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**Judicial Meetings with Children in Australian
Family Law Proceedings:
Hearing Children's Voices**

by

Michelle Meilin Fernando

BA, LLB(Hons), Grad Cert Legal Prac

**Submitted in fulfilment of the requirements for the Degree of
Doctor of Philosophy**

University of Tasmania, July 2011

Declarations

Declaration of Originality

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The research associated with this thesis abides by all international and Australian codes on human and animal experimentation. Research conducted under this study received approval from the Human Research Ethics Committee (Tasmania) Network which is constituted under the National Health and Medical Research Council.

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Michelle Meilin Fernando

Abstract

Australian family law judicial officers rarely take the opportunity to meet with children who are the subject of proceedings, despite the fact that the outcome of these proceedings will affect many important aspects of a child's life. This appears to be at odds with the court's obligation to regard the best interests of the child as the paramount consideration and the child's right to participate pursuant to the *United Nations Convention on the Rights of the Child*. While it appears that the practice of judicial meetings with children is not encouraged in Australia, internationally there is growing support. Several countries have implemented guidelines or taken other steps to actively encourage greater use of the practice. In some countries, judicial meetings are carried out frequently, uncontroversially and successfully. Delegates at the 5th World Congress on Family Law and Children's Rights in 2009 passed a resolution in support of judges considering whether to meet with a child in every case before them.

This thesis looks at the benefits that can be gained, both for children and for decision-making, by judges meeting with children. These benefits are viewed within the wider context of how the right of children to express their views is exercised in family law matters and the literature on how children feel about their current level of participation in court proceedings. In determining what is in the best interests of a child, judges may be aided by a practice that enables them to learn more about a child's needs and interests than via other recognised methods of hearing children's views.

The thesis explores the reasons why there are only a handful of cases in which Australian judges have met with children and discusses the main criticisms of the practice. The author conducted a unique empirical study to discover the views and experiences of the Australian family law judiciary about meeting with children. Utilising both qualitative and quantitative methods, the study involved in-depth interviews with four Family Court judges and a survey of all family law judicial officers in Australia. The results of the study make an original contribution to the field of judicial attitudes to children's participation in family law. It was discovered that some problems discussed in the literature, such as due process and confidentiality, may be more perceived than real as judges were able to suggest ways to overcome them. The study found that many judges see strong benefits in meeting

with children, but that they may be unable to overcome two lingering concerns. Judges perceive that they lack the skills and training to meet with children, and they are troubled by the prospect that judicial meetings may subject children to parental pressure or manipulation.

The thesis makes recommendations to ensure greater certainty in the practice of judicial meetings with children. These include the implementation of Australian guidelines on when and how judicial meetings should be conducted. With recent child-focused changes to family law and practice, such as the Less Adversarial Trial procedure, and growing international discussion, it is anticipated that judicial culture may slowly change. With time, judges may consider the potential benefits of meeting with a child in every case that comes before them. It is argued that it is imperative they do so in order to give effect to the internationally recognised rights of children and the fundamental obligation of the family law courts to regard the best interests of the child as the paramount consideration.

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My late father Dr Patrick Fernando AM, child and adolescent psychiatrist, was a helper of families in crisis, a fighter for the rights of children, a great believer in the value of higher education, and a fantastic dad. This thesis is dedicated to his memory.

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Abbreviations

2006 Amendments	<i>Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)</i>
CLRA	<i>Children’s Law Reform Act</i> RSO 1990, cC12 (Ontario, Canada)
COCA	<i>Care of Children Act</i> 2004 (New Zealand)
FCA	Family Court of Australia
FCNZ	Family Court of New Zealand
FCWA	Family Court of Western Australia
FLA	<i>Family Law Act</i> 1975 (Cth)
FMCA	Federal Magistrates Court of Australia
former Rules	<i>Family Law Rules</i> 1984 (Cth)
ICL	Independent Lawyer for the Child (previously known as Child Representative and Separate Representative)
LAT	Less Adversarial Trial procedure, contained in Division 12A of the <i>Family Law Act</i> 1975 (Cth).
OCL	Office of the Children’s Lawyer (Ontario, Canada)
Rules	<i>Family Law Rules</i> 2004 (Cth)
UNCRC	United Nations Convention on the Rights of the Child

Introduction

[C]hildren's proceedings [in family law] are unlike any other litigation, civil litigation, in this land. I mean, where else do you have the principal party, about whom the action is and the orders will affect, who doesn't have an audience?¹

This thesis discusses the practice of judges² meeting with children who are the subject of family law proceedings³ before them; a practice that occurs only rarely in Australia. When making parenting orders for the children of separated parents under Part VII of the *Family Law Act* 1975 (Cth) ('FLA'), judges must regard the best interests of the child as the paramount consideration.⁴ In determining what is in a child's best interests, judges take into account numerous specified factors,⁵ including any views expressed by the child.⁶ Judges receive evidence of children's views through several methods: mainly through accounts from others as to what the child has said to them, reports from child welfare experts and evidence led by an Independent Children's Lawyer. It is within judges' discretion to meet with children directly to ascertain their views and gain a sense of what issues are important to the child in any given case. In Australia, judges have seldom taken this opportunity.

This thesis critiques the current practices of the Australian family law courts⁷ in relation to hearing from children. It advocates the practice of judicial meetings with children as a useful and important measure, in appropriate cases, to supplement the more common methods of hearing children's views. The reasons for the current reluctance of Australian judges to meet with children are also explored and critiqued. An argument is developed that judges should consider whether meeting with a child is appropriate in every case before them. The thesis develops a model for 'best practice' judicial meetings, including the presence of a child welfare expert to assist with the

¹ Comment by Judge C in interview. Judge C was one of four judges of the Family Court of Australia interviewed by the author as part of this research. See Chapter Five for discussion of the author's empirical study.

² The term 'judge' as used in this thesis is defined below, under the heading 'Terminology'.

³ Family law proceedings in Australia are proceedings under the *Family Law Act* 1975 (Cth) ('FLA'). It does not, as in some other jurisdictions, relate to child protection proceedings or adoption. This thesis concerns proceedings under Part VII of the FLA, being proceedings with respect to arrangements for children after parental separation.

⁴ FLA s60CA.

⁵ Listed in FLA s60CC(2) and (3).

⁶ FLA s60CC(3)(a).

⁷ The generic term 'court' is used throughout this thesis. See below, under the heading 'Terminology', for the definition of this term.

conduct of the meeting. It also puts forward guidelines for judges to follow in considering whether and how to meet with a child.

Aims

The aims of this thesis are:

- To examine what the court is required to do to discharge its obligation to listen to children, and to emphasise the importance of allowing children to have a say in decisions that affect them;
- To critique the various ways in which the court hears children's views in family law proceedings and to highlight the benefits that can flow, both for children and for decision-making, when judges meet with children;
- To discuss the perceived detriments that result from judicial meetings with children and to suggest ways in which those detriments can be managed.
- To discover the views of Australian judges about judicial meetings with children and to discover why, in general, Australian judges are apparently reluctant to meet with children.
- To investigate how children participate in proceedings in other comparable family law jurisdictions and to discover the reasons why, in contrast to Australia, judges frequently meet with children in some jurisdictions, and what has been done in those jurisdictions to address perceived detriments of judicial meetings.
- To make recommendations for reform to Australian family law and practice to increase awareness among judges of the benefits of children participating directly in family law proceedings, and to encourage judges to meet with children in appropriate cases.

The demise of rule 15.03 of the Family Law Rules 2004 (Cth)

One of the bases for this thesis was Rule 15.03 (formerly 15.02)⁸ of the *Family Law Rules* 2004 (Cth) ('Rules'). This rule stated:

Rule 15.03 Interviewing a child

- (1) A judicial officer may interview a child who is the subject of a case under Part VII of the Act.
- (2) The interview may be conducted in the presence of a family consultant or another person specified by the judicial officer.
- (3) If the child expresses a wish during the interview that is relevant to the case, the judicial officer may order a family report to be prepared.

Rule 15.03 was removed from the Rules in August, 2010 by the *Family Law Amendment Rules* 2010 (Cth) ('Amendment Rules').⁹ It was not replaced. There is now nothing in the FLA or in the Rules that refers to meetings between judges and children. The explanatory statement to the Amendment Rules discloses that rule 15.03 was removed without any consultation process.¹⁰ In addition, it is argued that there was no apparent justification for the removal of the rule.

To amend the Rules, the Chief Justice the Family Court of Australia ('FCA') is required to undertake consultation that is considered appropriate and reasonably practicable.¹¹ The Chief Justice has authorised the FCA's Rules Committee to undertake consultation on her behalf.¹² Appropriate consultation may include drawing on the knowledge of people with expertise in the field relevant to the

⁸ Rule 15.02 was renumbered rule 15.03 by SLI No 33 of 2009, Schedule 4(2).

⁹ Rule 15.03 was omitted by the *Family Law Amendment Rules* 2010 (Cth), Sch 1 [16], which came into force on 1 August, 2010. The rule still operates in the Family Court of Western Australia ('FCWA'), where it remains numbered rule 15.02 (FCWA website <<http://www.familycourt.wa.gov.au/L/legislation.aspx?uid=3707-0960-0689-6759>> at 26 January 2011). This is because the FCWA did not adopt amendments to the Rules made in March 2009 following the introduction of Part VIIIAB of the FLA, dealing with financial matters relating to de facto relationships. The FCWA therefore uses a former version of the Rules.

¹⁰ Explanatory Statement, *Family Law Amendment Rules* 2010 (Cth), 2.

¹¹ *Legislative Instruments Act* 2003 (Cth) s17. This Act applies to the Rules by virtue of the FLA s123(2). Pursuant to that section, the Rules are treated as a legislative instrument, and references to a 'rule-maker' in the *Legislative Instruments Act* 2003 (Cth) refer to the Chief Justice of the FCA acting on behalf of the judges of the FCA.

¹² Explanatory Statement, *Family Law Amendment Rules* 2010 (Cth), 1.

proposed amendments and ensuring people who are likely to be affected by the proposed amendments have an opportunity to comment.¹³

No consultation is required if it is considered to be unnecessary or inappropriate.¹⁴ The reason given for the lack of consultation in this instance was that the changes made by the Amendment Rules were ‘either of a technical or drafting nature or to give effect to measures in the Law and Justice (Cross Border and Other Amendments) Bill 2009 (Cth)’.¹⁵

While this may be the case for other rules changed or removed by the Amendment Rules, the removal of rule 15.03 was clearly not of a technical or drafting nature and neither was it for the purposes of giving effect to measures in the Bill.¹⁶

Aside from there having been no consultation in relation to the removal of rule 15.03, the explanatory statement to the Amendment Rules arguably does not disclose sufficient justification for its removal. It states the reasons for the removal of rule 15.03 to be ‘[t]o reflect that a Judge (sic) interviewing a child subject to proceedings is most unusual’¹⁷ and because ‘[t]his does not generally occur and when it does it can be the subject of case specific orders’.¹⁸

There are many procedures referred to in the Rules that are ‘most unusual’ or do not ‘generally occur’ and could be the subject of case specific orders. These include the rules relating to children giving evidence,¹⁹ a party changing their name during proceedings²⁰ and the extensive rules relating to case guardians.²¹ A version of rule 15.03 was present in the previous *Family Law Rules* 1984 (Cth) (now repealed), and

¹³ *Legislative Instruments Act* 2003 (Cth) s17(2).

¹⁴ *Legislative Instruments Act* 2003 (Cth) s18(1).

¹⁵ Explanatory Statement, *Family Law Amendment Rules* 2010 (Cth), 2.

¹⁶ The Law and Justice (Cross Border and Other Amendments) Bill 2009 (Cth) amends various Acts to make changes relating to the cross border justice scheme, taking evidence from prisoners by audio or audio-visual link and the service of subpoenas between Australia and New Zealand in certain family proceedings (Explanatory Memorandum, Law and Justice (Cross Border and Other Amendments) Bill 2009 (Cth), Outline).

¹⁷ Explanatory Statement, *Family Law Amendment Rules* 2010 (Cth), 2.

¹⁸ Explanatory Statement, *Family Law Amendment Rules* 2010 (Cth), Sch 1 [16].

¹⁹ Rules r15.02 (formerly rule 15.01 and renumbered by SLI No 33 of 2009, Sch 4[2]).

²⁰ Rules, r24.03.

²¹ Rules, Part 6.3.

underwent significant amendment with the creation of the current Rules.²² Removing the only statutory provision giving guidance to judges on how to meet with children on the basis that the practice ‘does not generally occur’ does not appear to be an appropriate or justified step.

Nevertheless, the explanatory statement to the Amendment Rules acknowledges that judges retain the discretion to meet with children if they wish, such meeting being ‘the subject of case specific orders’.²³ Further, the rule remains operative in the Family Court of Western Australia.²⁴

The removal of rule 15.03 highlights the importance of this thesis, as the removal represents a retreat from a children’s rights framework in the Australian family law system. The rule concerned a practice that involved the direct participation of children in proceedings. Removing this rule, without consultation with experts in child welfare, researchers or representatives of children’s rights²⁵ or children themselves, reflects an ostensibly prevailing culture of the Australian family law judiciary to avoid engagement with children and to discourage direct participation.

The removal of any reference in the FLA or the Rules to judicial meetings with children has occurred at a time when other jurisdictions in the world are taking active steps to encourage the practice of judges meeting with children, or at least to further explore the surrounding issues. The family courts in England and Wales implemented guidelines in 2010,²⁶ following the lead of the Family Court of New Zealand, which enacted guidelines in 2007.²⁷ Judges in Ontario, Canada, have established a working group to discuss judicial meetings, and the Advocates’ Society in that province is

²² See discussion in Chapter Three about the evolution of this rule.

²³ Explanatory Statement, *Family Law Amendment Rules 2010* (Cth), Sch 1 [16].

²⁴ The rule dealing with judges meeting with children is numbered rule 15.02 in the version of the Rules operating in Western Australia.

²⁵ Such as the Human Rights Commissioner or the Commissioners for Children in the various States and Territories.

²⁶ Family Justice Council, *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (2010). These guidelines were approved by the President of the Family Division of England and Wales, and commenced in April, 2010.

²⁷ Family Court of New Zealand, *Judges’ Guidelines: Discussions with Children* (2007). These guidelines commenced in July, 2007.

developing guidelines for judges meeting with children.²⁸ The Family Court in Israel is in the process of rolling out a new pre-trial procedure whereby children are given the option to meet with a judge in all family law cases.²⁹ Further, delegates at the 5th World Congress on Family Law and Children's Rights in 2009 passed a resolution to support proposals that judges consider in every children's case whether to hear from the child directly, and that judges undergo training in the area of child witnesses.³⁰

Against this international background, the Australian family law system seems out of step in its attitude to judicial meetings with children.

Structure of this thesis

The thesis comprises seven chapters. **Chapter One** describes the court's role in making decisions for children after family separation. The vast majority of parents are able to make decisions for their children without a judicial decision. Nevertheless, the court has an important role to play when parents are unable to reach agreement.

Chapter Two discusses why it is important for the court to listen to children's views. It examines the court's obligations pursuant to the *United Nations Convention on the Rights of the Child*³¹ and the FLA, and puts forward reasons as to why children should be given a say in decisions that affect them, including the benefits to children who feel they have been heard.

Chapter Three examines the established methods available to a court to receive evidence of children's views. It explores the value and the limitations of each, highlighting in particular the valuable role of a report from a child welfare expert.

Chapter Four reviews the potential benefits, to children and to the decision-making process, of judges meeting with children to discuss issues relevant to the proceedings.

²⁸ Email correspondence from Associate Professor Rachel Birnbaum, Canadian researcher, to the author dated 29 January 2010 and 31 December 2010.

²⁹ Email correspondence from Dr Tamar Morag, Chair, Legislative Subcommittee on Children and Families, to the author dated 29 March 2010. See Chapter Six for further details.

³⁰ 5th World Congress on Family Law and Children's Rights, Halifax, Canada, 23-26 August 2009, Resolution 20. See Chapter Six for more details.

³¹ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

It discusses cases in which judges have described that conducting a judicial meeting in the circumstances of the case was useful.

Chapter Five examines the reasons behind the apparent reluctance of Australian judges to meet with children. It discusses the detriments of judicial meetings as identified in the literature and suggests ways in which these can be minimised. The perceived detriments are analysed in the context of the results of the author's two-part research study. The author interviewed four judges of the Family Court of Australia, and surveyed all family law judicial officers in Australia (with a nearly 50 percent response rate) about their experiences and views of judicial meetings with children. The results of the study are presented and analysed in this chapter.

Chapter Six looks at how children's views are presented and treated by courts exercising family law jurisdiction in New Zealand, the United Kingdom and Canada. The various laws, procedures and judicial attitudes to meeting with children in the three jurisdictions are compared and contrasted with the situation in Australia.

Drawing on the author's research, **Chapter Seven** contains recommendations for reform to Australian family law and practice, including the introduction of guidelines for judges meeting with children. This chapter also draws together the conclusions of the research.

Prior research in Australia

With the groundswell of approval for judicial meetings with children in countries all over the world, and recent child-focused reforms to family law and practice in Australia,³² this thesis makes a timely contribution to the existing literature about children's participation in family law matters.

This study explores in depth the issue of judicial meetings with children. Several Australian authors have written about the benefits of children's participation in family

³² See Chapter One for discussion about these reforms, including the Less Adversarial Trial and the Child Responsive Program.

law proceedings, but this has been within a wider context where judicial meetings are examined as one of a number of methods by which children's views can be heard.³³

The most extensive research in this area to date has been by Parkinson and Cashmore.³⁴ They have spoken with children about their experiences of decision-making following parental separation,³⁵ and collected the views of judges,³⁶ parents and children³⁷ about judicial meetings with children. Their research was consolidated in a book,³⁸ which also contains the results of their interviews with lawyers and child welfare experts in relation to how children's views are heard in family law proceedings.

Parkinson and Cashmore's research has been an important base for much of this thesis. Nevertheless, this thesis constitutes an original study in several respects. Aside from analysing some of the (very few) Australian cases in which judges have spoken with children, this study contains a detailed comparative analysis of how children's views are heard in other family law jurisdictions comparable to Australia. This analysis, to the author's knowledge, has not previously been carried out. This research also involved a large scale study of the views of family law judicial officers. While Parkinson and Cashmore also interviewed judicial officers for their research, this study differs in several methodological aspects, including recruitment of participants, sample size and interview procedure.³⁹

³³ J Cashmore, 'Children's Participation in Family Law Matters' in Hallet and Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (2003); R Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197; Chief Justice D Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127.

³⁴ Judi Single is also a named author on several of Parkinson and Cashmore's published articles.

³⁵ P Parkinson, J Cashmore and J Single, 'Adolescents' Views on the Fairness of Parenting and Financial Arrangements After Separation' (2005) 43 *Family Court Review* 429.

³⁶ P Parkinson and J Cashmore, 'Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges' (2007) 21 *International Journal of Law, Policy and the Family* 160.

³⁷ P Parkinson, J Cashmore and J Single, 'Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia' (2007) 21 *International Journal of Law, Policy and the Family* 84.

³⁸ P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008).

³⁹ The differences between Parkinson and Cashmore's study and the present study are discussed in detail in Chapter Five.

Terminology

In this thesis, the term ‘court’ is intended to refer to all courts with jurisdiction to make decisions under Part VII of the *Family Law Act* 1975 (Cth), including the Family Court of Australia, the Federal Magistrates Court of Australia and the Family Court of Western Australia.⁴⁰ The term ‘judge’, similarly, is intended to refer to all judicial officers with power to make such decisions (notwithstanding the fact that such persons may not actually be judges). These include judges of the Family Court of Australia, federal magistrates of the Federal Magistrates Court of Australia and judges and magistrates of the Family Court of Western Australia.

The term ‘children’ is, unless otherwise specified, intended to apply to all children who are the subject of proceedings under Part VII of the FLA. A parenting order is an order made under Part VII of the FLA dealing with such matters as with whom a child lives, with whom they spend time and the allocation of parental responsibility.⁴¹

Aspirations

It is hoped that the analysis contained in this thesis may help to shift the prevailing judicial culture in Australia in relation to judicial meetings with children. By reinforcing the significance of listening to children in family law proceedings, highlighting both the benefits of meeting with children and the successful use of judicial meetings in mainstream family law practice elsewhere, and by proposing practical reforms and guidelines which will facilitate such meetings in Australia, it is hoped that this thesis will invigorate debate about this important issue.

⁴⁰ Note that proceedings in the Family Court of Western Australia with respect to ex-nuptial children are conducted under the *Family Court Act* 1997 (WA). To the extent that the law and procedures under such proceedings are similar to those under Part VII of the FLA, this thesis is intended to apply to those proceedings. It is acknowledged that magistrates and judges of other State and Territory courts also have summary jurisdiction under the FLA in limited circumstances. The research in this thesis did not include these courts.

⁴¹ FLA s64B. See Chapter One for details of how the court makes parenting orders for children.

Chapter One

1 The court's role in making decisions for children

1.1 Introduction

Despite the significance of the role of the court¹ in the Australian family law system, it is acknowledged that judges² are given responsibility for making decisions for children in only few matters. Parents retain responsibility for making decisions for their children, even after they have separated. The vast majority of separated parents are able to agree on future parenting arrangements. Their agreements may be informal, or may be negotiated with the assistance of lawyers or other third parties. Parties who are able to reach agreement may ask the court to embody their agreement in enforceable orders of the court.³ The court will do so if satisfied that the orders are in the children's best interests.⁴

When parents are unable to agree about future parenting arrangements for their children, they must make an application to the court to assist. Few of the cases in which an application is filed proceed to the stage where a judge must make a decision. Nevertheless, judge-made law plays an important role. Judges are often asked to make decisions in the most complex of cases, and the way in which judges decide cases will influence how decisions in future cases are made. Judge-made law will influence the expectations of parties, lawyers and others, such as family dispute resolution providers,⁵ who become involved with the family post-separation.

This chapter describes the various ways in which decisions are made for the children of separated parents in Australia, and the role the court plays when parents are unable

¹ As defined in the Introduction, unless otherwise specified, 'court' in this thesis refers to any court deciding matters under Part VII of the *Family Law Act 1975* (Cth), including the Family Court of Australia ('FCA'), the Federal Magistrates Court of Australia and the Family Court of Western Australia.

² As defined in the Introduction, the term 'judge' is intended to refer to all judicial officers with jurisdiction for hearing matters under Part VII of the *Family Law Act 1975* (Cth), including judges of the FCA, federal magistrates of the Federal Magistrates Court of Australia and judges and magistrates of the Family Court of Western Australia.

³ *Family Law Rules* 2004 (Cth) ('Rules') Part 10.4.

⁴ *Family Law Act 1975* (Cth) ('FLA') s60CA.

⁵ See 1.5.3 below.

to reach agreement. It describes the role children play (or do not play) in the process of making decisions that affect them.

1.2 Who are 'children'?

There is no definition in the *Family Law Act* 1975 (Cth) ('FLA') of the meaning of what constitutes a 'child'. Article 1 of the United Nations Convention on the Rights of the Child ('UNCRC'),⁶ to which Australia is a signatory, states, 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'

Section 65H of the FLA states that the court must not make a parenting order for a child who is over the age of 18 years, or a child who is in a marriage or de facto relationship. Therefore, aside from where specific reference is made to other powers of the courts, or the jurisdictions of other courts, such as child welfare, the focus of this thesis is on the rights of children under the age of 18 years, living in Australia, whose parents are not living together.

1.3 Parental separation in Australia

In 2003, just over one million children in Australia were living with one parent and also had a natural parent living elsewhere. Thus 22% of children in Australia had separated parents.⁷

Assuming this statistic has not much changed, for around one in five children in Australia, decisions must be made for their parenting arrangements and their ongoing relationships with both parents. The only exceptions will be in extraordinary circumstances such as where the father is unknown or where one or both parents unilaterally elect not to have an ongoing relationship with the child.⁸

⁶ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

⁷ Australian Bureau of Statistics, *4102.0 Australian Social Trends* (July 2006), ABS website <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/7d12b0f6763c78caca257061001cc588/5a3e269e290eb5b1ca2571b0001032d8!OpenDocument>> at 1 December 2010.

⁸ Even in these situations, a grandparent or other person concerned with the child's care may seek to have arrangements made in their favour.

1.4 What is a parenting order?

When a child's parents are unable to agree on decisions affecting the child, particularly in relation to a child's living arrangements, one or both of them may apply to the court to make a parenting order.⁹

A parenting order is defined in section 64B of the FLA to be an order dealing with one or more of a number of matters listed in section 64B(2). These include matters such as with whom a child is to live,¹⁰ the time a child is to spend with another person,¹¹ the allocation of parental responsibility,¹² communication a child is to have with another person,¹³ maintenance of a child¹⁴ and 'any other aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child'.¹⁵ The court may make such parenting order as it thinks proper.¹⁶

1.5 How arrangements for children are made

1.5.1 Parental responsibility

Each parent of a child has parental responsibility for that child until the child reaches the age of 18.¹⁷ This position is not affected by any change in the nature of the relationship of the child's parents.¹⁸ Whether a child's parents are living together, are separated or have re-married, does not affect their parental responsibility for the child. This position, where each parent has parental responsibility, continues unless a court makes an order that affects it. Even where a court makes a parenting order for a child,

⁹ FLA s65C.

¹⁰ FLA s64(B)(2)(a).

¹¹ FLA s64(B)(2)(b).

¹² FLA s64(B)(2)(c).

¹³ FLA s64(B)(2)(e).

¹⁴ FLA s64(B)(2)(f). Although note that, in most cases, maintenance for a child will be determined under the *Child Support (Assessment) Act 1989* (Cth) and the accompanying administrative regime.

¹⁵ FLA s64(B)(2)(i).

¹⁶ FLA s65D. This is subject to s61DA (presumption of equal shared parental responsibility) and s65DAB (parenting plans).

¹⁷ FLA s60C(1).

¹⁸ FLA s61C(2).

parental responsibility will not be affected, except where this is expressly provided for in the parenting order, or where it is necessary to give effect to a parenting order.¹⁹

'Parental responsibility' is defined in s61B as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'. This definition encompasses every decision a parent makes on behalf of a child. Parental responsibility includes making decisions about long-term issues such as the child's surname, the child's religion and which school they attend. It also includes day-to-day issues, such as what the child eats, what time they go to bed and what they watch on television.

The scope of parental responsibility is affected by the maturity and understanding of the child. As a child becomes more mature and develops the capacity to make their own decisions, the scope of parental authority and control diminishes accordingly. A child who is fully able to understand the nature and consequences of a decision is considered competent to make the decision themselves.²⁰ However, in the context of family law proceedings, where the 'best interests' of a child are paramount,²¹ even the views of a competent child will be considered secondary to their best interests.²²

1.5.2 Informal arrangements

The majority of separated parents are able to agree on arrangements for the care of their children between themselves, without assistance or intervention of the court or other third party. These arrangements can be flexible and often do not involve a written agreement.

The Australian Institute of Family Studies' evaluation of the 2006 family law reforms, a large scale study of many aspects of the family law system with a particular focus on the changes made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), confirmed 'what has been popular wisdom among many family law

¹⁹ FLA s61D. A person who is not a parent, such as a grandparent or other person 'concerned with the care, welfare and development of the child', may also apply to the court for a parenting order, including an order for parental responsibility (FLA ss65C, 64B(2)).

²⁰ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402; *Secretary, Department of Health and Community Services v JWB and SMB ('Re Marion')* (1992) FLC 92-293.

²¹ FLA s60CA.

²² *H and W* (1995) FLC 92-598, 800.

system professionals for many years: that there is large group of separated parents who sort things out themselves with little or no use of services'.²³ Of the 10,000 parents who participated in the evaluation's longitudinal study of separated families and who had finalised the arrangements for their children at the time of interview,²⁴ over 80 percent indicated that the arrangements were mainly arrived at through discussion, or that they 'just happened'.²⁵

It is not known whether children are often consulted when their parents make informal agreements. It is assumed that, at least in some cases, children will be consulted about the arrangements. Parkinson et al reported the results of interviews with 60 children of separated parents, aged 12-19 in Australia, carried out in 1997.²⁶ While it is not known whether the arrangements for these young people had been decided by informal arrangements, negotiated settlement or by a court process, half of the interviewees reported that they had 'no say at all' in where they would live after their parents separated.²⁷ Only 13 children reported that they had 'a lot of say'.²⁸ Parkinson et al found that adolescents were more likely to report having had 'some say' in the decision than very young children.²⁹ It seems logical that older children would be more likely to be consulted in relation to their future arrangements, to ensure that the agreement takes into account the child's own wishes and commitments. Literature in this area encourages parents to discuss matters relating to the family separation with their children, but cautions against approaches that involve demeaning the other parent or forcing children to make decisions in circumstances where they may feel uncomfortable.³⁰

²³ R Kaspiew et al, 'The Australian Institute of Family Studies' Evaluation of the 2006 Family Law Reforms' (2010) 24 *Australian Journal of Family Law* 5.

²⁴ Ibid, 7. At the time of interview, around 70% of the total cohort had 'sorted out' their parenting arrangements.

²⁵ Ibid. Many of these parents had also sought assistance from a lawyer and/or a counsellor or family dispute resolution provider. However they indicated that the 'main' method of reaching a decision was informal agreement with the other parent.

²⁶ P Parkinson, J Cashmore and J Single, 'Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation' (2005) 43 *Family Court Review* 429.

²⁷ Ibid, 432.

²⁸ Ibid, 433.

²⁹ Ibid, 432.

³⁰ J Kelly and M Kisthardt, 'Helping Parents Tell Their Children About Separation and Divorce: Social Science Frameworks and the Lawyer's Counseling Responsibility' (2009) 22 *Journal of*

Informal agreements are seen as a desirable alternative to court intervention. Parents who are able to continue to make joint decisions and arrangements for their children demonstrate their ongoing parental responsibility and promote the principles of Part VII of the *Family Law Act* 1975 (Cth).³¹ However, informal arrangements, even when in writing, have no legal force. There are no penalties for contravening an informal agreement or means of enforcement. Only when an agreement is embodied in consent orders (discussed below) does it become legally enforceable.

1.5.3 Negotiated settlements

Separated parents who are unable to make agreements on their own may seek assistance from an independent third party who can facilitate discussion between the parties and assist them to negotiate a settlement in a non-judicial process.³² The FLA encourages parents to make agreements for the ongoing parenting of their children without the need to seek a court-ordered decision.³³ As one of a number of significant reforms to Australian family law in 2006,³⁴ the Commonwealth Government created Family Relationship Centres throughout Australia.

The role of a Family Relationship Centre is to provide information to families at any stage of their relationship, to facilitate services to help prevent relationship breakdown and to provide assistance to separating families in helping them reach agreement for future parenting arrangements for their children.³⁵ Even parents who think they will be unable to reach a negotiated settlement must make a 'genuine effort' to resolve their dispute before they institute court proceedings.³⁶

the American Academy of Matrimonial Lawyers 315. See fuller discussion of the authorities in on the subject of appropriate involvement of children in Chapter Two.

³¹ FLA s60B(2)(d) states that parents should agree about the future parenting of their children.

³² The three types of assisted dispute resolution recognised by the Act are counselling, family dispute resolution and arbitration. All have different aims and approaches but all seek to assist the parties to settle on a negotiated outcome. Lawyers for the parties may also be instrumental in facilitating settlement. Collaborative law is another method of dispute resolution that has been introduced recently in Australia. In collaborative law, the parties are represented by lawyers and contract that they will not institute legal proceedings against the other. If negotiations fail, the parties must seek alternative legal representation.

³³ See, for example, FLA PtIIIB, s60I(1), s60B(2)(d).

³⁴ Implemented under the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth).

³⁵ Family Relationships Online website <<http://www.familyrelationships.gov.au>> at 2 December 2010.

³⁶ *Family Law Rules* 2004 (Cth) ('Rules') r1.05 and Schedule 1.

Subject to certain exceptions,³⁷ the court may not hear an application under Part VII of the FLA unless the application is accompanied by a certificate from a family dispute resolution practitioner.³⁸ The practitioner must certify that the parties have attended family dispute resolution and have made a genuine effort to resolve their dispute, or that the applicant attempted to engage the other party in family dispute resolution, or that family dispute resolution was inappropriate in the circumstances.³⁹

Whether children are given the opportunity to be involved in negotiated settlements depends on the practices of individual dispute resolution providers. Article 12 of the UNCRC, to which Australia is a signatory, gives children a right to express their views in all matters affecting the child. However, there is nothing that guarantees children's right to participate in the process of making negotiated settlements. Several studies that report children's dissatisfaction with their level of involvement in family decision-making after parental separation are discussed in Chapter Two.

Parties who are able to settle their matter may ask the court to make consent orders in the terms of their agreement.⁴⁰ The court will do so, so long as it is satisfied that the orders sought are in the best interests of the child.⁴¹ Orders made by consent are enforceable under the Act, and there are penalties for non-compliance.

1.5.4 Court-ordered decisions

Parents who are not able to agree on arrangements for their children must apply to the court to make a decision under Part VII of the FLA.

1.5.4.1 The Family Law Courts

Three Australian courts have jurisdiction to make parenting orders for children whose parents have separated: the Family Court of Australia, the Federal Magistrates Court of Australia and the Family Court of Western Australia. The Family Court of Australia ('FCA') was created by the FLA in 1975. Prior to this, there was no

³⁷ FLA s60I(9). Exceptions include where the court is satisfied that there are reasonable grounds to believe there has been child abuse or family violence in the family.

³⁸ FLA s60I(7).

³⁹ FLA s60I(8).

⁴⁰ Rules Part 10.4.

⁴¹ FLA s60CA.

specialist family court and family law matters were generally dealt with by the vesting of federal jurisdiction in the state Supreme Courts pursuant to section 77(iii) of the *Australian Constitution*. With Australia's growing population and increased workload on state courts, a specialist federal court dealing with family law was considered appropriate.⁴²

Pursuant to the *Australian Constitution*, the Commonwealth has power to make laws with respect to, inter alia, 'divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants'.⁴³ 'Matrimonial cause' was originally defined in the FLA to include 'proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage'.⁴⁴ A 'child of a marriage' was originally defined to include not only children of married couples, but also children of one of the parties to a marriage, such as step-children. This definition was held to be ultra vires,⁴⁵ creating an unsatisfactory bifurcation of jurisdiction whereby parenting orders for a biological child of two parents who had been married could be made under the FLA, while arrangements for children whose parents had not been married, or who were the child of only one of the parties to a marriage, could be decided only by a state court under state law.

The *Australian Constitution* allows states to refer any of their powers to the Commonwealth.⁴⁶ In 1986 and 1990 all states except Western Australia referred their power with respect to 'guardianship, custody, maintenance and access' of ex-nuptial children to the Commonwealth. The states' referral of power was implemented into Commonwealth legislation through the *Family Law Amendment Act 1987* (Cth). The states did not refer their power to legislate with respect to adoption or child welfare/protection. These remain within the jurisdiction of individual states.

The referral of power means that, from the time the referral was implemented, the FLA covers arrangements for all children of separated parents in the referring states, irrespective of whether their parents have ever been married. This is a far more

⁴² L Young and G Monahan, *Family Law in Australia* (7th Ed, 2009), 32.

⁴³ *Australian Constitution*, s51(xxii).

⁴⁴ FLA s4(c)(iii) (now repealed).

⁴⁵ *Russell v Russell* (1976) 134 CLR 495.

⁴⁶ *Australian Constitution* s51(xxxvii).

satisfactory arrangement than before, when children were treated differently on the basis of their parents' marital status.

Western Australia formed its own Family Court.⁴⁷ The Court exercises both federal and non-federal jurisdiction, particularly in relation to maintenance, welfare and parenting of ex-nuptial children. Where one or both of the child's parents is resident in a different state, the FLA will apply.⁴⁸

The Federal Magistrates Court was established under the *Federal Magistrates Act* 1999 (Cth) and commenced operation in 2000. It was created to address concerns about the growing complexity of matters, delays and costs in the FCA.⁴⁹ It was intended that the Federal Magistrates Court would deal with less complicated family law matters. Its jurisdiction is the same as that of the FCA.⁵⁰ It can also deal with matters which are within Federal Court jurisdiction, such as immigration and bankruptcy.

The Commonwealth Attorney-General has recently proposed the merger of the family law component of the Federal Magistrates Court with the FCA, and has introduced legislation in this regard.⁵¹ It is not known when, or if, this merger will proceed.

1.5.4.2 The phases of decision-making

After an application has been filed in the court, the parties must attend a number of specific court events,⁵² run by a Registrar or a family consultant.⁵³ If the parties are

⁴⁷ FLA s41 allows States to create their own Family Courts, at the expense of the Commonwealth.

⁴⁸ FLA s 69ZJ. It is acknowledged that proceedings with respect to ex-nuptial children in the Family Court of Western Australia are conducted under the *Family Court Act* 1997 (WA), and not the FLA. To the extent that the law and procedures governing such proceedings are similar to those under Part VII of the FLA, this thesis is intended to apply to those proceedings.

⁴⁹ Young and Monahan, above n42, 36.

⁵⁰ It was anticipated that the two courts, while being independent, would cooperate to provide streamlined access to the federal family law system, including access to services and easy transfer of cases. The two courts have been operating under a combined registry since 2004 (Family Law Courts website

<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Us/About+the+Family+Law+Courts/FLC_overview> at 29 January 2011).

⁵¹ Access to Justice (Family Court Restructure and Other Measures) Bill 2010 (Cth); FCA, *Annual Report 2009-2010* (2010) 11.

⁵² Rules Part 12.2. The court events discussed in this section apply only to the Family Court of Australia. The pre-trial procedures may differ in the Federal Magistrates Court of Australia and the Family Court of Western Australia, however the procedures of all three courts are similar in

unable to settle their matter by the end of these events, their matter proceeds to a trial before a judge.

Parties in a parenting case attend an initial procedural hearing before a Registrar.⁵⁴ The hearing gives the parties an opportunity to attempt to resolve their case by agreement and enables the Registrar to assess the case.⁵⁵ If the parties are unable to settle, the Registrar makes orders for the future conduct of the case and may order that the parties attend the Child Responsive Program.⁵⁶

The Child Responsive Program involves a series of meetings between a family consultant, the parents and the children. Its aims are to ensure that parents focus on the children's needs and to assist parents and the court to achieve the best outcome for children.⁵⁷ The family consultant usually meets with the parents and talks with the children. The children are given an opportunity to speak about their feelings and experiences of their family before and after separation. The family consultant gives feedback to the parents about the children's views and experiences and encourages the parents to discuss future arrangements for their children.⁵⁸

If considered appropriate, the family consultant holds a settlement meeting with the parties and their legal representatives, with the aim of resolving some or all of the issues in dispute. He or she also prepares a Children and Parents Issues Assessment, setting out the main issues, the feedback given to the parents about the children's

that they employ a range of techniques to try to encourage parties to settle their matter with assistance from family consultants and Registrars.

⁵³ A family consultant is a psychologist or social worker employed as an officer of the court to assist parents and the court to achieve best possible outcomes for children (FCA, Brochure, *The Child Responsive Program*, Family Law Courts website

<http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb30d94daf25775/BRCRP_0908w.pdf> at 30 November 2010).

⁵⁴ Rules r12.04, Family Law Courts website, 'When your dispute is about parenting arrangements' <<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Family+Court+of+Australia+pathways/FCoA+pathway+parenting+hp>> at 30 November 2010.

⁵⁵ Rules r12.04(1).

⁵⁶ Rules r12.04(2).

⁵⁷ Rules, Dictionary; Family Law Courts website, 'Child responsive program'

<<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Family+Court+of+Australia+pathways/FCoA+pathways+CRP>> at 30 November 2010.

⁵⁸ Family Law Courts website, 'Child responsive program', *ibid*.

views and experiences and a summary of the discussions. The assessment is made available to the parties, their legal representatives and the court.⁵⁹

The Child Responsive Program acknowledges that hearing from children can help parents better understand their needs and experiences and realise the impact of family separation on their children. It is hoped that this encourages parents to consider the best future parenting arrangements for their children.⁶⁰ In Chapter Two, it is argued that involving children has very important benefits for children and for the decision-making process.

A further procedural hearing is held before a Registrar⁶¹ to make orders for the future conduct of the case. These orders may include referring the parties to family counselling or family dispute resolution, appointing an Independent Children's Lawyer ('ICL') and allocating the first day before a judge.⁶²

The parties may settle a matter by agreement at any time leading up to and including the trial. Of the small number of applications filed that proceed to a hearing, a significant number settle during the trial.⁶³ Around 10 percent of matters filed in the FCA conclude with a judicial determination.⁶⁴ A similar statistic was found for the total applications filed in all three courts in the 2004-2005 financial year.⁶⁵

Encouraging parties to settle their matter without the need for a judicial determination 'has been central to the philosophy of the [FLA] since its inception'.⁶⁶ To this end,

⁵⁹ Ibid.

⁶⁰ FCA, Brochure, *The Child Responsive Program*, above n53.

⁶¹ Family Law Courts website, 'When your dispute is about parenting arrangements', above n54.

⁶² Rules r12.09.

⁶³ Around half of matters that proceeded to hearing in the FCA in the financial year 2009-2010 settled during the trial (FCA, *Annual Report 2009-2010* (2010) 41, Figure 3.5). Around 70 percent of matters that proceeded to hearing in all three courts in the financial year 2004-2005 settled during the trial (Family Law Council, *Statistical Snapshot of Family Law 2003-2005* (2007), 42).

⁶⁴ FCA, *Annual Report 2009-2010* (2010), 40. This statistic includes all applications for final orders under the FLA, including both children and property matters.

⁶⁵ In 2004-2005, the number of applications for final orders (both children and property) made in the FCA, the Federal Magistrates Court and the Family Court of Western Australia was 26,234. In the same year, 2545 matters (just under 10 percent) were concluded by judicial determination (Family Law Council, *Statistical Snapshot of Family Law 2003-2005* (2007), 18, 42.

⁶⁶ Young and Monahan, above n42, 655.

the court may order that the parties attend counselling or family dispute resolution at any stage in the proceedings.⁶⁷

1.5.4.3 How the court makes decisions for children

The process the court goes through in making parenting orders for children was described by the Full Court in *Goode and Goode*.⁶⁸ The court's starting point is a presumption of equal shared parental responsibility.⁶⁹ Except in cases where there are reasonable grounds to believe that one parent has engaged in family violence or child abuse,⁷⁰ the court must apply a presumption that it is in the best interests of the child for both parents to have equal shared parental responsibility.⁷¹ The presumption can be rebutted by evidence that, in the circumstances of the case, it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility.⁷²

If the court makes an order for equal shared parental responsibility, the court must consider, if it is in the child's best interests and reasonably practicable, making an order that the child spend equal time with each parent.⁷³ If the court decides not to make an order for equal time, the court must consider, again if it is in the child's best interests and reasonably practicable, making an order that the child spend substantial and significant time with each parent.⁷⁴ Substantial and significant time is defined as including time that falls on both weekends and weekdays, and holidays and non-holidays.⁷⁵ It must also allow the parent to be involved in the child's daily routine, and occasions and events that are of particular significance to the child and the parent, such as birthdays.⁷⁶

If the court decides not to make an order for substantial and significant time, the matter is 'at large' and the court may determine the matter in accordance with the

⁶⁷ FLA s13C.

⁶⁸ *Goode and Goode* (2006) FLC 93-286.

⁶⁹ FLA s61DA.

⁷⁰ In such cases, the presumption does not apply (FLA s61DA(2)).

⁷¹ FLA s61DA(1).

⁷² FLA s61DA(4).

⁷³ FLA s61DAA(1).

⁷⁴ FLA s65DAA(2).

⁷⁵ FLA s65DAA(3)(a).

⁷⁶ FLA s65DAA(3)(b),(c).

child's best interests.⁷⁷ The court should also have regard to the objects and principles of Part VII, contained in section 60B.

In determining what is in a child's best interests, the court must consider the factors set out in subsections 60CC(2) and (3).⁷⁸ These factors, and the significance of their division into 'primary' and 'additional' considerations, are discussed in Chapter Two. The views of children are one factor among many the court must take into account in determining what is in a child's best interests. Case authority has consistently affirmed the importance of children's views in decision-making.⁷⁹ The various ways in which children's views are heard in family law proceedings are discussed in Chapter Three.

1.5.4.4 The Less-Adversarial Trial

A judge's role in a traditional adversarial system was characterised by Denning LJ to be:

[T]o hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large... It is only by cross-examination that a witness' evidence can be properly tested.⁸⁰

In Australian family law, the adversarial trial system has generally been followed. Over time, however, changes have been made, to both legislation and practice, which recognise the special nature of children's cases, and differentiate them from other types of litigation.⁸¹ Judges have recognised the need for flexibility to stray from a strict adversarial system in cases where the best interests of the child are paramount.⁸² Despite this, 'the recognition and endorsement of modifications of the adversarial

⁷⁷ *Goode and Goode* (2006) FLC 93-286, [65]. FLA s60CA states that the court must regard the best interests of the child as the paramount consideration.

⁷⁸ FLA s60CC(1).

⁷⁹ See discussion of relevant cases in Chapter Two.

⁸⁰ *Jones v National Coal Board* [1957] 2 KB 55, 63 (Denning LJ).

⁸¹ P Fitzgerald and M Fernando, 'Has the Less Adversarial Trial Process Abolished the Rules of Evidence?' (2009) 20(3) *Australian Family Lawyer* 25, 26; M Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings*, FCA (2007) 10-11.

⁸² R Chisholm, 'Less Adversarial Proceedings in Children's Cases' (2007) 77 *Family Matters* 28, 29; See *Re JRL; ex parte CJL* (1986) 161 CLR 342, *Re P (a child) and the Separate Representative* (1993) FLC 92-376, *U v U* (2002) 211 CLR 238 and other cases discussed in Harrison, above n81, 10-15.

process in children's cases rarely translated into such cases being conducted otherwise than in accordance with the traditional adversary model'.⁸³

The Less Adversarial Trial ('LAT') procedure was developed out of growing concern that the adversarial model was not providing the best environment in which to decide matters concerning children.⁸⁴ Concerns had been expressed from a number of sources about the impacts on children of hostile parental disputes,⁸⁵ the increasing complexity and expense of litigation and the growing numbers of self-represented litigants.⁸⁶

After a successful pilot project,⁸⁷ the LAT was introduced in 2006 as one of a number of reforms to the law and practice surrounding children's matters in family law. It applies in all cases to be decided under Part VII of the FLA. The role of a judge under the LAT was described by O'Ryan J:

[T]he judge has far greater control and responsibility for what is happening and for determining what is required to resolve issues in the best interests of the child. The judge is no longer simply required to accept what he or she is given by the parents and what they contend to be the issues. The overriding control of the judge includes control of the evidence that is provided to the Court and what questions, if any, are asked of any witness. The judge actively participates in the trial process by identifying issues, deciding what material is required to resolve issues and generally directing the proceedings, rather than simply acting as an umpire.⁸⁸

The five principles of the LAT are stated to be: consideration for the needs of the child and the impact the proceedings will have on the child; that the court is to actively direct, control and manage the conduct of the proceedings; safeguarding the child and parties against abuse and family violence; conducting proceedings in a way

⁸³ Harrison, above n81, 33.

⁸⁴ Ibid, 34.

⁸⁵ See, for example, J McIntosh, 'The Less Adversarial Approach and Children's Best Interests' in FCA, *Less Adversarial Trial Handbook: A Companion to the Less Adversarial Trial (Parenting Cases) DVD* (2009), 1.

⁸⁶ Harrison, above n81, 33.

⁸⁷ The positive outcomes of evaluations of the pilot project were discussed in R Hunter, 'Child-related proceedings under Part VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us' (2006) 20 *Australian Journal of Family Law* 227; J McIntosh, *The Children's Cases Pilot Project*, Final Report to the Family Court of Australia (2006).

⁸⁸ Justice S O'Ryan, 'Background to the Less Adversarial Trial' in FCA, *Less Adversarial Trial Handbook*, above n85, vii.

that will promote cooperative and child-focused parenting; and conducting proceedings with as little delay and formality as possible.⁸⁹

In keeping with these principles, the LAT has many features that distinguish it from a traditional trial process. The parties are encouraged to speak directly to the judge, so that information is given to the judge in the parties' own words, and not through their lawyers.⁹⁰ Many of the traditionally accepted rules of evidence do not apply.⁹¹ The judge has power to narrow the issues to be decided and can decide what evidence is to be presented and by whom.⁹² A family consultant is usually present throughout the hearing as an expert adviser to assist the court and the parties.⁹³

One principle of the LAT is that proceedings under Part VII of the FLA are to be child-focused.⁹⁴ Various aspects of the model are aimed at delivering outcomes that have more positive effects for children and their families than those delivered through traditional litigation.⁹⁵ However, this does not translate into children being encouraged to participate in the proceedings.⁹⁶

As will be evident from the results of the author's survey of Australian family law judicial officers in Chapter Five, the introduction of the LAT has not changed the ways in which children's views are heard in family law proceedings.⁹⁷ Specifically, judges take the opportunity to meet directly with children only on rare occasions and the introduction of the LAT has not made them more willing to extend that opportunity.⁹⁸ Further, only 23 percent of judicial officers agreed with the proposition that, given recent child-focused changes to pre-trial and trial procedures (such as the

⁸⁹ FLA s79ZN.

⁹⁰ Harrison, above n81, 53; M Fernando, 'Conversations between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters' (2009) 23 *Australian Journal of Family Law* 48, 67.

⁹¹ See Fitzgerald and Fernando, above n81; FLA s69ZT.

⁹² Fitzgerald and Fernando, above n81, 26; FLA s69ZX(1).

⁹³ Harrison, above n81, 51; FLA s69ZS.

⁹⁴ FLA s69ZN(3) states that the first principle is that the court is to consider the needs of the child and the impact that the conduct of the proceedings may have on the child.

⁹⁵ Chief Justice D Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127, 138

⁹⁶ Fernando, above n90, 67.

⁹⁷ The methods by which the court hears children's views are discussed in Chapter Three.

⁹⁸ See Chapter Five. It was found that only a handful of family law judicial officers had met with children in the past, and over 60 percent strongly disagreed or disagreed that they would be likely to meet with a child to hear their views in the future.

LAT), the incidence of judicial meetings with children is likely to increase. The remainder disagreed with the proposition, or responded that they did not know.⁹⁹

An increase in judicial meetings with children was anticipated by the instigators of the LAT, at least in the pilot program stage. The former Chief Justice, Alastair Nicholson, who was instrumental in the initial push for reform,¹⁰⁰ expressed regret that meetings between judges and children occurred only rarely during the pilot program, and attracted some criticism when they did.¹⁰¹ Further, the Practice Direction that accompanied the introduction of the LAT¹⁰² expressly referred to meetings between judges and children. Paragraph 9.2 stated:

In the discretion of the Judge, and in appropriate cases, the Judge may interview the child. This will generally be done with the consent of the child and after taking into account the evidence of any relevant report writer or expert involved in the case on these issues. The Judge may direct that other persons, such as the independent children's lawyer or a family consultant, may be present at such an interview.

Significantly, the entire Practice Direction was revoked in 2009 and has not been replaced.¹⁰³

1.6 Conclusion

Although the majority of decision-making for children after parental separation is made outside a courtroom, the court has a vital role to play in this regard. Judges are asked to intervene in the most complex and hostile of cases, where parents are unable to agree, even with assistance from others, about the future parenting of their children. The decisions made by judges will have profound effects on the children for whom decisions are made. They also shape the way future decisions will be made, both by judges and by parents and their lawyers outside the courtroom.

⁹⁹ See Chapter Five.

¹⁰⁰ A Nicholson, 'Family Law Reform: How Much Real Reform is Involved? Does It Take Us Forward or Backwards?' (Paper presented to the ACT Council of Social Services, Canberra, 17 August 2006), 21.

¹⁰¹ Ibid, 22; Harrison, above n81, 50.

¹⁰² FCA, *Child-related Proceedings (Division 12A)*, Practice Direction No 2 of 2006 (now revoked).

¹⁰³ Practice Direction No 2 of 2006 was revoked by FCA, *Revocation of Children's Cases Program and Child-related Proceedings (Division 12A) Practice Directions*, Practice Direction No 3 of 2009.

Because of the significance of judge-made decisions, it is important that judges ensure they make the best decision in the circumstances of each case. The best decision in any case will be one that reflects the best interests of the child. This thesis argues that hearing from children will enable judges to determine more accurately what is in a child's best interests, leading to better outcomes for children and a higher quality of decision-making. Chapter Two discusses why listening to children's views is vital for judicial decision-making.

Chapter Two

2 Why it is important for judges to listen to children's views

2.1 Introduction

This chapter explores why it is important for a court,¹ in making decisions for children, to allow children to participate in the process and to take account of the views children express. The various methods by which children's voices may be heard in family law proceedings are discussed in Chapter Three. This chapter puts forward three reasons for allowing children to participate:

1. Children have a right to express their views pursuant to Article 12 of the *United Nations Convention on the Rights of the Child* ('UNCRC');²
2. Section 60CC(3)(a) of the *Family Law Act* 1975 (Cth) ('FLA') compels a court to take account of any views expressed by a child, when making a parenting order; and
3. Research has shown that children want to participate in decision-making about their family arrangements and that children benefit when they feel their views have been taken into account.

Importantly, it is not suggested that children be allowed to make final decisions about their future living arrangements but only that decision-makers take due account of their views. As will be shown, children themselves have expressed the view that they do not necessarily want to make these types of decisions but they do want to be part of the decision-making process. Further, to allow children to dictate what orders should be made for them upon parental separation would be contrary to the court's mandate,

¹ As defined in the Introduction, unless otherwise specified, 'court' in this thesis refers to any court deciding matters under Part VII of the *Family Law Act* 1975 (Cth), including the Family Court of Australia, the Federal Magistrates Court of Australia and the Family Court of Western Australia.

² *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

which is to regard the best interests of the child, and not the child's views, as the paramount consideration.³

This chapter first looks at the implementation and effect of the UNCRC, focusing in particular on Article 12, which gives children a right to express their views freely and be provided with the opportunity to be heard in any proceedings affecting them. The potential tension between Article 12 and other rights in the UNCRC, such as the 'protection' rights and the 'best interests' principle is discussed. It is concluded that it is the perceptions of children themselves, rather than interpretation by adults, which determines whether the right to participate in Article 12 has been complied with. Although the UNCRC is, on its own, unenforceable in Australian domestic law, it is argued that the rights created therein are, nevertheless, an important statement of Australia's commitment to children. Judicial decision-makers have an obligation to listen to children and take their views seriously. Further, many principles of the UNCRC have been implemented via Australian statutory instruments. Those contained in the FLA are discussed.

The chapter then discusses section 60CC(3)(a) of the FLA in detail. The section compels a court to take into consideration any views expressed by a child in making a parenting order, taking into account such factors as the child's maturity and level of understanding in determining what weight to give those views. Section 60CC(3)(a) contains only one of a number of factors that a court must take into account in determining the parenting order to be made in the best interests of an individual child.

Relevant cases are discussed to see what judges making parenting orders have said about the importance of taking children's views into account. All agree that children's views are of great importance. In some cases, where the court is weighing up equally sound, but competing, proposals from each parent, the child's views may be the determining factor. However, views expressed by a child will always be subject to the 'best interests' principle found in section 60CA of the FLA, which requires the court to regard the best interests of the child as the paramount consideration.

³ FLA s60CA.

Parents and courts alike have commonly excluded children from participating directly in decision-making about their living arrangements following parental separation. It is generally considered to be in the 'best interests' of children to protect them from the fallout of their parents' divorce. However, according to substantial research in this area, children themselves say that they want to have their views heard and taken seriously in post-separation decision-making. This is despite their exposure to issues surrounding their family's separation, such as family conflict, which may carry some negative effects. This research is discussed later in this chapter. Children have demonstrated that they have the desire and the capacity to participate meaningfully in the decision-making process and that they are able to distinguish the opportunity to 'have a say' from the responsibility of making a decision. On the whole, children are able to accept that the final decision may not accord with their views. Nevertheless, children who feel they have been listened to, benefit as a result. They appear better able to accept decisions about their living arrangements, irrespective of the result, and less likely to suffer negative consequences from their family separation than children who are not invited to participate.

2.2 The child's right to be heard and express their views pursuant to Article 12 of the UNCRC

A compelling reason for the court to listen to children's views is that Australian children have a right, enshrined in an international convention, to express their views and be heard in any proceedings affecting them. Australia has an obligation to uphold that right through its laws and processes.

Article 12 of the UNCRC reads:

12.1 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.

12.2 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.

Australia ratified the UNCRC in December 1990, thereby agreeing to undertake all appropriate legislative, administrative and other measures to implement the rights contained therein.⁴

Taking a simple and literal reading of Article 12 of the UNCRC, Australia has expressly agreed, by ratifying the UNCRC, that children have a right to express their views and that, therefore, children who are the subject of family law disputes will be provided with the opportunity to be heard in the proceedings. Article 12 has been broadly conceptualised as children's right to 'participate', although this term does not appear in the text of Article 12.⁵

Beginning with the history and background to the UNCRC, the following issues will be explored:

1. the effect of Article 12 when viewed in the context of the other articles of the UNCRC;
2. the interpretation of Article 12 and what rights it actually grants to children, and
3. whether Article 12 is legally enforceable in Australia.

2.2.1 Background to the UNCRC

The UNCRC, adopted by the United Nations General Assembly in 1989, 'marked the full transformation, and complete emergence, of the idea of children as rights bearers at the international level'.⁶ Throughout the 20th Century, various attempts were made at an international level to protect the interests of children.⁷ The resulting written instruments, however, were not legally binding⁸ and had significant limitations,⁹ and a need was perceived for a convention particularly relating to the rights of children.

⁴ UNCRC Art 4.

⁵ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, [3], CRC/C/GC/12 (2009) <<http://www2.ohchr.org/english/bodies/crc/comments.htm>> at 12 February 2010.

⁶ J Tobin, 'The Development of Children's Rights' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 26.

⁷ These included the creation of UNICEF in 1946 and the *Declaration on the Rights of the Child*, proclaimed by the General Assembly on 20 November 1959, UN GA Res 1386 (XIV). See M Otłowski and B M Tsamenyi, 'Parental Authority and the United Nations Convention on the Rights of the Child: Are the Fears Justified?' (1992) 6 *Australian Journal of Family Law* 137, 138; R Pietrowicz and S Kaye, *Human Rights in International and Australian Law* (2000) 45.

⁸ Otłowski and Tsamenyi, above n7, 138.

⁹ In particular, the *Declaration on the Rights of the Child*, above n7, while emphasising the protection and safety of children, failed to create participatory or autonomy rights (Tobin, above n6, 26).

While the existing United Nations conventions and instruments ostensibly extended to people of all ages, the particular needs of children were not addressed.¹⁰ Provisions which were specifically concerned with the special circumstances of children were scattered among many different international instruments.¹¹ For the sake of consistency and the recognition that children, by reason of their vulnerability, were in need of special rights and protection, it was proposed to bring children's rights together into one international document.¹²

Work on a convention for children commenced in 1979, which the United Nations declared to be the Year of the Child. On 20 November 1989, after ten years of negotiation between the States Parties, the UNCRC was approved by the General Assembly. The provisions of the UNCRC were arrived at by a process of consensus, which explained the lengthy formulation period. While this had the effect of creating a document which satisfied the greatest number of States Parties, it was arguably 'a process which ensured that anything controversial was left out'.¹³ It also led to the watering down of certain provisions which may otherwise have been couched in stronger language. An example is the requirement for the best interests of children to be 'a primary consideration' in actions concerning children,¹⁴ instead of 'the paramount consideration' which is the standard adopted in the jurisdictions of many of the States Parties.¹⁵ The UNCRC prescribes only minimum standards.¹⁶

¹⁰ Tobin, above n6, 26; Otlowski and Tsamenyi, above n7, 139.

¹¹ Ibid.

¹² Otlowski and Tsamenyi, above n7, 139.

¹³ M Jones, 'Myths and Facts Concerning the Convention on the Rights of the Child in Australia' (Paper presented at the 6th Australian Institute of Family Studies Conference, Melbourne, November 1998) 1.

¹⁴ UNCRC Art 3.1.

¹⁵ Otlowski and Tsamenyi, above n7, 142. See, for example, FLA s60CA. Nevertheless, it has been held that, in regarding children's best interests as a 'primary' consideration, a decision-maker may 'give those interests first importance along with other considerations as may, in the circumstances of a given case, require equal, but not paramount weight' and 'asking whether the force of any other consideration outweighed [the child's best interests]' (*Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('Teoh'), [31], [39] (Mason CJ and Deane J)).

¹⁶ Ibid, 140; UNCRC Art 41.

Only two States Parties¹⁷ have not ratified the UNCRC, making it one of the most widely ratified UN conventions. Selected articles of the UNCRC are reproduced at Appendix One.

2.2.2 Rights granted to children

The UNCRC grants a wide range of rights¹⁸ to all children under the age of 18 years in ratifying countries.¹⁹ Lansdown argued that the principles contained in UNCRC can be broken down into three main categories: provision, protection and participation: He wrote:

The **provision** Articles recognize (sic) the social rights of children to minimum standards of health, education, social security, physical care, family life, play, recreation, culture and leisure.

The **protection** Articles identify the rights of children to be safe from discrimination, physical and sexual abuse, exploitation, substance abuse, injustice and conflict.

The **participation** Articles are to do with civil and political rights. They acknowledge the rights of children to a name and identity, to be consulted and to be taken account of, to physical integrity, to access to information, to freedom of speech and opinion, and to challenge decisions made on their behalf.²⁰

Several articles of the UNCRC have significance for children whose parents have separated and who are the subject of contested hearings under Part VII of the FLA. These include the articles which govern relationships between children and their parents. Many of the principles embedded in those articles have been implemented, or were already present, in the FLA. For example, section 60CA of the FLA requires the court to regard the best interests of the child as the paramount consideration (Article 3.1). The 'objects and principles' in section 60B(1) and 'primary considerations' in section 60CC(2) (which emphasise the benefit to children of having a meaningful relationship with both parents and the need to protect children from physical or psychological harm) are reflective of Articles 9.3 and 19.1 respectively. Article 18.1 is reflected in the acknowledgement in section 61C that each parent of a

¹⁷ These are USA and Somalia. Statistics updated 5 December 2008 (Office of the United Nations High Commissioner for Human Rights website <<http://www2.ohchr.org/english/bodies/ratification/11.htm>> at 13 January 2009).

¹⁸ Otlowski and Tsamenyi, above n7, 140.

¹⁹ Ibid, 141; UNCRC Art 1.

²⁰ G Lansdown, 'Children's Rights' in B Mayall (ed), *Children's Childhoods: Observed and Experienced* (1994) 36.

child has parental responsibility for that child, and the requirement in section 60CC(3)(a) for the court to take account of any views expressed by a child is somewhat reflective of Article 12. Some amendments introduced by the *Family Law Reform Act* 1995, such as the inclusion of the 'objects and principles' section,²¹ were made to directly implement principles of the UNCRC.²²

2.2.3 Tension between children's right to participate, the 'best interests' principle and protection rights

A child's right to express their views and be heard pursuant to Article 12 of the UNCRC cannot be exercised in an unfettered manner. There is an apparent tension between the 'participation' rights, such as that in Article 12, and the 'protection' rights, such as the right to be protected from harm (Article 19.1). In a situation where a child would like to participate in a decision but to do so would put them in a situation of harm, the two sets of rights will conflict. The extent to which children are granted a voice and have their views taken seriously depends on how the court prioritises these potentially conflicting rights.²³

Adding to the complexity, Article 3.1 - the 'best interests' principle - states that in all actions concerning children, the best interests of the child shall be a primary consideration. This article 'clearly locates adults as having responsibility for the welfare of children'.²⁴ It appears, then, that a child's right to participate is qualified by the 'best interests' principle, meaning that children are granted a right to participate only in situations where adults believe it is in their best interests to do so. This can lead to the potential erosion of children's 'participation' rights. As Lansdown explained:

²¹ FLA s60B.

²² A first draft of the Family Law Reform Bill contained explicit reference to articles of the UNCRC. Those references were removed in subsequent drafts, apparently responding to concern that the legislation would otherwise incorporate certain UNCRC articles into domestic law (M Harrison and R Graycar, 'The Family Law Reform Act: Metamorphosis or More of the Same?' (1997) 11 *Australian Journal of Family Law* 327, fn14). See discussion below at 2.2.6 about the High Court's decision in *Teoh* and the government's reaction to it.

²³ B Neale and C Smart, 'Agents or Dependents? Struggling to Listen to Children in Family Law and Family Research' (Working Paper 3, Centre for Research on Family, Kinship and Childhood, University of Leeds, 1998) 1.

²⁴ Lansdown, above n20, 40.

[T]he operation of the best interests principle should not be seen as inherently beneficial to children. It can be, on the contrary, a powerful tool in the hands of adults, which can be used to justify any of their actions and to overrule the wishes and feelings of children.²⁵

The granting of participatory rights for children empowers them in a way that many adults find problematic.²⁶ Allowing a child to participate may require adults to relinquish their 'power' and control over children, and may result in over-burdening children with responsibility for decision-making.²⁷ Many adults perceive children as lacking the competence and autonomy presumed by the idea of a right and think they must therefore be protected in the exercise of the rights granted to them.²⁸ Adults justify interfering with a child's right to participate on the grounds that to do so would not be in their 'best interests'. However, granting participation rights to children does not mean they should be treated like adults. As will be explored in this chapter, children who want to have a say in decision-making may not necessarily want to make decisions themselves.²⁹ Further, as Morrow wrote:

[C]hildren don't tend to use the language of 'rights', not surprisingly; rather, they use a language of participation and inclusion, encapsulated by the phrase used by many of them, the desire to 'have a say' in decisions that affect them.³⁰

Children 'are asking for inclusion and participation and are aware of their exclusion and lack of participation'.³¹

Therefore, adults must ensure that if children's participation rights are to be interfered with, they are truly acting in the child's best interests and not out of concern that children are incapable of exercising their rights. This involves careful deliberation about how to determine what is in a child's 'best interests'. Lansdown argued that determining 'best interests' is not a purely subjective task, but must occur with full recognition that children have basic civil rights, including the right to be listened to

²⁵ Ibid, 41.

²⁶ Neale and Smart, above n23, 1.

²⁷ V Morrow, 'We Are People Too: Children's and Young People's Perspectives on Children's Rights and Decision-Making in England' (1999) 7 *International Journal of Children's Rights* 149, 150.

²⁸ Ibid, 150; Note Neale and Smart's discussion of the conceptualisation of children as active moral and social agents and/or dependants in need of protection, and the perceived tension between the two (Neale and Smart, 'Agents or Dependants?', above n23, 1-2).

²⁹ There is a wealth of research on this issue, which is discussed in detail later in this chapter.

³⁰ Morrow, 'We Are People Too', above n27, 167.

³¹ Ibid, 166.

(Article 12), the right to freedom of expression (Article 13) and the right to freedom of conscience (Article 14). Lansdown wrote:

If one accepts these principles as given, then they form the principled framework against which the concept of best interests can be tested. Without it, the rights of the child can be subjugated to personal prejudice, an unwillingness to resolve conflict, lack of any consideration of the child's perspective or simply a battle for power in which the adult is invariably the stronger.³²

Children must be allowed to participate in decision-making in accordance with Article 12 unless it is determined, in full acknowledgment and respect for children's rights,³³ that to do so would not be in the child's best interests.

2.2.4 The meaning of Article 12 and the rights it grants to children

If respect is to be given to children's rights, the scope of those rights must be determined. Article 12 is ambiguous in that it does not make clear what is required by decision-makers to ensure that the rights contained therein have been respected. From the wording of Article 12, it is evident that children have the right to freely express their views in all matters affecting them, and the subsequent right for those views to be given due weight, according to the child's age and maturity.³⁴ For this purpose, children are to be given an opportunity to be heard (either directly, or through a representative or appropriate body).

The wording of Article 12 does not disclose whether, for example, it is the child's perspective or the decision-maker's perspective that is relevant for determining whether Article 12 has been complied with. It does not define what giving 'due weight' to a child's views involves or how much account must be taken of children's views in making a final decision. It does not indicate whether a child who wishes to be heard directly must be heard directly, or whether Article 12 is nonetheless complied with where the child is heard through a 'representative or appropriate body', contrary to the child's wish. Significant guidance on how the rights in Article 12 are to be complied with has been given by the UN Committee on the Rights of the Child ('UN Committee'), a body of independent experts which monitors implementation of

³² Lansdown, above n20, 41.

³³ Ibid, 44.

³⁴ United Nations Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard*, above n5, [15].

the UNCRC by States Parties. It also publishes its interpretation of human rights provisions.³⁵

First, the UN Committee has decreed that 'all children involved in judicial and administrative proceedings must be informed in a child friendly manner about their right to be heard, modalities of doing so and other aspects of the proceedings'.³⁶ The UN Committee also noted that expressing their views is a choice for children, not an obligation, and children are entitled to choose not to exercise their right to be heard.³⁷ It is up to States Parties to 'ensure that the child receives all necessary information and advice to make a decision in favour of his or her best interests'.³⁸

Second, the UN Committee has given some direction as to what decision-makers must do with a child's views once they have been expressed. It could be said that Article 12 has been complied with once a child's views have been expressed and listened to. Article 12 does not state that a decision-maker is in any way bound by the views expressed by a child, but only that the views of the child are to be 'given due weight in accordance with the age and maturity of the child'. What constitutes 'due weight' is not specified.

The UN Committee has described children's enjoyment of Article 12 to be in three distinct phases: 'To speak, to participate, to have their views taken into account'.³⁹ Therefore, it is not enough to 'hear' a child, and then disregard their views:

Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their interactions on their behalf ever more sensitive to the implementation of children's rights... [A]rticle 12 requires consistent and ongoing arrangements. Involvement of and consultation with children must avoid being tokenistic.⁴⁰

³⁵ Office of the United Nations High Commissioner for Human Rights website
<<http://www2.ohchr.org/english/bodies/crc/>> at 23 July 2010.

³⁶ United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard* (2006) [40]
<http://www2.ohchr.org/english/bodies/crc/docs/discussion/Final_Recommendations_after_DGD.doc> at 12 February 2010.

³⁷ United Nations Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard*, above n5, [16].

³⁸ Ibid.

³⁹ United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard*, above n36, Preamble.

⁴⁰ Ibid, [13].

From these comments, it is clear that the UN Committee considers children's rights under Article 12 entitle children to express their views, to participate in the decision-making process, and to have their views taken seriously.⁴¹ The UN Committee has also affirmed that a child's age should not be a barrier to the child's right to fully participate in judicial processes.⁴²

Third, it is important to look at what direction the UN Committee has provided on whether, when being provided with an 'opportunity to be heard', the child must be given the choice of whether their views are heard directly, or indirectly (through a 'representative or an appropriate body'), or both. The wording of Article 12.2 does not make clear whether children are entitled to be heard directly, or whether Article 12.2 is complied with even in circumstances where children wish to be heard directly, but their views are instead presented through a 'representative or appropriate body'. This is a relevant consideration when discussing post-separation court proceedings, where children's views are very rarely heard directly by the decision-maker, but are most often presented through expert reports and evidence from the child's parents and witnesses.⁴³

The UN Committee is of the opinion that children who wish to participate in the proceedings should have the choice of whether to be heard directly, or through a representative or appropriate body.⁴⁴ The child must receive information about both options and be made aware of the possible consequences of each.⁴⁵ The UN Committee recommended that, wherever possible, children must be given the opportunity to be directly heard in proceedings.⁴⁶

Allowing children who wish to express their views directly to a decision-maker the opportunity to do so accords with the UN Committee's view that involvement and

⁴¹ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, above n5, [2].

⁴² United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard*, above n36, [51].

⁴³ See detailed discussion in Chapter Three for the various ways in which children's views are heard by the court.

⁴⁴ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, above n5, [35].

⁴⁵ *Ibid*, [41].

⁴⁶ *Ibid*, [35].

consultation with children must not be tokenistic.⁴⁷ The UN Committee also stressed that children are entitled to express their views in ‘an environment in which the child feels respected and secure when freely expressing her or his opinions’.⁴⁸ A child who, despite their wish to be heard directly, is permitted to express their views only through a representative, is unlikely to feel respected or secure in disclosing their opinions, and may feel that their involvement in the decision-making process is meaningless. Children’s perspectives of their own rights are important in identifying the matters of most concern to children and ensuring that their dignity is protected.⁴⁹ Ultimately:

[T]he realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child’s parents or guardian.⁵⁰

Children must be left feeling confident that their views have been properly taken into account, and the child’s experience of participation is crucial to the child’s sense of being heard.⁵¹ This is particularly so because a court’s paramount consideration is the child’s best interests, so the child’s views may be overruled in favour of a decision that the court considers better serves the child’s interests. It may be easier for children to come to terms with a decision that goes against their views if they feel they have been heard, even if those views are ultimately overruled by other interests that judges consider more important.⁵²

The UN Committee, in reviewing Australia’s commitment to the UNCRC, noted its concern that children’s views are not always sufficiently taken into account in Australian judicial and administrative proceedings affecting children.⁵³ It

⁴⁷ United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard*, above n36, [13].

⁴⁸ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, above n5, [23].

⁴⁹ Morrow, ‘We Are People Too’, above n27, 151; See also Preamble to the UNCRC.

⁵⁰ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, above n5, [25].

⁵¹ F Raitt, ‘Judicial Discretion and Methods of Ascertaining the Views of a Child’ (2004) 16 *Child and Family Law Quarterly* 151, 161.

⁵² *Ibid.*

⁵³ United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Art 44 of the Convention, Concluding Observations: Australia*, [29], CRC/C/15/Add.268 (2005).

recommended that the right of children to express their views in all matters affecting them should be expressly provided for in Family Law reform.⁵⁴

2.2.5 The effect of the UNCRC in Australian domestic law

Australia ratified the UNCRC on 17 December, 1990.⁵⁵ Ratifying a treaty makes it binding on Australia in international law, but the treaty does not become part of Australian domestic law unless it is given the force of law by statute.⁵⁶ A treaty that has not been incorporated into domestic law does not affect the rights or liabilities of Australian citizens.⁵⁷ The Commonwealth Government has not enacted or proposed to enact legislation implementing the UNCRC, although some domestic laws have been made or amended which give effect to principles of the UNCRC.⁵⁸ This is hardly a singular event, as Australia has ratified all seven of the international human rights conventions,⁵⁹ but has not given the force of law to any of these statements of rights. Victoria and the Australian Capital Territory have taken the initiative of enacting statements of rights.⁶⁰ Nevertheless, there is no Bill of Rights at a federal level and Australia remains the only modern liberal democracy in the world without a national statement of rights.⁶¹

⁵⁴ Ibid, [30].

⁵⁵ Office of the United Nations High Commissioner for Human Rights, *Second and Third Periodic Reports of States Parties due in 1998 and 2003: Australia*, [2], CRC/C/129/Add.4 (2004).

⁵⁶ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('Teoh'), 286-7 (Mason CJ and Deane J), 298 (Toohey J), 304 (Gaudron J), 315 (McHugh J); Rt Hon Sir H Gibbs, 'Teoh: Some Reflections' (Paper presented at the Fifteenth Conference of the Samuel Griffith Society, Adelaide, 23-25 May, 2003) <<http://www.samuelgriffith.org.au/papers/html/volume15/v15chap7.html>> at 3 December 2009.

⁵⁷ Gibbs, above n56; *Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

⁵⁸ Such as FLA s60B, the 'objects and principles' section, discussed above.

⁵⁹ *The International Covenant on Civil and Political Rights; the UNCRC; the Convention Against Torture; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of Persons with Disabilities*. Commonwealth Government Attorney-General's Department website <<http://www.ag.gov.au/humanrights>> at 2 November 2009.

⁶⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT). In 2007, the Tasmanian Law Reform Institute released a report in favour of a Bill of Rights for Tasmania. No legislative action has been taken to date.

⁶¹ J Bessant and R Watts, 'Children and the Law: An Historical Overview' in Monahan and Young (eds), *Children and the Law in Australia* (2008) 21. Proposals for a federal statement of human rights arise from time to time and lead to media attention and public discussion, such as the National Human Rights Consultation held in July, 2009 (<http://www.humanrightsconsultation.gov.au> at 14 January 2011). However, no active steps to enact a federal bill or charter of rights have been taken.

Despite Australia agreeing to 'undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the [UNCRC]' (Article 4), this has not occurred in practice. Tobin wrote:⁶²

Although there is evidence of a trend to recognise the rights of children within the legal systems of some states, Australia has remained obstinate in its refusal to implement the [UN]CRC. This is not to say that children do not have human rights in Australia...or that articles under the [UN]CRC have not informed, or are incompatible with, discrete aspects of legislation and policy within some jurisdictions within Australia. On balance, however, there has been no deliberate or concerted effort to use the [UN]CRC and the notion of children as rights bearers as the benchmark against which to develop, implement and monitor laws and policies affecting children.⁶³

Therefore, the actual effect of the UNCRC on Australian law is extremely limited.⁶⁴ Where there is ambiguity in domestic legislation, an interpretation of that legislation which complies with the UNCRC should be adopted.⁶⁵ Further, principles contained within international instruments can be used in exercising judicial discretion and as a guide to developing the common law.⁶⁶

As will be discussed below, Australia's ratification of international instruments may also give rise to a legitimate expectation, on the part of a person seeking to rely on the convention, that the principles of the convention will be complied with.⁶⁷

The only notable incorporation of the UNCRC in domestic law is its annexure to Schedule 3 of the *Australian Human Rights Commission Act 1986* (Cth).⁶⁸ The Act

⁶² Tobin, above n6, 30.

⁶³ Ibid, 24.

⁶⁴ With the exception of the State and Territory that have enacted statements of rights that will have force in matters under their jurisdiction.

⁶⁵ S Roberts, 'Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh: The High Court Decision and the Government's Reaction to it' (1995) 2 *Australian Journal of Human Rights* 135, 135; *Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); Gibbs, above n56.

⁶⁶ Roberts, above n65, 135; *Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J); *Mabo v Qld [No 2]* (1991) 175 CLR 1, 42 (Brennan J); *Dietrich v R* (1992) 177 CLR 292, 321 (Brennan J); Gibbs, above n56.

⁶⁷ *Teoh* (1995) 183 CLR 273. See discussion below.

⁶⁸ The Australian Human Rights Commission, formerly named the Human Rights and Equal Opportunity Commission, has a role in monitoring and promoting compliance with international human rights standards in Australia, including receiving complaints about alleged breaches of human rights under federal laws (Australian Human Rights Commission website <www.humanrights.gov.au> at 2 November 2009).

states that the Aboriginal and Torres Strait Islander Justice Commissioner must have regard to the UNCRC in performing his or her functions.⁶⁹

2.2.6 Legitimate expectation UNCRC will be complied with

In *Minister of State for Immigration and Ethnic Affairs v Teoh* ('*Teoh*')⁷⁰ the majority of the High Court affirmed the Federal Court's decision that the ratification of an international treaty (there the UNCRC) gives rise to a legitimate expectation that decision-makers will act in accordance with the principles of the convention. In their joint judgment, Mason CJ and Deane J said:

[R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent any statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention.⁷¹

The case concerned the deportation from Australia of a Malaysian citizen, who had several young children living in Australia. It was found that, by failing to obtain information about or to consider the effect of their father's deportation on the children, the immigration authority had acted with a lack of procedural fairness.

The High Court emphasised that the existence of a legitimate expectation does not compel the decision-maker to act in accordance with a convention. However, where the decision-maker proposes to act contrary to the expectation, principles of procedural fairness dictate that parties must be given notice and adequate opportunity to present submissions against the proposed course.⁷²

The Commonwealth Government responded swiftly. On 10 May 1995 the Minister for Foreign Affairs and the Attorney-General released a Joint Statement seeking to dispel any notion of a legitimate expectation with regard to international instruments. The statement read:

⁶⁹ *Australian Human Rights Commission Act* 1986 (Cth) s46C(4)(a).

⁷⁰ *Teoh* (1995) 183 CLR 273.

⁷¹ *Ibid.*, 365.

⁷² *Ibid.*

We state on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law... Any expectation that may arise does not provide a ground for review of a decision. That is so, both for existing treaties and for future treaties that Australia may join.⁷³

After a change in government, a similar statement was issued by the then Minister for Foreign Affairs and the Attorney-General in 1997.⁷⁴ To give effect to the Joint Statement made in 1995, the government introduced the Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth). However, the bill lapsed. Further similar Bills were introduced in 1997 and 1999 but, despite the efforts of both major political parties to reverse the effect of the decision in *Teoh* through legislative means, no Act has been passed.⁷⁵

The Joint Statements on their own are ineffective in reversing the effect of the High Court's decision in *Teoh*.⁷⁶ However, remarks made by members of the High Court, in obiter, indicate that some members have 'great doubts'⁷⁷ as to the correctness of the decision in *Teoh* and the principle of legitimate expectation.⁷⁸ The Australian Government's opinion is that, if a party in a future case were to rely on *Teoh*'s case to support an argument of legitimate expectation, the Court would likely overturn the concept of legitimate expectation arising out of international treaties.⁷⁹

⁷³ Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General Michael Lavarch, *International Treaties and the High Court Decision in Teoh*, 10 May 1995.

⁷⁴ Gibbs, above n56.

⁷⁵ Human Rights Law Resource Centre Ltd, *Human Rights Law Resource Manual*, Ch 4, 21 <www.hrlrc.org.au> at 25 July 2008; Gibbs above n56.

⁷⁶ The effectiveness of the Joint Statement was doubted by Hill J in *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431, and its ineffectiveness was confirmed by Goldberg J in *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80, who held the Joint Statement lacked the required specificity to reverse the High Court's position in *Teoh*. However, it is possible that the government could make a clear announcement of a change of policy to prevent a legitimate expectation that a treaty will be complied with from arising in the future (Gibbs, above n56, discussing the dissenting judgment in *Fisher v Minister for Public Safety (No 2)* [1990] 1 WLR 347, 363).

⁷⁷ Gibbs, above n56.

⁷⁸ See joint judgment of McHugh and Gummow JJ, and judgment of Callinan J in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1.

⁷⁹ Office of the United Nations High Commissioner for Human Rights, *Second and Third Periodic Reports of States Parties due in 1998 and 2003: Australia* [40] CRC/C/129/Add.4 (2004). Given

2.2.7 The effect of Article 12 for children who are the subject of family law proceedings

At the time Australia ratified the UNCRC, the concept of children 'having a say' in decisions was not a new one. However, the ratification 'coincided with an increasing recognition of children's developing right to self-determination'.⁸⁰

As mentioned above, many articles of the UNCRC can be found in the FLA and have either been implemented as a direct result of the UNCRC, or were already present in the legislation. These include the 'best interests' principle, parents' duties and responsibilities (including the child's right to regular contact with their parents) and children's rights to participate and be protected from harm.

There is no individual complaints mechanism for children who perceive that their rights under the UNCRC have been violated.⁸¹ States Parties are required to report regularly to the UN Committee on the Rights of the Child to advise of ways in which that State has taken steps to implement the Convention.⁸² The only sanction is an unfavourable report by the Committee, which lacks punitive or legal power.

Each Australian state and territory has created the office of a Commissioner for Children, whose role it is to examine various state and territorial laws and practices to monitor compliance with the articles of the UNCRC and make recommendations for

the reactions to *Teoh's* case from both major political parties, it is unlikely the subsequent change in government has affected this view.

⁸⁰ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission ('ALRC and HREOC'), *Seen and Heard: Priority for Children in the Legal Process*, Report no 84 (1997) [3.10].

⁸¹ This is in contrast to complaints mechanisms available to individuals and groups who feel their rights pursuant to that international instrument have been violated, which are found in the *Optional Protocol to the International Covenant on Civil and Political Rights*, the *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, Art 22 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art 14 of the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (Office of the United Nations High Commissioner for Human Rights website <<http://www2.ohchr.org/english/bodies/complaints.htm>> at 24 July 2010).

⁸² UNCRC Art 44.

reform.⁸³ This role is limited to matters of state and territory jurisdiction, including child welfare (child protection) and youth justice.

Family law falls under Commonwealth jurisdiction. No Commissioner for Children has been appointed at the federal level.⁸⁴ However, the UNCRC has been declared an 'international instrument relating to human rights and freedoms' under section 47(1) of the *Australian Human Rights Commission Act 1986* (Cth), meaning the Commission must examine whether existing law and practices (including those relating to family law) comply with the UNCRC and, if not, make recommendations to the Minister in this regard.⁸⁵

A child cannot take steps to enforce their right to express their views and be heard pursuant to Article 12 of UNCRC. The only statutory provision compelling a court to listen to children's views in family law matters is section 60CC(3)(a) of the FLA. That section is discussed later in this chapter. The section does not specifically grant children a right to express their views, or state that children are to given an opportunity to be heard in proceedings affecting them. It does, however, require the court to consider any views expressed by a child in making a decision under Part VII

⁸³ Australian Institute of Family Studies, NCPC Resource Sheet, *Children's Commissioners and Guardians* (2010) <<http://www.aifs.gov.au/nch/pubs/sheets/rs15/rs15.html>> at 15 December 2010; Commissioner for Children (Tas) <www.childcomm.tas.gov.au>; Commission for Children and Young People and Child Guardian (Qld) <www.ccypcg.qld.gov.au>; Commissioner for Children and Young People (WA) <www.ccyp.wa.gov.au>; Commission for Children and Young People (NSW) <www.kids.nsw.gov.au>; Office of the Child Safety Commissioner (Vic) <www.ocsc.vic.gov.au>; Office of the Guardian for Children and Young People (SA) <www.gcyp.sa.gov.au>; Office of the Children's Commissioner (NT) <www.childrenscommissioner.nt.gov.au>; Children and Young People's Commission (ACT) <www.hrc.act.gov.au>.

⁸⁴ Australian Institute of Family Studies, NCPC Resource Sheet, *Children's Commissioners and Guardians* (2010) <<http://www.aifs.gov.au/nch/pubs/sheets/rs15/rs15.html>> at 15 December 2010. However, the Commonwealth Commissioner for Children and Young People Bill 2010 (Cth) was introduced in the Senate on 29 September 2010. It was referred to the Senate Legal and Constitutional Affairs Committee, whose report is due in May 2011 (Parliament of Australia, Parlinfo search <http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/billslst_c203aa1c-1876-41a8-bc76-1de328bdb726/upload_pdf/blist.pdf;fileType=application%2Fpdf#search=%222010s%22> at 15 December 2010).

⁸⁵ *Australian Human Rights Commission Act 1986* (Cth) s11. Children can make complaints to the Commission if they feel their rights pursuant to UNCRC have been breached. If the Commission finds there has been a breach of human rights, the Commission will prepare a report for the Attorney-General, which may contain recommendations for action and must be tabled in Parliament. No personal remedy is available to the child, unless the dispute is able to be resolved by conciliation (Australian Human Rights Commission website <http://www.hreoc.gov.au/human_rights/children/hreoc_promote_rights_of_children.html> at 24 July 2010).

of the FLA. In responding to reports submitted by Australia, the UN Committee on the Rights of the Child recommended, in 2005, 'that the right of the child to express his/her views in all matters affecting him/her be expressly provided in the Family Law reform'.⁸⁶ This recommendation has not been put into effect. As discussed above, it is unlikely the concept of a 'legitimate expectation' that the UNCRC will be complied with will be upheld in future cases. Therefore, aside from section 60CC(3)(a) of the FLA, the practical effect of the principles of the UNCRC for children who are the subject of family law proceedings is limited to statutory interpretation and development of the common law.

Without the force of law, the UNCRC 'is an aspirational document'.⁸⁷ This is not to say it is unimportant. By ratifying the UNCRC, Australia has made commitments at an international level and held out a promise to Australian children that they will be treated in accordance with their fundamental human rights entitlements.⁸⁸ In the context of family law disputes, it means judicial officers have a responsibility to ensure that children are properly heard and respected in the court process.⁸⁹

2.3 The legislative requirement to take children's views into account

2.3.1 Scope of section 60CC(3)(a)

In Australian family law, the court's dealings with children are governed by Part VII of the FLA. When a court is asked to make a parenting order for a child whose parents have separated, it is required to regard the best interests of the child as the paramount consideration.⁹⁰ In determining what is in a child's best interests, the court must consider factors set out in s60CC of the FLA. One of these factors, found in section 60CC(3)(a), is the requirement that the court consider 'any views expressed by

⁸⁶ United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Australia* [30] CRC/C/15/Add.268 (2005).

⁸⁷ M Rayner, 'Why Children Need to Know their Rights' (2003) 5(2) *Newcastle Law Review* 23, 28.

⁸⁸ Jones, above n13, 10; ALRC and HREOC, *Seen and Heard*, above n80, [3.18].

⁸⁹ J Cashmore and P Parkinson, 'What Responsibility do Courts Have to Hear Children's Views?' (2007) 15 *International Journal of Children's Rights* 43, 43.

⁹⁰ FLA s60CA.

the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'.⁹¹

Therefore, in any decision involving living arrangements for a child, the FLA is explicit in requiring the court to consider any views that have been expressed by the child. Those views will constitute evidence on which the court will rely to assist in making a decision. The court retains the discretion to determine what weight, if any, should attach to evidence of children's views, taking into account the child's maturity, level of understanding and other factors.⁹²

Views expressed by a child are only one of multiple factors the court must take into account when determining what is in a child's best interests. Factors listed in section 60CC(2) are named the 'primary considerations' and are 'the benefit to the child of having a meaningful relationship with both of the child's parents'⁹³ and 'the need to protect the child from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence'.⁹⁴ Factors listed in section 60CC(3) are named 'additional considerations', and include, as well as the child's views, matters such as the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent,⁹⁵ the likely effect of any changes in the child's circumstances⁹⁶ and the capacity of each parent to provide for the child's needs.⁹⁷

Prior to the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) ('2006 Amendments'), the factors the court was required to consider in determining what was in a child's best interests were not divided into 'primary' and 'additional' considerations. Instead, a section 68F(2) (now repealed) contained a single list of factors, one of which was the requirement for the court to consider a child's 'wishes', as they were formerly called (s68F(2)(a)). The Family Court has held that no one factor was to be considered more important than any other, and the importance and

⁹¹ FLA s60CC(3)(a).

⁹² Ibid.

⁹³ FLA s60CC(2)(a).

⁹⁴ FLA s60CC(2)(b).

⁹⁵ FLA s60CC(3)(c).

⁹⁶ FLA s60CC(3)(d).

⁹⁷ FLA s60CC(3)(f).

relevance of each factor was to be determined according to the circumstances of each individual case.⁹⁸ Nevertheless, it is evident that children's views have always, in practice, been treated as a matter of particular significance.⁹⁹ Indeed, prior to 1983, the court was required not to make an order contrary to the views of a child aged 14 or older, unless satisfied by reason of special circumstances that it was necessary to do so.¹⁰⁰

Parliament has made clear that children's 'views' encompass, but can include more than, children's 'wishes', which was the terminology prior to the 2006 Amendments. 'Views' can capture a child's perceptions and feelings, and allow for decisions to be made in consultation with the child, without the child having to express a 'wish' as to which parent they want to live with, although the child may express a wish if they so desire.¹⁰¹ Parliament also considered it appropriate to replace 'wishes' with 'views' in order to make the wording of the section consistent with Article 12 of the UNCRC.¹⁰²

The 2006 Amendments divided the factors the court must consider in determining what is in a child's best interests into 'primary' and 'additional' factors. Parliament has made clear on several occasions that the intention of this division is for the 'primary' considerations to be considered most important, and the 'additional' considerations of less importance.¹⁰³ This clearly changed the position prior to the 2006 Amendments position that no one factor was to be considered more important

⁹⁸ *B and B: Family Law Reform Act 1995* (1997) FLC 92-755.

⁹⁹ See below for discussion on how children's views have been treated in past cases.

¹⁰⁰ FLA s64(1)(b) (repealed); L Young and G Monahan, *Family Law in Australia* (7th Ed, 2009) 382.

¹⁰¹ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) [56].

¹⁰² Ibid [57].

¹⁰³ Some examples include: '[T]he intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the Act which are set out in the new section 60B' (Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) [49]); 'Primary factors should be the most important in the consideration of the court' (Commonwealth, *Government Response to the Recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs on the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2005) [35] <<http://aph.gov.au/>>); '[T]he legislative intent [is] that, in general, the primary factors will be the most important' (Commonwealth, *Government response to the Senate Legal and Constitutional Legislation Committee Report on the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) 2 <<http://aph.gov.au/>>); 'When you look at the additional considerations, you can see that they definitely are secondary to those two primary considerations' (Commonwealth, *Parliamentary Debates*, Senate, 30 March 2006, 123 (Senator Ellison)).

than any other.¹⁰⁴ The requirement to take children's views into account is now listed as an 'additional' consideration.¹⁰⁵ It could be argued, therefore, that the 2006 Amendments have demoted the importance of children's views and that children's views are now to be regarded as less important than they were under section 68F(2) (now repealed). This would represent a retreat from a children's rights approach to decision-making.¹⁰⁶ It should be noted, however, that Parliament has expressly stated that there may be instances where additional considerations may outweigh the primary considerations.¹⁰⁷

Parkinson argued that, although the primary considerations are given priority over the additional considerations,¹⁰⁸ it would be unusual for the primary and additional considerations in a given case to be in conflict.¹⁰⁹ In most cases, Parkinson submitted, it is through a detailed examination of the relevant additional considerations that the court may be assisted to determine the significance of the primary considerations, and the orders to ultimately make.¹¹⁰ Parkinson maintained that, rather than the 'additional' considerations having been downgraded, the additional considerations amplify the primary considerations.¹¹¹

Thackray J in *G and A*¹¹² affirmed the extra-judicial view of Chisholm J¹¹³ that the primary considerations do not necessarily outweigh or 'trump' the additional considerations and that the primary considerations cannot be determined without reference to the additional considerations.¹¹⁴ His Honour also commented on

¹⁰⁴ *B and B: Family Law Reform Act 1995* (1997) FLC 92-755.

¹⁰⁵ FLA s60CC(3)(a).

¹⁰⁶ B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008) 280.

¹⁰⁷ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) [51].

¹⁰⁸ P Parkinson, 'The Values of Parliament and the Best Interests of Children- A Response to Professor Chisholm' (2007) 21 *Australian Journal of Family Law* 213, 226; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 March 2006, 25 (Attorney-General Mr Ruddock), 'the Parliament is giving advice for the courts to view these two (primary) matters as matters that should be addressed in priority. The others are factors that can be taken into account, but they are not equal'.

¹⁰⁹ P Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers' (2006) 20 *Australian Journal of Family Law* 179, 183.

¹¹⁰ *Ibid*, 183.

¹¹¹ *Ibid*, 187.

¹¹² *G and A* [2007] FCWA 11 (Unrep, Thackray J, 12 January 2007).

¹¹³ R Chisholm, 'Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *Australian Journal of Family Law* 143, 170-171.

¹¹⁴ *G and A* [2007] FCWA 11 (Unrep, Thackray J, 12 January 2007) [21].

Parliament's deliberate choice of the word 'additional' instead of 'secondary'. Rather than meaning the factors are 'next below' or 'supplementing' the primary considerations, as the word 'secondary' would suggest, '[additional] means precisely that - something additional to what has already been stated'.¹¹⁵

The two primary considerations are also reproduced in section 60B, which states the objects and principles underlying Part VII of the FLA. The objects help to guide the court in its interpretation of the considerations and what is in a child's best interests,¹¹⁶ and an interpretation and application that promotes the objects of Part VII is to be preferred to one that does not.¹¹⁷

If it is true that the additional considerations are not 'trumped'¹¹⁸ by the primary considerations, and merely 'amplify' them,¹¹⁹ it is not clear why Parliament decided to divide the section 60CC factors into two distinct categories, rather than leaving them in one list. The Explanatory Memorandum to the 2006 Amendments stated, 'The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the Act which are set out in the new section 60B'.¹²⁰ It also stated that 'these objects are elevated to primary considerations as they deal with important rights of children and encourage a child-focused approach'.¹²¹ However, given that the considerations listed as 'primary' are also included as 'objects' in section 60B and, further, that Parliament envisioned there may be instances where the additional considerations 'may outweigh the primary considerations',¹²² the need to divide the section 60CC factors into two categories may be queried. Further, it could be said

¹¹⁵ Ibid, [22]; However, note that Parliament referred to the 'additional' considerations as 'factors in the secondary list', 'secondary considerations' and 'secondary factors' (Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [50], [51]).

¹¹⁶ FLA s60B(1); *B and B: Family Law Reform Act 1995* (1997) FLC 92-755; Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers', above n109, 182.

¹¹⁷ Ibid, 182.

¹¹⁸ *G and A* [2007] FCWA 11 (Unrep, Thackray J, 12 January 2007).

¹¹⁹ Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers', above n109, 187.

¹²⁰ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [49].

¹²¹ Ibid, [52].

¹²² Ibid, [51].

that *all* the factors listed in section 60CC, not just those classified as ‘primary’, deal with important rights of children and encourage a child-focused approach.

It is easy to see how, as argued by Parkinson,¹²³ consideration of some additional factors can assist the court to determine the significance of primary factors. For example, there is a clear correlation between examining the nature of the child’s relationship with each of the child’s parents (s60CC(3)(b)(i)) (an additional consideration) and determining the benefit to the child of having a meaningful relationship with both parents (s60CC(2)(a)) (a primary consideration). Further, if a dispute involves allegations of physical violence against a child, additional factors such as the capacity of each of the child’s parents to provide for the needs of the child (s60CC(3)(f)(i)), each parent’s attitude to the child and to the responsibilities of parenthood (s60CC(3)(i)), and any family violence involving the child (s60CC(3)(j)), will be highly relevant to the court’s determination of the primary consideration of the need to protect the child from harm (s60CC(2)(b)).

However, it is not clear how an examination of children’s views directly relates to either of the primary considerations. Indeed, a child’s views are likely to be largely irrelevant to a consideration of protecting the child from harm (s60CC(2)(b)), as a court will take steps to protect a child regardless of the child’s views on that matter. As for the primary consideration of the benefit to the child of having a meaningful relationship with both parents (s60CC(2)(a)), the child’s views on their relationships with their parents and what parenting orders should be made may be relevant to the court’s determination of whether the child would benefit from having a meaningful relationship with a parent and, if so, how that may be achieved. However, it is submitted that the examination of a child’s views is no more relevant to this primary consideration than it is to any other consideration listed in section 60CC. For example, views expressed by a child may be relevant to the nature of the relationship of the child with each of the child’s parents and other persons (s60CC(3)(b)), the likely effect of any changes in the child’s circumstances, including the likely effect of any separation from either parent, any other child or other person (s60CC(3)(d)) and

¹²³ Parkinson, ‘Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers’, above n109, 183. See more detailed discussion above.

the capacity of each parent or any other person to provide for the child's needs (s60CC(3)(f)).

The requirement for the court to consider any views expressed by a child has, at best, been left behind and, at worst, been demoted by Parliament in favour of two other considerations which Parliament has deemed more 'important'.¹²⁴ This has occurred with no satisfactory explanation for the apparent change. There is no doubt that the considerations listed as 'primary' are both factors of great importance. A child's right to have a meaningful relationship with each of their parents, and their right to be protected from harm are both enshrined in the UNCRC (Article 9.3 and Article 19.1)¹²⁵ As noted, these factors are also included as 'objects' of Part VII of the FLA, to 'ensure that the best interests of children are met'.¹²⁶ However, the right of children to express their views and have them taken into account in decision-making is also an important right enshrined in the UNCRC (Article 12). If Parliament is to maintain the divide between 'primary' and 'additional' considerations, it is submitted that the requirement to consider children's views should be included as both a 'primary' consideration under section 60CC(2) and an 'object' of Part VII of the FLA under section 60B.¹²⁷

Although the requirement to consider children's views appears to hold less importance under the FLA than it did prior to the 2006 Amendments, there is no evidence to date that, in practice, the court considers children's views to have less

¹²⁴ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [49].

¹²⁵ Although, note that Article 9.3 of UNCRC refers to a child's right to 'maintain personal relations and direct contact with both parents' and does not expressly include the term 'meaningful relationship'.

¹²⁶ FLA s60B.

¹²⁷ In the Australian government's *Fourth Report under the Convention on the Rights of the Child*, specific reference is made to the protection of children from harm being 'elevated to the status of primary factor to be considered by the court', pursuant to the 2006 Amendments. No mention is made in the report of the placement of children's views in the list of 'additional' considerations. In relation to children's views, the report states that the 2006 Amendments have replaced reference to 'wishes' in the FLA to 'views' and that 'independent children's lawyers act as advocates for the best interests of the child'. This is misleading, as independent children's lawyers are not appointed in all children's cases (see Chapter Three) (*Fourth Report under the Convention on the Rights of the Child*, Australia (2008) [80-81], [143],

<[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(084A3429FD57AC0744737F8EA134BACB\)~Fourth+Australian+CRC+Report+-+Proofread+Version++May+2009.DOC/\\$file/Fourth+Australian+CRC+Report+-+Proofread+Version++May+2009.DOC](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~Fourth+Australian+CRC+Report+-+Proofread+Version++May+2009.DOC/$file/Fourth+Australian+CRC+Report+-+Proofread+Version++May+2009.DOC)> at 15 December 2010).

importance than previously. As will be seen in the analysis below of cases that considered the significance of children's views, the court has consistently held that children's views are of great importance in decision-making. It does not appear that this position has changed after the 2006 Amendments. There has not yet been any judicial comment made on whether the division of the section 60CC factors into two tiers has led to a demotion of children's views. Nevertheless, a clearer picture of whether, in effect, a demotion of children's views has occurred will emerge as the body of post-2006 Amendments case law develops.

Regardless of whether the division of section 60CC factors into 'primary' and 'additional' considerations has lessened the importance of children's views, the views of children are only one factor amongst many others which the court is required to take into account.¹²⁸ Ultimately, the court's mandate in making decisions about children is to regard the best interests of the child as the paramount consideration.¹²⁹ The court starts from this essential premise and it remains the final determinant.¹³⁰ If the court believes the best interests of a child will be served by making an order which is contrary to views the child has expressed, the court will nevertheless make that order.¹³¹

Section 60CC(3)(a) is also qualified in that the court is required to consider 'any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to children's views'. Prior to 1995, the only qualification to the requirement to take children's views (then wishes) into account was the requirement that those wishes be given such weight as the court considered

¹²⁸ Nevertheless, case law has consistently held the views of children to be a very important factor in decision-making. See analysis of cases which have discussed the importance of children's views below.

¹²⁹ FLA s60CA.

¹³⁰ *B and B: Family Law Reform Act 1995* (1997) FLC 92-755, 84,219.

¹³¹ Note Chisholm's view that, notwithstanding the 2006 Amendments, a judge's role remains to decide what he or she ultimately believes is in the best interests of the child, using the legislation for guidance, and to act on it. Therefore a judge need not reach a different result on the basis of the 2006 Amendments than he or she would have reached before (Chisholm, 'Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006', above n113, 169-172). This differs from Parkinson's view that, by requiring judges to follow the path set out for them in Part VII, it is unlikely that Parliament did not intend to change the outcomes in some cases, or that it intended its legislative objectives to be subordinated to the personal values of judges about what is in the best interests of children (Parkinson, 'The Values of Parliament and the Best Interests of Children- A Response to Prof Chisholm', above n108, 227).

appropriate in the circumstances of the case.¹³² Specific reference to the child's 'maturity or level of understanding' was introduced in 1995 and continues in the current section 60CC(3)(a). This qualification was adopted from the *Children Act* 1989 (UK) and reflects the wording of UNCRC Article 12.1.¹³³ Henaghan and Tapp argued that this qualification to section 60CC(3)(a) is unnecessary to protect children because their best interests remain the paramount consideration.¹³⁴ Specific reference to children's maturity and level of understanding when determining what weight to give to children's views is a superfluous qualification to section 60CC(3)(a) and, arguably, could indicate an intention by Parliament that children's views are not intended to be regarded very highly.¹³⁵

2.3.2 Failure to implement Article 12 of the UNCRC

The foregoing reveals that there is a serious question as to whether Australia's family law legislation is compatible with Australia's international obligations pursuant to UNCRC:¹³⁶ after all, Australia has ratified the UNCRC but has not specifically implemented the articles of the UNCRC in domestic legislation.¹³⁷ Pursuant to the FLA, any views that are expressed by a child must be considered,¹³⁸ which is consistent with the part of Article 12 which requires decision-makers to take account of children's views. Nevertheless, the FLA does not specifically grant children a right to express their views, nor is there a statutory provision which ensures children have

¹³² FLA s64(1)(b) (repealed).

¹³³ Family Law Council, *Letter of Advice to the Attorney-General on the Operation of the (UK) Children Act 1989* (1994) recommendation 4. Note that the UNCRC refers to the views of the child being given weight in accordance with 'the age and maturity of the child', rather than the child's 'maturity and level of understanding', which is the wording in the FLA s60CC(3)(a).

¹³⁴ M Henaghan and P Tapp, 'Judicial and Legislative Conceptions of Childhood and Children's Voices in Family Law' in A Smith, M Gollop, K Marshall and K Nairn (eds), *Advocating for Children: International Perspectives on Children's Rights* (2000) 66; FLA s60CA.

¹³⁵ N Thomas and C O'Kane, 'When Children's Wishes and Feelings Clash with their Best Interests' (1998) 6 *International Journal of Children's Rights* 137, 138. See the views of Principal Judge of the Family Court of New Zealand, Judge Boshier, on the significance of removing reference to the child's age and maturity in the equivalent section of the *Care of Children Act* 2004 (NZ) (Judge P Boshier, 'The Care of Children Act 2004: Does it Enhance Children's Participation and Protection Rights?' (2005) 9(2) *Children's Issues* 7, 8). Further, cases post-1995 have made clear that children's views retain the same importance as prior to the inclusion of this limitation (see cases decided after 1995 discussed at 2.3.3, and discussion at n155 below).

¹³⁶ R Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197, 202.

¹³⁷ Note, however, that some aspects of the UNCRC have been incorporated into the FLA, including in FLA s60B, the 'objects and principles' section.

¹³⁸ FLA s60CC(3)(a).

the opportunity to be heard. Legislation in New Zealand and Scotland, for example, in line with the UNCRC obligations, specifically state that children must be given reasonable opportunities to express their views.¹³⁹ The FLA contains no such provision.¹⁴⁰ Significantly, there is no reference to a child's right to be heard and express their views in the objects and principles of Part VII of the FLA.¹⁴¹

The UN Committee on the Rights of the Child has urged all States Parties to ensure Article 12 is 'adequately integrated in all relevant domestic laws, regulations and administrative instructions'.¹⁴² It has also issued a specific recommendation to Australia that the right of the child to express his or her views in all matters affecting him or her be expressly provided for in the FLA.¹⁴³

Graham and Fitzgerald have expressed a concern that:

By failing to fully implement a child's right to be heard as expressed in Article 12 of UNCROC, the legislation affords children limited opportunity to express their wishes in all family law proceedings that concern them and continues to position children at the margins of participation.¹⁴⁴

2.3.3 How s60CC(3)(a) is treated by the court

Any views expressed by a child will constitute part of the body of evidence the court will consider in making parenting orders for a child. As discussed above, the child's views are only one factor amongst a number to which the court must have regard, and children's views may be given varying weight depending on factors, such as the child's maturity and level of understanding, that the court thinks are relevant.¹⁴⁵

¹³⁹ *Care of Children Act* 2004 (NZ) s6(2)(a) states that a child must be given reasonable opportunities to express views on matters affecting the child. A similar provision is found in the *Children (Scotland) Act* 1995 s11(7)(b).

¹⁴⁰ Arguably, a child's right to express their views in family law proceedings could be inferred from FLA s60CE, which prohibits the court or any person from requiring a child to express his or her views in relation to any matter. It could be said that the fact a child cannot be compelled to express their views infers that children have a right to express their views. However, there have been no judicial or legislative pronouncements to this effect.

¹⁴¹ Chisholm, 'Children's Participation in Family Court Litigation', above n136, 201.

¹⁴² United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard*, above n36, [42].

¹⁴³ United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Art 44 of the Convention, Concluding observations: Australia*, [30], CRC/C/15/Add.268 (2005).

¹⁴⁴ A Graham and R Fitzgerald, 'Taking Account of the 'To and Fro' of Children's Experiences in Family Law' (Paper presented at the Childhoods Conference, Oslo, June 2005).

¹⁴⁵ FLA s60CC(3)(a).

Nevertheless, Australian cases have emphasised that, in any given case, an expression of children's views is an important consideration in making a decision, and such views should be given proper and realistic weight.¹⁴⁶ Failure to do so has been held to amount to an appealable error.¹⁴⁷

In *Fitzgerald and Robinson*¹⁴⁸, the court made a decision according with the views of two children, aged 12 and 9, who each wanted to live with one of their parents. The judge took into account the strength of the views and the fact each child's decision was well-informed, and ordered the 12 year old male to live with the father and the 9 year old girl to live with the mother, even though this was against the wishes of both parents, who did not want the children to be separated. Wood J noted the children had expressed their views 'very forcibly', remarking that 'in a case where there is little to choose between the competing proposals of the parents, a well-founded expression of the child's desires can frequently be the determining factor in resolving the issue of the child's placement'.¹⁴⁹

The Full Court in *Joannou and Joannou*¹⁵⁰ affirmed that a court must have regard to children's views, regardless of their age. The trial judge determined not to take notice of the wishes of four children aged 4-8, due to their young age. The Full Court said this approach was wrong. The evidence of wishes (now views) of children of this age would not be irrelevant; the evidence may or may not be helpful, depending upon factors which would only become clear upon their wishes being obtained. The case emphasised the importance of children's views in the court's deliberations as to what parenting orders to make.

Perhaps the most definitive statement about the importance of a court considering children's views was made in *H and W*¹⁵¹. The case was appealed on the ground that the trial judge had given insufficient weight to the views of children aged 7 and 8. The Full Court allowed the appeal. In their joint judgment, Fogarty and Kay JJ stated that children's views are important and ought to be given proper and realistic

¹⁴⁶ *H and W* (1995) FLC 92-598; *R and F* (1996) FLC 92-650.

¹⁴⁷ *Joannou and Joannou* (1985) FLC 91-642; *H and W* (1995) FLC 92-598.

¹⁴⁸ *Fitzgerald and Robinson* (1978) FLC 90-401.

¹⁴⁹ *Ibid*, 77,062.

¹⁵⁰ *Joannou and Joannou* (1985) FLC 91-642.

¹⁵¹ *H and W* (1995) FLC 92-598.

weight.¹⁵² Their Honours noted that the court will attach varying degrees of weight to a child's wishes (now views) depending upon, amongst other factors, the strength and duration of their wishes, their basis and the maturity of the child.¹⁵³ Ultimately the overall welfare (now best interests) of the child remains the ultimate determinant.¹⁵⁴ In a separate judgment, Baker J said: 'In my opinion, a child's wishes must not only be considered, but must be shown to have been considered... If the trial judge decided to reject the wishes of a child, then clear and cogent reasons for such a rejection must be given'.¹⁵⁵

In *K and Z*¹⁵⁶ the trial judge ignored the strong views of two children aged 8 and 6, who wanted to live with their mother. Despite evidence that the children would suffer extreme sadness and grief if not in their mother's care, the judge found the mother had influenced the children, and their strong desire to live with her was partially attributable to that influence. The Full Court reversed the decision, finding that the trial judge had failed to sufficiently take into account the maturity of the children and the duration of their wishes. It held that, in cases where both parents are able to provide reasonable homes and comparable care, the strongest and perhaps determinant factor will be the children's views. The children were allowed to live with their mother.

Despite these strong statements of the importance of children's views, there is no question that even strongly held views of a child will be departed from where the best interests of the child require a result contrary to those views. In *R and R: Children's Wishes*,¹⁵⁷ a father tried to argue that children's wishes should never be departed from where they are soundly and genuinely based. The Full Court disagreed and said that,

¹⁵² Ibid, 81,944.

¹⁵³ Ibid, 81,947.

¹⁵⁴ Ibid 81,948.

¹⁵⁵ Ibid 81,967. Note that this case was decided on the pre-1995 wording of s64(1)(b) (now repealed) which did not require the court to consider the child's 'maturity or level of understanding' in determining how much weight to give children's views. Despite this, this case was considered to be the leading authority on children's views, and often referred to in cases post-1995. This lends weight to the argument above that specific reference in FLA s60CC(3)(a) and its predecessor s68F(2)(a) (now repealed) to children's maturity and level of understanding when determining the weight to give children's views is unnecessary and superfluous.

¹⁵⁶ *K and Z* (1997) FLC 92-783.

¹⁵⁷ *R and R: Children's Wishes* (2000) FLC 93-000.

while the Full Court in *H and W*¹⁵⁸ did emphasise the importance of children's views, it did not say they should never be departed from. Appropriate and careful consideration must be given to children's wishes and, when the trial judge's decision goes against validly held wishes, they must show good reason for doing so. The weight to be given to children's wishes will vary in the circumstances of each case.

In a 2003 study of 91 cases that went to trial in the Family Court, children's wishes were regarded as of moderate or high importance to the outcomes in nearly 30% of cases.¹⁵⁹ As will be seen in Chapter Five, in interviews with the author, judges of the Family Court have expressed how important the views of children are to their decision-making. This includes, at times, views expressed by even very young children.

The 2006 Amendments to the FLA, and particularly the division of section 60CC into 'primary' and 'additional' considerations,¹⁶⁰ changed the way in which the court determines what is in children's best interests. Fehlberg and Behrens argued that, as a result of children's views being classified as an 'additional' consideration, children's views may no longer have such importance in their own right but may be used, for example, to 'inform the answer to whether there is a prospect of the child having a meaningful relationship with both parents'.¹⁶¹ Without guidance from the Full Court, or intervention from Parliament,¹⁶² the issue of whether children's views are to be treated differently under the 2006 Amendments to the FLA remains in doubt. As discussed in Chapter Six, it appears that children's views under the FLA have a less

¹⁵⁸ *H and W* (1995) FLC 92-598.

¹⁵⁹ Family Court of Australia, *Submission to the Standing Committee on Family and Community Affairs Inquiry into Joint Custody Arrangements in the Event of Family Separation*, (2003) Part B, 10 <<http://www.aph.gov.au/house/committee/fca/childcustody/subs/sub1550.pdf>> at 3 November 2009.

¹⁶⁰ FLA s60CC(2) and (3).

¹⁶¹ Fehlberg and Behrens, above n106, 280, citing Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers', above n109. See discussion above about the impact of the division of s60CC factors into 'primary' and 'additional' considerations, and particularly the differing views of Chisholm and Parkinson in relation to whether matters will be decided differently under the new regime (above n131).

¹⁶² Parkinson, 'The Values of Parliament and the Best Interests of Children- A Response to Prof Chisholm', above n108.

explicit and significant role than in some other jurisdictions, such as New Zealand and Scotland.¹⁶³

2.4 Children's desire to be heard and participate in decision-making, and the benefits from them doing so

Not surprisingly, separating parents are often worry about the effects of the separation on their children. As much as possible, parents seek to protect their children from these effects. Many parents are concerned that, if their children are invited to discuss the family separation with parents or others, it will 'upset' or 'unsettle' them.¹⁶⁴ Smart et al describe the prevailing discourse as treating children from separated families as 'objects of concern'.¹⁶⁵ Children are seen as victims of separation. Harm to children whose parents are separating is considered virtually unavoidable.¹⁶⁶

Despite the concerns of parents, children have overwhelmingly indicated that they want to have a say in decisions affecting them.¹⁶⁷ A wealth of research, conducted both in Australia and elsewhere, has consistently found that children want to be involved in decision-making processes. Many have strong opinions about the importance of being listened to and having their views taken into account when decisions about their living arrangements are made.¹⁶⁸ From the numerous studies on children's views, three main messages are apparent: that children want to know what is going on, that they generally want to be consulted and have their views taken into account, and that they would like arrangements to be flexible to meet their changing needs and circumstances.¹⁶⁹

¹⁶³ In these jurisdictions, notably, judges are also more proactive in meeting with children (see Chapter Six).

¹⁶⁴ C Smart, A Wade and B Neale, 'Objects of Concern? Children and Divorce' (1999) 11 *Child and Family Law Quarterly* 365, 366.

¹⁶⁵ Ibid, 366.

¹⁶⁶ Ibid.

¹⁶⁷ Morrow, 'We Are People Too', above n27, 167.

¹⁶⁸ M Gollop, N Taylor and A Smith, 'Children's Perspectives of their Parents' Separation' in A Smith, N Taylor and M Gollop (eds), *Children's Voices: Research, Policy and Practice* (2000) 153.

¹⁶⁹ J Cashmore, 'Children's Participation in Family Law Matters' in Hallet and Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (2003) 160.

In this discussion, it is not intended to trivialise the disruption and trauma caused to children by family separation. Particularly when parents are in high conflict, the suffering of their children is often an unfortunate and tragic consequence.¹⁷⁰ This problem cannot be magically solved by allowing children to participate in decision-making. Nevertheless, as is discussed below, the negative effects on family separation can be lessened, and children made to feel empowered and happier about outcomes, when children feel they have been listened to and had their views taken into account.

2.4.1 Children's desire to be involved in decision-making

In a survey of young people conducted in the preparation of the Australian Law Reform Commission and Human Rights and Equal Opportunities Commission Report, *Seen and Heard*, 85% of the 623 child respondents were of the view that children should have a greater say in family law decisions.¹⁷¹ Many said that children should be able to choose where they are to live.¹⁷² However, this view is not in keeping with results of some other published research, discussed below.

In 'Objects of Concern',¹⁷³ Smart et al reported on the outcomes of two studies involving children in the UK. In the first, the 'Nuffield study', the researchers interviewed 51 children from separated families living in a wide variety of economic circumstances and parenting arrangements. The second, the ESRC study,¹⁷⁴ involved interviews with 65 children who shared their time more or less equally between both their parents. Children in both studies were aged from 4 to 22 years.¹⁷⁵

Both studies involved in-depth interviews with the children, usually on a one-on-one basis.¹⁷⁶ The interviewers made use of vignettes, posing moral dilemmas about what children should do when faced with typical problems that occur in post-divorce family

¹⁷⁰ See, for example, J McIntosh, 'Enduring Conflict in Parental Separation: Pathways of Impact on Child Development' (2003) 9 *Journal of Family Studies* 63; J Kelly, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research' (2000) 39 *Journal of the American Academy of Child and Adolescent Psychiatry* 963.

¹⁷¹ ALRC and HREOC, *Seen and Heard*, above n80, [13.55].

¹⁷² *Ibid.*

¹⁷³ Smart et al, 'Objects of Concern', above n164.

¹⁷⁴ So named because it was funded by the Economic and Social Research Council, UK.

¹⁷⁵ Smart et al, 'Objects of Concern', above n164, 366.

¹⁷⁶ *Ibid.*, 367.

life. The children were therefore drawing on their own experiences, although answering questions in the abstract.¹⁷⁷

The researchers observed that the children all appeared to assume that children have a right, to some degree, to participate in family life and have a say in family arrangements, especially when dealing with something as important as divorce.¹⁷⁸ The children interviewed presumed that all children would be given an opportunity to participate in decision-making concerning difficult issues and that people would actually listen and place value on what they said.¹⁷⁹ They 'took for granted that they would be entitled to be involved although our research with both children and parents suggests that adults are actually unlikely to involve their children or even fully inform them of what is going on'.¹⁸⁰

Interestingly, the children were also aware of the significance of age and the idea that participation rights related to a degree of maturity and knowledge. The model of involvement proposed by the children required respect, fairness and care and no exclusion or secrecy, but did not require parents to treat children as if they were adults.¹⁸¹

In another UK study, carried out in 1996-97, Morrow asked children from eight class groups from four different schools about children's participation in family decision-making.¹⁸² The children were from different socio-economic backgrounds, ages, races, and from both junior and secondary schools. The children were asked to complete a questionnaire and then discuss issues in groups. They were asked to discuss various aspects of family life, including the concepts of 'being listened to' and 'having a say' in family decision-making. Morrow found that, on the whole, the children thought they should be able to have a say in decisions which affect them. The children emphasised wanting to have a say, rather than having the power to make the decision themselves.¹⁸³ Some children felt they did have a say in family decision-

¹⁷⁷ Ibid.

¹⁷⁸ Ibid, 375.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid, 376.

¹⁸² V Morrow, *Understanding Families: Children's Perspectives*, National Children's Bureau (1998).

¹⁸³ Ibid, 43.

making, others did not.¹⁸⁴ Most felt it was important to have a say in matters affecting them, although this varied according to gender and ethnicity.¹⁸⁵

In another study by Morrow, children wrote essays about what they thought children's rights should be.¹⁸⁶ Sixty-six children aged 11-16 wrote about children's rights. Written examples collected 'suggest that children's main concern seems to be with being respected and trusted; in effect, they wanted to be regarded 'as people'.'¹⁸⁷ Coming across clearly from the accounts of these children was their feeling that their voices were seldom heard and, if heard, that they were usually discounted.¹⁸⁸ Morrow found that, in relation to issues of rights, children were not preoccupied with their exclusion from rights adults enjoy, such as the right to vote, but were more interested in their lack of autonomy and inclusion in decision-making, often with regard to mundane, everyday issues.¹⁸⁹

In a New Zealand study, Gollop et al conducted semi-structured interviews with 106 children aged 8-18 living in post-separation situations.¹⁹⁰ The study produced findings similar to those reported above:

[T]he young people stressed the importance of children being listened to and having their views taken into account when decisions which affect them are made. Many children thought it was important that they be consulted about their living arrangements and their contact with their non-resident parent.¹⁹¹

2.4.2 Children's capacity to participate and communicate effectively

Research suggests that almost all children are able to express what is important to them,¹⁹² and that children's capacity to understand family issues and participate in

¹⁸⁴ Ibid, 45.

¹⁸⁵ Ibid, 45. The researcher noted that some children of Pakistani origin were less able to relate to the concept of rights and individuality than children from Western backgrounds. Some girls of Pakistani origin expressed content that others made decisions on their behalf.

¹⁸⁶ Morrow, 'We Are People Too', above n27.

¹⁸⁷ Ibid, 153.

¹⁸⁸ Ibid, 154.

¹⁸⁹ Ibid, 155.

¹⁹⁰ Gollop et al, 'Children's Perspectives of their Parents' Separation', above n168.

¹⁹¹ Ibid, 153.

¹⁹² A Smith, N Taylor and P Tapp, 'Rethinking Children's Involvement in Decision-Making after Parental Separation' (2003) 10 *Childhood* 201, 212.

decision-making is often underestimated.¹⁹³ In all the studies discussed above, it was found that children have clear views about the changes they, and their family, face post-separation and that they are highly capable of expressing those views.¹⁹⁴

In the study by Gollop et al, the researchers found that children are able to articulate both positive and negative views about their parents' separation.¹⁹⁵ Even children as young as five were able to talk about their feelings and experiences.¹⁹⁶ Morrow agreed that quite young children can engage meaningfully with the notion of rights and being listened to.¹⁹⁷ While Morrow's research found that, on the whole, discussions about rights and participation were much fuller with older children, younger children could nevertheless engage meaningfully with notions of decision-making.¹⁹⁸

The results of these studies challenge the view that children are incompetent and vulnerable¹⁹⁹ and it is therefore inappropriate to engage them in discussions involving issues concerning family separation. The studies suggest that children are indeed often competent social actors who are able to reflect on their family's circumstances and devise ideas and strategies for coping with post-separation life. This reinforces the view that even quite young children may have sensible ideas to offer.²⁰⁰ Therefore, the issue of children expressing their views about family arrangements post-separation appears not to be so much about the child's ability to provide useful information (an ability many children clearly possess), as it is of adults' competence or willingness to elicit and listen to those views in the context of a trusting, supportive and reciprocal relationship.²⁰¹

It should be noted at this point that many children, although having the capacity to have a say in decision-making, may not wish to do so.²⁰² It is important to recognise

¹⁹³ Gollop et al, 'Children's Perspectives of their Parents' Separation', above n168, 155.

¹⁹⁴ Ibid, 153; Morrow, 'We Are People Too', above n27, 166.

¹⁹⁵ Gollop et al, 'Children's Perspectives of their Parents' Separation', above n168, 155.

¹⁹⁶ Ibid, 153.

¹⁹⁷ Morrow, *Understanding Families*, above n182, 45.

¹⁹⁸ Ibid, 40.

¹⁹⁹ Ibid, 45; Smart et al, 'Objects of Concern', above n164, 366.

²⁰⁰ Smith et al, 'Rethinking Children's Involvement in Decision-Making after Parental Separation', above n192, 207.

²⁰¹ Ibid, 212.

²⁰² Ibid, 204; P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008) 63.

the individual needs of each child, and not to generalise about what children might want.²⁰³ The studies discussed emphasise, not that all children want to be involved in family decision-making, but that children want to be given the opportunity to be involved.²⁰⁴ This also involves recognising and respecting the child's choice, should they choose not to participate in decision-making.

2.4.3 Children benefit when they feel involved in decision-making

Studies suggest that participation in decision-making is often good for children's development and sense of well-being. Children appreciate having their views sought,²⁰⁵ and involving children directly makes them 'feel respected, valued and involved'.²⁰⁶ There is evidence that the increased sense of control felt by children who are able to participate effectively in decision-making processes concerning their family separation is strongly related to children's psychological and physical health.²⁰⁷ Involving children in decision-making 'teaches them useful skills for taking responsibility, empowers them to be effective citizens, and strengthens their feelings of personal identity.'²⁰⁸ This may help facilitate children's growth towards mature and responsible adulthood.²⁰⁹

Children who feel they have been consulted about their living arrangements and kept informed about what is going on feel happier about the outcome and are more likely to accept and adhere to the decision,²¹⁰ irrespective of whether the decision accords

²⁰³ M Gollop, A Smith and N Taylor, 'Children's Involvement in Custody and Access Arrangements after Parental Separation' (2000) 12 *Child and Family Law Quarterly* 383, 398.

²⁰⁴ Raitt, above n51, 3.

²⁰⁵ Gollop et al, 'Children's Involvement in Custody and Access Arrangements after Parental Separation', above n203, 397.

²⁰⁶ Baroness Hale of Richmond, 'Children's Participation in Family Law Decision-Making: Lessons from Abroad' (2006) 20 *Australian Journal of Family Law* 119, 124.

²⁰⁷ ALRC and HREOC, *Seen and Heard*, above n80, [13.55]; J Kelly, 'Legal and Educational Interventions for Families in Residence and Contact Disputes' (2001) 15 *Australian Journal of Family Law* 92, 113.

²⁰⁸ Gollop et al, 'Children's Involvement in Custody and Access Arrangements after Parental Separation', above n203, 384.

²⁰⁹ Smith et al, 'Rethinking Children's Involvement in Decision-Making after Parental Separation', above n192, 204.

²¹⁰ Cashmore, 'Children's Participation in Family Law Matters', above n169, 159; Hale, above n206, 124.

with their views.²¹¹ Children see their views as contributing to better decisions and more workable arrangements that they could be happy living with.²¹² It is likely these children will also adjust to changes in their living arrangements more quickly.²¹³ Children have reported that they feel better when they know what is going on and feel they have some control over the situation, rather than being entirely at the 'mercy' of the actions and decisions of their parents and others.²¹⁴

A study by Parkinson et al of adolescents' views on the fairness of parenting arrangements demonstrated the importance of the connection between young people having a say and their perception of the fairness of their parenting arrangements.²¹⁵ The researchers interviewed 60 young people aged 12-19 in Australia. The more the young people thought they had been consulted about their living arrangements, the more likely they were to be happy with those arrangements.²¹⁶ The researchers found:

While many of the young people were quite happy with the living and contact arrangements, about a quarter to a third of young people, respectively, said they wanted a greater say in relation to the decisions about where they would live and how much contact they would have with their parents after separation. None said that they wanted less say than they had had over either the living or the contact arrangements. Not surprisingly, young people who said that they thought the contact arrangements were unfair were much more likely to indicate that they wanted more say in those arrangements.²¹⁷

Further, in contrast to the view that keeping children out of decision-making processes following family break up will protect them from undue suffering, research has shown that children who are kept informed and given an active role in decision-making are more likely to cope with the stress of their parents' separation and adjust to the ensuing changes in their lives.²¹⁸ Smith et al wrote:

²¹¹ See the discussion below about children's understanding of the difference between 'having a say' and making a decision, and their expressed preference to participate, without being responsible for the ultimate decision.

²¹² Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n202, 68.

²¹³ Gollop et al, 'Children's Perspectives of their Parents' Separation', above n168, 155.

²¹⁴ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n202, 67.

²¹⁵ P Parkinson, J Cashmore and J Single, 'Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation' (2005) 43 *Family Court Review* 429, 439.

²¹⁶ *Ibid*, 433.

²¹⁷ *Ibid*, 439.

²¹⁸ See P Tapp and M Henaghan, 'Family Law: Conceptions of Childhood and Children's Voices - the Implications of Article 12 of the United Nations Convention on the Rights of the Child' in A Smith, N Taylor and M Gollop (eds), *Children's Voices: Research, Policy and Practice* (2000)

It is clear that when children are given the opportunity to participate, their competence and capability as social actors in actively coping with family problems and in assisting with the legal resolution of family disputes, is enhanced.²¹⁹

The harmful effects of parental separation can therefore be lessened, and children's resilience strengthened, by giving children the opportunity to participate appropriately in decision-making.²²⁰

Studies have shown that excluding children from decision-making processes only heightens the pain, confusion and other negative effects felt as a result of the family separation.²²¹ Keeping children in the dark about family separation and ensuing transitions can make children feel disempowered and isolated,²²² and may inhibit children's resilience in coping with family difficulties.²²³ Failure to keep children informed and to consult with them may lead to increased distress for children and feelings of rejection.²²⁴ Taylor argued:

Children lacking information about the separation are also more likely to suffer from such symptoms as anxiety, depression and conduct disorder, to exhibit distress and to blame themselves for their parents' separation. They cope better if they have appropriate information and involvement, and are helped to understand the changes and to participate actively in them. Ideally, children's participation in decision-making processes should start early as it has many benefits for the development of personal identity, moral reasoning, competency, and increases children's satisfaction with the outcome of any decision reached.²²⁵

In the study by Gollop et al discussed above,²²⁶ the researchers found that, of all the children interviewed, those who felt they were not listened to, or who were forced into arrangements which they did not like or could not change, appeared to be the most

95; Gollop et al, 'Children's Perspectives of their Parents' Separation', above n168, 155; Kelly, above n207, 113.

²¹⁹ Smith et al, 'Rethinking Children's Involvement in Decision-Making after Parental Separation', above n192, 211.

²²⁰ ALRC and HREOC, *Seen and Heard*, above n80, [16.3]; Smith et al, 'Rethinking Children's Involvement in Decision-Making after Parental Separation', above n192, 201.

²²¹ N Taylor, 'What Do We Know about Involving Children and Young People in Family Law Decision Making? A Research Update' (2006) 20 *Australian Journal of Family Law* 154, 164.

²²² Gollop et al, 'Children's Involvement in Custody and Access Arrangements after Parental Separation', above n203, 398.

²²³ Ibid, 385.

²²⁴ Gollop et al, 'Children's Perspectives of their Parents' Separation', above n168, 155; J Fortin, *Children's Rights and the Developing Law* (2003), 203.

²²⁵ Taylor, 'What Do We Know about Involving Children and Young People in Family Law Decision Making?', above n221, 165.

²²⁶ Gollop et al, 'Children's Involvement in Custody and Access Arrangements after Parental Separation', above n203.

dissatisfied. Some of these children simply refused to comply with the decisions imposed upon them.²²⁷ The researchers stated, 'This illustrates that when children are not consulted or their views are not heard by adults, then the likelihood of family friction and unworkable arrangements is greatly enhanced.'²²⁸ Chisholm summarised the situation as follows:

It is very easy to overlook the importance of consulting children and thinking about their understanding of what is going on, and failing to do so can be very distressing to children, and a violation of their rights.²²⁹

2.4.4 'Having a say' does not mean deciding

There is a difference between children being listened to, consulted and provided with information, and children being asked to actually make the decision.²³⁰ Many popular discussions of children's rights regard children's autonomous decision-making as the dominant theme.²³¹ The unfair burden of responsibility is frequently raised as a reason for keeping children out of post-separation discussions and ignoring their views.²³² In contrast to this popular discourse, research has found that many children who want to 'have a say' in decisions that affect them do not necessarily want to take responsibility for making the final decision.²³³ Encouraging children's participation in family decision-making and legal processes does not mean that children's views should be determinative, or that children should be given sole responsibility for decisions.²³⁴

Earlier in this chapter, the 'paramountcy principle' was discussed. That is, in making parenting orders for children, the court must regard the best interests of a child as the

²²⁷ Ibid, 397.

²²⁸ Ibid, 397.

²²⁹ Chisholm, 'Children's Participation in Family Court Litigation', above n136, 199.

²³⁰ Morrow, *Understanding Families*, above n182, 48; Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n202, 16.

²³¹ Morrow, 'We Are People Too', above n27, 166.

²³² Chisholm, 'Children's Participation in Family Court Litigation', above n136, 217; Smith et al, 'Rethinking Children's Involvement in Decision-Making after Parental Separation', above n192, 204.

²³³ Morrow, *Understanding Families*, above n182, 45; Gollop et al, 'Children's Involvement in Custody and Access Arrangements after Parental Separation', above n203, 397; C Smart and B Neale, 'It's My Life Too: Children's Perspectives on Post-Divorce Parenting' (2000) 30 *Family Law* 163; Morrow, 'We Are People Too', above n27; Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n202, 66.

²³⁴ Smith et al, 'Rethinking Children's Involvement in Decision-Making after Parental Separation', above n192, 204; Kelly, above n207, 113.

paramount consideration.²³⁵ In all proceedings involving children, the views of the child will ultimately be subordinate to what is in a child's best interests.²³⁶ If the child's views are considered to be contrary to what is in their best interests, a decision that goes against the child's views will be made. Similarly, a decision that accords with a child's views will be made only if this would lead to a result that a court believes, in all the circumstances, to be in the child's best interests. In the context of determining living arrangements post-separation, it is difficult to think of a situation where it may be in a child's best interests to have decision-making autonomy except, perhaps, in the case of near-adult children. To give children decision-making responsibility for post-separation decisions may give children a level of power and authority that they are not equipped to bear.²³⁷ This may also affect children's relationships with their parents who may change the way they relate to their child out of fear the child will express a choice for living with the other parent.²³⁸ These consequences would not be in children's best interests. Nevertheless, it is important for children to make their views and feelings known to their parents, to the court and to others. Many children may appreciate the chance to make those views and feelings known, while realising and accepting that the decision is up to adults to make.²³⁹

Research data support the view that children are able to understand the important difference between participating in a decision and having their views considered, and being required to make a decision.²⁴⁰ In Neale and Smart's research, the children interviewed drew a distinction between making an autonomous choice (seen as difficult), and participating in joint decision-making with family members (seen as appropriate).²⁴¹ Most children considered being required to choose their post-

²³⁵ FLA s60CA.

²³⁶ The 'best interests' principle is found in both the UNCRC and the FLA. See discussions earlier in this chapter.

²³⁷ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n202, 16; R Warshak, 'Payoffs and Pitfalls of Listening to Children' (2003) 52 *Family Relations* 373, 374.

²³⁸ *Ibid.*

²³⁹ Chisholm, 'Children's Participation in Family Court Litigation', above n136, 217. Perhaps this indicates that children are aware that their views may be different to what is in their best interests, and that adults are ultimately responsible for determining an outcome that is in their best interests.

²⁴⁰ Gollop et al, 'Children's Involvement in Custody and Access Arrangements after Parental Separation', above n203, 397; Smart et al, 'Objects of Concern', above n164, 376; J Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 *Virginia Journal of Social Policy and the Law* 129, 151.

²⁴¹ Neale and Smart, 'Agents or Dependents?' above n23, 12.

separation living arrangements was unfair because it entailed too much responsibility and the risk of hurting one of their parents. Only where there was abuse or real hatred, or where one parent would clearly not care properly for a child, did the children think it was legitimate for a child to make a decision.²⁴² The children interviewed understood that choice and participation were not the same thing, and that a child's ability to choose is not the same as their desire to do so.²⁴³

Most children want to have a say, but they do not necessarily want to take responsibility for the decision.²⁴⁴ Children prefer to take part collaboratively in the process of decision-making during family transitions rather than making decisions autonomously.²⁴⁵

Of the 60 young people interviewed in the Parkinson, Cashmore and Single study, only 13 said that it ought to be up to children to choose their residence and contact arrangements. For most of the respondents, having a say equated with something less than having the right to decide for themselves.²⁴⁶ Smart and Neale also found that most children in their study did not aspire to make autonomous choices over residence and contact, but instead wished to participate in a democratic process of decision-making. They considered participation in decision-making as most appropriate for their families, rather than choice.²⁴⁷ Gollop et al had similar findings in their study.²⁴⁸

It is acknowledged that children who express strong views about their post-separation parenting arrangements may nevertheless be disappointed if the ultimate decision does not accord with their views. While children have said that they do not want to be responsible for making decisions about post-separation parenting, they may

²⁴² Smart et al, 'Objects of Concern', above n164, 376. Although the children in the study expressed this view, allowing a child who is the victim of abuse to make a determination about their living arrangements may also be inappropriate, as an abusive power relationship may result in a decision contrary to what is in the child's best interests. Children may align themselves with a parent of whom they are fearful, or the parent they regard as most unstable (Warshak, above n237, 375).

²⁴³ Neale and Smart, 'Agents or Dependents?' above n23, 12.

²⁴⁴ Kelly, above n240, 151.

²⁴⁵ Taylor, 'What Do We Know about Involving Children and Young People in Family Law Decision Making?', above n221, 163.

²⁴⁶ Parkinson et al, 'Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation', above n215, 439.

²⁴⁷ Smart and Neale, 'It's My Life Too', above n233, 166.

²⁴⁸ Gollop et al, 'Children's Involvement in Custody and Access Arrangements after Parental Separation', above n203.

nevertheless expect the decision-maker to make a decision which accords with their views. Therefore, it is of vital importance that children are informed from the outset first, of the various ways in which their views can be expressed and second, of the use that will be made of their views. Particularly they should be informed that their views will be taken into account but may not necessarily be followed; and that the court's role is to make a decision which the court believes is the child's best interests, and not one which necessarily accords with the child's views.²⁴⁹ It is important that the child feels the expression of their views has not been merely tokenistic or ignored.²⁵⁰ Children must be assured that they have been listened to, even if their views are not followed. Even if, after all these matters have been explained, children are still disappointed with an outcome which does not accord with their views, it is argued that their dissatisfaction may be lessened by the fact they have been listened to and this must be contrasted with the feelings of frustration and disappointment felt by children who are not given an opportunity to participate.²⁵¹

2.4.5 Benefits of children's participation for decision-making

Debates about the effects on children of family breakdown and post-separation living arrangements have generated an image of children as passive and vulnerable, and in need of protection.²⁵² Adults have expressed a fear of overburdening children by involving them in post-separation issues.²⁵³ As the studies discussed in this section have shown, children can be capable and active participants in decisions about their welfare. Family and legal decision-making can be approached very differently if adults see children as capable and willing to engage in decisions which affect them.²⁵⁴ The challenge for parents and decision-makers will be to overcome the tension

²⁴⁹ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n202, 63; United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, above n5, [41].

²⁵⁰ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n202, 63; United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, above n5, [45].

²⁵¹ See, for example, the results of the study reported in Gollop et al, 'Children's Involvement in Custody and Access Arrangements after Parental Separation', above n203.

²⁵² Morrow, *Understanding Families*, above n182, 49.

²⁵³ Ibid.

²⁵⁴ Taylor, 'What Do We Know about Involving Children and Young People in Family Law Decision Making?', above n221, 158.

between wanting to protect children from the harmful effects of family conflict, and enabling children to be active participants in their own welfare.²⁵⁵

Aside from the benefits for children which have been discussed, involving children adds a level of knowledge and information to decision-making processes which may not be otherwise attainable. The result of this may be that decisions are made which are, on the whole, better for children and their families. As Smart et al wrote:

One of the ironies of this exclusion of children from open discussions about divorce and changes in family life is that they are a fount of knowledge and information themselves on what it is like, on how to cope, on how to intervene (even in limited ways), and what it all feels like. They may have a very different perspective on the process when compared to parents, and they may even have solutions to some of the typical problems thrown up by parenting across households. We may have a lot to learn about divorce from children if we suspect the presumption that they are damaged goods in need of protection.²⁵⁶

Even where listening to children does not add anything to the outcome of a decision, Atwool argued that at least children 'have had a chance to have a say and this may make it easier to live with the consequences. There is nothing more damaging than the pervasive sense of powerlessness that results from having no voice'.²⁵⁷

2.5 Conclusion

This chapter has identified three important but equally compelling reasons why the court should take account of children's views when making decisions about children's living and care arrangements after family separation. These are: children's right to be heard pursuant to the UNCRC, the legislative requirement to take children's views into account and children's desire to participate in decision-making.

Children have expressed very clearly that they want to have an opportunity to be heard decisions that affect them. More importantly, children feel they have a right to have their views taken seriously. The right to participate in decision-making is enshrined in international law, to which Australia has accepted by ratifying the UNCRC.

²⁵⁵ Morrow, *Understanding Families*, above n182, 49-50

²⁵⁶ Smart et al, 'Objects of Concern', above n164, 366-367.

²⁵⁷ N Atwool, 'Children's Participation in Decision-Making' (Paper presented at Children's Issues Centre 6th Child and Family Policy Conference, Dunedin, 31 July 2005), 11.

The UNCRC has not been implemented in domestic law and, indeed, there is no legislative provision granting children a right to participate in family law decision-making. Section 60CC(3)(a) of the FLA, however, compels a court to have regard to any views expressed by a child in making a decision in the best interests of that child. This means, at the very least, that the court must take steps to ascertain what the views of each child are in every proceeding,²⁵⁸ and have regard to any views expressed in making their decision. The court retains discretion as to how much weight to afford to any views expressed.

In conclusion, it is important for a court, in making decisions for children after their parents have separated, to listen to children's views and to take those views seriously. Insufficient recognition is currently given, in legislation or in practice, to the capacity of children to express their views and to their right to be heard in proceedings which affect them. It is argued that valuable benefits can be gained, both for children and for the decision-making process, by allowing children to participate in family law decision-making.

Of course, as was discussed in Chapter One, it is far better for children and their families if matters are resolved without the need for court intervention. Parents should listen to what their children have to say from early stages of the decision-making process. This thesis is necessarily confined to matters that have not been able to be resolved, and have entered the trial phase of the court's processes. Therefore, although children's views should be taken into account at all stages and by all people involved in a family separation, including parents, counsellors and mediators, this thesis only examines the court's methods of hearing children's views. In the following chapter, the various methods by which a court may hear a child's voice are explored.

²⁵⁸ Although note FLA s60CE which states that children cannot be required to express their views in relation to any matter.

Chapter Three

3 How judges hear children's views

3.1 Introduction

This chapter looks at the various ways in which judges can receive evidence of children's views. As discussed in Chapter Two, the court must take numerous factors into account in making a parenting order for a child, including 'any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'.¹

The methods by which children's views are expressed are very important as each may yield new information about the nature, validity and strength of those views. This information constitutes valuable evidence for the court to weigh up in making the ultimate decision. In making a parenting order, the court must regard the best interests of the child as the paramount consideration.² Ensuring the court receives evidence that is useful, current and accurate enables it to make decisions that are in the best interests of children.

This chapter explores in turn the different methods by which the court hears children's views and discusses the advantages and limitations of each method. It is argued that the presentation of evidence of children's views should achieve two main objectives. First, children should be assured that they have been given an opportunity to express their views, pursuant to their rights in Article 12 of the *United Nations Convention on the Rights of the Child* ('UNCRC'),³ and that any views they have expressed will be taken into account in the ultimate decision. Second, the court should be provided with evidence of children's views that is relevant, accurate and therefore assists it to make the ultimate decision.

¹ *Family Law Act* 1975 (Cth) ('FLA') s60CC(3)(a).

² FLA s60CA.

³ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

While evidence from an expert in children's welfare is likely to yield the most valuable evidence of children's views, it is contended that ideally the court should receive information about those views from a variety of sources to ensure that all pertinent evidence has been ascertained and to satisfy children that their views have been heard. The most appropriate methods of ascertaining the views of a child should be determined in the individual circumstances of each case.

It should be noted that this chapter focuses on methods of hearing children's views that occur in the trial phase of proceedings. Methods that involve the collection of children's views prior to a matter being listed for trial, such as child-inclusive mediation, are not discussed in this chapter and are generally outside the scope of this thesis.⁴

3.2 Methods of hearing children's views

Section 60CD(2) of the *Family Law Act* 1975 (Cth) ('FLA') specifies three ways by which the court may inform itself of a child's views: it may have regard to anything contained in a report given to the court under section 62G(2); it may make an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or it may inform itself of a child's views by such other means as it thinks appropriate, subject to the applicable Rules of Court.⁵ Notwithstanding these methods, the FLA states that nothing permits the court or any person to require a child to express their views in relation to any matter.⁶

3.2.1 Expert report

Pursuant to section 62G(2), the court may direct a family consultant to provide a report 'on such matters relevant to the proceedings as the court thinks desirable'.⁷ A family consultant⁸ is a psychologist or social worker who specialises in child and

⁴ See Chapter One for brief discussion about child-inclusive mediation, such as the Child Responsive Program, and the various stages of children's proceedings.

⁵ FLA s60CD(2). The 'applicable Rules of Court' are the *Family Law Rules* 2004 (Cth) ('the Rules').

⁶ FLA s60CE.

⁷ FLA s62G(2).

⁸ Defined in FLA s11B.

family issues after family separation.⁹ Based on discussions with the child and each parent and observations of the child's interactions with each parent,¹⁰ the family consultant will prepare a report on the family's circumstances including the family consultant's recommendations on parenting arrangements they consider to be in the best interests of the child.¹¹ The report is adduced into evidence and the family consultant can be cross-examined and questioned as to the bases for their views.¹²

The family consultant must ascertain the views of the child and include those views in their report¹³ unless to do so would be inappropriate due to the child's age or maturity, or 'other special circumstance'.¹⁴ A family report is a very common method of providing children's views to the court. It is estimated that family reports are ordered in around 60% of contested children's matters.¹⁵ From July 2004 to June 2005 over 3,000 reports were ordered in the Family Court of Australia, the Federal Magistrates Court of Australia and the Family Court of Western Australia.¹⁶

Where a case involves complex issues, such as allegations of child abuse or mental health issues, the parties or the court may appoint an independent 'single expert witness' with specialist knowledge in that area to provide a report.¹⁷

Evidence of children's views provided by a report from a family consultant or other expert is 'valuable and relevant material to assist a judge in forming his (sic) ultimate conclusions'.¹⁸ Due to the expertise of report writers, reports are usually highly

⁹ Family Law Courts, *Family Consultants*, Fact Sheet

<http://www.familylawcourts.gov.au/wps/wcm/resources/file/ebf0b70be149875/Family_consultants_120207.pdf> at 12 July 2010.

¹⁰ Observation is a technique used more often with younger children (P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008) 127).

¹¹ *Ibid*, 47.

¹² *Ahmad and Ahmad* (1979) FLC 90-633, 78,295; *Hall and Hall* (1979) FLC 90-713, 78,819.

¹³ FLA s62G(3A).

¹⁴ FLA s62G(3B).

¹⁵ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (ALRC and HREOC), *Seen and Heard: Priority for Children in the Legal Process*, Report no 84 (1997) [16.35]; J Cashmore, 'Children's Participation in Family Law' in C Hallett and A Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (2003) 163.

¹⁶ Family Law Council, *Statistical Snapshot of Family Law 2003-2005* (2007), 37.

¹⁷ Rules, Div15.5.2.

¹⁸ *Hall and Hall* (1979) 90-713, 78,819.

regarded and are given significant weight.¹⁹ This expertise makes evidence from report writers more reliable than evidence of children's views from other sources. Parkinson and Cashmore remarked:

The use of family reports to ascertain the wishes and feelings of children reflects a view that it is better to rely on the work of trained experts to interview children and to interpret their wishes and feelings to the court. Not only are such professionals regarded as better able to interview children, but they are also seen as better qualified to interpret their views in the light of all the circumstances.²⁰

Family reports are 'highly influential',²¹ with the court's final decision generally being consistent with the recommendations of the report writer.²² One study showed that family reports prompted settlement or were followed by judges in 76% of cases where a report had been prepared.²³ However, despite their high level of influence, case authority has emphasised that there is 'no magic' in a family report.²⁴ The court is not bound to accept the evidence or recommendations of the report writer.²⁵

The process of preparing a family report involves children speaking with a family consultant or other expert, who writes a report based on the writer's observations. This necessarily means that children's views are not communicated directly to the court, but are filtered by the report writer. Parkinson and Cashmore wrote:

The filtering of children's voices has the benefit not only of shielding them from the centre of the conflict but also allowing their voices to be articulated by a social-science trained professional who can be sensitive to the parent-child dynamics in terms of how those views are presented. The family report writer can also place the child's perspective in the context of all the family relationships and comment where a child's views may be the consequence of pressure from a parent or be inconsistent as a reaction to loyalty conflicts.²⁶

¹⁹ Ibid; Chief Justice A Nicholson (as he then was), 'Children and Young People: The Law and Human Rights' (Paper presented at the Law Society of the ACT, Sir Richard Blackburn Lecture, Canberra, 14 May 2002) 19.

²⁰ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 48.

²¹ ALRC and HREOC, *Seen and Heard*, above n15, [16.36]

²² Ibid; Cashmore, above n15, 164; Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 132.

²³ ALRC and HREOC, *Seen and Heard*, above n15, [16.36] citing T Brown et al, 'Mandated Co-ordination: Aspects of the Interface between the Family Court of Australia and the Victorian State Child Protection Service' (Paper presented at Australian Association of Family Lawyers and Conciliators Seminar, Melbourne, April 1997), 15. This figure was also referred to in Cashmore, above n15, 164.

²⁴ *Hall and Hall* (1979) 90-713, 78,819.

²⁵ Ibid.

²⁶ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 61.

The presentation of children's views through a family report allows those views to be heard 'in a way that still shields them from the heat of battle'.²⁷ Children are given an opportunity to express their views without feeling burdened with decision-making responsibility.²⁸ However, the filtering of children's views through the medium of a report can also mean that children's views may be heard only with qualifications and caveats.²⁹ As children are not routinely shown a copy of the report, they may not be apprised of how the views they expressed to a family consultant were presented. This may result in children feeling dissatisfied with the way in which their views have been heard, and the court is denied the advantage of hearing directly from children.³⁰

There is evidence that children are unhappy about a process that requires them to express their views to a third person who subsequently includes those views, amongst other matters, in a report to the court. In particular, children have commented that they were not happy with the techniques employed by report writers, the lack of confidentiality and privacy, the feeling that their views were not properly understood or taken seriously, and the filtering and reinterpretation by the report writer of what they had said.³¹

In a small study in the USA, cited by Trinder,³² it was found that children aged 8-12 who had been seen by court evaluators (similar to family consultants) were unhappy with the evaluators' method of indirect questioning, which was used instead of asking children to directly state their preferences. None of the 14 children interviewed 'found that the indirect approach adopted by the evaluators met their hopes'.³³ Those who wanted to influence the outcome of the case 'felt misrepresented, and were angry about being treated "merely" as children'. Children who wanted to avoid any responsibility for the outcome of the case 'were angry about being manipulated by

²⁷ Ibid.

²⁸ ALRC and HREOC, *Seen and Heard*, above n15, [16.36].

²⁹ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 61.

³⁰ The benefits to a court of hearing direct evidence of children's views are discussed in Chapter Four.

³¹ Cashmore, above n15, 164; P Henderson, 'To Heed the Child's Voice' (2000) *New Zealand Law Journal* 267, 268; Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 149.

³² L Trinder, 'Competing Constructions of Childhood: Children's Rights and Children's Wishes in Divorce' (1997) 19 *Journal of Social Welfare and Family Law* 291, 300.

³³ Ibid.

“trick” questions, interpreting indirect methods of questioning as adult assumptions of children’s naiveté’.³⁴ One child expressed their anger at such ‘trick’ questions, stating, ‘They must think you are just plain stupid’.³⁵

Children also expressed dissatisfaction with this method of expressing their views in a UK study by Neale and Smart.³⁶ A child related his experience of speaking to a court welfare officer (similar to a family consultant) at age 15 for the purpose of the officer providing a report to the court, saying:

I don’t think it helped (talking to the [court welfare officer]) I didn’t see why everybody should ask all these questions and when you do tell them certain things it doesn’t go in the report... I only really told them what they wanted to hear... I really had no one else to talk to, sort of thing, so I just made my mind up and that were it. ... Somebody else to be involved is an idea, somebody who you know isn’t going to go straight back and say, ‘well this and this’ to the [court] but just get them sat down and sort of talk between them [Q In confidence?] Yes and then if you do want them to pass it on, they would.³⁷

Aside from their dissatisfaction with the interview process itself, children are seldom afforded an opportunity to follow up on the interview and subsequent report. Parents, as parties to the proceedings, are given copies of the report and are able to cross-examine the report writer about its contents. Children, in contrast, rarely have the opportunity to look at the report, and are not given any means to challenge the account of their views or the recommendations made in the report.³⁸

Further, the value of the report to the court and the ultimate decision is heavily reliant on the skill, accuracy and credibility of an individual report writer. While, anecdotally, Australian judges have great praise for the skills of family consultants and other experts available to the court,³⁹ it is inevitable that some report writers are more skilled than others. Further, family reports necessarily cover a wide range of

³⁴ Ibid.

³⁵ Ibid, 301.

³⁶ B Neale and C Smart, ‘Agents or Dependents? Struggling to Listen to Children in Family Law and Family Research’ (Working Paper 3, Centre for Research on Family, Kinship and Childhood, University of Leeds, 1998).

³⁷ Ibid, 14.

³⁸ Cashmore, above n15, 164.

³⁹ See, for example, the views expressed by judges in P Parkinson and J Cashmore, ‘Judicial Conversations with Children in Parenting Disputes: the Views of Australian Judges’ (2007) 21 *International Journal of Law, Policy and the Family* 160; also the views expressed by Chief Justice Bryant in S Lunn, ‘Judges Urged to Talk to Kids in Family Disputes’, *The Australian* (Sydney), 11 July 2008, 7.

issues and, unless specifically directed to do so, the report writer may not consider particular issues that the judge considers important. A family report may fail to address a particular factor that would otherwise have influenced the ultimate decision.⁴⁰

The judge, being the person responsible for making a decision, must be satisfied that he or she has been provided with all the relevant evidence. However, judges are reliant to some degree on the report writer having pursued all relevant enquiries and included pertinent evidence in the report. This was a concern for the Full Court in *R and R: Children's Wishes*.⁴¹ Nicholson CJ (as he then was), Finn and Guest JJ remarked that, although the family report writer had asked the children if they had a preference as to where they would live, and informed them they did not have to answer the question if they felt uncomfortable doing so, it did not appear that the family report writer had asked each child how they would feel if the court made a decision that did not accord with their preference.⁴² Their Honours said:

In our view, it would seem generally desirable that authors of family reports ask such a supplementary question where children do feel comfortable to express a preference on a matter before the Court. The inclusion of such information as well as the Counsellor's assessment of it in family reports is an aid to better understanding the wishes of children and the process of giving weight to them.⁴³

In *Hall and Hall*⁴⁴, the Full Court stressed that a judge is not bound to accept a family report and noted that there may be situations where the report writer's assessment of the parties turns out to be based on facts that are wrong.⁴⁵ Further, the report writer may form favourable or unfavourable views about the parties during the interview process. In court, under cross-examination or in the face of evidence from other witnesses, the parties may prove to be of a different character from that which the report writer accepted.⁴⁶ Their Honours stressed that report writers do not have the same opportunity as the trial judge to weigh evidence, observe the demeanour of

⁴⁰ See, for example, *Painter and Morley* [2007] FamCA 283 (Unrep, Benjamin J, 29 March 2007), discussed in detail in Chapter Four.

⁴¹ *R and R: Children's Wishes* (2000) FLC 93-000.

⁴² *Ibid*, [60].

⁴³ *Ibid*, [61].

⁴⁴ *Hall and Hall* (1979) FLC 90-713.

⁴⁵ *Ibid*, 78,819.

⁴⁶ *Ibid*.

witnesses in court and make findings of fact based on evidence that may not have been available to the report writer.⁴⁷

It is clear that family reports and other expert reports, because of the specialist knowledge of their writers, provide the court with valuable evidence of children's views. Nevertheless, children's views form only a small component of a given report, which also details the report writer's interviews with the child and the parents, interaction of the child and various family members, and the report writer's recommendations on parenting arrangements for the family. Further, the report writer, not being the ultimate decision-maker, cannot be expected to address all the matters within the contemplation of the judge without specific direction to do so. While judges invariably provide direction to report writers about what they would like addressed in the report, there may be matters that are insufficiently covered, or matters arising subsequent to the report that are not addressed.

It also appears that children are not satisfied that this method adequately ensures that their voices have been heard by the decision-maker. Given the demonstrated value of family reports to the outcome of decisions, it is important that this continues to be a standard method of presenting evidence of children's views. However, courts should be aware of and consider the benefits both to children and to the decision-making process of utilising methods in addition to family reports when hearing children's views.

3.2.2 Independent Lawyer for the Child

In a smaller⁴⁸ number of contested children's cases, the court appoints a lawyer to represent the best interests of the child. The title given to this person is an Independent Children's Lawyer ('ICL'). The ICL is a 'best interests' representative.⁴⁹

⁴⁷ Ibid.

⁴⁸ In a study of parents who had been involved in contested proceedings by Parkinson and Cashmore, an ICL had been appointed in less than a third of cases (29%), whereas a family report or other expert report had been prepared in over three-quarters (78%) of those proceedings (Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 141). In a study of children by the same authors, a family report or other expert report had been prepared in all but one contested matter, whereas an ICL had been appointed in only half of those matters (Ibid, 148-149).

⁴⁹ Bennett and Bennett (1991) FLC 92-191; Family Law Courts, *Guidelines for Independent Children's Lawyers* (2007) [4]

They are not the child's legal representative and are not obliged to act on any instructions given by a child.⁵⁰ The ICL is required to form an independent view of what is in the best interests of the child and act in relation to the proceedings in what they consider to be the best interests of the child.⁵¹ The role of the ICL has been described as having two distinct features: to assist the court to make decisions in the best interests of children, and to provide a voice for children in proceedings affecting them.⁵²

It is part of an ICL's role to ensure that any views expressed by a child are put before the court.⁵³ The court may make orders for the purpose of allowing the ICL to ascertain the child's views.⁵⁴ An ICL is not obliged to disclose to the court any information the child communicates to them.⁵⁵ However, an ICL may disclose to the court information communicated by a child if the ICL considers the disclosure to be in the best interests of the child.⁵⁶ This applies even if the disclosure is made against the wishes of the child.⁵⁷ An ICL is not obliged to meet with the child.⁵⁸ Although they are required by the legislation to ensure the child's views are put to the court, this can be satisfied by ensuring the child is spoken to by a family consultant who will ascertain the child's views and include them in a report.⁵⁹

<<http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb02ee0237902cd/ICL%20guidelines-6-12-07.pdf>> at 6 July 2010.

⁵⁰ FLA s68LA(4).

⁵¹ FLA s68LA(2).

⁵² Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (2004) [2.3]. The cost of an ICL is borne by the Legal Aid Commission, or by the parties, depending on the parties' financial circumstances (see s117(3),(4)).

⁵³ FLA s68LA(5)(b).

⁵⁴ FLA s68L(5), however, note that a person cannot require a child to express their views in relation to any matter (FLA s60CE).

⁵⁵ FLA s68LA(6).

⁵⁶ FLA s68LA(7).

⁵⁷ FLA s68LA(8).

⁵⁸ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 141, states that 'except for exceptional circumstances, it is expected that independent children's lawyers will have contact with children to discuss their views.' This expectation is also contained in the *Guidelines for Independent Children's Lawyers*, above n49, [6.2] (discussed below), but is not, however, contained in the FLA.

⁵⁹ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 143, where it is stated, 'In the circumstances of a particular case, it may be most appropriate for the independent children's lawyers to work with court mediators and experts to get evidence about the best arrangements for the child before the court, rather than inform the court directly of the views of the child.'

Guidelines have been published with the intention of providing direction to ICLs and information to others about the ICL's role.⁶⁰ Although they do not have the force of law, the guidelines encourage ICLs to meet with children in all cases, unless the child is under school age, there are significant practical limitations to meeting the child, or there are 'exceptional circumstances'.⁶¹ The guidelines also encourage ICLs to explain to children their role and the court process, including 'how the child can have a say and make his/her views known during the process [and] 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'.⁶²

Because the ICL is a 'best interests' advocate, rather than a child's legal representative in the traditional sense, if the child's views do not accord with what the ICL believes to be in the child's best interests, the ICL must submit that it is not in the child's best interests that his or her wishes be acceded to by the court, notwithstanding the child's wishes to the contrary.⁶³ Many children feel marginalised by 'best interests' advocacy.⁶⁴ The model contradicts the understanding of many children, who expect that 'their lawyer' will represent their views, and not their 'best interests'.⁶⁵

The 'best interests' advocate model of representation 'effectively denies competent children the right to instruct their advocates even where they are directly involved in a case'.⁶⁶ The *Seen and Heard* report by the Australian Law Reform Commission and the Human Rights and Equal Opportunities Commission stated:

Many children have the maturity and judgment to direct their lawyer just as many adults have limited maturity and poor judgment but instruct legal representatives. The fact that a child's views may be editorialised or discounted for no reason other

⁶⁰ Family Law Courts, *Guidelines for Independent Children's Lawyers*, above n49. The guidelines were written by National Legal Aid and endorsed by the Family Law Courts.

⁶¹ *Ibid*, [6.2].

⁶² *Ibid*, [5.1]. See 3.2.5.1 for discussion about children becoming party to proceedings.

⁶³ *Wotherspoon and Cooper* (1981) FLC 91-029, 76,282.

⁶⁴ ALRC and HREOC, above n15, [13.56].

⁶⁵ Cashmore, above n15, 166; ALRC and HREOC, *Seen and Heard*, above n15, [13.57]; Family Law Council, *Pathways for Children*, above n52, [1.53].

⁶⁶ ALRC and HREOC, *Seen and Heard*, above n15, [13.53].

than that the representative disagrees with those views effectively holds children to a higher standard than adults.⁶⁷

This differs from other areas of Australian law where children are entitled to instruct their legal representatives, such as in child protection proceedings,⁶⁸ or where a child has been charged with a criminal offence.⁶⁹ Further, in overseas family law jurisdictions, such as New Zealand, children can instruct their lawyers in family law matters.⁷⁰ The *Seen and Heard* report recommended that in all cases where an ICL is appointed and the child is willing and able to express their views or provide instructions, the ICL should allow the child to direct the litigation as an adult client would.⁷¹ The Family Law Council's report, *Pathways for Children*, agreed that competent children⁷² should be able to instruct their own lawyer in family law matters, but with the qualification that the child's direct representative should be separate and in addition to the appointment of an ICL.⁷³ These recommendations have not seen implementation.

An ICL is not automatically appointed in every contested children's case. There are many more cases in which an expert report is ordered by the court than those where an ICL is appointed, although both may be employed in the same case.⁷⁴ The court may order that the child be represented by an ICL 'if it appears to the court that the child's interests in the proceedings ought to be independently represented by a

⁶⁷ Ibid. A similar view was expressed in G Russ, 'Through the Eyes of a Child, "Gregory K": A Child's Right to be Heard' (1993) 27 *Family Law Quarterly* 365, 379.

⁶⁸ In some, but not all, Australian jurisdictions, a child who is capable of giving instructions must be independently represented by a lawyer who is to act on their instructions (ALRC and HREOC, above n15, [13.23]-[13.32]).

⁶⁹ G Monahan, 'Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings' (2008) 8 *Queensland University of Technology Law and Justice Journal* 392, 394.

⁷⁰ Family Court of New Zealand, *Practice Note: Lawyer for Child Code of Conduct* (2007), [14.1] <<http://www2.justice.govt.nz/family/practice/notes/default.asp>> at 16 November 2009. However, note that in England and Wales for example, as in Australia, the court must be satisfied that the child has 'sufficient understanding' before they are entitled to instruct their lawyer (*Family Proceedings Rules* 1991 (UK), r9.2A). See Chapter Six for comprehensive discussion of the methods by which children's voices are heard in countries other than Australia.

⁷¹ ALRC and HREOC, *Seen and Heard*, above n15, recommendation 70.

⁷² The test of whether a child is 'competent' was expressed in the report to be that derived from *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112, which established that, as a child becomes more mature and develops the capacity to make their own decisions, the scope of parental authority and control diminishes accordingly. A child who is fully able to understand what is proposed in a particular situation is considered to be 'Gillick competent'.

⁷³ Family Law Council, *Pathways for Children*, above n52, [4.52].

⁷⁴ See above n48.

lawyer'.⁷⁵ The broad rule, confirmed in *Re K*⁷⁶ is that the court will appoint an ICL where it considers the child's interests require independent representation.⁷⁷ That case set out 13 grounds where the ordering of separate representation for a child would be justified. These included cases involving allegations of child abuse, where there is apparent intractable conflict between the parents and where the child appears alienated from one or both parents.⁷⁸

While *Re K*⁷⁹ provides case authority, there is no guidance in statute for the circumstances in which ICLs should be appointed. In *Pathways for Children*, the Family Law Council recommended against setting out grounds for appointment in legislation. While acknowledging that statutory grounds for appointment would achieve greater certainty:

[N]ew and difficult cases may raise issues that were not foreseen by the drafters of legislation, and thus not fit within any statutory criteria. It would potentially close the list of categories of cases in which an appointment may be justified, whereas the Family Court in *Re K* intended that they should remain open and non-exhaustive.⁸⁰

The Family Law Council was of the opinion that grounds for appointment are a matter for judicial discretion, and the court needs flexibility to decide whether the circumstances of a case justify appointment of an ICL.⁸¹

The *Pathways for Children* report also expressed concern that factors that influence a court's decision as to whether or not to appoint an ICL may not be applied consistently across Australia.⁸² It recommended that research be undertaken into how the discretion to appoint a child representative is exercised, including the influence of the various grounds set out in *Re K*⁸³ -and whether the discretion is being applied consistently.⁸⁴ The appointment of ICLs in Australia differs from jurisdictions such as New Zealand, where lawyers for children are appointed in every children's case

⁷⁵ FLA s68L(2).

⁷⁶ *Re K* (1994) FLC 92-461.

⁷⁷ *Ibid*, 80,773.

⁷⁸ *Ibid*, 80,774.

⁷⁹ *Re K* (1994) FLC 92-461.

⁸⁰ Family Law Council, *Pathways for Children*, above n52, [3.11].

⁸¹ *Ibid*, [3.14].

⁸² *Ibid*, [3.8].

⁸³ *Re K* (1994) FLC 92-461.

⁸⁴ Family Law Council, *Pathways for Children*, above n52, Recommendation 2.

that is likely to proceed to a hearing.⁸⁵ The fact that ICLs are not appointed in every case, along with the suggested grounds for appointment set out in *Re K*,⁸⁶ means that in cases that are considered 'straightforward', it is unlikely that children will have the benefit of an ICL.⁸⁷

One responsibility of an ICL is to ensure that all available information that is relevant to the best interests of the child is brought to the court's attention.⁸⁸ This may be information that the parties may not otherwise provide to the court, and could include evidence about the child's well-being, such as information about the child's progress at school or relationships with their siblings and others. However, the value of this role may be questioned. In the *Seen and Heard* report, it was stated:

In some cases, particularly in relation to very young children or those who are unwilling to participate, the representative may add nothing of substance to assist the court to determine the issues. In other cases the conclusions reached and the submissions made by the representative may add to the rancour of the litigation by simply supporting one party, creating a perception of "two against one" that does not assist in the resolution of the dispute.⁸⁹

Further, under the Less Adversarial Trial procedure,⁹⁰ judges now take an active role in managing the conduct of proceedings.⁹¹ They can, for example, give directions or make orders about the matters in relation to which the parties are to present evidence.⁹² A judge can ask questions of, and seek evidence or the production of documents from, parties, witnesses and experts on matters relevant to the proceedings.⁹³ In this context, the ICL's role in ensuring relevant evidence is brought before the court appears somewhat redundant.

⁸⁵ Except where the appointment would serve 'no useful purpose' (*Care of Children Act 2004* (NZ) s7(2)).

⁸⁶ *Re K* (1994) FLC 92-461.

⁸⁷ C Barnett and C Wilson, 'Children's "Wishes" in the Australian Family Court: Are they Wishful Thinking?' (2004) 11 *Psychiatry, Psychology and Law* 73, 76.

⁸⁸ See FLA s68LA(2)(b), s68LA(3), s68LA(5)(c).

⁸⁹ ALRC and HREOC, *Seen and Heard*, above n15, [13.64].

⁹⁰ See Chapter One for discussion on the Less Adversarial Trial.

⁹¹ FLA s69ZN(4). See FLA s69ZX for the court's general duties and powers relating to evidence. The Less Adversarial Trial system is discussed in Chapter One.

⁹² FLA s69ZX(1)(a).

⁹³ FLA s69ZX(1)(e).

If the guidelines are followed, ICLs can be valuable conduits for explaining information to children.⁹⁴ In particular, ICLs can explain to children ways in which they are able to express their views, and give an assurance that their views will be heard by the court.⁹⁵ However, ICLs have reported significant differences in individual approaches to their role, including whether or not they meet with children, their interviewing style in ascertaining children's views, how much they explain to children about their role, and whether they inform the child of the position they intend to take in the proceedings, especially when that position conflicts with the child's views.⁹⁶ It is well known that not all ICLs meet with children in every case.⁹⁷ It is evident, therefore, that many ICLs do not follow many or all of the recommendations in the guidelines, including informing children of how they can make their views known and, if appropriate, advising them of the possibility of applying to become a party to the proceedings.⁹⁸

Further, even if the guidelines were followed by every ICL, the ICL's role as a 'best interests' advocate remains. While the ICL has a duty to ensure the court is informed of any views expressed by the child,⁹⁹ the ICL must make submissions that are contrary to those views if the ICL believes that the child's views do not accord with his or her best interests.¹⁰⁰ In this situation, although the views of the child would be made known to the court, there would be no-one present in the court room to represent those views or to make submissions on the child's behalf. Children have expressed disappointment and frustration with the failure of ICLs to advocate in accordance with their views.¹⁰¹

⁹⁴ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 138.

⁹⁵ Guidelines [5.1].

⁹⁶ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 133-139.

⁹⁷ A Hart, 'The Silent Minority: The Voice of the Child in Family Law' (2003) 28 (4) *Children Australia* 31, 35; Family Law Council, *Pathways for Children*, above n52, [1.53]; Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n10, 146.

⁹⁸ Family Law Courts, *Guidelines for Independent Children's Lawyers*, above n49, [5.1].

⁹⁹ FLA s68LA(5)(b); *ibid*, [5.3].

¹⁰⁰ FLA s68LA(3); Family Law Courts, *Guidelines for Independent Children's Lawyers*, *ibid*, [5.4]; N Ross, 'Images of Children: Agency, Art 12 and Models for Legal Representation' (2005) 19 *Australian Journal of Family Law* 94, 99.

¹⁰¹ ALRC and HREOC, *Seen and Heard*, above n15, [13.57].

3.2.3 Evidence from others

The most common method by which a court hears evidence of children's views is by evidence from others of what the child has said to them. This may include evidence from each of the child's parents and, where applicable, grandparents, family friends, therapists and others who spend time with the child. In family law matters, evidence from others about representations made by a child may be admissible, notwithstanding the rule against hearsay.¹⁰² In many other areas of law, such representations would be contrary to the rule against hearsay, and usually inadmissible.¹⁰³

While evidence of children's views from the child's parents and other witnesses is admissible, the court is cautious in the weight it gives to it, particularly where it is adduced by one or both of the child's parents, as the evidence may be unreliable and have little probative worth.¹⁰⁴ Self-serving affidavits from parents that include the views of children 'are common, but of little value'.¹⁰⁵ A parent may deliberately report a child's views in a way that bolsters that party's own case. Children's views may be taken out of context, or a child may tell a parent what they think the parent wants to hear.¹⁰⁶ Evidence from independent witnesses, such as a child's therapist, may be considered more reliable and given more weight than evidence from the child's parents.

3.2.4 Judicial meeting with a child

Until very recently, rule 15.03¹⁰⁷ of the *Family Law Rules* 2004 (Cth) ('Rules') stated that a judge may interview a child who is the subject of parenting proceedings.¹⁰⁸ It stated that the interview may be conducted in the presence of a family consultant or

¹⁰² FLA s69ZV.

¹⁰³ *Evidence Act* 1995 (Cth) s59.

¹⁰⁴ *Reynolds v Reynolds* (1973) 47 ALJR 499, 502 (Mason J).

¹⁰⁵ J Redman, 'The Voice of the Children in Family Disputes' (1997) 12(1) *Australian Family Lawyer* 29, 30.

¹⁰⁶ Chief Justice A Nicholson (as he then was), 'Children and Children's Rights in the Context of Family Law' (Paper presented to the LawAsia Conference, Brisbane, 21 June 2003) 6; R Warshak, 'Payoffs and Pitfalls of Listening to Children' (2003) 52 *Family Relations* 373, 374.

¹⁰⁷ Formerly rule 15.02, this rule was renumbered by SLI No33 of 2009, Sch 4[2].

¹⁰⁸ Rules r15.03(1) (now omitted).

another person specified by the judicial officer.¹⁰⁹ If the child expressed a wish during the interview that was relevant to the case, the judicial officer may have ordered a family report be prepared.¹¹⁰ The equivalent provision in the previous *Family Law Rules* 1984 (Cth) ('former Rules') was more restrictive, stating that no information obtained by a judge during such an interview could be used as evidence in the proceedings.¹¹¹ The former Rules also prevented a child from being interviewed by a judge without the agreement of the child's representative (now ICL).¹¹² The revision to this provision was made having regard to comments made in *ZN and YH and Child Representative*¹¹³ by the former Chief Justice Nicholson,¹¹⁴ and those restrictions were removed.

As discussed in the Introduction to this thesis, rule 15.03 was omitted in 2010.¹¹⁵ It was not replaced. The reason given for the omission of the rule was that a meeting between a judge and a child 'does not generally occur and where it does can be the subject of case specific orders'.¹¹⁶ This means that the ability to meet with a child is still within judicial discretion. It is unfortunate that rule 15.03 has been omitted, as judges are now given no guidance for the ways in which a judicial meeting with a child should be conducted. As discussed in the Introduction, the fact that judicial meetings do not 'generally occur' does not seem sufficient of itself to justify the removal of the rule.¹¹⁷

Nevertheless, it is recognised (although no longer in any statutory instrument) that judges have discretion to meet with children directly in order to ascertain children's views and other information, to assist them in making parenting orders that are in the

¹⁰⁹ Rules r15.03(2) (now omitted).

¹¹⁰ Rules r15.03(3) (now omitted).

¹¹¹ Former Rules O23r5.

¹¹² Ibid.

¹¹³ *ZN and YH and Child Representative* (2002) FLC 93-101.

¹¹⁴ Explanatory Statement, *Family Law Rules* 2004 (Cth), Statutory Rules 2003 No 375. Nicholson CJ's comments in this case are also discussed in Chapter Five.

¹¹⁵ Omitted by the *Family Law Amendment Rules* 2010 (Cth), Sch 1 [16], which came into force on 1 August, 2010.

¹¹⁶ Explanatory Statement, *Family Law Amendment Rules* 2010 (Cth), 5.

¹¹⁷ There are many other rules that are seldom used, which nevertheless remain. As discussed in the Introduction, these include the rules relating to children giving evidence (r15.02) and a party changing their name during proceedings (r24.03).

best interests of children.¹¹⁸ Further, there is nothing that restricts judges speaking with children for that purpose. In *N and N*¹¹⁹ Mullane J held that a judge may speak with a child, even in circumstances where the intention of the court is not to obtain the child's views. In that case, discussed in more detail in Chapter Four, his Honour used a judicial meeting with a child to personally explain his orders and reasons to an 11 year old boy as 'a demonstration of the Court's respect for the young person in question and his rights to participate in proceedings concerning him'.¹²⁰

Chapter Four identifies the various benefits that can be gained by judges meeting with children, including the ability to hear evidence directly from children, being able to explore options for parenting arrangements with the child and satisfying children that their views have been heard. However, despite these benefits, the practice of judicial meetings with children in Australia is extremely rare. Chapter Five explores the reasons for the apparent reluctance of judges to meet with children, and discusses the main concerns about the practice.

3.2.5 Child as party or witness

The FLA states that, aside from a family report or ICL, the court may inform itself of a child's views through any other means it considers appropriate, subject to the Rules of Court.¹²¹ A child can be joined as a party to the proceedings or called as a witness.¹²² However, cases in which children are directly involved in open court proceedings are extremely uncommon,¹²³ as there is a perception that involving children so closely in adversarial proceedings between their parents can be harmful for children.¹²⁴

¹¹⁸ As in cases such as *ZN and YH and Child Representative* (2002) FLC 93-101.

¹¹⁹ *N and N* (2000) FLC 93-059.

¹²⁰ *Ibid*, [7].

¹²¹ FLA s60CD(2)(c).

¹²² However, note FLA s100B that states a child must not swear an affidavit or be called as witness unless the court makes an order allowing the child to do so.

¹²³ R Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197, 207; Chief Justice D Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127, 134.

¹²⁴ Chisholm, *ibid*, 203, 208; Bryant, *ibid*, 135; Redman, above n105, 30. For example, a child who appears as a witness in proceedings would most likely be subjected to cross-examination from one or both of their parents' counsel. If one or both parents were self-represented, the child could possibly be cross-examined by his or her own parent/s.

3.2.5.1 Child as party

The FLA allows children to commence proceedings in the Family Court.¹²⁵ However, unless the court is satisfied that the child understands the nature and possible consequences of the case and is capable of conducting the case,¹²⁶ a child may become a party to proceedings only through a case guardian.¹²⁷

The FCA does not keep statistics on the number of children appearing in proceedings, either through a case guardian or in their own right, but anecdotal evidence indicates it occurs very rarely.¹²⁸ There are few reported decisions in which a court has been asked to determine a child's competence to intervene in or initiate proceedings.¹²⁹ In *Pagliarella and Pagliarella*¹³⁰ Hannon J made an order joining a child as a party to the proceedings. However, the reported judgment related to issues arising after that ruling and did not indicate his Honour's reasons for joining the child as a party.

In *Pathways for Children*, the Family Law Council opined that there are circumstances in which it is appropriate to allow a 'Gillick' competent child¹³¹ to be joined as a party to proceedings and instruct their own legal representative (who is not the ICL).¹³² These circumstances were said to be in cases where:

- the child is considered by the court to be *Gillick* competent;
- the child has a strong view about the outcome of the proceedings;
- the ICL considers that, in the best interests of the child, submissions contradicting those wishes should be made to the court; and

¹²⁵ FLA s69C(2).

¹²⁶ Rules r6.08(2).

¹²⁷ Rules r6.08(1). A case guardian acts on behalf of the child. Their role is 'to conduct [the] litigation and provide appropriate instructions to do so' (*Kannis and Kannis* (2003) FLC 93-135, 78,261). Therefore, as with an ICL, the case guardian acts in the child's interests and not according to the child's instructions. It appears, then, that the option of being made a party to proceedings is only useful in a case where a child is considered competent to instruct a lawyer, or where an ICL has not been appointed.

¹²⁸ ALRC and HREOC, *Seen and Heard*, above n15, fn1333.

¹²⁹ Family Law Council, *Pathways for Children*, above n52, [4.40].

¹³⁰ *Pagliarella and Pagliarella* (1993) FLC 92-400.

¹³¹ See above, n72 for explanation of 'Gillick' competence.

¹³² Family Law Council, *Pathways for Children*, above n52. [4.52].

- the child, after being told of the intention of the child representative to make contradicting submissions, seeks to have legal representation in order to make submissions supporting the child's wishes.¹³³

The *Seen and Heard* report recommended that children be informed about their options for participation in family law proceedings, including their rights to seek legal advice or initiate proceedings.¹³⁴ According to the *Guidelines for Independent Children's Lawyers*, where a child of sufficient maturity wishes to be directly represented in the proceedings, the ICL should inform the child of the possibility of becoming a party to proceedings.¹³⁵

However, given the lack of cases in which a court has considered an application by a child to be joined as party to proceedings, it is likely that children are not regularly being informed of their right to make such application. Alternatively, it could be the case that children have not, in the past, expressed a desire to become a party to family law proceedings. There is no evidence that courts are reluctant to join children as a party to proceedings when an application is made, as there is no significant body of case law in which children have made such applications.

3.2.5.2 Child as witness

It has been suggested that, particularly in the case of older children, it may be appropriate for children to present their views directly to the court in the form of affidavits, and appear as witnesses in the proceedings.¹³⁶ This would address children's dissatisfaction with having their views 'filtered' through a family report, or being subject to the 'best interests' advocacy of an ICL, which can result in an ICL taking a position that contradicts the child's views.

The FLA prohibits a child, other than a child who is or is seeking to become a party to proceedings, from swearing an affidavit or being called as a witness in proceedings

¹³³ Ibid. The Family Law Council said, at [4.53], that it would be appropriate in these cases for the ICL to continue his or her role as a best interests representative and make appropriate submissions to the court.

¹³⁴ ALRC and HREOC, *Seen and Heard*, above n15, recommendation 152.

¹³⁵ Family Law Courts, *Guidelines for Independent Children's Lawyers*, above n49, [5.1].

¹³⁶ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 143.

unless the court makes an order allowing him or her to do so.¹³⁷ Therefore, a party who wishes a child to give evidence in support of that party's case must first seek the court's permission. This restriction 'is designed to prevent a child under eighteen from giving evidence for or against either of his parents',¹³⁸ which is considered extremely undesirable.¹³⁹ The requirement for the court's approval before evidence from children can be admitted was 'obviously designed for the protection of children and for their removal as far as possible from forensic partisanship in spousal conflict'.¹⁴⁰

The matters that a court may take into account when deciding whether or not to give permission for a child to give evidence in proceedings were considered in *Foley and Foley*.¹⁴¹ Lambert J said the following factors should be considered:

- the nature and degree of cogency of the evidence it is sought to adduce through the child;
- whether such evidence is reasonably available from another source;
- the maturity of the child;
- the nature of the proceedings, and
- the relationship of the child to persons affected by those proceedings.¹⁴²

His Honour also noted that:

the court should weigh the value of the evidence to the determination of the issues between the parties against the possible detriment to the child in being thus involved in the adversary procedures between the parties. This necessarily involves some consideration of the prospects of a continuing relationship between the child and the parties following the necessary determination of the issues between the parties.¹⁴³

Given these factors, it is unusual for a court to order that a child give evidence in proceedings. This is particularly so where it is considered that a child's testimony in favour of one party will adversely affect the child's relationship with the other party

¹³⁷ FLA s100B.

¹³⁸ *Borzak and Borzak* (1979) FLC 90-688, 78,671 (Wood SJ).

¹³⁹ See *Todd and Todd (No 1)* (1976) FLC 90-001, 75,057 where Watson J said, 'I could think of nothing more counter-productive to the relationship between parent and child for the future than allowing [a child to be called as a witness in a dispute between the child's parents].'

¹⁴⁰ *Cooper and Cooper* (1980) FLC 90-870, 75,509 (Watson SJ).

¹⁴¹ *Foley and Foley* (1978) FLC 90-511.

¹⁴² *Ibid*, 77,680 (Lambert J).

¹⁴³ *Ibid*.

in a way that is detrimental to the child. In *Foley*,¹⁴⁴ the husband sought to admit an affidavit made by his son from a previous relationship, and call him as a witness. The son was aged 17 and was not the subject of the proceedings, which concerned the care of the two children of both the husband and the wife. In order to determine whether he should grant permission for the evidence to be admitted, Lambert J met with the child in chambers, in the presence of the equivalent of a family consultant, 'as the best means available of informing myself as to his maturity and effect upon himself and his future relationship with the husband and the wife, which would most likely follow his being called as a witness at the hearing'.¹⁴⁵ As a result of that meeting, and consideration of the relevant factors his Honour had identified (outlined above), Lambert J decided not to allow the child's affidavit to be admitted or the child to be called as a witness.

Chisholm argued that, while a court would no doubt more favourably consider the giving of evidence in proceedings by older children with sufficient maturity, the views of older, more mature children would be likely to be very influential in any event.¹⁴⁶ Those views could easily be presented in a family report, therefore 'the outcome of the case may not be much affected by putting them through the experience of giving evidence'.¹⁴⁷ However, the former Chief Justice of the FCA has spoken in favour of children giving evidence, saying that to refuse a child who wishes to give evidence may be to violate their rights. Chief Justice Nicholson (as he then was) said:

I wonder if it is not time to re-think the approach of never calling children as witnesses. Children do give evidence in other courts. Methods have been developed to protect them, including the opportunity to give evidence by video link from a location other than the court room. There may be children who wish to give evidence and if they do, it is difficult to see the rationale for preventing them doing so. To refuse them this right may well be a breach of their entitlements under [*the United Nations Convention on the Rights of the Child*] and may effectively prevent the Court ascertaining their wishes.¹⁴⁸

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, 77,680.

¹⁴⁶ Chisholm, above n123, 208.

¹⁴⁷ *Ibid.*, [*35].

¹⁴⁸ Nicholson, 'Children and Young People: The Law and Human Rights', above n19, 18.

3.3 Conclusion

Although this thesis focuses on one method of how judges hear children's views - the practice of judicial meetings with children - the importance of other methods available by which evidence of children's views are presented to the court should not be downplayed. In particular, evidence of children's views presented in a report by a family consultant or other expert who has spoken to the child, is a valuable tool that enables children's voices to be heard in family law matters. Report writers are specialists and have expertise in speaking with children and interpreting their views. In circumstances where a judicial meeting with a child may be appropriate, it is not suggested that such a meeting is a substitution for a family report.

Each method of hearing children's views has benefits and limitations, and the method or methods that are utilised in each case should be determined in the circumstances of that case. In most cases, a combination of several of the methods discussed in this chapter ought to be applied to ensure the main objectives of hearing children's views are met. In particular, it is imperative that, when making a parenting decision in the best interests of a child, the court is able to hear the most relevant, reliable and accurate evidence of children's views. It is also important that children feel that their views have been heard. Chapter Four examines the particular benefits that can be gained from judges meeting with children in appropriate cases. It looks at cases in which the 'team' approach to hearing children's views has proved useful.

Chapter Four

4 Why judges should meet with children

4.1 Introduction

This chapter discusses various positives that can result from judges speaking with children, and argues that judicial meetings with children ‘can be of real benefit to the children, to the court and ultimately to achieving the best decision’.¹ Judicial meetings can, in appropriate cases, lead to better decision-making in a number of ways. Hearing from children directly may yield information to assist judges in making decisions that promote children’s best interests. Judges can ascertain children’s views in cases of urgency, where other methods of ascertaining children’s views are not available or practical. By allowing judges to discuss with children various options which may be within a judge’s contemplation, better informed and more appropriate decisions may be made. Further, the information gleaned during a judicial meeting may give parties the impetus they need to settle their matter, thus avoiding the inconvenience and expense of a trial.

It is further argued that judicial meetings with children can, in appropriate cases, have benefits for children. Many children have expressed a desire to speak with judges directly. Allowing them to do so truly enables children to ‘have a say’, and assures children that their views have been listened to by the decision-maker. This also respects and promotes children’s rights to participate, pursuant to Article 12 of the *United Nations Convention on the Rights of the Child* (‘UNCRC’).² Judges may also meet with children after a decision has been made, not for the purpose of hearing children’s views, but to explain their orders and reasoning to the child who is the

¹ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (‘ALRC and HREOC’), *Seen and Heard: Priority for Children in the Legal Process*, Report no 84 (1997), [16.29].

² *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

subject of the proceedings.³ Again, this shows respect for children and acknowledges the importance of their interests in the outcome of decisions.

It is acknowledged that judicial meetings with children may not be appropriate in every case. This may include, for example, where a child does not wish to speak with a judge, where a child is particularly vulnerable, or where there are significant concerns that a child has been subjected to extreme parental pressure or manipulation.⁴ Judges need to exercise their discretion in each case carefully, and should, in the event that a meeting with a child is considered appropriate, give due consideration as to how to conduct it. This would include deliberation about who is to be present during the meeting and what is to be discussed. In Chapter Five, various concerns and criticisms about judicial meetings with children are considered, including ways in which some of those issues may be addressed. Appendix Five contains draft guidelines that suggest how judicial meetings with children should be conducted.

4.2 Benefits for decision-making

4.2.1 Hearing evidence directly

In making parenting arrangements for children under Part VII of the *Family Law Act* 1975 (Cth) ('FLA'), the court must regard the best interests of the child as the paramount consideration.⁵ It is therefore vital that the court is provided with the best evidence available, including evidence about children's views that is both reliable and current. Chapter Three discussed the various ways in which a court can become informed of children's views. The most common methods of hearing evidence of the

³ Such a meeting could be in addition to meeting with a child to hear the child's views before a decision has been made.

⁴ As discussed in Chapter Two, the UNCRC gives children a right to be heard in decisions that affect them. The fact that a child may have been subjected to parental pressure or manipulation should not automatically disqualify that child from being given an opportunity to be heard (*BJG v DLG* [2010] YJ No 119 (YKSC) [13]. However, in accordance with the 'paramountcy principle' in both the UNCRC (Article 3) and the FLA (s60CA), the child will not be given an opportunity to be heard if to do so would be contrary to the child's best interests (G Lansdown, 'Children's Rights' in B Mayall (ed), *Children's Childhoods: Observed and Experienced* (1994) 40-44. See fuller discussion in Chapter Two).

⁵ FLA s60CA.

views of a child are through accounts from the child's parents and other witnesses,⁶ and a report from a family consultant or other expert who has spoken with the child. An Independent Children's Lawyer⁷ ('ICL'), if one has been appointed, must ensure that the child's views are put before the court,⁸ usually through a family report.

Notwithstanding this generally comprehensive approach to obtaining information about the child, these methods involve the presentation of indirect evidence of children's views. They do not allow the court to hear about children's views from children themselves. Instead, the court receives that information through the 'filters' of their parents, a family consultant or others. Methods that involve hearing from children directly, such as joining a child as a party to the proceedings, or allowing them to give evidence, are extremely rare, for the reasons set out in Chapter Three. So, too, it is rare for Australian family law judicial officers to meet with children, notwithstanding that the child is the subject of the hearing and the person whose 'best interests' must be regarded as the court's paramount consideration.⁹ As Le Poer Trench J noted in *Lachlan and Lachlan*,¹⁰ 'nowhere else in our legal system are proceedings conducted where an interested person has no right of personal appearance'.¹¹ It is argued that if a judge does not avail him or herself of the opportunity to hear directly from the person who is central to the proceedings, this can lead to an implication that decisions may be made on evidence that is not the best available evidence in the circumstances.¹²

Hearing directly from a child about their views may have several benefits for decision-making, including the disclosure of valuable information that may not otherwise be obtained, and the consequent ability of the court to make decisions on the best evidence possibly available.¹³ Evidence received directly from children has

⁶ See Chapter Three for discussion on the perceived lack of reliability and probative value of statements about children's views made by others.

⁷ See Chapter Three for discussion about the ICL's role and appointment.

⁸ FLA s68LA(5)(b).

⁹ FLA s60CA.

¹⁰ *Lachlan and Lachlan* [2008] FamCA 455 (Unrep, Le Poer Trench J, 25 June 2008).

¹¹ *Ibid*, [657] (Le Poer Trench J).

¹² M Fernando, 'Conversations Between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters' (2009) 23 *Australian Journal of Family Law* 48, 53.

¹³ As discussed in Chapter Five, the principles of natural justice require any new information obtained at a judicial meeting, if relied on by the judge, to be disclosed to the parties.

more probative value than indirect, or filtered, evidence of children's views.¹⁴ More may be learnt about children's views and feelings by speaking with them directly than is possible by receiving such information second or third hand.¹⁵ As one judge said at an ICL conference, '[e]vidence [presented at a trial] can be flat and cold. Speaking to the child makes the evidence real'.¹⁶ Having the opportunity to see and interact with a child may better equip judges to understand the needs of that child, and make a decision that best promotes that child's best interests. Principal Judge Boshier of the Family Court of New Zealand said:

Giving children a say can also remind us that children are as affected by our decisions as adults are, and will help to keep decisions focused on achieving the best possible outcome for the children involved.¹⁷

Speaking with children brings them into 'sharp focus',¹⁸ and 'enables the judge to form an impression about the children and their personalities and characteristics'.¹⁹ One judge interviewed by the author stated:

If you see the children, you certainly have, I think, a much higher empathy for them because you have got that child in your eye. Not only a mental vision, because you can sometimes get that from a photograph. But you have got an actual experience of having interacted with that child. And that is a lot more compelling than a photograph.²⁰

Further, although the reliability and value of evidence contained in a report from an expert who has spoken with the child is not disputed,²¹ hearing from a child directly may disclose to the judge important aspects of the case that were not evident in a

¹⁴ *Reynolds v Reynolds* (1973) 47 ALJR 499, 503 (Mason J).

¹⁵ Baroness Hale of Richmond, 'Children's Participation in Family Law Decision Making: Lessons from Abroad' (2006) 20 *Australian Journal of Family Law* 119, 124.

¹⁶ Comment made by The Honourable Justice Robert Benjamin, Judge of the Family Court of Australia, during a presentation at the Legal Aid Commission of Tasmania ICL Conference, Launceston, 24 August 2007.

¹⁷ Judge P Boshier, 'The Care of Children Act 2004: Does it Enhance Children's Participation and Protection Rights?' (2005) 9(2) *Children's Issues* 7, 7.

¹⁸ J Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 *Virginia Journal of Social Policy and the Law* 129, 153.

¹⁹ *Ryan and Ryan* (1976) FLC 90-144, 75,706 (Evatt CJ, Watson SJ and Ellis J).

²⁰ Judge C in interview. As part of this thesis, the author interviewed four FCA judges concerning their opinions and experiences of judicial meetings with children. The results of those interviews are discussed in Chapter Five.

²¹ See discussion in Chapter Three about the important role played by family reports in the presentation of children's views to the court.

family report. Guest J in *C and C*²² remarked that ‘the impression that I obtained from the interview process was, with respect, far more helpful than the impression I obtained from the report’.²³ This is not to say that judges should speak with children in substitution for evidence of children’s views through family reports and other means. However, hearing from children directly in appropriate cases, without their views being filtered by a report writer or other person, may yield useful information to supplement the evidence already before the court or reveal different aspects to the case.

The case of *ZN and YH and Child Representative*²⁴ is a good example of where a judicial meeting with children disclosed important information that was not contained in a family report. The mother wished to relocate to the USA with three children, aged 14, 12 and 9. The family consultant (then called court counsellor) interviewed the children and presented their views in a report. The elder two children expressed a desire to move to America, while the youngest was uncertain. The trial began around a year after the interviews were conducted. Chief Justice Nicholson, as he then was, invited the children to meet with him directly. The invitation was conveyed through the ICL (then called child representative). All accepted the invitation, and the judge met with each child individually in the presence of the ICL. It was made clear to the children that his Honour would not necessarily act upon their views, but that they would be taken into account.

In his judgment, Nicholson CJ explained his reasons for wanting to meet with the children. His Honour said it gave them an opportunity to express their views to him, given their ages and the time that had passed since the family report. Further, his Honour was concerned that the views expressed in the report may not represent the children’s real views and, in any event, their views may have changed with the passage of time.²⁵

During their meetings with the judge, both the eldest and youngest children expressed views that they did not want to move to the USA. The middle child maintained her

²² *C and C* [2006] FamCA 701 (Unrep, Guest J, 26 June 2006).

²³ *Ibid*, [26].

²⁴ *ZN and YH and Child Representative* (2002) FLC 93-101.

²⁵ *Ibid*, [105].

position that she wished to move. As his Honour was bound by the former Rules, which prevented any of the information obtained during the meeting from being used in evidence, Nicholson CJ ordered a further interview and report from the family consultant. His Honour determined that the children's views (then wishes) weighed against permitting their relocation, but emphasised that, while he had given weight to the views of the children, they had been only one factor amongst others in reaching the ultimate decision to restrain the mother from relocating with the children.²⁶

Had the judge not spoken with the children in this case, he would have been restricted to the account of the children's views that was contained in the family report. This account was ultimately found to be inaccurate and outdated. Speaking with the children allowed the judge to make a more informed decision and, arguably, a decision that better promoted the children's best interests than the decision that would have been, had he not spoken to the children.

As happened in this case, hearing from children directly may give judges a fuller picture of the relevant issues²⁷ than may be disclosed through other means. The court's decision-making ability is enhanced,²⁸ as the court is better informed and more equipped to make a decision that truly promotes the best interests of children. Any practice that assists the court to make decisions in the best interests of individual children has benefits for children themselves, as it is obviously beneficial to children involved in parenting disputes that the best decision is made for them, in all the circumstances.²⁹ It follows that the parties, usually parents who presumably want the best for their children, will also reap the benefits, provided those parents are truly motivated by their children's best interests and not by an adversarial 'win or lose' mentality.³⁰

²⁶ Ibid, [165].

²⁷ A Smith and N Taylor, 'The Sociocultural Context of Childhood: Balancing Dependency and Agency' in A Smith, N Taylor and M Gollop (eds), *Children's Voices: Research, Policy and Practice* (2000), 14.

²⁸ Ibid.

²⁹ Fernando, above n12, 55.

³⁰ Ibid.

4.2.2 Obtaining children's views in cases of urgency

As was illustrated above, an account of children's views that is detailed in a family report or other expert report may be outdated by the time a matter proceeds to a trial.³¹ A meeting between a judge and a child may allow the evidence of the child's views to be updated, or satisfy the judge of the continuing validity of the views as presented in the report, without the unnecessary delay of a further family report.³²

Further, ascertaining children's views through a judicial meeting may be justified in circumstances where no family report has been prepared, and there is no way of quickly obtaining one. This was illustrated in a case that was referred to by Parkinson and Cashmore.³³ Competing applications were filed by the father and maternal grandparents for care of a 10 year old girl. The circuit judge had only one day of sittings remaining and the matter was estimated to take three days. The court was in a remote area and the judge was reluctant to transfer the matter to a city or adjourn it to another circuit judge, which would mean a delay of around six months.

The judge proposed to speak with the child directly, and the parties agreed. His Honour met with the child in a nearby park, accompanied by the judge's female associate. The judge reported that the child clearly and articulately expressed that she wanted to live with her mother, who was not a party to proceedings but had been present in court.

The judge returned to court and described what had happened, explaining that the parties were still entitled to have a trial if they wished, and the court would accept an oral application from the mother if she wished. The parties agreed that previous

³¹ For example, in *ZN and YH and Child Representative* (2002) FLC 93-101, some 12 months passed between the time the children's interviews for the family report were conducted and the trial. In addition, the Family Court of Australia ('FCA') has a key performance indicator ('KPI') that more than 75% of matters pending conclusion should be less than 12 months old. In the last financial year, the FCA achieved the result that 72% of matters pending conclusion were less than 12 months old. (FCA, *Annual Report 2009-2010* (2010), Part 3). Taking into account both the KPI and the result actually achieved, there is likely to be a period of several months between the time of a family report (which is usually ordered close to the commencement of proceedings) and the trial.

³² P Parkinson and J Cashmore, 'Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges' (2007) 21 *International Journal of Law, Policy and the Family* 160, 176.

³³ *Ibid*, 172.

concerns about the mother's lifestyle were no longer a problem and, after private discussions, consent orders were made for the child to live with the mother and have contact with both the father and the grandparents.

In Parkinson and Cashmore's article, the judge's description of his feelings about the experience is quoted:

Listening to a child on that one occasion had an amazing therapeutic effect on the entire family, and I felt so good. I mean, my associate was in tears, my wife who'd come on circuit with me walked into the back of the court, and she was in tears, I was holding back tears. It was a very fulfilling experience.³⁴

The judge's willingness to speak with the child in this case resulted in the quick settlement of the matter. It saved the time, expense and inconvenience of an estimated three day hearing, and a potential delay of six months. Further, the judge's comments above highlight the positive emotional effects on the family as a result of listening to the child's views. The family was able to settle the matter with a creative outcome that would not have been proposed had the matter proceeded to the anticipated trial.³⁵

4.2.3 Exploring options with the child

A meeting between a judge and a child can involve more than a child simply expressing a preference for where he or she wants to live. Speaking with a child allows a judge to canvass possible options for parenting arrangements with the child and obtain the child's input before orders are finally made.³⁶ The child may be able to explore with the judge which options in the contemplation of the judge would best suit the child.³⁷ As in the case above, a child may be able to suggest a desirable arrangement that is not within the contemplation of the parties or the court. As Baker J said in *H and W*:³⁸

³⁴ Ibid, 173.

³⁵ Note that, in this case, the judge met with the child without a family consultant being present. In this thesis, the presence of a family consultant during a judicial meeting with a child is advocated in all cases where a family consultant is reasonably available. See more detailed discussion in Chapter Five and proposed guidelines in Chapter Seven.

³⁶ Parkinson and Cashmore, 'Judicial Conversations with Children', above n32, 176.

³⁷ Ibid.

³⁸ *H v W* (1995) FLC 92-598.

There appears to have been a tendency for adults to under estimate (sic) the wisdom of children and their ability to make sound choices about their future welfare. It must be recognised that children know their parents' attributes and failings better than any outsider and in most cases they alone have direct experience of the environment which each offers.³⁹

This view has received support from a number of quarters. For example, Judge Carl, a German judge, agreed that children know their parents best. He suggested that children are often able to come up with ideas and concrete suggestions for areas about which even parents who are in bitter conflict can agree, with the help of the court.⁴⁰ This can be useful, 'even if this relates only to a smaller problem which seems hardly relevant in relation to the overall conflict'.⁴¹

A good example of where children assisted to resolve, in a high conflict case, what would otherwise be considered a minor issue occurred in *Painter and Morley*.⁴² The case concerned four children aged 10-15 years, whose parents were in 'intractable' conflict.⁴³ When living with their father, the children would wake early each school morning, catch two buses and then walk 3-4 kilometres to school. At the end of the school day, the children would catch three buses to get home. Benjamin J was most concerned about this, but decided to speak with the children before making any changes to their living and transport arrangements. Benjamin J met with the children in the presence of the family consultant. The children stated very strongly that they enjoyed their travel arrangements and the social interaction arising as a result.⁴⁴ The children asked his Honour not to change the arrangements. His Honour decided the children's best interests were served by retaining the travel arrangements.

By speaking with the children, his Honour was able to discover what was really important to them. While the children's views had been presented in a family report, the evidence was 'filtered' through the family consultant. The full meaning and strength of the children's views became apparent to the judge only upon meeting with

³⁹ Ibid, 81,964 (Baker J).

⁴⁰ Judge E Carl, 'Giving Children Their Own Voice in Family Court Proceedings: A German Perspective' (Paper presented at the 4th World Congress on Family Law and Children's Rights, Cape Town, 20-23 March 2005), 7.

⁴¹ Ibid.

⁴² *Painter and Morley* [2007] FamCA 283 (Unrep, Benjamin J, 29 March 2007).

⁴³ Ibid, [127].

⁴⁴ Ibid, [77].

the children. The issue that the children considered to be most important, which was their desire to maintain the status quo, was quite different from the issues presented by their parents, who were in high conflict and preoccupied with arguing about which parent was the more suitable carer for the children. In this case, his Honour was able to identify what really constituted the children's interests, and make an order that promoted their best interests in the circumstances. This result was different from what his Honour may have ordered had he not spoken with the children.⁴⁵

Courts make decisions that affect almost every aspect of children's lives. Therefore, it makes sense that judges speak with children before decisions are made, in order to gain awareness of how the decision will affect that child. Parkinson and Cashmore encapsulated this as follows:

There seems to be increasing acceptance in some quarters that decisions that people seek to make about children's futures, even those presumed to be made on the basis of 'their best interests', cannot be made without an awareness of how the children themselves will respond to those decisions. That is, the decision-maker needs to weigh up the possible effects of different decisions on the children themselves, for the children are the ones who have to live with those decisions. In addition, children's reactions to the decision may in turn determine whether it was in fact in their best interests.⁴⁶

In the New Zealand case of *S v S*⁴⁷ a judicial meeting with a child assisted Murfitt J to achieve a satisfactory outcome in a difficult case. The child, C, was aged nine. Her parents had separated when she was three years old. C had lived in the primary care of her mother, whilst spending most of her school holidays with her father. The parents lived a short plane flight away from one another. C had long expressed a view that she wanted to move to live with her father, so her father brought an application in those terms. The evidence was that C had not spent any non-holiday time with her father since the parties separated, but she had demonstrated contentment in the care of each parent, and there were no concerns about either party's ability to care for her.⁴⁸

C requested to meet with the judge who would be making a decision about her future. Murfitt J agreed, and met the child in the presence of her lawyer. C confirmed that

⁴⁵ Some information in this summary was recounted by Benjamin J in an address to students at the University of Tasmania on 16 May 2008, and does not appear in the judgment.

⁴⁶ P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008), 8.

⁴⁷ *S v S* [2009] NZFLR 108.

⁴⁸ *Ibid*, [3].

she wished to move to live with her father. However, she also expressed the view that she would like to see more of her father, and spend some time with him and her step-mother outside of school holiday periods. She also spoke of the level of doubt that had entered her thinking after her father had asked her whether she was sure about her preferences.⁴⁹

Murfitt J determined that C's views had been skewed by her unbalanced experience of life with each of her parents. C's life with her mother was centred around the tedium and routine of school term, whereas life with her father had been in holiday time.⁵⁰ C had expressed a wish to spend more time with her father, and experience 'normal' life with him.⁵¹ Given that C had expressed some reservations about a permanent shift in her primary care, and that her experience of the world had been confined, Murfitt J did not treat her views as reflecting a determined wish to leave her mother's primary care permanently. Rather, Murfitt J interpreted C's views as indicating a need for a more balanced experience of life with her father and with her mother.⁵²

Murfitt J put in place an interim arrangement that would allow C to experience both day-to-day and holiday time with both of her parents. Orders were made for C to live with her father for one school term, and spend significant Christmas holiday time with both her mother and her father. C would live with her mother for the next school term. The matter would then be reviewed after C had an opportunity to experience a more balanced life with each of her parents.

4.2.4 Promoting settlement

Parties have always been encouraged to settle their disputes by 'agree[ing] on what is best for their children, rather than fighting in the courtroom'.⁵³ This encouragement is shown through various legislative provisions,⁵⁴ as well as pre-court and case management procedures. Agreement is encouraged at any stage in the dispute, and a

⁴⁹ Ibid, [78].

⁵⁰ Ibid, [85].

⁵¹ Ibid, [86].

⁵² Ibid, [87].

⁵³ Australian Government, *A New Family Law System: Government Response to Every Picture Tells a Story. Response to the Report of the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child-Custody Arrangements in the Event of Family Separation* (2005), 1.

⁵⁴ See, for example, FLA s13A.

settlement which is negotiated on the commencement date of a trial is nevertheless considered preferable to going ahead with the trial. Parties are told that the advantages of reaching settlement include the ability to have control over the decision, and saving the emotional and financial cost of a trial.⁵⁵ Trials also require the most significant effort and resources for the court.⁵⁶

While it is preferable that all relevant information be ascertained well before the matter proceeds to a trial,⁵⁷ this does not always happen. Judicial meetings with children are a way in which additional evidence, previously unknown by the parties, may be discovered. This may give the parties the information and impetus they need to settle the matter. Judge Carl agreed, saying:

Having the voice of the child in the solution-finding process very often leads to the revelation of resources and new alternatives and can be an effective catalyst in breaking up the adversarial relation between hostile parents. So the child can contribute to find an amicable solution of the conflict without taking the responsibility for it.⁵⁸

In another matter before Benjamin J, his Honour's decision to speak directly with a child led to the settlement of a difficult matter. The child, aged 14, lived with his father. Contact with his mother had, in recent years, been sporadic at best. The mother claimed she had been diagnosed with a terminal illness, and filed an application for regular contact with the boy. The father's case was that the child had told him he did not want to see his mother. The mother claimed the child had said the opposite to her.

Before the interim hearing commenced, the judge invited the child to speak with him in closed court. A family consultant was present and led the discussion with the child. When the judge asked the child for his thoughts, the child replied, 'I just want to see my mum'. In open court, the family consultant gave an oral report of what the child

⁵⁵ Family Law Courts, *Marriage, Families and Separation*, Prescribed Brochure <<http://www.familycourt.gov.au>> at 8 September 2008.

⁵⁶ Family Court of Australia, *Annual Report 2006-2007* (2007), 49.

⁵⁷ See Chapter One for discussion on the various stages of decision-making once a matter is filed in court.

⁵⁸ Carl, above n40, 10. Judge Carl works in Germany, where judges meet with children frequently.

had said. As a result of this information, consent orders were made for the child to see his mother on a regular basis.⁵⁹

Ascertaining the child's views in this matter led the parties to explore settlement in a meaningful way. Had a judicial meeting not occurred, the child's true views may not have been discovered until some time after the interim hearing, when a family report was prepared. The judge would have been compelled to either adjourn the matter until a report could be prepared or make a decision without knowing the child's true views, and would have risked making a decision that did not accord with the child's best interests.

4.3 Benefits for children

4.3.1 Children want to meet with judges

Many children have expressed a particular desire to speak directly to the judge who is to make decisions for their parenting arrangements after family separation.⁶⁰ In Chapter Two, a body of research was discussed which concluded that children want to have a say in decisions that affect them and that they benefit from doing so. This is the case even in situations where the final outcome does not accord with the child's views. The research discussed in Chapter Two found that children are aware of the difference between 'having a say' and making a decision.

Children are able to understand that it is the judge, and not the child, who has the responsibility for making decisions about parenting arrangements after family separation. However, as Raitt described:

Children who do wish an opportunity to express their views have sometimes talked to researchers about the importance of having access to the ultimate decision-maker. This might be because they lack confidence that anyone else was paying attention to

⁵⁹ This case was heard in 2006. As the matter was settled, there is no written judgment. Benjamin J recounted the matter on the occasions referred to at n16 and n45 above. An account of the matter is also detailed in Parkinson and Cashmore, 'Judicial Conversations with Children', above n32, 173-175.

⁶⁰ Chief Justice A Nicholson (as he then was), 'Children and Young People: The Law and Human Rights' (Paper presented at the Law Society of the ACT, Sir Richard Blackburn Lecture, Canberra, 14 May 2002) 18; J Cashmore, 'Children's Participation in Family Law Matters' in C Hallet and A Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (2003) 167.

them, as well as the affirmation that can be conveyed by a judge being willing to see them.⁶¹

It is acknowledged that opportunities for children to ‘have a say’ should ideally occur before the matter comes before a judge for hearing in court.⁶² If children are consulted by their parents and others, such as mediators, prior to court proceedings, many benefits can be achieved for decision-making.⁶³ These benefits were discussed in Chapter Two. However, studies have shown that children are often not kept informed about developments after family separation by their parents, or consulted in relation to decision-making.⁶⁴

In an Australian study by Parkinson et al, the researchers spoke with 60 young people aged 12-19, whose parents had separated, about their views of family decision-making after separation. Half the young people (30/60) said that they had ‘no say at all’ in the family decision-making about where they would live after their parents separated.⁶⁵ Further, Gollop et al conducted a study of 107 children and young people from separated families in New Zealand, which examined the extent to which children and young people were consulted, in family decision-making, about their parenting arrangements after separation. Only 19 percent of the children interviewed reported being consulted about their initial ‘custody’ arrangements (with whom they would live).⁶⁶ More children (37%) reported being consulted about their initial ‘access’ arrangements (with whom they would spend time, and when).⁶⁷ These studies demonstrate that many children are not given an opportunity to ‘have a say’ in family decision-making. Consequently, it may be up to judges to ensure that children are given an opportunity to express their opinions, and have their voices heard, even if it is at a late stage in proceedings.

⁶¹ F Raitt, ‘Hearing Children in Family Law Proceedings: Can Judges Make a Difference?’ (2007) 19 *Child and Family Law Quarterly* 204, 217.

⁶² A Smith, N Taylor and P Tapp, ‘Rethinking Children’s Involvement in Decision-Making after Parental Separation’ (2003) 10 *Childhood* 201, 211.

⁶³ See, for example, discussion about the Child Responsive Program in Chapter One.

⁶⁴ See, for example, N Taylor, ‘What Do We Know about Involving Children and Young People in Family Law Decision Making? A Research Update’ (2006) 20 *Australian Journal of Family Law* 154, 165 and the studies referred to below.

⁶⁵ P Parkinson, J Cashmore and J Single, ‘Adolescents’ Views on the Fairness of Parenting and Financial Arrangements after Separation’ (2005) 43 *Family Court Review* 429, 432.

⁶⁶ M Gollop, A Smith and N Taylor, ‘Children’s Involvement in Custody and Access Arrangements after Parental Separation’ (2000) 12 *Child and Family Law Quarterly* 383, 387.

⁶⁷ *Ibid.*

In another study by Parkinson et al, the authors spoke with children about their views on talking to judges in parenting disputes. The authors interviewed children, aged 6-18 years, who had been the subject of both contested and non-contested matters involving their care arrangements after parental separation. Of the 35 children interviewed, 85 percent said that children should have the opportunity to talk to the judge in chambers if they wished to do so.⁶⁸ Some acknowledged that talking with a judge might be ‘scary’ and that not everyone may want the opportunity. However, they said that children should still be given the option.⁶⁹ A recent study by Bagshaw et al collected data from online surveys of parents and children about their experiences of post-separation parenting arrangements with a particular focus on family violence.⁷⁰ The results of the survey of children supported the national and international research findings that children want to have a greater say in post-separation parenting decisions. In particular, nearly 40 percent of children who responded said that they would have liked to communicate their views directly to the judge.⁷¹

The main reason expressed by the children in Parkinson et al’s study for wanting to speak directly to judges was that they wanted to have a say in decisions, and have their views heard by the decision-maker.⁷² They wanted to have themselves and their views acknowledged, and thought meetings between judges and children would result in better decisions being made.⁷³ Also, they wanted interviews to be conducted in private, so they could speak freely without their parents knowing what was said.⁷⁴

⁶⁸ P Parkinson, J Cashmore and J Single, ‘Parents’ and Children’s Views on Talking to Judges in Parenting Disputes in Australia’ (2007) 21 *International Journal of Law, Policy and the Family* 84, 89.

⁶⁹ Ibid.

⁷⁰ Bagshaw et al, ‘The Effect of Family Violence on Post-Separation Parenting Arrangements’ (2011) 86 *Family Matters* 49.

⁷¹ Ibid, 58. Seventy-seven children responded to this question.

⁷² Parkinson et al, ‘Parents’ and Children’s Views on Talking to Judges’, above n68, 89-90.

⁷³ Ibid.

⁷⁴ Ibid, 90-91. As discussed in Chapter Five, confidential meetings between judges and children may be contrary to the principles of natural justice and due process. This thesis argues that all parties to the proceedings must receive an account of the meeting, whether that be through a recording, transcript or written report, at the discretion of the judge.

Further, the children said they wanted their views to be heard by the judge without those views being filtered by others,⁷⁵ or any ‘mixed messages or misinterpretation’.⁷⁶

Interestingly, although the children in this study said they wanted their views to be heard by the judge, only a minority assumed that by talking to the judge, a decision would automatically be made in accordance with their views.⁷⁷ Most expressed a fair level of trust and hope that the judge would do what he or she thought was best and right for the child.⁷⁸ The children expressed eagerness to speak with judges directly, even though they were aware that their views would also be presented to the court through other methods, such as a family report or ICL.⁷⁹ Similar attitudes have been expressed by children in studies conducted in other countries.⁸⁰

In a DVD produced by the Family Justice Council’s Voice of the Child Committee (United Kingdom), three children described their experiences of family law proceedings, with all expressing the opinion that children should be given the option of meeting with the judge if they wish. One child, Laura, did meet with the judge during her parents’ prolonged court proceedings, which commenced when Laura was nine and ended when she was 13 years old. At age 16, she recalled her experience:

There were aspects of the meeting I felt were inappropriate, such as there was confectionary on the table. That, I felt, was more patronising than productive to getting our views across. Although, in saying that, the judge who was listening appeared to be the first person in four years that really understood our pain and fear, and was interested in getting us an accurate outcome. I feel that, if I hadn’t had that meeting, the outcome could have been devastatingly different.⁸¹

⁷⁵ Ibid, 92.

⁷⁶ Ibid, 90.

⁷⁷ Ibid.

⁷⁸ Ibid, 94.

⁷⁹ Ibid, 104.

⁸⁰ See quotes from children cited in C Lyon, ‘Children’s Participation in Private Law Proceedings with Particular Emphasis on the Question of Meetings between the Judge and the Child in Family Proceedings’ in Sir M Thorpe, Rt Hon Lady Justice Hale and E Clarke (eds), *No Fault or Flaw: The Future of the Family Law Act 1996* (2000), 68; G Douglas et al, ‘In Practice: Separate Representation Report’ (2006) 36 Family Law 385; Family Justice Council Voice of the Child Committee, DVD, *Inside the Family Court: Children’s Experiences of Family Proceedings* (2010).

⁸¹ Family Justice Council Voice of the Child Committee, DVD, *Inside the Family Court: Children’s Experiences of Family Proceedings* (2010). Similar results are being found in a study by Canadian researchers Birnbaum, Bala and Cyr who are in the process of speaking with children about their various levels and methods of involvement in family law matters. Many of the children who had spoken with judges, while initially feeling anxious about the meeting, said they

Judges have also observed that children who have been given the opportunity to meet with them have appeared to appreciate the experience. In *C and C*⁸² Guest J met with three children aged 8-12 and commented on their keenness to speak with him:

I asked them how they felt about the process and E responded by saying that she felt 'pretty cool' about talking to me. N made it clear that he was 'not nervous,' and S... was quick in vocalising that she thought it was 'excellent, awesome'. In those circumstances, I had no doubt that the children were very much at ease.⁸³

In the New Zealand case of *P v P*⁸⁴ Judge Adams met with three girls who were the subject of proceedings. His Honour assured the children that it was he, and not they, who would be making the ultimate decision, and that he would communicate his decision to them. During the meeting, two of the children said they were 'not ready' to spend time with their father. His Honour decided against the views of those children, and ordered that they have structured, supervised contact with the father. Immediately after handing down his decision, his Honour went to a room adjoining the courtroom, where the girls were waiting. He explained his decision and reasons to them. One of the children passed his Honour a note she had previously written. The note thanked him for the decision to order contact, which she had correctly assumed would be ordered.⁸⁵ The child expressed her satisfaction with the process, despite the fact that the decision conflicted with the view the child had expressed to the judge.

Perhaps, as some commentators have previously noted, a child who feels satisfied that they have had their views heard in the decision-making process, even in

were glad to have met with the judge as it was important for the decision-maker to see who they were. This was despite the fact that many of the children did not agree with the judge's decision (Email correspondence from Birnbaum to the author on 10 December 2010; R Birnbaum, N Bala and F Cyr, 'Children's Experiences with Family Justice Professionals and Judges: A Comparative Analysis of Ontario and Ohio' (Paper presented at the Ontario Bar Association Family Law Boot Camp, Toronto, 4 February 2011)).

⁸² *C and C* [2006] FamCA 701 (Unrep, Guest J, 26 June 2006).

⁸³ *Ibid*, [16].

⁸⁴ *P v P* (Family Court, Manukau Fam-2004-004-003261, 6 June 2006, Judge Adams), Minute, and the substantive decision *P v P* (Family Court, Manukau Fam-2004-004-003261, 6 June 2006, Judge Adams).

⁸⁵ *Ibid*, as discussed in J Caldwell, 'Judicial Interviews of Children: Some Legal Background' (2007) 5 *New Zealand Family Law Journal* 215, 217-218.

circumstances where their views are not followed, is more likely to accept and comply with a decision than a child who feels they have not been listened to.⁸⁶

By this discussion, it is not meant to imply that the court does not currently take children's views seriously. The various methods by which the court hears children's views are well known and widely used. As the Chief Justice of the Family Court, Bryant CJ said:

It is apparent from countless judgments delivered by the Court over its thirty year history that the Court does take children's views into account. However, available research tends to suggest that this is not well understood by children and young people.⁸⁷

It is possible that, through the common methods employed by the court to hear evidence of children's views, children are not aware or do not appreciate that the court takes active steps to ensure the views of children are heard and taken into account. Giving children the opportunity to meet with a judge and discuss their circumstances may not always add to the body of evidence or assist the judge in making the ultimate decision. However, allowing children who wish to do so to meet with the decision-maker may give children greater satisfaction that their views have been heard. Lyon wrote:

[C]hildren need to see, like everyone else, that justice has been done and it is very difficult for them to appreciate this if they feel as marginalised and as irrelevant as many of them do.⁸⁸

Conversely, denying children the opportunity to meet with the judge may cause children distress, or lead them to feel that their views are not an important factor in decision-making. Former Chief Justice Nicholson, acknowledging that some children want to express their views directly to a judge, said, 'I think that judges should consider [meeting with children] more often, especially in cases involving older children'.⁸⁹

⁸⁶ Cashmore, 'Children's Participation in Family Law Matters', above n60, 159. Hale, above n15, 124.

⁸⁷ Chief Justice D Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127, 137.

⁸⁸ Lyon, above n80, 78.

⁸⁹ Nicholson, above n60, 18.

4.3.2 Acknowledging the child's right to be heard

As discussed in Chapter Two, by ratifying the UNCRC, Australia has recognised that children have a right, pursuant to Article 12 of that convention, to be heard and have their views taken into account in any proceedings affecting them.⁹⁰ Giving children the opportunity to meet with the judge who is to make decisions about their future care, upholds that right.

Article 12 is somewhat ambiguous, in that it does not specify whether children have a right to be heard directly, or whether the right is still respected where children are heard 'through a representative or an appropriate body'. Meeting directly with a judge allows a child to participate directly in the proceedings. In Chapter Two it was argued that, in order to uphold a child's right under Article 12, they must be given the choice about whether they express their views directly, or through a third party, or not at all.⁹¹ Therefore, it is important that children are given the option to meet directly with a judge. Whether a child wishes to pursue that option is a matter for them to decide. Birnbaum and Bala agreed, stating, in relation to judicial meetings with children:

It is... our view that all children should be regarded as having the *right* to decide whether they want to meet with the person who may be making very important decisions about their future (emphasis in original).⁹²

Noting that the court has a statutory obligation to take into account any views expressed by a child in making a decision for their post-separation parenting arrangements, it follows that any court procedure that promotes the child's right to express their views upholds Article 12 of the UNCRC, and also complies with the court's obligation to take children's views into account. Therefore, the practice of judges meeting with children demonstrates Australia's compliance with an important international obligation and, significantly, demonstrates to children that they have a right to be involved. Parkinson et al wrote:

⁹⁰ Confirmed by Nicholson CJ in *ZN and YH and Child Representative* (2002) FLC 93-101, [112].

⁹¹ See discussion in Chapter Two; United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, CRC/C/GC/12 (2009), [35] <<http://www2.ohchr.org/english/bodies/crc/comments.htm>> at 12 February 2010.

⁹² R Birnbaum and N Bala, 'Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio', (2010) 24 *International Journal of Law, Policy and the Family* 300, 330.

Working through the issues involved in [judicial meetings with children] may yield many benefits in ensuring that the decision-making process allows children not only to be heard, but to know that they have been heard.⁹³

Many judges have explicitly recognised that allowing a child to meet with a judge upholds the child's right to be heard pursuant to the UNCRC. Comments to that effect were made by Nicholson CJ in *ZN v YH and Child Representative*⁹⁴ and by Baroness Hale of Richmond, a United Kingdom judge, who wrote that 'even if it was of no benefit to me in making the decision, I would still think it is the child's right to be heard if that is what she wants'.⁹⁵

In *N and N*⁹⁶ Mullane J said that his practice of explaining his orders and reasoning to children directly (discussed further below) was in specific acknowledgment of children's rights under the UNCRC and the legitimate expectation that the Family Court will exercise its inherent powers in conformity with that treaty.⁹⁷ In this particular case, Mullane J said his meeting with an 11 year old boy was 'intended to inform the person whose interests are most affected by the proceedings of the outcome and the reasons in a way that is more beneficial to him and more respectful of him'.⁹⁸

In an article written by United Kingdom District Judge Crichton, his Honour reported on a meeting with a 12 year old girl who was the subject of a welfare matter.⁹⁹ The girl, Shanika, requested to meet with the judge and he agreed. Her views had already been set out in detail in an expert report. His Honour met with Shanika and they 'chatted' for 10-15 minutes. When the matter resumed in court, Shanika was allowed to remain. She chose to sit in the judge's chair.¹⁰⁰ There was no significant dispute in

⁹³ Parkinson, Cashmore and Single, 'Parents' and Children's Views on Talking to Judges', above n68, 105.

⁹⁴ *ZN and YH and Child Representative* (2002) FLC 93-101, [112].

⁹⁵ Hale, above n15, 125-126.

⁹⁶ *N and N* (2000) FLC 93-059.

⁹⁷ *Ibid*, [18], citing *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. However, note that his Honour's practice was to speak with children after his decision had been made. Although his Honour acknowledged children's right to be 'involved' in proceedings, his practice did not allow children to participate directly in the decision-making. Further, note the discussion in Chapter Two regarding the effectiveness of the 'legitimate expectation' doctrine, which has been placed in doubt.

⁹⁸ *N and N* (2000) FLC 93-059, [19]

⁹⁹ District Judge N Crichton, 'Listening to Children' (2006) 36 *Family Law* 849, 849.

¹⁰⁰ *Ibid*.

the hearing, and a temporary arrangement was agreed, with the matter to come back to court in six weeks. His Honour detailed what happened at the next court event and his reasoning for agreeing to meet with Shanika and involve her in the process:

[Shanika] came in smiling, and unhesitatingly and confidently walked towards the bench to sit in my chair. I had already arranged an extra chair for me to sit beside her. The hearing did not take long and I made a final care order. It was Shanika's birthday the following day. A short informal party followed, with cards and presents. What was the value of all this? The guardian had already filed a comprehensive report including an accurate account of Shanika's wishes and feelings. Shanika's presence did not add to my knowledge of her case nor did it assist in a decision which was agreed in any event. However, ... I hope and believe that when she looks back on the awful events which changed the course of her life she will feel that she was acknowledged and respected by the family justice system.¹⁰¹

4.3.3 Explaining orders to a child

Some judges have met with children after the orders of the court have been handed down, in order to explain the orders and the judge's reasoning to the child.¹⁰² One judge interviewed by the author in the research project described in Chapter Five spoke with children on one occasion to explain orders that had been made by consent, because the parties were unable to agree on who should explain the decision to the children.¹⁰³ In another matter, Benjamin J, after making a decision in a very difficult case involving a parent and children who were members of the Exclusive Brethren, took advantage of his role as a judge to explain his orders to the children in question, as he knew the children were more likely to comply with the orders if they had been delivered by a person in a position of authority.¹⁰⁴ As in *P v P*,¹⁰⁵ a New Zealand judge may choose to meet with a child to explain the decision to them in addition to meeting with the child prior to the decision in order to hear their views.¹⁰⁶

¹⁰¹ Ibid, 850.

¹⁰² See, for example, Judge J Doogue, 'A Seismic Shift or a Minor Realignment? A View from the Bench Ascertaining Children's Views' (2006) 5 *New Zealand Family Law Journal* 198, 204; *P v P* (Family Court, Manukau Fam-2004-004-003261, 6 June 2006, Judge Adams), Minute.

¹⁰³ Interview with Judge A (see Chapter Five for details).

¹⁰⁴ Recounted by the judge in an address to students at the University of Tasmania on 16 May 2008.

¹⁰⁵ *P v P* (Family Court, Manukau Fam-2004-004-003261, 6 June 2006, Judge Adams), Minute, and the substantive decision *P v P* (Family Court, Manukau Fam-2004-004-003261, 6 June 2006, Judge Adams).

¹⁰⁶ Discussed above at 4.3.1.

In *N and N*,¹⁰⁷ Mullane J stated he had made it his practice to meet with children 11 years and older to explain to them briefly the outcome of the proceedings, the proposed orders and a summary of the reasons. The child would be accompanied by the person who had written the family report and, if applicable, the child representative (now ICL).¹⁰⁸ While these meetings served no evidentiary purpose, as in each case his Honour's decision had already been made, his Honour described the practice in that instance as 'a demonstration of the Court's respect for the young person in question and his rights to participate in proceedings concerning him'.¹⁰⁹

This approach conforms with the view of the United Nations Committee on the Rights of the Child ('UN Committee'), which has stated that, in order to adhere to children's rights under Article 12 of the UNCRC:

The decision-maker has to inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously.¹¹⁰

The UN Committee has commented that an explanation of the outcome of proceedings by a judge to a child is particularly important in circumstances where the views of the child could not be accommodated.¹¹¹ The judge can reassure the child that their views are very important and have been taken into account in the deliberations. The judge can explain that the child's best interests must be the paramount consideration, so orders must be made that reflect those interests even where the orders do not accord with the child's own preferences. The judge can explain why the orders he or she has made promote the child's best interests in all the circumstances. As discussed above, this may assist the child to accept and comply with the decision, even if the outcome does not accord with their views.¹¹²

¹⁰⁷ *N and N* (2000) FLC 93-059.

¹⁰⁸ *Ibid*, [2].

¹⁰⁹ *Ibid*, [7].

¹¹⁰ United Nations Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard*, above n91, [45].

¹¹¹ United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard* (2006), recommendation 41

<http://www2.ohchr.org/english/bodies/crc/docs/discussion/Final_Recommendations_after_DGD.doc> at 12 February 2010.

¹¹² See above n86.

4.4 Conclusion

Judicial meetings with children can be beneficial, both for children and for decision-making. From the examples above, it is clear that the main purpose of a judicial meeting with a child is not necessarily for the judge to unearth new and significant information about the child's views. A judge may sometimes merely hear a restatement of the views children have expressed previously, but with the advantage of hearing that evidence directly. Being able to view the child in person, and hear their side of the story, may allow judges to discover what is important to the child, and clarify the evidence already presented to the court. In this way, judicial meetings with children may be viewed as an important complement to other valuable methods of hearing children's views, such as through a family report. Giving judges a fuller picture of the circumstances of a case better enables them to make decisions that are in the best interests of children.

In addition, there may be circumstances where judicial meetings with children do produce new and important evidence about children's views, such as where children's views have changed over time or in cases of urgency where no other timely means of obtaining a child's views are available.

When these benefits are viewed alongside the benefits to children of feeling involved in the decision-making process, and children's expressed desire to speak with judges who are deciding their case, it is disappointing that Australian family law judges take the opportunity to meet with children so rarely.

The next chapter looks at the possible reasons for this and, in particular, discusses concerns expressed about the practice that may be deterring judicial officers from meeting with children in appropriate cases.

Chapter Five

5 Why Australian judges do not meet with children

5.1 Introduction

This chapter looks at why, despite the benefits for children and decision-making discussed in Chapter Four, judicial meetings with children in Australian family law proceedings are extremely rare. The chapter looks at the detriments of judicial meetings with children, as identified in the literature, and explores the views of Australian judges in relation to the practice. Nothing in the *Family Law Act* 1975 (Cth) ('FLA') or the *Family Law Rules* 2004 (Cth) ('Rules') compels a judge to meet with a child in any circumstances. Whether such a meeting takes place is a matter entirely for judicial discretion.¹ Given the paucity of reported and unreported cases where judicial meetings have occurred, it appears that Australian judges are reluctant to speak with children.

The first part of this chapter outlines several perceived problems and detriments that can arise when judges meet with children. These have been identified in the existing literature, and have also been highlighted by judges, both in Australia and overseas, in previous studies. Ways in which these problems may be solved, or the detriments lessened, are discussed. The second part of this chapter outlines and discusses the author's empirical research project. The author conducted separate interviews with four judges of the Family Court of Australia ('FCA'), whose identities will remain anonymous. The judges were asked about their views, practices and experiences of judicial meetings with children. Based on this qualitative information, the author developed and distributed a short survey to all family law judicial officers in Australia (N=92). Almost half of the cohort (N=44) participated in the study by completing the surveys. The identities of these judicial officers will also remain anonymous. The intention of this study was to discover the incidence of judicial meetings with children

¹ *KS and DS* (1999) FLC 92-860, [35] (Nicholson CJ). The practice of judges speaking with children was formerly provided for in the *Family Law Rules* 2004 r15.03. That rule was omitted by the *Family Law Amendment Rules* 2010, however nothing prevents a judge from meeting with a child at a judge's discretion. See detailed discussion about this in the Introduction and in Chapter Three.

in Australia, and the range of views about the practice. The study also gave all family law judicial officers in Australia the opportunity to express their concerns in relation to judicial meetings with children and to suggest ways in which perceived problems with the practice could be addressed.

5.2 Detriments of judicial meetings as identified in the literature

The detriments of, or problems with, judicial meetings that have commonly been raised in the literature are threefold.² The first relates to the fact that judicial meetings with children commonly involve the hearing of evidence in a forum where the parties and their counsel are not present. This creates a problem with due process and the preservation of natural justice. The problem is heightened in circumstances where it is proposed, by the judge or by the child participating in a judicial meeting, that information obtained in the meeting remains ‘confidential’. Second, there is a widely held view that judges lack the skills and expertise to speak appropriately with children and to accurately interpret what they say. Third, there are concerns that subjecting children to judicial meetings may be harmful to them, and contrary to their best interests.

Judicial meetings with children may also create detriments that have not been fully explored in the literature. One is that the incorporation of judicial meetings as a common part of the trial process would necessarily lead to an increase in the court’s costs and administrative burden. Judges’ workloads would also increase. It is important that this necessary consequence of judicial meetings with children be recognised, although the full extent of the increased burden on courts and judges will not become apparent unless and until the incidence of judicial meetings increase. There may also be other detriments that cannot be foreseen at this stage, but may arise if judges begin meeting with children more often.

² J Cashmore, ‘Children’s Participation in Family Law Matters’ in Hallet and Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (2003), 167.

5.2.1 Due process and confidentiality

A fundamental principle of due process and natural justice is that all parties to proceedings be given the opportunity to hear and test all the evidence, and be allowed to make submissions in respect of that evidence, before a decision is made.³ When a judge meets with a child, in the absence of the parties and their counsel, for the purpose of ascertaining or confirming evidence about the child's views, it may be perceived that the court is receiving and acting on evidence which is unknown and untested by the parties and counsel.⁴ This would constitute a breach of natural justice. As will be discussed below, this concern can be addressed by ensuring that the parties receive an account of the judicial meeting and are given an opportunity, prior to a decision being made, to make submissions, ask for clarification, or challenge the evidence.

Under the *Family Law Rules* 1984 (Cth) ('former Rules'), a judge could not rely on any information obtained during a meeting with a child, as the former Rules specified that such meetings were 'confidential'.⁵ The main problem with judicial meetings remaining confidential was highlighted in the United Kingdom case of *H v H*.⁶ After speaking with the two children alone in chambers, the trial judge made orders that did not appear to accord with the evidence adduced in open court. The judge had made confidential notes of his meeting with the children and had recorded a promise he made to the children that nothing said by them would be disclosed. The appeal court was faced with the choice of either looking at the confidential notes and breaking the promise, or hearing the appeal without being able to consider matters vital to the original decision. The court instead ordered a rehearing by a different judge.

In *ZN and YH and Child Representative*⁷ Nicholson CJ said he thought it may be desirable to revise the (former) Rules to remove the requirement that judicial meetings

³ *Allesch v Maunz* (2000) FLC 93-033, 87,517 (Kirby J); *Kioa v West* (1985) 159 CLR 550; *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1962) 113 CLR 475.

⁴ Judge J Doogue, 'A Seismic Shift or a Minor Realignment? A View from the Bench Ascertaining Children's Views' (2006) 5 *New Zealand Family Law Journal* 198, 205; Cashmore, 'Children's Participation in Family Law Matters', *ibid*; R Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197, 203.

⁵ Former Rules, O23 r5.

⁶ *H v H* (1974) 1 All ER 1145.

⁷ *ZN and YH and Child Representative* (2002) FLC 93-101.

remain confidential.⁸ This requirement was removed with the introduction of the *Family Law Rules* 2004 (Cth) and there is now nothing preventing judges from relying on, as evidence, any information obtained through a discussion with a child.⁹ For natural justice principles to be upheld, however, the court must ensure that the parties are furnished with all information arising from the judicial meeting and have an opportunity to respond to it. There are various ways in which this may be done.

In *ZN v YH*,¹⁰ for example, Nicholson CJ ordered that the children be reinterviewed by the family consultant and a further family report be prepared. This approach, if adopted regularly, may lead to unnecessary and costly delay. In other Australian cases, judges have asked a family consultant to be present during the judicial meeting. The family consultant supplies an oral or written report in open court as to what happened during the meeting.¹¹ This is an appropriate way for information obtained during the judicial meeting to be adduced as evidence.¹² The parties can ask questions of the family consultant about the information presented, including the family consultant's opinion of the validity of any views expressed by the child.

As will be discussed below, the presence of a family consultant during a meeting between a judge and a child is desirable. Their presence puts to rest other perceived criticisms of judicial meetings with children such as the effect on the child and judges' lack of training in this area (discussed below). Conducting judicial meetings in the presence of a family consultant was suggested by Parkinson and Cashmore in their proposed guidelines for judicial conversations with children.¹³

⁸ Ibid, [108].

⁹ Rules r15.03 (now omitted). This rule, which specifically referred to judges' discretion to meet with children, was omitted by the *Family Law Amendment Rules* 2010, which came into force on 1 August 2010. This omission does not affect judges' discretion to speak with children (Explanatory statement, *Family Law Amendment Rules* 2010 (Cth), [16]).

¹⁰ *ZN and YH and Child Representative* (2002) FLC 93-101. This case was discussed in detail in Chapter Four.

¹¹ See, for example, *Painter and Morley* [2007] FamCA 283 (Unrep, Benjamin J, 29 March 2007), *A and D* [2004] FamCA 879 (Unrep, Guest J, 26 August 2004), *Lachlan & Lachlan* [2008] FamCA 455 (Unrep, Le Poer Trench J, 25 June 2008).

¹² P Parkinson and J Cashmore, 'Judicial Conversations with Children in Parenting Disputes: the Views of Australian Judges' (2007) 21 *International Journal of Law, Policy and the Family* 160, 184.

¹³ Ibid.

A problem may surface if the family consultant's perception of what happened during the judicial meeting differs from the judge's perception. The family consultant reports the outcome of the judicial meeting to the parties but it is the judge who finally determines the matter. The effect of a discrepancy between the judge's and family consultant's respective recollection of events may have serious consequences for the outcome of a matter. This problem was raised by many Australian judicial officers who participated in the author's interviews and survey. Several judges made suggestions for how this difficulty may be addressed and these are discussed in the second part of this chapter. In any event, it is argued below at 5.2.2 that evidence collected as a result of a judicial meeting is unlikely to be complex, subtle or ambiguous. Therefore, a significant difference between the recollection of the judge and the family consultant as to what happened during the meeting is less likely.

At the judge's discretion, a transcript or audio or visual recording of the judicial meeting, or part thereof, can be given to the parties. As discussed in the second part of this chapter, many family law judicial officers in Australia agree that this should occur in all but exceptional cases.¹⁴

If a judge ensures that the parties are provided with a family consultant's report and/or a transcript or audio or video recording of the judicial meeting during the course of proceedings, it can generally be accepted that all parties, though not present during the meeting, will receive an account of what was said, and that the fundamental principles of due process will be complied with. The parties will have an opportunity to respond and make submissions about the evidence obtained as a result of the meeting, before the judge makes the final decision.

Unfortunately, this approach conflicts with children's own preference about the way in which their views expressed in a judicial meeting should be dealt with. Many children have indicated that things said during a meeting between a child and a judge should remain confidential.¹⁵ Aside from offending the principles of natural justice,

¹⁴ Note the discussion below that, in some circumstances, judges may exercise their discretion to limit the amount of information given to the parties, particularly if it is considered that sharing all details of the meeting would be harmful to the child.

¹⁵ B Neale and C Smart, 'Agents or Dependents? Struggling to Listen to Children in Family Law and Family Research' (Working Paper 3, Centre for Research on Family, Kinship and Childhood,

to keep the outcome of judicial meetings confidential, it has been argued, trivialises the child's voice and increases the prospects of errors of reasoning and the overall outcome of the case.¹⁶ These results are clearly not in children's best interests.

It is important that children are made aware, before the judicial meeting, that things they say will not necessarily remain confidential and may be made known to everyone involved in the court proceedings, including their parents.¹⁷ As Megaw LJ said in *H v H*:¹⁸

It seems to me that...while the judge seeing the child privately must naturally do all he can to encourage the child to speak freely, frankly and without fear, he may not give the child a promise which would be such in its terms, or be understood by the child as meaning, that in no circumstances will anything that the child says be made known to anyone else.¹⁹

Judges must ensure that children are aware, and understand, that matters discussed during a meeting will not necessarily remain confidential. Without the child's consent the meeting should not proceed. A problem may arise if a child, having agreed at the beginning of the judicial meeting that things they say may be reported to their parents, subsequently reneges on that agreement and requests that some aspect of the meeting remain confidential. If the child is unable to be swayed, the judge must not rely on the disclosure as the basis for making his or her decision.²⁰ To do so would be contrary to the principles of natural justice, which require that a judge's decision be soundly based on the evidence available to the parties. Judges are often required to disregard information which is not properly admitted as evidence, and information which a child insists should be confidential should not be treated any differently.²¹ A

University of Leeds, 1998), 14; P Parkinson, J Cashmore and J Single, 'Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia' (2007) 21 *International Journal of Law, Policy and the Family* 84, 91.

¹⁶ J Caldwell, 'Judicial Interviews of Children: Some Legal Background' (2007) 5 *New Zealand Family Law Journal* 215, 220.

¹⁷ Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 185; Doogue, above n4, 205.

¹⁸ *H v H* (1974) 1 All ER 1145.

¹⁹ Ibid, 1148 (Megaw LJ).

²⁰ This was agreed by all judges interviewed in Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 165.

²¹ This would not be the case if the disclosure related to an allegation of child abuse, in which case the judge, family consultant or Independent Children's Lawyer would be mandated to report the disclosure to the relevant child protection authority under FLA s67ZA.

judge who considers that he or she cannot disregard the information must disqualify him or herself from hearing the matter.²²

It should be remembered, however, that judges have a wide discretion in the conduct of children's matters and may, in certain circumstances, exercise that discretion in order to keep confidential something a child has said. One such circumstance may be if the matter to be kept confidential is not significant to the outcome of the proceedings, or can be presented as evidence in another way. In *Re Alex*,²³ for example, the trial judge respected the child's wish for the judicial meeting to be kept confidential. In order to comply with due process, the judge did not rely on anything the child said during the meeting and, where there were specific matters on which his Honour wished to rely, he referred those matters to witnesses to ensure the evidence was brought into the open.²⁴ In *Lachlan and Lachlan*²⁵ Le Poer Trench J justified his decision not to release a copy of a DVD recording of his meeting with a teenage boy. The parents had received all relevant information arising from the meeting through a report from the family consultant, who had been present at the meeting. His Honour said that children have some right to confidentiality in certain circumstances, and a trial judge has discretion not to publish information if it may be harmful to the child to do so.²⁶

5.2.2 Judges are not trained to speak with children

One of the main criticisms of judges meeting with children is the perception, often held by judges themselves, that judges lack the required skills and training to speak with children²⁷ or to draw out and interpret their views.²⁸ It is widely thought that

²² In accordance with the test of judicial prejudice approved by the High Court in *Johnson v Johnson (No 3)* (2000) FLC 93-041.

²³ *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (2004) FLC 93-175.

²⁴ *Ibid.*, 78,958.

²⁵ *Lachlan and Lachlan* [2008] FamCA 455 (Unrep, Le Poer Trench J, 25 June 2008).

²⁶ *Ibid.*, [658-659]. His Honour said that while there was nothing particular arising from his meeting with the child that his Honour thought should remain confidential, 'without understanding all of the history of the family I could be entirely insensitive to some piece of information which the child gave me which I thought unimportant to the decision to be made by me. If I were to make available to the parties the recording of the interview I might inadvertently cause damage to an aspect of the relationships between the child and his parents. It is this aspect of the matter which in this case I find compellingly drives me not to release the recording of the interview.' (*Ibid.*, [661]).

²⁷ Chisholm, above n4, 203.

judges ‘generally lack knowledge about developmental differences in [children’s] cognitive, language, and emotional capacities’.²⁹

A situation where a judge attempted to interpret a child’s views arose in *Nicholson and Crans*.³⁰ Demack J interviewed a 15 year old boy without anyone else being present. The child expressed a clear preference to live with his mother. His Honour found the child’s answers were ‘carefully rehearsed and designed to bring forth all conceivable reasons to support the view that he was advancing’.³¹ His Honour was unsatisfied that the views expressed were the child’s true wishes and not the product of the mother’s manipulation.

As Demack J was without the assistance of a family consultant (as they are now called), an issue arises as to whether his Honour had the expertise to assess the validity of the child’s views in this case, particularly when his Honour stated in the same paragraph, ‘[h]e is a small lad for his age and appeared to be extremely nervous’. It is unclear whether this observation had any impact on his Honour’s findings. If it did, it may have been inappropriate to make findings of truth based on a child’s size and his apparent nervousness on meeting with a judge by himself. On the other hand, judges are accustomed to ascertaining the veracity of evidence and credibility of witnesses. While the task may be different when the evidence is being presented by a child, judges would presumably have some skill in determining the truth of what is said. This may be so particularly in cases involving older children.

While it is almost certain that the majority of judges do not have adequate training to comfortably and appropriately speak with children alone, this problem can be addressed by offering training³² and taking advantage of the skills and training of a family consultant. In *ZN and YH*³³ Nicholson CJ said:

²⁸ J Cashmore, ‘Children’s Participation in Family Law Matters’, above n2, 167.

²⁹ J Kelly, ‘Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice’ (2002) 10 *Virginia Journal of Social Policy and the Law* 129, 154.

³⁰ *Nicholson and Crans* (1976) FLC 90-025.

³¹ The full text of this judgment has not been reported. These facts were taken from the extract published by CCH Australia Limited, *Family Law Cases*, citation above.

³² M Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings*, Family Court of Australia (2007), 42, also A

This Court already offers regular judicial training to judges and there is no reason why such training should not be offered as part of that programme.³⁴

If judicial meetings are conducted in the presence of a family consultant, the consultant can facilitate the discussion and ask appropriate questions to ascertain the child's views, thus relieving the judge of that responsibility. The judge may listen to the conversation and ask specific questions as they arise, or invite the child to speak freely.³⁵

In any event, in the vast majority of cases the child's views would previously have been obtained and interpreted by a family consultant, and presented in a family report. This goes some way to explaining why meetings between judges and children are so rare, as 'interviews by other professionals have long since replaced judicial interviews as the normal means of ascertaining the views of children'.³⁶

Family consultants are highly trained to speak with children and establish their views. They have the expertise to analyse the views expressed by a child and give the judge an informed opinion on whether the views are genuinely held or whether the child is under some other influence, such as parental pressure or loyalty.³⁷ This thesis argues that a meeting between a judge and a child should take place in addition to hearing the child's views through the reports of family consultants and other suitably qualified experts.³⁸ It is a complementary measure, to clarify or elucidate information or emphases that may have been left inconclusive by a report, or to satisfy a child who wishes to talk directly to a judge. A judicial meeting should not be in substitution for

Nicholson, 'Family Law Reform: How Much Real Reform is Involved? Does It Take Us Forward or Backwards?' (Paper presented to the ACT Council of Social Services, Canberra, 17 August 2006) 22.

³³ *ZN and YH and Child Representative* (2002) FLC 93-101.

³⁴ *Ibid*, [109].

³⁵ As occurred in the case involving the purportedly terminally ill mother discussed in Chapter Four.

³⁶ Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 162.

³⁷ Chief Justice A Nicholson (as he then was), 'Children and Children's Rights in the Context of Family Law' (Paper presented at the LawAsia Conference, Brisbane, 21 June 2003) 6. For example, it has been widely recognised that children may be 'alienated' from one parent to the extent that a child may express unreasonable negative feelings and beliefs toward a parent that are significantly disproportionate to the child's actual experience with that parent (J Kelly and J Johnston, 'The Alienated Child: A Reformulation of Parental Alienation Syndrome' (2001) 39 *Family Court Review* 249).

³⁸ Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 164.

an expert report, except in circumstances of urgency or where it is impractical to obtain one.³⁹

While some direction may be given by the court, the family consultant cannot be expected to know what particular information provided by the child will be considered important by the judge. Further, the family report is usually provided well before the trial. By the time the matter is ready for hearing before a judge, issues of importance to the ultimate decision may be different from when the family report was prepared. A judicial meeting can allow the child's views to be updated in preparation for a trial.

Additionally, in many of the cases mentioned in Chapter Four, the views expressed by children during judicial meetings did not require interpretation or deciphering.⁴⁰ Instead, they were simple statements of what children considered to be important in their situations, which clarified, supplemented or updated information already disclosed in a family report.⁴¹ Had the respective judges in cases such as *ZN and YH*⁴² and *Painter and Morley*⁴³ been limited to the accounts of the children's views in the family reports, the decisions may have been different, and may not have accorded with the children's best interests.

Lyon has argued that judges should not let their perceived lack of 'expertise' prevent them from speaking with children:

What does it take to talk to children? Do judges have the same reservations when dealing with children in the dock in criminal courts? Do they refuse to do cases in which children are defendants because they 'do not know how to talk to children?' It is necessary to be provocative here because this is a very serious question and one in respect of which children feel extremely insulted when they are told that someone has not been 'specially trained to talk to them'. Children have successively made the very valid point in a huge range of research studies now that they are people who

³⁹ This view was confirmed by the Full Court in *Joannou and Joannou* (1985) FLC 91-642.

⁴⁰ This accords with the experience of judges who have spoken with children in other countries, such as in New Zealand where judicial meetings with children take place relatively frequently. See Chapter Six for discussion about practices in other jurisdictions.

⁴¹ See, for example, *Painter and Morley* [2007] FamCA 283 (Unrep, Benjamin J, 29 March 2007).

⁴² *ZN and YH and Child Representative* (2002) FLC 93-101.

⁴³ *Painter and Morley* [2007] FamCA 283 (Unrep, Benjamin J, 29 March 2007).

have the same rights to be informed and to be involved in decisions made about them as any other person.⁴⁴

In contrast, the Chief Justice of the FCA, Diana Bryant, said it was not a good idea for judges to speak with children for forensic purposes.⁴⁵ She expressed the concerns identified above; that judges are not qualified for the purpose and would not glean any information not already available through a family report. Her Honour also said that, although there may be a role for a judge and child to meet for non-forensic purposes (for example, to explain a decision to the child), ‘you would have to be extremely careful about the process’.⁴⁶

5.2.3 Effect on the child

There are concerns that judicial meetings, which require children to meet with judges and express views and feelings about their parenting arrangements, can be harmful to children. It may be intimidating for children to speak with the person, whom they know to be the judge, who is deciding such important issues in their lives.⁴⁷ There is also much research that shows that it is harmful for children to be exposed to parental conflict.⁴⁸ When children are given this central role in their parents’ conflict, the risk of harm may intensify.⁴⁹ Children may feel pressured by one parent to put forward a particular view, or may be manipulated by parents seeking to use the judicial meeting as an opportunity to strengthen their own position.⁵⁰ Children may feel torn between

⁴⁴ C Lyon, ‘Children’s Participation in Private Law Proceedings with Particular Emphasis on the Question of Meetings between the Judge and the Child in Family Proceedings’ in Sir M Thorpe, Rt Hon Lady Justice Hale and E Clarke (eds), *No Fault or Flaw: The Future of the Family Law Act 1996*, 2000, 75.

⁴⁵ S Lunn, ‘Judges Urged to Talk to Kids in Family Disputes’, *The Australian*, 11 July 2008, 7. ‘Forensic purposes’, as defined in this thesis and also in this newspaper article, include speaking with children for the purposes of ascertaining or hearing their views. This is distinct from meeting with children for ‘non-forensic’ purposes, which would include greeting the child or explaining a decision to the child, without hearing evidence from the child.

⁴⁶ Ibid.

⁴⁷ This was discussed by Nicholson CJ in *ZN v YH and Child Representative* (2002) FLC 93-101, also by Judge P Boshier, ‘Involving Children in Decision Making: Lessons from New Zealand’ (2006) 20 *Australian Journal of Family Law* 145, 150.

⁴⁸ See, for example, J McIntosh, ‘Enduring Conflict in Parental Separation: Pathways of Impact on Child Development’ (2003) 9 *Journal of Family Studies* 63; J Kelly, ‘Children’s Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research’, (2000) 39 *Journal of the American Academy of Child and Adolescent Psychiatry* 963.

⁴⁹ P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008), 14.

⁵⁰ Boshier, above n47, 150.

their parents, or may feel they are required to take sides in their parents' dispute.⁵¹

Smart and Neale also observed:

There are real and justified fears that it would be harmful or at least hypocritical to involve children in discussions when there is little hope that their wishes could be met once voiced. It is also possible that once encouraged to speak out, children might become the targets of parental resentment.⁵²

Kelly noted that meeting with a judge may have potential advantages or serious disadvantages for children, depending on the child's intellect, ability to reason, maturity and reason for wanting to speak with a judge.⁵³ Kelly said that meeting with a judge is 'a formidable and inherently stressful experience for most school-aged youngsters', and that judicial meetings place the majority of children in 'untenable psychological positions'.⁵⁴ Kelly wrote:

Assuming that their discussions are not confidential, [children] may simultaneously experience intense loyalty conflict, guilt, and fears of retribution or serious damage to the parent-child relationship.⁵⁵

Some of these negative effects also arise when judicial meetings do not take place, and children express their views to a family consultant for the purposes of a family report. Nevertheless, the concerns are important and 'should be attended to'.⁵⁶

First, a child should meet with a judge only when either requested by the child, or agreed to upon invitation from the judge.⁵⁷ A child should never be forced to speak with a judge or, indeed, share their views with any person.⁵⁸ As in many of the cases described in Chapter Four, a judge may invite a child to attend a judicial meeting. The family consultant or Independent Children's Lawyer ('ICL')⁵⁹ can convey an invitation from a judge, or a request by a child, to attend a judicial meeting.⁶⁰

⁵¹ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n49, 14.

⁵² C Smart and B Neale, 'It's My Life Too: Children's Perspectives on Post-Divorce Parenting' (2000) 30 *Family Law* 163, 163.

⁵³ Kelly, above n29, 153.

⁵⁴ *Ibid*, 154.

⁵⁵ *Ibid*.

⁵⁶ Smart and Neale, 'It's My Life Too', above n52, 163.

⁵⁷ Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 184.

⁵⁸ FLA s60CE states that a child cannot be required to express their views.

⁵⁹ See Chapter Three for discussion about the appointment and role of the ICL.

⁶⁰ The obligation for an ICL to convey to a judge a child's request for a judicial meeting was specifically set out in Family Court of Australia, *Child-Related Proceedings (Division 12A)*,

Harm to a child can be minimised by ensuring judicial meetings take place in the absence of the parties and their representatives. While the Rules have never specified any such limitation, there is authority that it is inappropriate for judicial meetings to take place in open court. In *Ahmad and Ahmad*⁶¹ the Full Court said:

To question children about their wishes in the presence of their parents and in a Court atmosphere, must put children in a highly embarrassing position and one which might very well lead to serious disturbances to the future relationship of children with one or other or both parents. Furthermore, it may very well encourage children to be manipulative.⁶²

Nicholson CJ in *ZN v YH*⁶³ said that the dangers associated with judicial meetings with children can be averted by seeking the opinion of the family consultant (as they are now called), and taking submissions from the child representative (now ICL) as to the desirability of a meeting occurring, taking into account the best interests of the child.⁶⁴ For example, the family consultant may advise against speaking directly with the child if the child is particularly vulnerable by reason of their age or circumstances.

The family consultant's assistance should also be sought to ensure questioning of the child is appropriate, given the child's maturity and circumstances. This avoids the risk of the child feeling pressured, or feeling embroiled in the conflict between his or her parents. For example, it is considered that asking children to give evidence in relation to disputed facts should generally be avoided,⁶⁵ whereas allowing the child the opportunity to express their views as to the outcome of a matter may be appropriate.⁶⁶ Chisholm suggested that children should be asked to express their views in terms of feelings and constructive suggestions, rather than in blanket statements about which of their parents they want to live with.⁶⁷

Practice Direction No 2 of 2006, [11.4]. This Practice Direction was revoked by Practice Direction No 3 of 2009.

⁶¹ *Ahmad and Ahmad* (1979) FLC 90-633.

⁶² *Ibid*, 78,295. This statement could also be construed as authority for the proposition that a judicial meeting should not take place in any setting where the child's parents are present. Even if the judicial meeting takes place in the judge's chambers, for example, the child's parents should not be permitted to attend.

⁶³ *ZN v YH and Child Representative* (2002) FLC 93-101.

⁶⁴ *Ibid*, [109].

⁶⁵ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report no 84 (1997), 16.28.

⁶⁶ *Ibid*.

⁶⁷ Chisholm, above n4, 212.

Further, a German judge has opined that, rather than suffering negative effects as a result of speaking directly with a judge, some children may benefit from being given the opportunity to express their views in a judicial meeting. Judge Carl wrote:

If and to what extent the child finds the hearing a strain essentially depends on the strains under which it has been placed due to events in the family prior to hearing. Naturally, what the child has experienced at home will resurface during the hearing. However, if the judge tries hard to approach the hearing sensitively, it can often even help lessen the strain the child is under because it can support the child in better dealing with its difficult situation.⁶⁸

Similarly, Lyon wrote:

[C]hildren involved in the divorce or relationship breakdown of their parents have already undergone major stress and strain. Simply seeing a judge and being asked their views rather than being asked to decide an issue could be a crucial factor in helping them to adjust to their new family situations.⁶⁹

Lyon also wrote, in relation to research conducted in the United Kingdom, that the ‘vast majority of solicitors instructed by children indicate that... a number of children actually find the process of seeing the person who is making important decisions about them therapeutic’.⁷⁰

In any event, a private discussion between a judge and a child is a far less invasive method of involving children directly than other options previously mentioned, such as joining a child as a party or having them appear as a witness.⁷¹ Bearing in mind that many children wish to be involved in the decision-making process,⁷² giving them the option to meet with a judge clearly causes fewer difficulties than a situation which requires a child to appear in open court.⁷³

It is important to acknowledge the detrimental effects that may be suffered by some children who are invited to participate in a judicial meeting, even when the process is entirely voluntary. However, while ‘there are consequences arising from inviting children to participate and discuss sensitive issues, there are also consequences arising

⁶⁸ Judge E Carl, ‘Giving Children their own Voice in Family Court Proceedings: A German Perspective’ (Paper presented at the 4th World Congress on Family Law and Children’s Rights, Cape Town, 20-23 March 2005), 5.

⁶⁹ C Lyon, above n44, 76.

⁷⁰ Ibid, 75.

⁷¹ See Chapter Three for discussion about these methods of hearing children’s views.

⁷² See detailed discussion about this in Chapter Two.

⁷³ Cashmore, ‘Children’s Participation in Family Law Matters’, above n2, 167.

from ignoring or silencing them’.⁷⁴ Judges in some other jurisdictions appear to be alive to this issue. In a study by Birnbaum and Bala, the researchers spoke with judges in Ohio, USA, about their views of judicial meetings with children. The majority of judges they spoke to in that jurisdiction believed that, in general, ‘more emotional harm is done if the child does not have an opportunity to be heard by the judge than if they are interviewed’.⁷⁵ Similarly, in the United Kingdom case of *Mabon v Mabon*⁷⁶, Thorpe LJ said:

If direct participation would pose an obvious risk of harm to the child arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk, then the judge is entitled to find that sufficient understanding has not been demonstrated. But judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings.⁷⁷

The potential detrimental effects must be balanced against the potential benefits of allowing children to be positively engaged and ‘have a say’ in decision-making by being given the opportunity to speak directly with the decision-maker.⁷⁸ A report by the Australian Law Reform Commission and the Human Rights and Equal Opportunities Commission stated: ‘Ensuring that in each case the child’s participation is appropriate may be difficult but this challenge should not be avoided’.⁷⁹

5.3 Research Study

The remainder of this chapter discusses the aims, methodology and results of a two-part research project undertaken by the author to determine the views of Australian family law judicial officers about judicial meetings with children. First, in-depth interviews with four judges of the Family Court of Australia (‘FCA’) were conducted. A survey was then developed and sent to all judicial officers presiding in a family law jurisdiction in Australia, including judges of the FCA, federal magistrates of the

⁷⁴ Smart and Neale, ‘It’s My Life Too’, above n52.

⁷⁵ R Birnbaum and N Bala, ‘Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio’ (2010) 24 *International Journal of Law, Policy and the Family* 300, 321.

⁷⁶ *Mabon v Mabon* [2005] 2 FLR 1011.

⁷⁷ *Ibid.*, [29] (Thorpe LJ).

⁷⁸ See Chapter Two for extensive discussion on the literature on children’s desire to be involved in decision-making and the benefits to children who are given opportunities to participate.

⁷⁹ ALRC and HREOC, above n65, [16.19].

Federal Magistrates Court of Australia ('FMCA'), and judges and magistrates of the Family Court of Western Australia ('FCWA').⁸⁰

5.3.1 Previous study in Australia

Internationally, there is a 'small body of empirical research'⁸¹ dealing with judges' views about judicial meetings with children in family law matters. Various studies by overseas researchers are referred to in this thesis, and the findings of studies conducted with judges in Canada, the United Kingdom and New Zealand are discussed in depth in Chapter Six.

It appears that the only Australian study of this kind was conducted by Parkinson and Cashmore. Parkinson interviewed 20 judicial officers (14 judges of the FCA and 6 federal magistrates) between February 2005 and July 2006.⁸² The judicial officers were asked about 'a range of matters concerning children's participation in decision-making about residence and contact disputes, including the significance of children's views, the assessment of influences on those views, the direct involvement of children either through interviews in chambers or in court, and the role of child representatives'.⁸³ Parkinson and Cashmore published the results of that study in an article,⁸⁴ and they were later included in a book written by them.⁸⁵ The book also contained the results of interviews conducted with children, parents, lawyers and counsellors about their views of children's participation.

Parkinson's interviews with 20 family law judicial officers highlighted several important issues, particularly in relation to Australian judges'⁸⁶ views about speaking with children. This included judges' general reluctance to speak with children (three quarters of judges interviewed indicated either that they would never speak with a

⁸⁰ The survey was not distributed to magistrates in the States and Territories who have summary jurisdiction in family law matters in certain limited circumstances.

⁸¹ Birnbaum and Bala, above n75, 302.

⁸² Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 162.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n49.

⁸⁶ As in this thesis, Parkinson and Cashmore, both in their article and book referred to the interviewed judicial officers as 'judges' for ease of reference, notwithstanding that 6 of the 20 officers interviewed by Parkinson were federal magistrates, and not judges.

child for forensic purposes or were extremely reluctant to do so).⁸⁷ The interviews also revealed the judges' main objections to judicial meetings with children,⁸⁸ the potential benefits which could be achieved by speaking with children and several anecdotes from judges who had spoken with children. Importantly, drawing from the results of the study, Parkinson and Cashmore made recommendations for guidelines on how and in what circumstances judicial meetings with children should take place.⁸⁹

Parkinson and Cashmore's study assisted in setting the background to much of this thesis, and the results of Parkinson's interviews with judicial officers have been relied on heavily, particularly in relation to identifying potential detriments of judicial meetings with children (discussed above at 5.2) and in developing suggested recommendations for reform and guidelines in this area (Chapter Seven).

This thesis attempts to build on Parkinson and Cashmore's landmark research. One of its contributions is to report original results from a study conducted by the author that employed an empirical research method, differing from the previous study in several important respects; namely recruitment method, sample size and interview procedure.

Regarding the method used to recruit participants, it appears that not all family law judicial officers in Australia were invited to take part in Parkinson and Cashmore's study. In total, 20 face-to-face interviews with judicial officers from the FCA and FMCA were conducted, including ten men and ten women, drawn from five registries across three different states in Australia.⁹⁰ Parkinson and Cashmore's study was described to be 'mixed method', meaning that it aimed to collect both qualitative and quantitative data.⁹¹

Although the present study collated qualitative information, it placed a greater emphasis on quantitative data. As noted, all 92 family law judicial officers in Australia were invited to take part in the survey, and the number of respondents (N=44) represented a 48 percent response rate. This is considered to be an adequate

⁸⁷ Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 162.

⁸⁸ Parkinson and Cashmore used the term 'judicial conversations', instead of 'judicial meetings'.

⁸⁹ Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 181-185.

⁹⁰ Ibid, 162.

⁹¹ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n49, 23.

response rate for analysis and reporting in empirical research of this nature.⁹² Since the sample size of the present study was twice that of Parkinson's, analyses of the data are potentially more robust and may yield greater statistical power.

It is suggested that a higher level of confidence can also be placed in the results of the present study because of its recruitment method and interview procedure. Because all family law judicial officers were approached, the results of the survey are arguably more representative of the total cohort than the data gathered by Parkinson. It is also worth considering whether Parkinson's recruitment method may have been more open to unintentional sampling bias.⁹³ Whilst face-to-face interviews are recognised in social science research as methodologically efficacious,⁹⁴ arguably a further strength of the present study is that the survey procedure was anonymous.⁹⁵ The anonymity provided to the participants may have elicited responses that were more honest or candid⁹⁶ than the responses given to Parkinson. On this point, it is relevant to note that the judicial officers who completed surveys for the present study were given the option to supply their name and contact details to the author. Of the 44 respondents, 16 chose to do this. This suggests that anonymity was important, to some degree, for the remaining 28 participating judicial officers.

Methodological differences aside, the timing of the studies needs to be briefly outlined. Parkinson and Cashmore's study was conducted over a 17 month period, concluding in July, 2006.⁹⁷ On 1 July 2006, the Less Adversarial Trial system ('LAT') commenced.⁹⁸ Interviews for the current study were conducted in early 2009, and surveys were completed in early 2010. Judicial officers were specifically asked, and were able to comment on, whether they believed proceedings under the LAT had created a court environment which was more conducive to judicial meetings

⁹² 'A review of published social research literature suggests that a response rate of 50 percent is considered adequate for analysis and reporting' (E Babbie, *The Practice of Social Research* (12th ed, 2010), 273). A more comprehensive discussion of the methodology of part two of the author's study is below.

⁹³ See E Babbie, *The Practice of Social Research* (12th Ed, 2010), 196-8.

⁹⁴ Ibid, 274-275; D de Vaus, *Surveys in Social Research* (4th Ed, 1995), Chapter 7.

⁹⁵ See discussion about the benefits to research when anonymity and confidentiality are assured in de Vaus, *ibid*, 337-339.

⁹⁶ Ibid.

⁹⁷ Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 162.

⁹⁸ The features of the Less Adversarial Trial system are discussed in Chapter One.

with children than prior to the LAT, and whether they believed that changes made to the FLA since 2006 would lead to increased incidence of the practice. Parkinson was not able to ask his interviewees about their experiences and opinions of the LAT, as it had not commenced at the time his interviews were conducted.⁹⁹

It is submitted that the author's study provides an important and useful complement to the research conducted by Parkinson and Cashmore. The previous research provided a valuable base for this study, insofar as it identified the main issues relevant to the practice of judicial meetings with children and provided background to much of the current research. Further, the results of Parkinson's interviews with 20 Australian judicial officers must be viewed in the wider context of Parkinson and Cashmore's research into children's participation involving not only judges, but children, parents, lawyers and counsellors.¹⁰⁰ It is, of course, within the context of this rich, wider study, that the results of Parkinson's interviews are most valuable.

5.3.2 Interviews with four FCA judges

5.3.2.1 Aims

The intention of this part of the study was to explore the reasons behind Australian judges' apparent reluctance to speak with children, evidenced by the results of Parkinson and Cashmore's study and the dearth of past cases in which judges have communicated directly with children. Parkinson and Cashmore had already identified the main reasons behind this reluctance,¹⁰¹ but it was considered necessary to obtain in-depth qualitative data about judges' experiences, opinions and concerns about the practice of judicial meetings with children.

⁹⁹ The LAT was trialled as the Children's Cases Program in the Sydney and Parramatta registries of the FCA from 2004. It is likely that some of Parkinson's interviewees participated in that trial (Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 162, 163). Nevertheless, the article reporting the results of Parkinson's interviews contains no questioning or comment about judicial meetings with children in the context of the Children's Cases Program (ibid).

¹⁰⁰ Parkinson and Cashmore, *The Voice of the Child in Family Law Disputes*, above n49; Parkinson, Cashmore and Single, 'Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia', above n15.

¹⁰¹ Parkinson and Cashmore, 'Judicial Conversations with Children', above n12, 166-171.

Therefore, the study involved confidential one-to-one interviews with four judges of the FCA who were thought to have diverse views¹⁰² about the practice of judges speaking with children. The aims of the interviews were twofold. The first was to obtain quality data about the breadth of judges' views in relation to judicial meetings to give texture and context to the already existing research in this regard. The second aim was to inform the later development of a short, mainly quantitative survey, to be sent to all family law judicial officers in Australia, with the intention of ascertaining majority viewpoints. This survey formed the second part the study, which is discussed in detail later in this chapter.

A similar two-part study was conducted in New Zealand by Cochrane in 2005, with the intention of ascertaining judges' views about children's participation. In Cochrane's study, however, the survey of Family Court judges was conducted before the interviews. Cochrane subsequently conducted interviews with three judges, which 'explored children's participation in family law proceedings in greater depth'.¹⁰³ It is important to note that, in both Cochrane's study and the current study, the results of the interviews were not intended to present general or majority views, but to add depth to the results of the survey and already existing research in this area.¹⁰⁴

5.3.2.2 Sample size and selection

A sample of four judges was considered appropriate for this qualitative study, in order to achieve the intention of obtaining rich, in-depth data about the breadth of judges' views, and as a preliminary step to inform the development of the later quantitative study. It was not the author's intention to claim that the views of this sample were representative of Australian family law judicial officers, or to draw any statistical inferences from their responses. Although it was always intended to include the views of judicial officers of the FMCA and the FCWA in the later survey, it was decided to confine the interviews to judges of the FCA (although, in hindsight, there is no reason why judicial officers of other courts could not have been included in this first part of the study). At the time the interviews were conducted there were

¹⁰² See below for an explanation of the selection process for interviewees.

¹⁰³ M Cochrane, 'Children's Views and Participation in Decision-Making' (2006) 5 *New Zealand Family Law Journal* 183, 183.

¹⁰⁴ *Ibid*, 185.

approximately 30 judges of the FCA. In a qualitative study, the sample size of four judges was therefore considered appropriate.

As mentioned above, Cochrane conducted in-depth interviews with three Family Court judges in New Zealand, in conjunction with a survey that was sent to 39 judges, being ‘nearly all the Family Court judges in New Zealand who then held permanent warrants’.¹⁰⁵ The sample size of three was considered appropriate to ‘add more depth’ to some of the issues raised in the survey.¹⁰⁶

In 2002-2004, Raitt conducted ‘in-depth interviews which explored judges’ perceptions and practices in relation to children’s participation in family proceedings’¹⁰⁷ with 20 members of the Scottish judiciary. Further, in a 2009 study of judges’ views about speaking with children by Birnbaum and Bala, the researchers conducted one-on-one interviews with 30 judges in Ontario, Canada and 16 judges in Ohio, USA.¹⁰⁸ As already discussed, Parkinson interviewed 20 judges of the FCA and federal magistrates in 2005-2006 to ascertain judges’ views about children’s participation and judicial meetings.¹⁰⁹

It is acknowledged that the sample sizes for the three previous studies were significantly greater than the number of judges interviewed by the author and, previously, by Cochrane. However, the larger studies were limited to the interviews with judges, and did not include a survey. It is submitted that as, in the second part of this study, all family law judicial officers in Australia were invited to take part and were given an opportunity to express their views in relation to judicial meetings with children, the small sample size in this first part of the study is justified.

The names of the four judges to be interviewed were selected through purposive sampling, following discussion between the author and the Honourable Justice Robert Benjamin of the FCA. The aim was to identify four judges who had different views and experiences of judicial meetings with children and, importantly, may be willing to

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ F Raitt, ‘Hearing Children in Family Law Proceedings: Can Judges Make a Difference?’ (2007) 19 *Child and Family Law Quarterly* 204, 207.

¹⁰⁸ Birnbaum and Bala, above n75.

¹⁰⁹ Parkinson and Cashmore, ‘Judicial Conversations with Children’, above n12.

discuss their views and experiences for the purposes of this study. From his Honour's personal knowledge and prior published materials, the names were decided. The judges were approached formally by the author and informally by Justice Benjamin, and all four agreed to be interviewed. The judges were all current sitting judges of the FCA at the time they were interviewed. They presided in three different Family Court registries in Australia.¹¹⁰

Purposive sampling is recommended when a specific research question is being asked for a particular purpose, thereby justifying the inclusion of specific people of interest and the exclusion of others.¹¹¹ Purposive sampling was used by Birnbaum and Bala for their interviews with judges in Ontario and Ohio in 2009. The researchers in that study commented that the judges were selected because 'they were highly experienced judges in family law disputes, who had varying experiences with judicial interviews of children, and agreed to be participants in this study'.¹¹² Williams also relied on purposive sampling for distribution of a questionnaire about the views of judges on judicial meetings in 2009, which was sent to 25 Canadian judges and 13 judges from other countries.¹¹³ Williams noted that, '[j]udges were specifically targeted based on their experience or views held on listening to children in separation and divorce proceedings, and geographic location'.¹¹⁴

The method of purposive sampling was essential to obtain quality data for this first part of the study. It was important to identify four judges who had different views about the practice of judicial meetings with children, and were willing and able to articulate those views. If a general invitation to all Australian family law judicial officers had been circulated, the data collected may have lacked the richness obtained from purposive sampling, and a diversity of views would not have been assured.

It is acknowledged that not all judges of the FCA, nor all family law judicial officers in Australia, were given an opportunity to participate in these interviews. However, it

¹¹⁰ To clarify, the Honourable Justice Benjamin was not one of the judges interviewed in this study.

¹¹¹ M Patton, *Qualitative Research and Evaluative Methods* (3rd ed, 2002) 230.

¹¹² Birnbaum and Bala, above n75, 315.

¹¹³ S Williams, 'Judges Listening to Children Directly in Separation and Divorce Proceedings: Individual, Institutional and International Guidelines', (Paper presented to the National Judicial Institute of Canada Family Law Program, Toronto, February 2010), Appendix A.

¹¹⁴ Ibid.

is important to note that all Australian family law judicial officers were given an opportunity to participate in the second part of this study, being the survey (discussed below).

5.3.2.3 Structure of the interviews

The interviews with the four judges of the FCA took place between February and April 2009. The author travelled to different states in Australia to interview the judges. The duration of each interview was between 50-80 minutes.

The interviews were semi-structured, in that the author prepared a list of questions it was considered desirable to ask. However, interviewees were not given copies of this list. This was to ensure that discussion flowed freely and that interviewees did not give pre-prepared answers. Although they did not receive a list of questions, interviewees were advised, when formally approached to participate, that they would be asked about 'your views about children's participation generally, your opinion and experiences of judicial conferencing, your concerns about the practice and whether you think there is more scope for judicial conferencing under the Less Adversarial Trial process than previously'.¹¹⁵ A similar format of semi-structured interviews was used by both Raitt and Cochrane in their interviews with family law judiciary.¹¹⁶

The interviews were taped and transcribed. A transcript of the interview was sent to each interviewee, who was given an opportunity to amend the transcript to ensure it correctly represented their views and that they could not be identified from their comments. All four agreed that the transcript of their interview, as amended, accurately represented their views.

5.3.2.4 Ethics

This study received ethics approval from the Social Sciences Human Research Ethics Committee (Tasmania) Network. As part of the conditions for ethics approval, the formal approach to the four interviewees was made in the form of an information sheet, which was accompanied by a consent form. A copy of the information sheet is

¹¹⁵ Information sheet. See Appendix Two.

¹¹⁶ Raitt, above n107; Cochrane, above n103.

attached at Appendix Two. The four judges consented to the interview, and returned signed consent forms.

At all times, the names of the judges who were interviewed remained confidential. The interviewees had no knowledge of the names of the other judges who participated in the study. The judges' names were removed from all collected data, and replaced with the identifiers 'Judge A', 'Judge B', 'Judge C' and 'Judge D'. The code connecting each judge's identifier with their name was known only to the author and is contained on the author's password-protected university computer in a locked office.

The gender of the interviewees was intentionally not identified. Although there are numerous female judges of the FCA, men significantly outnumber women.¹¹⁷ It was therefore considered undesirable to identify the gender of the judges to avoid any possibility a judge could be identified on the basis of their gender and comments.¹¹⁸

5.3.2.5 Results

All four judges expressed the opinion that children's views can be very important for decision-making, so it is essential that, even in the case of very young children, their views are ascertained and treated seriously. However, in other respects, the opinions of the four judges differed significantly. An outline of the issues that were raised, and a summary of the judges' responses, follows.

5.3.2.5.1 Experiences of meeting with children in the past, and attitude to doing so in the future

Judges A, B and D had never met with a child for forensic purposes.¹¹⁹ Judge C had spoken with children on 'five or six occasions'. On one occasion, Judge A spoke with

¹¹⁷ Analysis of the list of current judges on the FCA website discloses 22 judges with traditionally male first names and 12 judges with traditionally female first names (<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Court/Judges/FCOA_Judges> at 13 September 2010).

¹¹⁸ No inference or assumption should be made as to whether or not one or more of the judges interviewed was female.

¹¹⁹ A 'forensic purpose' was explained to the interviewees as seeing a child for the main purpose of hearing the child's views. In contrast, seeing a child for a 'non-forensic' purpose would include explaining orders to a child post-decision, or simply meeting the child, without asking for their views.

a sibling group to explain consent orders, as the parents were unable to agree on who should explain them. Judge A would not be opposed to speaking with a child for a forensic purpose in the future, should an appropriate situation arise. However, even in a situation where the child's views must be obtained urgently, Judge A commented, 'I would be saying I want the Family Consultant to meet with the children tomorrow and give evidence the next day... or I want the ICL to do it. My first thought wouldn't be, "Oh, I must talk to the children".'

Judge B could not envision ever speaking with a child, saying:

To my mind, [the prospect of meeting with a child for a forensic purpose] is just about as scary as handing me a scalpel and saying, "Just a bit of brain surgery before lunch please, Judge". It almost gets into that realm for me. I'm terrified of it.

Judge C, who has met with children on several occasions, stressed that he/she did not meet with children as a general approach, but did so 'in circumstances where I have felt that it would be of assistance to me, or in one case, [where] it was absolutely necessary in order to get the case to progress further'. Judge C did not advocate meeting with children in every case, saying:

My concern is about exposing children to an environment in which, in the normal course of life, they wouldn't be exposed.... Is this, at the end of the day, really going to be in a child's best interests that I have the opportunity to meet the child and discuss matters with the child?

Judge C had met with children for both forensic and non-forensic purposes, and would likely meet with children in the future, as appropriate cases arose.

Judge D would not speak with a child in the future, even if a child requested a meeting. Judge D was opposed to meetings between judges and children taking place, for reasons explained below. Even if Judge D were asked to explain orders to a child, Judge D said, 'I work very long hours getting through the work that I have got to do. It would be nice to perhaps have the time to think about whether or not I would explain to [a child] why I had done something. But it is not a luxury I currently have'.

5.3.2.5.2 Skills in speaking with children

Judge C was the only judge who considered themselves equipped to speak with children, stating:

I'm a parent myself, so I have had a lot of experience with children. So I have got a fair range of experience. I've been doing family law for many years and in that time I have had a lot of exposure to psychologists and psychiatrists and counsellors about parenting and the impact of children saying this or that to them. So I think I am pretty sensitive.

Judges A, B and D did not think they were qualified to speak with children and to interpret their views. They did not think personal experience as a parent or professional experience in interviewing children as an ICL¹²⁰ gave them the necessary expertise to undertake this task.

5.3.2.5.3 Benefits of meeting with children

Benefits for children

Judges A, B and C acknowledged the importance for children of knowing that they have been heard, and that many children would therefore appreciate and benefit from speaking to a judge. However, both Judge A and Judge B also emphasised that this role can most often be taken by a family consultant, who can speak with children 'in more depth and more expertly',¹²¹ and ensure their views are put to the court.

Judge D acknowledged that, especially in the case of older children, children may benefit from being able to meet the decision-maker and talk to them. However, in Judge D's opinion, this did not justify judicial meetings with children occurring. Judge D also acknowledged that it may be acceptable for judicial meetings with children to take place for non-forensic purposes, for example, to explain orders to a child.

Benefits for judges' decision-making

Judge C said that, aside from allowing children to know they have been heard, meeting with children can be very beneficial for the judge. Judge C said the judge can be assured that the child is fully informed about the situation and will cope with the decision in the contemplation of the judge. Alternatively, the judge can learn that the child will not cope with the order the judge is proposing. Judge C said that in one case:

¹²⁰ At least one of the judges referred to in this paragraph had worked as an ICL (or its past equivalent) before being appointed to the bench.

¹²¹ Judge A.

When I heard the psychologist give oral evidence, the impression I was left with was that if I made an order that she stay with her father, that would be okay. She would stay there and settle in quite well. Well, when I saw that child, I was absolutely convinced that she wasn't going to stay. She was going... to run. And given her age, it created a very dangerous circumstance... So that interview gave a different colour to the report from the expert to that which I had perceived before the interview.

Judge C also said that meeting with children removes the 'filter' which is necessarily present when receiving evidence of children's views through an expert report.

Meeting with a child directly gives Judge C:

a much higher empathy for them because you have got that child in your eye. Not only a mental vision, because you can sometimes get that from a photograph. But... you have got an actual experience of having interacted with that child. And that is a lot more compelling than a photograph.¹²²

Judge B agreed that seeing a child face-to-face is beneficial, just as seeing a witness testify is better than reading their evidence on paper or hearing them on the telephone.

Judge B said that seeing a child directly can give context to the evidence:

It gives you an opportunity to hear them say it, and to see them say it. To observe them in their surroundings. Often what people say orally and what their body language says are two different things. And they are the sorts of things you can't pick up from a report.¹²³

Judge A acknowledged that meeting with a child directly could have some benefits for decision-making. However, for Judge A, those benefits were outweighed by the potential problems which may arise, being problems of transparency, lack of expertise and ability to challenge the evidence (discussed below).

Judge D did not think that meeting with a child could create any benefits for decision-making and thought the practice of judicial meetings with children for forensic purposes was a bad idea. Judge D said, 'If the family consultant is going to be there anyway, and is going to report on what happened, then you may as well have the family consultant do it and tell you what happened rather than be involved in the process'. Judge D said the family consultant would pick up on anything the child said that was significantly important and would report on it. 'So, if all I am doing is seeing the child and knowing what their face looks like, I don't need to do that.'

¹²² Judge C.

¹²³ Judge B.

5.3.2.5.4 *Concerns about judicial meetings with children*

Reporting of evidence

All four judges expressed concerns about the way in which evidence collected during a judicial meeting with a child is reported back to the parties. While all acknowledged the importance of having a family consultant present during the meeting, who could later report the events back to the parties, they were concerned about the potential disconnect between the judge's interpretation of events and the family consultant's report. Judge C expressed concern about what a judge should do if the evidence from the family consultant appeared to be in conflict with the judge's memory of what happened during the judicial meeting. Similarly, Judge A said:

It is impossible for me to listen to that evidence objectively when I have been part of it and probably set it up, and might be the cause of the problem. I might be the one who asked the wrong questions, or didn't ask the right questions or whatever.

Judge B said a practical difficulty may emerge:

Just because the counsellor makes concessions, based on the things I have heard I might not make the same concessions. That's where I think the difficulty lies. Unless someone can actually say to a judge "Where does that come from?", and I would certainly find it abhorrent that someone be entitled to ask that, because then you have a whole branch of advocacy called "Questioning the judge". And that's where I find one of the difficulties as a conceptual thing for me moving into this field.

Judge C thought the problem could be resolved by adjourning proceedings and speaking with the family consultant about their recollection of events. If the judge and the family consultant were still in conflict, they could review a DVD of the meeting. However, Judge D still saw the potential problem of a family consultant interpreting the information differently from the judge as 'a procedural fairness gap that you are leaving open'.

When a child wants a disclosure to remain confidential

The four judges were in agreement that children should be told, prior to the commencement of a meeting with a judge, that nothing they say can be kept confidential. However, they had different approaches as to what a judge should do if faced with a situation where a child insists on a disclosure remaining confidential.

Judge A said that, if a child insisted on telling a 'secret', the child should be directed to the family consultant to make their disclosure to that person. Judge A said:

I don't want [children's] secrets. What do I do with their secrets? I then know some terrible secret and I am meant to hear the case on a different basis. You just can't do that. But they do need a safe outlet for any secrets. That is essential.

Judge C would enter into a process of negotiation with the child as to the disclosure of the information. Judge C said the judge may ultimately have to disregard the child's disclosure, but acknowledged some judges would have difficulty 'where what it is that you are putting out of your mind is a picture of a child telling you something'. Judge C said judges must retain discretion to deal with individual situations as they arise.

Judge B and Judge D thought the evidence would have to be disregarded, and the parties informed accordingly, but this may lead to 'the perception of secret information...being passed from child to judge that the judge hasn't told anybody about'.¹²⁴ Judge D said that, where a child discloses highly sensitive or volatile information which the child wishes to remain secret, the judge may have to disqualify him or herself from the case.

Judges' lack of skills and training

All judges agreed that family law judicial officers may lack skills and training to speak appropriately with children and interpret their views. Judge D said:

There are people who are far better qualified to speak to children, to interpret what they are saying, to write a report about what they are saying, which is then available to all the parties to read and for me to receive into evidence.

5.3.2.5.5 How concerns may be addressed

The judges made some suggestions as to how the main concerns regarding judicial meetings with children may be allayed to some degree. All agreed that judicial meetings should be audio or video recorded. Judge A said the transcript of the meeting should not be released to the parties except when the judge decides there are exceptional circumstances to warrant its release. Judge B and Judge D said that, in most cases, a video of the proceedings should be provided to the parties. However, they said the judge should retain discretion to limit or control dissemination of the video if it contains sensitive matters.

¹²⁴ Judge D.

All judges agreed that a family consultant should be present to prepare and debrief the child. Judge C said the child should be thoroughly briefed about the purpose of the meeting, whether the parents will receive a recording and the fact that nothing the child says can remain secret. The judges agreed that, ideally, the parties should agree to the judicial meeting with the child taking place. However, they also agreed that parental consent should not be a necessary condition to the meeting going ahead.

5.3.2.5.6 Views on why judges don't speak with children

The judges were asked why they thought judicial meetings with children were so uncommon in Australia. All agreed on three main reasons: judges felt they lacked training and expertise to speak with children; the difficulties posed by attempting to ensure the parties receive an accurate account of the evidence; and the circumstances in which the parties are given an opportunity to respond to the evidence.

All agreed that most judges would not be deterred from meeting with a child out of fear that their decision may be overturned on appeal. They also did not think that an apprehension about becoming emotionally involved in their cases would be a significant factor for most judges. Further, Judge B did not think a lack of time or resources was an issue, and that no judge would say they were too busy to meet with a child if they thought it was important. This differed from the view of Judge D, who thought lack of time was a significant factor.

5.3.2.5.7 Whether recent reforms, such as the Less Adversarial Trial process, will make judicial meetings with children more popular

Judge A thought that recent child-focused reforms in family law had put the issue of judges speaking to children on the front-burner. However, Judge A noted that the number of judges who actually speak with children were few and far between and the numbers, to Judge A's knowledge, were not growing.

Judge B had a different view, seeing it as a generational issue. Judge B thought older judges may be more resistant to speaking with children than younger judges so, as older judges retire and are replaced by younger judges, speaking with children may well become the norm. Judge B said, 'In ten years time you might be sitting here

talking to someone who is saying, “What’s the problem? Why are you even bothering to ask me? Of course we do!””

Judge D acknowledged that speaking with children was a reasonably hotly debated topic amongst judges. However, Judge D said that only a few judges actually do it and even then very rarely. Therefore, Judge D did not think recent changes to trial procedure would change the incidence of judicial meetings with children at all. Judge C did not make any comment on this issue.

5.3.2.5.8 Guidelines for how judges should meet with children

Judge A and Judge B were firmly of the view that there should be guidelines directing judges on how to speak with children, including who might be present at a judicial meeting, what should be said to the child, what kind of questions might be asked and how the evidence is to be reported back to the parties. Judge A explained:

I really don’t like the concept that something as important, complex and difficult [as judicial meetings with children] is just left completely at large. I believe in judicial discretion, but there should be some parameters as well. And guidelines are ideal because they are not binding in any way, but they guide you.

Judge C advocated legislative reform in this area, saying that guidelines would not be strong enough. Judge C said, ‘I think you need legislation that particularly says that what happens may be confidential at the judge’s discretion’.

Judge D said there was no need for guidelines or legislative reform, because the incidence of judges meeting with children in Australia is so rare. Judge D said, ‘If it became a regular practice amongst a number of judges, then sure... But until it became a systematic regular thing, then why put the time and effort into creating guidelines about it?’

5.3.2.5.9 Training for judges meeting with children

All four judges agreed that judges should undergo training before speaking with children. Judges A, B and C all said they would be willing to participate in training which would assist them to speak appropriately with children and correctly interpret their views. However, Judge A warned:

I think there is still a danger that we could never undergo thorough training, and I think the danger is that we’d do a little bit of training and then we would think we

were experts. Given how busy we are, and all the demands on us, we could only do a very small bit of training. It couldn't be anything that would equip us in the same way as the experts are equipped.

Judge D said there was no point in all judges undergoing training, as there was no real push for judges to start speaking with children regularly.

5.3.2.6 Analysis

Three distinct viewpoints emerged from these interviews. Judge C, who saw children from time to time and thought there were benefits in doing so, acknowledged that judges who meet with children would encounter various difficulties on occasion, but that judges were equipped to deal with these difficulties. Judge C was supportive of the practice of judges meeting with children in appropriate cases.

Judge D had the opposite view. Judge D could see no benefit in judges meeting with children and, given the role of the family consultant in proceedings, thought judicial meetings with children were unnecessary. Judge D was opposed to the practice of judges speaking with children.

Judges A and B could see the benefits, both to children and to the decision-making process, of judicial meetings with children taking place in appropriate cases. However, both judges were unable to overcome their concerns about the practice, particularly in relation to the reporting of evidence to the parties and judges' ability to ascertain and interpret children's views. While their personal views appeared to be that judicial meetings with children are a good idea in theory, they were unable to reconcile this with their professional concerns about how particular issues may be dealt with in practice. Judges A and B were cautiously supportive of the practice of judges speaking with children.

These three distinct viewpoints also emerged in the results of the second part of this study - the survey of all family law judicial officers in Australia. While some judicial officers were supportive of judicial meetings with children occurring in certain circumstances, many expressed a similar view to Judge D, and thought judicial meetings were inappropriate and unnecessary. Others evinced similar opinions to Judges A and B, who could see benefits, albeit tempered by lingering concerns about the practice of judges meeting with children.

5.3.3 Survey of Australian family law judicial officers

5.3.3.1 Aims

The aims of this study were to ascertain the incidence of judicial meetings with children in Australia and the views of family law judicial officers about the practice. It was therefore important to give every judicial officer presiding over family law matters in Australia the opportunity to participate.¹²⁵ The study also aimed to collect data about the diversity of views on the main issues surrounding children's participation and judicial meetings with children, including which aspects of meeting with children judicial officers found particularly troubling, and which they did not find concerning. The survey aimed to discover whether there were majority viewpoints amongst the Australian family law judiciary in relation to these matters, and whether trends emerged among the views of judicial officers with particular characteristics, such as those from the same court, or those who had met with children in the past.

It is important to note that, throughout this thesis, the term 'judge' has been used to describe all judicial officers practising in the family law jurisdiction in Australia, including judges of the FCA, federal magistrates of the FMCA, and judges and magistrates of the FCWA. However, in this study, it was necessary to distinguish between judicial officers of different courts. Accordingly, for the remainder of this chapter, the generic term 'judicial officer' is used instead of 'judge'. Judicial officers of particular courts are, when appropriate, identified accordingly (eg 'judge of the FCA').

5.3.3.2 No previous study in Australia

To the best of the author's knowledge, a quantitative study on the views of all family law judicial officers about judicial meetings with children in Australia has not previously been undertaken. However, as discussed in detail above, Parkinson and Cashmore previously conducted a study on this topic that involved interviews with 20 family law judicial officers. Given the small sample size, it appears that the previous

¹²⁵ See above n80 which details the exclusion of certain State and Territory judicial officers exercising limited family law jurisdiction from time to time.

study was intended to be mainly qualitative. However some quantitative data were collected from the results.¹²⁶

5.3.3.3 Structure of the study

A survey instrument was developed that built on the results of previous studies of judges' views about judicial meetings with children. In particular, the results of Parkinson's interviews with 20 judicial officers, and the author's in-depth interviews with four judges of the FCA were drawn on. Given the notoriously busy schedules of Australian family law judicial officers, the survey was designed to be short and simple, requiring minimal time for completion. It was hoped this would encourage judicial officers to respond. The survey also allowed respondents, if they wished to do so, to expand on their answers in the form of written comments. A copy of the survey is attached at Appendix Four.

In mid-February 2010, the survey was mailed¹²⁷ to 106 judicial officers, being the combined population of judges of the FCA (33),¹²⁸ federal magistrates of the FMCA (59)¹²⁹ and judges and magistrates of the FCWA (14).¹³⁰ The author was subsequently informed that, of the 59 federal magistrates at that time, 14 did not deal with family law matters at all.¹³¹ Those 14 judicial officers were therefore unable to, and did not, participate in the survey. This brought the number federal magistrates able to participate to 45. All 92 judicial officers who had jurisdiction to decide parenting disputes¹³² in Australia were therefore invited to participate in the survey.¹³³

¹²⁶ See, for example, Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n49, 170.

¹²⁷ See 5.3.3.4 for details on how the survey was distributed to judicial officers.

¹²⁸ Family Court of Australia website <<http://www.familycourt.gov.au>> at 17 February 2010.

¹²⁹ Federal Magistrates Court of Australia website <<http://www.fmc.gov.au>> at 18 February 2010.

¹³⁰ Email correspondence from the Chief Judge of the FCWA to the author dated 14 August 2009.

¹³¹ Email correspondence from the Acting Deputy CEO of the FMCA to the author dated 18 June 2010. Federal magistrates who do not deal with family law matters preside over other matters of federal jurisdiction. Some federal magistrates who do deal with family law matters also preside over other matters of federal jurisdiction.

¹³² The term 'parenting disputes' was selected over the term 'children's matters', which is often used in this thesis, so as to avoid any confusion with other types of cases which could also be classified as 'children's matters', such as child protection matters and juvenile justice.

¹³³ Aside from magistrates and judges of State and Territory courts who have summary jurisdiction to deal with family law matters in certain limited circumstances.

Of the 92 possible respondents, 44 judicial officers completed and returned responses to the survey. This constituted a response rate of nearly 48 percent.¹³⁴ Of the 44 respondents, 16 were judges of the FCA, 20 were federal magistrates of the FMCA and 8 were judges and magistrates of the FCWA (6 judges and 2 magistrates).¹³⁵ All responses were received by the end of April 2010. Several respondents included additional information with their completed survey, including letters to the author and copies of judgments that they thought may be of interest. Many respondents made detailed hand-written comments about their views and experiences of judicial meetings with children.

In Cochrane's study, discussed above, questionnaires were mailed to 39 judges, being 'nearly all the Family Court judges in New Zealand who then held permanent warrants'.¹³⁶ Thirty-four of the 39 completed the questionnaire, 'representing a response rate of 87 per cent'.¹³⁷ In a previous study of judges' approaches to children's participation in Arizona, USA, Atwood sent questionnaires 'to 110 state court judges and fifty tribal court judges'¹³⁸ whose responsibilities might include child custody dispute resolution'.¹³⁹ A total of 60 judges responded, 'twelve of whom indicated that they did not preside over child custody disputes and returned blank questionnaires',¹⁴⁰ bringing the total number of completed questionnaires to 48.

5.3.3.4 Ethics and distribution

The survey underwent a 'minimal risk' ethics approval process and was approved by the Social Sciences Human Research Ethics Committee (Tasmania) Network.

Permission to distribute the survey to judicial officers was then sought from the FCA, the FMCA and the FCWA. The FCWA granted permission with no need to obtain further ethics approval from that court. Both the FCA and the FMCA required the

¹³⁴ The response rate was 47.8 percent. This is considered to be an adequate response rate for analysis and reporting of quantitative empirical research (see above n92).

¹³⁵ The response rate from each court is calculated in the results and analysis section below.

¹³⁶ Cochrane, above n103, 185.

¹³⁷ Ibid.

¹³⁸ Referring to judges presiding over the courts of Indian tribes within Arizona, governed by codes 'that parallel state law in their approach to child custody litigation' (B Atwood, 'The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform' (2003) 45 *Arizona Law Review* 629, 633).

¹³⁹ Ibid.

¹⁴⁰ Ibid.

survey to be approved by their respective ethics committees. Application was made for ethics approval in accordance with the protocols of those courts, and permission to distribute the survey was granted by both courts. The three courts also agreed to disseminate the survey to their judicial officers on behalf of the author, to assist with distribution and to maintain the anonymity of the respondents.

Each judicial officer was sent a copy of the survey, an information sheet and a stamped, self-addressed envelope to return the completed survey to the author. A copy of the information sheet is attached at Appendix Three. Participants were told that their identities would remain confidential. As discussed above at 5.3.1, participants were given the option of adding their name and contact details if they were willing to be contacted in relation to their responses and comments. Respondents were assured these details would be used for contact purposes only and would not be published. Sixteen respondents chose to disclose their name and contact details.

The survey asked respondents to identify the court in which they worked and whether they were a judge or magistrate. Each was also asked to identify the length of time they had been a family law judicial officer and whether or not they had previously worked as an ICL. Participants were deliberately not asked to identify their gender. Although an analysis of responses based on gender would have been useful, it was considered that asking respondents to identify their gender, in conjunction with the other identifiers, would not have sufficiently protected their anonymity. It was important that respondents could not be identified, so that opinions would be expressed openly, and without fear of attribution.¹⁴¹

5.3.3.5 Survey results and analysis

5.3.3.5.1 Response rate from each court

As noted above, the survey generated a response rate of nearly 48 percent (44 respondents from a possible 92). It is useful to analyse whether judicial officers from one court were more likely to respond than those from another court. Table 1

¹⁴¹ See de Vaus, above n94, 337-339.

compares the number of family law judicial officers from each court with the number who responded.

Table 1: Response rates

Court	Number of judicial officers hearing parenting disputes	Number of respondents	Response rate
FCA	33	16	48.5%
FMCA	45	20	44.4%
FCWA	14	8	57.1%

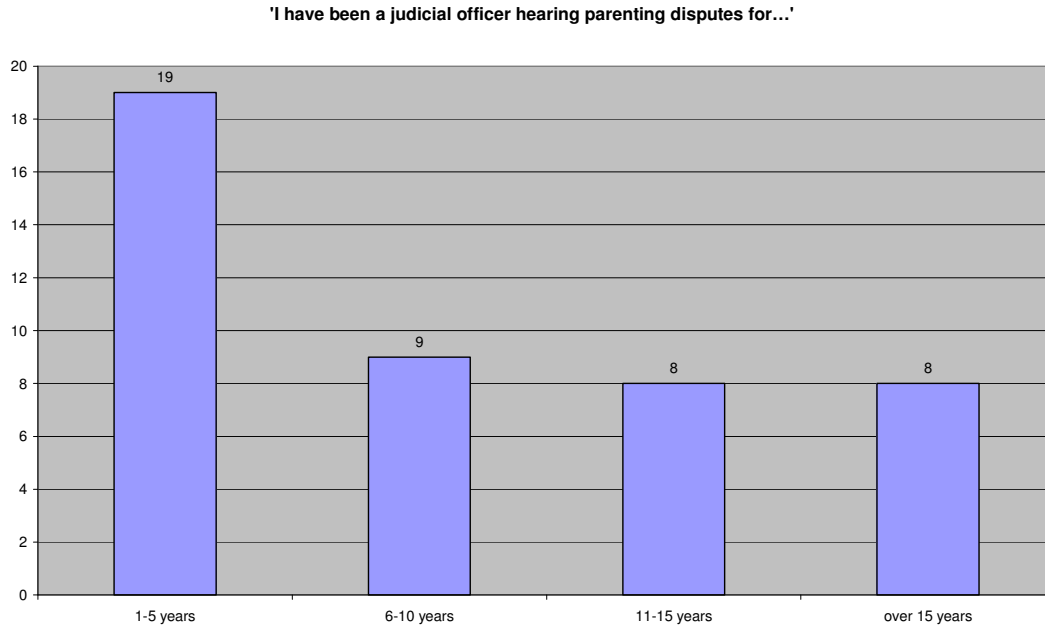
At least 44 percent of judicial officers from each court responded to the survey, so views from officers of all three courts were represented in the data. The response rate was comparable.¹⁴² Of the three courts, judicial officers from the FCWA were most likely to respond to the survey.

5.3.3.5.2 Background of respondents

Respondents were asked to indicate how long they had been a judicial officer hearing parenting matters. The question was asked in general terms, with options of a range of years rather than a specified period, and it did not matter if a respondent had served in that capacity in more than one court. In that case, the respondent would indicate the length of their cumulative experience on the bench.

¹⁴² The high response rate from the FCWA may suggest that views of judicial officers from that court were over-represented in the data. However, as officers of the FCWA constituted only 14 of 92 family law judicial officers in Australia, and 8 of 44 respondents to the survey, it is argued that the higher response rate from that court did not significantly affect the representative nature of the data.

Graph 1: Length of judicial experience



Nineteen of 44 respondents (43.2%) indicated they had been a judicial officer hearing parenting disputes¹⁴³ for between 1-5 years. Respondents in the other three categories were fairly evenly spread. It was desirable to determine whether the large percentage of respondents in the 1-5 years category was representative of the total number of judicial officers in that group, or whether judicial officers who were more recently appointed were more likely to respond to the survey. Of the 100 judicial officers from the three courts whose date of appointment is publicly available, 50 were appointed in 2005 or later.¹⁴⁴ Therefore, it appeared that the large number of respondents who had been hearing parenting disputes for between 1-5 years was indeed generally representative of the total number of judicial officers in that group, and there was nothing to suggest that judicial officers who were more recently appointed were more likely to respond to the survey than other judicial officers.¹⁴⁵

¹⁴³ See fn132 above for definition of 'parenting disputes'.

¹⁴⁴ FCA website <<http://familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Court/Judges/>> at 5 October 2010 (names and dates of appointment of judges of the FCA and judges of the FCWA); FMCA website <<http://fmc.gov.au/html/magistrates.html>> at 5 October 2010 (names and dates of appointment of federal magistrates of the FMCA).

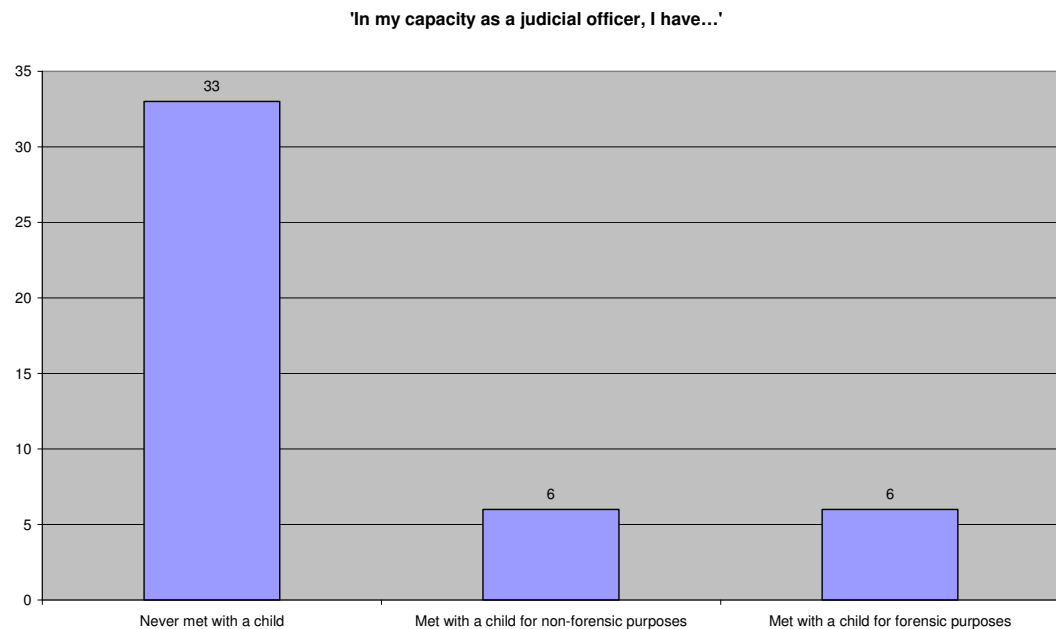
¹⁴⁵ It is acknowledged that this is a crude and limited analysis of the number of family law judicial officers who have been hearing parenting disputes for 1-5 years for the following reasons: 1. While appointment dates of judges of the FCWA are published on the FCA website, the appointment dates of magistrates of the FCWA are not; 2. This analysis does not take into account

Respondents were also asked whether they had previously worked as an Independent Children's Lawyer (formerly Child Representative or Separate Representative). Twenty-six respondents (59.1%) indicated they had worked in that capacity, either as solicitor or counsel, and 18 (40.9%) indicated they had not.

5.3.3.5.3 Incidence of judicial meetings with children

Respondents were asked to indicate whether, in their capacity as a judicial officer, they had met with a child in the past. Respondents who had met with children in the past were also asked to specify whether the meeting/s had been for 'non-forensic' or 'forensic' purposes, and to indicate the number of occasions on which each had occurred. To explain the term 'non-forensic', the example of explaining orders to a child, subsequent to a hearing, was given. A 'forensic' purpose was explained to mean ascertaining the child's views.

Graph 2: Judicial officers' experience of meetings with children



the length of time served by judicial officers who may have been recently appointed to one court, having previously been a judicial officer in one of the other courts; 3. The appointment date of all federal magistrates of the FMCA was taken into account, while, as explained above, many do not deal with the family law jurisdiction; 4. This analysis was undertaken several months after the survey was distributed. It is evident from the courts' websites that several judicial officers have been appointed since the survey was distributed, and therefore did not take part in the survey. Further, other judicial officers may have retired or resigned since the survey was distributed.

Thirty-three of the 44 respondents (75%) said they had never met with a child who was the subject of proceedings before them. Six judicial officers indicated that they had met with a child for a non-forensic purpose.¹⁴⁶ Six judicial officers had met with children for a forensic purpose. This meant that 86.4 percent of respondents (38/44) had never met with a child for the purpose of hearing the child's views.

Of the six judicial officers who had met with a child for a forensic purpose, four were judges of the FCA and two were federal magistrates. No judicial officer of the FCWA had ever met with a child for either a forensic or non-forensic purpose. One judge of the FCA had met with children for both forensic and non-forensic purposes.

The survey disclosed that even judicial officers who had, in the past, met with children, had not done so often. Of the judicial officers who had met with children only for non-forensic purposes, one had done so on four occasions. Four had met with children only once or twice.

Of the judicial officers who had met with children for the purpose of hearing children's views, one had done so on approximately 10 occasions.¹⁴⁷ Two had spoken with children on three occasions. The remaining three had done so only once or twice. These results confirmed the view expressed in this thesis that, given the dearth of reported and unreported cases that indicate that a judicial meeting with a child has occurred, the incidence of meetings between family law judicial officers and children in Australia is rare.

5.3.3.5.4 Likelihood of meeting with a child in the future

Respondents were asked whether they agreed with the proposition that they would be likely to meet with a child for a forensic purpose (ie to ascertain a child's views) in the future. Responses were indicated on a Likert scale:

'strongly agree', 'agree', 'don't know', 'disagree' or 'strongly disagree'.

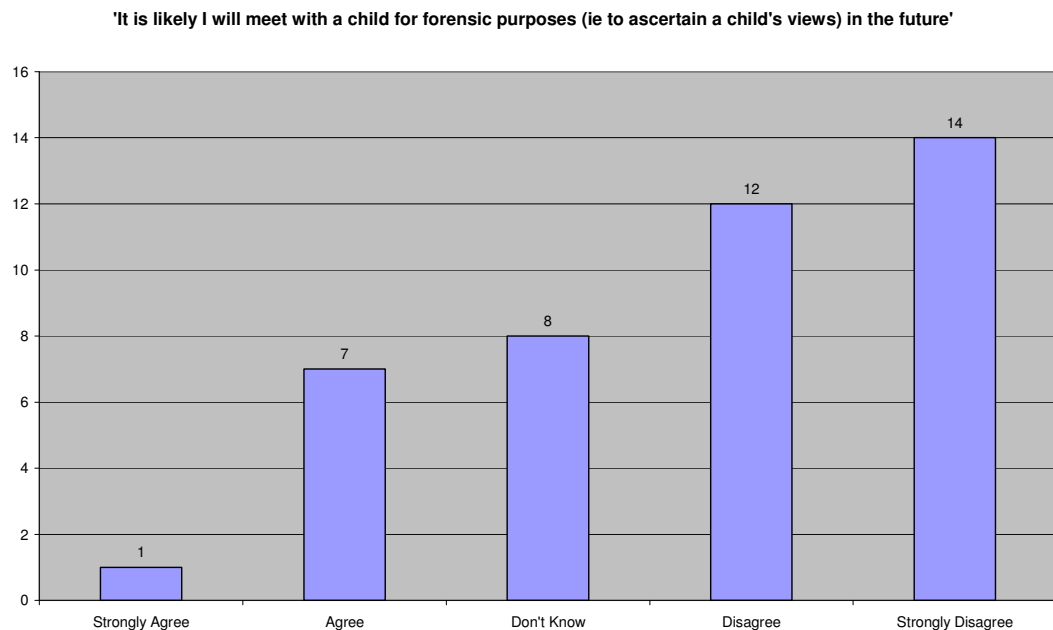
Two judicial officers who indicated they strongly disagree that they would meet with a child in the future explained that they were judges of the Court of Appeal of the

¹⁴⁶ One of these judicial officers also indicated they had met with children for 'forensic' purposes.

¹⁴⁷ This judicial officer also indicated that they had met with a child for non-forensic purposes on two occasions in the past.

FCA. Both said their answer was indicative of the fact that they would almost never have an opportunity to meet with a child, and not necessarily of a reluctance to speak with a child. Therefore, these two responses were excluded from the results, bringing the number of analysed responses to this question to 42. Neither of these judges had spoken with a child in the past, either for forensic or non-forensic purposes, so their exclusion from the results did not affect the analyses that follow.

Graph 3: Likelihood of future judicial meetings with children



Only one judicial officer strongly agreed that he or she would speak with a child for a forensic purpose in the future. Not surprisingly, this was the same respondent who indicated they had spoken with a child for a forensic purpose on approximately 10 occasions in the past.

A further 7 respondents (16.7%) agreed they would be likely to speak with a child for a forensic purpose in the future. Eight respondents (19.0%) said they 'don't know' whether they would be likely to speak with a child. The clear majority (61.9%) indicated they disagree (12/42) or strongly disagree (14/42) that they would be likely to speak with a child for a forensic purpose.

There did not appear to be any correlation between the judicial officers who had spoken with children in the past and those who said they may be likely to do so in the

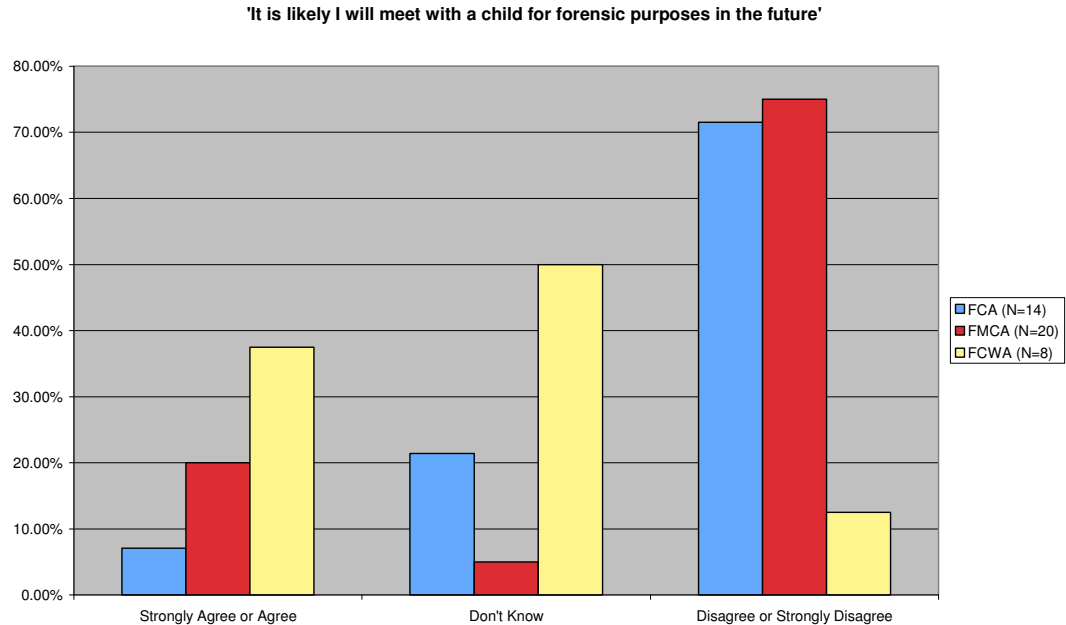
future. Of the eight respondents who agreed or strongly agreed that they would meet with a child for a forensic purpose in the future, four had never done so in the past, for either forensic or non-forensic purposes. Only two had met with a child for a forensic purpose in the past. The remaining two had met with children but only for non-forensic purposes.¹⁴⁸ Three judicial officers who had met with children for forensic purposes in the past indicated they disagreed or strongly disagreed with the proposition they would do so again. One of the respondents who had met with children for forensic purposes on three occasions in the past, strongly disagreed they would do so in the future. Another judicial officer who had met with a child for forensic purposes on one occasion said they ‘don’t know’ whether they would do so again.

In summary, six of the eight judicial officers who agreed or strongly agreed that they would meet with children in the future to ascertain their views had never done so in the past. Further, of the six judicial officers who had met with children in the past to ascertain their views, only two indicated that they would be likely to do so again. As none of these judicial officers provided qualitative responses to explain the apparent discrepancy between their attitude to meeting with children in the future, and their experiences of doing so in the past, any attempted explanation would be speculative.

Whether judicial officers from different courts were more likely to meet with children in the future

The data from the question posed above were broken down to analyse the responses from each of the three courts, in order to determine whether there was any correlation between a judicial officer’s attitude to whether they may be likely to meet with a child for forensic purposes in the future, and the court in which they work.

¹⁴⁸ See above for explanations of the terms ‘forensic’ and ‘non-forensic’ that appeared in the survey, or see the survey instrument itself at Appendix Four.

Graph 4: Prospect of future judicial meetings with children by court

These results indicated that judicial officers from both the FMCA and the FCA were very unlikely to meet with children, with 75 percent (15/20) and 71.4 percent (10/14) respectively strongly disagreeing or disagreeing that they would meet with a child to ascertain their views in the future. Twenty percent (4/20) of federal magistrates agreed they would meet with a child in the future. Only one FCA judge strongly agreed they would meet with a child in the future, with no other FCA judges agreeing with the proposition.

The results from judges of the FCA are particularly interesting, as 28.6 percent of those judicial officers (4/14) had met with children for forensic purposes in the past.¹⁴⁹ While the FCA contained the largest number of judicial officers who had met with children to ascertain their views in the past, only one judge said they would be likely to do so again. Over 70 percent of FCA judges indicated they were not likely to meet with a child in the future.

Parkinson, in his interviews with 20 judicial officers of the FCA and FMCA, found that three quarters of interviewees indicated they would never, or would be extremely

¹⁴⁹ See 5.3.3.5.3 above.

reluctant to, meet with a child for a forensic purpose.¹⁵⁰ That finding accords with the findings in this research. However, on the basis of the interviews, Parkinson and Cashmore also determined that '[a]t least in the Family Court, more than a third of judges would be prepared to talk with children in some circumstances or already make it a practice to do so in appropriate cases'.¹⁵¹ That statement does not accord with the responses to this survey, as only one of 14 FCA judges agreed that they would be likely to speak with a child in the future. While just over 21 percent of FCA judges said they 'don't know' whether they would meet with a child for forensic purposes in the future, this is not a satisfactory basis for concluding that those judges would 'be prepared to talk with children in some circumstances'.¹⁵² The difference between Parkinson and Cashmore's findings and the current findings on this issue may be attributable to the different methods employed by the two studies.¹⁵³

Only one judicial officer from the FCWA disagreed they would meet with a child in the future. Three respondents from that court (37.5%) agreed they would be likely to meet with a child for forensic purposes. A further 50 percent (4/8) said they 'don't know'. This is remarkable, given that no judicial officer of the FCWA who responded to the survey had ever met with a child in the past, either for forensic or non-forensic purposes.¹⁵⁴

Whether judicial officers who were more recently appointed were more likely to meet with a child in the future

It was useful to discover whether the length of time for which judicial officers had been appointed had any bearing on their stated likelihood of meeting with a child in the future.

¹⁵⁰ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n49, 170.

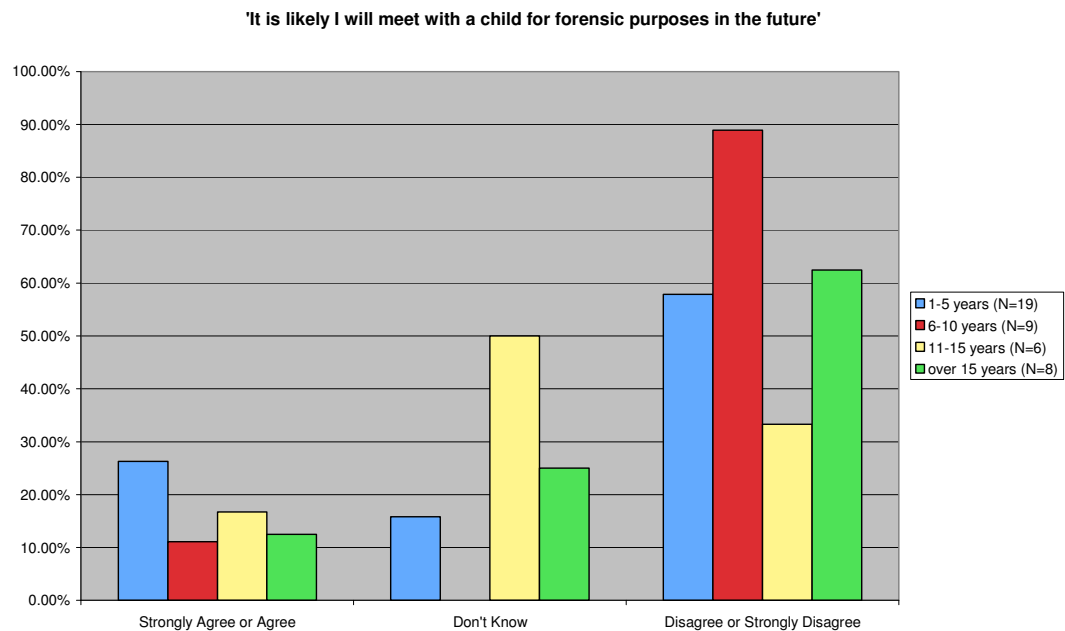
¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ See 5.3.1 above where the methodological differences were explained.

¹⁵⁴ See 5.3.3.5.3 above.

Graph 5: Prospect of future judicial meetings with children by length of time on the bench



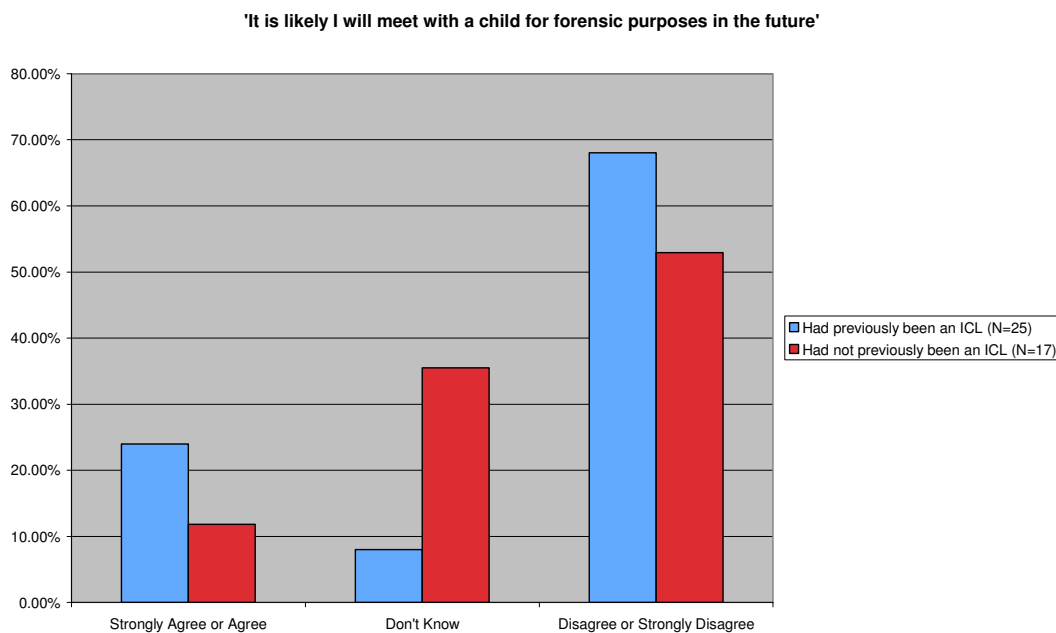
These results indicate that judicial officers who were more recently appointed (between 1-5 years hearing parenting matters) were slightly more likely to meet with children in the future, with 26.3 percent agreeing or strongly agreeing with the likelihood that they would do so, compared with a lower percentage of judicial officers in the other groups. However, a similar number of judicial officers in both the 1-5 year group and over 15 years group (around 60%) disagreed or strongly disagreed with the likelihood that they would meet with a child in the future. The group least likely to meet with a child in the future was made up of those who had been hearing parenting matters for between 6-10 years, with nearly 90 percent disagreeing or strongly disagreeing with the proposition. Therefore, there did not seem to be any distinct correlation between the length of time that a judicial officer had been hearing parenting disputes and their likelihood of meeting with a child. Particularly, it did not appear that recently appointed judicial officers were significantly more likely to meet with children in the future than their more experienced counterparts. This contradicts the view of Judge B, expressed in the author's interviews with four FCA judges, who opined that older judicial officers may be more resistant to speaking with children, so that as judicial officers retire and are

replaced with younger judicial officers, meeting with children may well ‘become the norm’.¹⁵⁵

Whether previous experience as an Independent Children’s Lawyer (‘ICL’) made a judicial officer more likely to meet with a child

The results were further analysed to determine whether judicial officers who had previously worked as an Independent Children’s Lawyer (ICL)¹⁵⁶ were more likely to meet with children for forensic purposes in the future. It was anticipated that, given past experience in meeting and speaking directly with children and hearing their views, judicial officers who had previously been ICLs may have more confidence to meet with children than those who had not had that experience. Further, having represented children in court, judicial officers who had been ICLs in the past may better understand that some children have a desire to express their views directly to a decision-maker.¹⁵⁷

Graph 6: Prospect of future judicial meetings with children by past experience as an ICL



¹⁵⁵ Interview with Judge B.

¹⁵⁶ See Chapter Three for discussion about the role and appointment of an ICL in parenting disputes.

¹⁵⁷ See Chapter Three for the role of the ICL in family law proceedings. See Chapter Four for discussion on children’s desire to express their views to the decision-maker.

Contrary to the anticipated outcome that judicial officers who had been ICLs may be more likely to meet with children in the future, these results disclosed that judicial officers who had been ICLs in the past were, if anything, more reluctant than other judicial officers to meet with children in the future.

A higher percentage of those who had been ICLs (68%) disagreed or strongly disagreed that they would meet with a child for forensic purposes in the future than those who had not been ICLs (52.9%). Interestingly, a higher percentage of those who had been ICLs (24%) also agreed or strongly agreed that they would meet with a child for forensic purposes than those who had not (11.8%).

Therefore, there did not appear to be any distinct correlation between whether a judicial officer had been an ICL in the past and whether they were likely to meet with a child for forensic purposes in the future.

5.3.3.5.5 Judicial officers' views on judicial meetings with children

Respondents were asked to consider a particular model for judicial meetings, and use it to inform their answers to the remainder of the survey. The model reflects the practices that have most commonly been used in Australia and is advocated in this thesis as the preferred model as to how judicial meetings should occur.¹⁵⁸ Judicial officers were asked to use the model and indicate their views about various statements on a Likert scale. Below is a description of the model, as it appeared in the survey instrument, and the results of this enquiry.

¹⁵⁸ See detailed discussion about various aspects of the model in Chapter Four.

THE MODEL

To answer the remaining questions in this survey, please consider a particular model of judicial meeting, which has most commonly been used in Australia.

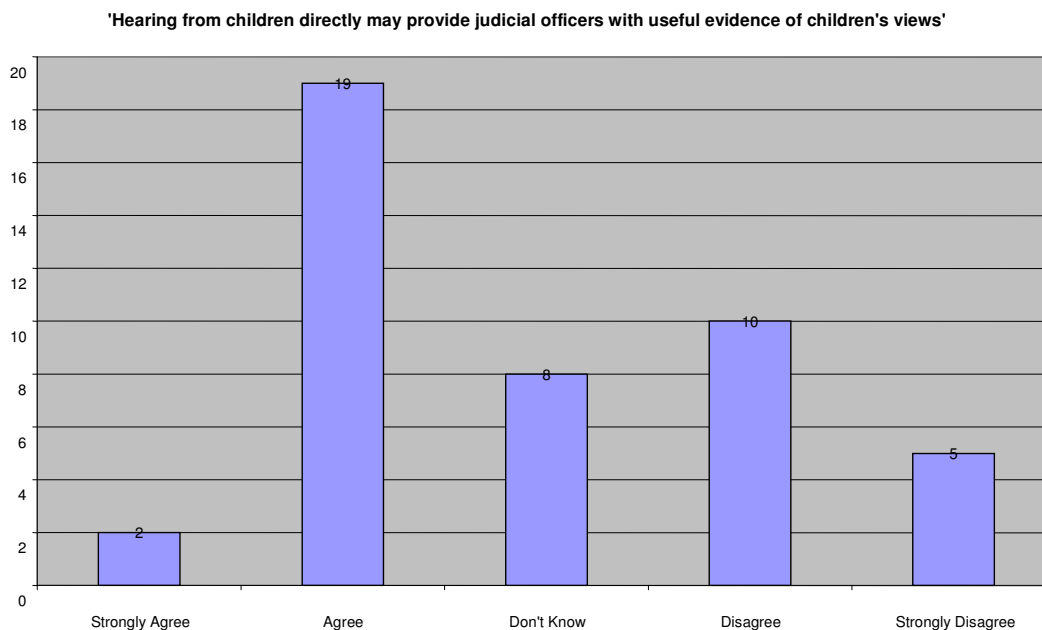
The features of the model are:

- The judicial meeting is in addition to, not in substitution for, a family report which includes the views of the child/ren.
- The judicial officer or a child may request a meeting;
- The meeting takes place between the child, the judicial officer and the Family Consultant, in chambers or in a closed court;
- The Family Consultant and judicial officer must ensure the child understands that nothing the child says will remain confidential;
- The child must, at all times, consent to the meeting;
- The meeting is recorded;
- The Family Consultant will assist the judicial officer to ask questions of the child;
- The Family Consultant will prepare a written or oral report as to the outcome of the meeting, which will be adduced into evidence, and
- The Family Consultant will be available for cross-examination by the parties' representatives and the ICL, if applicable.

The judicial officer retains discretion as to the following matters at all times:

- whether or not it is in the child's best interests for a meeting to take place;
- whether or not the parties are provided with a transcript or DVD of the meeting, and
- whether to see children individually, or in sibling groups, or both.

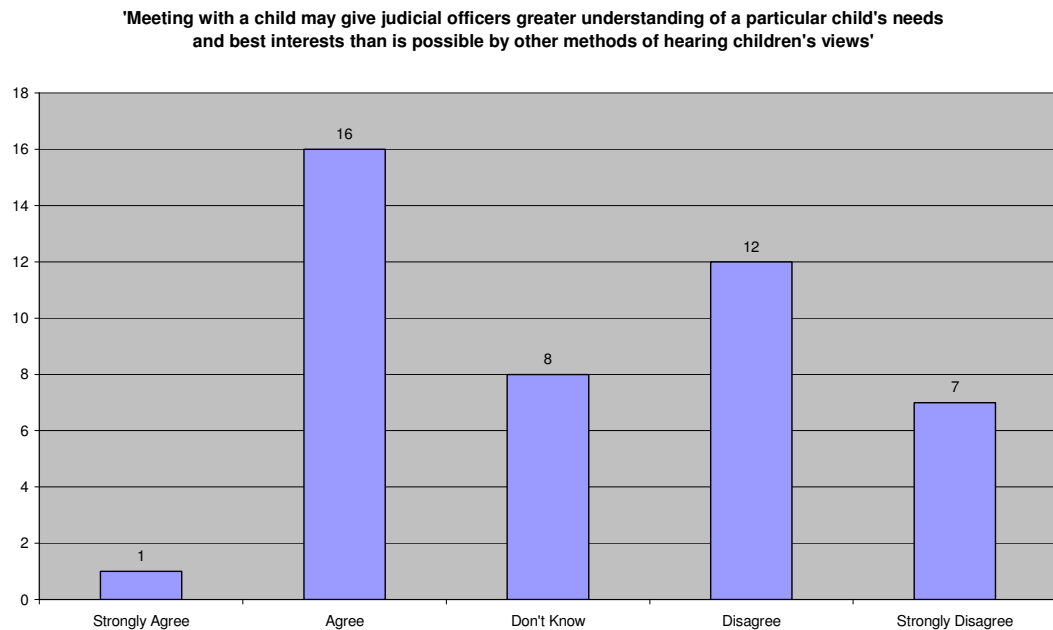
Graph 7: Whether judicial officers thought meeting with children could yield useful evidence of children's views



Twenty-one of 44 respondents (47.7%) agreed or strongly agreed that meeting with children could provide judicial officers with useful evidence of children's views. This

is significant because, although judicial meetings with children are very rare in Australia, the results show that nearly half of family law judicial officers in Australia thought that such meetings may be useful. In contrast, 34.1 percent (15/44) judicial officers disagreed or strongly disagreed that judicial meetings may yield useful evidence of children's views.

Graph 8: Whether judicial meetings with children could be a better method of ascertaining children's views



As discussed in Chapter Three, judicial officers hear evidence of children's views from a variety of different sources. Two common methods, a report from a family consultant and evidence brought through an ICL, are highly regarded by the judiciary.¹⁵⁹ It is therefore significant that 38.6 percent (17/48) of respondents agreed or strongly agreed that meeting with a child may give judicial officers greater understanding of children's needs and best interests than other methods of hearing children's views. As a judicial officer's paramount consideration is to make decisions which he or she believes best promote the best interests of individual children,¹⁶⁰ it is significant that over one third of respondents believed that judicial meetings with

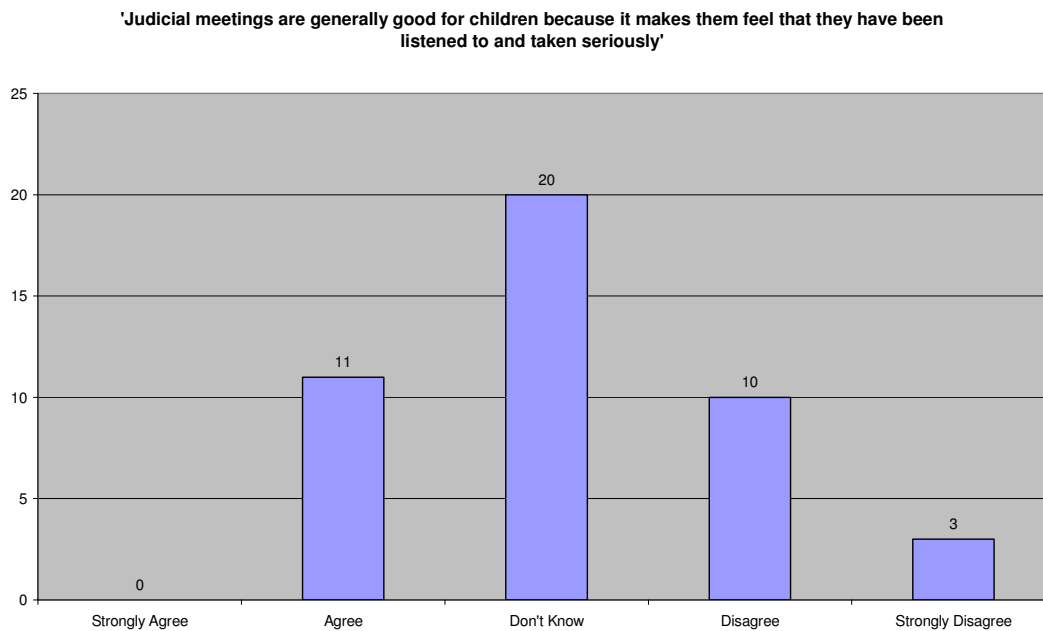
¹⁵⁹ See detailed discussion in Chapter Three.

¹⁶⁰ FLA s60CA.

children may better serve that purpose than the more traditional and widely accepted methods of hearing children's views.

Given this result, and the results of the previous question that found nearly 50 percent of judicial officers believe that judicial meetings may yield useful evidence of children's views, it is curious that more judicial officers do not take the opportunity to meet with children. Conversely, 19/44 respondents (43.2%) did not agree that meeting with children may give judicial officers greater understanding of children's needs and best interests, and a further 8 judicial officers indicated they 'don't know' whether this would be the case.

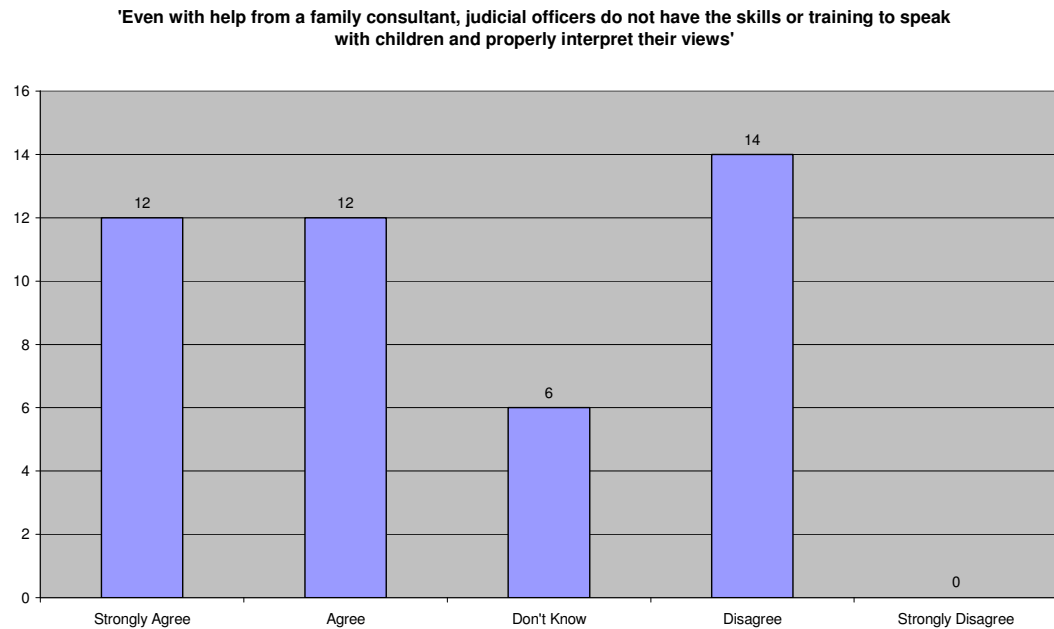
Graph 9: Whether judicial officers thought judicial meetings have benefits for children



Only 11/44 respondents (25%) agreed that judicial meetings have benefits for children, in that they allow children to feel that they have been listened to and taken seriously. No respondents strongly agreed with the proposition. The remaining 75 percent of judicial officers either didn't know whether this was the case, or disagreed (or strongly disagreed) with the proposition. As detailed at length in Chapter Two and Chapter Four, a wealth of research has found that many children want to have a say in decisions that affect them, including being able to express their views directly to the decision-maker, and that they benefit from doing so. The fact that 75 percent of respondents either did not know this, or disagreed that children benefit from being

given an opportunity to speak with the decision-maker may indicate a lack of awareness, or a misunderstanding, of the relevant literature.

Graph 10: Whether judicial officers believed they lack the skills or training to meet with children



A majority of judicial officers (54.5% or 24/44) agreed or strongly agreed that judicial officers lack the skills and/or training to speak with children and interpret their views. This is so, even when a family consultant is present during the meeting and can assist. This result is consistent with the generally accepted view that judicial officers lack the expertise to speak with children. That view is reflected both in literature on this topic, discussed earlier in this chapter at 5.2.2, and in the opinions of three of the four FCA judges who were interviewed by the author in the first part of this research study.¹⁶¹

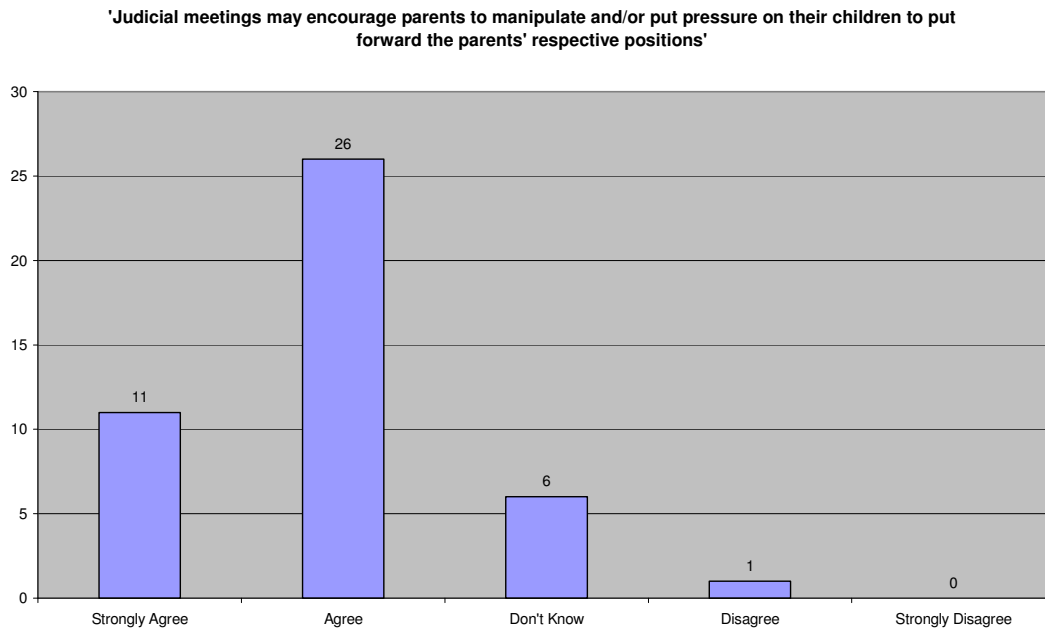
As suggested in the discussion at 5.2.2, this problem could be addressed by offering training for judicial officers in how to speak with children and interpret their views. All four judges interviewed in the first part of this study agreed that judicial officers should undergo training before speaking with children.¹⁶² The majority of respondents to this survey also agreed that judicial officers should have further

¹⁶¹ See 5.3.2.5.2 and 5.3.2.5.4 above.

¹⁶² See 5.3.2.5.9 above.

training.¹⁶³ However, a number of judicial officers, in their responses to this survey, made clear their opinion that judicial meetings with children are not appropriate, even if training is provided.¹⁶⁴

Graph 11: Judicial concern about parental pressure and manipulation



A vast majority of judicial officers expressed concern that judicial meetings may encourage parents to manipulate or pressure their children, with 84.1 percent (37/44) of respondents agreeing or strongly agreeing with the proposition. Six judicial officers (13.6%) said they did not know whether this would be the case, and only one judicial officer disagreed with the proposition.

This strong majority concern may be influenced by judicial officers' experiences of witnessing the personalities of parents involved in high conflict cases. Unfortunately, as judicial meetings within Australia have been so rare, there is no way to ascertain whether the parents of children invited to participate in judicial meetings indeed attempt to manipulate or put pressure on the child. Further, this question does not deal with judicial officers' capacity to identify this problem, if it does occur, and ensure the child is protected. The judicial officer may seek advice from the family

¹⁶³ See 5.3.3.5.9 below.

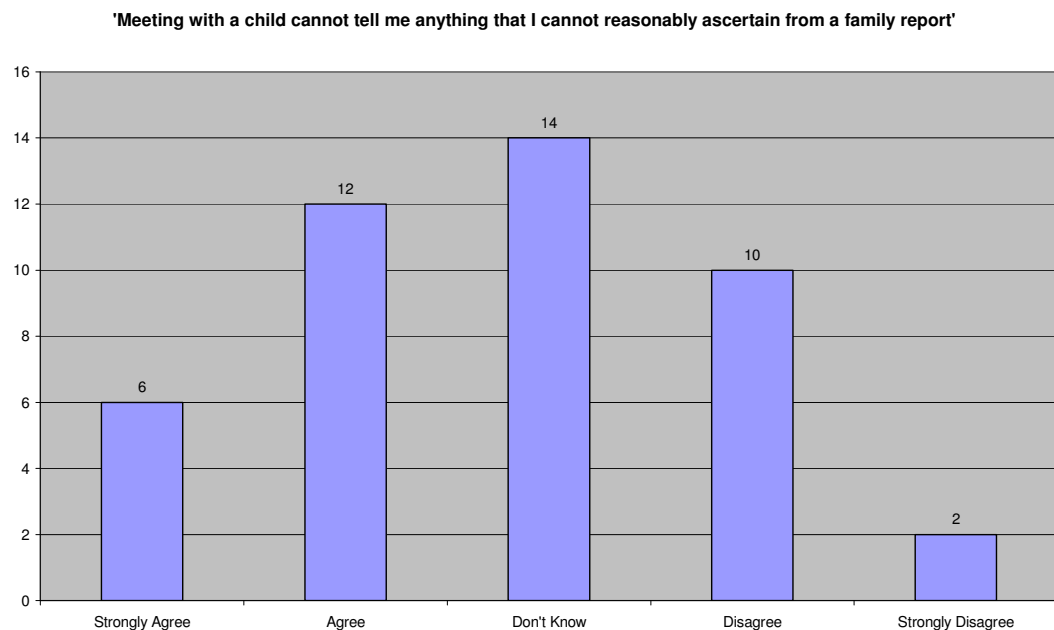
¹⁶⁴ See 5.3.3.5.12 below.

consultant as to whether the child has been subjected to manipulation or pressure and take this into account when meeting with the child. The judicial officer may decide not to proceed with the judicial meeting, should the perceived manipulation or pressure place the child in a situation where conducting a judicial meeting would not be in the child's best interests.

To the best of the author's knowledge, no studies have been conducted, either in Australia or elsewhere, as to whether parents exert pressure on, or attempt to manipulate their children in meetings with judicial officers. Nor is there any research on the effect of that manipulation or pressure on children's welfare. It would be useful for such research to be conducted in jurisdictions where judicial meetings with children occur frequently, such as New Zealand.¹⁶⁵

In the absence of any evidence on this issue, it appears to be the perception of judicial officers that parents could attempt to manipulate or pressure their children, and that this may be a significant barrier to judicial officers' willingness to meet with children.

Graph 12: Whether judicial officers believe that meeting with children can yield anything additional to a family report



¹⁶⁵ See Chapter Six for discussion about the incidence of judicial meetings with children in New Zealand.

The responses to this question produced almost a ‘bell curve’, with a full spread of views. Eighteen of 44 respondents (40.9%) agreed or strongly agreed that meeting with children would not yield anything that cannot be ascertained from a family report. Presumably, these respondents would never meet with children, as they consider such a meeting unnecessary, and superfluous to a family report. A possible exception may be made by these judicial officers in circumstances when a child requests a meeting with the decision-maker.

It is significant that, while 31.8 percent (14/44) of judicial officers did not know whether meeting with a child could yield anything not contained in a family report, 27.3 percent (12/44) disagreed or strongly disagreed with the proposition. This means that over one quarter of judicial officers thought that meeting with a child could yield useful information and observations that it may not be possible to glean from a family report.

This result accords with the earlier finding that 38.6 percent (17/48) of judicial officers agreed or strongly agreed that meeting with children may give judicial officers greater understanding of children’s needs and best interests than other methods of hearing children’s views. Given that a significant number of judicial officers can see benefits in meeting with children that may not be available through other methods of hearing children’s views, it is interesting that judicial officers’ reluctance to meet with children persists.

5.3.3.5.6 How judicial officers think problems with due process can be accommodated

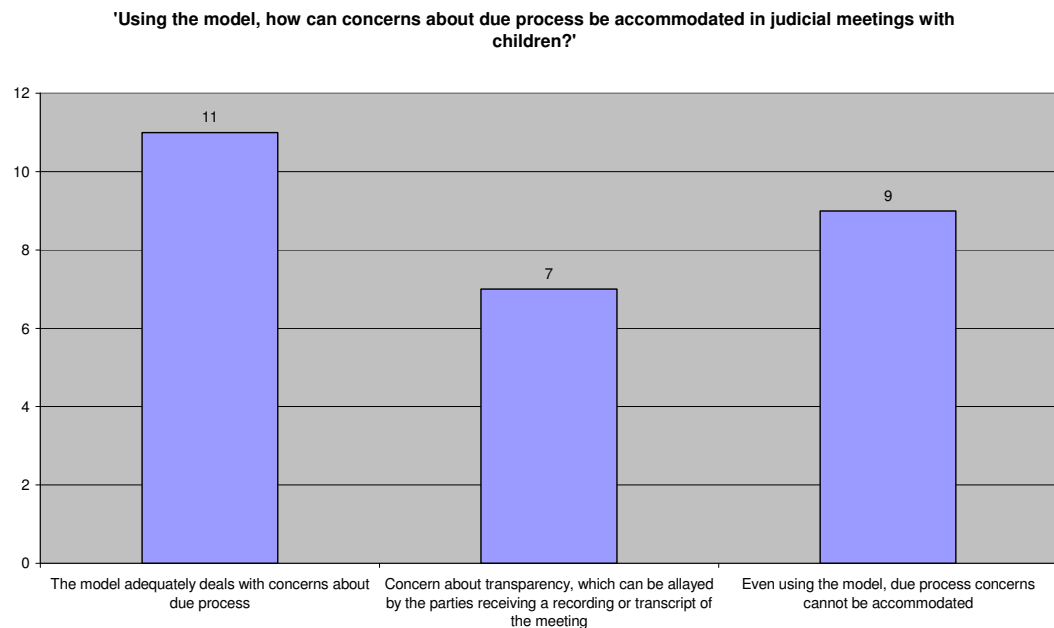
As discussed at 5.2.1, one well-documented problem in the literature about judicial meetings involves principles of natural justice and due process. As judicial officers may hear evidence to which the parties are not privy, the prevailing problem is how that evidence can be conveyed to the parties in a way that upholds the principles of due process. Respondents to the survey were asked to consider the suggested model and indicate how they thought problems with due process could be accommodated.

Twenty-eight judicial officers responded to this question. One respondent commented that they would reject the proposed model, including the presence of a family consultant. The judicial officer expressed the view that they would see the child alone

and ‘report candidly in open court as to everything that was said’.¹⁶⁶ This response was excluded from the results on the basis that it was inconsistent with and outside the scope of the model that respondents were asked to consider. In any event, this view appeared to be isolated, as all other judicial officers who were open to the concept of judicial meetings with children occurring supported the presence of a family consultant during such meetings.

The remaining 27 responses fell into three main categories: those who thought the model adequately dealt with the problem of due process, those who had concerns about transparency (which they specifically stated would be allayed by the parties receiving a transcript or recording of the meeting), and those who believed that despite the model, concerns about due process could not be accommodated. The results are presented in the graph below:

Graph 13: Ensuring due process



Eleven of the 27 respondents (37.0%) said that, using the model, they had no concerns about due process. It is important to note that this attitude is in response to a specific question. It is not an indication that all 11 judicial officers were in favour of judicial meetings with children occurring, but only indicates that those judicial officers did not

¹⁶⁶ Judicial officer 90.

have any concerns about due process. Indeed, it was clear from responses to other questions that several of these respondents, while not concerned about due process, were not in favour of judicial meetings taking place. For example, one judicial officer wrote:

The presence of a family consultant, transcription, feedback via the family consultant, all address concerns about due process, which begs the question- why not just leave it to a family consultant in the first place?¹⁶⁷

Another commented:

The issue is not due process. The issue is that judicial meetings are invariably requested by highly compromised parents in highly polarised disputes. The corollary is that where a meeting might be helpful to assist a child to feel 'listened to', it is likely to be where parents are so compromised as to request the meeting in the first place.¹⁶⁸

Seven of 27 respondents (25.9%) said they had a concern about the transparency of the process, which would be allayed if, in all but exceptional cases, the parties were to receive a transcript or audio or visual recording of the judicial meeting. One judicial officer also commented that it may be prudent to have the ICL present during the meeting, in order to assure the parties that the meeting was conducted appropriately.¹⁶⁹

Another respondent also commented that parties' concerns about the fact they are not present during the meeting may be reduced if the judicial officer were to provide them with a list of anticipated questions and issues to be raised before the meeting.¹⁷⁰ The respondent further commented that, in controversial cases, a judicial officer may need to consider granting leave to the parties to call expert evidence, or to adduce additional evidence, in response to the information arising from the judicial

¹⁶⁷ Judicial officer 89.

¹⁶⁸ Judicial officer 25. This judicial officer appeared to assume that one or both parents may request that a judicial meeting with a child take place. This is not consistent with the model, and not an aspect that respondents were asked to consider. Under the model, judicial meetings may be requested either by the judicial officer or the child. This respondent may have misunderstood the model, or may have been making an observation about the circumstances in which, in their experience, judicial meetings have most often been requested.

¹⁶⁹ Judicial officer 107.

¹⁷⁰ Clearly, even if this were done, the judge could only anticipate the issues and questions to be raised by the judge. The judge would, in most cases, have no advance notice of any issues the child wished to raise during the meeting.

meeting.¹⁷¹ Yet another respondent said that a set of standard orders and information about judicial meetings should be developed and given to the child's parents, to ensure that they know what they should and should not do, both before and after the meeting.¹⁷²

One third of respondents (9/27) said that, even under the proposed model, due process could not be accommodated. Five gave explanations for their opinion, and two main issues were raised. The first was the role of the judge as a trier of fact, and the inappropriateness of judicial officers having access to material that the parties cannot access. One judicial officer commented that '[t]he role of the judge is to listen/decide - all in open court with the parties/parents knowing what is said.'¹⁷³ Another remarked that '[t]he judge ought not to descend to the evidentiary arena other than in the most exceptional of cases'.¹⁷⁴ These comments conform with the traditional view that the role of judicial officers is not inquisitorial. Given the Less Adversarial Trial approach to children's cases, where judicial officers take a more active role in the conduct of proceedings and the presentation of evidence, this view is, arguably, outdated.¹⁷⁵

The second main issue was that '[r]egardless of the evidence given by the family consultant, the reality is that it is the judge's own experience of the interview that influences them'.¹⁷⁶ One judicial officer commented:

The purpose of due process cannot be achieved because, whatever the model, the judge cannot be cross-examined and, having seen everything for himself or herself, cross-examination by the child's representative or a party's lawyer of the family consultant will not make any difference.¹⁷⁷

The same concern was expressed by all four of the FCA judges interviewed by the author in the first part of this study.¹⁷⁸

¹⁷¹ Judicial officer 8.

¹⁷² Judicial officer 12.

¹⁷³ Judicial officer 50.

¹⁷⁴ Judicial officer 26.

¹⁷⁵ See Chapter One for discussion about the Less Adversarial Trial procedure, which commenced on 1 July 2006, and the role of judicial officers.

¹⁷⁶ Judicial officer 97.

¹⁷⁷ Judicial officer 46.

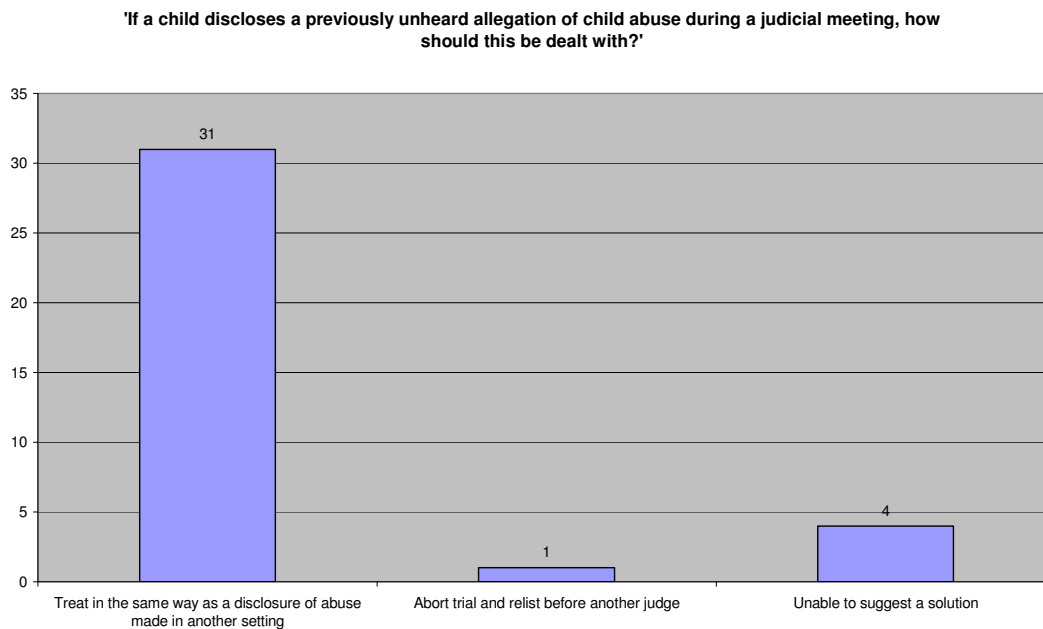
¹⁷⁸ See 5.3.2.5.4 above.

It is significant that two thirds of judicial officers (18 of 27 respondents) were either satisfied that principles of due process were complied with under the model, or would be satisfied if the parties received a transcript or recording of the meeting. Only one third of respondents thought the model was contrary to due process principles. This may indicate that the problem of due process is not as significant for many judicial officers as the literature states. These results suggest that other concerns, such as lack of training, may be more influential on judicial officers' apparent reluctance to meet with children than apprehensions about due process.

5.3.3.5.7 *How judicial officers would deal with disclosures from children*

Respondents were asked what should happen if, during a judicial meeting with a child, the child disclosed an allegation of child abuse or, alternatively, a statement not involving abuse but something the child wished to remain confidential.

Graph 14: Disclosure of allegation of child abuse



Most respondents had no difficulty with this scenario. Thirty-one of the 36 judicial officers who responded to this question (86.1%) generally said that an allegation of abuse disclosed by a child during a judicial meeting must be treated in the same way as a disclosure made in any other forum. This was said to include referring the matter to the family consultant for mandatory reporting to the relevant child protection

agency,¹⁷⁹ informing the parties of the disclosure, referring the matter for expert assessment and, above all, ensuring the safety of the child.

This majority view was also held by the judges interviewed by Birnbaum and Bala in Ohio. The researchers reported:

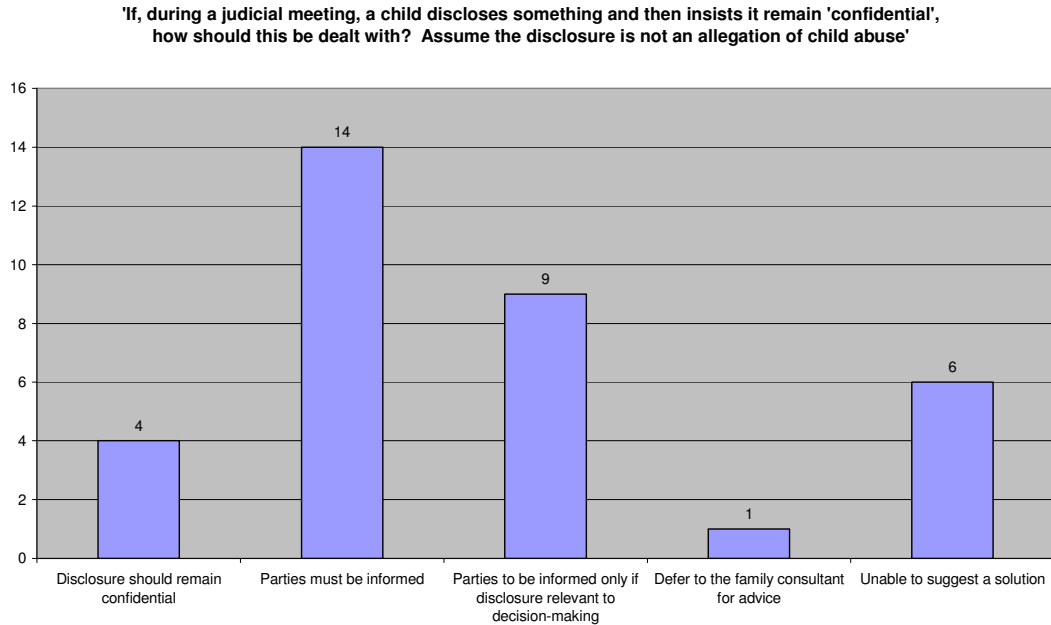
Some of the Ohio judges volunteered that they had concerns about the possibility of being a witness in future child protection proceedings if a child disclosed abuse by a parent in the interview. The majority of judges, however, had no concerns about the possibility of a child making disclosures of abuse, as when this occurs they telephone child welfare authorities themselves, speak to the parents about the allegation, or have the child's guardian ad litem deal with the issue.¹⁸⁰

In the current study, one respondent said that if a child were to make a disclosure of child abuse during a judicial meeting, the trial would need to be immediately aborted and relisted before another judicial officer. Four judicial officers (11.1%) were unable or unwilling to suggest ways in which an allegation of child abuse made during a judicial meeting could be dealt with. One officer commented, 'This is a good reason for judges NOT to have such meetings'.¹⁸¹

¹⁷⁹ The requirement and procedure for mandatory reporting is contained in the FLA s67ZA.

¹⁸⁰ Birnbaum and Bala, above n75, 321.

¹⁸¹ Judicial officer 26.

Graph 15: 'Confidential' disclosure by a child (not of abuse)

In relation to a disclosure (not concerning abuse) made during a judicial meeting by a child who insists the disclosure remain confidential, respondents' views on what should occur were more diverse. Four of the 34 respondents to this question (11.8%) were of the view that the disclosure should, indeed, remain confidential. One of the four respondents said they would inform the parents that a disclosure had been made and would remain confidential. This respondent noted they would have obtained the parents' consent to that possibility prior to the judicial meeting taking place.

A further 26.5 percent of respondents (9/34) said that the parties should be informed of the content of the disclosure only if the statement made is relevant to the decision-making. These respondents were of the view that, unless such a disclosure impacts on the judicial officer's ultimate decision, it should remain confidential.

Fourteen respondents (41.2%) noted that, under the proposed model, the child would have been told prior to the meeting commencing that nothing the child said would remain confidential. Accordingly, these judicial officers were of the view that, in this circumstance, the child would have to be reminded of their agreement. So long as it would not put the child in a situation of danger, the disclosure would have to be revealed to the parties. One judicial officer noted that, should the child not agree to the disclosure being made known to the parties, the judicial officer may have to

disqualify themselves from the proceedings. One respondent said that they would defer to the family consultant for their opinion on whether the child's disclosure ought to remain confidential, or be disclosed to the parties.

Six respondents (17.6%) were unable to resolve the issue of what should happen if a child makes a request for 'confidentiality' during a judicial meeting. One judicial officer saw this as 'one reason why these meetings are most undesirable'.¹⁸²

As with the issue of due process discussed above, it appears that the issue of disclosures by children did not pose as great a problem for the majority of judicial officers as the literature indicates. Most were able to suggest ways in which to deal with a disclosure made by a child during a judicial meeting, should one arise. It is noteworthy that, while most respondents agreed on the same course of action where the disclosure is one of abuse, judicial officers had differing approaches to how they would deal with a disclosure that did not relate to abuse. Ultimately, if judicial meetings with children were to become commonplace, and children made disclosures frequently, it would be undesirable for judicial officers to have diverse practices in dealing with those disclosures. This is particularly so if those practices would differently affect parties' rights. In Chapter Seven, guidelines are suggested for how judicial officers may deal with disclosures by children.

5.3.3.5.8 Concerns about the model

Respondents were asked to complete the statement, 'My biggest concern about this model of judicial meetings with children is...' Despite the request for respondents to name their 'biggest' concern, 11 of the 36 judicial officers who responded to this question listed more than one concern. Some listed up to four concerns. There was no way to determine which of the listed concerns may be a respondent's 'biggest' concern, so all concerns listed were recorded and treated as equal. Judicial officers named a wide variety of concerns, which were recorded and grouped into the categories that appear in the table below. Responses from judicial officers who listed more than one concern were recorded in each of the categories in which a concern

¹⁸² Judicial officer 21.

was expressed, so the total number in the right-hand column is greater than the number of respondents who answered this question.

Table 2: Judicial officers' concerns about the model

'My biggest concern about this model of judicial meetings with children is...'

Description of concern	Number of respondents who expressed concern
No concern	2
Harm caused to children from parental pressure or manipulation	9
Judicial officers' lack of expertise and skill	9
Evidence not introduced in open court	6
Judicial meeting adds nothing more than a family report can provide	5
Judicial officer may become a witness	5
Misunderstanding by children that their views will be implemented	3
Children may lack capacity to understand the process	2
Lack of time and resources	2
Over-empowering children	2
Harm caused to children by bringing them into the dispute	2
The presence of a family consultant	1
Judicial officer may attach greater weight to children's views than would otherwise be the case	1
Lack of guidelines as to when judicial meetings are appropriate	1
Meetings are more likely to be requested in high conflict cases where meetings are inappropriate ¹⁸³	1
Delay caused to trial	1
Judicial meeting will replace input from social scientists	1

These results reinforce the views expressed in earlier responses that judicial officers are most concerned about two matters: their lack of expertise and skill to speak with children; and that judicial meetings may expose children to undue pressure or parental manipulation. The next most common concerns were that evidence is not introduced in open court, that judicial meetings with children are superfluous to family reports, and that judicial officers may become witnesses.

As discussed above at 5.2.2, the problem of judicial officers' lack of expertise and skill can be addressed by offering training, a proposition that most respondents agreed with (see below at 5.3.3.5.9). The concerns that judicial meetings with children may lead to children being subjected to pressure or manipulation, and that judicial officers may become witnesses in their own hearings, are not concerns that are capable of

¹⁸³ Despite this expressed concern, under the proposed model, it is not up to parents to request judicial meetings with children. See above n168.

confirmation unless and until judicial meetings with children increase. The concern that evidence is not introduced in open court can be addressed to some degree by ensuring principles of due process are complied with, as discussed above at 5.2.1. Further, this concern, as well as the concern that judicial meetings are superfluous to family reports, is not shared by the majority of judicial officers.¹⁸⁴

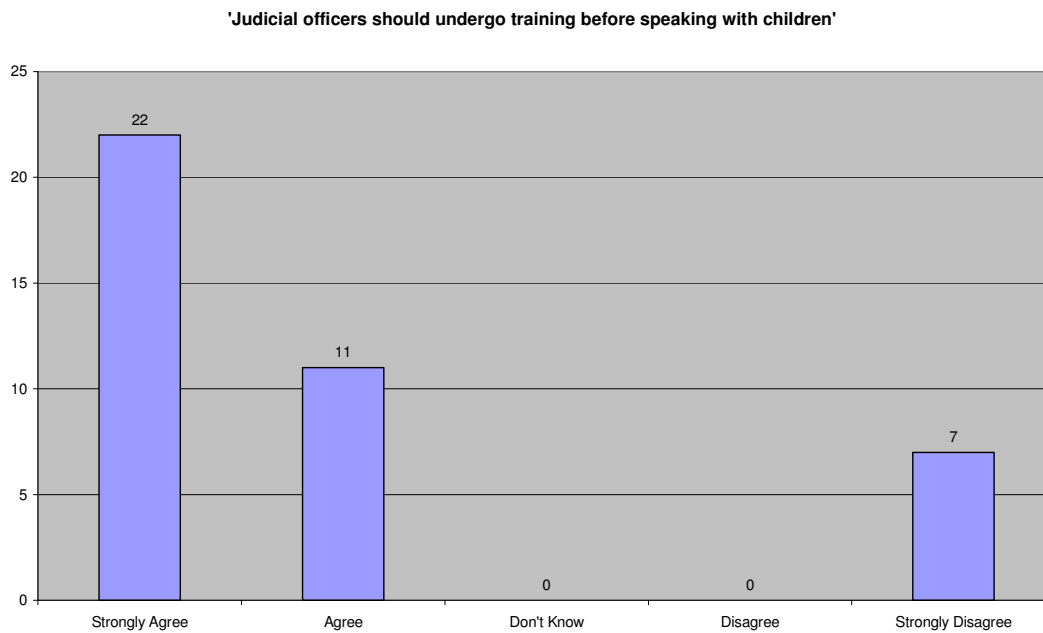
Several other concerns that were expressed involved children's perception of the process, including children being over-empowered, lacking capacity to understand, being harmed by being brought into their parents' dispute or believing their views will be implemented as a result of meeting with the decision-maker. These concerns can arguably be managed by judicial officers working with the family consultant to ensure that children are informed about and understand the nature and purpose of a judicial meeting, and that children are not harmed by the process. Training will better equip judicial officers to carry this out.

5.3.3.5.9 Training for judicial officers meeting with children

Respondents were asked whether judicial officers should undergo training before speaking with children.

¹⁸⁴ See above at 5.3.3.5.5 and 5.3.3.5.6.

Graph 16: Whether judicial officers should undergo training before meeting with children



Judicial officers expressed strong views about this issue, with respondents either indicating in favour, or 'strongly disagreeing' with this proposition. No respondents said they 'don't know' or 'disagree' with the statement that judicial officers should undergo training before speaking with children. An overwhelming 82.5 percent of respondents strongly agreed (22/40) or agreed (11/40) that judicial officers should undergo training before speaking with children.

Seven respondents (17.5%) said they 'strongly disagree' that judicial officers should have training in speaking with children. Four gave reasons for this view. One respondent said that judicial officers should not undergo training because '[j]udicial officers should *not* speak with or to children'.¹⁸⁵ Another said that training is 'not necessary',¹⁸⁶ while yet another wrote that 'Judges cannot be social workers and psychologists as well! In the *rare* case of a judicial meeting, the judge's own experience and instinct should suffice'.¹⁸⁷ One respondent believed it was inappropriate to suggest that judicial officers have further training:

¹⁸⁵ Judicial officer 33.

¹⁸⁶ Judicial officer 50.

¹⁸⁷ Judicial officer 26.

This conflicts with the independence of the judiciary. Judges are appointed on the basis that they are able to do the job for which they are appointed and can decide what they need to learn to do it properly as well as the method by which they can learn. To dictate to a judge in the way implicit in the question is not only improper, it is impractical. One cannot make somebody conform to the beliefs and attitudes of others.¹⁸⁸

With respect, the views of judicial officers who commented that training is not necessary or not appropriate seem somewhat out of touch with the prevailing attitude of the Australian judiciary to judicial education.¹⁸⁹ Judicial officers are offered and encouraged to undergo training in a wide range of areas, and most generally recognise the importance of ongoing education in performing their role.¹⁹⁰ It may be significant that all three judicial officers who expressed this view were reasonably experienced.¹⁹¹

5.3.3.5.10 Support for guidelines on judicial meetings with children

Respondents were asked whether there should be guidelines or legislation for how judicial meetings with children are conducted.

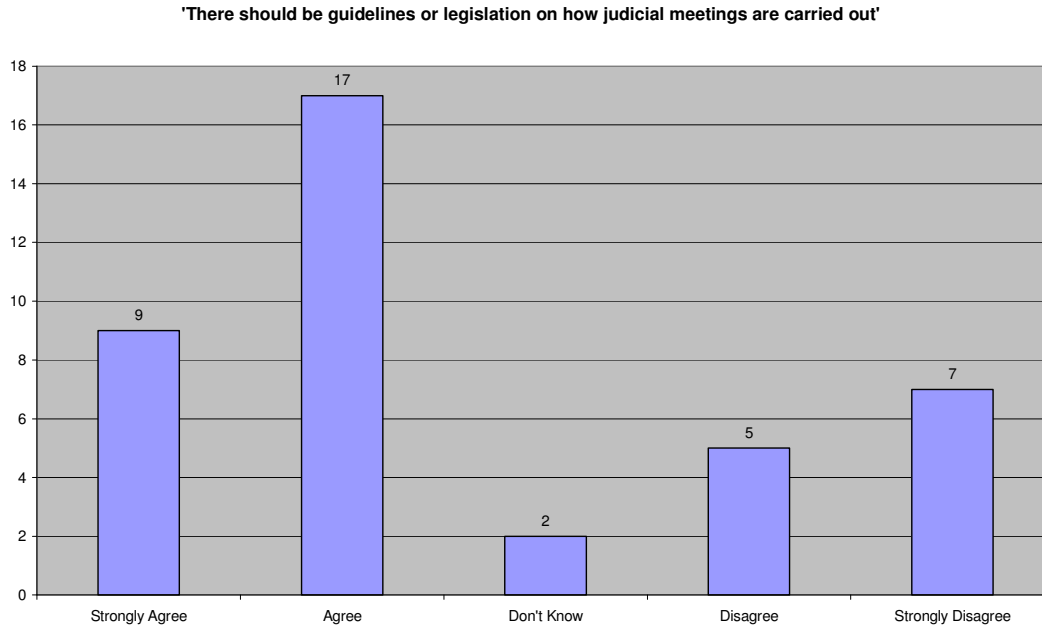
¹⁸⁸ Judicial officer 46.

¹⁸⁹ For example, Chief Justice of the High Court of Australia, French CJ, said 'The times are long gone when persons appointed to judicial office in the common law world were thought to ascend to the Bench on the date of their appointment, fully equipped with all the knowledge and skills necessary to the judicial task... Judicial education and training upon appointment and during the tenure judicial office is now a well-established feature of judicial systems around the world' (Chief Justice R French, 'Judicial Education- A Global Phenomenon' (Presentation to the International Organisation for Judicial Training 4th International Conference on the Training of the Judiciary, Sydney, 26 October 2009), 4 <<http://www.hcourt.gov.au/speeches/frenchcj/frenchcj26oct09.pdf>> at 11 November 2010); Former Chief Justice of the High Court of Australia, Gleeson CJ, said 'It is important that the judiciary should accept that continuing education is part of the job... There was some early resistance within the judiciary but that has disappeared' (Chief Justice M Gleeson (as he then was), 'Judicial Selection and Training: Two Sides of the One Coin' (2004) 13(1) *Legal Education Digest* 13).

¹⁹⁰ See, for example, National Judicial College of Australia, 'Judicial Education in Australia' (2007) <<http://njca.anu.edu.au/Publications/Documents/Judicial%20Education%20in%20Australia%20007.pdf>> at 11 October 2010.

¹⁹¹ Judicial officer 50 and judicial officer 26 both indicated they have been hearing parenting matters for 6-10 years. Judicial officer 46 indicated he or she had been a judicial officer hearing parenting matters for over 15 years.

Graph 17: Whether there is a need for guidelines



Twenty-six of the 40 judicial officers (65%) who responded to this question indicated that they 'strongly agree' or 'agree' with the proposition. However, it is significant that 12 of the 26 specified in written comments that they were in favour of guidelines, but not of a change in legislation.

The general view of these respondents appeared to be that, while guidelines would be helpful, legislation would be too prescriptive and cumbersome. One respondent wrote, 'The legislation is already complex. Judicial officers do not need further legislative constraints but guidelines could be useful'.¹⁹² Another wrote, 'Legislation is too cumbersome and political to modify over time'.¹⁹³

Judicial officers who indicated they 'disagreed' or 'strongly disagreed' with guidelines or legislation on judicial meetings with children offered differing reasons for their views. Four respondents said that, as judicial meetings are entirely optional and discretionary, guidelines or legislation were not appropriate and not likely to be

¹⁹² Judicial officer 42.

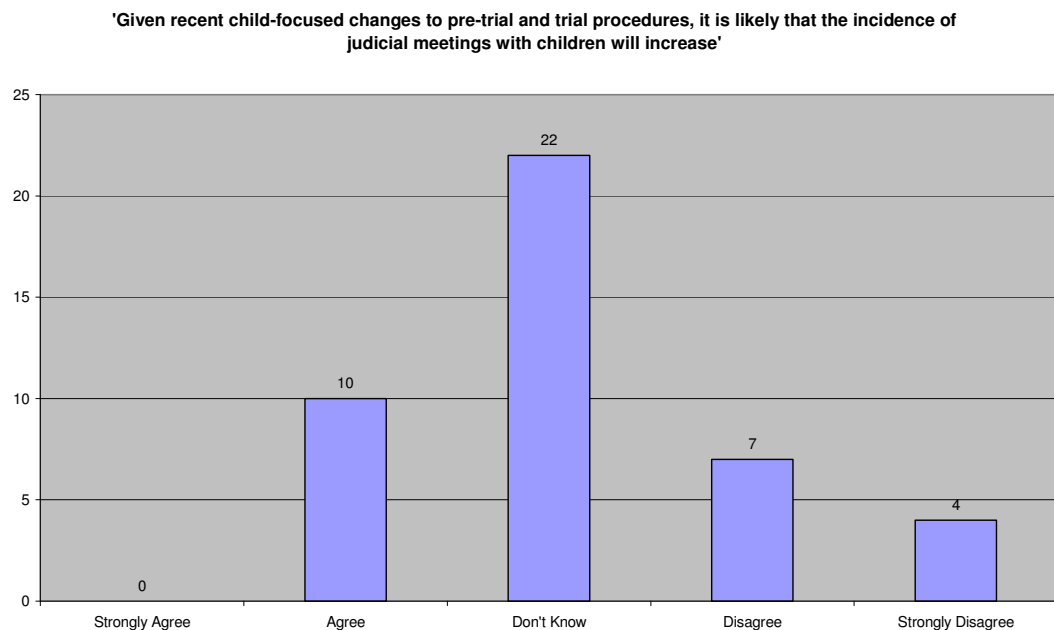
¹⁹³ Judicial officer 52.

helpful. One respondent said they ‘strongly disagree’ with guidelines or legislation because ‘there should not be any judicial meetings with children’.¹⁹⁴

5.3.3.5.11 *Whether judicial meetings with children will increase*

Respondents were asked whether they agree with the proposition that judicial meetings with children may increase in the future, particularly given recent changes to procedures relating to children’s hearings, including the introduction of the Less Adversarial Trial system.

Graph 18: Judicial officers’ views of whether judicial meetings with children will increase



Respondents were clearly divided on the issue of whether the incidence of judicial meetings with children is likely to increase. Twenty-two of the 43 respondents who answered this question (51.1%) were unable to form an opinion. Ten respondents (23.3%) indicated that they ‘agree’ the number of judicial meetings with children will increase. Eleven respondents (25.6%) said they ‘disagree’ or ‘strongly disagree’ with the proposition.

¹⁹⁴ Judicial officer 33.

5.3.3.5.12 *Officers who are opposed to judicial meetings with children*

Analysis of the survey responses disclosed a large group of judicial officers who made clear their opposition to judicial meetings with children taking place in any but the most extreme of circumstances. These officers expressed their views through various written comments in their completed surveys. Those comments were as follows:

Table 3: Comments opposing judicial meetings with children

Judicial Officer	Comment/s	<i>Court</i>
21	'They ...should not undertake speaking with children.'	FCA
25	'[T]hey shouldn't do it, trained or untrained.'	FCA
33	'Judicial officers should NOT speak with or to children.'	FCA
46	'I am opposed to children speaking to the judge who is to decide.'	FCA
51	'A judge should not have access to material different from all parties' and due process concerns <i>can't</i> be addressed.	FCA
61	'Meetings with children should not occur.'	FMCA
65	'[Y]ou don't conduct interviews with children as a judicial officer.'	FMCA
67	'[Judicial meetings] should not occur.'	FMCA
80	'I do not think it is a desirable practice' and '[T]he practice is inappropriate.'	FMCA
95	'[I] do not agree with [judicial] meetings.'	FMCA
104	'I do not agree with speaking with children.'	FMCA

This group of eleven judicial officers opposed to judicial meetings with children made up 25 percent (11/44) of all respondents to the survey. It represented 31.3 percent

(5/16) of the total number of respondents who were judges of the FCA, and 30 percent (6/20) of respondents who were federal magistrates of the FMCA. It is noteworthy that no judicial officers of the FCWA indicated they were opposed to judicial meetings with children.

All but two of the judicial officers in this group also indicated they ‘strongly disagree’ that they would meet with a child for forensic purposes in the future.¹⁹⁵ All but three also indicated their view that concerns about ensuring due process in judicial meetings with children ‘cannot’ be addressed.¹⁹⁶

The emergence of this significant group, which was opposed to judicial meetings with children taking place, was surprising. It was expected that all judicial officers would accept that the option to meet with children is within the discretion of the court. This is especially so because, until very recently, the ability to meet with children was specifically provided for in the *Family Law Rules* 2004 (Cth).¹⁹⁷ From the existing literature on this topic, it was anticipated that judicial officers’ reluctance to meet with children would be due to factors such as a lack of confidence, perceived lack of skill or unease with complying with due process on the part of individual respondents. It was not anticipated that many judicial officers fundamentally disagree with the concept of judicial officers meeting with children.

5.3.3.6 Discussion

The results of this study confirmed the prevailing view that Australian family law judicial officers meet with children only on very rare occasions and that many are reluctant to do so.

The vast majority of judicial officers have never met with a child who is the subject of a parenting dispute. However, nearly 20 percent agreed or strongly agreed it is likely they would meet with a child to ascertain their views in the future.¹⁹⁸ Significantly,

¹⁹⁵ Judicial officers 51 and 80 indicated they ‘disagree’ they would meet with a child for forensic purposes in the future.

¹⁹⁶ Judicial officers 25 and 65 did not think that due process concerns were insurmountable. Judicial officer 95 did not respond to the question about due process.

¹⁹⁷ Rule 15.03 (now omitted). This rule was omitted by the *Family Law Amendment Rules* 2010 (Cth), which came into force on 1 August 2010.

¹⁹⁸ See 5.3.3.5.4 above.

the survey found that a judicial officer's inclination to meet with a child in the future did not have any correlation with that judicial officer's experience (or lack thereof) of meeting with a child in the past, or whether they had previously been an ICL. There did appear to be a correlation, however, between a judicial officer's likelihood of meeting with a child in the future and the court in which they work. The results showed that judges of the FCA were least likely to meet with children in the future, while officers of the FCWA were most likely.

Many judicial officers agreed that meeting with children can have significant benefits. Many agreed that meeting with children may yield useful evidence of children's views, and give judicial officers greater understanding of the needs and best interests of individual children than is possible through the other methods of hearing children's views. However, the majority of judicial officers did not appear to be aware, or disagreed, that judicial meetings can also have benefits for children in that they allow children to know they have been listened to and taken seriously. This may show a lack of appreciation of the extensive research that has been published on this issue.

Despite recognition of the benefits of judicial meetings with children, a majority of respondents expressed concern that judicial officers may lack the skills and/or training to meet with children and interpret their views. A majority were also concerned that judicial meetings with children may encourage parents to manipulate or pressure their children. This may explain why, although many judicial officers believe judicial meetings can be useful, the vast majority are still reluctant to speak with children.

Most judicial officers expressed satisfaction with the proposed model for judicial meetings with children, and concerns about due process as discussed in the prevailing literature were able to be allayed. Further, although the literature on this topic suggests that the problem of children wanting meetings to remain 'confidential' may hinder judicial meetings, most judicial officers were confident that they would be able to deal with 'confidential' disclosures made by children and ensure that principles of due process were complied with.

A strong majority of respondents expressed support for ongoing training for judicial officers in meeting with children. This training would hopefully address the lingering concern that judicial officers lack the skills and expertise to meet with children.

Training may also better equip judicial officers to identify cases in which children may have been manipulated or pressured by their parents, and ensure the child is protected. Judicial officers should also engage the assistance of a family consultant in this regard. A strong majority were also in favour of guidelines being promulgated to give some direction on how judicial meetings with children should be conducted.

It is significant that around 30 percent of judicial officers of the FMCA and FCA expressed complete opposition to judicial officers meeting with children. These officers may be unaware of the benefits that can arise from meeting with children, or they may be unable to overcome their concerns about the practice.

This study found that many family law judicial officers in Australia are in favour of judicial meetings with children taking place in appropriate circumstances. Twenty percent of the respondents to this survey agreed or strongly agreed they may meet with a child to ascertain their views in the future, and the incidence of judicial meetings with children may increase. This thesis argues in favour of opportunities for further education being offered to judicial officers to better equip them to meet with children and interpret their views. It also advocates the implementation of guidelines for judicial meetings with children. The majority of judicial officers agree with both these suggestions. The implementation of these suggestions may reassure judicial officers sufficiently to overcome their concerns about the practice, and may lead to an increase in the number of judicial officers who meet with children.

5.4 Conclusion

This chapter has confirmed that the very small number of cases in which judicial meetings occur in Australia can indeed be attributed to reluctance on the part of judges to meet with children. The vast majority of judges have not met with children in the past and have indicated they are unlikely to do so in the future. However, it was also found that many judges view judicial meetings with children in a positive light and believe that meeting with children may yield important information that may assist judges to make decisions that are in children's best interests.

It appears that judges remain reluctant to meet with children because they are unable to overcome two main concerns about the practice. The first is a lack of skills and training by judges. The second is a concern that children will be subject to parental

pressure or manipulation, and thus be harmed by the process of meeting with a judge. Despite a reasonable amount of literature discussing the ‘problems’ of due process and confidentiality arising from judicial meetings with children, many judges, with the benefit of the proposed model for judicial meetings with children, did not believe these problems to be insurmountable, and indeed many did not view these issues as concerning at all.

This chapter has identified the main detriments of judicial meetings with children and suggested ways in which those detriments can be lessened. It is important to acknowledge that meetings between judges and children may lead to disadvantages for the administration of justice and the well-being of children. However, this thesis argues that these disadvantages are far outweighed by the benefits that can result. Further, the full extent of any detriment that will result as a consequence of judges meeting with children cannot be known unless and until judges meet with children more often.

The next chapter investigates the way in which children’s views are heard in different comparable jurisdictions. Through understanding how the practice works (or does not work) in other jurisdictions, insight may be gained into what steps may be taken to reassure Australian judges about meeting with children. It is also important to discover, particularly in jurisdictions where judicial meetings with children occur fairly frequently, whether the perceived problems and detriments about the practice have occurred and, if so, how these have been addressed.

Chapter Six

6 How judges hear children's views in other jurisdictions

6.1 Introduction

This chapter looks at the ways in which children's views are heard in family law proceedings in New Zealand, the United Kingdom and Canada, with a particular focus on judicial meetings with children. The chapter discusses the various laws, practices and attitudes to judicial meetings in the three jurisdictions, and compares them with the situation in Australia. The three jurisdictions have been chosen to compare with Australia because of their similarities in culture, legal systems and general approach to contested disputes involving children. All four jurisdictions (New Zealand, the United Kingdom, Canada and Australia) hold the welfare or best interests of the child as paramount in family law decision-making by a court, and compel the court to take into account the views of children who are the subject of proceedings.

Despite the similarities between these jurisdictions, it appears there is little correlation in their individual approaches to listening to children. Whereas judicial meetings with children occur fairly often in New Zealand and Scotland, for instance, such meetings remain rare in Canada and England and Wales. Guidelines have recently been introduced in England and Wales to encourage judges to meet with children.

In this chapter, it is often necessary to distinguish between court intervention to make arrangements for children whose parents have separated, when the parents are unable to reach agreement, and court intervention for 'welfare' or 'child protection' matters, where decisions are made to protect children who are at risk. In the United Kingdom, in particular, these two different types of judicial intervention are termed 'private family law' and 'public family law' proceedings respectively.¹ This terminology has

¹ The main issue for courts in deciding these two types of matters is, of course, different. While public law matters focus on protecting the child from a situation of risk or harm, private law focuses on arrangements that are in the best interests of the child. For detailed discussion on the difference between public and private law matters, see, for example, Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks*, Consultation Paper No 1 (2010).

been adopted throughout this chapter for ease of reference and to avoid confusing changes in wording. Further, where the generic term 'family law' is used, this refers to 'private' family law.

The terminology applying to children's 'views' is not consistent among the different jurisdictions. In some of the countries discussed, the terms used in the relevant statute include 'wishes', 'feelings' and 'preferences'. When discussing the law of that country, the discussion in this chapter most often adopts the terminology applicable in that jurisdiction. However, for ease of reference and consistency, the word 'views' is frequently used to describe children expressing themselves and having a say in family law matters that affect them. It is submitted that there is no relevant or significant difference between these terms for the purposes of this thesis.

Similarly, some jurisdictions use the term 'welfare' instead of 'best interests', and 'custody and access' instead of the terminology used in the *Family Law Act 1975* (Cth) ('FLA').² These terms arguably have the same meaning and are thus interchangeable. In this chapter, when discussing procedures in a particular country, terminology distinctive to that jurisdiction, such as 'custody and access', has sometimes been used where a particular policy or statute containing that language is referred to. Otherwise, the terminology used in Australia has been employed.

In a number of European countries, such as Germany, judges meet with children in proceedings as a matter of course.³ The system of trial in these jurisdictions is characterised as inquisitorial, meaning that the judge has an investigative role and can pursue any inquiries he or she considers relevant, including the appointment of experts and the presentation of evidence, in order to determine the truth of a matter.⁴ In some ways, it would have been useful to explore how children's views are treated

² Terms used in the FLA include 'lives with' and 'spends time with'. These have replaced the terms formerly used in the FLA, including 'residence' and 'contact' (prior to 2006) and 'custody and access' (prior to 1996).

³ See Judge E Carl, 'Conducting Proceedings in Custody and Access Cases before German Family Court' (Paper presented at the 11th National Family Law Conference, Gold Coast, September 2004) and 'Giving Children Their Own Voice in Family Court Proceedings: A German Perspective' (Paper presented at the 4th World Congress on Family Law and Children's Rights, Cape Town, 20-23 March 2005).

⁴ M Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings*, Family Court of Australia (2007) 7.

and presented in these jurisdictions, particularly as judicial meetings with children are so frequent and uncontroversial. However, it was decided to confine this discussion to jurisdictions that have traditionally adhered to an adversarial mode of trial.⁵ A comparison of the practice of judicial meetings with children in Germany and Australia would be meaningless without detailed examination of the difference in trial procedure and judicial culture in the two jurisdictions, which is beyond the scope of this thesis.

Further, as this thesis is confined to issues surrounding parenting arrangements for children after family separation, it has deliberately not explored the issue of whether judges meet with children in Australian State and Territory law, such as in child protection matters. As explained in Chapter One, child protection has remained within the jurisdiction of the states, whereas the Commonwealth has power over parenting arrangements following separation. Practices amongst individual states and territories are likely to differ,⁶ and an examination of the practices within each state would not be germane to this discussion.

6.2 New Zealand

Compared to Australia, meetings between judges and children in private family law matters in New Zealand occur fairly frequently. In a study of 130 judgments decided in three years in the 1990s that mentioned how children's views had been ascertained, Tapp found that a judge had met with a child in 23.1 percent of those cases (30 out of 130).⁷ In a further study of 24 judgments mentioning children's views between 2001 and 2005, Tapp found that a judge had met with a child in 41.7 percent of those cases (10 out of 24).⁸

⁵ See Chapter One for discussion about the characteristics of the adversarial trial system.

⁶ See, for example, discussion about the differing practices in each Australian state and territory in relation to children's representation in child protection matters in Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (2004) [4.20]-[4.26] and Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (ALRC and HREOC), *Seen and Heard: Priority for Children in the Legal Process*, Report no 84 (1997) [13.23]-[13.32].

⁷ P Tapp, 'Judges are Human Too: Conversation Between the Judge and a Child as a Means of Giving Effect to Section 6 of the Care of Children Act 2004' (2006) 1 *New Zealand Law Review* 35, 45.

⁸ *Ibid*, 64-65.

This section explores the legislation, policies and procedures in relation to how children's views are heard in New Zealand family law proceedings. In particular, it looks at possible reasons why judicial meetings with children in New Zealand have a popularity not enjoyed in Australia, and how (and if) problems with the practice as identified in Australia have been addressed in New Zealand.

6.2.1 The Family Court of New Zealand

The Family Court of New Zealand ('FCNZ')⁹ has broader jurisdiction to make orders for children than the Family Court of Australia ('FCA').¹⁰ While the FCA's primary jurisdiction over children is in private family law matters,¹¹ the FCNZ has jurisdiction over private family law matters, but also public family law matters¹² and adoption. In Australia, these remain matters under the jurisdiction of each Australian state or territory.¹³

This means that judges of the FCNZ are able to adopt a more holistic approach to the needs of children and families, and develop outcomes that are best for each child in their particular circumstances. A judge of the FCNZ can, for example, simultaneously weigh up competing proposals from a child's parents and from the relevant child welfare authority. A judge may involve the child welfare authority in situations where he or she believes the child may be at risk, or where both parents are considered to be inadequate carers. In Australia, private and public family law

⁹ In this chapter, the FCNZ is intended to refer to any New Zealand court with jurisdiction to hear family law matters. While the High Court of New Zealand is generally the court of appeal from decisions of the Family Court, it does have jurisdiction to hear some first instance decisions.

(Courts of New Zealand website

<<http://www.courtsofnz.govt.nz/about/system/structure/overview>> at 24 November 2009).

¹⁰ Throughout this thesis, the word 'court' has been used to refer to all Australian courts with jurisdiction to decide matters under Part VII of the *Family Law Act* 1975 (Cth), particularly the FCA, the Federal Magistrates Court of Australia and the Family Court of Western Australia. However, in this chapter, the FCA has been chosen to compare with courts in different countries, in order to avoid any complication caused by the generic term 'court'.

¹¹ Governed by Part VII of the FLA.

¹² See introduction to this chapter for the meaning of 'private' and 'public' family law matters.

¹³ Note that the Family Court of Western Australia has jurisdiction to decide both 'private' family law matters and matters concerning adoption. Child protection, or 'public' family law matters, however, remain outside the jurisdiction of that Court.

matters are not heard in the same court, and judges of the FCA cannot make orders under the relevant child welfare legislation.¹⁴

6.2.2 The law on children's views

Private family law matters involving children are governed by the *Care of Children Act* 2004 (NZ) ('COCA'). Public family law (child protection) and adoption matters are governed by separate Acts.¹⁵ Section 6 of the COCA states:

6 Child's views

- (1) This subsection applies to proceedings involving
 - (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
 - (b) the administration of property belonging to, or held in trust for, a child; or
 - (c) the application of the income or property of that kind.
- (2) In proceedings to which subsection (1) applies,
 - (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
 - (b) any views the child expresses (either directly or through a representative) must be taken into account.

This section clearly affords greater importance and weight to the views of children than is afforded in Australia by section 60CC(3)(a) of the FLA. While both section 60CC(3)(a) of the FLA and section 6 of the COCA compel the court to take account of children's views, the COCA does not refer to factors such as the child's 'maturity or level of understanding', which Australian judges are asked to consider under the FLA in determining how much weight to give to the child's views.¹⁶

The COCA's predecessor, the *Guardianship Act* 1968 (NZ), did require judges to have regard to a child's 'age and maturity' and, further, specified that a child's views

¹⁴ In the recent decision of *Secretary of the Department of Health and Human Services & Ray and Ors* (2010) FLC 93-457, the Full Court of the FCA held that the trial judge did not have power to order a state welfare agency to be joined to family law proceedings without the agency's consent. The trial judge had considered intervention by the state welfare agency necessary, as he did not regard any of the parties to be satisfactory carers for the children. The Full Court observed that the case illustrated 'the need for continuing attempts to harmonise in some way the administration of State and Federal laws concerned with the welfare of children' (at [96]).

¹⁵ *Children Young Persons and their Families Act* 1989 (NZ); *Adoption Act* 1955 (NZ).

¹⁶ See FLA s60CC(3)(a).

be ascertained only 'if the child is able to express them'.¹⁷ Like section 60CC(3)(a) of the FLA, this former section placed qualifications on the way a court was to hear children's views and implied that children, by reason of their age and maturity, may lack capacity to express themselves.¹⁸ Under the COCA, the maturity of a child will continue to have relevance for New Zealand judges in assessing how much weight to place on a child's views. However, the removal of the qualifications that were found in the equivalent section of the *Guardianship Act* 1968 (NZ) emphasises the importance of listening to children of all ages and 'is perhaps a recognition that age and maturity are not linked in the same way for every child'.¹⁹

The most striking difference between section 6 of the COCA and section 60CC(3)(a) of the FLA is that the COCA specifically states that children 'must be given reasonable opportunities to express views on matters affecting the child'.²⁰ This accords with the wording of Article 12.2 of the *United Nations Convention on the Rights of the Child* ('UNCRC').²¹ As discussed in Chapter Two, there is no equivalent section in the FLA. There is nothing in the FLA that discusses the importance of involving children or implements Article 12 of the UNCRC.²²

In *Carpenter v Armstrong*²³ the New Zealand High Court²⁴ found that section 6 of the COCA had not been complied with at trial because a seven year old child had not been afforded reasonable opportunities to express his views.²⁵ The child had not been directly asked by the psychologist involved in the case, or by the lawyer for the child, about his views on his mother's proposed relocation to the United Kingdom, or whether he wished to express any views. The court held that children may not be prepared to engage in discussion, or may have insufficient understanding to express

¹⁷ *Guardianship Act* 1968 (NZ) (now repealed) s23(2).

¹⁸ Judge P Boshier, 'The Care of Children Act 2004: Does it Enhance Children's Participation and Protection Rights?' (2005) 9(2) *Children's Issues* 7, 8. See also Judge J Doogue, 'A Seismic Shift or a Minor Realignment? A View from the Bench Ascertaining Children's Views' (2006) 5 *New Zealand Family Law Journal* 198, 199.

¹⁹ Boshier, 'The Care of Children Act', above n18, 8.

²⁰ COCA s6(2)(a).

²¹ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

²² See discussion in Chapter Two about the requirement to take children's views into account under s60CC(3)(a) of the FLA.

²³ *Carpenter v Armstrong* HC TAU CIV 2009-470-511 [31 July 2009].

²⁴ The High Court hears appeals from the FCNZ (COCA s143).

²⁵ *Carpenter v Armstrong* HC TAU CIV 2009-470-511 [31 July 2009], [83].

reliable views. Nevertheless, they need to be offered a 'reasonable opportunity' to express their views.²⁶ The court held that if the psychologist 'had been able, from her expertise, to convey "views" to the Court (even in the form of a statement recording an unwillingness to engage on the topic) that would have amounted to a reasonable opportunity for the views to be expressed'.²⁷

Another difference between the relevant statutory provisions in the two jurisdictions is that section 6 of the COCA, through the words 'any views the child expresses (either directly or through a representative)', contemplates direct participation by children in proceedings under that Act.²⁸ The FLA contains no reference to direct participation by children. Further, as has been explained in previous chapters, it is extremely rare for children to participate directly in private family law proceedings in Australia.

It is also worth noting that in New Zealand the requirement to take children's views into account is contained within its own section.²⁹ This differs from the FLA where children's views are one factor in a long list of 'additional considerations' to be taken into account, along with the 'primary considerations' when determining what decision is in the best interests of a child.³⁰ Arguably, assigning a separate section to children's views gives them particular prominence and reinforces the recognition of children's right to participate in proceedings.³¹

From this discussion, it can be concluded that children's views are intended to be treated much more seriously under the COCA than they are in Australia under the FLA. Due to the prescriptive nature of section 6 of the COCA, a party, or a child,³² can appeal a decision on the grounds that the child has not been given sufficient, or

²⁶ Ibid. [80].

²⁷ Ibid. [82].

²⁸ Judge P Boshier, 'Involving Children in Decision Making: Lessons from New Zealand' (2006) 20 *Australian Journal of Family Law* 145, 149.

²⁹ COCA s6.

³⁰ FLA s60CC(3)(a). See Chapter Two for discussion of the significance of children's views being characterised as an 'additional' and not a 'primary' consideration.

³¹ Boshier, 'The Care of Children Act', above n18, 8.

³² COCA s143 allows a party or a child who is dissatisfied with a decision to appeal. Presumably a child would do this through the lawyer for the child, but there is no specific requirement to do so in the COCA.

'reasonable', opportunities to express their views in the proceedings.³³ In Australia, lacking a statutory requirement to give children reasonable opportunities to express their views, this would not be available as a ground of appeal.³⁴

As with the FLA, the COCA states that the best interests of a child is to be the court's paramount consideration.³⁵ No matter how much importance is accorded to children's views under the COCA, a decision that is contrary to a child's views will be made in circumstances where the court determines that decision to be in the best interests of the child.³⁶

6.2.3 How the FCNZ hears children's views

While the COCA does not stipulate the methods by which children are to be given an opportunity to express their views, methods used by the FCNZ are similar to those referred to in section 60CD(2) of the FLA. These include obtaining evidence of children's views from accounts of the child's parents and others, through a report from an expert in children's welfare, through the lawyer for the child (New Zealand's equivalent of the ICL³⁷) and by a meeting between the child and the judge.³⁸ As will be discussed later, until very recently the statutory Rules in both Australia and New Zealand provided endorsement of such meetings.³⁹ However, judicial meetings with children are very common in New Zealand, but extremely rare in Australia.

³³ See, for example, *Carpenter v Armstrong* HC TAU CIV 2009-470-511 [31 July 2009], *C v S [Parenting Orders]* [2006] NZFLR 745.

³⁴ A successful appeal under the FLA, based on children's views, would need to establish that the judge failed to correctly exercise his or her discretion under s60CC(3)(a); namely, that the court did not consider evidence of children's views, or gave insufficient weight to those views (such as in *Joannou and Joannou* (1985) FLC 91-642 and *H and W* (1995) FLC 92-598, discussed in Chapter Two).

³⁵ FLA s60CA, COCA s4(1). Note COCA s4(1) refers to both the best interests and welfare of the child to be the court's paramount consideration.

³⁶ See, for example, the judgment of Boshier J in *JA v LAD* FC TAU FAM: 2007-070-1478 [28 November 2007], where the children were removed from the mother's primary care because of serious concerns about the mother's capacity to care for the children. This went against the children's strongly expressed views.

³⁷ ICL stands for Independent Children's Lawyer, who represents a child's interests in Australian family law. See Chapter Three for discussion about the role and appointment of an ICL.

³⁸ *C v S [Parenting Orders]* [2006] NZFLR 745, [31(f)] (Randerson J).

³⁹ *Family Law Rules* 2004 (Cth) r15.03 (now omitted); *Family Court Rules* 2002 (NZ) r54. The Australian Rule was very recently omitted by the *Family Law Amendment Rules* 2010, which commenced on 1 August 2010.

In New Zealand, there is no equivalent of a family consultant. There is no social worker attached to the case whose role it is to assist the court and the parties throughout the court process.⁴⁰ The equivalent of a family report is provided by an independent psychologist or psychiatrist whose role is of limited scope and duration.⁴¹

6.2.3.1 Expert report

If satisfied that it is necessary for the proper disposition of an application, the court may request a 'person whom the court considers qualified' to prepare a written cultural, medical, psychiatric or psychological report on the child who is the subject of the application.⁴² Such a report plays a similar role in proceedings to that of a family report in the Australian family law system.⁴³ The report writer can be called as a witness in the court proceedings.⁴⁴ Unlike the wording of the FLA regarding family reports, the wording of the COCA section 133 suggests that reports are to be produced by psychiatrists or psychologists, and not social workers.⁴⁵

Case authority in New Zealand has confirmed that the FCNZ may not order a psychological report solely for the purpose of ascertaining a child's views,⁴⁶ because children's views should primarily be introduced through the child's lawyer or through a meeting with the judge.⁴⁷ It has been argued that asking a psychologist to 'ascertain' the views of children amounts to delegation of a judicial function.⁴⁸ While a child's views will no doubt form a part of a psychologist's report, they are not to be its sole focus. The situation is different in Australia, where the primary means of ascertaining children's views is likely to be through a family report, and there is nothing prohibiting a court from ordering a family report for the sole purpose of ascertaining a child's views.

⁴⁰ FLA s11A.

⁴¹ COCA s133.

⁴² COCA s133.

⁴³ See FLA s62G.

⁴⁴ COCA s134(7).

⁴⁵ COCA s133(2)(b).

⁴⁶ *K v K* [2005] NZFLR 28, [92].

⁴⁷ *Ibid*, [91] (Heath and Venning JJ); *M v Y* [1994] 1 NZLR 527.

⁴⁸ Doogue, above n18, 200.

In situations where there are issues about the child's welfare, the court may order a report from the child protection authority or social worker.⁴⁹

6.2.3.2 Lawyer for the Child

The COCA states that, unless an appointment would serve 'no useful purpose', the court must appoint a lawyer for the child in any proceeding involving a child's day-to-day care or contact that is likely to proceed to a hearing.⁵⁰ This differs from Australia, where ICLs are not appointed in every contested children's matter, and case law has given guidance as to the 'types' of cases in which an ICL should be appointed.⁵¹

The FLA makes clear that ICLs are not to act as the child's lawyer and are not obliged to follow a child's instructions.⁵² An ICL must represent what they believe to be the child's best interests.⁵³ In New Zealand, the role of a lawyer for the child is to provide independent representation and advice to the child.⁵⁴ The lawyer represents their child client's instructions as would a traditional lawyer,⁵⁵ but is also required to put forward the child's best interests in a way that is not expected from a traditional lawyer.⁵⁶ The lawyer for the child must act for both the child and the court, and their dual role can cause uncertainty and confusion, including debate as to how far the lawyer should act in what they think are the child's best interests, if those interests are contrary to the child's views.⁵⁷

A lawyer for the child must meet with the child to find out their views, unless the lawyer considers it inappropriate to do so because of 'exceptional circumstances'.⁵⁸ This is important for children's participation because it grants each child the

⁴⁹ COCA s132.

⁵⁰ COCA s7(2).

⁵¹ *Re K* (1994) FLC 92-461. See FLA ss68L and 68LA for the appointment and role of the ICL. See Chapter Three for comprehensive discussion about the role of the ICL in Australian family law.

⁵² FLA s68LA.

⁵³ FLA s68LA.

⁵⁴ See Family Court of New Zealand, *Practice Note: Lawyer for Child Code of Conduct* (2007), [5.2] <<http://www2.justice.govt.nz/family/practice/notes/default.asp>> at 16 November 2009, and Family Court of New Zealand, *Children's Guide to the Family Court* <<http://www2.justice.govt.nz/family/court/what-to-expect/children.asp>> at 16 November 2009.

⁵⁵ FCNZ, *Lawyer for Child Code of Conduct*, above n54, [14.1].

⁵⁶ Boshier, 'The Care of Children Act', above n18, 8.

⁵⁷ Boshier, 'Involving Children in Decision Making', above n28, 148. In that situation, the lawyer must act in accordance with the child's views (Boshier, 'The Care of Children Act', above n18, 9).

⁵⁸ COCA s7(3).

opportunity, at the very least, to speak directly with an officer of the court. The FLA contains no requirement for an ICL to meet with a child.⁵⁹ Further, the use of the word 'exceptional' in the COCA makes clear that there will be only a very small number of cases in which the lawyer should not meet with a child.⁶⁰ In many cases, a lawyer for the child will meet with their child client on several occasions leading up to a hearing.⁶¹

The lawyer for the child can ensure the child's views are put before the court through the evidence of witnesses and, commonly, a lawyer for the child will file a written memorandum setting out the child's instructions.⁶² The lawyer for the child is not a witness, and cannot be required or permitted to give evidence.⁶³ The lawyer for the child has a duty to advocate, before the court, a position that accords with the child's views, even where the lawyer does not think the views are in accordance with the child's best interests.⁶⁴

Aside from presenting the child's views, the lawyer for the child has multiple other tasks, such as explaining to the child the purpose and contents of any expert report⁶⁵ and taking reasonable steps to ensure that the effect of any parenting order is explained to the child, in a manner and language that the child will understand.⁶⁶

A lawyer for the child will also advise the court about whether they consider it appropriate for the judge to meet with the child, and will inform the judge of the

⁵⁹ The guidelines, however, encourage ICLs to meet with children in all cases (Family Law Courts, *Guidelines for Independent Children's Lawyers* (2007) [6.2] <<http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb02ee0237902cd/ICL%20guidelines-6-12-07.pdf>> at 6 July 2010). Despite these guidelines, many ICLs do not meet with children in all cases. See full discussion in Chapter Three.

⁶⁰ Boshier, 'The Care of Children Act', above n18, 9.

⁶¹ FCNZ, *Lawyer for Child Code of Conduct*, above n54, [7.1]; *S v S* [2009] NZFLR 108, [53] (Murfitt J).

⁶² A memorandum of this kind is referred to in many cases, including *S v S* [2009] NZFLR 108, [11] (Murfitt J) and *AD v KT [Parenting order]* [2008] NZFLR 761, [24] (Hansen J).

⁶³ Tapp, above n7, 54 referencing *M v Y* [1994] 1 NZLR 527; FCNZ, *Lawyer for Child Code of Conduct*, above n54, [14.2].

⁶⁴ Boshier, 'The Care of Children Act', above n18, 9.

⁶⁵ Unless the lawyer considers that to do so would be contrary to the child's welfare and best interests (COCA s134(5)).

⁶⁶ COCA s55(4). This does not necessarily mean that the lawyer for the child must do the explaining. They must ensure the order is explained to the child, which implies they can arrange for another person to do so (Boshier, 'The Care of Children Act', above n18, 9).

child's views about this.⁶⁷ The lawyer for the child will accompany the child and remain throughout the judicial meeting⁶⁸ as a 'known and hopefully trusted companion'.⁶⁹ Lawyers for children may accompany their child clients to other court events, collect and deliver them to court related appointments, and be available by telephone for their child clients to call with any queries.⁷⁰ These varied tasks demonstrate that the role played by the lawyer for the child is larger in scope than that of the ICL in Australia, and involves a much closer relationship between lawyer and child than the relationship between an ICL and a child.

A lawyer for the child in New Zealand cannot advocate a position that is contrary to their child client's views. If the child's views conflict with what the lawyer for the child believes to be in the child's best interests, the lawyer must attempt to resolve the conflict through discussion with the child.⁷¹ The lawyer for the child will advise the court of the lawyer's position and, where the conflict is unable to be resolved, invite the court to appoint another lawyer to represent the child's welfare and best interests.⁷² This person is called a counsel to assist.

The counsel to assist takes the role of a 'best interests' advocate. The lawyer for the child will continue to represent the child's views. The task of a counsel to assist is to help the court by adopting an advocacy role that focuses on the child's wider interests, beyond their wishes.⁷³ In some ways, the role of the counsel to assist more closely reflects the role taken by the ICL in the Australian family law system.⁷⁴

⁶⁷ FCNZ, *Lawyer for Child Code of Conduct*, above n54, [10].

⁶⁸ Family Court of New Zealand, *Judges' Guidelines: Discussions with Children* (2007), [9] <<http://www.justice.govt.nz/family/practice/guidelines>> at 20 November 2009. Interestingly, this guideline appears to conflict with rule 54 of the *Family Court Rules* 2002 (NZ) which gives a judge discretion to exclude anyone from a hearing when the judge speaks with a child (see discussion below).

⁶⁹ *S v S* [2009] NZFLR 108, [63] (Murfitt J).

⁷⁰ FCNZ, *Children's Guide to the Family Court*, above n54.

⁷¹ FCNZ, *Lawyer for Child Code of Conduct*, above n54, [5.5].

⁷² *Ibid.*

⁷³ *S v S* [2009] NZFLR 108, [6] (Murfitt J).

⁷⁴ For discussion on the role of the ICL in Australia, see Chapter Three.

6.2.3.3 Judicial meetings with children

As was previously the case in Australia, the Rules of Court in New Zealand specifically allow judges to speak with children. Rule 54 of the *Family Court Rules* 2002 (NZ) states:

54 Ascertaining wishes or views of child or young person

If a Court is required, or considers it necessary or desirable, to ascertain the wishes of a child or young person at any hearing of any application, the Court may—

- (a) order that any party to the proceedings, and the lawyers or other persons representing a party or the child or young person, be excluded from the hearing for so long as may be necessary to ascertain those wishes or views; or
- (b) direct when and where the Judge will ascertain those wishes or views.

Judges' discretion to exclude anyone from the hearing⁷⁵ seems to conflict with the guidelines for judicial meetings with children (discussed below at 6.2.6), which state that a meeting between a judge and a child should take place in the presence of the lawyer for the child. Further, in all the cases analysed by Tapp (discussed below at 6.2.4) in which a judicial meeting with a child took place, a lawyer for the child was present. The apparent discrepancy between the statutory Rules and the relevant guidelines suggests that further clarification of this issue is needed.

As with Rule 15.03 of the *Family Law Rules* 2004 (Cth) (now omitted),⁷⁶ nothing in the New Zealand Rules compels a judge to speak with a child. However, as has already been mentioned, judicial meetings with children in family law matters in New Zealand occur frequently, usually as part of a 'team' approach to ascertaining children's views.

6.2.4 Team approach

Section 6 of the COCA, which compels the court to give children 'reasonable opportunities' to express their views, suggests it may be necessary to give children more than one opportunity to express their views in different contexts or to different

⁷⁵ *Family Court Rules* 2002 (NZ) r54(a).

⁷⁶ This Australian rule was very recently omitted by the *Family Law Amendment Rules* 2010 (Cth), which commenced on 1 August 2010.

people.⁷⁷ New Zealand courts have generally implemented this requirement by utilising a combination of two or more of the methods discussed above to ascertain children's views, commonly termed the 'team' approach.⁷⁸ In *M v Y*⁷⁹ Hardie Boys J said:

Whether or not the Judge sees the child, the child's wishes must be ascertained. That may in a proper case be done through the specialist appointed to report, or through counsel for the child, or by a combination of one or both of these with an interview by the Judge himself.⁸⁰

The Principal Judge of the FCNZ has endorsed the team approach, saying:

Part of an individualised approach is ensuring every child is given the best opportunity to express his or her views. Each of the above methods needs to be utilised to their utmost to ensure the needs of each child are taken into account. Each child will respond differently not only to the method used to obtain their views but also to the person they have to talk to.⁸¹

Using an approach where a child expresses their views through a combination of methods and people 'maintains the requisite flexibility to respond to individual children, having regard to their age, gender, ethnicity, culture, personality, cognitive development and verbal capacity'.⁸² However, 'one also has to be conscious of not subjecting the child to a barrage of interviews, so a degree of balancing needs to take place'.⁸³

The case law demonstrates the growing popularity of the team approach. In a large scale study, Tapp and others looked at 829 written judgments concerning family law matters decided in 1990, 1994 and 1998 to ascertain how children's views were presented to the court in each of those years. These cases were decided under the *Guardianship Act* 1968 (NZ), which was the predecessor to the COCA. Of the 829 judgments, 130 mentioned how the children's views were ascertained.⁸⁴

⁷⁷ *C v S [Parenting Orders]* [2006] NZFLR 745, [31] (Randerson J).

⁷⁸ Tapp, above n7.

⁷⁹ *M v Y* [1994] 1 NZLR 527.

⁸⁰ *Ibid*, 537 (Hardie Boys J).

⁸¹ Boshier, 'Involving Children in Decision Making', above n28, 151.

⁸² Doogue, above n18, 201.

⁸³ Boshier, 'Involving Children in Decision Making', above n28, 151.

⁸⁴ Tapp, above n7, 45.

Over the three years surveyed, the researchers found an expert report was the sole means of ascertaining views in 48 percent of cases. Children's views were ascertained through the lawyer for the child and also a meeting between the judge and a child in 14.6 percent of cases. In 7.6 percent, a combination of a meeting between the judge and the child and an expert report was used.⁸⁵ In all cases, meetings between the judge and child were carried out in the presence of the lawyer for the child.⁸⁶

Tapp also analysed 24 written decisions under the *Guardianship Act* 1968 (NZ) handed down between 2001 and 2005 that mentioned children's views. She found that, out of the 24 judgments, the views of a child were communicated through the expert reporter alone in 37.5 percent of cases. In 29 percent, a combination of a meeting between the judge and the child, in the presence of the child's lawyer, and an expert report were used. In 16.6 percent of cases, the child's views were put to the court through the lawyer for the child and an expert report. The child's views were ascertained through a judicial meeting and the lawyer for the child in 12.5 percent of cases. In 4 percent, the sole method of ascertaining the child's views was through the lawyer for the child.⁸⁷ Of the 24 decisions, a judge had spoken with a child (in combination with other methods of hearing children's views) in 10 cases (41.7%).

Tapp commented that, when compared to the analysis of the cases decided in the 1990s:

[W]hile the expert report remains the dominant means of ascertaining the child's views, the 'team approach' - that is, a judicial interview combined with Counsel for the Child and an expert report - has become a much more common way of putting the child's views before the court (7.6% of cases in the 1990s compared with 29% of cases in the, admittedly very small, sample of cases decided this century).⁸⁸

Tapp also looked at 11 judgments decided after the commencement of the COCA in 2005⁸⁹. In four of the 11 cases, the child's lawyer was the sole means of ascertaining a child's views. An expert's report was used, usually in conjunction with other

⁸⁵ Ibid, 46.

⁸⁶ Ibid, 45-46.

⁸⁷ Ibid, 64-65.

⁸⁸ Ibid, 65.

⁸⁹ The COCA came into force on 1 July 2005 (COCA s2).

methods of hearing children's views, in six cases.⁹⁰ Four of the 11 decisions (36.4%) mentioned that the judge spoke with the child. In all four cases there was also a lawyer for the child and, in three cases, an expert report.⁹¹

6.2.5 The popularity of judicial meetings with children in New Zealand

In stark contrast to Australia, where the incidence of judges speaking with children in proceedings is rare, New Zealand has a 'long unbroken history of judicial interviewing'.⁹² Smith et al wrote that in the 1970s and 1980s it was not uncommon for judges in New Zealand to speak directly with children. The practice waned with the establishment of the FCNZ in 1980, when the use of expert reports to ascertain children's views became more prevalent.⁹³ However, developments such as the *Bill of Rights Act* 1990 (NZ), New Zealand's ratification of UNCRC in 1993 and, more recently, the introduction of the COCA have seen renewed emphasis on the right of children to direct participation, and increasing instances of judges speaking with children in family law disputes.⁹⁴

In the 24 cases studied by Tapp that were decided from 2001 to 2005, a judge had spoken to a child in order to ascertain their views in 41.7 percent of cases (10/24).⁹⁵ In a study that involved a survey of judges, Cochrane found that 55 percent of judges who responded said they see children in private family law matters in their chambers prior to a defended hearing and 30 percent said they had seen children after a hearing had concluded to explain the reasons for their decision.⁹⁶ Fifty percent of judges who responded said they had seen children in chambers prior to or during a defended

⁹⁰ Tapp, above n7, 65-66.

⁹¹ Ibid, 66. It was not disclosed in Tapp's analyses of cases whether judicial meetings with children were conducted with one child, or in sibling groups.

⁹² J Caldwell, 'Judicial Interviews of Children: Some Legal Background' (2007) 5 *New Zealand Family Law Journal* 215, 216. See this article and also Tapp, above n7 for historical accounts of judges speaking with children in New Zealand.

⁹³ B Smith, N Taylor and P Tapp, 'Rethinking Children's Involvement in Decision-Making after Parental Separation' (2003) 10 *Childhood* 201, 208.

⁹⁴ Ibid, 209; Tapp, above n7, 37.

⁹⁵ Tapp, above n7, 64.

⁹⁶ M Cochrane, 'Children's Views and Participation in Decision-Making' (2006) 5 *New Zealand Family Law Journal* 183, 187. The survey was sent to 39 judges, being the entire complement of Family Court judges at the time. It yielded a response rate of 87 percent. It is argued, therefore, that Cochrane's findings are fairly representative of the FCNZ judiciary.

hearing involving public family law (child protection) issues.⁹⁷ Tapp opined that, in New Zealand, 'most judges will speak with a child whose lawyer advises the judge that the child wishes to speak with them'.⁹⁸

As discussed above, judicial meetings with children are not the most common method of a court hearing children's views. Evidence of children's views obtained through an expert report or from the lawyer for the child is far more common. However, judicial meetings continue to have a place in the 'team' approach.

Many cases, including those from superior courts, have endorsed the practice of judges speaking with children.⁹⁹ Case authority has stated that where a child wishes to speak with the judge and has firm views and/or sufficient maturity, the judge should exercise his or her discretion to speak with the child.¹⁰⁰ Particularly in the case of older children, it is 'common and perhaps necessary' to meet with them.¹⁰¹ In *K v K*¹⁰² the Full Court of the High Court of New Zealand held that children's wishes should be introduced 'primarily' either through counsel for the child or through a meeting with the judge.¹⁰³ The use of a judicial meeting to ascertain the wishes of children and to form an assessment of a young person's well-being and temperament was endorsed by the Court of Appeal in *L v L*.¹⁰⁴ The value to a judge of meeting with a child directly was acknowledged by the court in *LJG v RTP [Child Abduction]*¹⁰⁵ and *Knight v Finn*.¹⁰⁶

Notwithstanding the many New Zealand cases promoting the value of judicial meetings with children, there is a long line of authority that confirms that the decision to meet with a child remains a matter for the individual discretion of the trial judge.¹⁰⁷

⁹⁷ Ibid, 189.

⁹⁸ Tapp, above n7, 68.

⁹⁹ Ibid, 42.

¹⁰⁰ *Brown v Argyll* [2006] NZFLR 705, [48] (Priestly J).

¹⁰¹ *M v Y* [1994] 1 NZLR 527, [537] (Hardie Boys J).

¹⁰² *K v K* [2005] NZFLR 28.

¹⁰³ Ibid, [91] (Heath, Venning JJ).

¹⁰⁴ *L v L* (CA 79/70, 2 June 1971, North P, Turner and Haslam JJ), 9 (Haslam J).

¹⁰⁵ *LJG v RTP [Child Abduction]* [2006] NZFLR 589, [88] (O'Dwyer J).

¹⁰⁶ *Knight v Finn* [2003] NZFLR 38, [27] (Neal J).

¹⁰⁷ *Brown v Argyll* [2006] NZFLR 705, [47] (Priestly J), *M v Y* [1994] 1 NZLR 527, 527 (Hardie Boys J).

Seeing a child is not obligatory for a judge,¹⁰⁸ and there may be reasons why a judge may not consider it to be in the child's best interests to do so. As Murfitt J said in *S v S*:¹⁰⁹

There will be many circumstances to justify a decision by a Judge not to interview children. For example, the child may have been already exposed to interviews and assessments by so many adults including his/her own lawyer, psychologist and counsellors so that a further interview might be viewed as harmful to the child. The child may simply not wish to meet with Judge. It may be that his/her views are so well known that they do not need to be expressed yet again.¹¹⁰

Judges have indicated that there are many benefits in speaking with children, even in situations where the child's views have already been made known to them through a report or the lawyer for the child. These include satisfying the child's need to know who is making a decision about their life, giving the judge a sense of professional responsibility for the child, allowing him or her to assess the child's personality, temperament and maturity, and assuring the child that the judge is solely responsible for making the final decision.¹¹¹ Meeting with a child 'may enhance the judge's ability to make good decisions for children',¹¹² and also satisfy the child that their views have been heard and recognised.¹¹³

Judges have also used judicial meetings with children to invent creative solutions to difficult cases. In Chapter Four, the case of *S v S*¹¹⁴ was discussed. After speaking with a nine year old girl who wished to move a long distance to live with her father, Murfitt J ordered that the girl move and live with her father for one school term, so she could spend more time and experience day to day life with her father, whom she had previously seen only during holidays. The orders were made on an interim basis, 'not as an experiment with this child, but to monitor how well she is faring and see whether any adjustments might be needed for the future once C has had the

¹⁰⁸ *Wright and Wright* [1984] 1 NZLR 366, 369 (Cooke J).

¹⁰⁹ *S v S* [2009] NZFLR 108.

¹¹⁰ *Ibid*, [57] (Murfitt J).

¹¹¹ *Ibid*, [60-61] (Murfitt J); Judge I Mill, 'Conversations with Children: A Judge's Perspective on Meeting the Patient before Operating on the Family' (2008) 6 *New Zealand Family Law Journal* 72, 73.

¹¹² Mill, above n111, 74.

¹¹³ *Ibid*; *S v S* [2009] NZFLR 108, [96] (Murfitt J).

¹¹⁴ *S v S* [2009] NZFLR 108.

opportunity of a more balance (sic) experience of her parents'.¹¹⁵ The arrangements were to be reviewed after six months, allowing the child to spend one school term living with her father and one term living with her mother.

In *C v C*¹¹⁶ the lawyer for the three children put forward their shared view that they did not wish to have overnight contact with their father. After putting in place temporary arrangements for contact, Somerville J ordered the matter to be reviewed by the court in six weeks. At that time, the children were to propose how they thought contact should progress, and could request a discussion of their proposals with the judge upon the matter returning to court.¹¹⁷

6.2.6 Guidelines

In July 2007 the Principal Judge of the FCNZ approved written guidelines in relation to discussions with children. The implementation of the guidelines has been uncontroversial and allows the judiciary to approach the task of meeting with children on 'an extremely principled basis'.¹¹⁸ The guidelines are 'intended to outline the procedure and establish recommended standards of Judicial practice to assist the Court in fulfilling its function pursuant to s6(2)(a) of the *Care of Children Act* 2004, namely, to enable children to be given reasonable opportunities to express any views on any matters affecting them'.¹¹⁹

The guidelines do not have the power of statutory rules or a practice note. They offer only guidance for judges, who retain individual discretion on all aspects of speaking with children.¹²⁰ The extent and manner in which the guidelines are implemented remain within the discretion of each judge.¹²¹

The guidelines state that the judge is entitled to expect that the lawyer for the child will advise the court whether or not the child wants to meet with the judge and the

¹¹⁵ Ibid, [88] (Murfitt J).

¹¹⁶ *C v C* (FC Tauranga, FAM 2003-070-000624, 5 August 2005, Somerville J).

¹¹⁷ Ibid, [9].

¹¹⁸ Judge P Boshier, 'Listening to Children's Views in Disputed Custody and Access Cases: Judicial Interviews in New Zealand' (Paper presented at the Association of Family and Conciliation Courts Annual Conference, Vancouver, 29 May 2008).

¹¹⁹ FCNZ, *Judges' Guidelines- Discussions with Children*, above n68, [1].

¹²⁰ *S v S* [2009] NZFLR 108, [67] (Murfitt J).

¹²¹ FCNZ, *Judges' Guidelines- Discussions with Children*, above n68, [2].

parties' attitude to such meeting. The lawyer for the child will make a recommendation on whether they think a meeting between the judge and the child should occur, and advise the purpose of any proposed meeting.¹²² The guidelines recommend that, should the judge decide not to meet with a child in any given case, the judge record in the judgment the reasons for that decision.¹²³

If a judge decides to speak with a child, the guidelines state the judge is to determine when and where the meeting is to take place, whether or not a record of the meeting is to be taken (eg by note taking, tape or digital recording or by any other means) and how any record of that meeting is to be conveyed to the parties (eg by audio recording, by typed transcript or by way of oral summary).¹²⁴ The child should be informed that a record may be taken and may be conveyed to the parties.¹²⁵ The parties should be able to respond to the content of the meeting by oral evidence or submission.¹²⁶

The meeting should take place in the presence of the lawyer for the child and such other persons (if any) as the judge decides.¹²⁷ The guidelines recognise that 'there will be occasions when the welfare and best interests of the child may outweigh the requirements of natural justice so that the content of any meeting between the child and judge (or any part thereof) shall be kept confidential'.¹²⁸ A meeting between the judge and the child may be kept confidential¹²⁹ and the judge is to consider any request for confidentiality made by the child.¹³⁰ The judge may decide that the record (or part of it) will not be made available to the parties.¹³¹

¹²² Ibid, [5].

¹²³ Ibid, [6].

¹²⁴ Ibid, [8].

¹²⁵ Ibid, [10].

¹²⁶ Ibid, [14].

¹²⁷ Ibid, [9]. As discussed above, this guideline appears to conflict with the *Family Court Rules* 2002 (NZ) r54(a) which allows a judge to exclude, amongst others, the 'persons representing... the child' from proceedings.

¹²⁸ FCNZ, *Judges' Guidelines - Discussions with Children*, above n68, [11].

¹²⁹ Ibid, [12].

¹³⁰ Ibid, [13].

¹³¹ Ibid.

6.2.7 How have concerns about judicial meetings with children been addressed?

As discussed in Chapter Five, three main concerns are often raised in relation to judicial meetings with children in Australia: first, what a judge should do if a child discloses something to them that the child wishes to remain confidential; second, how principles of procedural fairness and due process can be maintained; and third, whether judges have the required skills and training to speak with children. It is valuable to explore whether those same concerns have been raised in New Zealand, where judicial meetings with children take place frequently and, if so, how (and if) they have been dealt with.

6.2.7.1 Confidentiality

Guideline 12 of the *Judges' Guidelines - Discussions with Children*¹³² ('guidelines') allows judges to treat their meeting with a child, or any part thereof, as confidential. It is recognised in Guideline 11 that this would occur in situations where the welfare and best interests of the child outweigh the principles of natural justice,¹³³ which would ordinarily require the parties to be informed of what happened during the meeting and given an opportunity to respond.

Judges are given direction on what they should do in a situation where a child may disclose something during a meeting with the judge, and then say that they wish the disclosure to remain confidential. The judge must advise the child that their request for confidentiality will be considered¹³⁴ but, in making a determination of whether or not to keep the information confidential, the judge must consider whether the best interests of the child in the circumstances outweigh the requirements of natural justice.¹³⁵

The guidelines also recommend that judges make clear to the child, prior to the meeting, that a record of the meeting may be conveyed to the parties.¹³⁶ This is to

¹³² Ibid, [12].

¹³³ Ibid, [11].

¹³⁴ Ibid, [13].

¹³⁵ Ibid, [11].

¹³⁶ Ibid, [10].

ensure that the child is not under a misapprehension that the meeting will remain confidential. Judges answering a questionnaire distributed by Justice Mill of the FCNZ reported they had no problems with telling children their parents would be told about what was discussed during the judicial meeting. The judges made this clear to children at the start of a meeting, and no child was reported as being worried or uncomfortable with this.¹³⁷

In practical terms, the operation of guidelines dealing with confidentiality has been uneventful.¹³⁸ As part of the 'team' method of hearing children's views, it is less likely that a child will disclose something to a judge during a judicial meeting that has not already been disclosed through an expert report or through the lawyer for the child.¹³⁹ The Principal Judge of the FCNZ informed the author that, to his knowledge, Guideline 11, which allows confidentiality to the child to outweigh natural justice in certain circumstances, has never been invoked by a judge.¹⁴⁰ In other words, a judge had not, as yet, made a determination that the best interests of the child outweighed the requirements of natural justice in order to justify a decision to keep any part of the meeting with the child confidential. However, the guidelines also ensure that, should such situations arise in the future, judges will have guidance on what to do and will act consistently.

6.2.7.2 Procedural fairness and due process

The Rules of Court¹⁴¹ make clear that a judge can exclude parties from a meeting between the judge and a child. The issue that arises is how principles of procedural fairness can be maintained in a situation where the parties are not present during the meeting and do not hear the evidence first hand, and how they may be given an opportunity to respond and make submissions in respect of what happens during the meeting.

¹³⁷ Mill, above n111, 76.

¹³⁸ Personal communication between the author and Judge Boshier, Principal Judge of the Family Court of New Zealand, 18 September 2009.

¹³⁹ Mill, above n111, 77.

¹⁴⁰ Personal communication between the author and Judge Boshier, Principal Judge of the Family Court of New Zealand, 18 September 2009.

¹⁴¹ *Family Court Rules* 2002 (NZ), r54.

Section 27(1) of the New Zealand *Bill of Rights Act* 1990, and the common law, require a court to observe principles of natural justice when making a determination that affects a person's rights which are protected or recognised by law. For parents, this means that, although they may not be present during a meeting between their child and the judge, they are entitled to receive an accurate record of the meeting and have an opportunity to respond to the issues raised therein.¹⁴² The one exception to this (where confidentiality to the child may outweigh natural justice) has been discussed above.¹⁴³

Despite early case authority such as *L v L*¹⁴⁴ where Haslam J said that it is entirely within the judge's discretion how far he or she will disclose to the parties anything that happened during a meeting,¹⁴⁵ later cases have shown that judges are anxious to comply with procedural fairness and ensure that parties receive an account of discussions between judges and children. However, judges are divided on how that account is to be conveyed. In Justice Mill's article,¹⁴⁶ his Honour listed the various ways in which judges reported having given accounts of judicial meetings with children. They were:

1. Take handwritten notes, later dictated and kept on the file;
2. Make notes and then dictate a memorandum in the presence of the parties;
3. Not to take notes or to record, apart from a note of the views taken from the child, and checked with the child;
4. Make an audio recording and play it to the parents;
5. Make an audio recording and make a transcript available to the parties before they give evidence;

¹⁴² Caldwell, above n92, 219.

¹⁴³ There do not appear to be any legal grounds for making this an exception to Section 27(1) of the New Zealand *Bill of Rights Act* 1990, which raises a query about the validity of Guideline 11 of the FCNZ's *Judges' Guidelines: Discussions with Children*, above n68. Such a discussion, however, is beyond the scope of this thesis.

¹⁴⁴ *L v L* (CA 79/70, 2 June 1971, North P, Turner and Haslam JJ).

¹⁴⁵ Ibid, [9] (Haslam J). Note that this case preceded both the *Bill of Rights Act* 1990 (NZ), and the FCNZ's *Judges' Guidelines: Discussions with Children*, above n68.

¹⁴⁶ Mill, above n111.

6. Make few notes, but give the parents an oral account that is recorded on audio tape and becomes part of the record in Court immediately afterwards. The lawyer for the child who attended the interview is asked to comment...¹⁴⁷

The Principal Judge of the FCNZ, Boshier J, has advocated the use of an audio recording. In *Jesus v Moriera*¹⁴⁸ his Honour said:

As a judicial interview forms parts of the judicial process it is important that impressions and views obtained by the Judge are able to be later scrutinised. To this end, I think it desirable that the judicial interview is recorded and made available either in transcript or audio form subsequently.¹⁴⁹

Chisholm J in *W v N*¹⁵⁰ said that, generally speaking, Boshier J's view in *Jesus v Moriera*¹⁵¹ should be followed. However, his Honour noted the situation may vary from case to case. The question of whether failure to make available an audio recording results in a breach of natural justice will depend on the particular circumstances of each case.¹⁵²

In *PMH v BKH*¹⁵³ Brown J elected not to audio record the meeting. Instead, when the matter was next in court, the judge reported orally to the parties and their counsel about what had transpired during the meeting. In that case, his Honour had agreed to the request of an eight year old girl to meet with him. They spoke about the limited issue of whether the child should be medicated for a behavioural disorder. The child's wishes had already been disclosed through the lawyer for the child and a psychologist's report. Brown J said that, while he had elected not to record this particular meeting, '[t]ape recording of judicial meetings with children in proceedings is essential if either there is an appreciable contest as to the child's wishes or position (and what is said to the Judge may therefore be pivotal), or there is any prospect that the child may say something to the Judge about a factual issue in dispute (such as abuse)'.¹⁵⁴

¹⁴⁷ Ibid, 75.

¹⁴⁸ *Jesus v Moriera* (Family Court, FAM 2004-044-1857, 20 April 2005, Boshier J).

¹⁴⁹ Ibid, [27].

¹⁵⁰ *W v N* [2006] NZFLR 793, [63].

¹⁵¹ *Jesus v Moriera* (Family Court, FAM 2004-044-1857, 20 April 2005, Boshier J).

¹⁵² *W v N* [2006] NZFLR 793, [63] (Chisholm J).

¹⁵³ *PMH v BKH* [2009] NZFLR 197.

¹⁵⁴ Ibid, [36] (Brown J).

In *S v S*¹⁵⁵ Murfitt J noted that the guidelines do not have the effect of a practice note. Therefore, it is up to the discretion of each judge to determine how and when a meeting should occur and how a record should be taken, if at all.¹⁵⁶ His Honour said:

I do not favour a video or audio recording of a discussion between a Judge and a child. I personally feel acutely uncomfortable in such a situation, and I expect that a child might feel compromised in communicating freely or naturally with a recording device (which of course the child must be informed of) nearby.¹⁵⁷

His Honour described his practice of speaking with the child without any obvious recording other than occasional note taking, supplementing those notes with other notes made immediately after the meeting. The parties receive prompt feedback in the form of a written record of the meeting and they have an opportunity to comment on the information the judge has received, except in 'those rare occasions when a child may seek to have confidentiality maintained on some particular thought'.¹⁵⁸

In the High Court decision of *AD v KT*¹⁵⁹ Hansen J was asked to comment about whether, in his opinion, judicial meetings with children should be audio recorded. His Honour relied on authorities such as *W v N*¹⁶⁰ and *Jesus v Moreira*¹⁶¹ to conclude that judicial meetings should be recorded, saying:

It is plainly desirable that the approach of the Family Court is standardised. I add my voice to those who favour the recording of any interview. I consider the interests of natural justice weigh heavily towards disclosure. Any views expressed by the child to the Judge are an integral and vital part of the process.¹⁶²

While issues of procedural fairness are often raised in commentary, they have not often been raised in practice, for example, by way of objection from parties whose children have been spoken to by judges.¹⁶³ It appears that, so long as the parties feel they have been afforded an account of what happened during the meeting and have an

¹⁵⁵ *S v S* [2009] NZFLR 108.

¹⁵⁶ *Ibid*, [67].

¹⁵⁷ *Ibid*, [72].

¹⁵⁸ *Ibid*, [74].

¹⁵⁹ *AD v KT* [2008] NZFLR 761.

¹⁶⁰ *W v N* [2006] NZFLR 793, [63].

¹⁶¹ *Jesus v Moriera* (Family Court, FAM 2004-044-1857, 20 April 2005, Boshier J).

¹⁶² *AD v KT* [2008] NZFLR 761, [61] (Hansen J).

¹⁶³ Mill, above n111, 74.

opportunity to respond to it, concerns about principles of natural justice not being complied with are allayed.¹⁶⁴

6.2.7.3 Training

New Zealand judges do not receive formal training in speaking with children. However, from time to time judges are given the opportunity to attend seminars on proper methods for speaking with children.¹⁶⁵ Despite the lack of regular or compulsory training, many New Zealand judges are generally confident about their ability to speak appropriately with children concerning their views.¹⁶⁶ Tapp attributes this confidence to the fact many judges are appointed when aged in their thirties and forties. Many have dependent children and almost all have extensive experience as lawyers for children.¹⁶⁷ 'It is therefore understandable that many Family Court judges believe they have the necessary experience and skill to communicate effectively with children'.¹⁶⁸ Judges have, though, expressed the view that they would like more training and education in this regard.¹⁶⁹

Importantly, New Zealand judges have shown a tendency to speak with children in the presence of the lawyer for the child but without the assistance of an expert in child welfare, such as a social worker or psychologist. The presence of the lawyer for the child is useful in that they are a 'known and hopefully trusted' companion to the child who can offer guidance to the judge if the meeting does not go smoothly or if important information, known to the lawyer, is missed in the discussion.¹⁷⁰ However, a lawyer for the child receives little more training in speaking with children or in childhood development than a judge.¹⁷¹ This thesis argues that, in Australia, a family consultant should, whenever possible, be present during judicial meetings with children. The perceived advantage of the attendance of a family consultant is that person's ability to assist with appropriate questioning of the child, and also to lend

¹⁶⁴ Boshier, 'Listening to Children's Views in Disputed Custody and Access Cases', above n118.

¹⁶⁵ See Boshier, 'The Care of Children Act', above n18, 10, where one such session was referred to.

¹⁶⁶ Mill, above n111, 72. See, for example, the views expressed by judges interviewed in Cochrane, above n96, 195.

¹⁶⁷ Tapp, above n8, 58.

¹⁶⁸ Ibid.

¹⁶⁹ Cochrane, above n96, 193, 195.

¹⁷⁰ *S v S* [2009] NZFLR 108, [63] (Murfitt J).

¹⁷¹ Boshier, 'The Care of Children Act', above n18, 10.

their expert opinion in determining whether the views expressed by the child are genuinely held.¹⁷² In most cases, both the judge and the lawyer for the child lack this specific expertise.¹⁷³

The attitude of New Zealand judges is that, as the third limb of the 'team' approach, children's views have usually already been disclosed through one or both of a psychologist's report and the lawyer for the child before the judicial meeting takes place.¹⁷⁴ As the judge is unlikely to discover anything controversial or any evidence previously unheard, the lack of expertise of the judge to question the child or to interpret their views is of limited relevance. It follows, then, that the success of judicial meetings in New Zealand is largely dependent on the team approach. Except in cases where the child's views are very straightforward, a judge should rely on the work of a lawyer for the child and/or an expert reporter before embarking upon a judicial meeting with a child.¹⁷⁵ Justice Mill, in relation to judges' competency to meet with children, wrote:

[W]e should remember we are Judges and be aware of our limitations. In difficult cases we should seek expert help as required. In many cases we are capable of hearing and interpreting children's views and sometimes we have to do this alone, but not often. We may not always be able to do so with confidence and we must not have false confidence. It calls for judgment.¹⁷⁶

6.2.8 Commentary on New Zealand law and practice

While hearing children's views is a feature in the family law legislation in both Australia and New Zealand, the idea of children having a 'voice' is given greater prominence in New Zealand. Taylor and Fitzgerald wrote:

The UNCRC's influence, as well as the theory and research valuing children as competent contributors to family and legal decision-making processes, is leading to a detectable shift in thinking and practice amongst Family Court professionals in New Zealand.¹⁷⁷

¹⁷² Caldwell, above n92, 221.

¹⁷³ Boshier, 'The Care of Children Act', above n18, 10.

¹⁷⁴ Mill, above n11, 74.

¹⁷⁵ See discussion about competency of judges to speak with children and interpret their views in Mill, above n11, 74.

¹⁷⁶ Ibid.

¹⁷⁷ N Taylor and R Fitzgerald, 'Children's Participation in Family Law Proceedings in New Zealand and Australia: Inclusion and Resistance' (Paper presented at the Children in Communities Conference, Dunedin, July 2005), 8.

This is evident in the COCA, which promotes a child's right to be heard in several respects. This includes section 6 of the Act, which gives children a right to be given opportunities to express their views and have them taken into account. In practice, also, the New Zealand system regards a judicial meeting with a child as an appropriate method of listening to children's views and an integral part of a 'team' approach that allows the court to hear evidence of what a child wants through a variety of methods. New Zealand courts take a more flexible approach to hearing the voices of children, meaning that traditional concerns about the practice of judicial meetings with children have been addressed in the past, and are not often raised.

Drawing together the research on the area of children's participation, and the laws and practices in Australia and New Zealand, a criticism that could be raised against the FCNZ is that its treatment of children's views may involve an automatic 'tick the box' approach of ascertaining the views of a child through the three established methods - via a psychologist's report, the lawyer for the child and a judicial meeting - without any real assessment of whether any of those methods, particularly a judicial meeting, is really in the best interests of a particular child.

While Australian judges may be characterised by their reluctance to speak directly with children, New Zealand judges appear, in comparison, very enthusiastic. This has led to situations where judges may be speaking with children in situations where a child does not want to communicate with the judge, or is distressed. In *Carpenter v Armstrong*¹⁷⁸ the appellate judge quoted from the trial judge's decision as follows:

Unfortunately the experience of speaking with the Judge was not a happy one for either child. John was in tears and had to be brought to my room in the arms of his maternal Aunty and so I considered it inappropriate to speak with him. Craig curled up on my couch in a foetal position with his thumb in his mouth and refused to engage in any ongoing discussion and so there was a one-sided conversation by me and accordingly I did not ascertain the child's views at all.¹⁷⁹

In *JA v LAD*¹⁸⁰ Boshier J spoke with three children whose mother had unilaterally relocated them far from where their father was living. The children said they were happy with the mother but wanted to spend more time with the father. The judgment

¹⁷⁸ *Carpenter v Armstrong* HC TAU CIV 2009-470-511 [31 July 2009].

¹⁷⁹ *Ibid*, [41] (Heath J quoting Somerville J's first instance judgment at [55]).

¹⁸⁰ *JA v LAD* FC TAU FAM: 2007-070-1478 [28 November 2007].

disclosed that, on the day the children's views were discussed in court, the lawyer for the child 'had been in the solicitor's room... when she heard crying and sobbing. She found the children and their mother outside in a hysterical state. The child's mother had telephoned their grandmother in hearing of the children and indicated that the children were going to have to live with their father "forever". The scene was hysterical'.¹⁸¹ On the basis of concerns about the mother's mental state, the judge made an interim order that the children live with the father immediately. While this distressing situation was clearly caused by the actions of the mother, one wonders how the children felt when, having discussed their views with the judge, a decision was made shortly thereafter that was contrary to those views. One also wonders whether the children felt anxious that something they had said to the judge had somehow contributed to this sudden change of course.

Perhaps Australian judges would argue that the enthusiasm of New Zealand judges to ensure children are presented with 'reasonable opportunities' to participate may lead to situations where children feel pressured into expressing their views when they do not wish to do so,¹⁸² or become too closely involved in their parental dispute. These outcomes would certainly not be in the best interests of children.

A further observation is that New Zealand judges speak with children in the presence of the lawyer for the child, but rarely in the presence of a child expert such as a social worker or psychologist. This differs from the Australian position where, on the rare occasions when judges speak to children, they often engage the help of the family consultant who can assist with the questioning of the child and can tell the judge whether, in their expert opinion, they believe the views expressed by the child are validly held.

Judges in both Australia and New Zealand are not especially trained to speak with children and are given little education in how children express themselves. Social workers and psychologists have training in this area. As there is no equivalent of a

¹⁸¹ Ibid, [31].

¹⁸² Note FLA s60CE which states that no-one can require a child to express their views. There is no equivalent provision in the COCA, however the FCNZ, *Lawyer for Child Code of Conduct*, above n54, [5.3] states that the lawyer should not require the child to express a view if he or she does not want to do so.

family consultant in New Zealand, to have an expert present the FCNZ would need to engage the services of the report writer or other specialist to assist with the meeting. In contrast, the Australian Less Adversarial Trial process involves the allocation of a family consultant to each case.¹⁸³ Australian judges have the benefit of being able to call on the expertise of a family consultant to assist with a judicial meeting with a child.

This discussion also raises the issue of who decides whether a judicial meeting will take place. Clearly, a judge has discretion as to whether or not to meet with a child.¹⁸⁴ However, in many cases there will be advice from the lawyer for the child about this.¹⁸⁵ This raises the issue of the lawyer's capacity and expertise to make this assessment. Presumably, a lawyer for the child has little more training than the judge to decide whether or not meeting a judge may be harmful to a child.¹⁸⁶ In Australia, a family consultant who has expertise in children's welfare can recommend for or against a judicial meeting with a child if this is raised as an option by the judge. In New Zealand, there being no equivalent of a family consultant, there is no child expert readily available to give an opinion as to whether a meeting with a judge would be in a child's best interests.

Despite these criticisms of New Zealand's practice of speaking with children, the main observation to be made is that the traditional criticisms raised in Australia as to why judges should not speak to children have not proved problematic in New Zealand, where judicial meetings with children occur frequently. Specifically, judges are rarely faced with a situation where a child wants something they say to remain confidential, as their views have, in most cases, already been heard through other methods and are unlikely to have changed significantly. Parties who receive an account of what happened during the judicial meeting are unlikely to object on the basis that principles of procedural fairness have not been complied with. Perhaps, if judicial meetings with children were to become more common in Australia, a situation may emerge where conceptual concerns regarding judicial meetings with children,

¹⁸³ See Chapter One for discussion about the features of the Less Adversarial Trial procedure.

¹⁸⁴ *Family Court Rules* 2002 (NZ) r54.

¹⁸⁵ FCNZ, *Lawyer for Child Code of Conduct*, above n54, [10].

¹⁸⁶ See Chapter Five for discussion about concerns that meeting with a judge could be harmful for a child.

such as due process and confidentiality, prove to be theoretical issues that do not cause problems in practice.

6.3 United Kingdom (England and Wales)

England and Wales mirror Australia, in that judges have shown a reluctance to speak with children directly, and cases where judges have spoken with children are rare. Judges in England and Wales most often receive evidence of children's views through a report from a children's welfare expert. Children are rarely independently represented. Two notable differences in England and Wales, when compared to Australia, are the lack of a specialised court and the lack of judicial continuity in hearing cases. A case may be heard by two or more judges before it is finalised. These differences add to the complexity of this issue in England and Wales.

In England and Wales there has been a growing push from several prominent figures in the family law system for judges to recognise the benefits that can be gained from speaking with children and to consider, in every case before them, whether it would be of benefit to meet with a child. In order to encourage judges to meet with children, guidelines have recently been implemented.¹⁸⁷ Whether or not these guidelines will lead to an increase in the number of judges who meet with children remains to be seen.

6.3.1 The law on children's views

The *Children Act* 1989 (UK) ('*Children Act*') sets out the law for both public and private family law proceedings, as well as adoption, in England and Wales. The law applicable to private family law cases is set out in the first 16 sections of the Act.¹⁸⁸ The legislative regime is similar to Part VII of the FLA in that it requires the court, when making an order for a child, to have regard to a list of factors that may be relevant to the decision. This list includes 'the ascertainable wishes and feelings of

¹⁸⁷ Family Justice Council, *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (2010) Purpose, <http://www.family-justice-council.org.uk/docs/Guidelines__Judges_seeing__Children.pdf> at 24 August, 2010.

¹⁸⁸ Judicial Studies Board, *Family Bench Book* (2006) 7-1 <www.jsboard.co.uk> at 1 November 2009.

the child concerned (considered in the light of his (sic) age and understanding)'.¹⁸⁹ When making decisions about arrangements for children, the welfare of the child is to be the court's paramount consideration.¹⁹⁰ With some small difference in terminology,¹⁹¹ these sections of the *Children Act* are similar to section 60CC(3)(a) and section 60CA of the FLA.¹⁹²

Significantly, the *Human Rights Act* 1998 (UK) ('HRA') incorporated the *European Convention on Human Rights*¹⁹³ ('ECHR') into United Kingdom law. Through the HRA, Article 6 of the ECHR is implemented. Article 6 states, inter alia, that in determination of a person's civil rights 'everyone is entitled to a fair and public hearing within a reasonable time'.¹⁹⁴ It is arguable that divorce proceedings fundamentally affect a child's civil rights. If children are denied the right to attend court and to be directly heard in private law proceedings, it could be argued they are not being granted a 'fair and public hearing', violating Article 6 of the ECHR and section 6(1) of the HRA.¹⁹⁵

The UNCRC has been ratified in the United Kingdom but has not been specifically incorporated into United Kingdom law.¹⁹⁶ As in Australia, some principles of the UNCRC have been given effect through domestic legislation and case law.¹⁹⁷

¹⁸⁹ *Children Act* s1(3)(a).

¹⁹⁰ *Children Act* s1(1).

¹⁹¹ The *Children Act* refers to 'welfare' (s1(1)) and 'wishes and feelings' (s1(3)(a)), whereas the FLA refers to 'best interests' (s60CA) and 'views' (s60CC(3)(a)).

¹⁹² The structure and content of the *Children Act* was influential on the substantial amendments made to the FLA by the *Family Law Reform Act* 1995 (Cth) (Family Law Council, *Letter of Advice to the Attorney-General on the Operation of the (UK) Children Act 1989* (1994); H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations?* (1999) 3-8, 15-17.

¹⁹³ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5; 213 UNTS221 (the ECHR).

¹⁹⁴ ECHR Article 6(1).

¹⁹⁵ Family Justice Council, Voice of the Child Committee, 'Enhancing the Participation of Children and Young People in Family Proceedings: Starting the Debate', March 2008, [4] <<http://www.family-justice-council.org.uk/ourwork.htm>> at 3 July 2009; C Lyon, 'Children's Participation in Private Law Proceedings with Particular Emphasis on the Question of Meetings between the Judge and the Child in Family Proceedings' in Sir M Thorpe, Rt Hon Lady Justice Hale and E Clarke (eds), *No Fault or Flaw: The Future of the Family Law Act 1996* (2000) 70. HRA s6(1) states, 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'.

¹⁹⁶ Sir M Potter, 'The Voice of the Child: Children's "Rights" in Family Proceedings' (2008) *International Family Law* 140, 140.

6.3.2 How the court hears children's views

6.3.2.1 Report from a CAFCASS officer

In private family law matters in England and Wales, the most common method by which the court hears children's views is through evidence from an officer of the Children and Family Court Advisory and Support Service ('CAFCASS'). In circumstances where the court considers the parties are not reliable reporters of the child's wishes and feelings,¹⁹⁸ the court will order a CAFCASS officer to interview the parents and children, and provide a 'welfare report'.¹⁹⁹ An officer will ascertain and report on the child's views and is required to explain the report to the child in a way that is appropriate to the child's age and understanding.²⁰⁰ While the child's views are discussed in the report, the officer will put forward a position that the officer believes is in the best interests of the child, which may not necessarily accord with the child's views.²⁰¹ The role of the CAFCASS officer is ostensibly similar to that of the family consultant in Australia.

CAFCASS officers are often (rightly or wrongly) criticised for not accurately reporting what the child has said, or putting their own interpretation or 'spin' on the child's views.²⁰² Despite this, the court does not favourably consider lawyers who cross-examine report writers on this issue.²⁰³ While a good reporter will accurately ascertain and clearly report upon the wishes and feelings of the child,²⁰⁴ reports and report writers are inevitably of varying quality.²⁰⁵

¹⁹⁷ Baroness Hale of Richmond, 'Children's Participation in Family Law Decision Making: Lessons from Abroad' (2006) 20 *Australian Journal of Family Law* 119, 120.

¹⁹⁸ Potter, 'The Voice of the Child', above n196, 141.

¹⁹⁹ *Children Act* s7; M Murch, 'The Voice of the Child in Private Family Law Proceedings in England and Wales' (2005) *International Family Law* 8, 14.

²⁰⁰ *Children Act* s7; *Family Proceedings Rules 1991* (UK) r4.11b(1).

²⁰¹ Hale, above n197, 125; Murch, above n199, 14.

²⁰² Hale, above n197, 122.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, 121.

²⁰⁵ This view was expressed by several judicial officers of England and Wales in various personal conversations with the author at the 5th World Congress on Children's Rights, Halifax, Canada, 23-26 August 2009.

6.3.2.2 Separate representation for children

The court can order that a child be separately represented in proceedings²⁰⁶ but such an order is rare²⁰⁷ and occurs only in 'exceptional cases'.²⁰⁸ In 2005-2006 there were over 1,000 such cases in England and Wales, compared with over 26,000 cases in which CAFCASS officers were asked to provide reports.²⁰⁹

A probable reason for the reluctance of courts to order separate representation for children is the associated expense.²¹⁰ The court's procedure is to appoint a person to be the child's 'guardian ad litem', with authority to take part in proceedings on the child's behalf. This person is often a CAFCASS officer or other social worker, and not a lawyer.²¹¹ The guardian will usually instruct a family lawyer, who in turn instructs a barrister. This involves a significant outlay in government funding.²¹² If the court is satisfied that the 'minor concerned has sufficient understanding to participate as a party in the proceedings concerned', the guardian ad litem can be removed, allowing the child to instruct the lawyer directly.²¹³ If the court gives leave, children are entitled to make applications to the court in matters that concern them.²¹⁴ The appointment of separate representation for children in England and Wales is significantly different in public family law matters (child protection matters). In these matters, children are automatically joined as a party to proceedings. The court appoints a welfare officer to be the child's guardian and to instruct a lawyer on the child's behalf.²¹⁵

In Australia, and particularly in New Zealand, separate representation for children in private family law matters provides the court with valuable information about children's views and best interests, which assists the court to make decisions. In England and Wales it appears that, in the vast majority of cases, evidence of

²⁰⁶ *Family Proceedings Rules 1991* (UK) r9.5.

²⁰⁷ Hale, above n197, 120; Judicial Studies Board, *Family Bench Book*, above n188, 7-1; Potter, 'The Voice of the Child' above n196, 146.

²⁰⁸ Murch, above n199, 15.

²⁰⁹ Potter, 'The Voice of the Child', above n196, 146.

²¹⁰ Hale, above n197, 120.

²¹¹ *Family Proceedings Rules 1991* (UK) r9.5

²¹² See discussion in Hale, above n197, 122.

²¹³ *Family Proceedings Rules 1991* (UK) r9.2A(6).

²¹⁴ *Children Act* s1(5).

²¹⁵ *Family Proceedings Rules 1991* (UK) r4.11A(1).

children's views is limited to accounts from the child's parents and the contents of a welfare report.

6.3.2.3 Judicial meetings with children

There is no provision in the *Children Act* that specifically allows judges in private family law matters to speak with children. However, it is recognised in both case law and practice that a judge may exercise his or her discretion to do so.²¹⁶

The case law suggests that meetings between judges and children in England and Wales have generally been discouraged. In both *B v B (Minors)*²¹⁷ and *Re M (A Minor) (Justices' Discretion)*²¹⁸ the court, while affirming that judges have a discretion to speak with children, emphasised that the discretion should be exercised with caution. Both cases held that if a judge is to see a child, it must be for a good reason in exceptional cases, and not as a matter of routine.²¹⁹

In *Mabon v Mabon*²²⁰ the English Court of Appeal noted growing recognition of children's autonomy and emphasised that, in situations where a child has sufficient understanding of all the relevant issues, the court should recognise the child's right to freedom of expression and to participate in decision-making processes that may fundamentally affect their lives. In obiter, Wall LJ said that one of the origins of the reluctance of English judges to speak with children is 'undoubtedly rooted in the rules of evidence and the adversarial mode of trial'.²²¹

*In the Matter of W (Children)*²²² demonstrated the differing views amongst the judiciary of England and Wales in relation to judges speaking with children. Three children aged 11, 13 and 15 had expressed views to a CAFCASS officer that they wished to relocate to Sweden with their mother, which was the substance of the application before the court. The CAFCASS officer outlined the children's views, but ultimately made a recommendation that conflicted with the views the children had

²¹⁶ *Re M (A Minor) (Justices' Discretion)* [1993] 2 FLR 706 (Booth J).

²¹⁷ *B v B (Minors)* [1994] 2 FLR 489.

²¹⁸ *Re M (A Minor) (Justices' Discretion)* [1993] 2 FLR 706.

²¹⁹ *B v B (Minors)* [1994] 2 FLR 489, (Wall J); *Re M (A Minor) (Justices' Discretion)* [1993] 2 FLR 706 (Booth J).

²²⁰ *Mabon v Mabon* [2005] 2 FLR 1011.

²²¹ *Ibid*, [38] (Wall LJ).

²²² *In the Matter of W (Children)* [2008] EWCA Civ 538.

expressed.²²³ The trial judge ordered against the proposed relocation and the matter was successfully appealed on the ground that the judge did not sufficiently consider the wishes and feelings of the children.

Thorpe LJ noted that the eldest child, 'J', in particular, would in another context be considered *Gillick* competent²²⁴ and that she, at a minimum, was entitled to be heard. While her views had been put forward by a CAFCASS officer, this:

...has the obvious disadvantage that at the conclusion of the process J can only feel that her wishes and feelings were insufficiently considered by the judge because they were diminished by the very professional whom she trusted to advance them. This conclusion might have been avoided had the judge had a meeting with the children, and particularly with J.²²⁵

Wilson LJ and Charles J, however, while agreeing that the trial judge had failed to give sufficient weight to the wishes and feelings of the children, did not agree that the judge should have met with the children to hear their wishes and feelings.

Wilson LJ said that he would have met with the children, but only after giving his judgment, in order to explain to them the reasons for the decision. His Lordship remarked that 'I would have done so in light of their ages and intelligence and in particular because my decision was contrary to their wishes'.²²⁶ His Lordship said he would not have met with the children prior to judgment for the purpose of hearing their wishes and feelings, because he was 'unpersuaded that the potentially important evidence collected in such strained circumstances would be either a balanced or comprehensive reflection of their views or easily susceptible of later forensic examination'.²²⁷ The third judge of the Court of Appeal, Charles J, said he would not have met with the children at all.²²⁸

²²³ Ibid, [56].

²²⁴ This is in reference to the test derived from *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 which established that, as a child becomes more mature and develops the capacity to make their own decisions, the scope of parental authority and control diminishes accordingly. A child who is fully able to understand what is proposed in a particular situation is considered to be '*Gillick* competent'.

²²⁵ *In the Matter of W (Children)* [2008] EWCA Civ 538, [33] (Thorpe LJ).

²²⁶ Ibid, [57] (Wilson LJ).

²²⁷ Ibid.

²²⁸ Ibid, [59] (Charles J).

The *Family Bench Book*, produced as a resource for judges by the Judicial Studies Board,²²⁹ cautions judges about speaking with children. It states:

The work done by the CAFCASS officer makes it unnecessary for the child to attend court or see the judge. The risk attached to a judge agreeing to see a child is that the child is likely to be placed under undue pressure or be coached by one or other or even both of his parents. However occasionally it may be in the child's best interest for the judge to see and hear what a child needs and wants to tell the judge personally.²³⁰

Although judicial meetings with children remain rare in England and Wales, attitudes to the practice are beginning to change.²³¹ This may be due to increased recognition of children's rights under the UNCRC and the ECHR,²³² or due to vocal support and encouragement of the practice by the former President of the Family Division, Sir Mark Potter ('Sir Mark'),²³³ and other commentators. In England and Wales 'vigorous debate has developed as to whether judges should not be speaking more frequently to children of sufficient age and understanding in appropriate circumstances, in order to hear their views directly...'.²³⁴

Speaking at the 17th World Congress of the International Association of Youth and Family Judges and Magistrates, Sir Mark said:

[I]t is my view that, in an effort to ensure the welfare and happiness of children, and to listen to their voice first hand, we should encourage judges to be willing to talk in private to children who wish to do so, trusting the judge to retail (sic) the burden of his concerns or any changed perception having heard the child, while respecting the confidence of the child in sensitive areas.²³⁵

The current President of the Family Division, Sir Nicholas Wall, is also reportedly supportive of the practice of judges meeting with children.²³⁶ It was he who approved

²²⁹ Judicial Studies Board, *Family Bench Book*, above n188.

²³⁰ *Ibid*, 7-13.

²³¹ Family Justice Council, 'Enhancing the Participation of Children and Young People', above n195, [4].

²³² Hale, above n197, 123.

²³³ Potter, 'The Voice of the Child', above n196, 145. Sir Mark was President of the Family Division until 2010, when Sir Nicholas Wall was appointed to the position.

²³⁴ *Ibid*.

²³⁵ Sir M Potter, 'The Family in the 21st Century' (Paper presented at the 17th World Congress of the International Association of Youth and Family Judges and Magistrates, Belfast, August 2006) <http://www.judiciary.gov.uk/publications_media/speeches/2006/sp280806.htm> at 8 October 2008.

²³⁶ Email correspondence from District Judge Crichton to the author dated 4 September 2010.

the Guidelines for Judges Meeting with Children²³⁷ (discussed at 6.3.5 below). An example of how one judge is attempting to encourage others to embrace the practice of meeting with children can be found in an article by District Judge Nicholas Crichton, in which he described positive personal experiences of speaking with children in a variety of cases.²³⁸

*In the Matter of W (Children)*²³⁹ Wilson LJ expressed his view on the future of judicial meetings with children:

It may be that, presumably under the guidance of a set of fully debated and carefully drawn principles and perhaps following a degree of judicial training, the practice of the family courts in England and Wales will come to encompass such meetings (at any rate for some purposes) more frequently.²⁴⁰

6.3.3 How judges speak with children in England and Wales

Judicial meetings with children in England and Wales are rare and, until very recently,²⁴¹ there was no set procedure or guidelines as to how meetings should be carried out. However, even advocates of judges speaking with children agree that it is not appropriate for a judicial meeting to occur in every case.²⁴² Sir Mark suggested two categories of cases in which a meeting with a child may be appropriate. These are, first, where there is doubt over whether the welfare officer's expression of the child's views is sufficient or correct and, secondly, where the child has expressed a wish to speak with the judge.²⁴³ Sir Mark said, 'In the absence of very good reasons I do not think any judge should refuse such a request'.²⁴⁴ Baroness Hale agreed that meeting with a child may be appropriate in the circumstances described.²⁴⁵

²³⁷ Judge C Bellamy, Judge J Platt and District Judge N Crichton, 'Talking to Children: The Judicial Perspective' (2010) 40 *Family Law* 647, 647.

²³⁸ District Judge N Crichton, 'Listening to Children' (2006) 26 *Family Law* 849, 850. See also Bellamy et al, above n237.

²³⁹ *In the Matter of W (Children)* [2008] EWCA Civ 538.

²⁴⁰ *Ibid*, [57] (Wilson LJ).

²⁴¹ Guidelines were produced by the Family Justice Council and approved by the President of the Family Division. They came into effect in April, 2010. See Family Justice Council, *Guidelines for Judges Meeting Children*, above n187.

²⁴² Potter, 'The Family in the 21st Century', above n235; Hale, above n197, 124.

²⁴³ Potter, 'The Family in the 21st Century', above n235.

²⁴⁴ *Ibid*.

²⁴⁵ Hale, above n197, 125-126.

Judges who are in favour of speaking with children have a diversity of views on how judicial meetings should occur. While all agree that the judge should see the children away from the parties in a private room, Sir Mark's preferred option is to have the parties' counsel present. They would sit 'unobtrusively in a corner, at liberty to take notes, but playing no part in the dialogue'.²⁴⁶ The CAFCASS officer would also be present. At the conclusion of the meeting the parties' counsel would draft an agreed memorandum of what had taken place, to be approved by each person present,²⁴⁷ presumably including the child.

Sir Mark's suggested approach addresses concerns about due process that have often been raised by those in opposition to judicial meetings with children. Under his suggested model, the judge is alleviated of the problem of deciding how to report the outcome of the meeting to the parties.²⁴⁸ The parties' representatives are able to report to their clients what has happened (whilst presumably being sensitive enough to withhold information that is not relevant to the case and could negatively affect family relationships). They can make submissions to the court on the basis of what they heard in the meeting.

It also addresses the problem of what to do when a child is under the misapprehension that what they say to the judge will remain confidential, or requests confidentiality from the judge. Using Sir Mark's approach, the child is, of course, aware that their parents' lawyers are in the room. They can reasonably presume, and will also be told, that the lawyers will report what they say back to their parents.

Despite this apparent solution to two lingering concerns in the debate surrounding judicial meetings with children, the method suggested by Sir Mark, with great respect, may also create problems. No suggestion is made as to what should happen in cases where one or both parties are self-represented. Further, the child may feel intimidated in the presence of several adults and, knowing that two are their parents' lawyers, may be reluctant to speak freely. This approach would be appropriate, perhaps, in cases

²⁴⁶ Potter, 'The Voice of the Child', above n196, 145.

²⁴⁷ Comments made by Sir Mark Potter, President of the Family Division, England and Wales (as he then was), during a panel discussion entitled 'Children's Voices: A Judicial Perspective' (5th World Congress on Children's Rights, Halifax, Canada, 23-26 August 2009).

²⁴⁸ Potter, 'The Voice of the Child', above n196, 145.

involving more mature, articulate children whose eagerness to be heard may outweigh any intimidation they feel as a result of disclosing their views to a small group that includes their parents' lawyers.

Sir Mark has acknowledged that, in certain cases, it may be appropriate for judges to meet with children alone, without the presence of the parties' counsel or a CAFCASS officer.²⁴⁹ The judge would report back to the parties and their lawyers the substance of the conversation, 'while respecting the confidence of the child in sensitive areas which (if made known) might damage rather than improve the child's relationship with either parent'.²⁵⁰ The House of Lords has confirmed that, while there is a strong presumption in favour of disclosing what a child says, in exceptional cases, where there is a serious risk of harm to the child, information may be withheld from the parties.²⁵¹

District Judge Crichton's practice is to see the children in the presence of a court associate (who is a lawyer and takes an administrative role), the guardian ad litem if applicable, and, if available, a CAFCASS officer. If there is a guardian ad litem, his Honour will speak with that person before the meeting to discover the relevant issues for the child and information about the child's personality. During the meeting, his Honour normally takes the child through the expert's report to ask whether the account of the child's views as presented in the report is accurate. The judge, with the court associate or the guardian ad litem, will then write a memorandum of what has happened during the meeting and, if appropriate, will ask the child to approve the memorandum that will be given to the child's parents and their lawyers. Crichton DJ does not normally tape or video record meetings.²⁵²

In *Re M*²⁵³ the welfare officer, who was present during the meeting, went into the witness box when court was resumed to give the parties and their counsel an account

²⁴⁹ Ibid. This thesis takes the position that it is not desirable for a judge to meet with a child without the presence of a third party, who is preferably an expert in child welfare. See discussion in Chapter Four and elsewhere.

²⁵⁰ Ibid.

²⁵¹ *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593. This was a case concerning adoption, and not family law proceedings. However, the judgment specifically equated the principles of confidentiality between the different areas of law.

²⁵² Personal communication between District Judge Crichton and the author on 1 September 2009.

²⁵³ *Re M (A Minor) (Justices' Discretion)* [1993] 2 FLR 706.

of what had occurred during the judicial meeting with the child. This method of reporting to the parties what has happened during the meeting, thus giving them an opportunity to respond to it, is argued in this thesis to be the most appropriate to ensure due process as a result of judicial meetings.

6.3.4 Jurisdiction and lack of continuity

Below the level of the High Court, there is no specialised family law jurisdiction in England and Wales. Judges and magistrates of the County and Magistrates Court who deal with private family law matters are just as likely to hear criminal, child welfare, domestic violence and other matters.²⁵⁴

In the context of judicial meetings with children, it could be said that judicial officers in England lack the specific focus to speak with children in private family law matters, especially when compared with their counterparts in Australia and New Zealand, who work in specialised family courts. However, it should be noted that judges in England and Wales also deal with youth justice and child welfare, so they should be well able to deal with children's issues and have some understanding regarding children's needs and development.

One further hurdle to increased judicial meetings with children in England and Wales is the lack of continuity of judges in cases. Often the judge who makes preliminary rulings, including how the child is to participate in proceedings, is not the judge who hears the trial. Establishing a 'docket system' to ensure continuity of judges in proceedings is an aim of the family law administration in England and Wales but, given constraints on judicial resources, is unlikely to be achieved in the near future.²⁵⁵

6.3.5 Guidelines and directions

In a paper produced by the Family Justice Council's Voice of the Child Committee,²⁵⁶ the committee encouraged greater participation of children in the legal process and

²⁵⁴ Murch, above n199, 12.

²⁵⁵ Potter, 'The Voice of the Child', above n196, 148. This can be contrasted to the situation in Australia where, from 2007, judges in the FCA have been responsible for management of their own cases from the time the case is docketed to finalisation (Family Court of Australia, *Annual Report 2009-2010* (2010), 19).

²⁵⁶ Family Justice Council, 'Enhancing the Participation of Children and Young People', above n195.

acknowledged benefits for children from being involved. The committee considered there are 'good reasons why judges should be less reluctant to see children than has hitherto been the case'.²⁵⁷ The committee developed Guidelines for Judges Meeting Children, which were approved by the President of the Family Division and became effective in April 2010.²⁵⁸

The purpose of the guidelines is 'to encourage judges to enable children to feel more involved and connected with proceedings... and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the Judge's task'.²⁵⁹ The guidelines emphasise that the primary purpose of a meeting between a judge and a child is to benefit the child, and not to gather evidence, which is the responsibility of the CAFCASS officer.²⁶⁰ The CAFCASS officer and/or the lawyer for the child is to communicate to the judge the child's desire to meet with them, and to advise whether a meeting accords with the child's best interests.²⁶¹ The parties are entitled to make submissions, both about whether the meeting should take place and, after the meeting has taken place, about its content.²⁶² In deciding whether or not a meeting should take place, the child's age is relevant but not determinative. The guidelines state that '[s]ome children of 7 or even younger have a clear understanding of their circumstances and very clear views which they may wish to express'.²⁶³ The judge retains discretion as to matters such as when and where the meeting will take place, the purpose of the meeting and who will be present.²⁶⁴ The judge is expected to explain to the child that what they say during the meeting will be communicated to their parents, and there will be no secrets.²⁶⁵ The judge should explain that decisions in the case are the responsibility of the judge, and discuss with the child how the judge's decision is to be communicated to the child.²⁶⁶ If a child has requested to see the judge but the judge decides a meeting may be

²⁵⁷ Ibid, 11.

²⁵⁸ Family Justice Council, *Guidelines for Judges Meeting Children*, above n187.

²⁵⁹ Ibid, Purpose.

²⁶⁰ Ibid, Preamble, [5].

²⁶¹ Ibid, [1].

²⁶² Ibid, [2], [6(iv)].

²⁶³ Ibid, [3].

²⁶⁴ Ibid, [5].

²⁶⁵ Ibid, [6(i)]. The guidelines allow for information to be kept from the parties in 'exceptional circumstances'.

²⁶⁶ Ibid, [6(ii),(iii)].

inappropriate, the judge 'should consider providing a brief explanation in writing for the child'.²⁶⁷

Sir Mark's view, which he hopes judges of England and Wales will adopt is that, in every case, the welfare officer and the judge should consider whether a judicial meeting will yield a positive benefit to the child and the court.²⁶⁸ Further, if a judge becomes aware of a request from a child to see the judge, the judge 'should assume such positive benefit in the absence of expert advice to the contrary'.²⁶⁹ Sir Mark also recommended training for judges in speaking with children but noted the difficulty in 'persuading the government to provide the necessary budget to the Judicial Studies Board'.²⁷⁰

6.3.6 Culture

Despite encouragement from both the former and current Presidents of the Family Division, and others, judicial meetings with children in England and Wales are still very rare.²⁷¹ Sir Mark has acknowledged that it will be a very slow process to dissuade judges from their reluctant mindset.²⁷² However, he is of the view that judges are increasingly speaking with children, if for no other purpose than to reassure the child that the judge has heard them and is taking them seriously.²⁷³ He sees the lack of resources and training as two significant hurdles to increasing judicial meetings with children.²⁷⁴

Crichton DJ's view is that children should be informed of their various options to participate in proceedings and be encouraged to become involved,²⁷⁵ including being informed of their option to request a meeting with the judge.²⁷⁶ The Family Justice

²⁶⁷ Ibid, [4].

²⁶⁸ Potter, 'The Voice of the Child', above n196, 145.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Comment made by Sir Mark Potter, President of the Family Division, England and Wales (as he then was), during a panel discussion entitled 'Children's Voices: A Judicial Perspective' (5th World Congress on Children's Rights, Halifax, Canada, 23-26 August 2009).

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ District Judge N Crichton, 'Children's Involvement in Court' (2006) 36 *Family Law* 170, 171.

²⁷⁶ During a panel discussion entitled 'Children's Voices: A Judicial Perspective' (5th World Congress on Children's Rights, Halifax, Canada, 23-26 August 2009), Sir Mark Potter, President

Council's Voice of the Child Committee agrees.²⁷⁷ There is currently no method by which children are informed of their options for involvement. While this role could be taken by the welfare officer,²⁷⁸ the issue of what would happen if a child's request to meet with a judge is refused by the judge remains unresolved.²⁷⁹

6.3.7 Commentary

In England and Wales children's 'wishes and feelings' are communicated to the court through a report from a welfare officer, who has a similar role to a family consultant in the Australian system. However, in many children's cases in Australia, children's views are also communicated through an independent lawyer for the child whose job it is to ensure the child's best interests are represented. A children's lawyer is appointed as a matter of course in New Zealand. In private family law matters in England and Wales separate representation for children is extremely rare, so children are denied this method of having their views heard by the court. Because of this, Sir Mark argues, '[J]udges should be prepared to look at the matter and to meet the child regardless of whether or not it will actively assist the judge in his decision'.²⁸⁰

The lack of separate representation for children in England and Wales is of concern, as it means children can be heard only through a welfare officer, whose role is limited in time and purpose and does not allow a mentoring relationship with the child.²⁸¹ In this environment, perhaps the interests of children would be well served by allowing them to speak with judges in appropriate cases. As discussed earlier, allowing children to be directly heard in private family law proceedings also complies with their civil right to be entitled to a fair and public hearing, pursuant to Article 6 of the ECHR and section 6(1) of the HRA.

of the Family Division, England and Wales (as he then was), said it was his view that the option of meeting with the judge should be put to children in all cases.

²⁷⁷ Family Justice Council, 'Enhancing the Participation of Children and Young People', above n195, [17].

²⁷⁸ Ibid.

²⁷⁹ See Lyon's analysis of the consequences of children feeling 'invisible' in family law decision-making, above n195, 78.

²⁸⁰ Potter, 'The Voice of the Child', above n196, 146.

²⁸¹ Ibid.

6.4 United Kingdom (Scotland)

The situation in Scotland differs markedly from that in England and Wales. Scottish judges (known as sheriffs in the lower courts) speak with children frequently for the purposes of ascertaining their views.

Raitt interviewed 20 Scottish judicial officers from 2002-2004 to discover their views and practices in relation to children's participation in family law proceedings.²⁸² The majority of judges interviewed by Raitt said they were willing to speak with a child if that is what the child wanted. No judge said they would never speak with a child.²⁸³ Even the two judges who expressed strong reservations about the practice did, on occasion, see children.²⁸⁴

6.4.1 Legislation and case law

When compared with England and Wales, the Scottish legislation has a 'more demanding' requirement for children's participation in proceedings.²⁸⁵ In relation to private law proceedings, section 11(7) of the *Children (Scotland) Act 1995* states that in considering whether or not to make a parenting order, the court:

- (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and
- (b) taking account of the child's age and maturity, shall so far as practicable—
 - (i) give him [sic] an opportunity to indicate whether he wishes to express his views;
 - (ii) if he does so wish, give him an opportunity to express them; and
 - (iii) have regard to such views as he may express.²⁸⁶

This section is similar to the New Zealand legislation, in that it provides that children are to be given opportunities to express their views if they wish to do so.²⁸⁷ This

²⁸² F Raitt, 'Hearing Children in Family Law Proceedings: Can Judges Make a Difference?' (2007) 19 *Child and Family Law Quarterly* 204, 207.

²⁸³ *Ibid*, 209.

²⁸⁴ *Ibid*.

²⁸⁵ F Raitt, 'Judicial Discretion and Methods of Ascertaining the Views of a Child' (2004) 16 *Child and Family Law Quarterly* 151, 154.

²⁸⁶ *Children (Scotland) Act 1995* s11(7).

²⁸⁷ COCA s6.

recognises the importance of communicating with children about the options available to express their views. The relevant statutes in England and Wales and Australia do not specifically grant children an opportunity to be heard, although they do require the court to consider any views (or wishes and feelings) expressed by the child.²⁸⁸ Moreover, in Scotland the relevant statutory rules prohibit the making of particular orders unless due weight has been given to any views expressed by a child.²⁸⁹

Section 11(10) of the *Children (Scotland) Act* 1995 also presumes that a child over 12 years of age is of sufficient age and maturity to express a view,²⁹⁰ suggesting the court must establish what that view is.²⁹¹ The Court of Session in *Shields v Shields*²⁹² affirmed that it is obligatory for a judge to establish whether a child wants to express their views and, if so, to find a way to enable that.²⁹³ The court found the trial judge had erred in failing to ascertain whether or not a nine year old boy wished to be heard in relation to his mother's proposal to relocate him to Australia, and had failed to ascertain those views. The court insisted children's views, wherever practicable, must be obtained:

[H]ow a child should be given such an opportunity [to be heard] will depend on the circumstances of each case and, in particular, on his or her age... Seeing a child in chambers is, of course, always open to the court but, in the case of a very young child, we do not discount the possibility that his or her views, or the lack of them, could properly be made known to the court through the agency of, for example, a private individual who is well known to the child or perhaps by a child psychologist. But, if, by one method or another, it is 'practicable' to give a child the opportunity of expressing his views, then, in our view, the only safe course is to employ that method.²⁹⁴

The *Children (Scotland) Act* 1995 also grants children a right to be heard in any family decision-making, even when a matter does not proceed to court.²⁹⁵ The legislation in Scotland, interpreted in light of *Shields v Shields*²⁹⁶ gives greater

²⁸⁸ *Children Act* s1(3)(a); FLA s60CC(3)(a).

²⁸⁹ *Act of Sederunt (Sheriff Court Ordinary Cause) Rules* 1993 (SI 1993/1956) r33.19(3).

²⁹⁰ *Children (Scotland) Act* 1995 s11(10).

²⁹¹ Raitt, 'Judicial Discretion', above n285, 154.

²⁹² *Shields v Shields* [2002] SCLR 334.

²⁹³ Raitt, 'Hearing Children in Family Law Proceedings', above n282, 207.

²⁹⁴ *Shields v Shields* [2002] SCLR 334, [11] (Marnoch L).

²⁹⁵ *Children (Scotland) Act* 1995 s6(1).

²⁹⁶ *Shields v Shields* [2002] SCLR 334.

emphasis to the participation of children and the importance of their views than the legislative regimes in England and Wales and Australia.

6.4.2 Hearing children's views

Children's views in Scotland can be heard through several methods. These include through written communication by the child to the court, a report from a curator ad litem,²⁹⁷ a meeting with a judge, and a lawyer who is directly instructed by the child.²⁹⁸

When an application is made in private family law proceedings, the judge can choose to serve the child with a copy of the application. Children are invited, if they wish, to respond in written form, including writing a letter to the judge. They are also told they can instruct their own lawyer or seek advice from the Scottish Child Law Centre.²⁹⁹

Most commonly, a 'curator ad litem' is appointed to speak with the child, observe the child's living situation and circumstances and write a report. The curator may be a social worker, but is usually a lawyer. The report contains the curator's factual observations of the child's circumstances.³⁰⁰ The curator must have spoken with the child, but can present the child's views according to their discretion. The report writer may recommend a specialist report be prepared if more complex issues are involved, such as family violence or abuse. There is no equivalent of the CAFCASS officer, as is found in England and Wales. A court has discretion to ask a child welfare expert, such as a social worker or psychologist, to become involved in a case and write a report but this is not routine.³⁰¹

Further, a child over the age of 12, or a younger child who is able to provide instructions, can instruct their own lawyer.³⁰² Provided the lawyer is satisfied that the

²⁹⁷ A curator ad litem is a person (usually a lawyer) appointed by the court to observe the child and the family and write a report. The role of the curator ad litem is discussed in more detail below.

²⁹⁸ Raitt, 'Judicial Discretion', above n285, 155.

²⁹⁹ Ibid; *Act of Sederunt (Sheriff Court Ordinary Cause) Rules* 1993 (SI 1993/1956), Appendix 1, Form F9 <<http://www.scotcourts.gov.uk/library/rules/ordinarycause/forms.asp>> at 23 February 2010.

³⁰⁰ Raitt, 'Judicial Discretion', above n285, 155.

³⁰¹ *Shields v Shields* [2002] SCLR 334, [11].

³⁰² *Age of Legal Capacity (Scotland) Act* 1991, s4A and 4B.

child can provide instructions, the court must accept the independent representation of the child in proceedings.³⁰³ This differs from England and Wales, where the court must be satisfied that the child has sufficient understanding to instruct a solicitor, regardless of what the solicitor thinks.³⁰⁴

6.4.3 How judges speak with children in Scotland

The use of a judicial meeting with a child to ascertain the child's views has been specifically mentioned with approval in Scottish case law.³⁰⁵ Many Scottish judges speak with children often, and have said they are happy to do so.³⁰⁶ Judges often meet with children in private, with only a judicial clerk present to act as an independent observer. That person is an administrator and does not have a role in recording or assisting with proceedings. The judge and child are otherwise alone.³⁰⁷

Given concerns that have been expressed in other jurisdictions about judges' lack of expertise in speaking with children and interpreting their views, the fact that Scottish judges may speak with children without any other court professional being present may appear alarming. However, as in other jurisdictions, the judge will most likely have had the benefit of reading a welfare report provided by the curator ad litem, which often contains a record of the child's views.³⁰⁸ Therefore, Scottish judges are unlikely to discover anything during an interview that has not already been disclosed in the report. Rather than being an investigative exercise, 'Scottish judges are willing to complement those reports by hearing directly from children in chambers'.³⁰⁹

Meetings between judges and children are not usually recorded, and the parties do not receive a comprehensive report of what has happened at the meeting. Instead, the judge gives a very brief, general report orally about the judicial meeting when the matter returns to court.³¹⁰ The judge does not act as a witness and cannot be cross-examined. In theory, this leads to a problem with due process, as the judge may be

³⁰³ Ibid.

³⁰⁴ Raitt, 'Judicial Discretion', above 285, 159; *Family Proceedings Rules* 1991 (UK), r9.2A(6).

³⁰⁵ *Shields v Shields* [2002] SCLR 334, [11].

³⁰⁶ Raitt, 'Hearing Children in Family Law Proceedings', above n282, 209.

³⁰⁷ Personal telephone communication between Raitt and the author on 13 August 2009.

³⁰⁸ Raitt, 'Hearing Children in Family Law Proceedings', above n n282, 208.

³⁰⁹ Ibid.

³¹⁰ Personal telephone communication between Raitt and the author on 13 August 2009.

acting on information received in private, to which the parties are not privy and cannot respond. In practice, the way in which judges speak with children in private and report back briefly to the parties has not caused problems.³¹¹ There is a reasonably high level of trust in what the judge is doing and the general view is that not all details of the meeting need to be known by the parties.³¹² Many of the judges interviewed by Raitt expressed concerns about disclosing details of the meeting to the child's parents, when the children may desire or expect their expressed views to remain confidential.³¹³ One judge interviewed by Raitt explained:

I think you can get round it in those sorts of circumstances by saying, 'having heard the views of the children' or 'taking all factors into account I think...', and in fact you never disclose the views of the child because you place the decision on you rather than on the child. I've certainly heard that approach being adopted as a means of getting round this problem of confidentiality.³¹⁴

It appears, therefore, that in Scotland, '[t]he key to decision-making which reconciles due process and confidentiality may lie in the extent to which the details of a child's views, as opposed to their broad thrust, have to be transmitted to the parties, and how much they influence the outcome'.³¹⁵ There are no written guidelines or directions on how Scottish judges should speak with children.

6.4.4 Commentary

Judges in Scotland have consistently expressed a view that it is important to hear directly from children. As discussed, the majority of judges interviewed in Raitt's study said they would be willing to speak with a child if the child so requested, and no judge interviewed said they would never speak with a child.³¹⁶ Of the 20 judges interviewed by Raitt, even the two judges who expressed strong reservations about the practice said they did see children on occasion.³¹⁷ Raitt also observed that, even where Scottish judges have expressed apprehension about their skill and ability to speak with children, they are often committed to finding a solution.³¹⁸ This situation

³¹¹ Ibid.

³¹² Ibid.

³¹³ Raitt, 'Hearing Children in Family Law Proceedings', above n282, 220-221.

³¹⁴ Ibid, 223, quoting a judge who was interviewed by Raitt.

³¹⁵ Ibid, 222.

³¹⁶ Ibid, 209.

³¹⁷ Ibid.

³¹⁸ Ibid.

is very different from the situation in England and Wales and Australia, where judges are reluctant to speak with children. It is submitted that the difference between the incidence of judicial meetings with children in England, Wales and Australia, when compared with Scotland, can be attributed to differences in the judicial culture of those jurisdictions.

Raitt observed that Scottish judges appeared to focus heavily on the importance of listening to children and taking their views seriously.³¹⁹ Judges regarded listening directly to children's views as having intrinsic value and considered judicial meetings with children to be far more than a token exercise.³²⁰ Raitt found that judges' views of why they considered it important to speak with children:

...ranged along a continuum where the minimum was to put the child at ease, to listen, to take the child seriously and to avoid misleading the child about confidentiality. Further along the continuum, the more pro-active judges tried to manage and resolve the disputes in a way that recognised the desirability, if not necessity, of securing the child's understanding and cooperation... The overall impression from the data was of a judiciary trying to create the conditions for new ways to facilitate children's participation and developing new practices to engage with children.³²¹

Further, judges emphasised that the purpose of judicial meetings with children is not confined to serving children's rights of participation. Judges recognised that they gain from obtaining fresh perspective and insights about the matter that they have to decide.³²²

There is a significant difference in the way in which Scottish judges speak with children, when compared with the other jurisdictions discussed in this chapter. In Scotland the judge will meet with the child alone, with only a court clerk present. No other professional, such as a welfare officer or lawyer, is routinely present.³²³ The advantages of having a welfare officer present during a meeting between a judge and child have already been noted. Further, the 'curator ad litem' in Scotland is a person who knows and is known by the child and may, if permitted to be present during a

³¹⁹ Ibid, 215.

³²⁰ Ibid, 208.

³²¹ Ibid, 223.

³²² Ibid, 223-224.

³²³ Presumably, if a child had instructed a lawyer in a given case, the child's lawyer would be present during the meeting with the judge.

judicial meeting, assist in helping the child to feel comfortable or offering guidance to the judge as to areas of questioning.

An issue arises as to whether the secret and private nature of judicial meetings with children in Scotland leads to a problem with transparency. It is left to judges to report orally to the parties what has occurred during the meeting with the child, and such reports are not usually comprehensive. Further, no-one can verify whether the judge's oral report accurately represents what happened, nor challenge the judge about this. Concerns about due process, however, are not often raised. Raitt has pointed out that the various methods of hearing children's views in Scotland are not mutually exclusive,³²⁴ and the central role is still reserved for the child welfare report provided by the curator ad litem.³²⁵ Judges who have read the child welfare report perhaps anticipate that no new information will be disclosed during a subsequent meeting with a child, and any report of such meeting provided to the parties will be uncontroversial. Certainly, this appears to have been the Scottish experience to date.

It is also worth noting that, unlike in England and Australia, Scottish judges do not often receive any report or opinion from a social worker or other child expert. While reports are provided by curators ad litem, they are usually lawyers by training. This may be another reason why judges in Scotland are more willing to speak directly with children than their counterparts in Australia and England and Wales. If Scottish judges do not have the benefit of anyone more qualified than they to speak with children and interpret and present their views, perhaps they are more likely to consider it appropriate to speak with children directly.

6.5 Canada

The family law system in Canada is made up of a combination of federal and provincial law,³²⁶ and practices in different provinces vary. This chapter focuses on the laws and procedures in Ontario, the most populous Canadian province. It should be noted that the incidence of judicial meetings with children in Ontario, and the

³²⁴ Raitt, 'Judicial Discretion', above n285, 158.

³²⁵ Raitt, 'Hearing Children in Family Law Proceedings', above n282, 208.

³²⁶ R Bessner, 'The Voice of the Child in Divorce, Custody and Access Proceedings' (report presented to Family Children and Youth Section, Department of Justice Canada, 2002), Introduction <http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2002_1.html> at 30 June 2009.

attitudes of its judiciary, may not be representative of the other provinces of Canada. While, from some of the cases discussed below, it appears that the attitude of the court to judges speaking with children may be similar in Ontario, British Columbia and Saskatchewan, judges in Quebec may have quite a different attitude to the practice of judicial meetings with children. The *Civil Code of Quebec*³²⁷ states that '[t]he court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his (sic) age and power of discernment permit it'.³²⁸ As a result of this provision, judicial meetings with children have become increasingly common in Quebec, and even quite young children who wish to communicate with a judge do so in family law matters.³²⁹

While this section concentrates on the laws and procedures of Ontario, cases from other jurisdictions are cited where the issues raised are relevant to the discussion.

6.5.1 Legislation

There are several statutes, both federal and provincial, which may apply to family law matters in Ontario. For the purposes of this discussion, the most relevant are the *Divorce Act* RSC 1985, c3, 2nd Supp ('*Divorce Act*'), and the *Children's Law Reform Act* RSO 1990, cC12 ('*CLRA*').

The *Divorce Act* is a federal statute. Section 16(8) of the Act states that when making a 'custody' order for a child, 'the court shall take into consideration only the best interests of the child... as determined by reference to the condition, means, needs and other circumstances of the child'.³³⁰ Section 24(1) of the CLRA states that the merits of an application in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, which are stated to include, inter alia, 'the child's views and preferences, if they can reasonably be ascertained'.³³¹ It is the combination of these two sections in two different statutes that compels the court to

³²⁷ *Civil Code of Quebec* SQ 1991, c64.

³²⁸ *Ibid*, Article 34.

³²⁹ R Birnbaum and N Bala, 'Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio' (2010) 24 *International Journal of Law, Policy and the Family* 300, 303.

³³⁰ *Divorce Act* s16(8).

³³¹ CLRA s24(2)(b).

determine the 'views and preferences' of a child when making a decision, regarding the child's living arrangements after family separation, which is in their best interests.

6.5.2 How the court hears children's views

In Ontario there are a variety of ways in which children's views can be heard in family law matters, aside from hearing evidence from the children's parents and others. These include by intervention provided by the Office of the Children's Lawyer, reports by private social workers or psychologists and, less commonly, by the child engaging a private lawyer or a meeting between the judge and the child.

6.5.2.1 Office of the Children's Lawyer

A court may make an order requesting the appointment of the Children's Lawyer under section 89(3) of the *Courts of Justice Act* RSO 1990 cC43, which authorises the appointment of the Office of the Children's Lawyer ('OCL') as the child's litigation guardian. If appointed, the OCL will represent the child in that capacity.³³² The order is in the form of a request by the court that the OCL provide such services to the child as he or she deems appropriate.³³³

The OCL is a publicly funded office, which represents children's legal interests in custody and access, welfare and estate issues.³³⁴ When the court makes an order requesting the involvement of the OCL in a private family law matter, the OCL retains discretion to accept or decline the court's request, despite the existence of an order. Further, the OCL has discretion to decide what kind of involvement, if any, the OCL will provide.³³⁵ The OCL does not have such discretion in a child protection matter and must appoint a lawyer for the child if ordered by a court.³³⁶ The OCL will accept referrals in private family law matters where it determines that the

³³² *Strobridge v Strobridge* (1994) 18 OR (3d) 753, [26].

³³³ D Goldberg, 'Representing Children in Custody and Access Proceedings' (Paper presented at the Law Society of Upper Canada, The Voice of the Child Conference, 5 March 2009), 4.

³³⁴ R Birnbaum, 'Examining Court Outcomes in Child Custody Disputes: Child Legal Representation and Clinical Investigations' (2005) 24 *Canadian Family Law Quarterly* 167; OCL website <<http://www.attorneygeneral.just.gov.on.ca/english/family/ocl>> at 25 February 2010.

³³⁵ Goldberg, above n333, 4.

³³⁶ *Child and Family Services Act* RSO 1990 cC1, s38; Office of the Children's Lawyer, *Policy Statement: Role of Child's Counsel*, revised 1 April 2006.

representation of the child will provide a meaningful contribution to the resolution of the matter and protect the child's interests in the proceedings.³³⁷

The types of assistance the OCL may be able to provide include:

- appointing a lawyer for the child;
- appointing a clinical investigator to provide a report which includes the child's views and the investigator's recommendations;
- appointing both a lawyer and clinical investigator where there are serious clinical and legal issues.³³⁸

The presence of a clinical investigator in addition to the child's lawyer is often termed a 'clinical investigator assist'. The OCL's website notes that, except in special circumstances, the OCL will not provide both legal representation and a clinical investigator's report in the same case.³³⁹

6.5.2.1.1 Clinical investigator

The clinical investigator, usually a social worker, interviews the child and reports on what was said by the child and the circumstances in which this information was communicated. The investigator can explain the context of the views expressed by the child and offer an opinion about how the child's views relate to their best interests. The investigator is a witness in the proceedings and can be cross-examined, ensuring evidence is fully explored and tested.³⁴⁰

6.5.2.1.2 OCL- child's lawyer

When a lawyer for the child is appointed by the OCL, the lawyer will conduct multiple interviews with their child client, as well as interviewing parents, counsellors and others.³⁴¹ The lawyer is not a witness and will make submissions along with the

³³⁷ Bessner, above n326, 2.3.2.

³³⁸ Office of the Children's Lawyer website
<<http://www.attorneygeneral.just.gov.on.ca/english/family/ocl/about.asp>> at 25 February 2010.

³³⁹ Ibid.

³⁴⁰ N Bala, V Talwar and J Harris, 'The Voice of Children in Canadian Family Law Cases' (2005) 24 *Canadian Family Law Quarterly* 211, [6(b)].

³⁴¹ Goldberg, above n333, 29.

parties' counsel as to what orders affecting the child the court should make. The lawyer must ensure that evidence of children's views is properly adduced and must not give evidence from the bar table.³⁴²

Canadian case law has affirmed that, unlike the position of the ICL in Australia, the child's lawyer is not a 'best interests' advocate and cannot supplant their views of what orders should be made for the child over any views expressed by the child. In *Strobridge*³⁴³ Granger J said:

In Ontario, ... the appropriate role of counsel for the children is the same as that of counsel for an adult. This role changes only when the child is unable to instruct counsel or articulate his or her wishes. It does not change even if counsel believes that the child's wishes are not in accordance with the child's best interests. If the child is able to provide instructions, he or she is entitled to be represented by counsel.³⁴⁴

However, there remains some confusion in Ontario about the role of the child's lawyer.³⁴⁵ While *Strobridge* made clear that the child's lawyer must follow the child's instructions if the child is capable of expressing them,³⁴⁶ the OCL has developed a policy that allows the child's lawyer to advocate a position that advances the interests of the child even if that position is not consistent with the child's instructions.³⁴⁷ The policy states:

- **Position on Behalf of the Child**

In taking a position on behalf of the child, child's counsel will ascertain the views and preferences of the child, if any, and will consider:

³⁴² *Strobridge v Strobridge* (1994) 18 OR (3d) 753, *CR v Children's Aid Society of Hamilton* [2004] OJ No 1251 [30]. However, anecdotally counsel for the child can indicate to the position of the child to the court and, with consent of the other parties, can summarise the child's views (*CR v Children's Aid Society of Hamilton* [2004] OJ No 1251 [27]).

³⁴³ *Strobridge v Strobridge* (1992) 10 OR (3d) 540, 540.

³⁴⁴ *Ibid*, 550 (Granger J). Granger J's view was affirmed by the Court of Appeal in *Strobridge v Strobridge* (1994) 18 OR (3d) 753. The relationship of the child's counsel and the child has also been described as a solicitor/client relationship in more recent cases such as *CR v Children's Aid Society of Hamilton* [2004] OJ No 1251 [31].

³⁴⁵ See, for example, R Birnbaum, 'Hearing the Voices of Lawyers and Clinical Agents Who Represent Children in Child Custody and Access Disputes' (2005) 24 *Canadian Family Law Quarterly* 281, where it was found that lawyers for children themselves are in disagreement as to what their role entails.

³⁴⁶ *Strobridge v Strobridge* (1992) 10 OR (3d) 540, 550; Hon Justice S Goodman, 'The Universal Conundrum- What does a Child's Best Interests Really Mean and How do you Determine it?' (Paper presented at the 13th National Family Law Conference, Adelaide, April 2008).

³⁴⁷ Bala et al, above n340, [6(b)]; OCL, *Policy Statement*, above n336; *Boukema v Boukema* (1998) 31 RFL (4th) 329 (Ont Ct J- Gen Div).

- a) the independence, strength, and consistency of the child's views and preferences,
- b) the circumstances surrounding the child's views and preferences, and
- c) all other relevant evidence about the child's interests.³⁴⁸

The wording of the policy allows the child's lawyer appointed by the OCL to present the child's views, while effectively cautioning the court against following those views. This is in spite of their child client's instructions.³⁴⁹ Dan Goldberg, senior counsel with the OCL, described the role of the child's lawyer as follows:

If a child is able to articulate views and preferences then counsel will ensure that they are placed before the court, *in context*, by presenting other relevant evidence including the circumstances surrounding those views and preferences. *If the child's wishes have been independently formulated, clearly and consistently communicated to counsel, then those views and preferences will form the basis of the position advocated by counsel on behalf of their child clients.*³⁵⁰ (emphases added).

This suggests that if the child's lawyer considers that any views expressed by the child have not been 'independently formulated or clearly and consistently communicated', the lawyer is justified in not taking a position that follows their child client's instructions. This does not appear to accord with the court's view in *Strobridge*,³⁵¹ where the trial judge's view was that counsel for the child must advocate the child's instructions even where counsel believes the child's views do not accord with their best interests.³⁵² The policy on which the OCL relies in order to take this position was developed by the OCL. It is not a statutory instrument or a practice direction and does not have the force of law. The policy is not widely available to the public and is not available from the OCL's website. These factors have added to the confusion about the appropriate role of the child's lawyer appointed by the OCL.

6.5.2.2 Lawyers engaged by children

While it does not commonly occur, children can engage their own private lawyers to represent them in family law cases.³⁵³ This appointment is usually funded by one or

³⁴⁸ OCL, *Policy Statement*, above n336, [5].

³⁴⁹ See *Boukema v Boukema* (1998) 31 RFL (4th) 329 (Ont Ct J- Gen Div).

³⁵⁰ Goldberg, above n333, 13.

³⁵¹ *Strobridge v Strobridge* (1994) 18 OR (3d) 753.

³⁵² See n344 above.

³⁵³ As reported by Martha McCarthy, Principal, Martha McCarthy & Company, a private law firm in Ontario, in personal communication with the author on 19 August 2009.

both of the child's parents, and is a costly way of ensuring the child's views are presented to the court.

The court takes a wary view of privately appointed children's lawyers if it appears as if the appointment has been manufactured by one parent; for example, if the parent has pressured the child to engage the lawyer or if the lawyer is simply advocating the position of the parent who is paying the lawyer's fees.³⁵⁴

6.5.2.3 Private assessors

The court may order a private assessment of the child's circumstances by a psychologist or psychiatrist pursuant to section 30 of the CLRA. When a clinical investigator provides a report pursuant to a request from the court under section 89(3) of the *Courts of Justice Act*,³⁵⁵ the report is funded by the OCL. When a private assessment is ordered, one or both of the parties must pay for the assessment.³⁵⁶ Private assessments are very expensive,³⁵⁷ sometimes costing in excess of C\$20,000.³⁵⁸

Being cost prohibitive, private assessments are ordered infrequently. Further, there is case authority that states private assessments should not be ordered unless the case involves serious clinical issues, such as abuse or mental illness.³⁵⁹

6.5.2.4 Judicial meetings with children

Section 64 of the CLRA gives the court discretion to speak with a child in a private family law matter. The section states:

³⁵⁴ See *Reid v Reid* (1975) 25 RFL 209 (Ont Sup Ct- Div Ct), *Rowe v Rowe* (1977) 26 RFL 91 (Ont Sup Ct- HCJ) and *Fiorellino v Fiorellino* (1996) 18 RFL (4th) 301 (Ont CT J- Gen Div).

³⁵⁵ *Courts of Justice Act* RSO 1990, cC43.

³⁵⁶ B Fidler and R Birnbaum, 'Child Custody Disputes: Private and Public Assessments' (2006) 25 *Canadian Family Law Quarterly* 137, 139.

³⁵⁷ C Davies, 'Access to Justice for Children: The Voice of the Child in Custody and Access Disputes' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, April 2004); Goodman, above n346.

³⁵⁸ Fidler and Birnbaum, 'Child Custody Disputes: Private and Public Assessments', above n356, 154.

³⁵⁹ *Linton v Clarke* (1994) 21 OR (3d) 568 (Granger J).

64 Child entitled to be heard

(1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.

Interview by court

(2) The court may interview the child to determine the views and preferences of the child.

Recording

(3) The interview shall be recorded.

Counsel

(4) The child is entitled to be advised by and to have his or her counsel, if any, present during the interview.

In *Uldrian v Uldrian and Uldrian*³⁶⁰ it was confirmed that section 64 of the CLRA does not impose a duty on a trial judge to meet with a child. Whether a judge speaks with a child is entirely within the judge's discretion.

6.5.3 Incidence of judicial meetings with children in Ontario

Despite having wide discretion to speak with children recognised in the CLRA, the lack of case law in Ontario discussing judicial meetings with children suggests judges are reluctant to use this power, and frequently do not even consider the possibility of meeting with a child.³⁶¹

Judges have expressed their disapproval of the practice of speaking with children in individual cases. In *Stefureak v Chambers*,³⁶² after reviewing the various methods employed by a court to hear children's views, Quinn J analysed the perceived problems associated with speaking with children and suggested a judge should speak with a child only where other methods of determining the child's views are unavailable. Quinn J's reasoning for this was that judges are not specifically trained to speak with children, and that meeting with a judge may be intimidating for a child.³⁶³

³⁶⁰ *Uldrian v Uldrian and Uldrian* (1988) 14 RFL (3d) 26.

³⁶¹ Birnbaum and Bala, above n329, 308-309.

³⁶² *Stefureak v Chambers* (2004) CarswellOnt 4244 (Ont SCJ).

³⁶³ *Ibid*, [62] (Quinn J).

In *Wakaluk v Wakaluk*,³⁶⁴ Bayda J said:

The procedure involving a judge speaking to a child, informally, in his chambers, also is not a particularly satisfactory one. To expect a child in such a short period and abnormal atmosphere (from the child's point of view) to choose between parents, and to expect to obtain from that child an accurate insight into the reasons for the child's feelings and preferences is ordinarily to expect too much.³⁶⁵

Several other cases have also discussed concerns about the practice.³⁶⁶

The practice of judges speaking directly with children is also discouraged by the OCL.³⁶⁷ A senior counsel of the OCL has cited as his reasons for disapproval of the practice judges' lack of interviewing skills and the risk that a child may be aligned with a parent, making information gleaned during a judicial meeting unhelpful.³⁶⁸

In 2009 Birnbaum and Bala interviewed 30 judges in Ontario about their views on speaking with children.³⁶⁹ Most of the interviewees expressed a real reluctance to meet with children and did not see the practice as being part of their regular routine or role.³⁷⁰ Of the 30 judges interviewed, 20 reported that they were aware their colleagues did not approve of judges speaking with children.³⁷¹ Twelve of the 30 had conducted a judicial meeting with a child in the past. However, of those twelve, only six had done so in a private family law matter. The remaining six judges had spoken with children in public family law (welfare) matters. A further eight judges stated that they would like to speak with children in the future, if they received training in skills to do so.³⁷²

The twelve judges who did speak with children from time to time met with an average of five children per year, the children having an average age of 12-15 years.³⁷³ Eight of the 30 judges interviewed said there were no circumstances in which they would

³⁶⁴ *Wakaluk v Wakaluk* (1976) 25 RFL 292 (Sask CA).

³⁶⁵ *Ibid*, 304 (Bayda J).

³⁶⁶ See *Jandrisch v Jandrisch* (1980) 16 RFL (2d) 239 (Man CA), [13] (Monnin JA), *LEG v AG* [2002] BCJ No 2319 (BCSC), [25-26] (Martinson J).

³⁶⁷ Goldberg, above n 333, 40-47; Also comments made by Goldberg, OCL senior counsel, in question time following a panel discussion entitled 'Children's Voices: A Judicial Perspective' (5th World Congress on Children's Rights, Halifax, Canada, 23-26 August 2009).

³⁶⁸ Goldberg, above n333, 34, 40.

³⁶⁹ Birnbaum and Bala, above n329.

³⁷⁰ *Ibid*, 315-316.

³⁷¹ *Ibid*, 316.

³⁷² *Ibid*, 317.

³⁷³ *Ibid*.

speak with a child to obtain the child's views. Those judges preferred that the child's views come through the child's lawyer or a neutral professional.³⁷⁴ However, all these eight judges 'did see the merit in the possibility of a meeting with a child post decision-making, in some cases, particularly if the decision was not what the child had articulated through others or just to have the child hear from the judge the reasons for the decision'.³⁷⁵ Only two judges interviewed reported having met with the child post-decision.³⁷⁶

All the judges interviewed said they were generally satisfied with the way lawyers and clinical investigators provided by the OCL reported about children's wishes to the court. Several judges also indicated that the OCL's traditional opposition to judges speaking with children would not prevent the judge from speaking with a child. However, they would listen carefully to any specific concerns raised by the OCL when deciding whether to meet with a child.³⁷⁷

The 30 judges interviewed were selected through 'purposive sampling'.³⁷⁸ The researchers selected them because they were 'highly experienced judges in family law disputes, who had varying experiences with judicial meetings of children, and agreed to be participants in this study'.³⁷⁹ Although the sampling took into account both rural and urban settings as well as gender,³⁸⁰ it cannot be said that these results are representative, in a quantitative sense, of the views of the entire family law judiciary

³⁷⁴ Ibid, 319.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ See Chapter Five for the definition of and discussion about purposive sampling, which was also employed by the author in her interviews with four FCA judges (also discussed in Chapter Five).

³⁷⁹ Ibid, 315. Another study of judges' views about speaking with children was conducted by Williams in 2009. Participants were also selected by 'purposive sampling', and were asked to complete a survey. Thirty judges responded in total. Of those, 19 were from various Canadian provinces and territories, and 11 were from jurisdictions outside Canada (S Williams, 'Judges Listening to Children Directly in Separation and Divorce Proceedings: Individual, Institutional and International Guidelines', (Paper presented to the National Judicial Institute of Canada Family Law Program, Toronto, February 2010). The results of that study have not been discussed in this thesis, firstly, because of the small number of Ontario judges who participated (6), and, secondly, because it is considered that the results of the study do not significantly add to the existing body of research already discussed in this chapter and, particularly, Birnbaum and Bala's study involving interviews with 30 Ontario judges. Nevertheless, the existence of the study should be noted.

³⁸⁰ Birnbaum and Bala, above n329, 315.

of Ontario. Nevertheless, the results of this study indicate that there are a number of judges in Ontario who do meet with children from time to time.

6.5.4 How judges speak with children in Ontario

The CLRA requires meetings between judges and children to be recorded and for the child's lawyer (if any) to be present.³⁸¹ Of all the jurisdictions that have been discussed in this chapter, this is the only example of a statutory requirement as to how judicial meetings with children are to be carried out. A judge retains discretion to decide whether to speak with a child and, if so, who will be present and how the outcome of the meeting will be reported back to the parties.

There are currently no guidelines for how judges in Ontario should speak with children. Cases have given limited guidance for how and in what circumstances meetings between judges and children should occur. This has resulted in significant variation in how, on the rare occasions judges do speak with children, the practice is carried out.³⁸²

In *Ward v Swan*³⁸³ Harper J said that, where children's views have been placed before the court, it is not proper to use a judicial meeting with a child in order to contest evidence that may be disputed. In that case, although the views of the children were not in dispute, the applicant wanted the judge to ask the child about other evidence that was in dispute. The judge refused.

In *Jespersen v Jespersen*³⁸⁴ the British Columbia Court of Appeal held that if a judge conducts a private meeting with a child with the consent of both parties, there is no obligation on the judge to disclose to the parties any details of the meeting. A judge retains discretion to decide whether to say anything at all about the meeting and, if so, what should be said.³⁸⁵ However, the Manitoba Court of Appeal in *Jandrisch v Jandrisch*,³⁸⁶ whilst also confirming that a trial judge has discretion to speak with a child in private, said that, if the rights of the parties are subject to appeal, it is

³⁸¹ CLRA s64(3),(4).

³⁸² Birnbaum and Bala, above n329, 310.

³⁸³ *Ward v Swan* [2009] OJ No 2107.

³⁸⁴ *Jespersen v Jespersen* (1985) 48 RFL (2d) 193 (BC-CA).

³⁸⁵ *Ibid*, 197 (Lambert JA).

³⁸⁶ *Jandrisch v Jandrisch* (1980) 16 RFL (2d) 239 (Man CA).

important that the parties be granted access to some record of what has been said at the meeting, even if that be a statement from the trial judge as to what was said.³⁸⁷

In *Demeter v Demeter*,³⁸⁸ the judge provided the parties with only a summary of the statements of the children, stating:

I think it inappropriate to disclose to the parties the full contents of my interview. I do not wish to embarrass the children and potentially to damage their future relationship with either parent. However, I do find it appropriate to advise the parties at this stage, prior to argument, in general terms of the children's stated wishes.³⁸⁹

His Honour then disclosed the children's views in two short paragraphs and proceeded to say:

In my view, it would be unfair to both parties not to know, at least in general terms, the views and preferences of the children. I hope that by disclosing the children's views as expressed to me yesterday, the children are protected from embarrassment and potential damage on the one hand while at the same time permitting counsel to know and address this factor in their submissions.³⁹⁰

In *LEG v AG*³⁹¹ Martinson J held that a judge can meet with a child in private, even in circumstances where the parties do not consent to the meeting. But he added that a judge must decide whether meeting with a child will be in the best interests of the child, taking into account the circumstances of the case, the purposes of the meeting and the general benefits and concerns about the proposed process.³⁹²

From these cases it is clear that the practices of individual judges vary significantly in relation to how meetings with children are conducted. One judge of the Superior Court of Justice in Ontario recently disclosed that his practice is to meet with the children in the presence of the lawyers for the parties. His Honour meets with the lawyers before the meeting to ask whether there is anything they would like him to put to the child, but his Honour gives no reassurance that those questions will be asked. The lawyers must remain silent throughout the meeting.³⁹³ Presumably, this

³⁸⁷ Ibid, [38] (Huband JA).

³⁸⁸ *Demeter v Demeter* (1996) 133 DLR (4th) 746 (Ont Gen Div).

³⁸⁹ Ibid, [9].

³⁹⁰ Ibid, [12], [13].

³⁹¹ *LEG v AG* (2002) BCJ No 2319 (BCSC).

³⁹² Ibid, [60] (Martinson J).

³⁹³ Comments made by The Honourable Mr Justice George Czutrin during a panel discussion entitled 'Children's Voices: A Judicial Perspective' (5th World Congress on Children's Rights, Halifax,

means the judge is not obliged to disclose any record of what happened in the meeting, as the parties' counsel can hear the proceedings for themselves and report back to their clients.

In Birnbaum and Bala's study the researchers found that all of the judges they spoke with who meet with children from time to time do so in the presence of the child's lawyer, or a court clerk, or both. Most record the meetings, although some reported they do not record the meeting³⁹⁴ and do not disclose to the parties everything the child had told them. All judges inform children that, while they could not promise confidentiality, they would try their best not to provide all the details of what was said to the child's parents. However, judges also recognised that any decision they make needs to be based on legally admissible evidence, and therefore all information disclosed by the child and relevant to the judge's decision needs to be shared with the parties and their counsel.

6.5.5 Commentary

There are some significant limitations to how children's voices are heard in private family law matters in Ontario and, particularly, on the use of judicial meetings with children.

First, despite an order made by a court requesting legal representation for a child or for a report to be prepared, the OCL has authority to decide what services, if any, will be provided. This is unlike Australia and the other countries discussed in this chapter, where the court can order legal representation³⁹⁵ or a welfare report. Aside from privately engaged lawyers for children, costly clinical assessments and judicial meetings with children, all of which are relatively uncommon in proceedings, the services provided by the OCL constitute the most important vehicle for presenting children's views to the court. If a judge has requested, by court order, the assistance of the OCL, the court presumably considers that such intervention is desirable and warranted. The possibility that the OCL can override a judge's recommendation and

Canada, 23-26 August 2009), and also in personal communication with the author on 18 August 2009.

³⁹⁴ This practice appears to be in breach of CLRA s64(3), which requires interviews with children to be recorded. See discussion above at 6.5.2.4.

³⁹⁵ Provided Legal Aid funding is available or the parties are able to pay.

either change the kind of assistance requested or deny any assistance at all does not appear to be in keeping with the best interests of children. Even where the OCL has provided a clinical investigator's report, in circumstances where the report may be outdated at the time of trial, the court cannot simply order an updated report. Again, a request must be made to the OCL, and it is up to the OCL to determine whether a further report will be provided.

Further, it is the policy of the OCL that it will not appoint both a lawyer for the child and a clinical investigator, except in very special circumstances.³⁹⁶ This means that, where a lawyer for the child is appointed, the court will not have the benefit of hearing from a social worker who has interviewed the child. While the lawyer for the child does speak with the child, they do not necessarily have more expert knowledge about children, or skills to elicit or interpret their views, than a judge. Also, despite case law that requires a lawyer for the child to represent the child's views,³⁹⁷ the OCL's own policy states that the lawyer for the child can present the 'circumstances surrounding the child's views', thereby effectively allowing the child's lawyer to advocate a position that does not accord with the child's views.³⁹⁸ This can frustrate the process of presenting a child's views to the court, and it appears that the role of the OCL lawyer for the child is in need of clarification. In these circumstances, speaking with a judge may present the child with a good opportunity to express their views to someone whom they know is going to listen and take those views into account.

Lastly, as in the United Kingdom, there is no specialised family court in Ontario. Judges who hear private family law matters will also hear public family law (welfare) matters, criminal, civil and other matters. It could be said that judges in Ontario lack the special child focus to meet with children in family law matters. However, as discussed in the context of the United Kingdom, it could equally be said that these judges are used to dealing with child witnesses and defendants in different areas of

³⁹⁶ OCL website <<http://www.attorneygeneral.jus.gov.on.ca/english/ocl/about.asp>> at 25 February 2010.

³⁹⁷ *Strobridge v Strobridge* (1992) 10 OR (3d) 540, 540. This was the first instance decision which was affirmed on appeal.

³⁹⁸ OCL, *Policy Statement*, above n 336, [5]; see discussion above.

law, and could therefore be capable and confident of speaking with children to ascertain their views.

Judicial meetings with children remain uncommon in Ontario, as they are in England and Wales and Australia. However, as in those other jurisdictions, there may be a changing trend. The Law Society of Upper Canada hosted a 'Voice of the Child' conference in 2009 and 2010, where many eminent people from the Ontario legal profession and elsewhere spoke, largely in favour, of increased direct participation for children in legal proceedings.³⁹⁹

In January 2010 Birnbaum and Bala presented the findings of their interviews with judges in both Ontario and Ohio at a Judges' Conference in Ontario. As a result, judges convened a working group to discuss the issue of judicial meetings with children,⁴⁰⁰ and the Advocates' Society in that province is developing guidelines for judges meeting with children.⁴⁰¹ At least one senior Ontario judge has publicly expressed support for judicial meetings with children in appropriate circumstances.⁴⁰²

Court resources are a major inhibitor of the extent to which children's views are presented in family law proceedings in Ontario. There are currently no in-house court services or specialised court counsellors to assist judges. This means there is no equivalent of Australia's family consultant available to assist judges in matters involving children's best interests and children's views. The court is entirely reliant on assistance provided by the OCL, unless the child engages a private lawyer or a costly independent assessment is ordered.

6.6 Conclusion

The views of children are significant for decision-making after family separation in all of the jurisdictions discussed. However, the main ways in which children's voices are

³⁹⁹ Law Society of Upper Canada, Family Law - Voice of the Child Conference, Toronto, 5 March 2009 and 10 March 2010. Speakers included researcher Rachel Birnbaum, Dan Goldberg from the OCL and well-known children's lawyer Jeffery Wilson. Law Society of Upper Canada website <<http://ecom.lsuc.on.ca/cpd>> at 24 August 2010.

⁴⁰⁰ Email correspondence from Birnbaum to the author dated 29 January 2010.

⁴⁰¹ Email correspondence from Birnbaum to the author dated 31 December 2010.

⁴⁰² Comments made by The Honourable Mr Justice George Czutrin during a panel discussion entitled 'Children's Voices: a Judicial Perspective' (5th World Congress on Children's Rights, Halifax, Canada, 23-26 August 2009).

heard differ. The two jurisdictions that legislatively protect a child's right to have 'reasonable opportunities' to express themselves, New Zealand⁴⁰³ and Scotland,⁴⁰⁴ are also the two countries in which judges speak with children regularly. The other jurisdictions discussed in this chapter have legislation requiring the court to take account of children's views, but they do not specifically afford children a right to express their views. It could be that judges in New Zealand and Scotland are therefore under greater pressure to ensure that children are provided with the opportunity to express themselves, which makes them more willing to meet with children directly. This is, perhaps, a tenuous link, as all the jurisdictions discussed require the court to have listened to children's views and take them into account. It is submitted, therefore, that the more likely reason that judges in some jurisdictions are more willing to meet with children than in others is simply a difference in judicial culture.

Even within jurisdictions where judges meet with children from time to time, there is no consistency as to how such meetings occur. Judges employ a variety of different methods to govern who is present during the meeting, how notes of the meeting are taken and how the result of the meeting is reported back to the parties. The individual exercise of judicial discretion to fit the particular requirements of each case appears to be an important aspect of judicial meetings with children. Judges in all the jurisdictions discussed appear to be aware of the various concerns about judicial meetings with children. Those who do speak with children, far from ignoring those concerns, ensure that meetings are conducted in such a way that the concerns are not a problem. From experience, they have shown that the expressed concerns have rarely (if ever) proved to be a problem.

In all jurisdictions discussed, other evidence of the children's views is available. Therefore, it cannot be said that judges speak with children because other evidence is unavailable. In New Zealand, the court may not have expert evidence but will have evidence from the child's lawyer. In the United Kingdom, the child may not have a representative, but a CAFCASS officer will generally have provided a report. In

⁴⁰³ COCA s6(2)(a).

⁴⁰⁴ *Children (Scotland) Act 1995* s11(7)(b)(i).

Canada, there may be either a lawyer for the child and/or an expert report. There appears to be no correlation between the amount of evidence available to the court and the frequency with which judges speak with children. Again, it appears that the only factor which dictates whether or not judges in a particular country are willing to meet with children, is judicial culture.

Worldwide, support for the idea of judicial meetings with children is gaining momentum. The Family Court in Israel, for example, recently trialled a project whereby children were invited to attend the first court date and elect the manner in which they wished their voice to be heard by the judge. This included the option to meet with the judge directly.⁴⁰⁵ After positive responses from judges, children, parents and social workers,⁴⁰⁶ the project has been extended to several registries and implemented in regulations, which are awaiting final approval to apply throughout that country's family law system.⁴⁰⁷

At the 5th World Congress on Family Law and Children's Rights in Halifax in 2009, a panel of five judges, each from a different country, spoke about their individual and their judiciaries' attitudes to meeting with children.⁴⁰⁸ Of the five judges who spoke, four were largely in favour of the practice in appropriate cases. At the end of the conference, the World Congress passed the following resolution:

Resolution

20

The Congress supports the following proposals:

- a) When a judge is hearing a case concerning a child, the judge give consideration to hearing from the child directly.
- b) Whether the judge hears from the child shall depend on the child's age and maturity, whether the child wishes to see the judge, and all other relevant circumstances including whether other material is available.

⁴⁰⁵ T Morag, 'Children's Participation in Family Court Proceedings: Lessons from a Pilot Project in Israel' (Paper presented at the 5th World Congress on Family Law and Children's Rights, Halifax, 23-26 August 2009).

⁴⁰⁶ Y Sorek and D Rivkin, *Evaluation of a Pilot Project of Children's Participation in Family Court Proceedings* (2010).

⁴⁰⁷ Email correspondence from Dr Tamar Morag, Chair, Legislative Subcommittee on Children and Families - the CRC Legislation, who headed the project, to the author dated 8 February 2011.

⁴⁰⁸ Panel discussion entitled 'Children's Voices: A Judicial Perspective' (5th World Congress on Family Law and Children's Rights, Halifax, Canada, 23-26 August 2009).

c) Judicial training in the area of child witnesses.⁴⁰⁹

The implementation of guidelines for judges meeting with children in New Zealand and, recently, the United Kingdom, also supports the argument that judicial meetings with children are becoming increasingly accepted and encouraged in many countries throughout the world. The principals of the Family Courts in both those jurisdictions have been vocal in their support for the practice and this, no doubt, will influence the culture surrounding the issue of judicial meetings in those countries. The steps that have been taken in New Zealand and the United Kingdom to encourage increased judicial meetings with children must be contrasted with the situation in Australia, where the Chief Justice of the FCA has expressed disapproval of judicial meetings with children,⁴¹⁰ and has recently authorised the omission of the only statutory provision specifically dealing with judicial meetings.⁴¹¹ While the Chief Justice has not taken any steps to outlaw or discredit the practice of judges meeting with children, her attitude to the practice cannot but influence judicial attitudes. For example, the implementation of Australian guidelines in relation to judicial meetings with children, which once seemed imminent,⁴¹² is now a distant concept.⁴¹³

⁴⁰⁹ 5th World Congress on Family Law and Children's Rights, Halifax, Canada, 23-26 August 2009, Resolution 20.

⁴¹⁰ S Lunn, 'Judges Urged to Talk to Kids in Family Disputes', *The Australian* (Sydney), 11 July 2008, 7.

⁴¹¹ As noted earlier, Rule 15.03 of the *Family Law Rules* 2004 (Cth), which dealt with 'judicial interviews' with children, was omitted by the *Family Law Amendment Rules* 2010 (Cth). Rule 15.03 and its predecessors have been present in the Rules of Court since the *Family Law Rules* 1984 (Cth) (now repealed). See Chapter Three for further discussion.

⁴¹² M Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings*, Family Court of Australia (2007) 50, where it is stated, 'At the time of writing this publication, Family Court judges were considering a set of draft guidelines to assist them when interviewing children'. To date, no such guidelines have eventuated.

⁴¹³ However, see Chapter Five where 65% of respondents to the author's survey of family law judicial officers indicated they were in favour of guidelines being implemented.

Chapter Seven

7 Recommendations and conclusions

7.1 Introduction

This chapter sets out the conclusions to this thesis and recommendations for the future. It is recommended that several reforms be made to family law and practice. These include amendments to the *Family Law Act* 1975 (Cth) ('FLA'), the implementation of guidelines for judges meeting with children, further education for judges in a number of areas and studies of the experiences of children and judges who have participated in judicial meetings. The recommendations are set out below, followed by the conclusions to the research.

7.2 Amendments to the Family Law Act 1975 (Cth)

7.2.1 Incorporating Article 12 of the United Nations Convention on the Rights of the Child

In Chapter Two, Australia's failure to implement Article 12 of the *United Nations Convention on the Rights of the Child* ('UNCRC')¹ was discussed. While the FLA contains a requirement that the court consider any views expressed by a child,² it does not afford children a statutory right to be heard in proceedings. The UN Committee on the Rights of the Child has recommended that the right of a child to express their views in all matters affecting them be expressly included in the FLA.³

Australia's ratification of the UNCRC is an important statement of commitment to children's rights. Nevertheless, the UNCRC has no legal effect within Australia unless implemented in domestic law.⁴ As party to the Convention, Australia has agreed to take all measures to implement the rights recognised in the UNCRC.⁵ It is

¹ *United Nations Convention on the Rights of the Child* ('UNCRC'), opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

² FLA s60CC(3)(a).

³ United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Australia* [30] CRC/C/15/Add.268 (2005).

⁴ See discussion in Chapter Two.

⁵ UNCRC Article 4.

recommended that Australia implement Article 12 of the UNCRC in the FLA as a matter of priority.

This could be achieved by inserting the following section in Part VII of the FLA:

Children's right to express their views

- a) In proceedings under this Part, a child has a right to express his or her views in all matters affecting the child.
- b) For the purposes of subsection (a), a child will be provided with reasonable opportunities to be heard in the proceedings.

This section would give legislative force to Article 12 of the UNCRC, and particularly affords children 'reasonable opportunities to be heard'. In this regard, it is similar to section 6 of the *Care of Children Act* 2004 (NZ) and section 11(7) of the *Children (Scotland) Act* 1995. The proposed section does not contain the qualification that a child has the right to express his or her views 'either directly or through a representative or appropriate body', which is the wording that appears in Article 12. The UN Committee on the Rights of the Child has made clear that whether a child expresses themselves directly or through a representative is a matter for the child to decide.⁶ It is not considered desirable to add the qualification to the section, as the qualification may be misinterpreted, and used as a justification to deny children who wish to be heard directly the right to do so.

The section, as drafted, means that children, regardless of their age, maturity or circumstances, have the right to express their views and must be given reasonable opportunities to do so. This is in keeping with leading case authority on children's views in Australia. Cases such as *Joannou and Joannou*⁷ and *H and W*⁸ affirmed that

⁶ United Nations Committee on the Rights of the Child, *General Comment no. 12: The Right of the Child to be Heard*, [35], CRC/C/GC/12 (2009).

⁷ *Joannou and Joannou* (1985) FLC 91-642.

⁸ *H and W* (1995) FLC 92-598.

a court must ascertain and consider a child's views,⁹ regardless of the age of the child.¹⁰

It was also argued in Chapter Two that there is no justification for the placement of the court's requirement to take children's views into account in the list of 'additional',¹¹ considerations in section 60CC(3) of the FLA. As discussed, in deciding what parenting orders to make for a child, the court must regard the child's best interests as the paramount consideration.¹² Section 60CC lists matters the court is to consider when determining what is in a child's best interests.¹³ Those matters are divided into 'primary' and 'additional' considerations. 'Any views expressed by the child' is listed as an additional consideration. The primary considerations are intended to be more important than the additional considerations in the determination of children's proceedings.¹⁴ As was argued in Chapter Two, it cannot be said that children's views are of less importance than the two primary considerations.¹⁵ Indeed, all three considerations reflect important rights of children that are enshrined in the UNCRC.¹⁶

It has been said that consideration of some of the 'additional' factors may assist the court to determine the significance of the primary factors.¹⁷ As argued in Chapter Two, there is a clear correlation between some of the additional considerations and

⁹ The weight to be given to a child's views, however, will be determined with regard to factors the court considers relevant, such as the child's maturity or level of understanding (FLA s60CC(3)(a)).

¹⁰ This is subject to the qualification that no-one can require a child to express his or her views in relation to any matter (FLA s60CE).

¹¹ FLA s60CC(3) lists the 'additional' considerations, including 'any views expressed by a child...'.

¹² FLA s60CA.

¹³ FLA s60CC(1).

¹⁴ Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth) [49]; Commonwealth, *Government Response to the Senate Legal and Constitutional Legislation Committee Report on the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) 2 <<http://aph.gov.au/>>. See Chapter Two for further discussion.

¹⁵ The primary considerations are the benefit to the child of having a meaningful relationship with each parent (FLA s60CC(2)(a)) and the need to protect the child from physical or psychological harm (s60CC(2)(b)).

¹⁶ FLA s60CC(2)(a) is reflective of UNCRC Art9.3, the child's right to maintain personal relations and direct contact with both parents. FLA s60CC(2)(b) is reflective of UNCRC Art19.1, the obligation to protect children from all forms of violence, injury, abuse, neglect, maltreatment or exploitation. FLA s60CC(3)(a), the requirement to consider any views expressed by the child, is reflective (but does not implement) UNCRC Art12.1, the child's right to express their views in all matters affecting them.

¹⁷ P Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers' (2006) 20 *Australian Journal of Family Law* 179, 183.

the primary considerations. However, it is not clear how the views of a child can help the court to determine the significance of the primary considerations. A child's views will be largely irrelevant in determining the need to protect the child from harm, as the court will seek to protect the child regardless of the child's views on the matter. A child's views may be relevant to the court's consideration of the benefit of a meaningful relationship between the child and their parents, however a child's views are of no more relevance to this issue than they are to any additional consideration in FLA section 60CC(3).¹⁸

The two primary considerations are also listed as 'objects' of Part VII of the FLA pursuant to section 60B. The objects help to guide the court in its interpretation of the considerations and its determination of what is in a child's best interests.¹⁹ A decision that promotes the objects of Part VII is to be preferred to one that does not.²⁰ It is recommended that, if Parliament is to maintain the divide between primary and additional considerations in section 60CC, children's views be included both as a primary consideration under section 60CC(2) and as an object of Part VII in section 60B.

The Commonwealth Attorney-General recently proposed several amendments to the FLA, intended to give greater emphasis to the need to protect children from harm. One proposed amendment is to insert a new 'object' of section 60B which states:

(4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.²¹

The intended effect of this amendment is 'that decision-makers, including family courts, must take account of the Convention on the Rights of the Child when dealing with matters in relation to children under Part VII of the Act'.²²

¹⁸ See Chapter Two for full discussion of this issue.

¹⁹ FLA s60B(1); *B and B: Family Law Reform Act 1995* (1997) FLC 92-755; Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers', above n17, 182.

²⁰ Ibid.

²¹ Exposure Draft, Family Law Amendment (Family Violence) Bill 2010 (Cth), Item 13.

²² Consultation Paper, Exposure Draft, Family Law Amendment (Family Violence) Bill 2010 (Cth), [2].

The proposed amendment to section 60B is a welcome development. However, the Full Court has previously held that section 60B provides guidance to the court, while not significantly affecting the way in which decisions for children are made.²³ It is recommended that this amendment to section 60B take place in addition to the other legislative amendments proposed in this chapter.

7.2.2 Amending section 60CD(2)

There is currently no express recognition, in legislation or in the Rules of Court,²⁴ of a judge's ability to meet with a child. It is recommended that section 60CD(2), which lists the various ways in which a court may inform itself of views expressed by a child, be amended to specifically refer to a meeting between a judge and a child. It is suggested that the section be amended to state:

60CD(2) How the court may inform itself of views expressed by a child

The court may inform itself of views expressed by a child:

- a) by having regard to anything contained in a report given to the court under subsection 62G(2); or
- b) by making an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or
- c) by a meeting between the judicial officer and the child; or
- d) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

Children may not be aware of the possibility of meeting with a judge. It is further recommended that, in order to facilitate this proposed amendment, the *Guidelines for Independent Children's Lawyers* ('ICL guidelines')²⁵ also be amended to include a statement that an ICL must discuss with the child the option of meeting with a judge.

²³ See decision of the Full Court in *B and B: Family Law Reform Act 1995* (1997) FLC 92-755, particularly at 84,220 where the Full Court said, in relation to s60B, 'The object contained in sub-section (1) can be regarded as an optimum outcome but is unlikely to be of great value in the adjudication of individual cases. The principles contained in sub-section (2) are more specific but not exhaustive and their importance will vary from case to case. They provide guidance to the Court's consideration of the matters in s 68F(2) (**now s60CC(2),(3)**) and to the overall requirement of s 65E (**now s60CA**)' (items in bold added).

²⁴ Rule 15.03 of the *Family Law Rules* 2004 (Cth), which stated that a judge may 'interview' a child who is the subject of a case was omitted by the *Family Law Amendment Rules* 2010 (Cth).

²⁵ Family Law Courts, *Guidelines for Independent Children's Lawyers* (2007)

<<http://www.familylawcourts.gov.au/wps/wcm/resources/file/eb02ee0237902cd/ICL%20guidelines-6-12-07.pdf>> at 6 July 2010.

The ICL guidelines already provide that an ICL is to explain to a child ‘how the child can have a say and make his/her views known during the process’²⁶ and that the ICL is to inform a sufficiently mature child who wishes to be directly represented of the option to apply to become a party to the proceedings.²⁷ It is also hoped that this amendment to the ICL guidelines may give greater encouragement to ICLs to meet with children. Whilst the ICL guidelines already state that ICLs are expected to meet with children in all cases,²⁸ this does not always occur.

The proposed amendment to the ICL guidelines is in keeping with Guideline 4.5 of the author’s Draft Guidelines for Judicial Meetings with Children (discussed below and appearing at Appendix Five) which states that a judge is entitled to expect that an ICL or family consultant (or other expert in children’s welfare) will advise the court as to whether or not the child wishes to meet with the judge.

A requirement for an ICL to apprise the judge of any request made by a child to speak with the judge was in the Practice Direction that accompanied the introduction of the Less Adversarial Trial procedure in 2006.²⁹ That Practice Direction was revoked in 2009.³⁰

7.3 Guidelines for judges meeting with children

7.3.1 Background

It is recommended that the court implement guidelines for judges meeting with children. As discussed in Chapter Six, guidelines have been implemented in New Zealand³¹ and in England and Wales.³² Sixty-five percent of Australian family law

²⁶ Ibid, [5.1].

²⁷ Ibid.

²⁸ Ibid, [6.2], unless the child is under school age or there are exceptional circumstances or significant practical limitations.

²⁹ Family Court of Australia, *Child-related Proceedings (Division 12A)*, Practice Direction No 2 of 2006 (now revoked). See Chapter One for explanation of the Less Adversarial Trial procedure.

³⁰ Practice Direction No 2 of 2006 was revoked by FCA, *Revocation of Children’s Cases Program and Child-related Proceedings (Division 12A) Practice Directions*, Practice Direction No 3 of 2009.

³¹ Family Court of New Zealand, *Judges’ Guidelines: Discussions with Children* (2007) <<http://www.justice.govt.nz/family/practice/guidelines>> at 20 November 2009.

³² Family Justice Council, *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (2010)

judicial officers who responded to the author's survey supported the idea of guidelines for judicial meetings.³³ The implementation of Australian guidelines was recommended by Parkinson and Cashmore,³⁴ and by Hunter.³⁵ Parkinson and Cashmore wrote:

On an issue where views among judges diverge so widely, there is value in guidelines that will not only provide a model of best practice to those judges who do want to meet with children, ...but will also provide reassurance to other judges, and indeed lawyers, who have grave reservations about the matter.³⁶

It is argued that guidelines will provide reassurance and certainty, both to judges who want to speak with children and judges who do not. The issuance of guidelines may lead to greater consistency in the practices of judges who do meet with children from time to time. Offering guidance on how to conduct judicial meetings may encourage some judges, who would otherwise be reluctant, to meet with children in cases where they feel a judicial meeting may be of benefit. The guidelines seek to address and resolve the perceived problems and detriments of judicial meetings as discussed in the literature and by the judicial officers who participated in the author's research study. They allow judges to focus on the key issue of whether a meeting will, in the circumstances of a particular case, promote the child's best interests. At the same time, it is important that judges retain discretion to decide whether or not to meet with children, and how best to do so in the circumstances of the individual case/child.

Drawing on the existing literature and the research carried out in this thesis, the author has written Draft Guidelines for Judicial Meetings with Children ('draft guidelines') which appear below (in sections) and at Appendix Five (as a complete document). The content of the draft guidelines was influenced by and incorporates aspects of a number of sources, including the guidelines of New Zealand³⁷ and England and

<http://www.family-justice-council.org.uk/docs/Guidelines__Judges_seeing_Children.pdf> at 24 August, 2010.

³³ See Chapter Five.

³⁴ P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008), P Parkinson and J Cashmore, 'Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges' (2007) 21 *International Journal of Law, Policy and the Family* 160, 181-185.

³⁵ R Hunter 'Child-related proceedings under Part VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us' (2006) 20 *Australian Journal of Family Law* 227, 243.

³⁶ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n34, 211.

³⁷ Family Court of New Zealand, *Judges' Guidelines: Discussions with Children*, above n31.

Wales,³⁸ guidelines suggested by Parkinson and Cashmore,³⁹ and suggestions for judges speaking with children made by Canadian researchers Birnbaum and Bala.⁴⁰ The results of the author's interviews with four judges of the Family Court of Australia and the survey of family law judicial officers (discussed in Chapter Five) were also relied on.

The draft guidelines adhere to the 'model' for judicial meetings with children which was developed by the author and presented for the consideration of family law judicial officers in the author's survey. The model appears in Chapter Five and in Appendix Four. The model reflects 'best practice' elements of how judicial meetings with children can occur. Those elements are advocated in this thesis.⁴¹ They include judicial meetings not being in substitution for expert reports, the consent of the child being required at all times and the presence of a family consultant to assist with the meeting and report to the court on the outcome of the meeting. The model was approved by many judicial officers who responded to the author's survey, several of whom expressed support for various aspects of the model.⁴²

The draft guidelines do not follow the views of Hunter. Hunter recommended that guidelines be implemented but her suggestions differed significantly from the model.⁴³ Hunter recommended that 'judicial interviews' with children take place only for non-forensic purposes, rather than for 'forensic or diagnostic' purposes.⁴⁴ She advocated the need for parental consent, and for direction about the age and maturity of children who may be interviewed. However, her views converge with the author in some respects, in that she recommended a judge consult the independent children's lawyer ('ICL') before a meeting takes place,⁴⁵ that a family consultant or ICL be

³⁸ Family Justice Council, *Guidelines for Judges Meeting Children*, above n32.

³⁹ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n34.

⁴⁰ R Birnbaum and N Bala, 'Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio' (2010) 24 *International Journal of Law, Policy and the Family* 300, 326-329.

⁴¹ These aspects are discussed in Chapter Four.

⁴² See Chapter Five.

⁴³ Hunter, above n35.

⁴⁴ In this thesis and in the existing literature, 'forensic' is taken to mean 'evidence gathering'. A judicial meeting for a 'non-forensic' purpose is one where the intention is not to hear evidence from a child, but to meet a child or explain the decision to a child.

⁴⁵ Although in this thesis, it is recommended that the judge consult with a family consultant in preference to an ICL.

present during a meeting, and that judges be provided with training in speaking with children.⁴⁶

7.3.2 Explanation of the draft guidelines

The draft guidelines are intended to be simple for ease of reference and utility. If judicial meetings with children become more common and a body of practice develops, the guidelines may need to be reviewed to provide for circumstances that arise from time to time. At present, while judicial meetings with children remain rare, it is undesirable to attempt to provide for every situation, as it is not possible to anticipate what sorts of issues may arise.

The structure of the draft guidelines follows the structure of the court's *Guidelines for Independent Children's Lawyers* ('ICL guidelines').⁴⁷ As with the ICL guidelines, the draft guidelines are divided into sections beginning with a section about the purpose of the guidelines, an introduction and a statement of principles.

⁴⁶ Although Hunter recommended that judicial training must occur before any interviews take place (above n35).

⁴⁷ Family Law Courts, *Guidelines for Independent Children's Lawyers*, above n25.

7.3.2.1 Purpose

Draft Guidelines for Judicial Meetings with Children

1. Purpose

These guidelines are for the use of judges⁴⁸ deciding children's matters under Part VII of the *Family Law Act* 1975 (Cth) ('the Act').

They are intended to give guidance to judges in deciding whether to meet with a child, and in conducting meetings with children. The guidelines recognise that, in some cases, it may be in the best interests of a child to meet with a judge. For example:

- A child may wish to meet with a judge, in order to meet the person who is making decisions for the child's life. The child may wish to satisfy themselves that their views will be heard by the decision-maker and will be taken seriously;
- Hearing directly from a child may give a judge greater understanding of a particular child's needs and interests. Meeting with a child may better enable a judge to determine what is in the child's best interests.

These guidelines are not intended to have the effect of a Practice Direction. The extent to which the guidelines, or any of them, will be followed is within the discretion of individual judges.

The purpose of the draft guidelines, as stated, is to give guidance to judges in deciding whether to meet with a child, and in conducting meetings with children. The guidelines give two examples of situations in which it may be in the best interests of a child to meet with a judge. These include where a child wishes to meet the decision-maker, to satisfy themselves that their views will be heard and taken seriously, and where hearing directly from a child may give a judge greater understanding of the child's needs and help them determine what is in a child's best interests.

Therefore, the guidelines recognise that judicial meetings with children can have benefits for both children (who are given an opportunity to be heard) and judges (who may be assisted in decision-making). This differs from the guidelines in both New Zealand and England and Wales, which are expressed as being solely to benefit children. The purpose of the New Zealand guidelines is to assist the court to fulfil its function pursuant to s6(2)(a) of the *Care of Children Act* 2004 (NZ) to enable children to be given reasonable opportunities to express their views.⁴⁹ There is no equivalent

⁴⁸ In these guidelines, 'judge' includes judges of the Family Court of Australia, federal magistrates of the Federal Magistrates Court of Australia and judges and magistrates of the Family Court of Western Australia.

⁴⁹ Family Court of New Zealand, *Judges' Guidelines: Discussions with Children*, above n31, [4].

legislative provision in Australia. Similarly, the purpose of the guidelines of England and Wales is ‘to encourage judges to enable children to feel more involved and connected with proceedings... and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the Judge’s task’.⁵⁰ Both sets of guidelines refer to children being given ‘opportunities’ to express their views and be involved in proceedings. This is in keeping with States Parties’ obligations under Article 12 of the UNCRC. The UNCRC is specifically referred to later in the draft guidelines for Australia (see 7.3.2.2 below). Neither the New Zealand guidelines nor the guidelines of England and Wales refer to the potential important benefits that can enhance decision-making by judges who meet with children.

The draft guidelines also emphasise that they are not intended to have the effect of a Practice Direction and the extent to which they are, or any part of them is, followed is entirely within the discretion of individual judges. This paragraph has been adopted from a similar statement in the New Zealand guidelines.⁵¹

7.3.2.2 Introduction and statement of principles

Draft Guidelines for Judicial Meetings with Children

2. Introduction

In making an order under Part VII of the Act, the court is required to consider any views expressed by the child (s60CC(3)(a)). Meeting with a child is one method by which the court can inform itself of children’s views. Even in circumstances where the court is not seeking to inform itself of a child’s views, these guidelines recognise that, in certain situations, it may benefit children to meet with a judge.

Ways in which the court may inform itself of the views expressed by a child are listed in s60CD(2) of the Act and include having regard to a report from a family consultant, ordering that the child’s interests be represented by an Independent Lawyer for the Child (‘ICL’) and other means as the court thinks appropriate, subject to the applicable Rules of Court. A judicial meeting with a child is no longer specifically provided for in the *Family Law Rules* 2004 (Cth).⁵² Nevertheless, the option of meeting with a child is still within the discretion of the court in individual cases.

In most cases, the court is informed of children’s views through a report by a family consultant or other expert in children’s welfare. ICLs also play a valuable role in ensuring the court is informed of children’s views. Nothing in these guidelines is

⁵⁰ Family Justice Council, *Guidelines for Judges Meeting Children*, above n32, [Purpose].

⁵¹ Family Court of New Zealand, *Judges’ Guidelines: Discussions with Children*, above n31, [2].

⁵² Rule 15.03 of the *Family Law Rules* 2004 (Cth), which specifically referred to a judicial officer ‘interviewing’ a child, was omitted by the *Family Law Amendment Rules* 2010 (Cth).

intended to replace or diminish the value of reports from family consultants or other child welfare experts, or the role of ICLs. The guidelines relate to circumstances in which a judge determines that a meeting may be an appropriate complement to other methods of hearing children's views.

3. Statement of principles

A judicial meeting with a child is one means of giving effect in family law proceedings to select Articles of the United Nations Convention on the Rights of the Child which state:

Article 3

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 12.1

Parties shall assure to the child who is capable of forming his or her 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.

Article 12.2

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 consistent with the procedural rules of national law.

The introduction to the draft guidelines puts the purpose in context. It was influenced by the introduction to the ICL guidelines. It highlights the court's legislative obligation to take children's views into account, and notes that meeting with a child is only one method of many that the court may employ to hear children's views. The introduction also notes that a judicial meeting may be of benefit to a child, even in situations where the child's views are not sought. This would include situations where a judge meets with a child after a decision has already been made.

Importantly, the introduction states that nothing in the guidelines is intended to replace or diminish the role of the two most valued methods of hearing children's views; reports from child welfare experts and evidence presented by ICLs.

The statement of principles recognises that a judicial meeting with a child is one means of giving effect to the UNCRC. It reproduces Articles 3 (the 'best interests' principle) and Article 12 (which gives children the right to express their views and

participate in proceedings). The statement of principles has been reproduced from the ICL guidelines, which contains an identical statement.⁵³

7.3.2.3 Deciding whether to meet with a child

Draft Guidelines for Judicial Meetings with Children

4. Deciding whether to meet with a child

4.1 In all cases under Part VII of the *Family Law Act* 1975 (Cth), at any time before judgment is delivered, a judge should consider meeting with the child or children who are the subject of the proceedings.

4.2 In considering whether to meet with a child, a judge may take into account:

- a) whether the child has requested to meet with the judge;
- b) the opinions of the family consultant (or other expert in children's welfare, if applicable) and the ICL (if one has been appointed) as to whether the judge should meet with the child;
- c) the age and maturity of the child;
- d) the purpose of any meeting;
- e) the timing and location of any meeting;
- f) the opinion of the parties as to whether the judge should meet with the child;
- g) any other circumstances the judge considers relevant.

4.3 A judge should not meet with a child if to do so would be contrary to the best interests of the child.

4.4 A judge should not meet with a child unless the child has consented to the meeting.

4.5 A judge is entitled to expect that the ICL or family consultant (or other expert in children's welfare) will advise the court as to whether or not the child wishes to meet with the judge.

4.6 A judicial meeting with a child should not be used in substitution for a family report or other expert report as a method for hearing children's views, except in circumstances where a report is not reasonably available.

4.7 A judge may consider recording in the judgment the reasons for his or her decision to meet with the child or, alternatively, to not meet with the child in any given case.

4.8 If a judge denies a child's request to meet with the judge, the judge should consider providing to a child a brief explanation in writing for his or her decision to deny the child's request.

Guideline 4.1 urges judges, in all cases and at any time before judgment is delivered, to consider meeting with a child who is the subject of the proceedings. This guideline

⁵³ Family Law Courts, *Guidelines for Independent Children's Lawyers*, above n25, [3].

was adopted from a resolution of the 5th World Congress on Family Law and Children's Rights.⁵⁴

Guideline 4.2 lists factors a judge may consider in deciding whether to meet with a child. These factors are uncontroversial, and reflect the discussions in this thesis,⁵⁵ as well as the guidelines from both New Zealand,⁵⁶ and England and Wales.⁵⁷ It is recommended that judges take account of the opinion of the family consultant and ICL (if one has been appointed) as to the desirability of a judicial meeting with a child taking place. If, for example, a child is particularly vulnerable or has been subjected to extreme pressure or manipulation from their parents, it is anticipated a family consultant or ICL would recommend that a judicial meeting with the child not proceed.⁵⁸

Guideline 4.3 ensures that the child's best interests are taken into account in deciding on the appropriateness of a judicial meeting with a child. The paramountcy principle (the requirement to consider the best interests of the child as the paramount consideration)⁵⁹ does not govern matters of procedure and evidence that arise during the course of proceedings.⁶⁰ However, a child's best interests will normally be a relevant matter in exercising discretion on procedural matters.⁶¹

The requirements that a child consent to the judicial meeting [4.4] and that a judicial meeting not be in substitution for an expert report except where a report is not reasonably available [4.6], have been advocated throughout this thesis as being necessary elements of a judicial meeting with a child.⁶² These aspects were included

⁵⁴ 5th World Congress on Family Law and Children's Rights, Halifax, 23-26 August 2009, Resolution 20. See Chapter Six for discussion about this resolution.

⁵⁵ Particularly discussions in Chapter Four and Chapter Five.

⁵⁶ Family Court of New Zealand, *Judges' Guidelines: Discussions with Children*, above n31, [4]-[5].

⁵⁷ Family Justice Council, *Guidelines for Judges Meeting Children*, above n32, [1]-[3].

⁵⁸ See fuller discussion in the first part of Chapter Five. However, even if a family consultant were to recommend against a judicial meeting taking place, the judge must consider whether giving the child an opportunity to meet with the judge would be in the best interests of the child, taking into account the child's right to be heard pursuant to Article 12 of the UNCRC (see Chapter Two).

⁵⁹ FLA s60CA.

⁶⁰ See decision of the majority of the High Court of Australia in *Northern Territory of Australia v GPAO* (1999) FLC 92-838.

⁶¹ *B and B (Re Jurisdiction)* (2003) FLC 93-136, 78,272-3. Further, FLA s43(1)(c) requires the court, in exercising jurisdiction under the FLA, to have regard to the need to protect the rights of children and to promote their welfare.

⁶² See particularly the first part of Chapter Five.

in the model presented to participants in the author's survey of family law judicial officers.

Guideline 4.5 states that a judge is entitled to expect that the ICL or family consultant will inform the judge of whether or not the child wishes to meet with the judge. As there are no direct means of communication between a judge and a child, the ICL or family consultant can communicate a judge's request for a meeting to a child, or inform a judge of a child's request to meet with him/her. This guideline has been adopted from the guidelines operating in New Zealand⁶³ and England and Wales.⁶⁴ It is appropriate that the ICL or family consultant take this role, rather than one of the child's parents, to avoid suspicion of parental pressure or manipulation.

The recommendation that a judge record, in his or her judgment, the reasons for the decision to meet or, alternatively, not to meet with a child [4.7] is adapted from the New Zealand guidelines.⁶⁵ It is appropriate, in accordance with due process, that the judge's deliberations about a judicial meeting remain as transparent as possible.

The recommendation that a judge who decides not to meet with a child provide a brief explanation of the decision in writing to the child [4.8] is taken from the guidelines of England and Wales.⁶⁶ Communication of this decision in correspondence from the judge to the child is a demonstration of respect for the child's right to be involved in the proceedings, pursuant to Article 12 of the UNCRC.

7.3.2.4 Meeting with a child during proceedings

Draft Guidelines for Judicial Meetings with Children

5. General procedures to be followed if a judge decides to meet with a child during the proceedings

5.1 Meeting with a child during proceedings

5.1.1 The judge may determine the circumstances of a meeting with a child, including:

- a) at what stage of the proceedings the meeting should take place;

⁶³ Family Court of New Zealand, *Judges' Guidelines: Discussions with Children*, above n31, [5].

⁶⁴ Family Justice Council, *Guidelines for Judges Meeting Children*, above n32, [1].

⁶⁵ Family Court of New Zealand, *Judges' Guidelines: Discussions with Children*, above n31, [6].

This recommends a judge record the reasons for a decision not to meet with a child

⁶⁶ Family Justice Council, *Guidelines for Judges Meeting Children*, above n32, [4].

- b) when the meeting is to take place;
- c) where the meeting is to take place (ie in the judge's chambers, in a closed court or elsewhere);
- d) the purpose of the meeting;
- e) who will be present during the meeting;
- f) who will prepare the child or children for the meeting;
- g) whether to meet with children individually, or in sibling groups, or both;
- h) how the meeting will be recorded.

5.1.2 Other than in exceptional circumstances, a judge should meet with a child in the presence of a family consultant or other expert in children's welfare. The family consultant or other expert may assist during the meeting by reassuring and explaining matters to the child, facilitating the discussion and assisting the judge to ascertain whether any views expressed by the child are genuinely held.

5.1.3 A judge may consider whether to ask the ICL to be present at the meeting. A judge should not meet with a child in the presence of the child's parents or their legal counsel. A judge should never meet with a child alone.

5.1.4 A judicial meeting with a child should be recorded by audio or audio-visual means.

5.1.5 Prior to the commencement of the meeting, the judge should inform the child:

- a) of the purpose of the meeting;
- b) that the child can withdraw their consent to the meeting at any time during the meeting;
- c) that the meeting will be recorded;
- d) that confidentiality cannot be guaranteed, and that their parents and other parties will receive an account of the meeting. The judge should obtain the child's agreement to this;
- e) that it is the judge's responsibility, and not the child's, to make the ultimate decision;
- f) of how the outcome of the decision will be communicated to the child.

At 5.1, the draft guidelines draw together the discussions that appear throughout this thesis on how judicial meetings with children should occur. In particular, the main problems discussed in the literature are addressed,⁶⁷ including recommendations that a judge should not meet with a child alone, and that a family consultant should be present to assist with the meeting and assist the judge to ascertain whether any views expressed by the child are genuinely held.⁶⁸ The value of a family consultant being

⁶⁷ See discussion in the first part of Chapter Five.

⁶⁸ Presumably, any conversation between the family consultant and the judge as to whether the child's views are genuinely held would take place out of the hearing of the child.

present during a judicial meeting with a child was emphasised by Birnbaum and Bala⁶⁹ and Parkinson and Cashmore.⁷⁰

The child must be made aware of the nature and purpose of the meeting, that decision-making responsibility rests with the judge, and that confidentiality cannot be guaranteed. Ensuring that children understand that the judge, and not the child, is responsible for making the ultimate decision and that the child's views are not determinative may reassure children who feel pressured or manipulated by their parents.⁷¹

7.3.2.5 Report to the parties

Draft Guidelines for Judicial Meetings with Children

5. General procedures to be followed if a judge decides to meet with a child during the proceedings

5.2 Report to the parties

5.2.1 The judge should ensure that the parties receive an accurate account of the judicial meeting with the child.

5.2.2 The judge may ask the family consultant or other expert in children's welfare to provide the court with an oral or written report about the judicial meeting with the child.

5.2.3 A judge may consider whether to release an audio or video recording, or transcript, or part thereof, of the judicial meeting with the child to the parties.

5.2.4 The parties should be given an opportunity to respond to the judicial meeting with the child. This may be by way of oral evidence, submissions or cross-examination of the family consultant or other expert in children's welfare.

Principles of natural justice require that the parties receive an accurate account of what happened during the judicial meeting with the child, and are given an opportunity to respond to that information.⁷² However, as the circumstances of each case will vary, it is imperative that judges retain discretion as to how that information is to be communicated to the parties. The judge must ensure that the parties receive all the evidence that may be influential to the judge's decision, but must also ensure

⁶⁹ Birnbaum and Bala, 'Judicial Interviews with Children in Custody and Access Cases', above n40, 327-8.

⁷⁰ Parkinson and Cashmore, *The Voice of a Child in Family Law Disputes*, above n34, 213-4; Parkinson and Cashmore, 'Judicial Conversations with Children in Parenting Disputes', above n34, 184-5.

⁷¹ Birnbaum and Bala, 'Judicial Interviews with Children in Custody and Access Cases', above n40, 328.

⁷² See fuller discussion in first part of Chapter Five.

that it is communicated in a way that causes the least harm to family relationships, promotes the child's best interests and is appropriate in all the circumstances.

Therefore, the draft guidelines recommend that the judge may ask a family consultant to provide a report to the parties on the outcome of the judicial meeting with the child. The judge may also consider whether to release a recording or transcript of the meeting to the parties. The judge may decide not to release the entire recording or transcript. The draft guidelines require the parties be given an opportunity to respond to the outcome of the judicial meeting by way of oral evidence, submissions or cross-examination of the family consultant. This is in keeping with principles of natural justice, and is also found in the guidelines of New Zealand⁷³ and England and Wales.⁷⁴

7.3.2.6 Disclosure

Draft Guidelines for Judicial Meetings with Children

5. General procedures to be followed if a judge decides to meet with a child during the proceedings

5.3 Disclosures by children

5.3.1 If a child, during a meeting with a judge, makes a disclosure and requests it to remain confidential from one or both of their parents or other parties:

- a) if the disclosure is one of child abuse, the judge should explain to the child that the disclosure cannot remain confidential and may be subject to mandatory reporting procedures.
- b) if the disclosure is not one of child abuse, the judge should remind the child of their agreement that confidentiality cannot be guaranteed. If the child does not agree to the disclosure being revealed to the parties, the judge should decide whether to keep the disclosure confidential or whether to reveal the disclosure, notwithstanding the child's request to keep the disclosure confidential.

5.3.2 Where the disclosure is not one of child abuse:

- a) if the disclosure is influential to the decision, the judge may decide to keep the disclosure confidential.
- b) if the disclosure is influential to the decision, the judge should reveal the disclosure to the parties.
- c) if the judge decides to reveal the disclosure to the parties, the judge should inform the child of his or her decision.

⁷³ Family Court of New Zealand, *Judges' Guidelines: Discussions with Children*, above n31, [14].

⁷⁴ Family Justice Council, *Guidelines for Judges Meeting Children*, above n32, [6(iv)].

This part of the draft guidelines reflects the general approach agreed by the majority of family law judicial officers who responded to the author's survey. The vast majority were in agreement that if, during a judicial meeting with a child, the child makes a disclosure of child abuse, that disclosure must be reported to the parties and child welfare authorities in accordance with established mandatory reporting protocols.⁷⁵ The draft guidelines recommend that this be explained to the child in this event.

If a child makes a disclosure, not being a disclosure of abuse, that they wish to remain confidential, many judicial officers who responded to the survey agreed that whether or not the judge is able to keep the child's confidence depends on whether the disclosure is influential to the judge's decision. Over 40 percent of judicial officers agreed that, in the first instance, the judge should remind the child of their agreement that things the child says during the judicial meeting cannot remain confidential. If the child still wishes the disclosure to remain confidential, the draft guidelines suggest that the judge keep the child's confidence (if the information is not influential to the ultimate decision) or reveal the disclosure (if the information is influential to the decision). If the judge decides to reveal the disclosure to the parties, guideline 5.3.4 recommends that the judge inform the child of that decision.

7.3.2.7 Meeting with a child after the conclusion of proceedings

Draft Guidelines for Judicial Meetings with Children

6. Meeting with a child after the conclusion of proceedings

6.1 A judge may decide to meet with a child after the conclusion of proceedings for the purpose of explaining the court's orders and reasoning to the child.

6.2 The judge retains discretion in all circumstances of the meeting, including where the meeting is to take place, when the meeting is to take place (before or after the court's judgment is delivered), who is to be present and whether the meeting is to be recorded.

6.3 No evidence may be gathered during a meeting with a child conducted after the conclusion of proceedings, as the proceedings have ended. If a child expresses any

⁷⁵ A judge is not obliged to report a suspicion of child abuse to a child welfare authority. However, a family consultant or ICL who has reasonable grounds for suspecting that a child has been abused or is at risk of being abused must notify a child welfare authority of his or her suspicion (FLA s67ZA). It is likely a family consultant or ICL will be present during the judicial meeting. If, for some reason, a family consultant or ICL is not present, the judge will presumably ensure that the child speaks with a family consultant or ICL and repeats the disclosure.

views during the meeting, the judge should disregard those views for the purposes of the decision.

6.4 A judge may meet with a child after the conclusion of the proceedings, notwithstanding the fact that the judge may have previously met with the child during the course of the proceedings.

A judge may wish to meet with a child after the conclusion of the proceedings to explain his or her decision and reasoning to the child. This may occur in circumstances where the judge had previously met with the child during the proceedings, and considers it important to explain to the child how their views were taken into account. A judicial meeting after the conclusion of proceedings may also occur in circumstances where the judge has not previously met with the child.

As discussed in Chapter Four, a judge taking time to meet with a child to explain matters to them directly shows respect for the child's right to be involved in proceedings pursuant to Article 12 of the UNCRC. The UN Committee on the Rights of the Child stated that a decision-maker must inform a child of the outcome of proceedings and explain how the child's views were considered in order to adhere to the child's rights under Article 12.⁷⁶ Explaining why a decision promotes the best interests of the child in all the circumstances may assist the child to understand and accept the decision, even in circumstances where the decision does not reflect the child's views.⁷⁷

The draft guidelines make clear that judges retain discretion on all aspects of a judicial meeting with a child that takes place after the conclusion of proceedings, including when and where the meeting will take place, who is to be present and whether the meeting is to be recorded. As the proceedings have been concluded, no evidence arising from the meeting may be taken into account.

7.3.2.8 Discussion

The draft guidelines contain limited background information and little detailed explanation for why certain recommendations are made. For example, there is no explanation as to why it is recommended that certain people be present during a

⁷⁶ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, above n6, [45].

⁷⁷ See fuller discussion in Chapter Four.

judicial meeting, and others not be present. No reasons are given for why children should be given particular information before a meeting takes place. No suggestions are made regarding what sort of information may be appropriate to keep from the parties, and what should be disclosed. The lack of explanatory detail is deliberate, so as not to complicate the guidelines and to ensure they are workable and subject to judicial discretion. It is recommended that, if the draft guidelines are implemented, a paper or explanatory statement be published in conjunction with them to inform judges and others working within the court system of the major issues that have been raised in the discussions in this area. The draft guidelines are to be contrasted with the suggestions made by Birnbaum and Bala and Parkinson and Cashmore in that regard. As the recommendations made by those authors were made in the context of academic publications, the authors were able to provide explanations of their recommendations alongside their suggested guidelines.

The draft guidelines were sent to the Honourable Justice Benjamin, judge of the Family Court of Australia, and the Honourable Justice Thackray, chief judge of the Family Court of Western Australia, for their review and comment. Both judges were of the view that the draft guidelines appear to be workable, and that the structure and wording of the document is appropriate for court guidelines.⁷⁸

7.4 Further education for judges

It is recommended that judges be offered further education and training in two areas. It is important that judges' attention be brought to the benefits of children being involved in decision-making. It is also recommended that training be offered to judges who may wish to meet with children in the future, or who are interested in finding out more about how judges may develop skills in speaking with children.

It is widely recognised that judges can benefit from 'programs of professional development that focus on their legal skills, their practical judicial skills, and their

⁷⁸ The approval by these judges was only in relation to the workability, structure and wording of the draft guidelines. It is not intended to imply that either judge approved of the content of the draft guidelines or believed that guidelines for judicial meetings with children should be implemented in their respective courts.

approach to their work and which help them to maintain fitness and enthusiasm for the work'.⁷⁹ The Chief Justice of the High Court of Australia French CJ said:

The times are long gone when persons appointed to judicial office in the common law world were thought to ascend to the Bench on the date of their appointment, fully equipped with all the knowledge and skills necessary to the judicial task... Judicial education and training upon appointment and during the tenure of judicial office is now a well-established feature of judicial systems around the world.⁸⁰

Former Chief Justice of the High Court of Australia Gleeson CJ (as he then was) agreed that judges are aware of the importance of continuing judicial education, stating that '[t]here was some early resistance within the judiciary but that has disappeared'.⁸¹

The Family Court of Australia and institutions such as the National Judicial College of Australia provide frequent opportunities for judges to gain knowledge and skills in relation to many aspects of their work. It is recommended that they provide judges with further education and training in the areas suggested.

7.4.1 Benefits to children in being involved in decision-making.

In response to the author's survey of Australian family law judicial officers discussed in Chapter Five, 75 percent of respondents indicated they 'don't know' or disagreed that judicial meetings are generally good for children because they make children feel that they have been listened to and taken seriously. There is a wealth of research showing that children want to be involved in decision-making, and that children benefit when they feel that their views have been heard.⁸² Many of these studies were

⁷⁹ National Judicial College of Australia, 'Judicial Education in Australia' (2007) 2, <<http://njca.anu.edu.au/Publications/Documents/Judicial%20Education%20in%20Australia%2007.pdf>> at 11 October 2010.

⁸⁰ Chief Justice R French, 'Judicial Education- A Global Phenomenon' (Presentation to the International Organisation for Judicial Training 4th International Conference on the Training of the Judiciary, Sydney, 26 October 2009), 4 <<http://www.hcourt.gov.au/speeches/frenchcj/frenchcj26oct09.pdf>> at 11 November 2010.

⁸¹ Chief Justice M Gleeson (as he then was), 'Judicial Selection and Training: Two Sides of the One Coin' (2004) 13(1) *Legal Education Digest* 13.

⁸² See, for example, M Gollop, A Smith and N Taylor, 'Children's Involvement in Custody and Access Arrangements after Parental Separation' (2000) 12 *Child and Family Law Quarterly* 383; A Smith, N Taylor and P Tapp, 'Rethinking Children's Involvement in Decision-Making after Parental Separation' (2003) 10 *Childhood* 201; N Taylor, 'What Do We Know about Involving Children and Young People in Family Law Decision Making? A Research Update' (2006) 20 *Australian Journal of Family Law* 154; P Parkinson, J Cashmore and J Single, 'Adolescents' Views on the Fairness of Parenting and Financial Arrangements after Separation' (2005) 43

discussed in Chapter Two. The fact that the majority of respondent judicial officers were unable to agree that children benefit from knowing they have been heard may indicate a lack of knowledge on the part of judicial officers of the relevant literature.

It is clearly desirable that judicial officers be acquainted with relevant literature relating to the welfare of children. It is recommended that research conducted with children about their participation in decision-making be brought to the attention of judges. This could be done through the circulation of relevant publications in this area, or as a component of the court's regular program of continuing judicial education. The Family Court of Australia ('FCA'), for example, conducts regular training for its judicial officers in a wide variety of areas.⁸³ Judges are encouraged to attend seminars on areas pertinent to their role. It is recommended that leading researchers in the area of children's participation be asked to speak at such seminars to inform judges about this important discourse.

7.4.2 Speaking with children and interpreting their views

One of the main problems with judicial meetings with children is that it is perceived, often by judges themselves, that judges lack the skills and training to speak with children appropriately and to accurately interpret their views.⁸⁴ Over 80 percent of judicial officers who responded to the author's survey agreed that judicial officers should undergo training before meeting with children. All four judges interviewed by the author also agreed with this proposition. It is recommended that training be offered, for judges who wish to participate, to develop skills in speaking with children and understanding their circumstances and development, including understanding of the different ways in which children may express themselves.

Family Court Review 429; P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008).

⁸³ Email correspondence from the Honourable Justice Benjamin to the author on 10 December 2010; *ZN and YH and Child Representative* (2002) FLC 93-101, [109] (Nicholson CJ).

⁸⁴ J Cashmore, 'Children's Participation in Family Law Matters' in Hallet and Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (2003), 167; R Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197, 203; J Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 *Virginia Journal of Social Policy and the Law* 129, 154. See discussion in first part of Chapter Five.

As discussed above, the FCA conducts training for its judges in many areas.⁸⁵ Former Chief Justice of the FCA Nicholson CJ (as he then was) endorsed the concept of judges undergoing training in speaking with children.⁸⁶ In *ZN and YH*⁸⁷ his Honour said, '[The FCA] already offers regular judicial training to judges and there is no reason why such training should not be offered as part of that programme (sic)'.⁸⁸

Similarly, appropriate training for judges meeting with children could also be provided by the National Judicial College of Australia ('NJCA').⁸⁹ The NJCA provides educational programs and resources to judicial officers throughout Australia. Its value as a provider of judicial education programs dealing with practical skills and educational development has been endorsed by the former Chief Justice of the High Court⁹⁰ and the former Attorney-General of Australia.⁹¹ The NJCA has not, to date, conducted a program on skills in speaking with children. However, programs have been run in related areas including child development and how to deal with child witnesses.⁹² The NJCA has indicated it would be willing to organise, or assist the court to organise, an educational program on meeting with children should the court so request.⁹³

7.5 Study of outcomes for children and judges

This thesis argues that judicial meetings with children have benefits both for children and for the judicial decision-making process. Children may benefit from being given an opportunity to speak directly with the decision-maker and judges may be able to make better decisions as a result of meeting with children in appropriate

⁸⁵ Email correspondence from the Honourable Justice Benjamin to the author on 10 December 2010.

⁸⁶ Chief Justice A Nicholson (as he then was), 'Family Law Reform: How Much Real Reform is Involved? Does It Take Us Forward or Backwards?' (Paper presented to the ACT Council of Social Services, Canberra, 17 August 2006) 22.

⁸⁷ *ZN and YH and Child Representative* (2002) FLC 93-101.

⁸⁸ *Ibid*, [109] (Nicholson CJ).

⁸⁹ Email correspondence from John McGinness, Director, National Judicial College of Australia, to the author dated 17 November 2010.

⁹⁰ Gleeson CJ (as he then was), above n81, 14.

⁹¹ Attorney-General P Ruddock (as he then was), 'Official Opening' (presentation at the Colloquium of the Judicial Conference of Australia, Adelaide, October 2004).

⁹² National Judicial College of Australia, Judicial Seminar on Child Witnesses, Darwin, 26 November 2007; National Judicial College of Australia, Annual Orientation Program for Magistrates.

⁹³ Email correspondence from John McGinness, Director, National Judicial College of Australia, to the author dated 17 November 2010.

circumstances. It is recommended that studies be conducted with both children and judges about their experiences of judicial meetings.

Many studies have found that children wish to have more of a say in decision-making.⁹⁴ Others have found that children want to be given the opportunity to speak with the ultimate decision-maker.⁹⁵ However, few studies to date have sought to discover whether children who were given the opportunity to meet with judges in family law proceedings felt that the process was beneficial. For example, it would be useful to discover whether participating in a meeting, or being given the opportunity to do so, made children feel that their views had been heard and taken seriously.

Canadian researchers Birnbaum, Bala and Cyr are conducting a study that examines this issue, along with the broader issue of children's experiences of their participation in family law proceedings generally. They are in the process of interviewing children who have been the subject of family law proceedings and have participated in a judicial meeting, were represented by a lawyer or were interviewed by a child welfare expert in Ohio, USA and Quebec and Ontario, Canada. The study has not concluded, but preliminary results suggest that children who met with a judge, whilst initially feeling anxious, were pleased they had been given an opportunity to meet with the decision-maker.⁹⁶ Some children who were not given the opportunity to meet with the judge said they would have liked to have been given the opportunity notwithstanding that their views had also been presented through other methods.⁹⁷

The Family Court in Israel recently evaluated a pilot project which trialled changes to the way children participate in court proceedings. The project involved inviting

⁹⁴ See, for example, Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report no 84 (1997); C Smart, A Wade and B Neale, 'Objects of Concern? Children and Divorce' (1999) 11 *Child and Family Law Quarterly* 365; V Morrow, *Understanding Families: Children's Perspectives*, National Children's Bureau (1998); M Gollop, N Taylor and A Smith, 'Children's Perspectives of their Parents' Separation' in A Smith, N Taylor and M Gollop (eds), *Children's Voices: Research, Policy and Practice* (2000). See detailed discussion of these and other studies in Chapter Two.

⁹⁵ See, for example, P Parkinson, J Cashmore and J Single, 'Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia' (2007) 21 *International Journal of Law, Policy and the Family* 84.

⁹⁶ Email correspondence from Birnbaum to the author on 10 December 2010; R Birnbaum, N Bala and F Cyr, 'Children's Experiences with Family Justice Professionals and Judges: A Comparative Analysis of Ontario and Ohio' (Paper presented at the Ontario Bar Association Family Law Boot Camp, Toronto, 4 February 2011).

⁹⁷ *Ibid.*

children to attend the first court date and elect the manner in which they wished their views to be heard.⁹⁸ Children were given the option to meet with a judge if they wished.⁹⁹ The evaluation involved a combination of feedback forms and interviews with children, judges, parents, social workers and other court officers about their views and experiences of the project.

The focus of the evaluation was the implementation of the regulations accompanying the project, and the attitudes of workers and participants in the court system to the new processes. For example, data were collected on how many children exercised their right to have their views heard by a judge or social worker, whether parents received adequate information about the process and whether children received an explanation of the final decision from a judge or social worker (which was required by the regulations).¹⁰⁰ The evaluation presented very little information about children's experiences of meeting with judges. Some relevant data were the reasons children disclosed for wanting to meet with judges.¹⁰¹ Children were also asked to comment on whether they thought being given the opportunity to participate in proceedings was a good idea and, if so, why they thought participation had been beneficial.¹⁰² Notably, 93 percent of children who participated in the evaluation study thought that inviting them to participate in proceedings was a good idea.¹⁰³ This information is a pertinent and helpful addition to the discourse about children's participation in court proceedings, but does not directly relate to children's experiences of meeting with judges in particular.

Some data were collected about the observations of social workers of children who participated in judicial meetings. The data were presented in the evaluation as follows:

⁹⁸ T Morag, 'Children's Participation in Family Court Proceedings: Lessons from a Pilot Project in Israel' (Paper presented at the 5th World Congress on Family Law and Children's Rights, Halifax, 23-26 August 2009).

⁹⁹ Ibid, Y Sorek and D Rivkin, *Evaluation of a Pilot Project of Children's Participation in Family Court Proceedings* (2010) i.

¹⁰⁰ Y Sorek and D Rivkin, *Evaluation of a Pilot Project of Children's Participation in Family Court Proceedings* (2010), iii-v.

¹⁰¹ Ibid, iv.

¹⁰² Ibid

¹⁰³ Ibid.

CP [children's participation] social workers reported that most of the children felt comfortable at the CP meetings with them and the judge; 70% of the children expressed themselves easily, and 69% seemed relaxed. Some children did not seem to feel comfortable: 25% were seen as tense and 23% voiced anxiety over their parents' reactions.¹⁰⁴

Both the Canadian study and the Israel pilot evaluation provide valuable information about children's opinions of how their views are represented (or not represented) in family law disputes. Nevertheless, it is recommended that a specific study on children's experiences of judicial meetings be conducted. In particular, it would be useful to discover whether children who were given the opportunity to meet with judges feel that the experience was worthwhile. Australian judges have also expressed strong concerns that judicial meetings with children will lead to attempts by parents to manipulate or pressure their children. It would be prudent to discover whether children who met with judges felt that they had been manipulated or pressured.

As judicial meetings with children in Australia are so rare, it is impossible to carry out a study of children's views on judicial meetings at this time. However, it is recommended that a study on this issue be carried out in a jurisdiction where judges meet with children regularly, such as New Zealand. No such study has been conducted in New Zealand, although the Chief Judge has expressed his in-principle support.¹⁰⁵ It is acknowledged that there are several pragmatic and ethical difficulties associated with conducting such research. These include practical problems of locating a relevant cohort of participants, securing consent from both parents and children, issues of confidentiality and privacy, ethical issues of interviewing children and the time which had elapsed since the proceedings. It would, however, be desirable to surmount these difficulties because of the important nature of the research.¹⁰⁶

¹⁰⁴ Ibid.

¹⁰⁵ Personal communication between the author and the Principal Judge of the Family Court of New Zealand, 18 September 2009.

¹⁰⁶ It is noted that similar studies, which involved asking parents and children about their experiences of family law proceedings, were conducted in the Family Court of Australia's evaluations of the Children's Cases Pilot Program and the Child Responsive Program (J McIntosh, *The Children's Cases Pilot Project: Final Report to the Family Court of Australia* (2006); J McIntosh and C Long, *The Child Responsive Program Operating within the Less Adversarial Trial: A Follow Up Study of Parent and Child Outcomes* (2007).

In relation to whether meeting with children leads to better decisions, there have been numerous studies in other jurisdictions where judges have expressed approval of the practice of judicial meetings with children.¹⁰⁷ However, aside from anecdotal accounts from judges who found meeting with children assisted them in making a decision, the author is not aware of any study in the world that has sought to discover whether conducting judicial meetings with children leads to a better quality of decision-making overall.

The evaluation of Israel's pilot project of children's participation did not attempt to examine how judicial meetings with children had influenced the judicial process and rulings.¹⁰⁸ Nevertheless, some data on judges' views about how judicial meetings had influenced their decisions were collected. The evaluation noted:

[J]udges reported that for 54% of the children with whom they had met, the meeting had helped them understand the case or shed a different light on it. In a few cases, it had led to a change in the legal proceedings, e.g., it had caused one of the parents to withdraw a custody suit. In in-depth interviews, some judges said that the child's participation had contributed little and not affected their views on the case. Other judges said that Child Participation had occasionally been significant to the judicial proceedings and decisive for the ruling.¹⁰⁹

It is recommended that, if judicial meetings with children in Australia increase in frequency, a study is carried out with judges and children who have participated in judicial meetings to learn about their experiences and views of the process.

7.6 Conclusions

This thesis has provided a detailed analysis of the issues surrounding the little-used practice of judicial meetings with children in Australia. It has drawn on international literature and original empirical research to establish that judicial meetings with children potentially have a significant role to play in Australian family law proceedings.

¹⁰⁷ See, for example, the results of interviews with Ohio judges in Birnbaum and Bala, 'Judicial Interviews with Children in Custody and Access Cases', above n40; M Cochrane, 'Children's Views and Participation in Decision-Making' (2006) 5 *New Zealand Family Law Journal* 183; F Raitt, 'Hearing Children in Family Law Proceedings: Can Judges Make a Difference?' (2007) 19 *Child and Family Law Quarterly* 204.

¹⁰⁸ Sorek and Rivkin, above n100, vi

¹⁰⁹ Ibid.

Meetings between judges and children are an important recognition of the child's right, enshrined in an international convention, to express their views and be heard in any proceedings that affect them. Further, the court has a legislative obligation to take children's views into account in making parenting orders that promote the best interests of the child. The importance of hearing evidence of children's views has consistently been affirmed in case law and by individual judges, evidenced by the results of the author's empirical study. It is important that judges receive evidence of children's views that is current and accurate. Many judges have agreed that, in appropriate cases, judicial meetings can provide valuable evidence of children's views and help them to make better decisions for individual children. This thesis has argued that if judges do not consider the desirability of meeting with children who are the subject of proceedings, they risk making a decision that is not based on the best evidence available, and one that may not reflect the child's best interests.

Children have consistently expressed a desire to 'have a say' in decisions that affect them, and many have voiced dissatisfaction about the ways in which their views are heard by the court. Children are unhappy about the 'filtering' of their views by report writers, and are frustrated that Independent Children's Lawyers are not appointed in every case, often do not meet with children and, in any event, do not act on the instructions of a child. Children have said that they want to be given the opportunity to participate directly in proceedings. None of the common methods by which children's views are heard allow children to participate directly. Many children want to be given the opportunity to speak directly with judges who are deciding their matters. They feel that allowing the judge to meet them and hear their views without a third party filter will result in better decisions being made. This study has highlighted research which shows that children who feel that their views have been listened to and taken into account are more likely to accept and adhere to the final decision, even where that decision does not reflect their views.

This thesis has emphasised that all the methods by which evidence of children's views are presented to the court are very important. While each method may have limitations, it may yield new information about the nature, validity and strength of the child's views. It has been shown that judicial meetings can be a valuable complementary measure to these established methods. Judicial meetings allow judges

to hear directly from children and satisfy children that their voices have been heard. It is appropriate that judges take advantage of these benefits while continuing to make use of the valuable evidence that can be gained through other methods of hearing children's views. In particular, evidence in reports from a family consultant or other expert in children's welfare may be particularly reliable. Report writers have the relevant expertise to express opinions about the veracity and strength of views expressed by a child. Further, report writers are able to observe children in the context of their family surroundings and relationships.

The empirical data gained from the author's survey and interviews with judges are an original and fertile source of information. They provide significant insights into the views of Australian judges about meeting with children. The data confirm the commonly-held view that Australian judges are generally reluctant to meet with children, and that the few judges who meet with children do not do so often. This study found that the vast majority of judges had never met with a child for the purposes of hearing the child's views, and a majority indicated they would be unlikely to do so in the future.

Nevertheless, the study also found that many judges had a positive attitude to the concept of judicial meetings and were keen to suggest ways to overcome their concerns about the practice. Many judges recognised that meetings with children may give the court valuable evidence that may not be available through other methods of hearing children's views. Judges also thought that meeting with children may allow judges to understand more about a particular child's needs and interests. Presumably, this meant that many judges believed that judicial meetings with children in appropriate situations could lead to better decisions being made in the circumstances of a case.

It has been argued that the problems and detriments that have been identified as consequences of judicial meetings can be managed, and any negative results minimised. First, a suggested model for how judicial meetings should take place was put forward. The model is also reflected in the draft guidelines discussed earlier in this chapter. The model includes features such as the presence of a family consultant to provide expert opinion, assist the child and the judge, and provide an account of the meeting to the parties. It also advocates the necessity of the child's consent to a

meeting taking place. These features help to allay the problems that have been raised in the literature about due process, intimidation of children and judges' lack of skill in speaking with children. Second, the data collected in the empirical study showed that the problem of due process and the dilemma of what to say to a child who requests that the content of a meeting remain confidential were not as troublesome for judges as the literature suggests. Many judges were confident that they could overcome these problems, should they arise. Third, in some comparable jurisdictions, judicial meetings with children take place frequently, without controversy and, anecdotally, with good results. Judges in jurisdictions such as New Zealand and Scotland have shown that they are able to deal with factors that are perceived to be of concern in Australia, such as due process and confidentiality. In those jurisdictions, there appears to be a fair level of trust and confidence in the ability of judges to meet with children in suitable cases and in an appropriate way. Perceived disadvantages of judicial meetings in those jurisdictions appear to be outweighed by the court's recognition of its duty to give children opportunities to be heard, and the court's strong emphasis on the importance of listening to children and taking their views seriously.

It is acknowledged that the prevailing concerns for Australian judges, as evidenced by the results of the empirical study, were the perception that judges lack the skills and training to meet with children, and that judicial meetings with children may encourage parents to manipulate or pressure their children. There was strong support from judges for guidelines to be enacted and for training to be provided for judges who wish to meet with children. Similar views have been expressed by judges and courts in all the international jurisdictions examined in this thesis. Steps are being taken in Ontario, Canada, to draft guidelines for judges meeting with children. The United Kingdom and New Zealand have already enacted guidelines. Training for judges who wish to meet with children has been acknowledged as an appropriate step in all these countries.

The recommendations made in this thesis are consistent with international benchmarks and international literature about judicial meetings with children. The recommendations are also based on the results of the author's empirical study. It is

argued that the proposed reforms to Australian family law and practice are apposite and timely, and that they should be implemented as a matter of priority.

Internationally, many jurisdictions are taking active steps to encourage judicial meetings with children. These steps are not being taken in Australia. The results of the author's empirical study disclosed a significant number of Australian judges who are completely opposed to judicial meetings with children. It is emphasised that this thesis is not intended to compromise the independence of the judiciary or judicial discretion. Judges who do not wish to meet with children should not be compelled to do so. Whether or not a judge should meet with a child in a particular case should be a matter entirely within the discretion of the judge.

This thesis has identified key areas for future research. The results of this future research will be an important addition to the growing body of knowledge in this area, and may lead to a change in the attitudes of judges who are opposed to meetings with children. In any event, it is hoped that this thesis will encourage greater discussion in Australia about the benefits of judicial meetings with children. Ultimately, it may contribute to a change in judicial culture so that Australian family law judicial officers routinely consider whether it would be in the best interests of the child to meet with the judge.

Appendix One

United Nations Convention on the Rights of the Child (Selected Articles)

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

Entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

.....

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

.....

Article 12

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.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

.....

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational 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.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

.....

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- (a) The law of a State party; or
- (b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention.// The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

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Appendix Two

Information sheet for interviews with four FCA judges

Faculty of Law
University of Tasmania
Private Bag 89
Hobart 7001

The Honourable Justice
Family Court of Australia
..... Registry
Address

Date

Dear Judge

Request for Interview for PhD Study: The Views of Four Australian Family Court Judges on the Practice of Judicial Conferencing with Children

I am a former family lawyer and current PhD candidate at the University of Tasmania. My thesis explores the rarely utilised practice of judges speaking directly with children, or 'judicial conferencing'.

My thesis will include a study of the views of Australian Family Court Judges and Federal Magistrates about judicial conferencing. The available research suggests judicial officers are generally reluctant to speak directly with children. I am interested in finding out specific opinions, experiences and concerns about the practice, with a view to researching whether those concerns can be addressed. My study will be in two parts:

Part One- Separate interviews with four Family Court Judges who have diverse views on judicial conferencing. This will be a qualitative study, to record the views expressed by individual judges.

Part Two- A simple survey, based on the results of the interviews, sent to all Family Court Judges (including the Family Court of WA) and Federal Magistrates. Amongst other things, participants will be asked whether they agree with various responses provided by the judges interviewed in Part One. This will be a quantitative survey to ascertain majority viewpoints.

Your name was put forward by Justice Robert Benjamin for one of the four possible interviewees for Part One of my study. Justice Benjamin provides assistance and advice on my research. I am writing to enquire whether you would be willing to be interviewed and provide your personal views and experiences on the issue of judges speaking with children. Your responses, and the responses of the other interviewees, will be included in my thesis and also be used as a basis for the survey in Part Two of

my study. I may also refer to your responses in one or more articles to be submitted for publication in journals, and in presentations at conferences.

This will be an original study and provide important insights into why judicial conferencing in Australia remains rare, while it is embraced in some other jurisdictions. I will be happy to provide you with the results of my study upon its completion, if you so request.

The interview will be conducted in private, in your chambers or other place nominated by you. I estimate it will take between 60-80mins. The interview will be audio recorded by ipod and later transcribed. I appreciate the interview may cover some sensitive issues and private information. Because of this, I will send you a copy of the transcript and ask you to get back to me within four weeks with any objections to it. If you are uncomfortable with anything contained in the transcript, the section objected to will not be published.

While some of your responses will be published in my thesis, the later survey and possibly future articles and presentations by me, your identity will remain confidential. Any identifying characteristics linking you with your responses will be removed. The only identifying characteristic to be published is the fact you are a current sitting Family Court judge.

No-one except Justice Benjamin and my PhD supervisors, Prof Margaret Otlowski and George Zdenkowski, will be aware you were interviewed in Part One of my study. Further, all records of our interview will be unidentifiable. Your responses will be linked with your name through a code, known only by me. Only I will know which of the four sets of responses have been provided by you. The information collected will be stored on a University of Tasmania computer, protected with a private password. Data must be stored for five years after the date of publication, after which time it will be deleted.

The general themes which I would like to cover in your interview are your views about children's participation generally, your opinion and experiences of judicial conferencing, your concerns about the practice and whether you think there is more scope for judicial conferencing under the Less Adversarial Trial process than previously. Your participation in my research is entirely voluntary. You may decline to answer any question, withdraw from the study at any time and withdraw any information you have supplied at any time before publication of the survey and/or thesis.

This study has received ethical approval from the Human Research Ethics Committee (Tasmania) Network which is constituted under the National Health & Medical Research Council. Any concerns of an ethical nature or complaints about the manner in which the study is conducted may be directed to the Ethics Executive Officer at human.ethics@utas.edu.au or ph (03) 6226 7479.

If you agree to participate in this study, please have your associate contact me at your convenience to arrange an interview time. I also ask that you complete and return the attached Consent Form, which is a requirement of the ethics committee. I propose an interview at.Specify times/dates for interview...

If you have any queries about this study, please do not hesitate to contact me, or my supervisor Prof Margaret Otlowksi. Our contact details are below. I very much hope you will be able to assist with my research. Your cooperation would be invaluable.

I look forward to hearing from you.

Yours sincerely

Michelle Fernando

Faculty of Law
University of Tasmania
mfernand@utas.edu.au
ph: 6226 2721
mob: 0409468712

Prof Margaret Otlowski
Faculty of Law
University of Tasmania
margaret.otlowski@utas.edu.au
ph: 6226 7569

Appendix Three

Information sheet for survey of Australian family law judicial officers

(This letter was sent on University letterhead).

**Letter to Judges of the Family Court of Australia, Federal Magistrates of the
Federal Magistrates Court of Australia and Judges and Magistrates of the
Family Court of Western Australia**

18 February 2010

Dear Judicial Officer

Survey of the Views of Family Law Judicial Officers about Speaking with Children

I am a former family lawyer and current PhD Candidate at the University of Tasmania. My thesis looks at the practice of judicial officers speaking directly with children in parenting cases.

I write to invite you to take part in a simple survey (enclosed), which asks about your experiences and opinions of judicial meetings with children. The available literature suggests that family law judicial officers in Australia are generally reluctant to speak directly with children. The aim of my research is to discover whether this reluctance exists and, if so, the main reasons behind it. I will then look at whether the prevalent concerns about judicial meetings can be addressed.

The survey has been sent to all Judges of the Family Court of Australia, Federal Magistrates, and Judges and Magistrates of the Family Court of Western Australia. It is a short and simple document, which should take no more than ten minutes for you to complete. It contains space for you to add optional comments to some of your responses, should you wish to do so.

It is hoped that the research findings will provide valuable insights into the best ways of hearing children's voices in parenting cases and, specifically, indicate the extent to which judicial meetings with children have a role to play. This information should prove useful to judicial officers, policy makers and the wider community.

Your completion and return of the survey will signify your consent to participate. While I strongly encourage you to participate, I respect your right to decline. The survey is anonymous, and there will be no consequences to you if you decide not to participate. You may also decline to answer any survey question.

If you do participate, you may choose to add your name and contact details so that I may contact you in relation to your responses. Your details will be used only to allow me to contact you, and will not be published at any time without your specific written consent.

Data collected from the survey will be securely stored until 5 years from publication of my thesis, at which time it will be destroyed. This study has received ethical approval from the Human Research Ethics Committee (Tasmania) Network which is constituted under the National Health & Medical Research Council. Any concerns of an ethical nature or complaints about the manner in which the study is conducted may be directed to the Ethics Executive Officer at human.ethics@utas.edu.au or ph (03) 6226 7479.

If you would like to participate, please complete the enclosed survey and return it to me in the stamped envelope provided, or at the address on this letterhead.

If you have any queries about this study, please do not hesitate to contact me, or my supervisor Prof Margaret Otlowksi. Our contact details are below. I very much hope you will be able to assist with my research.

Yours faithfully

Michelle Fernando

Faculty of Law
University of Tasmania
mfernand@utas.edu.au
ph: 6226 2721
mob: 0409468712

Prof Margaret Otlowksi
Dean
Faculty of Law
University of Tasmania
margaret.otlowksi@utas.edu.au
ph: 6226 7569

Appendix Four

Survey of Australian family law judicial officers

SURVEY

The Views of Family Law Judicial Officers about Speaking with Children

This survey asks you to describe your experiences and opinion of the practice of judicial officers speaking directly with children. In this survey, this practice is referred to as a 'judicial meeting'.

Please return your completed survey to Michelle Fernando, Faculty of Law, University of Tasmania, Private Bag 89, Hobart 7001, or in the stamped envelope provided.

Question One

Please tick the applicable box

I am a...

- ☐ Judge of the Family Court of Australia
- ☐ Federal Magistrate of the Federal Magistrates Court of Australia
- ☐ Judge of the Family Court of WA
- ☐ Magistrate of the Family Court of WA

Question Two

Please tick the applicable box

I have been a judicial officer hearing parenting disputes for...

- ☐ 1-5 years
- ☐ 6-10 years
- ☐ 11-15 years
- ☐ Over 15 years

Question Three

I have previously worked as an Independent Children's Lawyer (formerly Separate Representative/ Child Representative).

Please tick the applicable box

- ☐ Yes
- ☐ No

Question Four

In my capacity as a judicial officer...

**Please tick the applicable box/es
and insert number, if relevant**

- ☐ I have never met with a child who is the subject of proceedings before me.
- ☐ I have met with a child/children for non-forensic purposes (eg to explain orders to the child). I have done this on approximately _____ occasions.
- ☐ I have met with a child/children for forensic purposes (ie to ascertain the child's views). I have done this on approximately _____ occasions.

Optional comments here or overleaf

.....

.....

Question Five

Please tick the applicable box

- It is likely I will meet with a child for forensic purposes (ie to ascertain a child's views) in the future.
- ☐ Strongly agree
- ☐ Agree
- ☐ Don't Know
- ☐ Disagree
- ☐ Strongly Disagree

Optional comments here or overleaf

.....

.....

THE MODEL

To answer the remaining questions in this survey, please consider a particular model of judicial meeting, which has most commonly been used in Australia.

The features of the model are:

- The judicial meeting is in addition to, not in substitution for, a family report which includes the views of the child/ren.
- The judicial officer or a child may request a meeting;
- The meeting takes place between the child, the judicial officer and the Family Consultant, in chambers or in a closed court;
- The Family Consultant and judicial officer must ensure the child understands that nothing the child says will remain confidential;
- The child must, at all times, consent to the meeting;
- The meeting is recorded;
- The Family Consultant will assist the judicial officer to ask questions of the child;
- The Family Consultant will prepare a written or oral report as to the outcome of the meeting, which will be adduced into evidence, and
- The Family Consultant will be available for cross-examination by the parties' representatives and the ICL, if applicable.

The judicial officer retains discretion as to the following matters at all times:

- whether or not it is in the child's best interests for a meeting to take place;
- whether or not the parties are provided with a transcript or DVD of the meeting, and
- whether to see children individually, or in sibling groups, or both.

Question Six

Using the above model, please indicate whether you agree with the following statements:

Please tick the applicable box

a) Hearing from children directly may provide judicial officers with useful evidence of children's views.

- ☐ Strongly Agree
☐ Agree
☐ Don't Know
☐ Disagree
☐ Strongly Disagree

b) Meeting with a child may give judicial officers greater understanding of a particular child's needs and best interests than is possible by other methods of hearing children's views.

- ☐ Strongly Agree
☐ Agree
☐ Don't Know
☐ Disagree
☐ Strongly Disagree

c) Judicial meetings are generally good for children because it makes them feel that they have been listened to and taken seriously.

- ☐ Strongly Agree
☐ Agree
☐ Don't Know
☐ Disagree
☐ Strongly Disagree

d) Even with help from a Family Consultant, judicial officers do not have the skills or training to speak with children and properly interpret their views.

- ☐ Strongly Agree
☐ Agree
☐ Don't Know
☐ Disagree
☐ Strongly Disagree

e) Judicial meetings may encourage parents to manipulate and/or put pressure on their children to put forward the parents' respective positions.

- ☐ Strongly Agree
☐ Agree
☐ Don't Know

- ☐ Disagree
- ☐ Strongly Disagree
- ☐ Strongly Agree
- ☐ Agree
- ☐ Don't Know
- ☐ Disagree
- ☐ Strongly Disagree

f) Meeting with a child cannot tell me anything that I cannot reasonably ascertain from a family report.

Question Seven

Using the above model, how can concerns about due process be accommodated in judicial meetings with children?

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Question Eight

If a child discloses a previously unheard allegation of child abuse during a judicial meeting, how should this be dealt with?

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Question Nine

If, during a judicial meeting, a child discloses something and then insists the disclosure remain 'confidential', how should this be dealt with? Assume the disclosure is not an allegation of child abuse.

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Question Ten

My biggest concern about this model of judicial meetings with children is...

.....
.....
.....

Question Eleven

Please tick the applicable box

Judicial officers should undergo training before speaking with children.

- ☐ Strongly Agree
☐ Agree
☐ Don't Know
☐ Disagree
☐ Strongly Disagree

Optional comments here or overleaf

.....
.....

Question Twelve

Please tick the applicable box

There should be guidelines or legislation on how judicial meetings are carried out.

- ☐ Strongly Agree
☐ Agree
☐ Don't Know
☐ Disagree
☐ Strongly Disagree

Optional comments here or overleaf

.....

Question Thirteen

Please tick the applicable box

- Given recent child-focused changes to pre-trial and trial procedures, it is likely that the incidence of judicial meetings with children will increase.
- ☐ Strongly Agree
☐ Agree
☐ Don't Know
☐ Disagree
☐ Strongly Disagree

Optional comments here or overleaf

.....

THANK YOU FOR COMPLETING THIS SURVEY

Do you have any comments you wish to make about these questions or about judicial meetings with children generally? If so, please add them below or overleaf.

Please add your name and contact details below if you are willing to be contacted in relation to any of your answers/comments. The researcher is bound by strict university ethical guidelines, referred to in the accompanying letter. Your name and details will be used for contact purposes only and will not be published without your specific written consent.

Please feel free to contact the researcher to discuss this survey or any other relevant matter.

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Appendix Five

Draft Guidelines for Judicial Meetings with Children

1. Purpose

These guidelines are for the use of judges¹ deciding children's matters under Part VII of the *Family Law Act* 1975 (Cth) ('the Act').

They are intended to give guidance to judges in deciding whether to meet with a child, and in conducting meetings with children. The guidelines recognise that, in some cases, it may be in the best interests of a child to meet with a judge. For example:

- A child may wish to meet with a judge, in order to meet the person who is making decisions for the child's life. The child may wish to satisfy themselves that their views will be heard by the decision-maker and will be taken seriously;
- Hearing directly from a child may give a judge greater understanding of a particular child's needs and interests. Meeting with a child may better enable a judge to determine what is in the child's best interests.

These guidelines are not intended to have the effect of a Practice Direction. The extent to which the guidelines, or any of them, will be followed is within the discretion of individual judges.

2. Introduction

In making an order under Part VII of the Act, the court is required to consider any views expressed by the child (s60CC(3)(a)). Meeting with a child is one method by which the court can inform itself of children's views. Even in circumstances where the court is not seeking to inform itself of a child's views, these guidelines recognise that, in certain situations, it may benefit children to meet with a judge.

¹ In these guidelines, 'judge' includes judges of the Family Court of Australia, federal magistrates of the Federal Magistrates Court of Australia and judges and magistrates of the Family Court of Western Australia.

Ways in which the court may inform itself of the views expressed by a child are listed in s60CD(2) of the Act and include having regard to a report from a family consultant, ordering that the child's interests be represented by an Independent Lawyer for the Child ('ICL') and other means as the court thinks appropriate, subject to the applicable Rules of Court. A judicial meeting with a child is no longer specifically provided for in the *Family Law Rules* 2004 (Cth).² Nevertheless, the option of meeting with a child is still within the discretion of the court in individual cases.

In most cases, the court is informed of children's views through a report by a family consultant or other expert in children's welfare. ICLs also play a valuable role in ensuring the court is informed of children's views. Nothing in these guidelines is intended to replace or diminish the value of reports from family consultants or other child welfare experts, or the role of ICLs. The guidelines relate to circumstances in which a judge determines that a meeting may be an appropriate complement to other methods of hearing children's views.

3. Statement of principles

A judicial meeting with a child is one means of giving effect in family law proceedings to select Articles of the United Nations Convention on the Rights of the Child which state:

Article 3

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 12.1

Parties shall assure to the child who is capable of forming his or her 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.

Article 12.2

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

² Rule 15.03 of the *Family Law Rules* 2004 (Cth), which specifically referred to a judicial officer 'interviewing' a child, was omitted by the *Family Law Amendment Rules* 2010 (Cth).

through a representative or an appropriate body consistent with the procedural rules of national law.

4. Deciding whether to meet with a child

4.1 In all cases under Part VII of the *Family Law Act* 1975 (Cth), at any time before judgment is delivered, a judge should consider meeting with the child or children who are the subject of the proceedings.

4.2 In considering whether to meet with a child, a judge may take into account:

- h) whether the child has requested to meet with the judge;
- i) the opinions of the family consultant (or other expert in children's welfare, if applicable) and the ICL (if one has been appointed) as to whether the judge should meet with the child;
- j) the age and maturity of the child;
- k) the purpose of any meeting;
- l) the timing and location of any meeting;
- m) the opinion of the parties as to whether the judge should meet with the child;
- n) any other circumstances the judge considers relevant.

4.3 A judge should not meet with a child if to do so would be contrary to the best interests of the child.

4.4 A judge should not meet with a child unless the child has consented to the meeting.

4.5 A judge is entitled to expect that the ICL or family consultant (or other expert in children's welfare) will advise the court as to whether or not the child wishes to meet with the judge.

4.6 A judicial meeting with a child should not be used in substitution for a family report or other expert report as a method for hearing children's views, except in circumstances where a report is not reasonably available.

4.7 A judge may consider recording in the judgment the reasons for his or her decision to meet with the child or, alternatively, to not meet with the child in any given case.

4.8 If a judge denies a child's request to meet with the judge, the judge should consider providing to a child a brief explanation in writing for his or her decision to deny the child's request.

5. General procedures to be followed if a judge decides to meet with a child during the proceedings

5.1 Meeting with a child during proceedings

5.1.1 The judge may determine the circumstances of a meeting with a child, including:

- i) at what stage of the proceedings the meeting should take place;
- j) when the meeting is to take place;
- k) where the meeting is to take place (ie in the judge's chambers, in a closed court or elsewhere);
- l) the purpose of the meeting;
- m) who will be present during the meeting;
- n) who will prepare the child or children for the meeting;
- o) whether to meet with children individually, or in sibling groups, or both;
- p) how the meeting will be recorded.

5.1.2 Other than in exceptional circumstances, a judge should meet with a child in the presence of a family consultant or other expert in children's welfare. The family consultant or other expert may assist during the meeting by reassuring and explaining matters to the child, facilitating the discussion and assisting the judge to ascertain whether any views expressed by the child are genuinely held.

5.1.3 A judge may consider whether to ask the ICL to be present at the meeting. A judge should not meet with a child in the presence of the child's parents or their legal counsel. A judge should never meet with a child alone.

5.1.4 A judicial meeting with a child should be recorded by audio or audio-visual means.

5.1.5 Prior to the commencement of the meeting, the judge should inform the child:

- g) of the purpose of the meeting;
- h) that the child can withdraw their consent to the meeting at any time during the meeting;
- i) that the meeting will be recorded;
- j) that confidentiality cannot be guaranteed, and that their parents and other parties will receive an account of the meeting. The judge should obtain the child's agreement to this;
- k) that it is the judge's responsibility, and not the child's, to make the ultimate decision;
- l) of how the outcome of the decision will be communicated to the child.

5.2 Report to the parties

5.2.1 The judge should ensure that the parties receive an accurate account of the judicial meeting with the child.

5.2.2 The judge may ask the family consultant or other expert in children's welfare to provide the court with an oral or written report about the judicial meeting with the child.

5.2.3 A judge may consider whether to release an audio or video recording, or transcript, or part thereof, of the judicial meeting with the child to the parties.

5.2.4 The parties should be given an opportunity to respond to the judicial meeting with the child. This may be by way of oral evidence, submissions or cross-examination of the family consultant or other expert in children's welfare.

5.3 Disclosures by children

5.3.1 If a child, during a meeting with a judge, makes a disclosure and requests it to remain confidential from one or both of their parents or other parties:

- c) if the disclosure is one of child abuse, the judge should explain to the child that the disclosure cannot remain confidential and may be subject to mandatory reporting procedures.
- d) if the disclosure is not one of child abuse, the judge should remind the child of their agreement that confidentiality cannot be guaranteed. If the child does not agree to the disclosure being revealed to the parties, the judge should decide whether to keep the disclosure confidential or whether to reveal the disclosure, notwithstanding the child's request to keep the disclosure confidential.

5.3.2 Where the disclosure is not one of child abuse:

- d) if the disclosure is influential to the decision, the judge may decide to keep the disclosure confidential.
- e) if the disclosure is influential to the decision, the judge should reveal the disclosure to the parties.
- f) if the judge decides to reveal the disclosure to the parties, the judge should inform the child of his or her decision.

6. Meeting with a child after the conclusion of proceedings

6.1 A judge may decide to meet with a child after the conclusion of proceedings for the purpose of explaining the court's orders and reasoning to the child.

6.2 The judge retains discretion in all circumstances of the meeting, including where the meeting is to take place, when the meeting is to take place (before or after the

court's judgment is delivered), who is to be present and whether the meeting is to be recorded.

6.3 No evidence may be gathered during a meeting with a child conducted after the conclusion of proceedings, as the proceedings have ended. If a child expresses any views during the meeting, the judge should disregard those views for the purposes of the decision.

6.4 A judge may meet with a child after the conclusion of the proceedings, notwithstanding the fact that the judge may have previously met with the child during the course of the proceedings.

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