundy Report* (n 218) 138.

<sup>225</sup> In relation to the general reduction in the provision of legal aid services by private practitioners, see also Impact Economics and Policy for National Legal Aid, 'Future Challenges: The Supply of Legal Aid Services' in *Justice on the Brink Stronger Legal Aid for a Better Legal System* (Report, November 2023) 18-25; National Legal Aid, Submission to the Independent Review of the National Legal Assistance Partnership, *Limited Supply* (October 2023) 15-16.

The AIFS study of Independent Children’s Lawyers (2014) examined this question, including by surveying judicial officers, non-ICL lawyers, and non-legal professionals.<sup>226</sup> The study concluded:

Although it is clear that in each jurisdiction there are some very highly regarded private practitioners, the survey responses suggest that, generally, in-house legal aid ICLs are considered to be of a higher standard than private practitioners on legal aid panels.<sup>227</sup>

In the experience of members of this Council, and the judicial officers, lawyers and non-legal professionals with whom they regularly interact, that conclusion remains accurate today. It is highly unlikely to change. It would only change if the relevant funding arrangements fundamentally changed, so that the remuneration received by private lawyers for undertaking work under grants of legal aid matched, or at least more closely approached, the remuneration they could achieve undertaking private client work. Only in that way would a greater number of suitably experienced and skilled private practitioners be attracted to ICL work and be prepared to remain in it.

In that regard, Council notes the recent recommendation in the *Mundy Report* to the effect that additional funding of \$84 million in 2024-25 and \$88 million in 2025-26 should be provided to enable ICLs to be paid at the scale rates set by the Courts.

Council acknowledges that the demands on the legal aid purse are, of course, not limited to the funding of ICLs. We acknowledge also that increasing rates of remuneration for ICLs without increasing rates of remuneration for other legal aid work will not happen.

We suggest that the answer, if better outcomes for children are to be achieved, is to focus on increasing the number and availability of in-house legal aid ICLs for the following reasons.

First it is clear that, in-house legal aid ICLs are, by virtue of their training and ongoing mentoring, of a higher standard than some private practitioners on legal aid panels. For all the reasons already noted, the retention of the relatively small number of high-quality private practitioner ICLs on legal aid panels is problematic.

Second, a greater investment in in-house legal aid ICLs will be more cost-effective than the increased funding identified in the *Mundy Report* as being necessary to attract more private practitioners to ICL work.

Third, a model prioritising the use of in-house legal aid ICLs would sustainably enhance and then maintain professional standards. While various organisations provide quality training opportunities for ICLs, those are necessarily limited and dependent on the individual ICL choosing to participate on a self-funded basis. In contrast, in-house legal aid ICLs benefit from working as part of a team, from “corporate knowledge”, and from mentoring and collaboration not readily available to sole practitioners. LACs are also well placed to work in collaboration with Aboriginal and/or Torres Strait Islander Legal Service (‘ATSILS’) to build their in-house capacity to represent Aboriginal and/or Torres Strait Islander children in family law proceedings through training, mentorship and the administration of grants of aid.

NLA has sought funding to develop an Aboriginal and/or Torres Strait Islander training module for ICLs in the National ICL training program.

In advocating for such a model, Council does not suggest that private lawyers should never be appointed as ICLs. Rather, the model we propose would both ensure that the interests of more children could be advanced by a higher rate of appointment of ICLs, and the quality of ICLs across-the-board could be raised, while still allowing for the involvement of the more skilled private practitioners willing to do the work.

<sup>226</sup> *Kaspiew et al 2014* [n 11].  
<sup>227</sup> *Ibid* [7.2.3], 107.

## 9.5 Issues to be addressed in the proposed model

First, and obviously, adequate funding would need to be provided to enable the employment of more in-house legal aid ICLs. The temptation to simply divert funds presently paid to private practitioners into hiring more in-house legal aid ICLs, and go no further, should be resisted; while that would achieve an improvement in quality, the gains in terms of numbers of children assisted would be less than what should be possible with a more rigorous approach.

Second, attention should be paid to the issues which face LACs in attracting and retaining high-quality young lawyers and retaining more senior lawyers long-term. As was observed in the *Mundy Report*:

Staff attrition is a significant issue across the legal assistance sector. High attrition rates reduce the sector's efficacy in service delivery to clients and placed further strain on an already overburdened workforce. High attrition also discourages employers from investing in their employees. Submissions indicate high attrition rates in the workforce are attributable to inadequate remuneration, unrealistic workloads, short fixed term contracts, burnout, stress and vicarious trauma.<sup>228</sup>

Those issues can be significantly addressed by measures over and above an injection of funding and the increase of salaries to competitive levels.<sup>229</sup>

Council recommends that consideration be given to implementing lateral incentives to attract and retain talented young lawyers to serve as in-house ICLs. Similar approaches have been taken in endeavouring to meet unmet needs in other areas. There are some examples of this, which include:

1. The government classifies "Distribution Priority Areas" identifying locations with a shortage of medical services by general practitioners. International medical students are required to work in such areas for a period. The Workforce Incentive Program Doctor Stream offers additional payments to doctors to work in remote areas. There are various state-based programs – for example, Rural Health West (which is Commonwealth funded) provides incentives of up to \$60,000 per annum for rural work;<sup>230</sup>
2. State governments encourage teachers to work in rural, regional and remote schools by providing subsidised employee housing and transport assistance, and allowances. Relevantly for present purposes, teachers located at public schools in a "very remote area" may be eligible to apply for remission of HELP debts.<sup>231</sup>

<sup>228</sup> *Mundy Report* (n 222) 164, [8.8] and associated data.

<sup>229</sup> As to which see data in *ibid* [8.7] 157-164.

<sup>230</sup> Rural Health West, *Rural Health West* (Web Page) < <https://ruralhealthwest.com.au/>>.

<sup>231</sup> Department of Education (Cth), *Reduction of Higher Education Loan Program (HELP) debts for teachers in very remote areas* (Web Page) < <https://www.education.gov.au/higher-education-loan-program/reduction-help-debts-teachers-very-remote-areas>>.

Council notes the recommendation in the *Mundy Report* for the establishment of a HECS-HELP forgiveness scheme for rural, regional and remote community sector lawyers and those in private practice doing substantial legal assistance work.<sup>232</sup>

The concepts of such a scheme, and other forms of incentive, are well-established. They are demonstrably effective tools for attracting workers in regional and remote areas.<sup>233</sup> Council recommends the application of those concepts to attract and retain young lawyers to work as in-house ICLs.

Council recommends that the central concept of such a scheme is that all relevant HECS-HELP debt should be forgiven for lawyers working in-house at a LAC, upon completion of five years' service. Some flexibility in the application of the scheme should be considered, so that (for example) where caring or other responsibilities prevent the completion of five years continuous service, debt forgiveness may still be achieved provided that service is completed within a particular timeframe.<sup>234</sup>

Council also acknowledges the recent recommendation of the Australian Human Rights Commission for the appointment of a Cabinet Minister for Children with cross portfolio responsibilities.<sup>235</sup> Should that recommendation be adopted, further measures for in-house representation of children in the justice system (not necessarily limited to existing structures) would warrant further consideration.

## 9.6 Training and development of ICLs

Council consider that nationally consistent training and ongoing professional development of ICLs to be essential to ensure they have the necessary skills, follow appropriate practices and are provided with the support they need to fulfil their role in the best interests of children they are appointed to represent.

NLA has commenced work on the design and development of a new ICL website and Learning Management System ('LMS'). The LMS will serve as a centralised hub for the Phase 1 online national accreditation training and to enable all ICLs to access training resources, recommended or mandatory assigned professional development training and the mentorship scheme. A child-centred domestic violence framework of training for ICLs is being developed in collaboration with Safe and Together, utilising the language and framework that has been the subject of training provided to the family courts and other stakeholders. Funding has also been sought for the development of an Aboriginal and/or Torres Strait Islander module for ICLs to be designed in partnership with Aboriginal and/or Torres Strait Islander Community-Controlled Organisations ('ACCOs').

Currently, the national training program for ICLs is overseen by NLA, which can draw on input from the Courts and others. That ensures consistency in both training and the identification of best practice, and should continue. The accreditation of ICLs is, in effect, undertaken by individual LACs which determine whether practitioners should be included in the panel of lawyers eligible to undertake the work. Again, that should continue – critical local knowledge as to the quality of the work undertaken by individual lawyers is not easily replicated in a national "accreditation" system.

## 9.7 The requirement that an ICL meet with the relevant child

Historically, the extent to which ICLs actually met with the children whose interests they were to represent was variable. While the national Guidelines for Independent Children's Lawyers published in 2013 voiced an expectation that an ICL would meet with the child other than in certain specified circumstances, the assessment of whether a meeting was appropriate was still a matter for the individual ICL. The guidelines were endorsed by LACs as a general policy position but practices varied. A 2014 study found that of the ICLs surveyed, 23% rarely or never met with the children, 11% reported always meeting with the children, with the balance saying that they "sometimes" or "often" did so.<sup>236</sup>

<sup>232</sup> *Mundy Report* [n 222] 175 [Recommendation 26].

<sup>233</sup> *Mundy Report* [n 222] 175, citing Jongsay Yong et al, 'Do rural incentives payments affect entries and exits of general practitioners?' [2018] 214 *Social Science & Medicine* 197.

<sup>234</sup> *Ibid* 175. The *Mundy Report* recommends a seven-year period.

<sup>235</sup> Australian Human Rights Commission, 'Help way earlier! How Australia can transform child justice to improve safety and wellbeing (Report, 2024) Recommendation 2.

<sup>236</sup> *Ibid* 44, Table 3.6.

The Guidelines were revised in 2024 and now provide that the ICL is to:<sup>237</sup>

- meet with the child and provide the child with an opportunity to express any views (not necessarily at the same time), unless the child is under 5 years old, or the child doesn't want to meet with the ICL or express a view, or there are exceptional circumstances, and
- ensure the court is fully informed of the child's views, in an admissible form (a way the court can accept as evidence) where possible. This is not the same as acting on instructions.

The very recent amendments to the *Family Law Act* address that issue directly. Council welcomes the amendments to s 68LA(5A) that now require an ICL to meet with the child, and provide the child with an opportunity to express any views in relation to the matters to which the proceedings relate.<sup>238</sup> The exceptions are where the child is under the age of 5, does not want to meet with the ICL or express their views, or there are exceptional circumstances justifying a decision not to meet or to not give a child the opportunity to express a view, including that to do so would expose the child to risk that cannot be safely managed, or significantly and adversely affect their welfare.<sup>239</sup> The court in turn is required to oversee compliance with those obligations before making final orders, even if those final orders are proposed to be made by consent.<sup>240</sup>

#### **Recommendation 10:**

***That Government facilitate the implementation of the following measures to enhance the existing role of the Independent Children's Lawyer:***

***(a) provide additional funding to Legal Aid Commissions to enable the hiring of more in-house Independent Children's Lawyers.***

***(b) encourage talented young lawyers to engage in employment as an in-house Independent Children's Lawyer within Legal Aid Commissions by providing incentives such as the waiving of HECS debt on a basis that is proportionate to years of service.***

## **9.8 Establishment of a Children's and Young People's Advisory Board**

At the February 2022 meeting, the Council agreed that, as recommended by the ALRC, a Children and Young People's Advisory Board should be established.

Our recommendation was based on Recommendation 50 of the ALRC's Final Report No. 135 *Family Law for the Future: An Inquiry into the Family Law System* (March 2019) which provided:

The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.

<sup>237</sup> Federal Circuit and Family Court of Australia, *Guidelines for Independent Children's Lawyers* (Web Page) Paragraph 5.1 <https://www.fcfcfa.gov.au/ft/pubs/icl-guidelines> ('ICL Guidelines').

<sup>238</sup> *Family Law Act* (n 5) s 68LA(5A).

<sup>239</sup> *Ibid* s 68LA(5B) - (5C).

<sup>240</sup> *Ibid* s 68LA(5D).

Our decision was also informed by Recommendation 10 of the second interim report of the Joint Select Committee on Australia’s Family Law System (March 2021) which includes:

The Committee also recommends that in considering how to make the family court less adversarial, the re-constituted Family Law Council should consider how best to involve the voice of children in parenting proceedings in appropriate cases. This should include consideration of the establishment of a Children’s and Young People’s Advisory Board.

In our letter to the Attorney General (see **Appendix B**) we note that children and young people’s advisory boards are formal mechanisms for decision-makers to seek the views and advice of children and young people. Generally, their main purpose is to:

- provide advice to government or governing bodies about issues that affect children and young people
- empower and develop the skills of children and young people.

There are a variety of children and young people’s advisory boards or groups across Australia, at national, state and local level. Some provide advice on a broad cross-section of children and young people’s issues,<sup>241</sup> and others are specific to a particular cohort of children and young people on a particular issue.<sup>242</sup>

While there are no national children or youth advisory boards or groups that currently provide advice specifically on family law issues in Australia, a pilot project, the Young Peoples Family Law Advisory Group (‘YPFLAG’), was conducted in 2016-2017 in South Australia. Established by the South Australia Family Law Pathways Network, the YPFLAG pilot project involved mobilising 10 young people from South Australia (aged between 12-17) who had experienced parental separation, in a ‘consumer reference’ group environment. The aim of the project was to hear feedback confidentially about their experiences of the family law system throughout the process of their parents’ separation, with the purpose to better understand this experience from their perspective, without parental intervention. The final report of the project includes a series of practical recommendations that were developed by the young people out of their meetings, about the family law system. It also recommended that the YPFLAG (or an equivalent program/group) become a permanent advisory body within the family law system. See YPFLAG, Report/Evaluation Young People’s Family Law Advisory Group A Pilot Project 2016-2017 (2017).

Internationally, the Family Justice Young People’s Board (‘FJYPB’) in the United Kingdom presents another example of a children and young people’s advisory board on family law matters. The FJYPB has been operating in the UK since 2000. Run by CAF/CASS,<sup>243</sup> the board is composed of a group of approximately 50 children and young people between 8 and 25 years old who live across England and Wales. All members either have had direct experience of the family justice system or have an interest in children’s rights and the family courts. The FJYPB supports the UK Family Justice Board, set up to improve the performance of the family justice system.<sup>244</sup>

241 For example, the NSW Youth Advisory Council provides advice to the NSW Minister for Youth and the Advocate for Children and Young People on issues, policies and laws that affect children and young people in NSW; see Office of the Advocate for Children and Young People, *About the Youth Advisory Council* (Web Page) <<https://www.acyp.nsw.gov.au/engage/youth-advisory-council-yac>>.

242 For example, headspace Youth National Reference Group, see headspace, *Headspace Reference Groups* (Web Page) <<https://www.digitalworkandstudy.org.au/our-organisation/our-people/reference-groups/apply/#hynrg>>.

243 See, Children and Family Court Advisory and Support Service, *Family Justice Young People’s Board* (Web Page) <<https://www.cafcass.gov.uk/family-justice-young-peoples-board/218>>.

244 Ibid.

One of the main rationales for establishing a Children and Young People's Family Law Advisory Board is to ensure that children with lived experience of the family law system in Australia can enjoy their right to be heard and have their views given due weight by family law decision-makers, as required by article 12 of the Convention.

As earlier noted, the importance of article 12 is underscored by the numerous recommendations related to child participation made by the UNCRC, in its Concluding Observations on Australia in 2019, including in relation to family law.<sup>245</sup>

A child-rights approach to participation emphasises that any engagement of children should be meaningful, rather than tokenistic.<sup>246</sup> As such, some of the key advantages of establishing a children and young people's advisory board are that it:

- signals an ongoing commitment to consulting with children and young people, rather than a one-off information gathering exercise
- provides children and young people with opportunities for empowerment and skills development
- allows for in-depth consideration by children and young people of complex issues involved in policy and legal reform
- enables children and young people to contribute to ongoing improvements of the way the family law system works.

As well as an Advisory Board, the views and experiences of children and young people in the family law system can also be gained by:

- research involving children and young people
- regular or one-off surveys with children and young people
- consultations with children and young people
- one-off advisory groups on particular projects or issues.

The final report/evaluation of the YPFLAG in South Australia provides useful background for consideration of these issues. Accordingly, Council recommended that a Children and Young People's Advisory Board should be established.

#### **Recommendation 11:**

***That the Council's recommendation for the establishment of a children's and young person's Advisory Board be implemented (see Council letter of advice dated 28 July 2022 at Appendix B).***

<sup>245</sup> UNCRC Concluding Observations (n 26) [22(a)].

<sup>246</sup> See also the Convention (n 4) [132-134].

## 9.9 Measures to support participation that are designed with children and young people and to address their post separation needs

The preceding discussion in sections 5 of this report in relation to what children and young people say they need in the post-separation context and in section 6 of this report where having safe and effective options for participation are identified as protective in nature, Council observes that there is a need for a co-design process with children and young people regarding measures to support options for this safe and effective participation in post-separation decision-making affecting them. The Children and Young People's advisory board may play an important role in this co-design process.

Council is also of the view that the Children and Young People's board would play an important role in co-designing measures to ensure that the Family Law system is appropriately addressing the post-separation needs of children and young people, including for psychosocial support, for advice and representation, and to facilitate safe participation in post-separation decision-making.

Consideration should also be given to including in these co-design process representatives from other government and non-government youth advisory groups across Australia.

We recommend that there be further consideration of Proposal 7-8 of the Australian Law Reform Commission's Discussion Paper No. 86 which recommended that children involved in family law proceedings should be supported by a 'Children's Advocate': a social science professional with training and expertise in child development and working with children. The purpose of this role is not legal representation.

The ALRC proposal contemplated the role of the Children's Advocate as being to:

- explain to the child their options for making their views heard;
- support the child to understand their options and express their views;
- ensure that the child's views are communicated to the decision maker; and
- keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.

The aim of a Children's Advocate role is to uphold children and young people's rights and amplify their voices, and to provide therapeutic, clinical and facilitative support. A Children's Advocate role could be a standalone role, or a part of the responsibilities of, for example, a counsellor, social worker or therapist.

### **Recommendation 12:**

***That a co-design process with children and young people be implemented to make recommendations to Government to ensure that the family law system is appropriately addressing their post-separation needs, including for psychosocial support, for advice and representation, and to facilitate safe and effective options to participate in post-separation decision-making including, where appropriate, through an appropriately qualified children's advocate.***

## 10. Utilising direct representation as an option when appropriate

In August 2011, the American Bar Association ('ABA') adopted the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings,<sup>247</sup> which provided for a model of direct representation for the child (on certain criteria), and what we would call an ICL or best interest model of litigation.

In doing so, the ABA recognised no other legal proceeding that pertains to children has such a major effect on their lives – and that only the child's physical liberty is threatened through for example, a change of residence.

The report continues:

Our notion of basic civil rights, and ABA Policy and Standards, demand that children and youth have a trained legal advocate to speak on their behalf and to protect their legal rights. There would be no question about legal representation for a child who was facing a month in juvenile detention, so why is there an issue for a child in an abuse and neglect case, where State intervention may last up to 18 years? The trauma faced by children in these proceedings has been recognized by at least one federal court which held that foster children have a constitutional right to adequate legal representation.<sup>248</sup>

In promoting best interests representation and direct representation, the ABA defines the two as:

- (1) "Best interest advocate" means an individual, not functioning or intended to function as the child's lawyer, appointed by the court to assist the court in determining the best interests of the child. A "best interests advocate" does not function as the child's lawyer and is not bound by the child's expressed wishes in determining what to advocate, although the best interests advocate should consider those wishes.<sup>249</sup>

That is our ICL equivalent.

- (2) "Child's lawyer" (or "lawyer for children") means a lawyer who provides legal services for a child and who owes the same duties, including undivided loyalty, confidentiality and competent representation, to the child as is due an adult client. A "child's lawyer" is a client-directed lawyer in a traditional attorney-client relationship with the child. A child so represented is a party to the proceedings.

<sup>247</sup> American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (Model Act, 2011).

<sup>248</sup> *Ibid* 18.

<sup>249</sup> *Ibid* 21.

Under the ABA model, the court may appoint one child's lawyer to represent siblings if there is no conflict of interest as defined under the applicable rules of professional conduct. The court may appoint additional counsel to represent individual siblings at a child's lawyer's request due to a conflict of interest between or among the siblings.

The applicable rules of professional conduct and any law governing the obligations of lawyers to their clients apply to such appointed lawyers for children.

The appointed child's lawyer shall represent the child at all stages of the proceedings, unless otherwise discharged by order of court. A child's right to counsel may not be waived at any court proceeding.

The ABA's Model Act, in so far as child protection matters are concerned, recognises the right of every child to have quality legal representation and a voice in any abuse, neglect, dependency, or termination of parental rights proceeding, regardless of developmental level. Nothing in their Act precludes a child from retaining a lawyer.<sup>250</sup>

Importantly, the ABA asks the States to establish minimum training requirements for lawyers who directly represent children. Such training is to focus on applicable law, skills needed to develop a meaningful lawyer-client relationship with child-clients, techniques to assess capacity in children, as well as the many interdisciplinary issues that arise in child welfare cases.

The duties of a child's lawyer include, but are not limited to:

1. to represent the child-client in the proceeding, including but not limited to: interviewing and counselling the client, preparing a case theory and strategy, preparing for and participating in negotiations and hearings, drafting court documents, and whatever else is required when acting for a person;
2. considering draft orders affecting the child and explaining to the court the basis for any opposition by the child;
3. expediting the proceedings and the resolution of contested issues;
4. where appropriate, discussing the possibility of settlement or the use of FDR;
5. meeting with the child prior to each hearing and for at least one in-person meeting every quarter;
6. where appropriate and consistent with both confidentiality and the child's legal interests, consulting with the best interests advocate;
7. prior to every hearing, investigating and taking necessary legal action regarding the child's medical health, mental health, social, education, and overall wellbeing;
8. visiting the home, residence, or any prospective residence of the child;
9. seeking court orders or taking any other necessary steps in accordance with the child's direction to ensure that the child's health, mental health, educational, developmental, cultural and placement needs are met; and
10. representing the child in all proceedings affecting the issues before the court, including hearings on appeal or referring the child's case to the appropriate appellate counsel.

---

250 Ibid.

Interestingly – and looking at the whole of the child – the child’s lawyer may request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. For example, special education, school discipline hearings, mental health treatment, delinquency or criminal issues, guardianship, adoption, paternity, probate, immigration matters, medical care coverage, post-secondary education opportunities, qualification, and tort actions for injury, as appropriate.

Ultimately, the ABA took the view that providing the child with an independent and client-directed lawyer ensures that the child’s legal rights and interests are adequately protected.<sup>251</sup>

Whilst the child’s lawyer helps to make the child’s wishes and voice heard, the child lawyer is not a mouthpiece. As with any client, the lawyer’s role is to counsel, guide and examine, with the child-client, other options and the consequences of what they are instructing counsel to do.

Importantly, the child’s lawyer should not confuse inability to express a preference with unwillingness to express a preference. If an otherwise competent child chooses not to express a preference on a particular matter, the child’s lawyer should determine if the child wishes the lawyer to take no position on the particular issue in the proceeding.

We do not say the ABA model is the be all and end all of hearing the voice of the child, but their initiative gives some content to considering direct representation as opposed to our very familiar best interests ICL approach.

In that respect the *Family Law Act* permits children to institute proceedings for parenting orders (s 65C), child maintenance orders (s 66F) and any other order under the *Family Law Act* unless a contrary intention appears (s 69C(2)).<sup>252</sup>

The current Guidelines for Independent Children’s Lawyers<sup>253</sup> provide that, where a child of sufficient maturity wishes to have a direct representative who will act on the child’s instructions, the ICL should inform the child of the possibility of applying to become a party to the proceedings.

In *Re JJT; Ex Parte Victoria Legal Aid* [1998] HCA 44; 195 CLR 184 Gummow J, at [43] observed that:

Doubtless, in most cases in Australia, separate representation (which is inescapably expensive) is also unnecessary. But well documented reports show that there are particular instances where special representation may not only be helpful but essential. Such cases include some involving Indigenous children, children from non-English speaking backgrounds, children with intellectual disabilities and children in respect of whom physical or sexual abuse is suspected or alleged. [references omitted]

<sup>251</sup> Ibid.

<sup>252</sup> *Family Law Act* (n 5).

<sup>253</sup> *ICL Guidelines* (n 237).

The issue was extensively considered by the ALRC in report ALRC 84; *Seen and Heard: Priority for Children in the Legal Process*<sup>254</sup> which stated at 16.58 and 16.59:

16.58 Children may be heard in family law proceedings by initiating proceedings on their own behalf. Children of appropriate age and maturity should be informed of their right to institute proceedings, to instruct legal representatives on their own behalf or to join applications. The Inquiry was told that children are often dissuaded from intervening when they express a wish to participate in family law proceedings as parties. One submission noted [m]uch of the resistance appears to be associated with a failure to recognise the competence of young people in forming their own views and a failure to take seriously the right of children to be heard.

16.59 Children should not have to institute or join proceedings merely to express their wishes or participate in litigation concerning their living arrangements. However, in some circumstances it may be appropriate for a child to become a party to proceedings. These could include situations where a parent is 'litigation weary' and the child is able to present cogent reasons as to why arrangements should change. Practitioners and court officers acknowledge that children of a certain age who are unhappy with the results of litigation concerning their living arrangements will 'vote with their feet'. These children should have access to the court to formalise their arrangements. That they are not in a position to do so may well undermine the stability of their new living arrangements. (references omitted)

Council agrees with the analysis of the ALRC and repeats, as a recommendation of Council, recommendation 152 of the ALRC Report.<sup>255</sup>

**Recommendation 13:**

***Children and young people should be informed about their options for participation in family law proceedings. The information should relate to the availability of counselling and their options for more direct participation in family law proceedings including their rights to seek legal advice or initiate proceedings. Electronically accessible brochures and other appropriate mediums should be produced to provide this information and should be directed to at least two developmental and literacy levels of children and young people. The brochures should be provided to both the applicant and the respondent at the early stages of the proceedings to be passed along to the children and young people concerned.***

**Recommendation 14:**

***Council further recommends that the Attorney-General's Department prepare an electronically accessible brochure to provide information regarding options for participation and direct representation to children and young people, Independent Children's Lawyers and other family law professionals.***

<sup>254</sup> ALRC 1997 Report (n 11).

<sup>255</sup> Ibid [Recommendation 152].

## 11. Supporting the participatory rights of Aboriginal and/or Torres Strait Islander children and young people

Every child and young person has a fundamental right to participate in decisions about their safety and welfare, to the extent that they wish to do so. The effective participation, in the context of family law legal proceedings, of Aboriginal and/or Torres Strait Islander children requires particular attention.

An ICL for an Aboriginal and/or Torres Strait Islander child or young person, should be appointed where possible from a community controlled Aboriginal and/or Torres Strait Islander Legal Service.<sup>256</sup> Where the role of the ICL is delivered through a mainstream legal practice or government LAC, this is less likely to lead to effective participation by the Aboriginal and/or Torres Strait Islander child or young person and poorer outcomes for the child.

It is well researched and documented across the world that the services, programs and initiatives which have been identified to work well for First Nations people are those which promote self-determinism and are designed 'by communities for communities', controlled by communities and responding to local contexts. In Australia, those services which empower self-determinism and enable ACCOs and Elders to work alongside government and non-government organisations in a partnership of mutual respect and trust are most effective and achieve better outcomes.<sup>257</sup> Analysis of leading social and health research provides evidence that services for Aboriginal and/or Torres Strait Islander people are more effective with community involvement.<sup>258</sup> Denato and Segal undertook a comprehensive review of Australian evidence that identified the crucial importance of Aboriginal and/or Torres Strait Islander community-control to outcomes in health service delivery. They cite several studies of the Office for Aboriginal and/or Torres Strait Islander Health to conclude: "A common theme emerging from these extensive reviews regarding 'what works' was the crucial importance of community engagement, ownership and control over particular programs and interventions".<sup>259</sup>

Self-determination in international law is the right of Indigenous peoples to freely determine their political status and economic, social, and cultural destiny. The right to self-determination recognises that Aboriginal and/or Torres Strait Islander communities are best placed to make decisions about their needs and the needs of their children. This includes Aboriginal and/or Torres Strait Islander local community autonomy in the delivery of funded legal assistance services and functions including, that of ICLs.

All Australian, state, territory and local governments have agreed to upholding self-determination as part of the National Agreement on Closing the Gap 2020-2030 ('National Agreement') with the Coalition of Aboriginal and/or Torres Strait Islander Peak Organisations ('Coalition of the Peaks').<sup>260</sup> The National Agreement itself acknowledges that 'Aboriginal and/or Torres Strait Islander community-controlled services are better for Aboriginal and/or Torres Strait Islander people, achieve better results, employ more Aboriginal and/or Torres Strait Islander people and are often preferred over mainstream services.'<sup>261</sup> In line with the evidence and the commitment of all governments to

<sup>256</sup> Aboriginal and Torres Strait Islander Legal Services are community-controlled representative organisations and include the Aboriginal and Torres Strait Islander Legal Services Queensland (ATSILS QLD), Aboriginal Legal Rights Movement (ALRM) South Australia, the Aboriginal Legal Service (NSW/ACT) Limited (ALS NSW/ACT), the Aboriginal Legal Service of WA Limited (ALSWA), the North Australian Aboriginal Justice Agency (NAAJA) Northern Territory, the Tasmanian Aboriginal Legal Service (TALS), the Victorian Aboriginal Legal Service Co-operative Limited (VALS). Commonwealth Government funding for ATSILs under the National Legal Assistance Partnership Agreement 2020-2025 is separated and administered by state and territory governments through funding agreements with ATSILs.

<sup>257</sup> Australian Institute of Health and Welfare and Australian Institute of Family Studies, *Family violence prevention programs in Indigenous communities* [Close the Gap Clearinghouse Resource Sheet No. 37, December 2016] 2-3.

<sup>258</sup> Oxfam Australia, *In Good Hands: The People and Communities Behind Aboriginal-led Solutions* (Report, October 2019).

<sup>259</sup> Ronald Denato and Leonie Segal, 'Does Australia have the appropriate health reform agenda to close the gap in Indigenous health?' [2013] 37(2) *Australian Health Review* 235.

<sup>260</sup> The Coalition of Aboriginal and Torres Strait Islander Peak Organisations is a representative body of more than 80 Aboriginal and/or Torres Strait Islander community-controlled peak organisations and members

<sup>261</sup> Joint Council on Closing the Gap, *National Agreement on Closing the Gap 2020-2030* (Report, July 2020) Clause 43.

the National Agreement, decisions around the legal assistance strategic and funding framework in relation to family law services (both legal and non-legal) for Aboriginal and/or Torres Strait Islander families and children, including new expenditure decisions in relation to the role of the ICL, should embed the principles contained in the National Agreement and transition service delivery to ATSILS where appropriate.

NATSILS<sup>262</sup> in their 2023 submission to the Independent Review of the National Legal Assistance Partnership 2020-25, submitted that in making new expenditure decisions in relation to the delivery of legal services to Aboriginal and/or Torres Strait Islander people, consideration must be given by government as to whether ATSILS<sup>263</sup> would be better placed to deliver that funded service, and whether non-Aboriginal Community-Controlled services should partner with ATSILS when providing a funded services to Aboriginal and/or Torres Strait Islander people. This would include consideration of the current funding model for ICLs for Aboriginal and/or Torres Strait Islander children and young persons, and whether this service should be transitioned from government LACs to appropriate ATSILS or delivered in partnership.

ATSILS are in a unique position to provide family law services as an ICL which facilitate the voice of Aboriginal and/or Torres Strait Islander children and young persons, as they are trusted by and have knowledge of the local communities they service. However, they are limited in their capacity to expand the reach of family law services to include child representation in family law across their locations due to the high demands on these services which far outstrip their funded capacity. As such, sustained capacity building and investment by government would be required to strengthen the existing capabilities and expertise of ATSILS in the provision of culturally safe family law services both as an ICL and in-house non-legal services in a model that recognises that interconnected nature of legal issues in relation to the welfare of children, with non-legal issues such as transgenerational trauma, poverty and lack of access to culturally appropriate supports when they are needed most.

Examples of where LACs have considered on a case-by-case basis whether ATSILS are best placed to deliver a legal service to Aboriginal and/or Torres Strait Islander individuals and communities, and collaborative partnerships, can be found in the child protection context. For example, in NSW the Aboriginal Legal Service (NSW/ACT) ('ALS NSW') is notified of new applications filed in the Children's Court by NSW Legal Aid and given the opportunity to nominate whether they are best placed to represent the child or another party in the application before the funded legal assistance is allocated by NSW Legal Aid to an in-house practitioner or to an external government funded "panel" practitioner.

More formal partnerships between government and ACCOs also exist, such as the Legal Assistance for Families: Partnership Agreement between NSW Legal Aid, the NSW Department of Communities and Justice and ALS NSW which is described as an 'agreement focussed on working collaboratively to achieve the best and safest outcomes for families'.<sup>264</sup> These examples do not involve a transition of funding for the provision of the service to the ALS NSW, however, but demonstrate how funded services as an ICL could transition to ATSILS and/or operate in partnership.

With investment in ATSILS to lead the provision of funded services as an ICL to Aboriginal and/or Torres Strait Islander children and young persons, there will still be a demand for LACs and funded "panel practitioners" to continue to provide these services to Aboriginal and/or Torres Strait Islander children and their families where legal conflicts of interest exist or there is no suitable local service.

Where the lack of cultural competence in service delivery is identified as a challenge to effective engagement with mainstream legal services for Aboriginal and/or Torres Strait Islander people, as a priority there must be minimum standards and requirements in cultural competence and cultural safety which ensure ICLs appointed in relation to an Aboriginal and/or Torres Strait Islander child

<sup>262</sup> The National Aboriginal and Torres Strait Islander Legal Services ('NATSILS') is the peak national body for Aboriginal and Torres Strait Islander Legal Services ('ATSILS') in Australia.

<sup>263</sup> Aboriginal and Torres Strait Islander Legal Services were the first established community-based legal services and are some of the oldest Aboriginal and/or Torres Strait Islander community-controlled representative organisations in Australia.

<sup>264</sup> Legal Aid New South Wales, *Legal Assistance for Families: Partnership Agreement (LAFPA)* (Web Page) <<https://www.legalaid.nsw.gov.au/my-problem-is-about/my-family-or-relationship/care-and-protection/lafpa>>.

or young person has knowledge of the unique cultural connections and needs of that particular child or young person, and understands the critical importance to Aboriginal and/or Torres Strait Islander children of their connection to culture, community and family including the adverse risks and consequences that flow from disconnection from family. This is essential to not only hearing the voice of the child or young person but to ensure that proper consideration is given to the cultural needs of that child as well as proper weight by the decision maker to the long-term negative impacts that disconnection from culture, family and community has for Aboriginal and/or Torres Strait Islander children and young people.<sup>265</sup> Cultural competence involves perpetual learning and development in training of professionals to achieve cultural safety for children and young persons. The outcome of this training should include, for example, understanding Aboriginal and/or Torres Strait Islander concepts of family and caring arrangements, concepts of family violence and disability, knowledge of that particular community's customs, traditions, views, child rearing practices, the effects of intergenerational trauma from Stolen Generations in child protection and family violence matters, and the impacts of colonisation and systemic racism on Aboriginal and/or Torres Strait Islander families. An ICL appointed for Aboriginal and/or Torres Strait Islander people must at a minimum recognise and acknowledge that:

Culture is not to be considered as homogenous and that in exercising their duties as an ICL, they must take active steps to understand what culture means for each individual child.

Culture plays an essential role in identity formation, is fundamental to ensuring wellbeing, and is a key protective factor against experiences of systemic racism and intergenerational trauma. Absent this connection to culture, community and family, there are elevated rates of youth suicide and poorer developmental, educational and economic outcomes for Aboriginal and/or Torres Strait Islander children and young people.

The existence or non-existence of primary attachment care should not be a singular reason to change the living arrangements of a child or refuse certain care arrangements.

Any training and review of the effectiveness of the training should be developed, led and reviewed by ACCOs and the voice of Aboriginal and/or Torres Strait Islander children must be central. Government may be assisted by Aboriginal and/or Torres Strait Islander members of a children's advisory board, if established. It should be noted that cultural competence and cultural safety have no national or consistent definitions and as such there is currently no national definition of "cultural safety" in delivering legal services to Aboriginal and/or Torres Strait Islander people. NATSILS in their submission to the Independent Review of the National Legal Assistance Partnership 2020-2025 recommended that government consult the Coalition of the Peaks for guidance on the development of a national and consistent definition of culturally safety. They identified that the Coalition of the Peaks has a deep understanding of the unique needs and challenges faced by Aboriginal and/or Torres Strait Islander communities and their expertise could provide valuable insights into defining cultural safety in a way that is meaningful and relevant. A nationally consistent definition of cultural safety could help ensure that policies and practices across the different legal assistance services are culturally appropriate and respectful. This aligns with Priority Reform 3 and clause 59 of the National Agreement on Closing the Gap, which emphasises the importance of cultural safety in improving outcomes for Aboriginal and/or Torres Strait Islander children. Incorporating this definition into funding arrangements for the provision of ICL services to Aboriginal and/or Torres Strait Islander children and young people can help ensure that legal services are delivered in a culturally safe manner that ensures the child or young person's voice and best interests are properly advocated.

<sup>265</sup> Davi Manzini Macedo et al, 'Effects of Racism on the Socio-Emotional Wellbeing of Aboriginal Australian Children' (2019) 18 *International Journal for Equity in Health* 132; Department of Education and Early Childhood Development, Victoria, *The State of Victoria's Children 2009: Aboriginal Children and Young People in Victoria* (Report, 2010).

**Recommendation 15:**

***Council is of the view that as a priority, professionals involved in delivering services to Aboriginal and/or Torres Strait Islander people as an Independent Children's Lawyer should be educated and trained in culturally safe and culturally appropriate practices, with the voices and perspectives of Aboriginal and/or Torres Strait Islander children central to the development of this education and training and that National Legal Aid be funded to develop the required mandatory training module for Independent Children's Lawyers in partnership with Aboriginal and/or Torres Strait Islander Community-Controlled Organisations.***

**Recommendation 16:**

***That Government invest in Aboriginal and/or Torres Strait Islander Legal Services long-term organisational capacity to play a leading role in the provisions of culturally safe services for Aboriginal and/or Torres Strait Islander children in the family law system including as the Independent Children's Lawyer.***

## 12. Supporting research and evaluation

Council supports efforts to incorporate children and young people's voices across the range of family law system processes. The Commonwealth Government should continue to encourage families to use non-adversarial processes wherever possible and safe to do so. Prolonged litigation can adversely impact the wellbeing of children, both directly and through effects on adults' capacities to parent. However, neither harms nor benefits from evolving family law processes should be assumed without evidence. The outcomes from changes recommended here towards greater child participation should be monitored and evaluated. In particular, longitudinal research into post-separation developmental outcomes for children and research drawing on a national minimum data set of data from courts and government-funded agencies is needed to rigorously evaluate the impact both of litigation and family law services interventions, and to ensure that all changes have the desired effect of improving family relationships and children and young people's wellbeing.

Longitudinal research in the context of family law system services is important to support developing understanding of the characteristics, dynamics, risks and needs of separating or separated families accessing these services. This should include examination of quantitative and qualitative data collected by the relevant agencies and services in relation to these factors and of any changes over time. A national minimum data set involves the development of a secure data asset drawing on data available from the range of agencies and services engaging with separating or separated families. These agencies and services include family relationship services, legal services, dispute resolution services, child support and courts. This national minimum data set and the application of data linkage capabilities, would support the monitoring of system performance, and facilitate understanding of how the range of services operate as a collective, as well as patterns in the service use, client profiles and trajectories through the family law system. Together, these data can better inform developments in service provision in the post-separation context for families.

### ***Recommendation 17:***

***That Government commission longitudinal research into post-separation outcomes for children and research drawing on a national minimum dataset from courts and government-funded agencies, to evaluate the impact of litigation and interaction with family law services.***

## 13. Ways to identify and address final parenting orders and parenting plans that no longer meet the children's best interests or developmental needs

Recent amendments to the *Family Law Act* may have given rise to concern that it may now be more difficult to revisit previous parenting orders, even if they have become unsuitable as a result of the child's evolving maturity and changed lifestyle or if, for example, the orders were made when a now teenage child was very young.

In Council's view, any such concern would be misplaced.

The *Family Law Amendment Act 2023* [Cth] introduced a new section (s 65DAAA) which largely codifies the principle established in *Rice v Asplund* (1979) FLC 90-725. That principle required that when final parenting orders are in place, applicants must demonstrate a significant change in circumstances since those orders were made before they can be reconsidered.

The new section now requires that a court must not reconsider a final parenting order unless it has considered whether there has been a significant change of circumstances since it was made, and is satisfied that in all the circumstances (including the question of whether there has been any such change) it is in the best interests of the child to reconsider the final order.

While the section does not expressly require proof of a significant change of circumstances as a preliminary threshold which must be cleared, the court is clearly required to focus on what change of circumstances is said to have occurred since the final orders were made. Absent appellate intervention, or cogent evidence that a material factor was not disclosed at the earlier hearing, a court considering a fresh application must presume that the existing final orders were in the best interests of the child at the time they were made.

Subsection 65DAAA(2) provides that in considering those questions the court 'may have regard to any matters that the court considers relevant' including the following:

- (a) the reasons for the final parenting order and the material on which it was based;
- (b) whether there is any material available that was not available to the court that made the final parenting order;
- (c) the likelihood that, if the final parenting order is reconsidered, the court will make a new parenting order that affects the operation of the final parenting order in a significant way (whether by varying, discharging or suspending the final parenting order, in whole or in part, or in some other way);
- (d) any potential benefit, or detriment, to the child that might result from reconsidering the final parenting order.

The legislation also specifically states that those identified provisions are not intended to limit the s 60CC factors to which we have earlier referred. Significantly those s 60CC factors include in s 60CC(2)(b) 'any views expressed by the child.'

These provisions give ample scope for the Court to consider a child's changed circumstances and evolving maturity in deciding whether to revisit previous parenting orders.

## 14. Ways to improve the drafting of parenting orders and parenting plans in addressing the changing developmental needs and views of children

For those families which require court intervention to determine the arrangements for children, protracted or repeat litigation is undesirable for obvious reasons. That said, while parenting orders are by their nature predictive, there are obvious limitations. Where parents cannot agree, courts can only determine what parenting arrangements will work best for children based on the information available at the time the decision is made. Particularly where the decision is made in relation to very young children, predictions can only extend so far. Those fundamental points cannot be addressed by attention to how orders might be drafted.

Equally, in high conflict cases, the drafting of parenting orders is necessarily prescriptive. Orders must be clear, concise and enforceable. Flexibility and enforceability are not concepts which sit comfortably together in such cases.

Parenting arrangements that reflect an agreement (whether informally in a parenting plan or in orders made by consent) can be more amenable to flexibility. In those circumstances, parents can sometimes anticipate particular life events which are likely, and pre-emptively agree to a response to those events. They can also agree to build consensual regular reviews into their arrangements, or for that matter obligations to mediate if disagreements later emerge.

Council is of the view that if the voice of the child is heard at all stages of the dispute resolution process, then it is more likely that parenting plans and parenting orders will better reflect the need for those orders to provide sufficient flexibility to adapt to the child's changing developmental needs.

It is, however, desirable for family law professionals and dispute resolution practitioners to be aware of the need to draft parenting orders and parenting plans such that they make adequate provision for the child's changing development needs and views.

Legislative prescription for that to occur is, however, inappropriate. This is because the circumstances of each family and each child will vary.

Council is of the view that the challenge of drafting parenting plans and orders that provide for the child's evolving development needs and wishes should best be addressed by giving significance to the issue in professional development courses and training programs. There are many strategies and techniques for building flexibility into parenting orders and plans. These include:

- Encouraging parents to create detailed and flexible parenting plans that can be adjusted as circumstances change. These plans should include mechanisms for resolving disputes amicably.
- Drafting orders with built-in flexibility that allow for adjustments such as including provisions for changes in schooling, extracurricular activities, or living arrangements.
- The development of these parenting plans and orders should be informed by the views and experiences of the children and young people to whom they apply, should the children and young people wish to participate in the decision-making process.
- The parties agreeing to periodic reviews of parenting orders by, for instance, planning for child inclusive mediation once the child achieves a level of maturity or reaches a milestone such as commencing high school.
- Providing parents with resources and support to understand the importance of adapting parenting arrangements as their child grows. This can include, for instance, workshops, counselling, and access to legal advice.
- Developing the education programs for children, to which we have earlier referred in this report, informing them of advice and support and advice they can obtain if they are faced with a situation where parenting orders that impact them are no longer appropriate.

## CONCLUSION

The term of reference addressed by this report recognises a number of fundamental principles.

First, that children and young people have rights, and should have agency in decisions which are made about them after their parents separate.

Second, that children and young people cannot access those rights and agency if they do not have adequate information available to them. That information must enable them to understand how decisions relevant to them will be made, the progress of the decision-making process, and the reasons for those decisions once they are made.

Third, that support for children from professionals including FDR Practitioners, CCEs, family report writers, ICLs and judicial officers is essential to the promotion of those rights and agency.

Fourth, that support from those professionals can only be enhanced by continual attention both to their skills and knowledge, and to the availability of their services.

Fifth, that continuing attention must be directed to improving both community-based and legal systems which deal with family breakdown, with a renewed focus on the needs and rights of children and young people.

The recommendations we have made flow from those fundamental principles. We commend all recommendations and, in particular note the following.

They seek to ensure that children and young people have access to information about the decision-making process, and how they can make their voices heard **(Recommendations 4 and 5)**.

They seek to ensure not only that children and young people's views are sought and considered **(Recommendations 6, 11 and 12)** but that children and young people are informed in an appropriate way about the decisions which affect them, and the reasons for those decisions **(Recommendations 13 and 14)**.

They seek to ensure that in court proceedings affecting children and young people, their interests are effectively and independently represented by competent professionals, and that the interests of Aboriginal and/or Torres Strait Islander children are considered and represented in a culturally safe and appropriate way **(Recommendations 15 and 16)**.

Finally, our recommendations seek to ensure that research and consultation continue, and that structural steps are put in place to ensure not only that children and young people's voices are heard in individual cases, but that they are heard in the process of continued enhancement of services, improvement of processes, and the development of the family law system more broadly **(Recommendations 11, 12 and 15)**.

# BIBLIOGRAPHY

## A) Articles/Books/Reports

Australian Child Rights Taskforce, *The Children's Report: Australia's NGO coalition report to the United Nations Committee on the Rights of the Child* (Report, Australian Child Rights Taskforce, UNICEF Australia, November 2018)

---

Australian Child Rights Taskforce, *Listen to Children* (Report, 2011)

---

Australian Human Rights Commission, *Free and equal: A Human Rights Act for Australia* (Summary Report, 2022)

---

Australian Human Rights Commission, *Free and Equal: Revitalising Australia's Commitment to Human Rights* (Final Report, 2023)

---

Australian Human Rights Commission, *'Help way earlier!' How Australia can transform child justice to improve safety and wellbeing* (Report, 2024)

---

Australian Human Rights Commission, *National Principles for Child Safe Organisations* (Report, 2018)

---

Australian Institute of Health and Welfare and Australian Institute of Family Studies, *Family violence prevention programs in Indigenous communities* (Close the Gap Clearinghouse Resource Sheet No. 37, December 2016) 2-3

---

Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report 135, March 2019) 19

---

Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84, November 1997)

---

Bagshaw, Dale et al, 'Family violence and family law in Australia: The experiences and views of children and adults in families who separated post 1995 and post 2006' (2010) 21 *Australian Family Lawyer* 1-219

---

Beckhouse, Kylie, *Laying the guideposts for participatory practice: Children's participation in family law matters* (Family Matters Research Report 98, Australian Institute of Family Studies, 2016) 26-33

---

Beckhouse, Kylie, 'To investigate legal representation schemes for children in the USA, Canada and the UK: administration, delivery and innovation' (Report, The Winston Churchill Memorial Trust of Australia, 2015b)

---

Beckwith, Stephanie, Lowe, Lauren, Wall, Liz, Stevens, Emily, Carson, Rachel, Kaspiew, Rae, MacDonald., Jasmine B. McEwen, Jade, Willoughby, M and Gahan, Luke, *Coercive Control Literature Review* (Final Report, 2023)

---

Bell, Felicity, 'Barriers to empowering children in private family law proceedings' (2016a) 30(3) *International Journal of Law, Policy & the Family* 225-247

---

Bell, Felicity, *Facilitating the Participation of Children in Family Law Processes* (Discussion Paper, Legal Aid NSW, 2015)

---

Bell, Felicity, 'Meetings between children's lawyers and children involved in private family law disputes' (2016b) 28(1) *Child and Family Law Quarterly* 5-24

---

Bell, Felicity, Judy Cashmore and Joe Harman, 'Australia' in Wendy Schrama et al, *International Handbook on Child Participation in Family Law* (Intersentia, 2021)

---

- Benjamin, Robert, 'Judges Receiving Evidence Directly from Children' (2012) 2(2) *Family Law Review* 99
- Birnbaum, Rachel, 'Views of the child reports: Hearing directly from children involved in post-separation disputes' (2017) 3 *Social Inclusion* 148
- Birnbaum, Rachel and Michael Saini 'A Qualitative Synthesis of Children's Participation in Custody Disputes' (2012) 22(4) *Research on Social Work Practice*, 400-409
- Birnbaum, Rachel and Nicholas Bala, 'The child's perspective on legal representation: Young adults report on their experiences with lawyers' (2009) 25 *Canadian Journal of Family Law* 11-71
- Birnbaum, Rachel and Nicholas Bala, *Views of the Child Reports: the Ontario Pilot Project – Research Findings and Recommendations* (Legal Research Paper No. 2017-092, Queen's University, 2017)
- Bonanni, Virginia, 'A child's right to participate in family dispute proceedings', *Family Dispute Resolution Centre* (Blog Post, 2 December 2021) <<https://www.fdrc.co.nz/a-childs-right-to-participate-in-family-dispute-resolution-mediation/>>
- Butler-Sloss, Elizabeth, *Report of the Inquiry into Child Abuse in Cleveland 1987* (Report, His Majesty's Stationery Office, 1988) 245
- Caldwell, John, 'Judicial interviews of children: some legal background' (2007) 5 *New Zealand Family Law Journal* 215.
- Caldwell, John and Nicola Taylor, 'Natural Justice and Judicial Meetings with Children: Documenting Practice within the New Zealand Family Court' (2013) 7 *New Zealand Family Law Journal* 264
- Carson, Rachel et al, *Children and young people in separated families: Family law system experiences and needs* (Research Report, Australian Institute of Family Studies, 2018)
- Carson, Rachel et al, *Compliance with and enforcement of family law parenting orders: Final report* (Research Report, ANROWS, 2022)
- Carson, Rachel et al, *Evaluation of the Children's Contact Service Activity: Final report* (Research Report, Australian Institute of Family Studies, 2023)
- Cashmore, Judy, 'Children's participation in family law decision-making: Theoretical approaches to understanding children's views' (2011) 33 *Children and Youth Services Reviews* 515-520
- Cashmore, Judy and Patrick Parkinson, 'Children's 'wishes and feelings' in relocation disputes' (2008) 28(2) *Child and Family Law Quarterly* 151-173
- Chisholm, Richard, *Family Courts Violence Review* (Report, 27 November 2009)
- Coleman, I, *Children and the law: The Family Court Experience and the Criminal Law Experience* (Seminar Paper, NSW Bar Association, 9 September 1996)
- Commission for Children and Young People Victoria, '*In our own words*': *Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system* (Report, 27 November 2019)
- Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Australia's Child Support Scheme* (Third interim report, 2021)
- Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Interim Report, December 2020)
- Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Second Interim Report, March 2021a)

- Commonwealth of Australia (Joint Select Committee on Australia's Family Law System), *Improvements in family law proceedings* (Final Report, November 2021b)
- 
- Denato, Ronald and Leonie Segal, 'Does Australia have the appropriate health reform agenda to close the gap in Indigenous health?' (2013) 37(2) *Australian Health Review* 235
- 
- Department of Education and Early Childhood Development, Victoria, *The State of Victoria's Children 2009: Aboriginal Children and Young People in Victoria* (Report, 2010)
- 
- Department of Social Services (Cth), *National Plan to End Violence Against Women and Children 2022-2032* (Report, 2022) 103
- 
- Department of Social Services (Cth), *Safe and Supported: The National Framework for Protecting Australia's Children 2021-2031* (Report, 2021)
- 
- Dimopoulos, Georgina, 'Children's Participation in Family Law Proceedings: Are We (Still) Not Listening?' (2023b) 32(1) *Australian Family Lawyer* 33
- 
- Dimopoulos, Georgina, *Decisional Privacy and the Rights of the Child* (Routledge, 2022)
- 
- Dimopoulos, Georgina, *Reconceptualising child rights: Children's Voices in a legal context* (Guest Author Series, Institute of Child Protection Studies, Australian Catholic University, 2020)
- 
- Dimopoulos, Georgina, 'Re-reading court judgements from a children's rights perspective' in *Decisional Privacy and the Rights of the Child* (Routledge, 2022)
- 
- Dimopoulos, Georgina, 'The right time for rights? Judicial engagement with the UN Convention on the Rights of the Child in Part VII proceedings' (2023a) 36(1) *Australian Journal of Family Law* 64
- 
- Dimopoulos, Georgina et al, "'Talk to us, not about us": Children's understandings and experiences of participation in Australian family law' (2024) *Child & Family Social Work* (under review)
- 
- Dimopoulos, Georgina, 'Writing Judgments for Children: How Might Australian Family Law Judicial Officers Do It (More Often)?' *Melbourne University Law Review* 29 (forthcoming)
- 
- Dobinson, Sarah and Rebecca Gray, 'A review of the literature on family dispute resolution and family violence: identifying best practice and research objectives for the next 10 years' (2017) 30(3) *Australian Journal of Family Law* 180-204
- 
- Dominello, Francesca and Amanda Head, 'Children's Access to Justice: An Examination of a Child's Right to Participate in Parenting Decisions in Australian Family Law' in *Human Rights and Legal Services for Children and Youth: Global Perspectives* (Springer, 2023) 151-174
- 
- Eekelaar, John, 'The Importance of Thinking that Children have Rights' (1992) 6 *International Journal of Family Law* 221
- 
- European Commission, *Creating child-friendly versions of written documents: A guide* (Guide, 2021) <<https://cp4europe.org/child-friendly-info-guide>>
- 
- Family Justice Council, *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (Guidelines, April 2010)
- 
- Family Law Council, *Access to Justice Report* (Report, Term of Reference 3, 2024)
- 
- Family Law Council, *Family Violence and the Hague Convention Report* (Report, Term of Reference 1c, 2024)
- 
- Family Law Council, *Family Violence and Systems Abuse Report* (Report, Term of Reference 1a and 1b, 2024)

Family Law Council, *Improving the Family Law System for Culturally and Linguistically Diverse Clients* (Report, Family Law Council, 2012)

---

Family Law Council, *Representation of Children in Family Law Proceedings: A Report to the Commonwealth Attorney-General* (Report, June 1989)

---

Fehlberg, Belinda et al, 'Exploring the 'best interests' principle: 'Home' after parental separation for children and young people who have experienced domestic abuse' (2023) *Australian Journal of Family Law* 36(1), 23-37

---

Fernando, Michelle, *Children's direct participation and the views of Australian judges* (Family Matters Research Report 92, Australian Institute of Family Studies, 2013a) 41-47

---

Fernando, Michelle, 'Children's voices in family law proceedings in Australia, the United Kingdom, New Zealand and Canada' in *Exploring Norms and Family Laws Across the Globe* (Lexington Books US, 2022) 207

---

Fernando, Michelle, 'Express recognition of the UN Convention on the Rights of the Child in the Family Law Act: What impact for children's rights to be heard?' (2013b) 36(1) *University of New South Wales Law Journal* 88-106

---

Fernando, Michelle, 'Hearing children in family law proceedings' [2014] 124 *Precedent* 38-41

---

Fernando, Michelle, 'Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings' (2012) 2 *Fam L Rev* 21

---

Fernando, Michelle and Nicola Ross, 'Stifled voices: Hearing children's objections in Hague child abduction convention cases in Australia' (2018) 32(1) *International Journal of Law, Policy & the Family* 93-108

---

Fitzgerald, Robyn and Anne Graham, 'The changing status of children within family law from vision to reality' (2011) 20(2) *Griffith Law Review* 421-448

---

Fortin, Jane, Joan Hunt and Lesley Scanlan, *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth* (Report, Sussex Law School, 2012)

---

Friedly, Gail, 'An Exploratory Study of Adolescents' Experiences with their Divorced Parents' Parenting Plans' (Doctoral Dissertation, Capella University, 2009)

---

Graham, Anne and Robyn Fitzgerald, 'Taking account of the 'to and fro' of children's experiences in family law' (2006) 21(2) *Children Australia* 30-36

---

Graham, Anne and Robyn Fitzgerald, 'Exploring promises and possibilities for children's participation in Family Relationship Centres. (2010) *Family Matters*, 84, 53-60

---

Graham, Anne et al, 'Australian children's perspectives on rights, responsibilities, and citizenship: Implications for teacher practice and citizenship education' in *Children as Citizens? International Voices* (Otago University Press, 2009)

---

Harris, Michelle, *An Evaluation of Victoria Legal Aid's Kids Talk Program 2007-2010* (Research Report, Victoria Legal Aid, 2012)

---

Henry, Pamela and Karine Hamilton, 'The inclusion of children in family dispute resolution in Australia: Balancing welfare versus rights principles' (2012) 20(4) *International Journal of Children's Rights* 584-602

---

Hodge, Machiko, 'Facilitating Children's Effective Participation in Alternative Dispute Resolution Processes' (Doctoral Thesis, Monash University, 2022)

---

Horsfall, Briony, 'Breathing life into children's participation: empirical observations of lawyer-child relations in child protection proceedings' (2013) 3(3) *New Zealand Law Review* 429-444

Impact Economics and Policy for National Legal Aid, 'Future Challenges: The Supply of Legal Aid Services' in *Justice on the Brink Stronger Legal Aid for a Better Legal System* (Report, November 2023) 18-25

Irish Government Department of Children and Youth Affairs, *National Strategy on Children and Young People's Participation in Decision-Making, 2015 - 2020* (Report, 2015) 21-23

James, Adrian et al, 'The voice of the child in family mediation: Norway and England' (2010) 18(3) *The International Journal of Children's Rights* 313-333

Joint Council on Closing the Gap, *National Agreement on Closing the Gap 2020-2030* (Report, July 2020)

Karle, Michael and Sandra Gathmann 'The state of the art of child hearings in Germany. Results of a nationwide representative study in German courts' (2016) 54(2) *Family Court Review* 167-185

Kaspiew, Rae et al, *Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers* (Research Report, ANROWS 01, 2022)

Kaspiew, Rae et al, *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report* (Research Report, ANROWS Horizons 04, 2017)

Kaspiew, Rae et al, *Independent Children's Lawyers Study: Final report* (Research Report, Attorney-General's Department, 2014)

Lodge, Jody and Michael Alexander, *Views of adolescents in separated families: A study of adolescents' experiences after the 2006 reforms to the family law system* (Commissioned Report, Australian Institute of Family Studies, 2010)

Lundy, Laura, "'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33(6) *British Educational Research Journal* 927-942

Lundy, Laura, John Tobin and Aisling Parkes, 'Art.12 The Right to Respect for the Views of the Child' in John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford Academic, online ed, 2019) 399

Macdonald, Gillian, 'Hearing children's voices? Including children's perspectives on their experiences of domestic violence in welfare reports prepared for the English courts in private family law proceedings' (2017) 65(1) *Child Abuse & Neglect* 1-13

Macfarlane, Lesley-Anne Barnes, 'Reflections on Children's Rights - Based 'Modernisation' of Scottish Family Law And Policy' [2024] 1 *Juridical Review* 1-15

Macedo, Davi Manzini et al, 'Effects of Racism on the Socio-Emotional Wellbeing of Aboriginal Australian Children' (2019) 18 *International Journal for Equity in Health* 132

McIntosh, Jennifer, *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors* (Research Paper, AFRC Issues Paper No. 1, 2007)

McIntosh, Jennifer, 'Four young people speak about children's involvement in Family Court matters' (2009) 15(1) *Journal of Family Studies* 98-103

McIntosh, Jennifer, Catherine Long and Yvonne Wells, *Children beyond dispute: A four year follow up study of outcomes from child focused and child inclusive post-separation family dispute resolution* (Research Report, Attorney-General's Department, 2009)

- McIntosh, Jennifer et al, 'Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of post separation adjustment' (2008) 46(1) *Family Court Review* (2008) 105–124
- Mill, Ian, 'Conversations with children: A Judge's perspective on meeting the patient before operating on the on the family' (2008) 6 *New Zealand Family Law Journal* 72
- Ministry of Justice (New Zealand) Independent Panel, '*Te Korowai Ture a-Whanua: The final report of the Independent Panel examining the 2014 family justice reforms*' (Final Report, 2019)
- Mol, Charlotte, *The Child's Right to Participate in Family Law Proceedings: Represented, heard or silenced?* (Intersentia, 1<sup>st</sup> ed, 2022) 2-3
- Moore, Tim et al, '*Taking us seriously: Children and young people talk about safety and institutional responses to their safety concerns*' (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, Institute of Child Protection Studies, Australian Catholic University, August 2015)
- Moore, Tim 'Protection through participation – Involving children in child-safe organisations' (Research Report, Australian Institute of Family Studies, 2017)
- Moritz, Dominique and Ben Mathews, 'A Continuum of Protection to Empowerment: The Evolving Legal Landscape of Decision-Making for Children and Adolescents' (2023) 12(6) *Laws* 89
- Mundy, Warren, *Independent Review of the National Legal Assistance Partnership* (Final Report, March 2024)
- National Legal Aid, Submission to the Independent Review of the National Legal Assistance Partnership, *Limited Supply* (October 2023) 15-16
- Neale, Bren, 'Dialogues with children: Children, divorce and citizenship' (2002) 9(4) *Childhood* 455–475
- Neale, Bren and Carol Smart, *Agents or Dependents? Struggling to listen to children in family law and family research* (Working Paper 3, Centre for Research on Family, Kinship & Childhood, Department of Sociology and Social Policy University of Leeds, UK, 1998)
- Office of the Children's Commissioner (England), *Do more than listen. Act: Consultation response to the Family Justice Review undertaken for the Family Justice Council's Voice of the Child sub-group* (Report, 2011)
- Orr, Kath, Annette Dickinson and Elizabeth Smythe, 'The lived experiences of children/young people in the Aotearoa-New Zealand family court system' (2024) 62(1) *Family Court Review* 176-193
- Oxfam Australia, 'In Good Hands: The People and Communities Behind Aboriginal-led Solutions' (Report, October 2019)
- Parkes, Aisling, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge, 1<sup>st</sup> ed, 2015)
- Parkes, Aisling, 'Implementation of Article 12 in the Family Law Proceedings in Ireland and New Zealand Lessons Learned and Messages for going forward' in Tali Gal and Benedetta Duramy, *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (online ed, Oxford Academic 2016)
- Parkinson, Patrick and Judy Cashmore, *The voice of a child in family law disputes* (Oxford University Press, 2008)
- Parkinson, Patrick, Judy Cashmore and Judi Single 'Adolescents' views on the fairness of parenting and financial arrangements after separation' (2005) 43 *Family Court Review* 429–444
- Parkinson, Patrick and Ruth Weston, *Shared care parenting arrangements since the 2006 Family Law Reforms: Report to the Australian Government* (Research Report, Attorney-General's Department, 2010)

Patel, Usha et al, 'Child Law I: Care of Children Act 2004' in *Brooker's Child Law: Child's Views* (Thomsen Reuters New Zealand, 2014)

---

Qu, Lixia, and Ruth Weston, 'Children's views about parental separation' in *The Longitudinal Study of Australian Children annual statistical report 2014* (Research Report, Australian Institute of Family Studies, 2015) 13-37

---

Quigley, Catherine, and Francine Cyr, 'Children's perspectives on parenting coordination: Insights from the Montreal parenting coordination pilot project' (2017) 14(2-3) *Journal of Child Custody: Research, Issues, and Practices* 151-174

---

Ross, Nicola, 'The hidden child: How lawyers see children in child representation' (Unpublished doctoral dissertation, University of Sydney, 2012) 148-151

---

Ross, Nicola, 'Different views? Children's lawyers and children's participation in protective proceedings in New South Wales, Australia' (2013) 27(3) *International Journal of Law, Policy and the Family* 332-358

---

Saini, Michael et al, 'Understanding pathways to family dispute resolution and justice reforms: Ontario court file analysis & survey of professionals' (2016) 54(3) *Family Court Review* 382-397

---

Saposnek, Don, 'Working with children in mediation' in 2004 in Jay Folberg, Anne Milne and Peter Salem, *Divorce and Family Mediation: Models, Techniques and Applications* (Guildford Press, 2004) 155-179

---

Sheehan, Grania et al, *Children's contact services expectation and experience: Final report* (Research Report, AIFS, 2005)

---

Sheehan, Grania and Rachel Carson, 'Protecting children's rights in contact disputes: The role of children's contact services in Australia' (2006) 44(3) *Family Court Review* 412-428

---

Smart, Carol, Bren Neale and Amanda Wade, 2001, *Changing Experience of Childhood: Families and Divorce* (Polity Press, 2001).

---

Smith, Anne, Nicola Taylor and Pauline Tapp, 'Rethinking children's involvement in decision-making after parental separation' (2003) 10 *Childhood* 201-216

---

Taylor, Nicola and John Caldwell, 'Judicial Meetings with Children: Documenting Practice Within the New Zealand Family Court' (2013) 3 *New Zealand Law Review* 445

---

Taylor, Julie et al, *Deaf and disabled children talking about child protection* (Research Report, National Society for the Prevention of Cruelty to Children, University of Edinburgh, 2015)

---

Tisdall, E. Kay, 'Subjects with agency? Children's participation in family law proceedings' (2016) 38(4) *Journal of Social Welfare & Family Law* 362-379

---

Tobin, John, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) *Nordic Journal of International Law* 155

---

Trinder, Liz, 'What might children mean by a meaningful relationship' (2009) 15(1) *Journal of Family Studies* 20-35

---

Victorian Government, *Royal Commission into Family Violence Report* (Final Report, March 2016)

---

Wall, Liz, Daryl Higgins and Cathryn Hunter, *Trauma-informed care in child/family welfare services* (Policy and Practice Paper, AIFS, 2016)

---

Yasenik, Lorri and Jon Graham, 'The continuum of including children in ADR processes: A child-centered continuum model' (2016) 54(2) *Family Court Review* 186-202

---

Yong, Jongsay et al, 'Do rural incentives payments affect entries and exits of general practitioners?' (2018) 214 *Social Science & Medicine* 197

---

## B) Cases

*A (Letter to a Young Person), Re (Rev 1)* [2017] EWFC 48

*Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (Supreme Court of Canada)

*Bergmann v Bergmann* [2022] FedCFamC1A 38

*Bielen v Kozma* (2022) 66 Fam LR 59

*Bondelmonte v Bondelmonte* 259 CLR 662

*C v C* (2003) FLC 93-159

*CF v Secretary of State for the Home Department* [2004] 2 FLR 517

*Children's Aid Society of Algoma (Elliot Lake) v PC-F* 287 ACWS (3d) 496 (Ontario Court of Justice)

*Dennett v Norman* [2007] FamCA 57

*DS v DS* (2003) 32 FamLR 352

*Eckhardt v Eckhardt* [2024] FedCFamC2F 271

*Eddington v Eddington (No 2)* (2007) FLC 93-349

*Ferrucci v Kovak (No 4)* [2024] FedCFamC1F 413

*Gaylard v Cain* [2012] FMCAfam

*Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 712

*Grainger v Grainger* [2019] FamCA 56

*Halligan v Weldon* [2024] FedCFamC2F 164

*H v W* (1995) 126 FLR 159

*Haward v Haward* [2023] FedCFamC1A 99

*Inwood v Brock* [2024] FedFamC1A 72

*Jarvis v Landry* 199 A.C.W.S. (3d) 841 (Nova Scotia Supreme Court – Family Division)

*Kulat v Azzarudin* (2018) FLC 93-838

*Lavigne v Gavin (No 2)* [2024] FedCFamC2F 737

*Libke v Sunley* 2013 SKQB 109

*Lotta v Lotta* [2017] FamCA 50

*M v S* (2006) 37 Fam LR 32

*Maldera v Orbel* [2014] FamCAFC 135

*Mestronov v Mestronov* [2007] FamCA 1627

*Ms D v Mr D* 2022 EWFC 164

*N (JK) v R (WF)* 213 A.C.W.S. (3d) 135 (British Columbia Supreme Court)

*Otmar v Mack* [2024] FedCFamC2F 37

*P v P* (1995) 19 Fam LR 1

*R v Keegstra* [1990] 3 SCR 697 (Supreme Court of Canada)

*R v R* (2000) 155 FLR 29

---

*RCB v The Honourable Justice James Forrest* (2012) 247 CLR 304

---

*Re B* (1997) 140 FLR 11

---

*Re Bennett* (1991) 17 Fam LR 561

---

*Re K* (1994) 117 FLR 63

---

*Re Marriage of Demetriou* (1976) 27 FLR 93

---

*Re Thomas* (2009) 41 Fam LR 220

---

*Re Tracey* (2011) 80 NSWLR 261

---

*Remellis v Moneas* [2024] FedCFamC2F 450

---

*Sargeant v Watkins* [1965] NSWLR 132

---

*SS v AH* [2010] FamCAFC 13

---

*Supreme Court of Yukon G (BJ) v G (DL 324 D.L.R. (4th)* 367

---

*Tavita v Minister of Immigration* (1994) 2 NZLR 257

---

*Thompson v Thompson* [2017] AWLD 5017 (Alberta Court of Appeal)

---

*Trahn v Long (No 2)* [2008] FamCAFC 194

---

*VW v J* (2004) 34 Fam LR 499

---

*VW v J* (2006) 34 Fam LR 499

---

*Vishaka v Rajasthan* (1997) 3 LRC 361

---

*Wilburn v Quinton* [2024] FedCFamC2F 42

---

*Wordsworth v Wordsworth* [2021] FedCFamC1A 28

---

*Worrall v Bartley* (2023) FCWA 2

---

*Zammit v Zammit* [2020] FamCA 950

---

*ZN v YH* (2002) 167 FLR 366

---

## **C) Legislation**

*Family Dispute Resolution Act 2013* (NZ)

---

*Family Law Act 1975* (Cth)

---

*Family Law Amendment Act 2023* (Cth)

---

*Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)

---

## D) Treaties

United Nations Committee on the Rights of the Child, General Comment No 12: The right of the child to be heard, 51st Sess, UN Doc CRC/C/GC/12 (20 July 2009)

---

United Nations Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, CRC/C/AUS/CO/5-6 (1 November 2019)

---

United Nations Convention on the Rights of the Child, opened for signature 20 November 1989, UNTS 1577 (entered into force 2 September 1990)

---

UNICEF, *The Convention on the Rights of the Child: The Children's Version* (Web Page) <<https://www.unicef.org/child-rights-convention/convention-text-childrens-version>>

---

## E) Other

54 Reasons, *Kid's Corner* (Web Page) <<https://www.54reasons.org.au/kids-corner>>.

---

American Bar Association, 'Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (Model Act, 2011)

---

Cambridge Family Law, 'The Lundy Model of Child Participation: space, voice, audience and influence for young people in decision making when parents separate', *Cambridge Family Law Webinar* (Laura Lundy, Anne Barlow and Jan Ewing, 7 March 2024)

---

Carson, Rachel, 'Give children a bigger voice, more of the time: Findings from the Children and Young people in Separated Families Project' (Presentations to the Family Law Pathways Network, 14 November 2019 and 20 May 2021)

---

Carson, Rachel, 'What is effective professional practice from the perspective of children and young people: Findings from the Children and Young People in Separated Families Project' (Presentation, Child Inclusive Practice Forum, 7 June 2021)

---

Carson, Rachel and Norma Williams, 'Give children a bigger voice more of the time: Children and young people's experiences of the family law system', *Child Family Community Australia Webinar* (AIFS, 27 September 2018) <<https://aifs.gov.au/webinars/give-children-bigger-voice-more-time-childrens-and-young-peoples-experiences-family-law>>

---

Children and Family Court Advisory and Support Service, *Family Justice Young People's Board* (Web Page) <<https://www.cafcass.gov.uk/family-justice-young-peoples-board/218>>

---

Department of Education (Cth), *Reduction of Higher Education Loan Program (HELP) debts for teachers in very remote areas* (Web Page) <<https://www.education.gov.au/higher-education-loan-program/reduction-help-debts-teachers-very-remote-areas>>

---

Dimopoulos, Georgina and Michelle Fernando, Submission 19 to the Senate Legal and Constitutional Affairs Committee on the Family Law Amendment Bill 2023 (Cth), *Strengthening Children's Rights and Participation in Family Law* (22 June 2023)

---

Emerging Minds, *In Focus: Supporting your child's wellbeing during separation or divorce* (Web Page) <<https://emergingminds.com.au/resources/in-focus-supporting-your-childs-wellbeing-during-a-separation-or-divorce/>>

---

Explanatory Memorandum of the *Family Law Amendment Bill 2023* (Cth)

---

Explanatory Memorandum of the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (Cth)

---

Family Dispute Resolution Centre (New Zealand), *Family Dispute Resolution Centre* (Web Page) <[www.fdrc.co.nz](http://www.fdrc.co.nz)>

---

Federal Circuit and Family Court of Australia, *Commonwealth Child Safe Framework* (Web Page) <<https://www.fcfoa.gov.au/commonwealth-child-safe-framework>>

---

Federal Circuit and Family Court of Australia, *Court Child Experts – FAQ* (Web Page) <<https://www.fcfoa.gov.au/fl/pubs/court-child-experts-faq>>

---

Federal Circuit and Family Court of Australia, *Guidelines for Independent Children’s Lawyers* (Web Page) Paragraph 5.1 <<https://www.fcfoa.gov.au/fl/pubs/icl-guidelines>>.

---

Federal Circuit and Family Court of Australia, *Independent Children’s Lawyer* (Web Page) <<https://www.fcfoa.gov.au/fl/children/icl>>

---

headspace, *Headspace Reference Groups* (Web Page) <<https://www.digitalworkandstudy.org.au/our-organisation/our-people/reference-groups/apply/#hynrg>>

---

Legal Aid New South Wales, *Legal Assistance for Families: Partnership Agreement (LAFPA)* (Web Page) <<https://www.legalaid.nsw.gov.au/my-problem-is-about/my-family-or-relationship/care-and-protection/lafpa>>

---

New Zealand Family Court, *Practice Note [2020] NZFC 3346: 19 June 2020*

---

Office of the Advocate for Children and Young People, *About the Youth Advisory Council* (Web Page) <<https://www.acyp.nsw.gov.au/engage/youth-advisory-council-yac>>

---

Rural Health West, *Rural Health West* (Web Page) <<https://ruralhealthwest.com.au/>>

---

Youth Law Australia, ‘Submission to the Senate Legal and Constitutional Committee into the Family Law Amendment Bill (2023)’ (Submission, June 2023)

---

## Appendix A: List of Council Members

Name	Position	Date of current appointment	Expiry of term
Deputy Chief Justice Robert McClelland AO (Chair)	Federal Circuit and Family Court of Australia	7 December 2021	6 December 2024
Dr Andrew Bickerdike	Relationships Australia Victoria	7 December 2021	6 December 2024
Justice Jacoba Brasch	Federal Circuit and Family Court of Australia	7 December 2021	6 December 2024
Dr Rachel Carson	Australian Institute of Family Studies	7 December 2021	6 December 2024
The Hon John Faulks	Mediator	7 December 2021	6 December 2024
Judge Alexandra Harland	Federal Circuit and Family Court of Australia	7 December 2021	6 December 2024
Ms Michelle Hayward	Women's Legal Service NSW	7 December 2021	6 December 2024
Ms Anne Hollonds	National Children's Commissioner	7 December 2021	6 December 2024
Ms Julie Jackson	Legal Aid Western Australia	7 December 2021	6 December 2024
Dr Rae Kaspiew	Australian Institute of Family Studies	7 December 2021	6 December 2024
Justice Richard O'Brien	Family Court of Western Australia	7 March 2024	6 March 2027
Ms Virginia Wilson	Federal Circuit and Family Court of Australia	7 December 2021	6 December 2024

## Appendix B: Council's Letter of Advice, July 2022

Dear Attorney-General

### Establishment of a Children and Young People's Advisory Board

At the February 2022 meeting, the Council agreed that:

- As recommended by the ALRC, a Children and Young People's Advisory Board should be established.
- The Advisory Board should not be a subcommittee of the Council but could be consulted by the Council while also advising other organisations and policy makers.
- The National Children's Commissioner should be funded to recruit, establish, and support an Advisory Board, including identifying members of the Advisory Board through a recruitment process with a view to membership which reflects the broad diversity of the community.
- The Council would write to the Attorney-General with advice to the effect that the recommendation would be best implemented by the National Children's Commissioner with the Government's support and assistance.

### Of further relevance:

Recommendation 50 of the ALRC's Final Report No. 135 *Family Law for the Future: An Inquiry into the Family Law System* (March 2019):

The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.

Recommendation 10 of the second interim report of the Joint Select Committee on Australia's Family Law System (March 2021) includes:

...  
The Committee also recommends that in considering how to make the family court less adversarial, the re-constituted Family Law Council should consider how best to involve the voice of children in parenting proceedings in appropriate cases. This should include consideration of the establishment of a Children's and Young People's Advisory Board.

In terms of how the Children and Young People's Advisory Board should be constituted and managed, the ALRC provided the following guidance (at paragraph 13.42 on page 397 of its report):

**Recruitment:** Advisory Board members could be identified through a public recruitment process, which may include promotion through relevant websites, specialist children's practitioners or Children's Commissioners. This reflects the approach taken in the UK, Scotland and South Australia. NATSILS highlighted the importance of ensuring the Advisory Board includes representatives of Aboriginal and Torres Strait Islander communities. People with Disability Australia submitted that the Board should include children and young people with disability who have experienced the family law system.

**Management and governance:** The Advisory Board should be managed or supported by professionals with specialist experience working with children.

This guidance was briefly raised at the Council's February meeting in terms of the composition of the proposed Advisory Board and how it could be formed and managed.

## Further information and issues to consider

Children and young people's advisory boards are formal mechanisms for decision-makers to seek the views and advice of children and young people. Generally, their main purpose is to:

- provide advice to government or governing bodies about issues that affect children and young people
- empower and develop the skills of children and young people.

There are a variety of children and young people's advisory boards or groups across Australia, at national, state and local level. Some provide advice on a broad cross-section of children and young people's issues,<sup>i</sup> and others are specific to a particular cohort of children and young people on a particular issue.<sup>ii</sup>

While there are no national children or youth advisory boards or groups that currently provide advice specifically on family law issues in Australia, a pilot project, the Young Peoples Family Law Advisory Group (YPFLAG), was conducted in 2016-2017 in South Australia. Established by the SA Family Law Pathways Network, the YPFLAG pilot project involved mobilising 10 young people from South Australia (aged between 12-17) who had experienced parental separation, in a 'consumer reference' group environment. The aim of the project was to hear feedback confidentially about their experiences of the family law system throughout the process of their parents' separation, with the purpose to better understand this experience from their perspective, without parental intervention. The final report of the project includes a series of practical recommendations that were developed by the young people out of their meetings, about the family law system. It also recommended that the YPFLAG (or an equivalent program/group) become a permanent advisory body within the family law system. See Young People's Family Law Advisory Group (YPFLAG), Report/Evaluation Young People's Family Law Advisory Group A Pilot Project 2016-2017 (2017).

Internationally, the Family Justice Young People's Board (FJYPB) in the United Kingdom presents another example of a children and young people's advisory board on family law matters. The FJYPB has been operating in the UK since 2000. Run by the Children and Family Court Advisory and Support Service (CAFCASS),<sup>iii</sup> the board is composed of a group of approximately 50 children and young people between 8 and 25 years old who live across England and Wales. All members either have had direct experience of the family justice system or have an interest in children's rights and the family courts. The FJYPB supports the UK Family Justice Board, set up to improve the performance of the family justice system. See <https://www.cafcass.gov.uk/family-justice-young-peoples-board/> for more information.

One of the main rationales for establishing a Children and Young People's Family Law Advisory Board is to ensure that children with lived experience of the family law system in Australia can enjoy their right to be heard and have their views given due weight by family law decision-makers, as required by article 12 of the United Nations *Convention on the Rights of the Child* (CRC).

The importance of article 12 is underscored by the numerous recommendations related to child participation made by the UN Committee on the Rights of the Child, in its Concluding Observations on Australia in 2019, including in relation to family law.<sup>iv</sup>

A child-rights approach to participation emphasises that any engagement of children should be meaningful, rather than tokenistic.<sup>v</sup> As such, some of the key advantages of establishing a children and young people's advisory board are that it:

- signals an ongoing commitment to consulting with children and young people, rather than a one-off information gathering exercise
- provides children and young people with opportunities for empowerment and skills development
- allows for in-depth consideration by children and young people of complex issues involved in policy and legal reform
- enables children and young people to contribute to ongoing improvements of the way the family law system works.

As well as an Advisory Board, the views and experiences of children and young people in the family law system can also be gained by:

- research involving children and young people
- regular or one-off surveys with children and young people
- consultations with children and young people
- one-off advisory groups on particular projects or issues.

These other methods may be an alternative to, or in conjunction with, the establishment of an Advisory Board.

There are some key questions that need to be considered in the establishment of a children and young people's Advisory Board. These will influence the decisions about the approach taken:

- What is its primary purpose?
- Who is the 'audience' for the children's views?
- Who are the members (including age, family law experience, diversity, and jurisdictional representation)? How should the members be recruited?
- What is the scope of its work?
- How will children's views be considered and given due weight?
- How can child safety be ensured?
- What resources will be required to support the recruitment and operation of the Advisory Board?
- What are the benefits for children of being involved?

The final report/evaluation of the Young Peoples Family Law Advisory Group (YPFLAG) in SA provides useful background for consideration of these issues.

## Recommendation

Accordingly it is the recommendation of the Family Law Council that;

- As recommended by the ALRC, a Children and Young People’s Advisory Board should be established.
- The Advisory Board should not be a subcommittee of the Council but could be consulted by the Council while also advising other organisations and policy makers.
- The National Children’s Commissioner should be funded to recruit, establish, and support an Advisory Board, including identifying members of the Advisory Board through a recruitment process with a view to membership which reflects the broad diversity of the community.

## Next steps

Subject to the views of the Attorney-General, Council recommends that a detailed proposal with costings should be prepared.

Yours sincerely

Deputy Chief Justice Robert McClelland AO  
Chairperson  
Family Law Council

<sup>i</sup> For example, the NSW Youth Advisory Council provides advice to the NSW Minister for Youth and the Advocate for Children and Young People on issues, policies and laws that affect children and young people in NSW.

<https://www.acyp.nsw.gov.au/engage/youth-advisory-council-yac>

<sup>ii</sup> For example, headspace, headspace Youth National Reference Group:

<https://www.digitalworkandstudy.org.au/our-organisation/our-people/reference-groups/apply/#hynrg>

<sup>iii</sup> <https://www.cafcass.gov.uk/family-justice-young-peoples-board/>

<sup>iv</sup> United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 22(a)

<sup>v</sup> See also UN Committee on the Rights of the Child, General Comment 12: the Right of the Child to be Heard, CRC/C/GC/12 (20 July 2009), paras 132-134 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=en)

## Appendix C: Demographics of participants in Family Law Council Stakeholder Survey

Data from a stakeholder survey undertaken by Council in 2023 provides insight from judicial officers registrars, private and public lawyers (including barristers) and non-legal professionals (including FDR practitioners, DFV professionals, and Post Order Program professionals<sup>266</sup>) about a range of aspects of the operationalisation of children and young people's rights in the Australian family law system (n=79). More than half of participants were either solicitors in private practice (22%) or solicitors in public practice (eg. Legal Aid lawyer or Community Legal Centre lawyer) (33%), with two in ten participants indicating that they were FDR practitioners (20%). A small proportion of participants were barristers (6%) or judicial officers (3%) or Domestic and Family Violence professionals (4%). Most participants were women (71%), with 19% men and 8% preferring not to say and 2% reported that they were non-binary or other. As the tables presented below indicate, participants were from a broad range of age groups and locations and most participants described all (47%) or more than three-quarters (20%) of their work to be in the field of family law:

**Table 1: Age of participants**

Option	Total	Percent
Under 25 years	2	2.53%
25 – 34 years	8	10.13%
35 – 44 years	18	22.78%
45 – 54 years	18	22.78%
55 years or older	27	34.18%
Prefer not to say	6	7.59%
Not Answered	0	0.00%

**Table 2: Proportion of Work in Family Law**

Option	Total	Percent
Less than a quarter	2	2.53%
About a quarter	4	5.06%
About a half	6	7.59%
About three quarters	9	11.39%
More than three quarters	16	20.25%
All	37	46.84%
Cannot say	5	6.33%
Not Answered	0	0.00%

**Table 3: Location of participants**

Option	Total	Percent
Australian Capital Territory	6	7.59%
New South Wales	16	20.25%
Northern Territory	2	2.53%
Queensland	5	6.33%
South Australia	12	15.19%
Tasmania	1	1.27%
Victoria	21	26.58%
Western Australia	14	17.72%
Other	2	2.53%
Not Answered	0	0.00%

<sup>266</sup> Post Order Program professionals included: professionals providing Parenting Orders Program, Post Separation Cooperative Parenting Programs and Supporting Children after Separation Programs.

## Appendix D: List of stakeholders consulted, and further explanation of Youth Consultation session

Participants of roundtables presenting to the Family Law Council in regard to Terms of Reference 2 were as follows:

Individual/Organisation	Date	Topic
Federal Circuit and Family Court of Australia	20 June 2022	Presentation on the development of a Child Participation Charter and Framework for the Family Law Courts
Federal Circuit and Family Court of Australia	20 June 2022	Update on the work of the Court Child Experts
Relationships Australia Queensland	6 October 2022	Roundtable with Cairns Family Law Services
Centacare Far North Queensland	6 October 2022	Roundtable with Cairns Family Law Services
Legal Aid Queensland	6 October 2022	Roundtable with Cairns Family Law Services
Far North Queensland FLPN Steering Committee	6 October 2022	Far North Queensland FLPN Steering Committee
Law Council of Australia - Family Law Section	7 October 2022	Updating Best Practice Guidelines for lawyers doing family law work
National Indigenous Australians Agency	28 November 2022	NIAA briefing: Closing the Gap Framework
Legal Aid ACT	28 November 2022	Roundtable with ACT Legal Professionals and Representative Bodies
ACT Law Society	28 November 2022	Roundtable with ACT Legal Professionals and Representative Bodies
ACT Bar Association	28 November 2022	Roundtable with ACT Legal Professionals and Representative Bodies
Women's Legal Centre ACT	29 November 2022	Roundtable with ACT Family Law Service Providers
Relationships Australia Canberra and Region	29 November 2022	Roundtable with ACT Family Law Service Providers
Victorian Bar	28 February 2023	Roundtable with Victorian Legal Professionals
Victoria Legal Aid	28 February 2023	Roundtable with Victorian Legal Professionals
Women's Legal Service Victoria	28 February 2023	Roundtable with Victorian Legal Professionals
South-East Monash Legal Service	28 February 2023	Roundtable with Victorian Legal Professionals

Djirra	28 February 2023	Roundtable with Victorian Legal Professionals
Queensland University of Technology	28 February 2023	Virtual Presentation on the <i>Australian Child Maltreatment Study 2019-23</i>
Legal Aid NSW	29 May 2023	Roundtable with NSW Legal Bodies
NSW Bar Association	29 May 2023	Roundtable with NSW Legal Bodies
NSW Law Society	29 May 2023	Roundtable with NSW Legal Bodies
Greater Sydney Family Law Pathways Network	29 May 2023	Family Law Pathways Networks
Illawarra and Southern Highlands Family Law Pathways Network	29 May 2023	Family Law Pathways Networks
Uniting Counselling and Mediation	30 May 2023	Family and Relationships Services – Child Inclusive Practice
Relationships Australia NSW	30 May 2023	Family and Relationships Services – Child Inclusive Practice
University of Melbourne	30 May 2023	Children’s Rights in the Family Law System
Southern Cross University	30 May 2023	Children’s Rights in the Family Law System
Bar Association of Queensland	28 August 2023	Roundtable with Queensland Family Law Professionals and Representative Bodies
Family Law Practitioner Association Qld (FLPA)	28 August 2023	Roundtable with Queensland Family Law Professionals and Representative Bodies
Queensland Law Society	28 August 2023	Roundtable with Queensland Family Law Professionals and Representative Bodies
Brisbane Domestic Violence Service - Micah Projects	28 August 2023	Discussion on Family Violence and Family Law
Griffith University	28 August 2023	Roundtable with Brisbane Academics
Family Relationship Advice Line (FRAL)	29 August 2023	Presentation on Family Relationship Advice Line
Relationships Australia Queensland	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
Uniting Queensland	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
CentaCare Brisbane	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
Greater Brisbane Family Law Pathway Network	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network

Sunshine Coast Family Law Pathway Network	29 August 2023	Roundtable with Family Law Services and Family Law Pathway Network
Legal Aid Queensland Family Report Writers	29 August 2023	Presentation on Legal Aid Queensland Family Report Writers
Legal Aid Queensland	29 August 2023	Roundtable with Legal Aid Qld and Qld CLC's
Caxton Legal Centre	29 August 2023	Roundtable with Legal Aid Qld and Qld CLC's
Women's Legal Services Queensland	29 August 2023	Roundtable with Legal Aid Qld and Qld CLC's
Children's and Family Commission Queensland	29 August 2023	Children's and Family Commission Queensland
University of South Australia	27 November 2023	Academic discussion
Anglicare SA	27 November 2023	Roundtable with Family Law Service Providers
Relationships Australia SA	27 November 2023	Roundtable with Family Law Service Providers
Uniting Communities Incorporated	27 November 2023	Roundtable with Family Law Service Providers
Law Society of South Australia	28 November 2023	Roundtable with South Australian Family Law Professionals and Representative Bodies
South Australian Bar Association	28 November 2023	Roundtable with South Australian Family Law Professionals and Representative Bodies
Communities Justice Services SA	28 November 2023	Roundtable with Legal Services Commission of South Australia and Community Legal Centres South Australia
Legal Services Commission of South Australia	28 November 2023	Roundtable with Legal Services Commission of South Australia and Community Legal Centres South Australia
Uniting Communities Law Centre	28 November 2023	Roundtable with Legal Services Commission of South Australia and Community Legal Centres South Australia
ACT Children and Young People Commissioner	7 March 2024	Roundtable with Children and Young People Commissioners and Aboriginal and Torres Strait Islander Children and Young People Commissioners
NSW Office of the Advocate for Children and Young People	7 March 2024	Roundtable with Children and Young People Commissioners and Aboriginal and Torres Strait Islander Children and Young People Commissioners
SA Commissioner for Aboriginal Children and Young People	7 March 2024	Roundtable with Children and Young People Commissioners and Aboriginal and Torres Strait Islander Children and Young People Commissioners

SA Commissioner for Children and Young People	7 March 2024	Roundtable with Children and Young People Commissioners and Aboriginal and Torres Strait Islander Children and Young People Commissioners
North Australian Aboriginal Family Legal Service (NAAFLS)	7 March 2024	Roundtable with Aboriginal Legal and Family Violence Legal Services
Aboriginal Legal Service (NSW/ACT)	7 March 2024	Roundtable with Aboriginal Legal and Family Violence Legal Services
Queensland Aboriginal and Torres Strait Islander Legal Service (ATSILS)	7 March 2024	Roundtable with Aboriginal Legal and Family Violence Legal Services
Queensland Indigenous Family Violence Legal Service (QIFVLS)	7 March 2024	Roundtable with Aboriginal Legal and Family Violence Legal Services
Tasmanian Aboriginal Legal Service (TALS)	7 March 2024	Roundtable with Aboriginal Legal and Family Violence Legal Services
Family Law Practitioners Association Western Australia (FLPA WA)	7 March 2024	Roundtable with WA Legal Professionals
Law Society of Western Australia	7 March 2024	Roundtable with WA Legal Professionals
Legal Aid WA	7 March 2024	Roundtable with WA Legal Professionals
WA Bar Association	7 March 2024	Roundtable with WA Legal Professionals
Victorian Children and Young People Commissioner	8 March 2024	Victorian Children and Young People Commissioner
Representatives of the Department of Social Services & Office for Youth's <i>Safe and Supported Youth Advisory Group</i>	23 May 2024	Family Law Council & Safe and Supported Youth Advisory Group Meeting

The Council facilitated a meeting with Department of Social Service's Safe and Supported Youth Advisory Group, co-led with the Office for Youth, in which Council members had the opportunity to meet with the Safe and Supported Youth Advisory Group on how to enhance the voices of children and young people in their interactions with the family law system. The Council was grateful for this valuable experience and thanks the young people involved for their insights and time.



