The Child Law Clinic

School of Law

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The Voice of the Child in Private Family Law Proceedings: A Comparative Review

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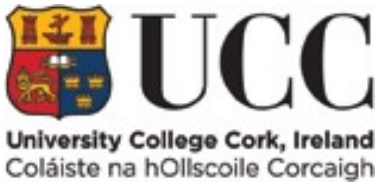

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Executive Summary

This comparative review reports on the outcomes of a phase 1 of a research project being undertaken by the Child Law Clinic at University College Cork that will examine the effectiveness of arrangements for ascertaining the views of children in private family law proceedings in Ireland. The purpose of the comparative review is to provide an insight into the processes and structures for the ascertaining the views of children in private family law proceedings in six jurisdictions (Ireland, England and Wales, Australia, New Zealand, Ontario, and Germany), with a view to identifying common challenges, the strengths and weaknesses of different approaches, and variations in law and practice. The review begins by setting out the provisions for the inclusion of the voice of the child in private family law proceedings under international law, before delving into the approaches of the various jurisdictions.

This analysis is conducted through the lens of several headings, including 1) the mechanisms used to facilitate child participation in private family law proceedings; 2) resourcing of child participation mechanisms, and the costs to parties; 3) the accreditation and regulation of professionals involved; 4) the effectiveness of existing arrangements; any documented negative impacts on children; and 5) any reform recommendations that have been made in each jurisdiction.

A range of different mechanisms for ascertaining the views of the child are evident across the jurisdictions, including the appointment of guardians *ad litem* or other professional experts to report on the child's views; the appointment of a lawyer for the child; judicial interviews; and child-inclusive case conferences or mediation. These mechanisms may be used alone or in combination.

The review identifies a number of common features across the jurisdictions. Strengths lie where explicit legislative provisions create structures for the inclusion of the child's views in the proceedings; but legislative provisions alone are not sufficient. One clear trend across the jurisdictions examined is the need for better training for professionals involved in facilitating child participation. Barriers to child participation due to the cost of commissioning expert reports and inadequate allocation of resources is also a common challenge. Evidence across jurisdictions clearly points to the negative effects on children associated with private family law proceedings, especially in cases where domestic violence is present. This leads jurisdictions to attempt to strike a balance between participation and protection of children; this can fuel paternalistic approaches that militate against child participation.

Some important variations in practice are also evident – most obviously in the range of mechanisms employed to ascertain the views of children, and the level of funding available to support this activity. Major fluctuations can be seen in the willingness to engage in judicial interviews, ranging from widespread unwillingness due to lack of formal training (eg in England and Wales, Australia, Ontario and Ireland), to widespread use of the practice (eg in New Zealand and Germany).

The findings of the comparative review suggests that there is no single ideal model for ascertaining the view of the child in private family law proceedings; various possibilities exist, and whatever model is chosen needs to adapt to local conditions.

Key features that should be present include clear legal obligations to facilitate child participation; adequate resourcing to ensure that a quality service is provided to all children equally; regular training for all professionals who have a role in ensuring that children can adequately participate in proceedings; and flexibility in the available mechanisms to ensure that the system adapts to the needs of the individual child. Reform recommendations that have arisen in each jurisdiction are identified; but no recommendations are made at this time for Ireland, so as to avoid pre-empting the findings of later phases of the research.

Introduction

For many years, knowledge of the day-to-day reality of court proceedings involving children and families in Ireland was limited to the experiences of those who had participated in them (whether as a party or as a professional). Proceedings took place *in camera*, with no access for researchers or members of the press. Written judgments were published in only a tiny handful of District Court and Circuit Court cases (which account for the overwhelming majority of such cases), and in the small number of superior court judgments arising in cases that found their way to that level. Literature on the system was based almost exclusively on the text of the relevant legislation and the small and unrepresentative sample of written judgments that were available. As such, there was no meaningful evidence base available to students, academics or policy-makers on which to base analysis and potential reform of the system.

In the past decade, the landscape has changed significantly, particularly with respect to proceedings under the Child Care Act 1991. These proceedings have been extensively researched and analysed in the work of the Child Law Project[1] and the UCC *Child Care Proceedings in the District Court* project.[2] These projects have produced a large body of literature based on courtroom observation and qualitative interviews and focus groups with professionals, creating the first robust body of empirical evidence of how child care proceedings operate and what aspects of them might benefit from reform.

However, to date, this body of work has not been replicated to the same degree in respect of private family law proceedings in respect of guardianship, custody and access, notwithstanding legal reforms allowing for courtroom observation work to take place. The few empirical studies that have been undertaken are either based on narrow subcategories of cases,[3] or were conducted before significant legal reforms took effect.[4] In particular, no detailed study has been undertaken analysing

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[1] See generally https://www.childlawproject.ie/.

[2] See A Parkes, C Shore, C O'Mahony and K Burns, "The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court" (2015) 27 *Child and Family Law Quarterly* 423; C O'Mahony, K Burns, A Parkes and C Shore, "Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland" (2016) 30 *International Journal of Law, Policy and the Family* 131; C O'Mahony, K Burns, A Parkes and C Shore, "Representation and participation in child care proceedings: what about the voice of the parents?" (2016) 38(3) *Journal of Social Welfare and Family Law* 302; C O'Mahony, K Burns, A Parkes and C Shore, "Child Care Proceedings and Family-Friendly Justice: The Problem with Court Facilities" (2016) 19(4) *Irish Journal of Family Law* 75; and K Burns, C O'Mahony, C Shore and A Parkes "What social workers talk about when they talk about child care proceedings in the District Court in Ireland" (2018) 23(1) *Child and Family Social Work* 113.

[3] See, eg, S McCaughren, S Holt, A Parks and S Gregory, *Research report on guidance on contact time for infants and young children in separated families* (One Family/TCD/UCC, 2022, available at https://onefamily.ie/contact-time-for-infants-and-young-children-in-separated-families-research-report/). This report gathered data through a survey of parents, two focus groups with professionals working in the area of family law, and six interviews with members of the Irish judiciary. However, its focus was restricted to cases involving contact arrangements for children aged 0-6 years.

[4] See, eg, R O'Shea, *Judicial Separation and Divorce Proceedings in the Circuit Court* (PhD Thesis, Waterford Institute of Technology, 2014, available at https://repository.wit.ie/2825/).

the full extent of the impact of the constitutional amendment approved by referendum in 2012 and implemented by legislation in 2015, which makes it an obligation to ascertain the views of all children capable of forming such views in proceedings concerning guardianship, custody and access. Meanwhile, media coverage of child and family law court proceedings, while excellent at times, is somewhat sporadic in nature, while the lack of a clear definition of the *in camera* rule and its exceptions serves as a significant barrier to qualitative research involving parties to the proceedings or their children.

The Child Law Clinic at University College Cork, working on behalf of civil society partners in the Children's Rights Alliance and One Family, aims to fill that gap in the evidence base (insofar as the restrictions associated with the *in camera* rule allow). The research project entitled *Child Participation in Family Court Proceedings in Ireland* will investigate the extent to which Article 42A.4.2° of the Constitution is being effectively implemented in guardianship, custody and access proceedings. The project will have four phases:

- Phase 1: Comparative Review of Current Practice (2023)
- Phase 2: National Survey of Professionals (2023)
- Phase 3: Courtroom Observation (2024)
- Phase 4: Qualitative Interviews with Professionals (2024-2025)

This document represents the output from Phase 1 – namely, a comparative review of child participation in private family law proceedings in six jurisdictions (Ireland, England and Wales, Australia, New Zealand, Ontario and Germany) conducted by researchers at the Child Law Clinic during 2023. The review begins by outlining the key obligations arising from international human rights law, before assessing the available evidence from each jurisdiction in turn. Matters that are considered in detail include 1) the mechanisms used to facilitate child participation in private family law proceedings; 2) resourcing of child participation mechanisms, and the costs to parties; 3) the accreditation and regulation of professionals involved; 4) the effectiveness of existing arrangements; any documented negative impacts on children; and 5) any reform recommendations that have been made in each jurisdiction. It should be noted that the relative absence of robust empirical evidence regarding child participation in private family law proceedings is not unique to Ireland; as such, the review of the practice of each jurisdiction (as distinct from its legal framework) is limited by the level of evidence available, which varies from one jurisdiction to another.

The purpose of this review is twofold. First, it has a standalone value as a detailed comparative survey of a number of jurisdictions, including both common law and civil law, that will be of interest to policy-makers and researchers in the field, both in Ireland and elsewhere. For that reason, we decided to publish the review upon its completion rather than wait until the entire project has concluded. Second, the review serves to identify the key issues and concerns that arise in respect of child participation in private family law proceedings, which will allow the project team to focus our inquiry in Phases 2, 3 and 4 of the project, due to take place during 2024 and early 2025. The design of survey questions, interview guides and courtroom observation templates will all draw on the results of this review.

Reform recommendations that have arisen in each jurisdiction examined in this comparative review are identified below; but no reform recommendations are made at this time for Ireland, so as to avoid pre-empting the findings of later phases of the research.

1. International Law Framework

1.1 CRC

The Convention on the Rights of the Child 1989 (CRC) is the authoritative international human rights instrument in the field of children's rights. It has been ratified by every State in the world with the sole exception of the United States of America; as such, it is binding on all six of the jurisdictions considered in this research brief. Article 12 of the CRC provides:

> 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.

In General Comment No 12 in 2009, the Committee on the Rights of the Child laid down a number of key principles regarding the interpretation of the right of children to be heard in court proceedings affecting them.[1] The Committee noted that "[t]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention".[2] States parties are under a "strict obligation" to either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child.[3] Because the right applies to all children capable of forming their own views, and Article 12 envisages no age limitations in this regard, "States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity."[4]

At the same time, the child "has the right not to exercise this right. Expressing views is a choice for the child, not an obligation."[5] Moreover, States Parties "must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child."[6]

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[1] Committee on the Rights of the Child, *General comment No. 12 (2009): The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, available at https://www.refworld.org/docid/4ae562c52.html.
[2] *Ibid* at [2].
[3] *Ibid* at [15] and [19].
[4] *Ibid* at [20] and [21].
[5] *Ibid* at [16].
[6] *Ibid* at [21].

The right to express views freely means that children must not be manipulated or subjected to undue influence or pressure.[7] Conditions for expressing views must account for the child's individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions.[8] A child "cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age."[9] As a precondition to being able to express an informed view, the child has a right be informed about the matters under consideration, and of the options and possible decisions to be taken (and their consequences). The child must also be informed about the conditions under which she or he will be asked to express her or his views.[10]

In relation to private family law proceedings, the Committee stipulates that "all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes".[11] Court proceedings must be "both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms."[12] Ideally, children should be informed of, and allowed to choose between, the various methods available for ascertaining their views (whether directly or through a representative).[13] Where the child's views are conveyed through a representative, that representatives "must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children"; additionally, "it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative."[14]

Finally, since Article 12 requires that children's views are given due weight, children have a right to receive feedback informing the child of the outcome of the process and how her or his views were considered. This acts as "a guarantee that the views of the child are not only heard as a formality, but are taken seriously", and "may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint."[15]

1.2 ECHR

The European Convention on Human Rights (ECHR) is binding on three of the jurisdictions examined in this brief – namely, Ireland, England and Wales and Germany – and enjoys varying degrees of incorporation into the domestic law of each of those jurisdictions. The right to be heard is not explicitly set down in the ECHR; however, it is increasingly featuring in the case law of the European Court of

[7] *Ibid* at [22].
[8] *Ibid* at [23[.
[9] *Ibid* at [34].
[10] *Ibid* at [25].
[11] *Ibid* at [52].
[12] *Ibid* at [34].
[13] *Ibid* at [36] and [41].
[14] *Ibid* at [36].
[15] *Ibid* at [45].

Human Rights regarding the interpretation of the right to private and family life under Article 8 of the ECHR.

The case law of the European Court of Human Rights does not interpret Article 8 as always requiring a child to be heard in court; this matter should be assessed according to the specific circumstances of each case, while considering the child's age and maturity.[16] A number of older decisions have found that no violation occurred in circumstances where it was decided that child participation in proceedings was not necessary or was potentially harmful to the child.[17] Nevertheless, in recent years, the Court has issued a number of decisions finding States in violation of Article 8 for failing to afford children the opportunity to express their views in private family law proceedings. For example, in *M and M v Croatia*, the Court found a violation of Article 8 regarding court proceedings concerning custody in which, *inter alia*, provision was not made to ascertain the views of a child as to which parent should take care of her.[18] The Court held that children have the same procedural rights as parents to be adequately involved in the decision-making process in custody proceedings;[19] as such, the failure to seek the views of a child of above-average intellectual capacities who was aged nine and a half years at the commencement of proceedings infringed Article 8 by failing to ascertain and ascribe due weight to her wishes as regards the issue of which parent to live with.[20] The judgment in this case made extensive reference to Article 12 of the CRC and General Comment No 12 of the Committee of the Rights of the Child to support its conclusions.[21]

Similarly, in *C v Croatia*, a violation of Article 8 was found on the basis that custody proceedings had not afforded a child the opportunity to be heard by the court either directly or through a representative such as a guardian *ad litem*.[22] The Court noted that "the applicant's situation, as a child of divorced parents in a custody battle, would appear to be an example of cases in which children may need special guardians *ad litem* in order to protect their interests, explain to them court proceedings and decisions and their consequences, as well as generally to liaise between the competent judge and the child."[23] As such, the Court found that "the combination of flawed representation and the failure to duly present and hear the

[16] European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to the rights of the child* (2015) at p 42, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf.
[17] See, eg, *sSahin v Germany* (30943/96, 8 July 2003).
[18] 10161/13, 3 September 2015. See further C Mol, "Maturity and the Child's Right to be Heard in Family Law Proceedings: Article 12 UNCRC and Case Law of the ECtHR Compared" in K Boele-Woelki (ed), *Plurality and Diversity of Family Relations in Europe* (Intersentia, 2019) at pp 237-254
[19] *Ibid* at [180] to [181].
[20] *Ibid* at [186].
[21] *Ibid* at [94], [97], [171] and [181].
[22] 80117/17, 8 October 2020.
[23] *Ibid* at [77].

applicant's views in the proceedings irremediably undermined the decision-making process in the instant case."[24]

[24] *Ibid* at [81].

2. Ireland

In private law proceedings in Ireland for custody, guardianship and access, the views of children must be given due weight, taking into consideration their age and maturity. These views can be ascertained in two different ways: directly, by judges who may hear children in an empty courtroom or in chambers in the absence of the parties to the proceedings, and indirectly, by court-appointed assessors who prepare expert reports.

There are several factors appearing repeatedly in the literature that contribute to the effectiveness of the entire process, including the availability of assessors and court dates. The cost of reports is another factor that can impede fair access to justice and the ascertaining of the child's views. The lack of clarity regarding the process and procedures can affect the consistency of decisions made both during the process itself and based on expert recommendations. Furthermore, judges often lack adequate training on how to ascertain the views of the child. The qualifications of assessors who prepare relevant reports and the lack of specialised training for all assessors can impact the quality of the reports. The availability and reliability of existing laws, guidelines, procedures, and requirements can also be questionable, leading to inconsistency and reports prepared by unqualified "experts." Finally, the impact on children of hearing their views in court settings and the impact of the *in camera* rule on the transparency of the process should also be considered.

Since 2015, many organisations have raised concerns about the implementation of the right of the child to be heard in private family law proceedings. The main barriers to implementation are the lack of clarity and transparency in ascertaining the views of the child, resulting in inconsistency in hearing the child's voice; a time-consuming and costly process with inadequate resources available to facilitate it; a lack of training for judges, and uncertainty about the qualifications of assessors. Legislative gaps, such as the absence of regulations for the experts who prepare reports or a mechanism for complaints, are also problematic. As Dawson remarks, Ireland has not implemented tangible and effective solutions to address these barriers.[1]

2.1 Mechanisms for Child Participation in Private Family Law Proceedings

After a referendum in 2012, Ireland inserted Article 42A into the Constitution. It came into effect on 28 April 2015. Among other things, it provides for the best interests of the child to be a paramount consideration in private family law proceedings and states that:

[1] K Dawson, "Listen to the Voice of the Child" (2018) 23(3) *Bar Review* 87 at p 87.

> Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.[2]

The Children and Family Relationships Act 2015 ("the 2015 Act"), in amending the Guardianship of Infants Act 1964 ("the 1964 Act"), implemented the State's constitutional obligation to legislate on the principle of hearing the voice of the child. Among the factors that the court must consider when deciding on the best interest of the child in private family law proceedings, the amended 1964 Act lists the views of the child, as far as they can be ascertained, as a relevant factor.[3] Although the 1964 Act does not specify how these views should be ascertained, the 2015 amendments allow for an expert to be appointed to convey them to the court.[4]

The Irish Government has expressed a strong commitment to further develop the implementation of the voice of the child in private family law proceedings. As part of this effort, the Family Courts Bill 2022 ("the 2022 Bill") [5] is progressing through the Oireachtas. During a Seanad Éireann debate in February 2023, Simon Harris TD, Minister for Justice, emphasised that one of the key principles of the 2022 Bill is to ensure that "the child's views are ascertained, where practicable, and given due weight, having regard to the child's age and maturity" in the conduct of private family law proceedings.[6]

2.1.1 Hearing children indirectly

In Ireland, there are two main legislative mechanisms that enable the expression of the child's views in legal proceedings related to custody, guardianship, and access: section 47 of the Family Law Act 1995 (1995 Act) and section 32 of the 1964 Act (as inserted by section 63 of the 2015 Act). To regulate the assessment process, the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 ("the 2018 Regulations") were issued and this statutory instrument provides guidelines for assessors preparing section 32 reports.[7] In addition, the Family Law Courts Development Committee has published specific guidelines for the conduct and preparation of section 32 and section 47 reports ("the Committee Guidelines").[8]

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[2] Constitution of Ireland, Article 42A.4.2.
[3] Guardianship of Infants Act 1964, section 31 (as inserted by Children and Family Relationships Act 2015, section 63).
[4] Guardianship of Infants Act 1964, section 32 (as inserted by Children and Family Relationships Act 2015, section 63).
[5] Family Courts Bill 2022, available at https://data.oireachtas.ie/ie/oireachtas/bill/2022/113/eng/initiated/b11322s.pdf.
[6] 291 Seanad Debates, 2 February 2023, available at https://www.oireachtas.ie/en/debates/debate/seanad/2023-02-02/19/.
[7] Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 (SI No 587/2018).
[8] Courts Service, *Report of the Family Law Reporting Project Committee* (2007) at p 41, available at

Section 47 of the 1995 Act allows the court, through its own motion or on application to it on behalf of a party to the proceedings, to procure a written expert report "on any question affecting the welfare of a party to the proceedings or any other person to whom they relate".[9] This report can inform the court of the child's views and wishes. A copy of the report shall be given to the parties to the proceedings, and to the person to whom it relates and the fees and the expenses shall be covered by the parties or any party to the proceedings in the proportions the court determines.

Section 47 does not refer to the views of the child at all, but only to the welfare of the child. It was not originally intended to be used for the purpose of ascertaining the views of the child, but was used to this end as a workaround in the absence of any more specific legislation. This gap was filled by the enactment of section 32 of the 1964 Act in 2015. Section 32 does not require any particular method for ascertaining the views of the child. However, it allows the court to appoint an expert to determine and convey these views. The expert is required to assess the maturity and the capacity of the child to form their own opinions on the matters at issue. If the assessor establishes this, and considering the best interests of the child, the views are conveyed to the court in the report.

Section 32(4) provides that a copy of the report shall be given to the parties of the proceedings and to the child concerned unless the court decides it would not be in the best interests of the child. In that case the court may decide to furnish the report to the parent, guardian, next friend of the child, or an expert appointed instead of directly to the child. The court or a party involved in proceedings has the option to summon an expert as a witness in the proceedings. The costs and expenses of an expert shall be covered by the parties or one party involved in the proceedings in proportions determined by the court.

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http://www.uspi.ie/attachments/File/Report_of_the_Family_Law_Reporting_Project_Committee_to_the_Board_of_the_Courts_Service.pdf.

[9] Family Law Act 1995, section 47. There is some doubt as to whether section 47 is available for use in the District Court, due to the non-commencement of section 11 of the Children Act 1997 (which would have inserted a new section 26 into the Guardianship of Infants Act 1964, providing: "For the purposes of the application of section 47 of the Act of 1995 to proceedings under this Act, 'court' includes the District Court.") See G Shannon, *Tenth Report of the Special Rapporteur on Child Protection* (2016) at p 227. However, section 47 itself states that it is available in proceedings under the Guardianship of Infants Act 1964, and the 1964 Act gives jurisdiction to the District Court. While section 2 of the Family Law Act 1995 of the Family Law Act 1995 provides that for the purposes of the 1995 Act, "the court" shall be construed in accordance with section 38, and section 38(1) provides that "the Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings under *this* Act". However, guardianship, custody and access proceedings are not proceedings held under the Family Law Act 1995; they are proceedings held under the Guardianship of Infants Act 1964. As such, since section 47 separately lists proceedings under the 1964 Act and proceedings under the 1995 Act as proceedings in which section 47 may be invoked, it would seem that the better view is that section 47 may be invoked in District Court proceedings under the 1964 Act notwithstanding the non-commencement of section 11 of the Children Act 1997.

Section 32 imposes an obligation on the Minister to bring in rules regarding relevant experts through a statutory instrument. The 2018 Regulations were issued in 2018 and came into effect on 4 January 2019. They specify the professions that qualify as experts on a child's views, including medical practitioners, psychiatrists, psychologists, teachers, and social workers. The chosen expert is required to provide details of their qualifications, experience, and the fees and expenses they may charge.[10] Furthermore, the regulations set out the minimum standards that experts must adhere to.[11]

Article 5(d) of the 2018 Regulations stipulates that an expert appointed by the court "shall ascertain whether the views expressed by the child are expressed as a result of undue influence on the part of another person and, if so, and where necessary and appropriate, shall facilitate the child in the expression of views that are not expressed as a result of such undue influence". The term refers to personal pressure that the child may be under while expressing their views, which can be of psychological or emotional significance and may arise from their relationship with one or more family members. It is therefore necessary for experts to receive proper training to investigate "undue influence" and for the term to be more precisely defined.

Guidelines issued by the Family Law Courts Development Committee were designed to direct the assessor, the court, and the parties to the procedures so that the process of writing the reports could be managed effectively, fairly, transparently and without unnecessary delays and costs. However, McGowan notes that "it is unclear as to the extent to which these guidelines are being availed of by practitioners and/or the courts".[12]

2.1.2 Judges interviewing children

Another way to ascertain the views of the child is through an interview with the judge. The judge can hear children in an empty courtroom or in chambers, without the parties to the proceedings, but in the presence of the court registrar and a stenographer.[13] However, as many authors have pointed out, there is uncertainty regarding how such an interview should be conducted, and the decision is left to the court's discretion. There is also "no formal training programme in place to enable judges to fulfil the task of interviewing children".[14] Roberts highlights that the only

[10] Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 (SI No 587/2018), Articles 2-4.
[11] Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 (SI No 587/2018), Article 5.
[12] D Mc Gowan, "Hopscotch hotchpotch", *Law Society Gazette*, 10 April 2020, available at https://www.lawsociety.ie/gazette/in-depth/voice-of-the-child.
[13] Courts Service, *Report of the Family Law Reporting Project Committee* (2007) at p 41, available at http://www.uspi.ie/attachments/File/Report_of_the_Family_Law_Reporting_Project_Committee_to_the_Board_of_the_Courts_Service.pdf.
[14] Mr Justice M White, The High Court, Background Paper To Presentation "*Challenges in family law proceedings*" at p 16, available at

available guidance on a child meeting a judge is given by the High Court in *SJ O'D v PC O'D*.[15] Abbott J provides seven key principles in this judgment:

> 1. The judge shall be clear about the legislative or forensic framework in which they are embarking on the role of talking to the children as different codes may require or only permit different approaches.
> 2. The judge should never seek to act as an expert and should reach such conclusions from the process as may be justified by common sense only, and their own experience.
> 3. The principles of a fair trial and natural justice should be observed by agreeing terms of reference with the parties prior to relying on the record of the meeting with children.
> 4. The judge should explain to the children the fact that they are charged with resolving issues between the parents of the child and should reassure the child that in speaking to the judge, they are not taking on the onus of judging the case itself. The judge should also assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all) determinative of the ultimate decision of the court.
> 5. The judge should explain the development of the relevant convention and legislative background relating to the courts in more recent times actively seeking out the voice of the child in such simple terms as the child may understand.
> 6. The court should, at an early stage, ascertain whether the age and maturity of the child is such as to necessitate hearing the voice of the child. In most cases the parents in the litigation are likely to assist and agree on this aspect. In the absence of such agreement then it is advisable for the court to seek expert advice from the Section 47 procedure, unless of course such qualification is patently obvious.
> 7. The court should avoid a situation where the children speak in confidence to the court unless the parents agree. In such cases, the children sought such confidence and the judge agreed to give it to them subject to the stenographer and registrar recording same. Such a course, while very desirable from the child's point of view, is generally not consistent with the proper forensic progression of a case unless the parents in the litigation are informed and do not object, as was the situation in this case.[16]

According to Roberts "these principles are not being uniformly applied or understood on a consistent basis through the various tiers of the family law courts".[17] It is worth

https://knowledge.barnardos.ie/bitstream/handle/20.500.13085/1059/cr_challenges_in_family_law_2013_0904.pdf?sequence=1 .

[15] C Roberts, "The voice of the child in family disputes – presentation for Legal Aid Board Family Law Conference 2013" at pp 6-7, available at https://www.legalaidboard.ie/en/about-the-board/press-publications/conferences/c-roberts.pdf.

[16] *SJ O'D v PC O'D* [2008] IEHC 468.

[17] C Roberts, "The voice of the child in family disputes – presentation for Legal Aid Board Family Law Conference 2013" at pp 6-7, available at

noting that many judges believe that indirectly hearing from the child can have negative consequences for them and pose significant challenges for the judge. In the case of *C v W,* Abbot J points out that "an expert report should be sought instead of seeing the judge if the custody or access case is more adversarial."[18]

Finally, the authors of a recent study mention two additional mechanisms for ensuring children's voices are heard in family law proceedings: submitting a letter to the judge for consideration and providing direct evidence in court through a video link. The authors note that the holding of private interviews with children is "not something that occurs with any degree of regularity, nor is it encouraged".[19] Some judges are strongly against the practice on the basis that they do not have the requisite skills and training to speak directly with children, and other professionals involved in child care proceedings have expressed concern that the suitability of judges to meet with children varies widely.[20]

2.2 Resourcing and Costs to Parties

The cost for obtaining a professional report burdens the parents. Section 32(9) of the 1964 Act provides that "[t]he fees and expenses of an expert appointed under subsection (1) shall be paid by such parties to the proceedings concerned and in such proportions, or by such party to the proceedings, as the court may determine".

In the Committee Guidelines,[21] there are several remarks concerning the costs of expert reports. McGowan notes that, in accordance with these points, the court is responsible for determining the appointment of costs and that the assessor must provide an estimate of costs for the assessment and the report preparation, along with details of the required timing of payment for the report, costs of court attendance and any revised cost estimate. There is a strong recommendation for the parties to

https://www.legalaidboard.ie/en/about-the-board/press-publications/conferences/c-roberts.pdf.

[18] *C v W* [2008] IEHC 469 at [37].

[19] Research Report on Guidance on Contact Time for Infants and Young Children in Separated Families (Trinity College Dublin/University College Cork, December 2022) at p 66, available at http://www.tara.tcd.ie/bitstream/handle/2262/101861/FINAL%20OneFamily%20TCD%20UCC%20Report%2012Dec22v2.pdf?sequence=1&isAllowed=y.

[20] A Parkes, C Shore, C O'Mahony and K Burns, "The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court" (2015) 27 *Child and Family Law Quarterly* 423 at pp 432-437. See further Joint Oireachtas Committee on Justice and Equality *Report on Reform of the Family Law System* (October 2019) at p 36, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

[21] Courts Service, *Report of the Family Law Reporting Project Committee* (2007) p 41, available at http://www.uspi.ie/attachments/File/Report_of_the_Family_Law_Reporting_Project_Committee_to_the_Board_of_the_Courts_Service.pdf.

secure funding to cover the fees to prevent delays in producing and discharging the report.[22]

2.3 Accreditation and Regulation of Professionals

The 2018 Regulations also provide specific rules regarding the professions, qualifications, experience and minimum standards of practice in respect of section 32 experts. Article 3(1) lists the professionals who are qualified to perform the functions of an expert, which includes psychiatrists, psychologists, social care workers and registered teachers with relevant experience of at least 5 years within the 10 years immediately preceding the appointment. This includes cases where multiple periods together amount to at least 5 years. Moreover, a person cannot be appointed unless they have a professional indemnity insurance policy in place that covers claims related to civil liability arising from the performance of such functions.[23]

The expert's performance of their functions shall adhere to the following minimum standards, as provided by Article 5 of the 2018 Regulations:

> (a) Independence: The expert shall act independently and must not be influenced by any party or person involved in the proceedings.
> (b) Communication: Unless it is not in the best interests of the child due to age or maturity, the expert shall inform the child of the reason for their appointment, the matters on which the child's views are being sought, and provide advice accordingly.
> (c) Facilitation of free expression: The expert shall facilitate the child in freely expressing their views.
> (d) Protection from undue influence: The expert shall determine if the child's views are influenced by another person, and if necessary, assist the child in expressing views not influenced by such undue influence.
> (e) Accurate reporting: The expert shall ensure that their report accurately reflects the views expressed by the child regarding the relevant matters in the proceedings.
> (f) Confidentiality: The expert shall maintain the confidentiality of documents and information provided to them, except as required by their obligation to furnish information to the court.
> (g) Knowledge of relevant laws and rules: The expert shall maintain sufficient knowledge of relevant legislation and court rules pertaining to the proceedings.

Importantly, there are no similar legislative provisions for section 47 reporters. According to the Committee Guidelines, the assessor holds general responsibility for

[22] *Ibid*.
[23] Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 (SI No 587/2018), Articles 3-4.

managing the assessment process, under the overarching supervision of the court.[24] This authority is essential to allow the assessor to be able to carry out the assessment in a way they feel is necessary. The Committee Guidelines also recommend that the relevant application should be listed in court for review once the report is concluded. If there are any delays in completing the assessment, appropriate steps should be taken to ensure that the report is completed within a timeframe that is suitable for the circumstances of the case.[25] However, the Committee Guidelines do not appear to published online, which may raise concerns about their accessibility to assessors.

2.4 Effectiveness of Existing Arrangements

The current mechanisms, instruments and guidelines provide a platform to ascertain the voice of the child in private family law proceedings. This section examines the effectiveness of existing arrangements by identifying factors that facilitate hearing the voice of the child in private family law proceedings in Ireland, as well as barriers to achieving this. Dawson correctly points out that "[i[t is not enough to legislate for the voice of the child to be heard. The State must ensure that this can be practically implemented in every case".[26]

Currently, the main obstacles to the process are recognised by the Joint Committee on Justice and Equality's 2019 Report on Reform of the Family Law System ("the 2019 Report"). The report expresses overall concern that "the right of the child to be heard is not being adequately fulfilled", citing "inadequate facilities, legislative gaps, adversarial proceedings and a lack of appropriately trained staff all proving to be major barriers to upholding the constitutional obligation".[27] Recent research commissioned by Treoir found that "[i]t is a common agreement across interviews with parents who have been in court for access that children's views are not taken into account as a standard procedure by the legal system. Furthermore, the responses suggest that there is no uniform approach within the legal system to whether the child is being interviewed for a report or not."[28] The most common factors impacting the effectiveness of the existing arrangements identified in this research include the following:

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[24] Courts Service, *Report of the Family Law Reporting Project Committee* (2007) at p 41, available at http://www.uspi.ie/attachments/File/Report_of_the_Family_Law_Reporting_Project_Committee_to_the_Board_of_the_Courts_Service.pdf.

[25] *Ibid.*

[26] K Dawson, "Listen to the Voice of the Child" (2018) 23(3) Bar Review 87 at p 87.

[27] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019), available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

[28] A Vestergaard, J O'Shea, J Garcia, C Gardner and A Dermody, *Establishing Meaningful Relationships between Children and Fathers who Do Not Live Together: Challenges and Solutions* at p 102 (Treoir/Quality Matters, 2023, available at https://www.treoir.ie/wp-content/uploads/2023/10/12.10.23_Treoir-Report_Digital.pdf). This research was based on 63 survey respondents and 20 interviews.

2.4.1 Time

The process of ascertaining the voice of the child in family law proceedings is often plagued by problems related to time. These problems include the length of court proceedings, the availability of assessors and court dates, the number of adjournments, and the lack of oversight by judges to ensure the timely completion of reports.

As noted by O'Shea, if an allegation of sexual abuse or other forms of abuse is made against a parent, it triggers a section 47 order, which restricts or limits the accused parent's access to the child and results in significant delay before the investigation report is presented to court, typically ranging from several months to a year. In cases observed by O'Shea, the potential impact of a section 47 order on the interim needs of the children involved was not taken into consideration. The courts did not discuss the option of "supervised access" to ensure the child's needs were met during the investigation. It was noted that a substantial number of section 47 orders had been previously made or were ordered in these cases, and almost all reports deemed the allegations to be "inconclusive." The delay caused by the investigation was observed to have a damaging effect on the relationship between the child and the accused parent, as acknowledged by the courts.[29]

According to Dawson, professionals are better equipped to ascertain the voice of the child away from the lengthy court process,[30] but resourcing and the availability of the assessors present another challenge. Delays in the preparation of the reports are noted in many reports and submissions. The issue of the extent to which the court should exercise oversight over the completion of the assessments and reports is also highlighted. McGowan points out that many judges do not want to increase their burden and do not seek such oversight, even though it is essentially up to the court to examine undue delays, which can be contrary to the best interests of the child.[31]

2.4.2 Cost

According to the Bar of Ireland, section 47 reports are usually ordered to be paid on a 50/50 basis and the cost of the report ranges from €750 to €5,000.[32] The Law Society estimates a cost of procuring an expert report in the region of €3,000-4,000.[33] Moreover, it has been noted that the low bar of the fixed charge for expert reports, as provided by section 32 of the 1964 Act, is unrealistic. In effect, assessors refuse to produce them at the State rate. Failure to cover the fees associated with expert

[29] R O'Shea, "Judicial Separation and Divorce in the Circuit Court" (PhD Thesis 2013) at p 298, available at https://repository.wit.ie/2825/1/thesis_ROS_WITLIB_201405final.pdf.
[30] K Dawson, "Listen to the Voice of the Child" (2018) 23(3) *Bar Review* 87 at p 87.
[31] D Mc Gowan, "Hopscotch hotchpotch", *Law Society Gazette*, 10 April 2020, available at https://www.lawsociety.ie/gazette/in-depth/voice-of-the-child.
[32] Bar Council of Ireland, *Submission by Council of The Bar of Ireland to the Legal Aid Board on the Operation of the Civil Legal Aid System* (2018), available at https://www.lawlibrary.ie/app/uploads/securepdfs/2021/06/Submission-by-Council-of-The-Bar-of-Ireland-to-the-Legal-Aid-Board-on-the-Operation-of-the-Civil-Legal-Aid-System.pdf.
[33] *Ibid*.

reports leaves open the possibility that the voice of the child may not be heard.[34] *The Denham Report* highlighted difficulties faced by non-legally aided persons in meeting costs for the appointment of experts under section 47 of the 1995 Act.[35] Hogan and Kelly have outlined that cases involving limited resources are denied the benefit of these reports, as the parties are already involved in legal action that by nature is very costly.[36]

Therefore, the fact that the 1964 Act (as amended) makes it mandatory for the fees of an expert appointed under section 32 to be paid by the parties to the proceedings risks a situation where not all children are afforded a similar opportunity to be heard, which falls short of the intended effect of Article 42A.4. The 2018 Regulations attempted to mitigate this risk by prescribing the rates of professional fees for preparing reports in relation to children. (There are no such equivalent provisions for section 47 reports.) For ascertaining the age and maturity of the child, determining the child's capacity to understand the report, and ascertaining whether the child is capable of forming his or her views on the matters of the proceedings or reporting them to the court, the expert may charge up to €240. For functions combining ascertaining the age and maturity of the child and furnishing a report to the court, the expert may charge up to €325. In addition, an expert may charge expenses for appearing as a witness in the proceedings, with a maximum amount of €250.[37] However, the intended effect of these Regulations is frustrated by the fact that the rates are set at relatively level which leaves many experts unwilling to perform the amount of work involved for the fee that would be payable, making it difficult for parents to identify experts to perform the task.[38]

The cost of obtaining the voice of the child raises concerns about fair access to justice, particularly when financial affordability acts as a barrier to ascertaining the child's perspective by professionals. According to the 2019 Report, lower-income families often cannot afford expert reports, leading to a compromise of the child's right to be heard.[39] Dawson questions the purpose of existing regulations "if the cost is beyond the means of most parents".[40] Even those who hold a legal aid certificate and receive

[34] *Ibid*.
[35] Sixth Report of the Working Group on a Courts Commission (1999) at p 68, available at http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/96E384ACEAED7F4F80256DA60039A0B8/$FILE/court6.pdf.
[36] C Hogan and S Kelly, "Section 47 reports in family law proceedings: Purpose, evidential weight and proposal for reform" (2011) 2 *Irish Journal of Family* 27.
[37] Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 (SI No 587/2018), Article 10.
[38] See Joint Oireachtas Committee on Justice and Equality *Report on Reform of the Family Law System* (October 2019) at p 36, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.
[39] *Ibid* at pp 36-37.
[40] K Dawson, "Listen to the Voice of the Child" (2018) 23(3) *Bar Review* 87 at p 87.

a contribution of around €350 may find it impossible to obtain a report.[41] Although the Legal Aid Board introduced a pilot scheme to help individuals with very low incomes meet with the assessors, it is noted that very few experts are willing to work for a €350 fee provided by the Board. As a result, the scheme is deemed ineffective.[42] The Bar of Ireland is also concerned about the lack of consistency in the amounts charged for expert reports, stating that "the deciding factors which result in such variations are unclear".[43] In cases where there is insufficient or no legal aid available and an expert report is ordered, delays in the proceedings are inevitable.[44]

2.4.3 Clarity and transparency of the process and procedures

The lack of clarity and transparency results in inconsistent practices in hearing the views of children.[45] This issue, as observed in the 2019 Report by the Joint Oireachtas Committee on Justice and Equality, is a significant problem in family law cases, where judges have different opinions on how to hear from the child.[46] In many countries, the task of hearing the voice of the child is entrusted to specialised advisory bodies that assist courts in making decisions about children. However, no such institution exists in Ireland, which makes the process less clear and transparent.[47] Under the 1964 Act (as amended), if an expert is not appointed by the court, there is no provision stipulating how the views of the child should instead be ascertained. This leaves the door open to nothing happening at all.[48]

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[41] Bar Council of Ireland, *Submission by Council of The Bar of Ireland to the Legal Aid Board on the Operation of the Civil Legal Aid System* (2018), available at https://www.lawlibrary.ie/app/uploads/securepdfs/2021/06/Submission-by-Council-of-The-Bar-of-Ireland-to-the-Legal-Aid-Board-on-the-Operation-of-the-Civil-Legal-Aid-System.pdf.
[42] F Gartland, "Rules Governing 'Voice of the Child' Experts in Family Court Cases to be Set", *Irish Times*, 12 January 2017, available at https://www.irishtimes.com/news/crime-and-law/rules-governing-voice-of-the-child experts-in-family-court-cases-to-be-set-1.2934704 .
[43] Bar Council of Ireland, *Submission by Council of The Bar of Ireland to the Legal Aid Board on the Operation of the Civil Legal Aid System* (2018), available at https://www.lawlibrary.ie/app/uploads/securepdfs/2021/06/Submission-by-Council-of-The-Bar-of-Ireland-to-the-Legal-Aid-Board-on-the-Operation-of-the-Civil-Legal-Aid-System.pdf.
[44] *Ibid*.
[45] See Irish Human Rights and Equality Commission, *Submission to the Committee on the Rights of the Child on Ireland's Combined Fifth and Sixth Periodic Reports* (2022) at p 53, available at https://www.ihrec.ie/app/uploads/2022/09/Ireland-and-the-Rights-of-the-Child-Final.pdf; see also Ombudsman for Children's Office, *Report of OCO to the Committee on the Rights of the Child on Ireland's Combined Fifth and Sixth Periodic Reports* (2022) at p 32, available at https://www.oco.ie/app/uploads/2022/09/Report-of-the-Ombudsman-for-Childrens-Office-to-the-UN-Committee-on-the-Rights-of-the-Child.pdf.
[46] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at 36, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.
[47] K Dawson, "Listen to the Voice of the Child" (2018) 23(3) *Bar Review* 87 at p 87.
[48] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at pp 34-35, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

2.4.4 Qualifications of the assessors

The 2019 Report also draws attention to the lack of regulations surrounding the preparation of section 47 reports, and the absence of a mechanism for filing complaints regarding the conduct of unregulated professionals who may be permitted to prepare such reports.[49] As noted previously, there are no specific qualifications required for experts appointed under section 47 of the 1995 Act, which creates a problem for judges who appoint unregulated professionals. Moreover, in the event that their opinion is challenged, there is no complaint mechanism available.[50] The topic of unregulated assessors has recently received significant media coverage recently in the context of unregulated psychologists.[51]

2.4.5 Training for judges and legal professionals

The lack of formal training for judges and legal professionals is a recurring theme in the literature, as well as in the reports and submissions of various stakeholders, including the Ombudsman for Children's Office (OCO).[52] This issue featured prominently in the recent Family Justice Consultation Process. Ní Longaigh argues that the lack of a training program specifically designed to prepare professionals who represent children in family law proceedings has the potential to significantly restrict the extent of child participation.[53]

Dawson notes that judges are not trained to interview children, making it difficult for them to implement section 31 of the 1964 Act (as inserted by the 2015 Act) without the help of a professional report.[54] O'Shea, who conducted an extensive study of judicial separation and divorce in Circuit Court, concludes that no court covered by the study allowed children to directly voice their thoughts. In multiple instances, counsel requested that a child be allowed to speak with a judge, but these requests were always denied. Out of the six judges interviewed, five expressed the belief that judicial training was necessary to enable them to have meetings with children in their private chambers.[55] The 2019 Report also cited testimony to the effect that judges may not have sufficient training to feel confident or capable of conducting interviews with children in their chambers or placing them in the witness box, given the sensitive nature of the proceedings.[56]

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[49] *Ibid* at p 38.
[50] *Ibid* at p 36.
[51] K Holland, "Reports for Family Law Courts on Best Interests of Children are Inconsistent, Unregulated" (Irish Times, 20 February 2023).
[52] Ombudsman for Children's Office, *Report of OCO to the Committee on the Rights of the Child on Ireland's Combined Fifth and Sixth Periodic Reports* (2022) at p 32, available at https://www.oco.ie/app/uploads/2022/09/Report-of-the-Ombudsman-for-Childrens-Office-to-the-UN-Committee-on-the-Rights-of-the-Child.pdf.
[53] C Ní Longaigh, "Through The Eyes of the Child: A Critical Analysis of Child Participation in Private Family Law Proceedings in Ireland" (2016) 15 *Cork Online Law Review* 38 at p 55.
[54] K Dawson, "Listen to the Voice of the Child" (2018) 23(3) *Bar Review* 87 at p 87.
[55] R O'Shea, "Judicial Separation and Divorce in the Circuit Court" (PhD Thesis 2013) at p 259 - 260, available at https://repository.wit.ie/2825/1/thesis_ROS_WITLIB_201405final.pdf.
[56] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at pp 34-35, available at

2.4.6 Undue Influence and the Voice of the Child

It is important to acknowledge the inherent limitations of reports on the views of the child, as they may not always accurately reflect the genuine views and preferences of children who may be influenced by parental pressure or manipulation, or whose views may be evolving or changing over time.[57] In the case of *AB v CD*, for example, the Court expressed concerns about the extent to which the children's views were influenced by their mother and the experts involved. After considering the children's perspectives, the Court determined that they were still being alienated by the mother. As a result, the Court concluded that their views should not be allowed to alter the fundamental approach of the Court.[58]

2.4.7 Age

A minimum age at which a child should be heard has not been established. Some judges assume that "a child below six or seven could not express a view directly."[59] Conversely, in *RP v SD*,[60] it was determined that there is no automatic presumption against hearing a child under the age of six. The court held the view that everyday life matters should be taken into consideration in determining the maturity of the child, which would assist the court in making a preliminary determination.[61] This is in contrast to the fact that psychologists and GALs interview children below that age bar, as noted by Dawson.[62] Therefore, the age of the child may play a significant role in determining whether they are given the opportunity to participate in legal proceedings, but there is no specific guidance provided on what age is considered appropriate for such participation.[63] Recent research commissioned by One Family has identified "the stark absence of the voice of infants and very young children in the Irish family law arena, specifically when decisions about contact time are being made", with several judges interviewed for this research indicating a reluctance to engage with children aged below 6 years.[64]

2.5 Reform Recommendations

Reform recommendations on the voice of the child in private family law proceedings come from various sources, including committees on justice and family law reform,

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https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

[57] R O'Shea, "Judicial Separation and Divorce in the Circuit Court" (PhD Thesis 2013) at p 152, available at https://repository.wit.ie/2825/1/thesis_ROS_WITLIB_201405final.pdf.

[58] *AB v CD* [2011] IEHC 543.

[59] K Dawson, "Listen to the Voice of the Child" (2018) 23(3) *Bar Review* 87 at p 87.

[60] *RP v SD* [2012] IEHC 188.

[61] *Ibid*.

[62] K Dawson, "Listen to the Voice of the Child" (2018) 23(3) *Bar Review* 87 at p 87.

[63] C Ní Longaigh, "Through The Eyes of the Child: A Critical Analysis of Child Participation in Private Family Law Proceedings in Ireland" (2016) 15 *Cork Online Law Review* 38 at p 47.

[64] S McCaughren, S Holt, A Parks and S Gregory, *Research report on guidance on contact time for infants and young children in separated families* at p 112 (One Family/TCD/UCC, 2022, available at https://onefamily.ie/contact-time-for-infants-and-young-children-in-separated-families-research-report/).

the Legal Aid Board, and the Ombudsman's for Children's Office, and a variety of non-governmental organisations and individuals who are stakeholders in the process. For example, in his presentation for the Legal Aid Board Family Law Conference in 2013, Roberts highlighted the need for clear guidelines in multiple areas regarding how judges should assess and take into account a child's wishes in legal proceedings. He emphasised the need for guidelines in areas such as the factors judges should consider when evaluating a child's desires, the age at which a child's wishes should be taken into account, accessing a child's wishes, how judges should communicate with and interview children, assessing the suitability and competence of professional reports, and guidelines for the format, service, and admissibility of such reports.[65]

Despite the passing of time, these areas have remained ambiguous and unresolved to this day, and are referenced in recommendations across various submissions and reports. The 2019 Report includes a call by Shannon for a structured framework that would provide consistency across courts, as the absence of legislative guidance and policy has often resulted in the voice of the child being unheard. Shannon emphasizes that the protocols and legislation must be drafted with consideration for various scenarios, such as private family law contexts and child abuse contexts.[66] In the same report O'Mahony stresses the importance of flexibility in selecting methods for ascertaining the views of the child, as every child and case is unique. [67]

The Children's Rights Alliance emphasises the importance of developing detailed guidelines for judges to follow during meetings with children, which would comply with the Council of Europe Guidelines on Child-Friendly Justice.[68] These guidelines should be made available for publication, and formal training should be provided to judges to equip them for this task.[69] These recommendations are also accentuated in the 2019 Report, which suggests that such trainings should be mandatory,[70] and assisted

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[65] C Roberts, "The voice of the child in family disputes – presentation for Legal Aid Board Family Law Conference 2013" at p 6 – 7, available at https://www.legalaidboard.ie/en/about-the-board/press-publications/conferences/c-roberts.pdf.

[66] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at p 35, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

[67] *Ibid* at p 37.

[68] Children Rights Alliance, *Submission to the Family Justice Oversight Group Consultation* (March 2021) at p 6, available at https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Children%27s%20Rights%20Submission%20to%20the%20Family%20Justice%20Oversight%20Group%20Consultation.pdf.

[69] Children Rights Alliance, *Submission to the Family Justice Oversight Group Consultation* (March 2021) at p 6, available at https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Children%27s%20Rights%20Submission%20to%20the%20Family%20Justice%20Oversight%20Group%20Consultation.pdf.

[70] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at p 39, available at

by ancillary services to enable reports to be obtained on any aspect of a child's welfare, if necessary.[71]

The Children's Rights Alliance also underlines the potential benefits of mandating specialised training for all professionals working in family law courts, including solicitors and barristers. Such training would have a specific focus on the procedures for meeting and hearing from children and young people, including those with intellectual disabilities.[72]
The cost of expert reports is an issue that is repeatedly raised in all reports. One Family suggests that qualified practitioners should be registered, supervised, and funded by the State. [73] The Children's Rights Alliance shares a similar view.[74] The Joint Committee on Justice and Equality proposes the implementation of a State scheme similar to the legal aid scheme, to ensure the appointment of an expert and to prevent the cost of expert reports from becoming a barrier to justice for a significant portion of the population. The Committee also recommends that funding must be provided to support the involvement of multiple agencies in proceedings.[75]

Treoir proposes several options to address this issue. One option is for the state to create and fund a panel of experts who can produce reports within a reasonable timeframe and be available to the courts. Alternatively, a national organization like the Guardian *ad Litem* (GAL) service in Northern Ireland could be established and utilised for both public and private law proceedings.[76] The Children's Rights Alliance

https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

[71] C Roberts, "The voice of the child in family disputes – presentation for Legal Aid Board Family Law Conference 2013" at p 6 – 7, available at https://www.legalaidboard.ie/en/about-the-board/press-publications/conferences/c-roberts.pdf.

[72] Children Rights Alliance, *Submission to the Family Justice Oversight Group Consultation* (March 2021) at p 6, available at https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Children%27s%20Rights%20Submission%20to%20the%20Family%20Justice%20Oversight%20Group%20Consultation.pdf.

[73] One Family, *One Family Submission to the Family Justice Oversight Group Consultation* (February 2021) at p 22, available at https://onefamily.ie/wp-content/uploads/2021/02/FJOG.-Family-Law-Justice-Reform-Submission.-One-Family.-Feb-2021.pdf.

[74] Children Rights Alliance, *Submission to the Family Justice Oversight Group Consultation* (March 2021) at p 6, available at https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Children%27s%20Rights%20Submission%20to%20the%20Family%20Justice%20Oversight%20Group%20Consultation.pdf.

[75] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at p 36, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

[76] Treoir, *Submission to the Joint Committee on Justice* (February 2021) at p 5 – 6, available at https://www.treoir.ie/wp-content/uploads/2021/03/Submission-on-General-Scheme-of-the-Family-Court-Bill-1.pdf.

are also suggest that the GAL Executive Office could be relocated to the Courts Service to oversee both public and private mechanisms.[77] One Family argues that it should be acknowledged that some children in private family law proceedings may require the services of a GAL, and publicly-funded GALs should be included in the reformed system.[78]

Moreover, it is crucial to establish legislative clarity regarding the criteria for appointing an expert, particularly concerning their qualifications, membership of a professional body, and accountability, and funding.[79] In their 2022 report, researchers from Trinity College and UCC note that in order to establish a strong, safe, and evidence-based process for assessing, making decisions, and creating supportive structures regarding contact time, professionals with expertise in both therapeutic and methodological aspects of determining and representing the opinions of infants and young children are necessary.[80]

Roberts emphasises the importance of ensuring the suitability and competence of professionals who provide reports, and suggests that their reports should be given greater consideration and examination. He also recommends standardising the format of such reports and requiring that they be prepared and furnished to parties in advance of the hearing. In addition, he argues that the weight to be given to the views of children in court proceedings should be clarified.[81]

In the 2019 Report, similar recommendations are made. The Committee agrees that criteria for appointing an expert should be clarified, including specialisation and accountability. Regulations should also be put in place to ensure that those who prepare reports are properly qualified. The appointment criteria for an expert, such as

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[77] Children Rights Alliance, *Submission to the Family Justice Oversight Group Consultation* (March 2021) at p 6, available at https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Children%27s%20Rights%20Submission%20to%20the%20Family%20Justice%20Oversight%20Group%20Consultation.pdf.

[78] One Family, *One Family Submission to the Family Justice Oversight Group Consultation* (February 2021) at p 22, available at https://onefamily.ie/wp-content/uploads/2021/02/FJOG.-Family-Law-Justice-Reform-Submission.-One-Family.-Feb-2021.pdf.

[79] Children Rights Alliance, *Submission to the Family Justice Oversight Group Consultation* (March 2021) at p 5 – 6, available at https://www.childrensrights.ie/sites/default/files/submissions_reports/files/Children%27s%20Rights%20Submission%20to%20the%20Family%20Justice%20Oversight%20Group%20Consultation.pdf.

[80] Research Report on Guidance on Contact Time for Infants and Young Children in Separated Families (Trinity College Dublin/University College Cork, December 2022) at p 6, available at http://www.tara.tcd.ie/bitstream/handle/2262/101861/FINAL%20OneFamily%20TCD%20UCC%20Report%2012Dec22v2.pdf?sequence=1&isAllowed=y.

[81] C Roberts, "The Voice of the Child in Family Disputes – Presentation for Legal Aid Board Family Law Conference 2013" at p 6-7, available at https://www.legalaidboard.ie/en/about-the-board/press-publications/conferences/c-roberts.pdf.

their field of expertise and level of accountability, need to be clearly defined. Shannon emphasises the need for regulations similar to those for section 32 reports to also be implemented for section 47 reports.[82] O'Mahony recommends that the default position should be the appointment of an expert, with clear exceptions outlined for when this may not be necessary.[83]

Finally, as noted in the One Family submission to the Family Justice Oversight Group Consultation, steps should be taken to make sure that court environments are child friendly. This can be achieved by incorporating interview and waiting rooms that are designed to cater to the needs of children. Additionally, One Family recommends implementing measures to make legal proceedings more child-friendly by providing relevant information to children and their parents or legal representatives.[84]

The Joint Oireachtas Committee on Justice and Equality concludes in its report that to ensure that children have meaningful involvement in family law proceedings, the system needs to be equipped to facilitate their participation. This means taking into account their developmental needs, communication abilities, and the potential impact of the proceedings on their well-being. Providing child-friendly court environments and legal proceedings is one step towards achieving this goal.[85]

[82] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at p 38, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.
[83] *Ibid* at p 35.
[84] One Family, *One Family Submission to the Family Justice Oversight Group Consultation* (February 2021) at 22, available at https://onefamily.ie/wp-content/uploads/2021/02/FJOG.-Family-Law-Justice-Reform-Submission.-One-Family.-Feb-2021.pdf.
[85] Joint Oireachtas Committee on Justice and Equality, *Report on Reform of the Family Law System* (October 2019) at p 35, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf.

3. England and Wales

3.1 Mechanisms for Child Participation in Private Family Law Proceedings

Article 12 of the United Nations Convention on the Rights of the Child (CRC) requires States Parties to provide a child capable of forming their views a right to express those views in all matters affecting the child with these views being given due weight in accordance with the age and maturity of the child. It should be borne at the outset that the CRC and its provisions are not directly incorporated into English and Welsh law domestically. That being said, however, elements of the CRC, and particularly Article 12, can be seen within the governing domestic legislation and has been held within case law as "morally authoritative".[1] The Children Act 1989 ("the 1989 Act") is the primary piece of legislation for which proceedings are instigated concerning the private arrangements of children during divorce and separation. One of the foundational elements of the Act can be found in section 1 which requires a court to regard the child's welfare as the paramount consideration when determining decisions related to the child's upbringing.[2] Barnett notes that Article 12 is given "expression" within the 1989 Act through section 1(3) by requiring a court to have first regard to the child's "ascertainable wishes and feelings" which should be "considered in light of their age and understanding".[3] This section also contains other elements which a court should have regard to and this has become known as the "welfare checklist".

A court has the power under section 8 of the 1989 Act to make residence and contact orders for a child in such proceedings. In order to aid the court in making such orders and ascertain the views of the child, section 7 empowers the court to commission a report to outline the matters relating to the welfare of the child. This kind of report can be carried out by various groups (including the local authorities) but are mainly carried out by the Children and Family Court Advisory and Support (CAFCASS). CAFCASS by its own definition is an independent court service charged with the representation of the child's views within these proceedings.[4] The service was formed under the Parliament (Criminal Justice and Court Services Act) 2000 and under section 12, the services of CAFCASS apply to both public and private family law cases.[5] As noted by MacDonald, CAFCASS is bound by the welfare checklist referred to above and will carry out these obligations through considering the disputed issues, the

[1] *A City Council v T, J and K* [2011] EWHC Fam 1082.
[2] Children Act 1989, section 1.
[3] Ministry of Justice, *Domestic Abuse and Private Law Children Cases: A literature Review* (2020) at p 62, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895175/domestic-abuse-private-law-children-cases-literature-review.pdf.
[4] *Ibid*.
[5] Criminal Justice and Court Services Act 2000, section 12.

options available to the court as well as any feasible recommendations which they can make to the court surrounding the welfare of the child.[6]

Another mechanism through which the views of the child is ascertained within the English and Welsh jurisdiction is through the process of a court appointed separate representative. According to rule 16.4 of the Family Procedure Rules 2010, within particularly complex family law cases, a court can make a child party to the proceedings along with the appointment of a guardian *ad litem* to report on the child's wishes and best interests. It should be noted that it is usually a member of CAFCASS who will be appointed as a guardian *ad litem* on behalf of the child. In what has been referred to by academics as the "tandem model", the guardian *ad litem* will then appoint a solicitor to act on behalf of the child.[7]

Additionally, the views of the child can be ascertained through direct participation of the child in the proceedings by way of a judicial interview. Fernando references case law and practice that has established that this it is at the discretion of the individual judge as to whether or not they will meet with the child.[8] The way in which the judge will interact with the child is further detailed in guidelines which were published in 2010 by the Family Justice Council's Voice of the Child Committee and will be discussed in relation to the effectiveness of this mechanism at section 3.4 below.

3.2 Resourcing and Costs to Parties

CAFCASS is funded and resourced by the Ministry of Justice and is a governmental organisation. This means that the parties to proceedings do not incur any fees for a court appointed guardian *ad litem* to conduct a report under section 7. In the case of rule 16.4 where the child is made a party to the proceedings, the child will be awarded legal aid and will not incur any cost.

3.3 Accreditation and Regulation of Professionals

CAFCASS is a service composed of social workers and therefore the requirements for working with working as a Family Court Advisor are largely similar to that of the general requirements for social workers in England and Wales. However, in addition to the basic requirements for becoming a registered social worker, a CAFCASS officer must also have undergone a minimum of 3 years post qualified experience which must also include experience with "highly vulnerable children and families".[9]

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[6] G Macdonald, "Hearing Children's Voices? Including Children's Perspectives on their Experiences of Domestic Violence in Welfare Reports Prepared for the English Courts in Private Family Law Proceedings" (2017) *65 Child Abuse and Neglect* 1 at p 2.
[7] A Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge 2013) at p 107.
[8] M Fernando, "Family Law Proceedings and the Child's Right to be Heard in Australia, The United Kingdom, New Zealand, and Canada" (2015) 52 *Family Court Review: An Interdisciplinary Journal* 44 at p 49.
[9] CAFCASS Website, Family Court Adviser, available at https://www.cafcass.gov.uk/careers/our-roles/family-court-

3.4 Effectiveness of Existing Arrangements

Research on the effectiveness of incorporating the voice of the child into private family law proceedings is admittedly limited with the majority of research having taken place over a decade ago. That being said, academics have undertaken some research into the extent to which those who avail of services such as CAFCASS (both parents and children) were satisfied with their experience. The main study was conducted by Bailey, Thoburn and Timms in 2011 (the 2011 Study), who sought to build off the seminal research conducted by Douglas in the mid-2000s. The authors of the 2011 study sought to avoid some of the "gatekeeping" by parents to ascertaining the views of the child in their study as was experienced by Douglas in her research and therefore removed the element of identifiable information from their research in order to maximise the response rate which resulted in 141 responses received.[10] The methodology of the 2011 Study took the form of a survey of resident parents of those youth who had been in contact with CAFCASS as part of contact or residence proceedings via the CAFCASS local offices. The survey assessed the extent to which the children understood the court process; were satisfied with their level of involvement; were satisfied of the professional services provided; and were satisfied with the orders made by the court.[11] Of the 141 responses, females represented around 75%. The ages of children ranged from 11 to 18 with a median age of 13. This meant that the satisfaction of very young children within the study was unable to be gauged and that the overall results were somewhat limited.

In a 2011 study, the majority of respondents (57%) considering that the services of CACASS having helped "make things better".[12] Within this figure a range of satisfaction levels can be seen with 21% believing the service to have helped them "a lot" and 36% "a little".[13] Whilst the 2011 study gives an indication of how well the system acts for those who avail of it, it does not fully capture the extent to which CAFCASS works with all children involved in private family law disputes. A report conducted by the Nuffield Family Justice Observatory in 2022 ("the 2022 report") directly analysed CAFCASS data. This study refers to the different mechanisms discussed above as "markers of participation".[14] The results from this report seem to mirror others that a section 7 report carried out by CAFCASS is the most prominent way for obtaining the

adviser/#:~:text=What%20you%20need,case%20analysis%2C%20planning%20and%20recording.

[10] G Douglas, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991: Final Report to the Department for Constitutional Affairs* (2006), available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=849ca3dd341a9f8ac840d1b2bba0b4d075a6f9a4.

[11] S Bailey, J Thoburn and J Timms, "Your Shout too! Children's Views of the Arrangements Made and Services Provided when Courts Adjudicate in Private Law Disputes" (2011) 33(2) *Journal of Social Welfare and Family Law* 123 at p 128.

[12] *Ibid* at p 130.

[13] *Ibid*.

[14] Nuffield Family Justice Observatory, *Uncovering Private Family Law: What can the Data Tell us about Children's Participation* (2022), available at https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/06/nfjo_report_private_law_child_participation_20220615_FINAL-1.pdf.

voice of the child with it appearing in 33.6% of the cases analysed. What is worrying is that over half of the cases analysed did not include any marker of participation involved (ie no report (section 7 or otherwise) nor separation representation under rule 16.4).[15] This would seem to limit the extent to which significance can be placed on the results of the 2011 study. That being said, the 2022 report does concede that a limitations of that study is that it does not capture the full picture of children's participation within private family law proceedings; it only refers to the formal markers of participation discussed above, and not to written communication between the judge and child, private judicial interviewing or the use of child friendly judgements.[16] Whilst the majority of responses stated their overall satisfaction with the services provided by CAFCASS there is still a strong minority within the 2011 study of those who were left with a dissatisfied impression of their experience. 33% of the responses reported feeling that the CAFCASS worker had not done anything for them at all. More concerning is the 10% who felt the involvement of CAFCASS in their case had actually worsened their situation by not fully explaining the court process or consequences of a court judgement.[17] This is particularly worrying in the context of the 2022 report where less than a half of the cases analysed involved children accessing CAFCASS services. The 2011 study noted that 23% of participants complained of a lack of time spent by the CAFCASS worker with the child as well as a lack of a continuing service after the proceedings.[18] It can be speculated that this figure might be even higher if CAFCASS was providing its services to more children, thereby spreading its resources more thinly. It should be noted however that the 2011 and 2022 reports are practically a decade apart and that no equivalent satisfaction report similar to that of the 2011 study has been completed in recent years.

Whilst the effectiveness of CAFCASS alone is dubious in light of the reports conducted, it should be noted that there is a general positive association with the "tandem" model of separate representation. The 2011 Study provides insights into this, with 61% of the responses outlining the helpfulness of all of the services taken as a whole.[19] Within this majority, 16% further detailed that the services were "very helpful" whilst 45% of responses rated the entirety of the services as "quite helpful".[20] Parkes notes that the "tandem model" of separate representation is somewhat recognised internationally as the ideal system for obtaining the voice of the child in the private family law sphere. For example in the seminal English case of *Mahon v Mahon*,[21] the England and Wales Court of Appeal reference the tandem model as "a Rolls Royce model" and the envy of many other jurisdictions.[22] As previously stated, this model

[15] *Ibid*.
[16] *Ibid* at p 7.
[17] S Bailey, J Thoburn and J Timms, "Your Shout too! Children's Views of the Arrangements Made and Services Provided when Courts Adjudicate in Private Law Disputes" (2011) 33(2) *Journal of Social Welfare and Family Law* 123 at p 130.
[18] *Ibid* at p 131.
[19] *Ibid*.
[20] *Ibid*.
[21] *Mabon v Mabon & Ors* [2005] EWCA Civ 634.
[22] *Ibid* at para [25].

involves the dual representation of a child who has been made a party to the proceedings owing to the complexity of the case. The child is then appointed a guardian *ad litem* and subsequent solicitor who are responsible for maintaining the child's interests within the proceedings. Douglas's research in 2006 on the "tandem" services reports that in general the children who were interviewed were happy about the idea of having a party represent them in court in order to increase their participatory ability.[23] Another benefit outlined by some children within the Douglas interviews was the fact that separate representation provided the child with an independent third party who the child could confide in. This was particularly relevant in cases where the proceedings were "entrenched" or where there existed an element of abuse within the familial dynamic.[24]

That being said, even the "Rolls Royce" model has flaws that have been documented in the literature. As noted by Parkes, even the judge within the seminal case of *Mahon v Mahon* was quick to note the deficits of the 16.4 Rule – particularly the paternalistic nature of the tandem service. Parkes notes that in practice it is really the guardian *ad litem* who instructs the solicitor on behalf of the child.[25] Given that the role of the representative is to firstly concern themselves with the welfare of the child (as per section 1 of the 1989 Act), the voice of the child becomes "secondary".[26] Douglas refers to this in the 2006 study where the children, via their interviews noted their "disappointment" with the guardian *ad litem* as a result of their confusion of the guardian's role who they did not feel had accurately "relayed their views as they had wanted them put to the court".[27] As noted by Parkes, the court in *Mabon* also referred to this concern regarding the 16.4 rule but was of the view that in the case of "articulate young people", their right to have their views heard should outweigh concerns for their welfare.[28] It should be noted also that the extent to which rule 16.4 is invoked in practice is minor and only in "exceptional cases". As is noted by Fernando, in the period of 2005-2006, rule 16.4 occurred in only 1,000 cases of the 26,000 that CAFCASS had been involved in during this period.[29] According to the CAFCASS annual report 2021-2022, these figures have not appeared to have

[23] G Douglas, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991: Final Report to the Department for Constitutional Affairs* (2006), p 203, available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=849ca3dd341a9f8ac840d1b2bba0b4d075a6f9a4.
[24] *Ibid* at p 8.
[25] A Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge 2013) at p 108.
[26] *Ibid* at p 107.
[27] G Douglas, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991: Final Report to the Department for Constitutional Affairs* (2006), p 190, available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=849ca3dd341a9f8ac840d1b2bba0b4d075a6f9a4.
[28] *Mabon v Mabon & Ors* [2005] EWCA Civ 643 at para [28].
[29] M Fernando, "Family Law Proceedings and the Child's Right to be Heard in Australia, The United Kingdom, New Zealand, and Canada" (2015) 52 *Family Court Review* 44 at p 62.

changed much with only 2,140 appointments under the 16.4 rule during this period.[30] A number of other issues have been noted in relation to the rule by Douglas, such as the added element of delay to proceedings, risk for trauma to the child from having to make decisions about which parent to live with or how much to see the other.[31]

A review of the literature also tells us that children can directly participate in proceedings by way of judicial interview. As previously stated, whether a child will meet with the judge is at the discretion of the presiding judge. Fernando notes that in the past there has been some criticism of the practice by those believing that the private meeting between judges and children in private family law cases should not be encouraged.[32] Fernando references the cases of *B v B*[33] as well as *Re M (A Minor)*[34] where the court held that whilst the decision to meet with a child was within the judge's discretion, this mechanism should only be availed of in exceptional cases and with caution. Daly, in referencing Douglas' research, notes that the attraction for children in meeting directly with the judge could be attributed to a dissatisfaction as to the way their views had been relayed to the court by their guardian *ad litem*.[35] A recognised concern is the potential for the process of judicial-interviewing to become a "cost-saving tool" whereby the time-consuming work of specialised social workers, such as CAFCASS, is eliminated.[36] These concerns are somewhat addressed by the Family Justice Council Guidelines for Judges Meeting Children which were published in 2010. Birch notes that the guidelines clearly state that the process of judicial interviewing should not be viewed as a replacement of CAFCASS or other organisations which are responsible for representing the voice of the child.[37] This is clear insofar as the guidelines reference that a judicial interview with a child should not be a "fact finding" mission, but should be more about assuring the child that their views are being heard on the matter. Additionally, they outline that judges in making their decisions should be wary as to who they will affect, such as children, and that judges should be able to communicate their orders accordingly in a child friendly

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[30] Children and Family Court Advisory and Support Service, *Annual Report and Accounts* (2022), available at https://www.cafcass.gov.uk/about-cafcass/reports-and-strategies/annual-reports/.

[31] G Douglas, *Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991: Final Report to the Department for Constitutional Affairs* (2006), p 11, available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=849ca3dd341a9f8ac840d1b2bba0b4d075a6f9a4.

[32] M Fernando, "Family Law Proceedings and the Child's Right to be Heard in Australia, The United Kingdom, New Zealand, and Canada" (2015) *52 Family Court Review: An Interdisciplinary Journal* 44 at p 49.

[33] *B v B (Minors)* [1994] 2 FLR 489.

[34] *Re M (A Minor) (Justices' Discretion)* [1993] 2 FLR.

[35] A Daly, "The Judicial Interview in Cases on Children's Best Interests – Lessons for Ireland" (2017) 20 *Irish Journal of Family Law* 3.

[36] A Daly, "The Judicial Interview in Cases on Children's Best Interests – Lessons for Ireland" (2017) 20 *Irish Journal of Family Law* 3.

[37] R Birch, *Voice of the Child – UK Perspective* (2016), available at https://www.5sah.co.uk/knowledge-hub/news/2016-04-07/voice-of-the-child-uk-perspective-a-lecture-given-by-roger-birch-on-the-18-march-2016.

fashion.[38] When meeting with a child, a judge should also explain the process in a child-friendly fashion including the lack of confidentiality that the child has within the meeting (which a judge should refer to as "secret keeping" when explaining to the child).[39] Daly also notes that where the child has expressed interest in meeting with a judge and that judge has subsequently deemed it inappropriate, the judge should communicate this to the child in a manner which the child can understand.[40]

3.5 Documented Negative Impacts on Children

A major theme which has been highlighted throughout the literature on the approach in England and Wales is the extent to which the views of the child are accurately represented to a court where elements of domestic abuse exist. MacDonald's study of 70 CAFCASS reports outlines concerns as to the extent to which the views and wishes of the child are actually considered by the CAFCASS workers when themes of domestic violence are present. MacDonald references a subsample of the welfare reports which she reviewed and notes that a child's lack of desire for contact with the non-resident parent is used selectively in continuance of a "pro-contact" ideology which the CAFCASS system operates under. This means that the service operates on the presumption that a child's best interests include continued contact with both parents even where one has displayed signs of physical or mental abuse towards the other spouse or even the child.[41]

MacDonald's study included an analysis of 70 CAFCASS welfare reports. The extent to which the child's voice was represented in the report was also subject to whether the child was pro-contact or not. Views of children which sought to continue contact with the alleged abusive parent were presented as "straightforward" but opposition stances were treated as "obstructive". MacDonald notes that where children are "steadfastly" opposed to contact, a recommendation in the report would frequently be made for indirect contact in order to maintain the relationship between the parent and child for the future.[21] Content analysis of the reports show a deliberate avoidance by a CAFCASS officer of any mention of alleged abuse reported by the child.[42] In cases where there abuse allegations were mentioned, these allegations or reference to them did subsequently not appear in the recommendations portion of the report. As MacDonald puts it, the child's experience of violence within the home simply disappears from the recommendations section of the reports.

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[38] *Ibid*.
[39] *Ibid*.
[40] A Daly, "The Judicial Interview in Cases on Children's Best Interests – Lessons for Ireland" (2017) 20 *Irish Journal of Family Law* 3.
[41] G MacDonald, "Hearing Children's Voices? Including Children's Perspectives on their Experiences of Domestic Violence in Welfare Reports Prepared for the English Courts in Private Family Law Proceedings' (2007) 65 *Child Abuse and Neglect* 1.
[42] G MacDonald, "Hearing Children's Voices? Including Children's Perspectives on their Experiences of Domestic Violence in Welfare Reports Prepared for the English Courts in Private Family Law Proceedings' (2007) 65 *Child Abuse and Neglect* 1.

A study conducted by Thiara and Gill in 2012 seeks to shed light on the extent to which domestic abuse allegations are handled by CAFCASS and the effects of this process on victims (parents and children).[43] The study suggests that the interview process by CAFCASS of the children was problematic as it encouraged the silencing of "no contact" preferences; where the views of the child were overtly similar to those of the mother, officers tended towards the view that this was as a result of parental alienation.[44] As noted by the Ministry of Justice, contact arrangements can be used as a device by an abusive perpetrator to continue abuse of a former partner or child, exposing children to "physical, psychological… sexual… and coercive control of their mother during contact sessions".[45] Therefore, this lack of taking children's desires for no contact into account presents a serious risk of opening children up to further and continued abuse.

In a recent study conducted by the Nuffield Family Justice Observatory in the UK, the researchers illustrated the impact that private law court proceedings have on the mental health of children. The Observatory studied over 17,000 children involved in private law proceedings in Wales between 2011 and 2018. The findings concluded that these children have rates of depression 60% higher than their peers,[46] rates of anxiety 30% higher than their peers,[47] and a higher likelihood of developing both in the future.[48] These statistics are alarming, and the risk of long term mental health problems for these children is very high.[49] The study also revealed the impact on schoolwork, concentration levels, and sleep, as well as the emotional toll of guilt, anger, grief, confusion and sadness, which all contribute to the harm and stress experienced by these children.[50]

However, it is important to note that children affected by family conflict will very often experience negative effects due to that conflict, which will not be mitigated by excluding the voice of the child in the family law proceedings. Indeed, excluding the voice of the child may be equally damaging to children. As Bell points out: "there is

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[43] R Thiara and A Gill, *Domestic Violence, Child Contact and Post-Separation Violence – Issues for South Asian and African Caribbean Women and Children: A Report of Findings* (2012), available at https://letterfromsanta.nspcc.org.uk/globalassets/documents/research-reports/domestic-violence-child-contact-post-separation-violence-report.pdf.
[44] *Ibid*.
[45] Ministry of Justice, *Domestic Abuse and Private Law Children Cases: A Literature Review* (2020) at p 4, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895175/domestic-abuse-private-law-children-cases-literature-review.pdf.
[46] Nuffield Family Justice Observatory, *Uncovering Private Family Law: Anxiety and Depression among Children and Young People* (2018) at pp 8-9, available at https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/06/nfjo_mental_health_private-law_report_20220216_final_eng.pdf.
[47] *Ibid* at pp 9-10.
[48] *Ibid* at p 11.
[49] S Cumbers, "The Impact of Contested Court Proceedings on Children" (*Birkett long Solicitors Blog* 26 November 2021), available at https://www.birkettlong.co.uk/site/blog/divorce-and-separation/the-impact-of-contested-court-proceedings-on-children.

no 'cut off point' at which children's participation" in family law proceedings becomes harmful and no mechanism to assess it. She states that excluding children from sharing their views may also bring negative consequences.[51]

Many experts have highlighted that children may be more vulnerable when their parents are distressed and traumatized by separation, leading to emotional unavailability from their parents. This can result in children avoiding discussions about the situation for fear of causing further upset and may feel anxious about showing loyalty to both parents. Research suggests that a considerable number of children are not informed about their parents' separation or divorce or plans for their future. However, studies have also shown that when children's views are respected and their independence is maintained, they are better equipped to cope with adversity, have higher self-esteem, and make better-informed decisions, ultimately improving their protection and overall quality of life.[52]

3.6 Reform Recommendations

The literature to date was considered by detail in the Ministry of Justice final report in 2022. It argues that the main obstacles in relation to ascertaining the voice of the child relate to the importance placed on a pro-contact stance, a lack of sufficient resources and funding, and a lack of communication between services.[53] In order to enhance the voice of the child within these private law proceedings, the Government's report indicates that further compliance with Article 12 of the CRC is needed.[54] In particular, it recommended that the extent to which professionals place importance on contact between the child and non-resident parents be looked at, especially in cases where there exists a pattern of domestic abuse. The paternalistic way in which these children's views are disregarded in favour of a parent's right to contact in a crucial inhibitor to ascertaining the voice of the child.[55]

The report recommends increased resourcing of CAFCASS in order to improve the services that it offers. It suggests that this would help with upskilling CAFCASS officers in their ability to properly identify and handle cases of domestic abuse insofar as it features within its welfare report recommendations.[56] Within the literature surrounding the efficacy of CAFCASS, there are some reports of the lack of sufficient time which is spent by the officer in interviewing the child when formulating their reports. The Ministry

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[51] F Bell, "Barriers to Empowering Children in Private Family Law Proceedings" (2016) 30 *International Journal of Law, Policy and the Family* 228.
[52] S Holt, "A Voice or a Choice? Children's Views on Participating in Decisions about Post-Separation Contact with Domestically Abusive Fathers" (2018) 40 *Journal of Social Welfare and Family Law* 459.
[53] Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (2022), available at https://consult.justice.gov.uk/digital-communications/assessing-harm-private-family-law-proceedings/results/assessing-risk-harm-children-parents-pl-childrens-cases-report.pdf.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid*.

of Justice referred to a submission by Nagalro who specifically outlined that in the formulation of section 7 reports by CAFCASS, it is often the case that only a one-hour meeting is conducted with the child who is expected to open up to a complete stranger about the intimate details of their family life and how they feel about it.[57] This issue of time limitations was observed in Thiara and Gill's research who also noted that a lack of resourcing and funding has meant that CAFCASS employees are not sufficiently trained in order to detail with cultural and ethnic diversity which could lead to a differentiation of presentation of abuse.[58] It could also mean that the recommendations that CAFCASS would be making in relation to the welfare of the child may need to be formed with the cultural aspects in mind.

The Report of the Ministry of Justice made further recommendations on the lack of coordination between the different services that exist and the court itself. It specifically noted that in making orders under section 8 of the 1989 Act, the court failed to refer to other agencies outside of CAFCASS which would be involved with the family (particularly where domestic abuse is alleged).[59] By failing to refer to these other services as well as placing the majority of importance on the views of an officer of CAFCASS, the court is potentially missing out on a wide gap of knowledge and expertise which could be offered by the likes of Barnardos, Safelives, and the Women's Aid Federation of England and Wales.[60] The report therefore advocated for the increased cooperation between CAFCASS and the other services as well as increased engagement of a court with these services who may as a result of their long-term involvement with the family have been able to form relationships which harbour a more realistic and detailed viewpoint of the child's desires in relation to childcare arrangements.

[57] *Ibid* at p 181.
[58] R Thiara and A Gill, *Domestic Violence, Child Contact and Post-Separation Violence – Issues for South Asian and African Caribbean Women and Children: A Report of Findings* (2012), available at https://letterfromsanta.nspcc.org.uk/globalassets/documents/research-reports/domestic-violence-child-contact-post-separation-violence-report.pdf.
[59] Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (2022) at pp 80-81, available at https://consult.justice.gov.uk/digital-communications/assessing-harm-private-family-law-proceedings/results/assessing-risk-harm-children-parents-pl-childrens-cases-report.pdf.
[60] *Ibid* at pp 80-81.

4. Australia

4.1 Legislative Background

Australia follows a common law legal system and as a federation the Commonwealth of Australia is made up of six states (New South Wales, Victoria, South Australia, Western Australia, Queensland, Tasmania) and two self-governing territories (The Northern Territory and the Australian Capital Territory). Sections 51 and 52 of the Australian Constitution set out the legislative powers of the Federal Parliament – some of which are exclusive, whilst others are devolved to or shared with the states and territories. With the exception of Western Australia (which has a state family court exercising both federal and state jurisdiction), all the other states and territories have referred state powers in the area of family law to the Commonwealth.[1] The Australian Constitution gives authority to the Commonwealth to legislate on "marriage" and "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants."[2] As such, family law matters are for the most part governed at federal level; however, state and territory governments retain legislative jurisdiction over adoption, child protection and welfare, and domestic violence.[3] What this means in practice is that for the resolution of various aspects of a family law matter this can involve the parties having to navigate multiple court systems. This has been particularly problematic in cases where family violence is a feature.[4] In an effort to address this "especially fragmented system with respect to children" and indeed to simplify procedures and enhance efficiency, the Family Court of Australia and the Federal Circuit Court of Australia amalgamated in 2021, leading to the establishment of the current Federal Circuit and Family Court of Australia.[5]

The Australian Constitution does not specifically mention children or their rights; however, Australia has ratified the CRC, thus placing a duty on the State to protect children and create legislative mechanisms where necessary to allow for children to

[1] House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect those Affected by Family Violence: Recommendations for an Accessible, Equitable and Responsive Family Law System which Better Prioritises Safety of those Affected by Family Violence* (Department of the Senate 2017) at p 21.
[2] The Australian Constitution, section 51.
[3] House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect those Affected by Family Violence: Recommendations for an Accessible, Equitable and Responsive Family Law System which Better Prioritises Safety of those Affected by Family Violence* (Department of the Senate 2017) at p 24.
[4] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response: Final Report (*ALRC No 114, 2010/ NSWLRC No 128, 2010) at p 52.
[5] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence - A National Legal Response: Final Report* (ALRC No 114, 2010)/ (NSWLRC No 128, 2010) at p 52.

exercise and enjoy the full suite of rights set out in the CRC.[6] Although Australian domestic law does not specifically refer to Article 12 of the CRC, its influence in shaping family law legislation is evident in the changes brought about by the Family Law Amendment (Shared Parental Responsibility) Act 2006.[7]

4.1.1 Family Law Act 1975

The Australian Family Law Act 1975 (1975 Act) is the primary piece of legislation governing private family law matters throughout Australia. The 1975 Act sets out the law that the courts must apply when determining family law disputes in relation to separation, divorce, access,[8] custody, and guardianship.[9] To ensure children receive a proper level of financial support from their parents, Division 7 of the 1975 Act sets out the principles for the provision of maintenance. However, there is limited scope with which the court can hear applications relating to child maintenance as this is primarily governed by the Child Support (Assessment) Act 1989 and managed administratively by Services Australia.

Whenever the court makes a parenting order, section 60CA provides that the court must regard the best interests of the child as the paramount consideration. The Court has considerable discretion to consider anything it thinks relevant in determining those best interests. Section 60CC sets out how the court is to determine what is in a child's best interests, laying down both "primary" and "additional considerations" in subsections (2) and (3) which the court must consider. The primary considerations set out in subsection (2) are:

> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
> (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect, or family violence.

Where there is a conflict between (a) and (b) then section 60CC(2A) obliges the court to prioritise subsection 2(b), placing the safety and wellbeing of the child above the relationship with a parent. This is of particular importance in cases where family violence and child abuse are a factor.

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[6] Australia ratified the CRC on 17 December 1990.
[7] For example, section 60CC(3)(a) of the 1975 Act requires the court in determining what is in the child's best interests to consider "any views expressed by the child and any other factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give the child's views."
[8] This includes the right to access with others besides parents as section 60B(2)(b) sets out that "children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives)."
[9] Rather than the terminology of "guardianship" and "custody" Division 2 of the 1975 Act refers to the term "parental responsibility." In section 61B this is defined as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."

The additional considerations set out in subsection (3) include:

- the views of the child, and any factors that the court thinks are relevant to the weight it should give to the child's views;
- the child's relationship with each parent and other persons (including grandparents or relatives);
- the extent to which each parent has engaged with the child and their wellbeing;
- the impact of the parental separation on the child;
- if the child is an Aboriginal or Torres Strait Islander child, their right to enjoy their culture and the impact of the parenting order on that cultural right; and
- any family violence involving the child or a member of the child's family.

4.1.2 Family Law Amendment Bill 2023

On 30 January 2023 the Australian Government released the draft Family Law Amendment Bill 2023 (1975 Act Amendment Bill) inviting submissions on the proposed legislative changes with the aim of prioritising the safety and welfare of children and simplifying the family law process for separating families. In a dramatic move away from the two primary considerations and thirteen additional considerations outlined under section 60CC of the 1975 Act, the 1975 Act Amendment Bill proposes to replace this section with a more modest six "general considerations" that place the focus on the child's best interests. Under these proposals, the court shall consider:

> (a) what arrangements would best promote the safety (including safety from family violence, abuse, neglect, or other harm) of:
>
> (i) the child; and
>
> (ii) each person who has parental responsibility for the child (the carer);
>
> (b) any views expressed by the child;
>
> (c) the developmental, psychological and emotional needs of the child;
>
> (d) the capacity of each proposed carer to provide for the child's developmental, psychological and emotional needs, having regard to the carer's ability and willingness to seek support to assist them with caring;
>
> (e) the benefit to the child of being able to maintain a relationship with both of the child's parents, and other people who are significant to the child, where it is safe to do so;
>
> (f) anything else that is relevant to the particular circumstances of the child.

Whilst it remains to be seen what aspects of the 1975 Act Amendment Bill will eventuate into law, it does demonstrate a level of acknowledgement by the Federal Government that the current legislative regime is problematic and that there is a need for legislation that more effectively situates the child in the decision-making process.

4.2 Mechanisms for Child Participation in Private Family Law Proceedings

Whilst children are typically excluded from participating directly in court proceedings there are a number of mechanisms within the 1975 Act through which a child's views may be ascertained for the court. Once proceedings have commenced the court can direct the parties to participate in what is known as a "Child Inclusive Conference."[10] This is a brief intervention conducted by a Court Child Expert (formerly known as Family Consultants) or Regulation 7 Family Consultant ("Reg 7 Family Consultant") to assist the Court in making interim orders and to determine how the matter should proceed. It may also assist the parties with negotiating an agreement earlier in the proceedings and lessen the likelihood of the matter progressing to full hearings.

Section 60CD(2) of the 1975 Act outlines a number of mechanisms with which the court may be informed of a child's views. This can be done through the preparation of family reports by a Court Child Expert or Reg 7 Family Consultant or "Single Expert", through the appointment of an Independent Children's Lawyer (ICL), or by any other means the court thinks appropriate such as direct meetings between the child and the judge. Each of these mechanisms are designed to provide children with a means with which to express their views so that they can be considered by the court in the decision-making process. Significantly, there is currently no obligation on the court to ensure that a child has in fact had the opportunity to express his or her views.

4.2.1 Family Reports

The purpose of a Family Report is to provide the court with an independent assessment of a family's circumstances and the specific needs of any children. This can assist the court in making appropriate decisions about parenting arrangements that are ultimately in the best interests of the child. Section 11 of the 1975 Act provides for the appointment of a Court Child Expert or Reg 7 Family Consultant for the purposes of completing a range of family report types. Further, section 11F gives the court specific powers to order the parties to attend appointments for the purposes of completing a family report, as well as to arrange for any children to attend.

Family reports can be ordered by the court under Section 62G of the 1975 Act. These reports are prepared by Family Consultants employed or contracted by the Court Children's Service (CCS). Court Child Experts employed by the CCS must be qualified psychologists or social workers, with expertise in the needs of children and families and in particular the needs of children in separated families. Reg 7 Family Consultants are also social workers and psychologists. Family reports can also be prepared by a "Single Expert" at the request of the court or the parties.[11] Essentially the role of the Single Expert is much the same as a CCS-employed Court Child Expert or Reg 7 Family

[10] Family Law Act 1975, section 11F.
[11] Federal Circuit and Family Court of Australia (Family Law) Rules 2021, Rule 7.03.

Consultant; however, where a Single Expert is requested by the parties and a subsequent order is granted by the Court, the parties are considered liable to pay the cost of the report as per Rule 7.07 of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021. In general, a Single Expert will complete the assessment in a much quicker timeframe than if the parties were to wait for a CCS allocated Court Child Expert or Reg 7 Family Consultant.

In preparing family reports all types of report writers are required to interview both parents separately as well as to interview any children to ascertain their views. Unlike parents, there is no requirement for the child to express their views and they can refrain from doing so. A range of issues such as the child's development, their relationship with their parents, the presence of any risk factors such as family violence, substance abuse and significant mental health issues that are likely to impact upon parenting capacity are considered in the family assessment. The family report writer can also include any other matter(s) considered relevant such as observations of the child with their parents.

This assessment process can assist parents to better understand their family dynamics and how family separation may affect their children, thus providing some impetus to set aside conflict and collaborate on a way forward that can reduce the negative impact of family separation upon a child and ultimately serve their best interests rather than those of the parents. Also, by directly involving children, parents are more likely to consider their views and what future arrangements would best meet their needs.

4.2.2 Independent Children's Lawyers (ICLs)

Section 68LA(2) of the 1975 Act provides for the appointment of an Independent Children's Lawyer (ICL). Whilst it is usually the court that appoints an ICL, it can also be at the request of the child, an organisation concerned with the welfare of children, or any other person, albeit at the court's discretion.[12] The role of the ICL is to provide an independent view to the court regarding the best interests of the child involved in family proceedings. Importantly, an ICL is not regarded as the child's legal representative (with a mandate to act on the child's instructions) but rather as an independent advocate for their best interests. Where disparities between the wishes of the child and the views of the ICL emerge, the ICL must still ensure that the child's views are conveyed to the court. As outlined in the *Guidelines for Independent Children's Lawyers*, "the professional relationship provided by the ICL will be one of a skilful, competent and impartial best interests advocate."[13] As with family report writers the child is not compelled to express their views if they do not wish to do so.

[12] Australian Law Reform Commission, *Report into the Family Law System, Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report No 135, 2019) at p 358.
[13] Federal Circuit and Family Court of Australia, *Guidelines for Independent Children's Lawyers* (Federal Circuit and Family Court of Australia 2021) at p 2.

4.2.3 Judicial Interviews

Throughout Australia, hearing directly from children in family law court proceedings is "very rare" and research has found that there are only a couple of cases per year in which a judicial officer will meet with a child.[14] Previously, rule 15.03 of the Family Law Rules 2004 stated that judicial officers could interview a child who was the subject of proceedings under Part VII of the 1975 Act; however, this was removed in 2010 given the rarity of such cases.[15] Notwithstanding this, it is still an option that remains available to judges as section 60CD(2)(c) of the 1975 Act gives the court considerable discretion to use "any such other means as the court thinks appropriate" to inform itself of the views of the child. Judicial interviews usually occur in private in the judge's chambers.[16]

4.3 Resourcing and Costs to Parties

4.3.1 Family Reports

As mentioned above the CCS holds responsibility for conducting family assessments ordered by the court under Section 62G of the 1975 Act. Family reports ordered by the court are funded at no cost to the parties and completed by a report writer allocated through the CCS (directly employed Court Child Expert or a contracted Reg 7 Family Consultant). However, if the parties request a family report and they are in receipt of legal aid they will have to meet further qualifying criteria to be eligible for Family Report funding. If the parties decide to engage a Single Expert to complete the Family Report, the cost will be borne by the disputing parties (not the ICL). In this case the CCS has no role and therefore it is the responsibility of the parties to source and coordinate this themselves, usually brokered through their legal representatives. The cost of completing a Family Report for final hearings is expensive ranging anywhere from $8,500 to $12,000 or more, depending on the complexity of the case and the issues in question.

4.3.2 ICLs

Throughout Australia it is the state and territory Legal Aid Commissions that hold responsibility for managing the allocation of an ICL to a family law matter. ICLs are "either employed directly by the Legal Aid Commission (LAC), or are lawyers in private practice who have been admitted to specialist 'panels' of ICLs maintained by the LAC and renumerated at legal aid rates."[17] When the court appoints an ICL their costs will be funded by the state or territory LAC if the parties are in receipt of legal aid. If

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[14] M Fernando, "Children's Direct Participation and the Views of Australian Judges" (2013) 92 *Family Matters* 41 at p 41.

[15] Family Law Amendment Rules 2010 (No 1), Schedule 1, para [16].

[16] M Fernando, "Children's Direct Participation and the Views of Australian Judges" (2013) 92 *Family Matters* 41 at p 44. Fernando found that only six of 44 respondent judges had ever met with a child for the purposes of hearing their views, equating to 86% having never met with a child for this purpose.

[17] F Bell, "Meetings Between Children's Lawyers and Children Involved in Private Family Law Disputes" (2016) 28 *Child and Family Law Quarterly* 5 at p 7.

the parties are not in receipt of legal aid, they will be liable for all or part of the ICL costs depending on their financial circumstances. Parties can apply to the LAC for a waiver of contribution however these are granted under very limited circumstances.

4.4 Accreditation and Regulation of Professionals

4.4.1 Lawyers

To practice law in Australia a person must first be admitted as a lawyer of the Supreme Court of an Australian state or territory and then hold a practising certificate issued in an Australian jurisdiction which requires applicants to have fulfilled academic and practical legal training requirements.[18] Each state and territory has an admission body, and all lawyers are required to adhere to the professional conduct and practice rules operating in that state or territory.

All lawyers working in the family law area should aim to follow *the Best Practice Guidelines for Lawyers Doing Family Law Work*.[19] These guidelines set out the principles of best practice to follow in family law proceedings and whilst they are not legally binding, they do provide a useful framework with which family lawyers can approach their work. Lawyers can also seek to gain specialist accreditation to be formally recognised as having advanced skills and competence in family law. Lawyers wishing to gain family law specialist accreditation much satisfy a range of eligibility criteria and following accreditation they are subject to reaccreditation requirements and must complete approved professional development activities.[20]

Each state and territory has a statutory complaints mechanism in place to receive and manage complaints relating to the conduct or behaviour and the quality of service provision from individual lawyers. In most cases complaints are resolved informally or through the use of mediation. However, in more serious cases an investigation can be carried out and if wrongdoing is identified, there are a number of disciplinary measures that can be taken including the issuing of a substantial fine, conditions applied to a lawyer's practising certificate and in the most serious of cases a lawyer's name can be removed from the legal roll so that they can no longer practice.

[18] Victorian Legal Admissions Board, *Guide for Applicants for Admission as an Australian Lawyer* (Victorian Legal Admissions Board, 2022); Admission Board of New South Wales, *Guide for Applicants for Admission as a Lawyer in NSW* (Admission Board of New South Wales 2023).
[19] Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for Lawyers Doing Family Law Work* (4th edn, Family Law Council and Family Law Section of the Law Council of Australia 2017).
[20] Law Society of Western Australia, *Accreditation Booklet 2021 – Family Law* (Law Society of Western Australia 2021; Queensland Law Society, *Family Law Assessment Criteria 2023 – Specialist Accreditation, Distinction in Law* (Queensland Law Society, 2023).

4.4.2 Family Report Writers

There is currently no direct statutory system of accreditation or regulation for family report writers in Australia despite significant concerns being raised across multiple forums about the "quality and reliability" of family reports as well as the "competency and accountability" of those who complete them.[21] Notwithstanding this, there are some indirect means of regulation and oversight for the professions involved.

In 2015, in an effort to promote good practice across both section 62G ordered reports and reports commissioned privately in family law proceedings, the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia introduced the *Australian Standards of Practice for Family Assessment and Reporting*.[22] These standards do not apply to preliminary assessments and cover only full family assessments for final hearings. The fundamental aim of the standards is to "increase the understanding in the broader sector as to what constitutes good practice in family assessments and reporting".[23] CCS employed and contracted report writers are required to comply with these standards as a condition of their employment or contract; however, for Single Expert report writers this requirement is discretionary. Further to this, section 11D of the 1975 Act confers immunity on family consultants given the quasi-judicial role they perform, in essence giving them the same protection and immunity as a judge of the Family Court.

Both psychologists and psychiatrists hold protected title status as set out under section 113 of the Health Practitioner Regulation National Law Act 2009. As such, registration with the Australian Health Practitioners Regulation Agency (AHPRA) is a statutory requirement to practice these professions in Australia. Further to this, the practice of psychiatry is considered a speciality and therefore psychiatrists must complete further medical training in psychiatry as well as completing 12 months of on-the-job training to be eligible to register. AHPRA (in partnership with 15 National Boards, one for each profession) has an overarching role of protecting the public. It does so through a range of mechanisms which include setting national standards, accrediting training and education, and managing complaints. Therefore, if parties in a family law matter wish to make a complaint about the practice of a family report writer who is a registered psychologist or psychiatrist, they can do so through the AHPRA complaints mechanism. They can also make a complaint to the state or territory health complaints organisation, for example the Health Care Complaints Commission in New South Wales, and the Health Complaints Commissioner in Victoria.

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[21] Attorney-General's Department, *Exposure Draft – Family Law Amendment Bill* 2023 (Consultation Paper, January 2023) at p 38; Australian Law Reform Commission, *Report into the Family Law System, Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report No 135, 2019) at pp 410-414; House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect those Affected by Family Violence* (PPS 544, 2017) at pp 270-277.

[22] P Hemphill & D Hugall, *Australian Standards for Practice for Family Assessments and Reporting* (Family Court of Australia, Federal Circuit Court of Australia and the Family Count of Western Australia 2015) at p 6.

[23] *Ibid*.

Historically social work has been a self-regulated profession in Australia with no restrictions on the title of social worker under Australian law. Hence, there has been no requirement for registration with a regulatory body despite the Australian Association of Social Workers actively campaigning for this and for the social work profession to be included as one of the health professions regulated through AHPRA.[24] In 2021, South Australia became the first of the Australian states and territories to create a statutory regulation scheme with the introduction of the Social Workers Registration Act 2021 which provides for the registration of social workers and to establish a Social Work Registration Board. Once the scheme is fully established, social workers practising in South Australia will be subject to eligibility and practice requirements, and parties in family law proceedings in South Australia will have the option to make a complaint directly to this body.

4.4.3 ICLs

The role of the ICL holds a considerable degree of discretion and they are expected to use their professional judgement and skills to determine their recommendations for the court. As members of the legal profession ICLs must uphold the practice standards set down for all lawyers working across the states and territories of Australia. Section 68LA of the 1975 Act sets out the role and specific duties and obligations of the ICL and the Federal Circuit and Family Court of Australia has published national guidelines specifically for the role.[25] Notwithstanding this, the role itself is not subject to any statutory accreditation or regulation requirements. ICLs are allocated by the state or territory LAC, either from their in-house specialist ICLs that have completed specialised ICL training or from an Independent Children's Lawyer Panel. The Independent Children's Lawyer Panel is comprised of lawyers in private practice who meet specific minimum requirements.[26]

If any party is unhappy with the practice of an ICL they can make an application to the court to have the ICL removed.[27] They can also make a complaint to the state or territory LAC (as the employer or contracting agent) and the state or territory body responsible for managing complaints such as the Legal Services and Complaints Committee in Western Australia, the Victorian Legal Services Board in Victoria, and the Legal Services Commission Queensland.

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[24] Australian Association of Social Workers, *Submission to the Senate Standing Committee on Community Affairs Inquiry into the Administration of Registration and Notifications by the Australian Health Practitioner Regulation Agency and Related Entities under the Health Practitioner Regulation National Law* (Submission 6, April 2021), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AHPRA/Submissions.

[25] Federal Circuit and Family Court of Australia, *Guidelines for Independent Children's Lawyers* (Federal Circuit and Family Court of Australia 2021).

[26] This includes five years post admission experience, primary practice in family law and the completion of the Independent Children's Lawyer National Training.

[27] *Gillen & Lindo* [2021] FedCFamC1F 7; *Bradshaw & Bradshaw* [2022] FedCFamC1F 930.

4.5 Effectiveness of Existing Arrangements

Over the years family law legislation in Australia has evolved demonstrating some of the efforts made at both federal and state and territory level to align domestic legislation with the international obligations set down in the CRC. However, despite this, multiple government and non-government sources have highlighted significant barriers to meaningful child participation in Australian legal proceedings.[28]

Whilst the 1975 Act provides for the child the right to express their views, children do not explicitly have the right to be heard nor does the child have the opportunity to express his or her views freely. Section 60CC outlines two primary best interests considerations and a further thirteen additional considerations the court must take into account in determining the child's best interests. As the two primary considerations, shared parenting and protection from harm supersede the child's right to be heard (as listed first in the additional consideration laid down under s60CC(3)(a)). Further, children's participation is only considered in contested cases. In consent cases parents are simply encouraged to have regard for the bests interests of the child in reaching an agreement, with no specific obligation upon them to do so. Hence, the child's views may very well be positioned as secondary to that of their parents in consent cases. Primary and secondary criteria further complicate judicial decision making the already complex judicial decision making decision more susceptible to appeal.

Achieving a balance between the child's right to participation and the duty to protect children from harm is a challenging endeavour. However, research in Australia and internationally indicates that children want to have more of a say in decisions that affect them and more specifically in decisions made about their care arrangements.[29] Notwithstanding this, it is important to point out that whilst children want the opportunity to participate in family law decision-making, this is not the same as wanting responsibility for being the ultimate decision-maker.[30] When children are afforded mechanisms for participation in family law proceedings the research further indicates that they can be "unhappy with the level and type of involvement they

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[28] F Bell, *Discussion Paper: Facilitating the Participation of Children in Family Law Processes* (Southern Cross University 2015); K Beckhouse, "Laying the Guideposts for Participatory Practice – Children's Participation in Family Law Matters" (2016) 98 *Family Matters* 26; R Carson, E Dunstan, J Dunstan & D Roopani, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies 2018).

[29] N Taylor, P Tapp & M Henaghan, "Respecting Children's Participation in Family Law Proceedings" (2007) 15 *International Journal of Children's Rights* 61 at p 63; Department of Social Services, *Growing Up in Australia: The Longitudinal Study of Australian Children* (Annual Statistical Report) (Australian Institute of Family Studies 2014) at p 27; R Carson, E Dunstan, J Dunstan & D Roopani, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies 2018) at p 30.

[30] J Cashmore & P Parkinson, "Children's and Parents' Perceptions on Children's Participation in Decision Making after Parental Separation and Divorce" 2008 46 *Family Court Review* 91 at p 92; F Bell, "Barriers to Empowering Children in Private Family Law Proceedings" (2016) 30 *International Journal of Law, Policy and the Family* 225 at p 226.

have had in these processes and would like to have a greater opportunity to participate".[31] Further to this, research by Carson *et al* found that children and young people did not always find that the approach of service professionals promoted their participation and instead "limited their practical impact or effectively marginalised the child or young person's involvement in decision making about parenting arrangements".[32]

4.5.1 Family Reports

The very nature of the family assessment process lends itself to a unique opportunity to create a meaningful participatory environment whereby a child can feel that their views are heard and will form part of the decision-making process, irrespective of whether these views are fully adhered to by the court. In Australia, family reports are viewed as a "necessary and important part of judicial decision making" with family report writers playing a vital role in providing information and recommendations to the court in family law matters.[33] However, there has been minimal Australian research conducted on the practices of family report writers and the quality of family reports and concerns have been raised in this regard, particularly for those produced by private practitioners.[34] This is particularly troubling considering the high levels of settlement reached by parties on the basis of recommendations made by report, as well as the weight placed upon them by judges.[35]

One mechanism for maintaining the quality of reports is to establish guidelines and as mentioned above the *Australian Standards of Practice for Family Assessment and Reporting* were introduced for family report writers in 2015. The guidelines provide minimum standards and best practice guidelines for all report writers. However, they are discretionary for private report writers, with no mechanism for enforcement currently in place. As such, they have limited bearing on a substantial cohort of family report writers that are neither employed nor contracted by the CCS. There is no direct oversight body for the accreditation and oversight of family report writers, nor are there direct compliance or complaints mechanisms. Yet, research indicates the high

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[31] Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System: Final Report* (ALRC No 135, 2019) at p 364.
[32] R Carson, E Dunstan, J Dunstan & D Roopani, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies 2018) at pp 50-51.
[33] A O' Neill, K Bussey, C Lennings & K Seidler, "The Views of Psychologists, Lawyers, and Judges on Key Components and the Quality of Child Custody Evaluations in Australia" (2018) 56 Family Court Review 64 at p 65.
[34] Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System: Final Report* (ALRC No 135, 2019) at p 410.
[35] M Saini, "Evidence Base of Custody and Access Evaluations" (2008) 8 *Brief Treatment and Crisis Intervention* 111 at p 120; House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (PPS 544, 2017) at p 208; A O' Neill, K Bussey, C Lennings & K Seidler, "The Views of Psychologists, Lawyers, and Judges on Key Components and the Quality of Child Custody Evaluations in Australia" (2018) *56 Family Court Review* 64 at p 65.

levels of complaints made against family report writers.[36] It must be noted that in most cases complaints are dismissed; however, the relatively high number of complaints does indicate a need for a dedicated regulatory and oversight body to manage these effectively and promote transparency. A limited divergence from this proposition can be found in the most recent literature with a small number of stakeholders submitting to a Australian Government consultation on family report writers expressing concern about workforce pressures and a duplication of regulatory requirements, stating a preference for greater resourcing and training to improve family report writer competency.[37] Overall, 95% of stakeholders in this consultation agreed that family report writers should be subject to quality assurance mechanisms, and this has ultimately been recognised by government in the drafting of the 1975 Act Amendment Bill which includes a measure to give government the power to make regulations that set standards and requirements for family report writers.[38]

Part III of the 1975 Act provides for the provision of in-house family consultant services overseen by the CCS. However, funding constraints have "undermined the ability of Family Consultants to provide the broad range of services consistent with Parliament's expectations of a family court."[39] This lack of adequate resourcing inevitably impacts upon children and families given the importance of achieving a timely outcome to what can be a highly stressful and emotionally charged process. Whilst those with the financial means to do so can seek out a private family report writer, thus having some control over the timeframe for completion, those who cannot are completely reliant on the CCS's ability to allocate a family report writer, inevitably delaying the process for the parties. Further to this, the Australian Law Reform Commission (ALRC) has also highlighted issues regarding the amount of time spent with families in conducting assessments by both CCS employed and Reg 7 Family Consultants. Stakeholders also submitted concerns regarding the expertise and qualifications of report writers to adequately make recommendations where family violence, child abuse, trauma and its associated impacts on adults and children, cultural factors, and disability feature.[40]

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[36] A O'Neill, K Bussey, C Lennings & K Seidler, "The Views of Psychologists, Lawyers, and Judges on Key Components and the Quality of Child Custody Evaluations in Australia" (2018) 56 Family Court Review 64 at p 74. This research from New South Wales found that thirty-nine % of report writers reported having complaints made against them. Similar findings are evident internationally also, see J Bow & F Quinell, "Psychologists' Current Practices and Procedures in Child Custody Evaluations: Five Years after American Psychological Association Guidelines" (2001) 32 *Professional Psychology: Research and Practice* 261 at p 266-267; M Ackerman and T Pritzl, "Child Custody Evaluation Practices: A 20-year Follow-Up" (2011) 49 *Family Court Review* 618 at p 619.

[37] Attorney General's Department, *Improving the Competency and Accountability of Family Report Writers:*
Summary of Submissions to the Consultation Paper (Attorney-General's Department 2023) at p 20.

[38] Family Law Amendment Bill 2023, section 11K.

[39] Australian Law Reform Commission, *Report into the Family Law System, Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report No 135, 2019) at p 358.

[40] *Ibid*.

4.5.2 ICLs

Whilst there is some evidence of the value of the ICL role, particularly from judicial officers and ICLs themselves, there is also evidence of widespread dissatisfaction across non-ICL lawyers, non-legal professionals, parents, and children alike.[41] One of the most significant issues cited in the literature is the nature of the contact between the ICL and the child.[42] The national *Guidelines for Independent Children's Lawyers* provides guidance for ICLs with the expectation that an "ICL will meet with a child, unless:

- the child is under school age; and/or
- there are exceptional circumstances, for example, where there is an ongoing investigation of sexual abuse allegations and in the particular circumstances there is a risk of systems abuse for the child; and/or
- there are significant practical limitations, for example geographic remoteness."[43]

However, directly beneath it states that "the assessment about whether to meet with the child and the nature of that meeting is a matter for the ICL."[44] Given these guidelines are largely understood as discretionary there is a wide variation across the states and territories as to how they are followed. In practice this has led to differing interpretations of the role amongst ICLs, and a lack of consistency as to whether direct participation with the child is necessary. It appears some ICLs prioritise the other aspects of the role, the gathering of evidence and litigation management over meeting with a child particularly when children have the opportunity for direct participation through the family report process.[45]

Concerns have also been raised with regards to the adequacy of accreditation, training and ongoing professional development arrangements in equipping ICLs to engage directly with children, particularly in cases where family violence and child abuse are a feature.[46] As mentioned above the role of the ICL is not subject to any ongoing oversight or professional training regime, hence an increasing likelihood of poorer outcomes for children and families.

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[41] R Kaspiew, R Carson, S Moore, J De Maio, J Deblaquiere & B Horsfall, *Independent Children's Lawyers Study: Final Report* (2nd edn, Australian Institute of Family Studies 2014) at p 38.
[42] *Ibid* at pp 33-52. See also F Bell, "Meetings Between Children's Lawyers and Children Involved in Private Family Law Disputes" (2016) 28 *Child and Family Law Quarterly* 5.
[43] Federal Circuit and Family Court of Australia, *Guidelines for Independent Children's Lawyers* (Federal Circuit and Family Court of Australia 2021) at pp 5-6.
[44] *Ibid* at p 6.
[45] R Kaspiew, R Carson, S Moore, J De Maio, J Deblaquiere & B Horsfall, *Independent Children's Lawyers Study: Final Report* (2nd edn, Australian Institute of Family Studies, 2014) at p xi.
[46] *Ibid*.

The availability of funding is cited as a practical constraint with private practitioners who take on ICL work are remunerated at legal aid rates which are substantially less than what they would earn through other private practice work. Therefore, there is little incentive for them to take on ICL work. Restrictions on funding have also reduced the capacity of ICLs to perform the full suite of duties expected of them to ensure that children have an appropriate voice in family law proceedings.[47]

4.5.3 Judicial Interviews

As mentioned above, direct meetings between children and judicial officers are very rare in Australia. Yet, direct participation between judicial officers and children can have a beneficial effect in terms of positively shaping the child's experience of the proceedings by allowing them direct access to the decision maker.[48] A study in 2007 by Parkinson *et al* found that 85 % of the children interviewed felt children should have the opportunity to talk to the judge in chambers.[49] As Kelly states, children and young people have "cogent, rational, and detailed input that they want a judge to hear because they have been rendered powerless, voiceless, and upset during the divorce process."[50] A range of reasons are given in the research as to why judicial officers do not meet with children, including judges feeling ill-equipped and uncomfortable speaking directly with children; issues around transparency; preferences for separation, and issues regarding duality of roles given there are other participatory mechanisms in the form of family reports and ICLs.[51] Interestingly, despite the other mechanisms of participation available to children in Australian family law proceedings research has found that children still want to have an opportunity to talk directly to the judge.[52]

4.6 Documented Negative Impacts on Children

When children are pulled into parental conflict, they may feel pressured to express their views or that they are required to take sides and choose one parent over the

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[47] Federal Circuit and Family Court of Australia, "Guidelines for Independent Children's Lawyers" (2021) at p 1.

[48] M Fernando, "Children's Direct Participation and the Views of Australian Judges" (2013) 92 *Family Matters* 41 at p 42.

[49] P Parkinson, J Cashmore & J Single, *Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia* (Sydney Law School Research Paper No. 07/08, February 2007) at p 9.

[50] 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 & Law* 129 at p 153.

[51] P Parkinson, J Cashmore & 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; P Parkinson & J Cashmore, "Judicial Conversations with Children in Parenting Disputes: The Views of Australian Judges" (2007) 21 *International Journal of Policy & the Family* 160; M Fernando, 'Children's Direct Participation and the Views of Australian Judges' (2013) 92 *Family Matters* 41.

[52] P Parkinson, J Cashmore & 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.

other.[53] It is imperative that mechanisms for children's participation are fit for purpose and do not cause further undue harm in a process that can already be fraught with conflict.

4.6.1 Family Reports

Research indicates that aside from child psychologists and counsellors, the most common professionals that children have direct contact with are family report writers.[54] Hence, the importance of taking into account children's views of their participation themselves and the extent to which they feel their views are captured in the family report process. In 2018, Carson *et al* conducted research on the experiences of children and young people in the family law system and this research found that for children who could recall engaging with a family report writer half indicated that their views were not acknowledged.[55] Further to this, some children described feeling that their views were "diminished or marginalised" by family consultants.[56] Further concerns were also raised about the conduct of the consultations informing the family report, the short duration of the consultations, the order in which the consultations occurred, the settings in which they took place, the artificiality and discomfort associated with the conduct of the interviews and the limited nature of interactions.[57]

4.6.2 ICLs

Similar to family report writers, the research indicates that children can feel "marginalised" even in instances where the ICL has met with the child. A lack of proper engagement by the ICL can result in the child having a very limited or erroneous understanding of the role of the ICL (as legal representative rather than best interests advocate), and in some cases, no awareness at all that the ICL exists.[58]

4.6.3 Judicial Interviews

Despite there being rare occurrences of direct meetings between children and judges, the research clearly indicates a preference by children to be afforded the opportunity to meet with a judge, particularly in contested cases. Therefore, it stands

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[53] F Bell, "Barriers to Empowering Children in Private Family Law Proceedings" (2016) 30 *International Journal of Law, Policy and the Family* 225 at p 226.
[54] R Carson, E Dunstan, J Dunstan & D Roopani, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies 2018) at p 45.
[55] *Ibid*.
[56] *Ibid* at p 54.
[57]R Carson, E Dunstan, J Dunstan & D Roopani, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies 2018) at pp 55-56.
[58] R Kaspiew, R Carson, S Moore, J De Maio, J Deblaquiere & B Horsfall, *Independent Children's Lawyers Study: Final Report* (2nd edn, Australian Institute of Family Studies 2014) at p 156; R Carson, E Dunstan, J Dunstan & D Roopani, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Australian Institute of Family Studies 2018) at p 63.

to reason that if this is not facilitated by the court, then – much like what has been indicated with family report writers and ICLs – children (and especially older children) are likely to feel disempowered and marginalised.

4.7 Reform Recommendations

Overall, the literature clearly indicates that whilst there are legislative and policy mechanisms in place to facilitate child participation, these do not always translate to the meaningful participation of children as articulated in Article 12 of the CRC. Legislation and policy alone are not enough to ensure child participation in family law proceedings in Australia and all actors involved in the process from the judges, lawyers, ICLs, and family consultants all have a role to play to ensure the child's views are taken into account where appropriate and in their best interests.

There has been no shortage of rhetoric advocating for reform in the family law arena in Australia for many years and in 2019 the ALRC conducted a major enquiry that produced key recommendations for simplifying the family law system, and ensuring children are the focus of decision making. Relationships Australia Victoria submitted to the ALRC that "there needs to be more emphasis on children's empowerment in the Australian Family Law system in cases of divorce and separation, especially where parental relationships are conflicted, in contrast to the traditional approach, which has emphasised children's welfare and interests".[59] This has recently culminated in the release of the Family Law Amendment Bill which will give legislative effect to many of the recommendations outlined in the ALRC and discussed above. For example, recommendation 53 of ALRC Report 135 called for the creation of a mandatory national accreditation scheme for private family report writers, including the establishment of a complaint's mechanism. The 1975 Act Amendment Bill subsequently includes provisions which will give government the power to make regulations that set standards and requirements for family report writers. Section 11L of the 1975 Act Amendment Bill further outlines the provision for disclosure by court to a regulator for the purposes of conducting investigations.

Further to this, recommendation 44 of ALRC Report 135 recommends that Section 68LA(5) of the 1975 Act be amended to include a specific duty on ICLs to comply with the *Guidelines for Independent Children's Lawyers*, and in particular the requirement to have direct contact with the child, giving statutory recognition to the full scope of their obligations upon appointment to represent a child and how those obligations interact with the overarching purpose of the 1975 Act. Section 68LA(5A) of the 1975 Act Amendment Bill incorporates this recommendation albeit with limitations set out in section 68LA(5B) – namely, if the child is under 5, if the child does not want to meet the ICL, or if there are exceptional circumstances which are set out under section 67LA(5D).

[59] Australian Law Reform Commission, *Report into the Family Law System, Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report No 135 2019) at p 362.

5. New Zealand

5.1 Mechanisms for Child Participation in Private Family Law Proceedings

The framework for hearing the voice of the child in private family law cases in New Zealand was previously governed under the Guardianship Act 1968. Section 23(2) placed an obligation on the court to "ascertain the wishes of the child, if the child is able to express them" and to take account for these wishes insofar as "the Court sees fit, having regard to the age and maturity of the child".[1] This provision was replaced by section 6 of the Care of Children Act 2004. This provides that in cases involving "the guardianship of, or the role of providing day-to-day care for, or contact with, a child", "the administration of property belonging to, or held in trust for, a child" or "the application of the income of property of that kind" a child has the right to be heard.[2] In these cases "a child must be given reasonable opportunities to express views on matters affecting the child; and any views the child expresses (either directly or through a representative) must be taken into account".[3]

An overhaul of the New Zealand Family Justice system led to disputes being brought away from the Family Court and moved towards out-of-court dispute resolution processes.[4] The Family Dispute Resolution Act 2013 provides that mediation must be the first step in "disputes involving the care of, upbringing of and contact with children".[5] These reforms did not engage with the issue of child participation in proceedings, with Taylor arguing that this resulted in a disparity in the level of involvement of children in cases in the Family Court and in out-of-court dispute resolution mechanisms.[6]

A 2019 report from an independent panel commissioned by the Ministry of Justice proposed a "raft of changes to strengthen and connect family justice services, including the Family Court".[7] Recommendations relating to child participation are being implemented through the Family Court (Supporting Children in Court) Legislation 2021. This Act was passed in August 2021, and will commence in August 2023. The 2021 Act will amend several provisions of the 2004 Act, such as giving children the opportunity to

[1] Guardianship Act 1968, section 23(2).
[2] Care of Children Act 2004, section 6(1).
[3] Care of Children Act 2004, section 6(2).
[4] N Taylor, "Overcoming Disparity between New Zealand's Family Court and Out-of-court Dispute Resolution Processes" (2017) 25 *International Journal of Children's Rights* 658 at p 3-4.
[5] *Ibid*.
[6] *Ibid.*
[7] Ministry of Justice, *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (2019) at p 2, available at https://www.justice.govt.nz/assets/family-justice-reforms-final-report-independent-panel.pdf.

participate in any decision affecting them;[8] that a lawyer of the child is to be "suitably qualified" and be required to explain proceedings to children in a matter they are likely to understand;[9] and an explicit reference to Article 12 of the CRC.[10] The 2021 Act will also insert a provision that a child should be given a reasonable opportunity to participate in dispute resolution processes under the Family Dispute Resolution Act 2013.[11]

5.1.1 Development of out-of-court mechanisms

Goldson's small-scale study into children involved in the mediation process indicates that children feel positive about being involved in the process, with children reporting feeling happy about their voice being heard, and less anxious.[12] However, in 2007, Barwick and Grey reported that of 380 family dispute cases that were referred for mediation, only 6% saw the attendance of children during the process.[13] The 2014 reforms of the New Zealand Family Justice System aimed to steer focus towards out-of-court mechanisms, in the aftermath of a report from the Ministry of Justice that identified the court process as too slow and complex.[14] Taylor notes that the failure of the 2013 Act to provide for any child participation mechanism has led to the three primary suppliers of FDR dictating how children should be involved in these disputes on a national level.[15] Different practices have emerged across these bodies, with some children speaking directly to a mediator, aand some speaking to a child consultant who passes on the child's views .[16] In 2016, hours of FDR services were extended beyond normal working hours, making it more feasible for children to participate in proceedings while still in school.[17]

5.1.2 "Team approach" in legal proceedings

In private family law disputes in New Zealand, children are generally heard through a "team" approach.[18] This approach involves using multiple methods to ascertain the views of the child.[19] Boshier emphasises the importance of using methods to ensure the needs

[8] Family Court (Supporting Children in Court) Legislation Act 2021, Part 1.
[9] Family Court (Supporting Children in Court) Legislation Act 2021, Part 1.
[10] Family Court (Supporting Children in Court) Legislation Act 2021, Part 1.
[11] Family Court (Supporting Children in Court) Legislation Act 2021, Part 2.
[12] J Goldson, *Hello, I'm a Voice, Let Me Talk: Child-inclusive Mediation in Family Separation'* (Centre for Child and Family Policy Research, Auckland University, 2006), available at https://thehub.swa.govt.nz/assets/documents/IP-hello-im-a-voice.pdf.
[13] H Barwick & A Gray, *Family mediation – Evaluation of the Pilot* (Ministry of Justice, 2007).
[14] N Taylor, "Overcoming Disparity between New Zealand's Family Court and Out-of-court Dispute Resolution Processes" (2017) 25 *International Journal of Children's Rights* 658 at p 660.
[15] *Ibid* at p 663.
[16] *Ibid* at pp 660-661.
[17] *Ibid*.
[18] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 *New Zealand Law Review* 387 at p 387.
[19] *Ibid*.

of each child are accounted for.[20] He claims that adopting a team approach affords each child the chance "to create a relationship of sufficient trust with a person so that they can discuss highly personal matters".[21] Fernando identifies judicial interviews, the appointment of a lawyer for the child, and the use of expert reports as the main methods employed to ascertain the views of the child in these cases.[22] It has been argued that the types of methods employed to ascertain the views of the child are influenced by the type of case the child is involved in.[23]

Despite the 2004 Act removing any reference to age and maturity in ascertaining children's views, case law indicates that some judges will still consider this factor in determining whether the voice of the child should be heard. In *DLB v DLS,* a lawyer for the child would not meet with the child as they felt they were too young to articulate views.[24] The High Court agreed that a four-year-old child cannot express views.[25] In *JBK v JWN* it was held that a four-year-old girl was too young for a judicial interview.[26] By contrast, *C v S* concerned two children, one aged four and the other aged three months, who were not given an opportunity to express their views. On appeal to the High Court, Raderson J stated that the obligation under section 6 was mandatory, and that the four-year-old child should have been able to express their views.[27] A similar outcome was achieved in *L v B,* where Potter J held in the High Court that the trial judge was incorrect in his decision to not give weight to the views of a five-year-old child due to the child's age and maturity.[28] Robinson reports that in 39 of cases studied, judges still considered the age and maturity of the child as factors.[29] She stated that in 10.8% of cases, judges, in recognising their section 6 obligations, held that the child was too young to express a view.[30] In a further 6.7% of cases, views were ascertained but discounted due to the age and/or maturity of the child.[31]

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[20] P Boshier & D Steel-Baker, "*Invisible Parties: Listening to Children*" (2007) 45(4) *Family Court Review* 548.
[21] *Ibid*.
[22] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) *3 New Zealand Law Review* 387 at p 387.
[23] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010).
[24] *DLB v DLS* [2007] NZFLR 263.
[25] *Ibid*.
[26] *JBK v JWN* FC Tauranga FAM-2004-070-1291, 4 July 2008.
[27] *C v S* [2006] NZFLR 745.
[28] *L v B* (High Court, Auckland, CIV 2009-404-005482, 22 January 2010, Justice Potter).
[29] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010) at p 42.
[30] *Ibid* at p 44.
[31] *Ibid*.

5.1.3 Judicial Interviews

Meeting with a judge is the primary way in which children can be directly involved in proceedings. Benefits of these interviews include a judge being able to better understand the child, to have the most up to date understanding of their views, and to help reassure the child that they are not responsible for any decision.[32] Judges are reportedly "increasingly concerned" with ensuring children understand the effect of proceedings, and that they are not responsible for any dispute.[33] Fernando reports that in New Zealand, judges meet with children "reasonably frequently".[34] Robinson's study attempts to analyse how the voice of the child is heard in 120 cases under section 6 of the Care of Children Act 2004. She reports that 32.5% of cases involved the use of judicial interview.[35] She notes that rates of judicial interviews are lowest in protection cases, where the child is at a particular risk due to a history of family violence, but that the overall use of judicial interviews remains relatively low across the four types of cases she examines.[36] A study conducted by Tapp indicates that judges meet with children in 41.7% of cases.[37] Robinson reports that some judges are more proactive in their engagement with children than others.[38] Caldwell states that 65% of judges "often, very often or always" meet with the child involved in proceedings.[39] In some instances a judge will meet with a child after proceedings have concluded to explain their reasoning for making their decision. This was seen in the case *P v P,* where Adams J met with a child to explain why he made an order that was contrary to what the child had expressed.[40] Cleland reports that children consistently express a desire to speak with the judge.[41]

The Judicial Practice Note does not require that judges be requested to meet with children, but Robinson states that this is a common reason given by judges for not

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[32] P Boshier & D Steel-Baker, "*Invisible Parties: Listening to Children*" (2007) 45(4) *Family Court Review* 548.
[33] New Zealand Law Commission, *Report 82: Dispute Resolution in the Family Court* (2003) Chapter 4.
[34] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 *New Zealand Law Review* 387 at p 399.
[35] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010) at p 32.
[36] *Ibid*.
[37] P Tapp, "Judges are Human Too: Conversations 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.
[38] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010) at p 38.
[39] John Caldwell, "Common Law Judges and Judicial Interviewing" (2011) 23(1) *Child and Family Law Quarterly* 41.
[40] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 *New Zealand Law Review* 387 at p 405.
[41] A Cleland, "Children's and Young People's Participation in Legal Proceedings in Aotearoa New Zealand: Significant Challenges Lie Ahead," (2013) 3 *New Zealand Law Review* 483 at p 492.

participating in judicial interviews.[42] In *DMM v SBM,* the judge did not meet with the child involved in the case as they "were not invited to do so".[43]

5.1.4 Lawyer for the Child

Boshier states that a lawyer for the child was the most common method of involving children in proceedings under the 1968 Act, and that the 2004 Act further strengthened the obligations of the lawyer for the child.[44] The lawyer for the child must meet with the child, unless there are exceptional circumstances in which a judge deems it inappropriate for the lawyer to meet with the child.[45] A lawyer for the child in New Zealand follows the direct representation model, meaning their purpose is to communicate the views of the child, but they must also aim to protect the best interests of the child.[46] Cleland notes that this model is most similar to what is envisaged by the CRC.[47] If the views of the child conflict with their best interests, the lawyer for the child may request counsel to assist to represent the child's best interests.[48] Reports from the lawyer for the child are provided as specified by the judge in an initial brief.[49] Any report should be forwarded to the parties legal representation, or to the parties themselves if they are representing themselves.[50] Reports should factual and concise, and summarise both steps taken by the lawyer and any outcome achieved.[51] There has been reluctance from the judiciary to provide any set model of reporting to be followed due to the different circumstances.[52] However, a sample template provided by the Ministry of Justice states that the report should set out the relevant issues in the proceedings, the current circumstances of the parties and the lawyer's advice to the court on further measures that may be appropriate.[53] Robinson reports that of 120 cases studied, 99% of

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[42] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010).
[43] *DMM v SBM* FC Waitakere FAM-2001-090-001220 (March 2009) at [13].
[44] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010) at p 44.
[45] Family Court Act 1980, section 9B(2).
[46] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 *New Zealand Law Review* 387 at p 394.
[47] A Cleland, "Children's and Young People's Participation in Legal Proceedings in Aotearoa New Zealand: Significant Challenges Lie Ahead" 3 *New Zealand Law Review* (2013) 483 at p 495.
[48] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 *New Zealand Law Review* 387 at p 384.
[49] Ministry of Justice, Principal Family Court Judge's Chambers, *Family Court Practice Note; Lawyer for the Child: Selection, Appointment, and Other Matters* (2015) at p 4, available at https://www.justice.govt.nz/assets/fc-lawyer-for-the-child-selection.pdf.
[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid*.
[53] *Ibid*.

cases involved a lawyer for the child.[54] Counsel to assist the lawyer for the child were employed in 6.6% of cases.[55]

5.1.5 Specialist Reports and Psychologists

In the New Zealand family justice system, a judge may seek a specialist report written by an expert to better understand the case.[56] Fernando states that specialist reports are most commonly provided by a psychologist.[57] These reports are employed at the discretion of the Court where it deems a report is necessary to the "proper disposition" of the application,[58] and the purpose of these reports cannot be solely to ascertain the views of the child. A study of 120 cases reported that 53% of cases involved a psychologist's report under section 133.[59] Fernando reports that these reports are considered "more reliable than evidence of children's views from other sources".[60]

5.3 Resourcing and Costs to Parties

5.3.1 Legal Proceedings

State funding is available to individuals on a low income, and covers legal advice about responsibilities and options, as well as assisting with completing court forms.[61] Eligibility is determined based on the number of individuals who are financially dependent on the party, and their income over the past year.[62] Recent legislation increased the availability of legal aid for parties involved in family law proceedings. The Family Court (Supporting Families in Court) Legislation Bill came into effect in July 2020, helping reduce delays in the Family Court and ensuring families have early legal advice. The Bill will assist in increasing legal aid and increasing remuneration for lawyers for the child to incentivise the recruitment of skilled lawyers.

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[54] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010) at p 31.
[55] *Ibid* at p 32.
[56] Care of Children Act 2004, section 133.
[57] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 New Zealand Law Review 387 at p 390.
[58] Care of Children Act 2004, section 133(6).
[59] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010) at p 32.
[60] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 *New Zealand Law Review* 387 at p 390.
[61] New Zealand Ministry of Justice, *Care of Children: Qualifying for Funding*, available at https://www.justice.govt.nz/family/care-of-children/resolving-parentings-disagreements/mediation-to-work-out-parenting-disagreements/qualifying-for-funding/.
[62] *Ibid*.

A Cost Contribution Order may be made in cases involving the use of a specialist report writer, a lawyer for child or a lawyer to assist.[63] The costs of a specialist report writer or a lawyer for child will depend on the time spent working on the case, any travel involved, and other expenses.[64] The government pays one third of these costs, with parties to the case paying the remainder of this.[65] A judge may not order an individual to pay this cost for several reasons, including if they are receiving legal aid, contributing to these costs would cause them or any dependent children "serious hardship", the case involved a child placed in their care under the 1989 Act, the child in question has been abducted to or from New Zealand, or any other reason the judge decides based on the circumstances that paying the cost would not be appropriate.[66] Parties to the case can apply to the court if they believe that contributing to the cost would cause them or their dependents serious hardship, or that they should pay less of the costs than other parties due to the specific circumstances of the case.[67]

5.3.2 Mediation

State funding is also available for those seeking to avail of Family Dispute Resolution (FDR) mediation services, including a Voice of Child Specialist.[68] If individuals do not qualify for this funding, the fee for FDR is divided according to the number of parties in the proceedings. If one party is eligible for funding and one is not, the cost will be $448.50 to the non-funded party. This includes 12 hours of FDR services in a 12-month period.

5.4 Accreditation and Regulation of Professionals

5.4.1 Lawyer for the Child

The lawyer for the child has a duty to ensure that any views of the child expressed to them directly, and any issues affecting their welfare, are before the court.[69] Any appointment of a lawyer for the child is made by the court. The judge is responsible for providing the brief for the lawyer, which shall include tasks to be carried out, reporting requirements (if any), time and funding allocated to fulfil the brief, and the timeframe for

[63] New Zealand Ministry of Justice, *Cost Contribution Order*, available at https://www.justice.govt.nz/family/about/cost-contribution-order/#:~:text=A%20Cost%20Contribution%20Order%20is,dispute%20between%20yourselves%20after%20applying.
[64] *Ibid*.
[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*.
[68] Family Dispute Resolution Centre, *Fees for FDR Mediation*, available at https://www.fdrc.co.nz/.
[69] New Zealand Law Society Family Law Section, *Lawyer for the Child: Best Practice Guidelines* (2018) at 5, available at https://www.lawsociety.org.nz/assets/news-files/0005-123764-FINAL-FLS-lawyer-for-child-best-practice-guideliines-23.2.18.pdf.

its completion.[70] To be considered for selection, the lawyer must meet certain criteria. This includes a holding a current practising certificate, a minimum of five years practice experience in the Family Court, a sound knowledge of relevant legislation, attendance at courses and completion of course relevant to the role.[71] Other requirements include good interpersonal skills, and ability to relate and listen to children and adults, sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families, and a commitment to following the Law Society's Best Practice Guidelines.[72] A recent report evaluating the effectiveness of the Family Justice system reported inconsistent practices among lawyers for the child, as well as many not having sufficient knowledge or skills to advocate for children, and the statutory criteria to be considered for selection failing to sufficiently take account for training, experience, or cultural background.[73]

5.4.2 Specialist Reports and Psychologists

Specialist report writers will be appointed by the court, in consultation with the lawyer for child.[74] The judge involved in the case will provide a brief to the writer, which will consider the match of skills to the requirements of the case, and the availability and workload of the report writer.[75] Schedule 4 of the High Court Rules include obligations that are binding on report writers. These include "an overriding duty to assist the Court impartially on relevant matters", the fact that the expert is not an advocate for either party, or not giving an opinion that falls outside of their area of expertise.[76] Report writers are selected from a list of available candidates in each court.[77] A panel will be convened by the Registrar or Family Court Co-Ordinator, generally consisting of four people, to consider applications to be included on this list of report writers.[78]

In order to be considered for selection, the report writer must be a registered psychologist with a current practising certificate, be a current financial member of either the New Zealand College of Clinical Psychologists or the New Zealand Psychological Society, and have at least five years clinical experience, including three years in child and family

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[70] Ministry of Justice, Principal Family Court Judge's Chambers, *Family Court Practice Note; Lawyer for the Child: Selection, Appointment, and Other Matters* (2015) at p 3, available at https://www.justice.govt.nz/assets/fc-lawyer-for-the-child-selection.pdf.
[71] *Ibid* at p 7.
[72] *Ibid* at p 8.
[73] Ministry of Justice, *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (2019) at p 86, available at https://www.justice.govt.nz/assets/family-justice-reforms-final-report-independent-panel.pdf.
[74] Family Court Practice Note, *Specialist Report Writers*, available at https://www.justice.govt.nz/assets/specialist-report-writers-practice-note-20180709.pdf.
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid*.
[78] Family Court Practice Note, *Specialist Report Writers*, available at https://www.justice.govt.nz/assets/specialist-report-writers-practice-note-20180709.pdf.

work.[79] Each individual must also show competency in assessment skills, cultural awareness, have an awareness of different family systems, family violence, substance misuse and psychopathology.[80] The Registrar in each court must ensure that "every report writer is reviewed at intervals of no more than three years".[81]

A report released in 2019 highlighted issues relating to hiring and retaining suitably qualified and experienced psychologists, as well as the lack of a pathway into Family Court work.[82]

5.5 Effectiveness of Existing Arrangements

5.5.1 Facilitating Factors

One facilitating factor in hearing the voice of the child is the legislative framework itself. New Zealand has been described as a world leader in child participation in proceedings.[83] Fernando notes that the "concept of children having a voice is given more prominence" in New Zealand than in many other jurisdictions.[84] New Zealand is one of very few jurisdictions that affords children the opportunity to engage directly with a judge via a judicial interview, and to instruct their lawyer.[85] Fernando argues that the latter is highly beneficial to children, helping them to feel that their voice is heard in the proceedings.[86] She outlines that while in jurisdictions such as Australia, Canada, England and Wales judges are more reluctant to meet with children, many judges in New Zealand will "regularly" meet with a child, even if the judge has already been made aware of the child's opinion through another method.[87] New Zealand is also one of few countries that places a child's right to express their views in proceedings concerning them on a statutory footing.[88] Recent legislative developments, including an explicit reference to Article 12 of the CRC, will only further enhance a child's right to be heard in the New Zealand Family Court.

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[79] *Ibid*.
[80] *Ibid*.
[81] *Ibid*.
[82] Ministry of Justice, *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (2019) at p 90, available at https://www.justice.govt.nz/assets/family-justice-reforms-final-report-independent-panel.pdf.
[83] Nicola Taylor and John Caldwell, "Judicial Meetings with Children: Documenting Practice Within the New Zealand Family Court" (2013) 3 *New Zealand Law Review* 445.
[84] M Fernando, "Family Law Proceedings and the Child's Right to be Heard in Australia, the United Kingdom, New Zealand, and Canada" (2014) 52(1) *Family Court Review* 46.
[85] *Ibid* at p 53.
[86] *Ibid*.
[87] *Ibid* at p 54.
[88] M Fernando, "Family Law Proceedings and the Child's Right to be Heard in Australia, the United Kingdom, New Zealand, and Canada" (2014) 52(1) *Family Court Review* 46 at p 53.

The existence of a specialised family court arguably helps promote the voice of the child in proceedings. The Family Court was established as a division of the District Court under the Family Court Act 1980.[89] A 2019 report examining the 2014 reforms of the Family Justice system identified several areas of improvement for the Family Court. This included greater judicial resourcing, greater judicial diversity, revised practice notes for legal professionals and better managing of complex cases.[90] Having a Family Court with dedicated personnel means that those working on cases involving child participation will have some level of experience in the area, as opposed to other jurisdictions where Judges working with a child may have no prior experience in the area. The "team" approach of child participation methods in New Zealand is a further facilitating factor in ensuring the voice of the child is heard. Tapp, in advocating for a team approach, highlights the importance of the child being able to voice their opinion to different individuals:

> Different situations and personalities of each child and the different skills and personalities of each of the legal and non-legal professionals involved in the Family Court process mean that some children will "match" with some adults and not with others.[91]

Boshier notes that children react differently to each method, and whether a child is willing to voice their opinion straight away or not is dependent on their personality.[92] By having a range of methods available in which the views of the child can be ascertained, the needs of each child can be best met.[93]

5.5.2 Barriers

A degree of uncertainty exists as to the true extent to which children's views are considered in proceedings. Robinson states that judges rarely indicate how they take account of the child's views.[94] She indicates that the three main reasons that a judge will not consider the views of a child are their age, that their views are contrary to their best interests, or that their views have been influenced by a third party.[95] The 2004 Act obliges the court to listen to the views of the child and to take them into account.[96]

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[89] Family Court Act 1980, section 4.
[90] Ministry of Justice, *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (2019) at p 90, available at https://www.justice.govt.nz/assets/family-justice-reforms-final-report-independent-panel.pdf.
[91] P Boshier & D Steel-Baker, "*Invisible Parties: Listening to Children*" (2007) 45(4) *Family Court Review* 548.
[92] *Ibid*.
[93] *Ibid*.
[94] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010) at p 38.
[95] *Ibid* at p 48.
[96] Care of Children Act 2004, section 6.

Notwithstanding this, the Backbone Collective have stated that they have received hundreds of reports from mothers whose children's views "have neither been sought, nor taken into account".[97] In 21% of cases analysed, the lawyer for the child's report accurately reflected the views of the child.[98] 26% of responses reported that the lawyer for the child did not report what the children had said.[99] The "overwhelming majority" of comments described the lawyer for the child:

> Dismissing their child/ren's views and/or not accurately reporting them, lying in the report about what the child said, minimising the child's views and experiences of abuse and distorting the children's views in ways that reflected what the lawyer for child wanted rather than the child.[100]

Only four responses positively described the lawyer for child accurately reporting the child's views.[101]

In cases where judicial interviews with the child have taken place, parties to the proceedings will have the chance to make submissions on the interview.[102] *J v M* outlined that interviews should be recorded or transcribed[103] but it is unclear to what extent this occurs in practice. The views of the child, which were ascertained via judicial interview, influenced a father's decision in *KMB v KSB.*[104] Here, the father withdrew his opposition to an application made by the mother after reading the interview transcript and understanding how the child was in favour of the application made by his mother.[105]

Existing research illustrates that a prominent barrier preventing children's voices being heard and considered is a lack of adequate training for professionals working with the child. Fernando discusses this barrier in the context of judicial interviews with children. She states that one limitation of these meetings is a "perceived lack of skill of speaking with children".[106] However, she argues that this problem is not evident in practice in New

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[97] The Backbone Collective, *Seen and Not Heard; Children in the New Zealand Family Court, Part 2 – Lawyer for Child?* (2018) at p 12, available at https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf.
[98] *Ibid* at p 22.
[99] *Ibid*.
[100] *Ibid* at p 23.
[101] *Ibid*.
[100] P Boshier and D Steel-Baker, "*Invisible Parties: Listening to Children"* (2007) 45(4) *Family Court Review* 548.
[103] *J v M,* FC NSD FAM 2004-044-001857, 20 April 2005.
[104] *KMB v KSB* FC HAS FAM 2005-020-102.
[105] P Boshier and D Steel-Baker, "*Invisible Parties: Listening to Children"* (2007) 45(4) *Family Court Review* 548.
[106] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 *New Zealand Law Review* 387 at p 402.

Zealand.[107] Cleland echoes the notion that insufficient training of professionals working in the family justice system acts as a barrier to children's voices being heard and considered.[108] She notes that 60% of judges referred to a judicial interview as a conversation, discussion or meeting, with only 15% of judges opting to use the word "interview".[109] This suggests a potential misunderstanding of judges of what exactly a judicial interview should strive to achieve.[110] Reports indicate that for most judges the purpose of the meeting is not to ascertain the views of the child, but is more commonly used to meet the children, explain the proceedings or to reassure them.[111]

In discussing the work of the lawyer for the child, Cleland notes that while these individuals are required to undergo training, this training may not be sufficient.[112] The Backbone Collective have reported that in many cases, reports have shown the lawyer for the child does not understand the "dynamics of domestic violence, and therefore failed to understand the children's fear, and in some cases inability to talk".[113] Boshier echoes these findings, stating that both judges and lawyers can lack the skills to "elicit and interpret the views of the child".[114] A report from the New Zealand Law Commission also identified the fact that counsel are often "not adequately trained to deal with children, and do not meet with them long enough to represent or ascertain their views" as a barrier to children's views being heard.[115] The Law Commission expressed concern that existing training did not adequately equip counsel with the necessary skills to work closely with children.[116] They recommended that counsel should be offered more in-depth training, particularly in the areas of "child development, family dynamics and techniques for interviewing children".[117]

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[107] *Ibid* at p 403.
[108] A Cleland, "Children's and Young People's Participation in Legal Proceedings in Aotearoa New Zealand: Significant Challenges Lie Ahead," (2013) 3 *New Zealand Law Review* 483 at p 494.
[109] *Ibid* at p 493.
[110] A Cleland, "Children's and Young People's Participation in Legal Proceedings in Aotearoa New Zealand: Significant Challenges Lie Ahead," (2013) 3 *New Zealand Law Review* 483 at p 494.
[111] *Ibid* at p 493.
[112] *Ibid* at p 496.
[113] The Backbone Collective, *Seen and Not Heard; Children in the New Zealand Family Court, Part 2 – Lawyer for Child?* (2018) at p 21, available at https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf.
[114] P Boshier & D Steel-Baker, "Invisible Parties: Listening to Children" (2007) 45(4) *Family Court Review* 548.
[115] New Zealand Law Commission, *Report 82: Dispute Resolution in the Family Court* (2003) Chapter 11.
[116] *Ibid*
[117] *Ibid*.

The Backbone Collective analysed individuals' experiences with the New Zealand Family Court in 2017, with 267 women reporting that a lawyer for the child was appointed in their case. Evidence showed that despite the requirement for the lawyer to meet with the child, 11% of children had not met with their lawyer.[118] Of the cases studied, only 21% of mothers reported that their child had a positive experience with their lawyer for the child.[119] 37% reported that the lawyer for the child said the child was "too young to know what was best for them", with 14% reporting that the child was prevented from speaking or asking questions.[120] 27% of mothers in these cases reported that the lawyer for the child did not communicate with the child in a way they could understand.[121] The lawyer for the child only explained the outcome of the proceedings to children in 18% of cases.[122]

In relation to reports written by psychologists, positive experiences with psychologists writing the specialist reports have been reported by both parents and young people.[123] Boshier proposes that a psychologist's report has "the benefit of involving someone who is trained to communicate with children, to ensure the child's views are correctly heard".[124] He states these reports are an "invaluable tool" that help ensure a child's view is more accurately portrayed to, and understood by, a court.[125] Psychologists writing these reports will also often be more proficient in discussing personal matters with children than judges or lawyers.[126] Several issues children have with the process have been identified, such as feeling that they are not being taken seriously, and the lack of privacy.[127] Other concerns that have been expressed include "a lack of objectivity, competence in assessing risk, limited observation time and the cost of reports."[128] An additional concern is the "serious shortage of report writers" and a difficulty recruiting suitably experienced and qualified psychologists.[129] This issue has contributed to the

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[118] The Backbone Collective, *Seen and Not Heard; Children in the New Zealand Family Court, Part 2 – Lawyer for Child?* (2018) at p 19, available at https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf.
[119] *Ibid* at p 20.
[120] *Ibid.*
[121] *Ibid* at p 40.
[122] *Ibid* at p 51.
[123] Ministry of Justice, *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (2019) at p 90, available at https://www.justice.govt.nz/assets/family-justice-reforms-final-report-independent-panel.pdf.
[124] P Boshier & D Steel-Baker, "*Invisible Parties: Listening to Children*" (2007) 45(4) *Family Court Review* 548.
[125] *Ibid*.
[126] *Ibid*.
[127] M Fernando, "How Can We Best Listen To Children in Child Law Proceedings" (2013) 3 *New Zealand Law Review* 387 at p 392.
[128] Ministry of Justice, *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (2019) at p 90, available at https://www.justice.govt.nz/assets/family-justice-reforms-final-report-independent-panel.pdf.
[129] *Ibid*.

delays in "appointing a report writer and receiving a report".[130] A 2019 Report stressed that this issue should be addressed urgently, and that a concentrated, collaborative effort between the Ministry of Justice, universities and psychologist professional bodies is needed to achieve this .[131] A further area of concern is the "release of report writer's notes to another psychologist for cross-examination".[132] The 2019 Report states that this is a "contentious issue" in which evidence is allowed to be tested before the Court, while also ensuring parties to the proceedings, or their children, are not harmed in the process.[133] It has been stated that existing legislation is adequate in this area, but that clarity in the judicial practice note would be welcomed.[134] The 2019 Report invited the Principal Family Court Judge to review this practice note alongside the Law Society and psychological report writers, and to "include standard conditions for releasing notes and materials to a psychologist assisting with preparation for cross-examination".[135]

Overall, Cleland is critical of the legal and administrative response in New Zealand to the voice of the child in proceedings.[136] She highlights that the failure to recognise children as independent rights holders may potentially lead to their views being overlooked.[137]

5.6 Documented Negative Impacts on Children

Robinson outlines some of the risks faced by children in participating in private law disputes. She argues that children are vulnerable to being unduly influenced and intimidated throughout proceedings.[138] She notes that children may voice opinions that they feel an interviewer wants to hear.[139] A further risk to children is that they become burdened by the process of participating in proceedings.[140] However, Robinson proposes that these risks can be combated through having adequately trained Family Court professionals, and fostering a trusting relationship between the child and the interviewer.[141] Children not feeling safe was also identified as a barrier to having their voices heard. A common theme in cases involving violence was that the lawyer for the child would meet the child while in the care of the abuser, leaving children "frightened

[130] *Ibid* at p 91.
[131] *Ibid*.
[132] *Ibid* at p 90.
[133] *Ibid* at p 93.
[134] *Ibid*.
[135] *Ibid*.
[136] A Robinson, *Children Heard But Not Listened To? An Analysis of Children's Views in Decision Making under s6 of the Care of Children Act 2004* (Dissertation, University of Otago, 2010) at p 487.
[137] *Ibid*.
[138] *Ibid* at p 13.
[139] *Ibid*.
[140] *Ibid* at p 14.
[141] *Ibid*.

about what to say".[142] Children have also reported being yelled at, rushed, intimidated and bullied during their meeting with their lawyer.[143] Boshier states that a child being intimidated by a Judge, or potentially being manipulated by a parent, as potential drawbacks of judicial interviews.[144]

5.7 Reform Recommendations

A 2019 Report from an independent panel commissioned by the Ministry of Justice proposed a "raft of changes to strengthen and connect family justice services, including the Family Court".[145] Recommendations include obliging a lawyer for the child to explain proceedings to their client; allowing a lawyer for the child to attend court-directed FDR; strengthening their development and supervision; and reviewing the Lawyer for Child Practice Note to strengthen the approval criteria and selection process involved in their appointment.[146] It was also recommended that children's participation be included as a "guiding principle" in the 2004 and 2013 Acts, that the 2004 Act places an obligation on parents and guardians to consult their children in matters that affect them, and that the Ministry of Justice develop a risk assessment tool for children in cases of family violence.[147] A further proposed reform was that the Ministry of Justice undertake a stocktake of appropriate models of child participation.[148] It was proposed that this should include key principles underlying children's participation, consideration of how children's voice can be heard in family violence cases, and developing a "best practice toolkit" that is co-designed by children.[149] It was recommended that judicial diversity be increased, and that all new Family Court judges spend one week in the Māori Land Court observing proceedings until a sufficient amount of Māori judges are appointed.[150] The report included recommendations on facilitating the participation of children with disabilities in proceedings, including developing best practice guidelines and training programmes for lawyers working with disabled children, and working to ensure lawyers appointed to work with children with disabilities are suitably qualified and experienced.[151]

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[142] The Backbone Collective, *Seen and Not Heard; Children in the New Zealand Family Court, Part 2 – Lawyer for Child?* (2018) at p 20, available at https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/5ae99c5588251bf787133d44/1525259361189/Seen+and+not+Heard+-+Lawyer+for+Child+3+May+2018.pdf.

[143] *Ibid*.

[144] P Boshier & D Steel-Baker, "*Invisible Parties: Listening to Children*" (2007) 45(4) *Family Court Review* 548.

[145] Ministry of Justice, *Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms* (2019) at p 2, available at https://www.justice.govt.nz/assets/family-justice-reforms-final-report-independent-panel.pdf.

[146] *Ibid* at p 16.

[147] *Ibid* at p 7.

[148] *Ibid*.

[149] *Ibid*.

[150] *Ibid* at p 15.

[151] *Ibid* at p 9.

Some recommendations relating to child participation are being implemented through the Family Court (Supporting Children in Court) Legislation 2021. This Act was passed in August 2021, and will commence in August 2023. The 2021 Act will amend several provisions of the 2004 Act, including by stipulating that children are to be given an opportunity to participate in any decision affecting them,[152] and that a lawyer of the child is to be "suitably qualified" and must explain proceedings to children in a matter they are likely to understand;[153] and further through the inclusion of an explicit reference to Article 12 of the CRC.[154] The 2021 Act will also insert a provision that a child should be given a reasonable opportunity to participate in dispute resolution processes into the Family Dispute Resolution Act 2013.[155]

[152] Family Court (Supporting Children in Court) Legislation Act 2021, Part 1.
[153] *Ibid*.
[154] *Ibid*.
[155] Family Court (Supporting Children in Court) Legislation Act 2021, Part 2.

6. Ontario

Throughout Ontario, there are seventeen Family Courts of the Superior Courts of Justice. In addition to going to court, family law matters can be resolved through private settlement, mediation, arbitration, negotiation or collaborative family law.[1] Both federal and provincial governments have jurisdiction over family law matters; Ontario being provincial and Canada being federal. In Ontario, the most extensive framework for child representation in Canada exists. The Office of the Children's Lawyer (OCL) represents children of all ages in custody/access and child protection cases.[2] After receiving an order under paragraph 89(3.1) of the Courts of Justice Act, a child can have representation at any stage of a procedure.[3]

6.1 Mechanisms for Child Participation in Private Family Law Proceedings

The position taken towards the views of the child throughout private family proceedings in Ontario has changed over time. In In *Novic v Novic*,[4] the Ontario Court of Appeal held it was not necessary for a child to be provided independent representation distinct from their parents. However, in *Kerton v Kerton*,[5] counsel was instructed to convey the views of the child while preventing other parties to the case becoming involved.[6] In 2018, the Supreme Court of Canada and the Court of Appeal for Ontario issued judgements recognising the significance of children's rights and giving children a voice that should be considered and cherished in family law processes.[7]

A number of different mechanisms are used in Ontario for ascertaining the views of children in private family law proceedings: these include representation by an OCL lawyer; interviews with children during parenting plan assessments; voice of the child reports; judicial interviews; and child-inclusive mediation.

6.1.1 OCL Lawyer

The most comprehensive program for the representation of children in Canada can be seen in the Office of the Children's Lawyer (OCL) in Ontario.[8] Section 89(1) of the Courts of Justice Act 1990 obliges the Lieutenant Governor of Ontario, on the advice of the Attorney General, to appoint a Children's Lawyer for Ontario. Under section

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[1] Government of Canada, *Voice of the Child in Court Proceedings,* (2022), available at https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/vccp-vecp/voi2b.html.
[2] *Ibid*.
[3] *Ibid*.
[4] *Novic v Novic* (1984), 37 RFL (2d) 333.
[5] *Kerton v Kerton* [1997] WDFL 718.
[6] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at p 77.
[7] J Long and P Senson, "A (Mostly) Positive Year For Advancing Children's Rights In Ontario 2019" (2019) 38 *Canadian Family Law Quarterly* 185.
[8] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at p 22.

89(3), the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding; and at the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding (such as a child in a private family law dispute between parents).

Section 112(1) of the same Act provides as follows:

> In a proceeding under the Divorce Act (Canada) or the Children's Law Reform Act in which a question concerning decision-making responsibility, parenting time or contact with respect to a child is before the court, the Children's Lawyer may,
> (a) cause an investigation to be made on all matters concerning decision-making responsibility, parenting time or contact with respect to the child;
> (b) cause an investigation to be made on matters specified by the court related to decision-making responsibility, parenting time or contact with respect to the child; or
> (c) meet with the child to determine the child's views and preferences with respect to matters that may include decision-making responsibility, parenting time or contact.

Section 112(2) provides that the Children's Lawyer may report and make recommendations to the court on the results of an investigation or meeting conducted under subsection (1).

Section 112(3) provides that the Children's Lawyer may act under subsection (1) or (2) on his or her own initiative, at the request of a court or at the request of any person. In practice, the involvement of the OCL in private family law proceedings will invariably be on foot of a request from the court. The OCL is mandated to provide representation whenever the court appoints counsel for a child in child protection cases.[9] In contrast, the OCL has a discretion whether to have a lawyer, a social worker, both or neither involved in private family law cases.[10]

In *Collins v Petric*, the Ontario Superior Court of Justice specified three circumstances in which the appointment of a lawyer for a child is not necessary: 1) where a full assessment has already been made, 2) where the appointment of a lawyer would significantly delay the proceeding, or 3) where the introduction of a new party might be upsetting for the child.[11]

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[9] R Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings* (Department of Justice Canada, 2002) at p 23.
[10] R Birnbaum, N Bala and L Bertrand, "Judicial Interviews with Children: Attitudes and Practices of Children's Lawyers in Canada" (2013) *New Zealand Law Review* 465 at p 471.
[11] [2003] WDFL 328 at [19].

6.1.2 Interviews of children during parenting plan assessments

In a survey circulated in 2016 by the Canadian Research Institute for Law and the Family, data suggested the most frequent form used to ascertain the views of children was through interviewing children during parenting plan assessment reports. A parenting plan assessment report is prepared by an assessor in order to consider the best interests of a child; predominately used throughout custody and access arrangements. Throughout the 2016 survey, data suggested the views of children were most commonly gathered by mental health professional, by way of parenting plan assessment reports.[12]

The assessor conducts an in-depth parenting plan evaluation and reports to the court. Psychiatrists, psychologists, social workers, and other mental health professionals are routinely used to conduct these parenting plan assessments.[13] The assessors' suggestions for parenting time and decision-making responsibilities prioritise the opinions of the child. It has become customary to give the opinions and beliefs of children more weight;[14] this can be seen from the decision by the Ontario Court of Appeal in *Kaplanis v Kaplanis*:[15] "the older the child, the more an order as to custody requires the co-operation of the child and consideration of the child's wishes." The main exception to this rule is when alienation has occurred, which might, in the view of the court, supersede the child's autonomy. This principle has usually been accepted in case law across Canada.[16]

6.1.3 Voice of the child reports

In Ontario, voice of the child reports are prepared by a social worker employed by the OCL, although there is variable practice elsewhere in Canada as to who prepares these reports.[17] Until 2016 the use of these reports was very limited in Ontario, based off perceptions of professionals and parents that a child should not participate in proceedings involving their parents.[18] However, post-2016 the use of these reports has become more common.

Voice of the child reports highlight children's perspectives in parenting disputes by way of interviews with health professionals. Generally, voice of the child reports are non-evaluative, providing limited commentary on remarks made by a child.[19] There is no specific legislation in relation to the use of such reports "beyond the language of

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[12] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at p 34.
[13] *Ibid* at p 77.
[14] *Ibid*.
[15] *Kaplanis v Kaplanis* (2005) 194 OAC 106.
[16] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at p 77.
[17] R Birnbaum and N Bala, "Views of the Child Reports: The Ontario Pilot Project" (2017) 31 *International Journal of Law, Policy and the Family* 344 at p 355.
[18] *Ibid* at p 344.
[19] *Ibid* at p 347.

the best interest of the child test section of the Children's Law Reform Act 1990 under section 24(2)",[20] which provides that "[i]n determining the best interests of a child, the court shall consider all factors related to the circumstances of the child, and, in doing so, shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being."

The overall purpose of a voice of the child report is to allow a child to speak openly to a neutral third party without the influence of a parent.[21] It provides the court with a brief account by an OCL clinician that summarises a child's statement on an issue. The report is conducted for children over the age of seven. A child undergoes two separate interviews – being brought to one each by both parents – providing a foundation for the report.[22] However, ambiguity exists surrounding the authority of the court to conduct a voice of the child report based on the failure of the legislator to establish a statutory body.[23]

Section 30 of the Children's Law Reform Act provides for the appointment of an assessor to consider the position of the child throughout custody and access matters, reporting to both the court and parents of the child.[24] In *Gajda v Canepa*,[25] the court relied on section 20(1)(3) of the Family Law Rules in order to appoint an individual to conduct a voice of the child report.[26] It was noted that the use of these reports aided in settling cases, avoiding significant financial costs on families.[27]

When considering a voice of the child report, a judge will generally consider the following:

- How clear the wishes of the child are;
- How informed their input is;
- The age of the child;
- The strength of the child's wishes; and
- The influence of each parent has had on the child's wishes.[28]

6.1.4 Judicial interviews

Section 64 of the Children's Law Reform Act 1990 gives judges the power to interview children in private family law proceedings in order to determine their views and

[20] M Hayes and R Birnbaum, "Voice of the Child Reports in Ontario: A Content Analysis of Interviews with Children" (2020) 61 *Journal of Divorce & Remarriage* 301.
[21] *Ibid*.
[22] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at p 28.
[23] *Ibid*.
[24] *Ibid*.
[25] *Gadja v Canepa* [2018] O.J. No. 4534, 2018 ONSC 5154.
[26] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at p 28.
[27] *Ibid*.
[28] M Hayes and R Birnbaum, "Voice of the Child Reports in Ontario: A Content Analysis of Interviews with Children" (2020) 61 *Journal of Divorce & Remarriage* 301.

preferences. Research indicates that this happens relatively infrequently compared to the other mechanisms, and that lawyers are broadly of the view that judicial interviews are not to be generally recommended and should be done rarely.[29] Birnbuam *et al* comment that lawyers tend to be against children meeting judges "for a variety of 'adult' reasons. While the majority of lawyers reported that they told their child clients about the different ways that children's views can be shared with the court, one has to wonder whether they ever tell children about meeting with a judge as one option, given their seeming lack of support."[30]

6.1.5 Child-inclusive mediation

Child-inclusive mediation allows a child to participate throughout the family dispute resolution process. In Ontario, there are multiple ways a child may express their views throughout mediation, including:

- The child meeting with mediator to express their views;
- The child shares views directly to parent(s); or
- The child meets with clinician for a number of sessions, in which a report shall be compiled of the child's preferences which is then communicated to the mediator.

This provides the child the opportunity to voice their concerns throughout the process, centring disputing parents focus on the needs of the child.[31]

6.2 Resourcing and Cost to Parties

The OCL has an independent budget and covers its own costs; however, as noted above, it has discretion as to which cases it takes on in private family law disputes.[32] Saini notes that "the high cost of legal representation and the limited funds and resources to publicly support these programs limit the number of children who are able to access the services."[33] The OCL is only able to accept around half of the private family law cases referred to it due to budget constraints.[34]

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[29] R Birnbaum, N Bala and L Bertrand, "Judicial Interviews with Children: Attitudes and Practices of Children's Lawyers in Canada" (2013) *New Zealand Law Review* 465 at pp 475-480.
[30] *Ibid* at p 480.
[31] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at p 28.
[32] R Birnbaum, N Bala and L Bertrand, "Judicial Interviews with Children: Attitudes and Practices of Children's Lawyers in Canada" (2013) *New Zealand Law Review* 465 at p 471.
[33] *Ibid* at p 23.
[34] J Haase, "The Utility of Public Law and Private Law in Incorporating the Voice of the Child in Family Law Proceedings" (2019) 70 *University of New Brunswick Law Journal* 333 at p 340.

Parenting plan assessments can be carried out either by government at no cost to the parents, or by a private assessor paid directly by the parents (although these are relatively expensive and beyond the reach of most families).[35]

Voice of the child reports have been described as comparatively cost-effective, although not necessarily suitable for every case.[36]

6.3 Accreditation and Regulation of Professionals

There are no specific regulations applicable to the professionals involved in child participation in private family law proceedings in Ontario beyond the standard professional requirements applying to all lawyers, social workers and health professionals. Section 89(2) of the Courts of Justice Act 1990 provides that no person shall be appointed as Children's Lawyer unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least ten years. It is not stipulated that the appointee, or indeed any of the lawyers employed by the OCL to act on its behalf, must have any specific experience or training in children's rights or child protection. Birnbaum *et al* note that while lawyers who represent children in Ontario "receive some limited education about their work, the knowledge base of the organisations that fund representation about children's perceptions and experiences in the family justice system are limited, and there must be more training and accountability for those who represent these most vulnerable clients."[37]

6.4 Effectiveness of Existing Arrangements

A study conducted in 2017 by Birnbaum and Bala (the Ontario Pilot Project) saw research being conducted to consider the effectiveness of the use of voice of the child reports . This study was conducted throughout 11 Ontario court jurisdictions.[38] Interviews were carried out with 34 children, 41 parents, 35 lawyers, 28 judges and 29 clinicians in relation to their experience with the use of VOC Reports.[39] Additionally, the Views of the Child Advisory Committee created an intake form for parents to utilise, alongside a Guide to Good Practices and Suggestions for Questions for clinicians, court endorsements and finally a report forum.[40] Out of 86 children (48% of whom had completed a voice of the child report), 44% of cases were settled as a

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[35] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at pp 23-24.
[36] *Ibid* at p 25. See also R Birnbaum and N Bala, *Views of the Child Reports: The Ontario Pilot Project – Research Findings and Recommendations* (2017) at pp 32 and 36, available at https://www.kings.uwo.ca/kings/assets/File/research/Birnbaum-LFO-TO.pdf.
[37] R Birnbaum, N Bala and L Bertrand, "Judicial Interviews with Children: Attitudes and Practices of Children's Lawyers in Canada" (2013) *New Zealand Law Review* 465 at p 481.
[38] R Birnbaum and N Bala, *Views of the Child Reports: The Ontario Pilot Project – Research Findings and Recommendations* (2017) at p 1, available at https://www.kings.uwo.ca/kings/assets/File/research/Birnbaum-LFO-TO.pdf.
[39] *Ibid*.
[40] *Ibid*.

direct reflection of the report.[41] The vast majority of parents/guardians noted they could obtain a voice of the child report within 30 days, highlighting the efficiency of the system.[42] The study highlighted that while all of the 34 children who participated in the study had appreciated the opportunity to share their views in the proceedings.[43] 63% of children expressed views the adults in their lives often empowered their voices; while two children worried about one of their parents not accepting their views.[44] In five reports conducted by social workers, evaluative statements were made, defying the overall purpose of the Reports (as mentioned above, the sole purpose of the Reports is to provide non-evaluative statements).[45] One occasion saw a social worker recommend services they believed would be beneficial to the family.[46]

Findings from this study demonstrated that some parents approached the use of voice of the child reports with caution. This can be seen by way of two mothers who believed the use of voice of the child reports solely supported the child, alienating the children from their parents.[47] The study also highlighted that the use of these reports has the potential to be counter-productive. A parent expressing concerns surrounding parental alienation stated:

> It … completely and utterly counterproductive to our particular situation, because in a situation of parental alienation, the children are going to say exactly what they are told to say and what they have been trained to say. So I don't think the program is effective in this context.[48]

Therefore, although this demonstrates the main substantial disconnect between theory and practice, it is important to acknowledge this was reported by a minority of the study. Although the purpose of the voice of the child report is to provide the child with space to have their views heard, findings suggested the lack of confidentiality within the process presented a consistent issue. Research suggested interviewers prompted children on multiple occasions in relation to what was written throughout the report, which arguably contradicts the sole purpose of obtaining the independent view of the child. Additionally, findings illustrated four children expressed concerns remembering what was said during the interview,[49] with one noting the clinician failed to go over the report as "she did not have time".[50] Further issues could be seen from

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[41] *Ibid* at p 18.
[42] *Ibid* at p 20.
[43] *Ibid* at p 18.
[44] M Hayes and R Birnbaum, "Voice of the Child Reports in Ontario: A Content Analysis of Interviews with Children" (2020) 61 *Journal of Divorce & Remarriage* 301 at p 312.
[45] *Ibid* at p 314.
[46] *Ibid*.
[47] R Birnbaum and N Bala, *Views of the Child Reports: The Ontario Pilot Project – Research Findings and Recommendations* (2017) at p 21, available at https://www.kings.uwo.ca/kings/assets/File/research/Birnbaum-LFO-TO.pdf.
[48] *Ibid.*
[49] *Ibid* at p 19.
[50] *Ibid.*

the failure to accurately report based on findings from a 10-year-old who stated that "[i]t looked like she [social worker] made some mistakes after we were done, cuz I said that I wanted to live with my mom, but it said on the paper that I want to live with my dad".[51]

Pursuant to section 64 of the Children's Law Reform Act 1990, judges retain discretion as to whether to ascertain the views of children in private family law proceedings. Unlike under Article 12 of the CRC, it is not mandatory to ascertain the views of all children capable of forming them. Moreover, voice of the child reports merely provide children the opportunity to have their views documented, not given due weight.

Another prevalent issue surrounding the extent to which children's views are considered deals with the issue of paternalism. Many lawyers continue to adopt the protectionist approach to children involved in family law proceedings, thinking that it is in the best interests of children to keep them, as much as possible, out of court processes.[52]

Meanwhile, parenting plan assessments have the advantage of allowing children to express their opinions to the court without the strain that can come with appearing in court.[53] In most cases, the assessor receives specific training in comprehending and interviewing children and their families. These parenting plan evaluations can help litigating parents come to an agreement, just like other court-based techniques for including the voice of the child. A parenting plan assessment may also be more likely to be considered and applied more strictly if the child is quoted in full.[54]

However, the time required to conduct an extensive examination, which may take several months, is one limitation of parenting plan assessments and might cause further delays in the legal procedure. This might not be an option for most families because of the significant cost of these assessments. Additionally, the evaluator will decide how much weight to give a child's wishes in an expert evaluation. Depending on the evaluator's perspective and methodology, this consideration or justification may or may not be given.[55]

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[51] *Ibid* at p 20.
[52] M Jackson and D Martinson, *Implementing Children's Participation Rights in Family Law and Child Welfare Court Proceedings* (FREDA Centre for Research on Violence Against Women and Children, 2020) at p 15, available at https://www.fredacentre.com/wp-content/uploads/RCY_FREDA_FinalLiteratureReview_26112020.pdf.
[53] M Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada* (Department of Justice Canada, 2019) at p 27.
[54] *Ibid*.
[55] *Ibid*.

6.5 Documented Negative Impact on Children

There appears to be ambiguity about courts' statutory authority to order a voice of the child report.[56] This can be seen among the judiciary, as certain judges believe there is no statutory authority to order the Report, whilst other judges have relied upon section 30 of the Children's Law Reform Act which provides for the assessment of parenting plans.[57] Although voice of the child reports provide an alternative to judicial interviewing of children[58], the inconsistent application of the reports by judges results in children receiving unequal treatment within the justice system. Furthermore, as demonstrated throughout the study conducted by Birnbaum and Bala, inconsistencies were seen throughout the writing of the reports, irrespective of the template provided to social workers throughout their training.[59] The failure to consistently apply a standard format for the reports results in the context of the information being inconsistent.[60] Despite the fact that a report template was provided to the social workers as part of their training, there were variations in how the reports were written. Consistency in the content and structure of voice of the child reports would improve access to and contextualization of the information supplied. The study highlighted clinicians failed to ask children to gain the consent of children prior to the report.[61] Failure to do so places the child in a position where they feel obliged to consent, contradicting the purpose of the reports to provide children a space to express their views, free from influence. Additionally, the study highlighted the lack of training provided for lawyers resulted in focus being placed on obtaining the 'truth' rather than the views of the child.[62]

6.6 Reform Recommendations

Research from Canada suggests that children are capable of participating throughout the decision-making process by way of "providing lived experiences and observations of their parents".[63] Some scholars have highlighted the importance of judicial interviews, suggesting such mechanisms should be available to children "as a complementary form of participation" irrespective of the nature of the case.[64] Implementing a national plan across all provinces of Canada would provide a transparent level of consistency to ensure the right for children to be heard throughout proceedings can be seen in practice.[65] In doing so, recommendations have been

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[56] *Ibid*.
[57] *Religg v Nesallah* (2017) ONSC 1491 at para [12].
[58] R Birnbaum and N Bala, *Views of the Child Reports: The Ontario Pilot Project – Research Findings and Recommendations* (2017) at p 35, available at https://www.kings.uwo.ca/kings/assets/File/research/Birnbaum-LFO-TO.pdf.
[59] *Ibid*.
[60] *Ibid* at p 36.
[61] *Ibid* at p 39.
[62] *Ibid* at p 40.
[63] *Ibid* at p 17.
[64] D Martinson and R Raven, *Implementing Children's Participation Rights in All Family Court Cases* (FREDA Centre for Research on Violence Against Women and Children, 2021) at p 11, available at https://www.fredacentre.com/wp-content/uploads/BRIEF-9_EN.pdf.
[65] *Ibid* at p 16.

made to implement an independent National Commissioner for Children and Youth, alongside a statutory mandate in order to protect the rights of child participation throughout Canada.[66]

[66] *Ibid*.

7. Germany

7.1 Mechanisms for Child Participation in Private Family Law Proceedings

Until 1979, the old section 1675 of the German Civil Code ("Bürgerliches Gesetzbuch" BGB – the main legislation in civil law on the federal level) included the possibility that judges could speak with the concerned child, but there was no obligation to do so.[1] Since 1979, children over the age of 14 must be heard by the court.[2] Section 159 of the German Act on Court Procedure in Family Matters and Non-litigious Matters ("Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit" FamFG; a code dealing with family matters on federal level) is the central norm concerning hearing children in court. In 2021, sections 159 and 68 FamFG were changed due to the introduction of a new law to fight sexual violence against children.[3] The obligation of the judge to gain a personal impression of the child was added to the previously already existing obligation to hear the child: section 159 paragraph 1 FamFG. Previously, the gaining of a personal impression was a by-product of the hearing of the child; now, they are two separate requirements.[4] These two requirements are independent of the age of the child, the differentiation between children under and above the age of 14 was abolished.[5] The age of 14 still makes a difference when it comes to the child's capability to litigate (section 9 paragraph 1 number 3 FamFG), the possibility for a child to file a complaint (section 60 sentence 3 FamFG) and related thereto the obligation to notify the child about the decision, allowing the right to file a complaint to be exercised (section 164 sentence 1 FamFG). Also, if one parent applies for sole custody, this will be refused if a child over 14 years old objects (section 1671 paragraph 1 BGB). Furthermore, the judge has no discretion anymore, but is obligated to hear the child and gain a personal impression almost in every case.[6] The importance of the child's views has undergone a major development and has increased greatly due to those reforms.[7]

Section 159 paragraph 2 number 2 FamFG includes an exception to the obligation to hear the voice of the child and gain a personal expression, when the child is obviously not able to express his or her wishes. Additionally, section 159 paragraph 2 number 1 FamFG features a general clause that the judge can waive the hearing and the

[1] V Bodensteiner, J Müller & J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".
[2] *Ibid*.
[3] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1595.
[4] BVerfG, *FamRZ 2008* at p 246; BGH, *FamRZ 2011* at p 796 marginal number 46 ; *FamRZ 2010* at p 1060 marginal number 40 ff.; *FamRZ 1985* at p 169; KG, *FamRB 2014* at p 459; T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1597.
[5] R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal number 6; T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1596.
[6] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1596.
[7] V Bodensteiner, J Müller & J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".

personal impression when there is a serious reason for it. In this case according to section 159 paragraph 3 sentence 1 FamFG the reason must be named during the court proceedings. It is not enough to just state that the hearing is a burden to the child.[8] The court has to weigh the disadvantages of the hearing in form of harmful psychological effects for the child and psychological advantages as well as gaining insights of the court.[9] Following this, the court may refrain from holding a personal hearing and obtaining a personal impression if there is a risk that the child is likely to be psychologically stressed in a way that is incompatible with his or her best interests or if the hearing and the obtaining of a personal impression would lead to a considerable impairment of the child's mental and physical health.[10] When the court has a reason to waive the personal impression and hearing, it must be considered whether at least the guardian *ad litem* or a social worker from the Youth Welfare Office can elaborate the wishes of the child and communicate them to the court.[11] According to section 159 paragraph 2 number 3 FamFG, the hearing and the personal impression can also be waived when the wishes of the child have no relevance to the decision and the proceeding. This is never the case when the person of the child is concerned.[12] Pursuant to section 159 paragraph 2 sentences 2 and 3 FamFG, this exception does not apply when sections 1666 and 1666a BGB are affected (meaning the welfare of the child is endangered and/or the child is supposed to be separated from his or her family). In this cases, the wishes of the child are always of relevance.[13] Then, the judge can gain at least a personal impression whether the child might be neglected, scared or developmentally delayed.[14]

Previously, according to the *Bundestag document* published to the amendment of section 159 FamFG, the jurisdiction already normally always heard the child in those proceedings.[15] Nevertheless, there was no legal obligation, which was changed by the amendment to not allow any exceptions.[16] However, according to section 159 paragraph 2 number 4 FamFG, a hearing and gaining of a personal impression can be waived when just the financial means of the child are concerned.

The court of appeal is competent if one of the parties appeals the decision made by the family court. Pursuant to section 68 paragraph 5 FamFG, the court of appeal must repeat the hearing of the child and the personal impression if sections 1666 or 1666a FamFG could be concerned, or the exclusion of the right of contact according to

[8] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1598; BVerfG, FamRZ 2009 at p 1472; BVerfG, *FamRZ 2009* at p 399.
[9] R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal number 12; BGH, *NJW 2019* at p 432 marginal number 16.
[10] *Ibid*, marginal number 12.
[11] Bundestag document number 19/23707; R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal
number 12.
[12] R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal numbers 14f.
[13] Bundestag document number 19/23707.
[14] R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal number 17.
[15] Eg BGH, *NJW 2016* at p 2501.
[16] Bundestag document number 19/23567 at p 10.

section 1684 BGB, or if the residual arrangement might be part of the proceeding. The results of the first instance cannot be used. This is also new since the law reform in 2021. Violations of the obligation to hear the child or to obtain a personal impression result in the annulment of the decision.[17]

Whether the wishes of the child are considered by the judge when making the decision is another question. The wishes of the child must be in the centre and normally respected, but this is limited when the views of the child are contrary to his or her best interests. In this case, the wishes cannot be respected. [18] How exactly the wishes of the child are elaborated is at the discretion of the judge. The age, maturity and skills of the child need to be considered when deciding about the methods to determine the child's views. The family court judge Jürgen Schmid points out that the concentration span of children and their knowledge must be taken into consideration.[19] He goes on to illustrate that in addition to the importance of the hearing to acknowledge the rights of the child, some decisions when the child is older practically cannot be enforced against the will of the child.[20]

The hearing includes the gathering of the statements of the child as well as an observation of the child's behaviour, body language and reactions.[21] For the personal impression of the judge, just the visual perception of the child is not enough, because this is already a logical consequence of the hearing. The perception of the behaviour and reactions to other people need to be taken into consideration as well as (depending on the individual case) other circumstances. The judge is supposed to elaborate non-verbal communication of the child to analyse the child's view. The results of the hearing of the child and of the procedure when gaining a personal impression must be documented and communicated to everyone involved. [22]

The new obligation of the judge in section 159 paragraph 1 FamFG does not affect the obligation of the Youth Welfare Office and the guardian *ad litem* to also gain a personal impression and talk to the child. The Youth Welfare Office has 559 Offices in Germany and is regulated by the county. It is responsible for children between their birth and at least up to their 18th birthday. Youth Welfare Offices plan, design and control the structures and services of child and youth welfare in the counties, they provide a wide range of services and ensure child protection.[23] The guardian *ad litem* will be assigned by the court pursuant to section 158 FamFG. The guardian *ad litem* is

[17] BGH, *FamRZ 2011* at p 800; *FamRZ 2010* at p 1064.
[18] V Bodensteiner, J Müller & J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".
[19] J Schmid, "Familiengerichtliche Kindesanhörung in sexualisierten Gewaltfällen" (2021) 88 *Kinderschutz stärken* at p 156.
[20] *Ibid* at p 157.
[21] E Carl, M Clauß & M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (C.H. Beck 2015) marginal number 386.
[22] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1597.
[23] Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *Jugendamtsmonitor* (Bundesarbeitsgemeinschaft Landesjugendämter, 2022).

supposed to figure out the interests of the child and represent him or her in court. Furthermore, the guardian *ad litem* is supposed to inform the child about the court procedure. The motive of obliging the judge to gain a personal impression of the child, even though the Youth Welfare Office and the guardian *ad litem* do this as well, is rather to supervise the Youth Welfare Office and the guardian *ad litem* due to several people taking part in the procedure.[24] But executive and judicial powers are mixed when the judges are not just deciding on the basis of the facts provided by the executives, but control the work of the executives, which is criticized. Furthermore, it is not proven whether this leads to advantages due to the control or to disadvantages, because the child has to speak to many different people.[25]

Parents cannot appeal against the hearing of their child and parents and their lawyers are not present when the child is heard to provide the child the possibility to speak freely. [26] Parents are informed afterwards about what the child said. But pursuant to section 158 FamFG, a guardian *ad litem* will be assigned by the court if this is necessary to exercise the child's rights. Whether a guardian *ad litem* represents the objective or subjective interests of a child is a subject of some debate; the interests the child claims to have (subjective) or the best interests of the specific child (objective) might be contradictory to the expressed wishes of the child. The prevailing opinion focuses on the subjective opinion of the specific child, unless the welfare of the child is endangered.[27]

According to section 1626 paragraph 2 BGB, parents are supposed to talk with their children about matters that concern the parental care and should try to seek an agreement with them. This is a restriction to the parents' right of residence and contact pursuant to sections 1631 paragraph 1 and 1632 paragraph 2 BGB. But when the child and the parent cannot come to an agreement, the will of the parents trumps, unless the welfare of the child is endangered (section 1666 BGB). The involvement of the children in decisions by the parents is not enforceable. It is merely a guideline for when custody and access issues are resolved by the court.[28]

The structuring of the hearing is at the discretion of the judge pursuant to section 159 paragraph 4 sentence 4 FamFG. Hearing via video link is possible if the traumatization of the child makes this necessary.[29] The hearing must be oral. While the court can use technical measures when this is necessary, the hearing cannot be replaced by a

[24] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1597.
[25] *Ibid*.
[26] V Bodensteiner, J Müller & J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".
[27] H Dettenborn, *Kindeswohl u d Kindeswille – Psychologische und rechtliche Aspekte* (6th edition, reinhardt, 2021) at p 61f.
[28] F Wapler, *Umsetzung und Anwendung der Kinderrechtskonvention in Deutschland* (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2017) at p 56.
[29] J Schmid, "Familiengerichtliche Kindesanhörung in sexualisierten Gewaltfällen" (2021) 88 *Kinderschutz stärken* at p 155.

written communication between the judge and the child.[30] A hearing via video link also has the goal that the child does not have to be heard multiple times, as the video can be used in multiple proceedings.[31] In the family court in Munich, a special room exists to conduct video hearings of children. The child and the judge are in the room and the hearing is transmitted as a live video stream into the court room. Also, the court in Munich has several portable video cameras to conduct hearings of children at locations outside the court if necessary.[32]

Furthermore, the hearing can take place at another location than the court, for example in a separate room, at school or at home.[33] To conduct the hearing in court allows the child to get to know the court and is neutral. The judge can command people to leave due to his or her domiciliary right (the authority of the right holder to freely decide who may gain entry to the building or room), which the judge does not have at the home of the child. But the rooms and the environment are unfamiliar to the child and the court rooms are often not child-friendly. At home, it is easier for the judge to gain a personal impression, because the environment in which the child is growing up can be analysed as well. But the judge cannot control the setting of the hearing and the presence of other people; the judge intrudes on the privacy of the family; and the child might be influenced because the setting is not neutral.[34] If the hearing takes place at home, the judge must make sure that the parents are not in the same room.[35]
Section 68 paragraph 4 sentences 2 and 3 FamFG foresee the possibility that the judge speaks with the child alone. This is a contradiction to section 159 paragraph 1 FamFG that stipulates that the child is heard in front of the whole court. The reason is that the child might be intimidated. Otherwise, the hearing just by the judge might not be enough and the child is supposed to be respected in the same way as an adult; but adults are always heard in front of the whole court.[36] The hearing of the child should take place at another day than the hearing of the parents and other parties. This way, the possibility that the child feels responsible for the outcome of the proceeding is lower and both parents need not be present when the child comes to court.[37]

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[30] R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal number 10.
[31] J Schmid, "Familiengerichtliche Kindesanhörung in sexualisierten Gewaltfällen" (2021) 88 *Kinderschutz stärken* at p 160.
[32] *Ibid.* See also E Carl/M Clauß/M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (C.H. Beck 2015) marginal number 389.
[33] J Schmid, "Familiengerichtliche Kindesanhörung in sexualisierten Gewaltfällen" (2021) 88 *Kinderschutz stärken* at p 156.
[34] Deutsches Kinderhilfswerk e.V., *Handreichung für Richter*innen – Arbeitshilfe zur Ausgestaltung einer kindgerechten Justiz im Familiengerichts- und Strafverfahren* (Deutsches Kinderhilfswerk, 2021) at p 18f.
[35] *Ibid* at p 19.
[36] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1598f.
[37] S Heinke, W Wildvang & T Meysen, "Kindschaftssachen nach häuslicher Gewalt: Praxishinweise für die Verfahrensführung und Mitwirkung" (2021) *Kindschaftssachen und häusliche Gewalt – Umgang, elterliche Sorge, Kindeswohlgefährdung, Familienverfahrensrecht* at p 134; Deutsches Kinderhilfswerk e.V., *Handreichung für Richter*innen – Arbeitshilfe zur*

The amendments to section 159 FamFG did not change the fact that the child needs to be informed about the subject of the proceedings in order to be able to express his or her opinion. This means there must be contact between the judge and the child; how exactly it is organized still depends on the discretion of the judge, who is supposed to consider the age and maturity of the child and the circumstances of the individual case. [38] A child is never obliged to say anything at the hearing.[39] According to section 163a FamFG, the child is not heard as witness nor as party.

The aim of the hearing of the child is first, to grant the right to be heard and second, to gain more facts to make an informed decision. [40] The right to free development of personality pursuant to Article 1 of German Basic Law and the right to be raised to a self-responsible and socially competent personality according to section 1 paragraph 1 of the eighth Social Security Code (SGB VIII) are realisable when the child can participate in decisions that concern him or her.[41] The right to be heard also follows from Article 103 para 1 of German Basic Law.

But parents have the right of upbringing the child (Article 6 paragraph 2 of German Basic Law). On 27 June 2008, the German Federal Constitutional Court stated in its decision 1 BvR 311/08 that the goal of Article 6 paragraph 2 of German Basic Law to raise the child as a responsible, socially capable person can just be reached, when the capability of a child to form own opinions and act independently, is respected.[42] The wishes and opinions of a child can be determined by a court when the child is heard and the judges are trained to communicate with children. [43] The obligation to investigate of the court and the rights of the parents from Articles 1, 2 and 6 paragraph 2 of German Basic Law can collide. This is especially the case when the child could be physically harmed or the rights of the parents prevent an investigation. In those cases, a balance must be found and the interests and the protection of the child must be prioritised.[44]

Ausgestaltung einer kindgerechten Justiz im Familiengerichts- und Strafverfahren (Deutsches Kinderhilfswerk, 2021) at p 20.

[38] S Heilmann, *Praxiskommentar Kindschaftsrecht* (2nd edition, Reguvis, 2020) § 159 FamFG marginal number 17; T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1596.

[39] J Schmid, "Familiengerichtliche Kindesanhörung in sexualisierten Gewaltfällen" (2021) 88 *Kinderschutz stärken* at p 155.

[40] R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal number 7.

[41] H Dettenborn, *Kindeswohl u d Kindeswille – Psychologische und rechtliche Aspekte* (6th edition, reinhardt, 2021) at p 62.

[42] BVerfG, 27 June 2008 – 1 BvR 311/08 -, marginal number 32.

[43] V Bodensteiner, J Müller & J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".

[44] Compare BGH, *FamRZ 2010* at p 720; OLG Frankfurt, *FamRZ 2017* at p 244; T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1597.

7.2 Resourcing and Costs to Parties

When the family court is concerned, the judge can decide who has to pay the costs of the proceeding according to section 81 paragraph 1 sentence 1 FamFG. A child never has to pay for a court proceeding (section 81 paragraph 3 FamFG). Normally, the costs of a proceeding concerning parental custody or access to a child are divided equally between the parties. If a party is responsible due to coarse fault for the proceeding, the party never had a chance to win the proceeding, the party lied or delayed the proceeding by coarse fault or did not take part in mediation, the judge can decide that this party has to pay more than the other party or even the full cost (section 81 paragraph 2 FamFG).

If the criteria are met, the parties (normally the parents) can receive legal aid. According to section 114 of the German Code of Civil Procedure ("Zivilprozessordnung" ZPO), people have the right to receive legal aid when they are not able to finance the court proceeding by themselves, they have good chances to win the process and the legal aid is not the reason of the wish to be a party of the proceeding. Who is entitled to receive legal aid is calculated according to the complex criteria of section 115 ZPO. Within four years, the confirmation of legal aid can be revoked pursuant to section 120a paragraph 1 ZPO, when the financial situation of the party changed.

Assessment reports are expensive. They are part of the proceeding and therefore part of the costs of the proceeding. Whether such a report is made is decided by the court, not the parties. All other potential costs of the participation of a child are also part of the court proceeding and are either paid by the parties or by legal aid.

7.3 Accreditation and Regulation of Professionals

7.3.1 Guardian *ad litem*

The court assigns a guardian *ad litem* according to section 158 FamFG. The judge is obliged to assign a guardian *ad litem* when this is necessary to guard the interests of the child. This is always the case when there might be a conflict with the parents' interests. Section 158 paragraph 2 FamFG names situations in which the judge is obliged to assign a guardian *ad litem* to protect the interests of the child:

> (2) The order is always required if one of the following decisions comes into consideration:
> 1. the partial or complete deprivation of personal custody under sections 1666 and 1666a BGB,
> 2. the exclusion of rights of access under section 1684 BGB, or
> 3. a retention order under section 1632 paragraph 4 or section 1682 BGB.
> (3) The appointment is generally required if
> 1. the interests of the child are in considerable conflict with those of his or her legal representatives;
> 2. there is to be a separation of the child from the person in whose care he or she is;
> 3. proceedings have as their object the surrender of the child, or;
> 4. a substantial restriction of the right of access is being considered.

The requirements to become a guardian *ad litem* are regulated in section 158a FamFG. The person must have specific legal knowledge in the area of child law. Furthermore, the person must have knowledge about developmental psychology of children and of child-friendly conversation techniques. These can be gained by different studies and work experiences listed in the provision. The person cannot have committed certain offences listed in section 158a paragraph 2 sentence 2 FamFG and must be objective and independent (section 158a paragraph 2, sentence 1 FamFG).

7.3.2 Assessors

Section 163 FamFG is the central provision concerning the appointment of assessors by the court and was changed in 2016.[45] According to section 163 paragraph 1 sentence 1 FamFG, an assessor must be instructed in proceedings pursuant to section 151 numbers 1-3 FamFG, meaning proceedings concerning parental custody, the right of contact and the right to information about personal circumstances of the child and concerning the surrender of the child.

The assessor must according to section 163 paragraph 1 sentence 1 FamFG at least have a psychological, psychotherapeutic, child and youth psychiatric, psychiatric, medical, pedagogical or social pedagogical professional qualification. If the qualification is in the area of pedagogic or social pedagogic, the assessor must have an additional qualification, that proves his or her diagnostic and analytical skills, section 163 paragraph 1 sentence 2 FamFG. The report when the welfare of the child is endangered must elaborate the ability of the parents to raise their child and the expand, type and probability of endangering the welfare of the child.[46] This is the reason why the law expects the assessor to have a specific background to be able to do this elaboration.[47] The court can specifically nominate an assessor with a specific qualification fitting to the case.[48] There is no need for a report by an assessor, if the given facts of the case already provide a reliable basis for a decision.[49]

Pursuant to section 163 paragraph 2 FamFG, the court can order that the assessor must work towards an agreement between the parties. The assessor is not supposed to influence the parties.[50] Section 163 paragraph 2 FamFG changed the role of the assessor: previously, the assessor was just supposed to elaborate the status quo. Now, the assessor can also have an interventionist role, trying to lead the parties to an agreement.[51] Paragraph 2 has been criticised because it can lead to a rejection of the assessor due to bias. Nevertheless, the paragraph was added because it was expected that when the assessor already obtained many information, he or she could use them to find a solution with the parents based on agreement, which would be in

[45] R Schlünder, "§ 163 FamFG" (2023) *BeckOK FamFG* foreword.
[46] BVerfG, *FamRZ 2015* at p 112; Bundestag document number 18/9092 at p 20.
[47] K Schulte-Bunert & G Weinreich, *FamFG*, (Wolters Kluwer, 2023) § 163, marginal number 2.
[48] U Bumiller, D Harders & W Schwamb, *FamFG* (C.H. Beck 2022) § 163, marginal number 1.
[49] OLG Frankfurt am Main, *FamRZ 2020* at p 2010; U Bumiller/D Harders/W Schwamb, *FamFG* (C.H. Beck 2022) § 163, marginal number 1.
[50] K Schulte-Bunert & G Weinreich, *FamFG*, (Wolters Kluwer, 2023) § 163, marginal 4.
[51] R Schlünder, "§ 163 FamFG" (2023) *BeckOK FamFG* marginal numbers 19f.

the best interests of the child.[52] The paragraph has also been criticised because it does not mention specifically that the agreement must be in the best interests of the child. However, according to section 1697a BGB, the court is always obliged to decide matters of parental custody in the best interests of the child.[53]

The provisions of the ZPO on evidence by assessors shall apply analogously (the application of a provision with different prerequisites for the facts to a similar, unregulated set of facts) via section 30 FamFG. Pursuant to section 404 paragraphs 4 and 5 ZPO, the parties can suggest people that are suitable as assessors and the court is supposed to respect this, if the parties agree on a person. According to section 30 paragraph 1 FamFG in conjunction with section 404 paragraph 2 ZPO, the parties may be heard on the person of the assessor. However, the regulation is interpreted as a permissive, in that the judge can hear the parties, but is not obliged to.[54] According to section 30 paragraph 1 FamFG in conjunction with section 411 paragraph 1 ZPO, the court must set a deadline within which the report must be submitted. The duration of the time period depends on the individual case.[55]

Due to a shortage of supply, it is often problematic to find qualified assessors. And when an assessor is found, the time limit often is not met, because the assessor has too many cases and is in addition dependent on the time of parents, the child, teachers, doctors and other people the assessor needs to talk to in order to write the report.[56] The deadline can be expanded if necessary. [57] The report of the assessors was often the reason for very long proceedings.[58] In matters of contact, the court shall regulate the right of contact by interim order to find a temporary arrangement until the final decision (section 153 paragraph 3 sentence 2 FamFG). This regulation is new since the reform in 2009 concerning the role of assessors and the deadlines for the report.[59] The family court must determine concrete questions by order that are to be answered by the report. It is not sufficient for the assessor to be given the task of deciding which option is most in the best interests of the child, as the court directs the assessor's work.[60]

7.4 Effectiveness of Existing Arrangements

Due to the welfare reports, mentioned in section 7.3.2 above, most judges consider the hearing of the child as crucial to their decision.[61] The exceptions to section 159

[52] Bundestag document number 16/6308 at p 242; K Schulte-Bunert & G Weinreich, *FamFG*, (Wolters Kluwer, 2023) § 163, marginal 4.
[53] R Schlünder, "§ 163 FamFG" (2023) *BeckOK FamFG* marginal number 20.
[54] *Ibid* marginal number 6.
[55] *Ibid* marginal number 7.
[56] *Ibid*.
[57] *Ibid* marginal number 14.
[58] *Ibid* marginal number 9.
[59] *Ibid* marginal number 11.
[60] Bundestag document number 16/6308 at p 242; R Schlünder, "§ 163 FamFG" (2023) *BeckOK FamFG* marginal number 17.
[61] F Badenschier, "Kindesanhörung ist nicht schlimmer als Prüfungsangst" (2011) Zeit online 07 March 2011.

FamFG apply to very few cases, meaning most children are heard. The existing arrangements are effective concerning hearing and considering the voice of the child. Whether those are the real opinions of the children or whether they are scared due to the setting of the hearing, influenced by others and finally not able to express their wishes, is hard to determine.[62] Thus, the effectiveness of the provisions cannot fully be analysed. This is especially the case because the law reform took place in 2021 and no studies have been conducted since then.

In general, there are many barriers to the voice of the child being heard. Self-determination of children has limits: the two criteria for it are age and maturity. The decision-making competence of children is supposed to be restricted when the child harms him- or herself. In this case, the will of the child is not respected. Also, the wellbeing of the child and the rights of the parents must be considered, but the goal must be to protect the child.[63]

As noted above, in some exceptional cases, the child is not heard by the court for his or her own protection. When the health of the child will be affected to a high degree and the psychological harm is too high, the requirement of a serious reason to not conduct a hearing of the child pursuant to section 59 paragraph 2 number 1 FamFG are met. When considering this requirement, the judge needs to have in mind that a hearing normally does not affect the concerned child to a high degree.[64] When the hearing is not conducted due to imminent danger, the hearing must be made up without delay according to section 159 paragraph 3 sentence 2 FamFG.

Another barrier is the ability of the child to articulate his or her wishes. The law does not contain any age threshold anymore, but the child must be able to articulate his or her wishes in order to be heard. If the child is too immature to directly participate, the wishes of the child must still be considered by for example asking the guardian *ad litem* who is supposed to elaborate the wishes of the child. It is not necessary that those wishes are elaborated by verbal communication; inferences of the wishes can be drawn from the behaviour of the child. According to a decision of the Federal Constitutional Court in 2008,[65] a child can express his or her wishes approximately above the age of three. Under the age of three, the court must at least obtain a personal impression. [66]

However, there are not only barriers to the voice of the child of being heard, but also facilitating factors. The hearing of children in court settings was greatly improved, when section 159 FamFG – the crucial law concerning hearing the child and gaining

[62] See heading number I.
[63] V Bodensteiner, J Müller & J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".
[64] E Carl, M Clauß & M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (CH Beck 2015) marginal number 409.
[65] BVerfG, *FamRZ 2008* at p 247.
[66] J Schmid, "Familiengerichtliche Kindesanhörung in sexualisierten Gewaltfällen" (2021) 88 *Kinderschutz stärken* at p 158.

a personal impression – was reformed in 2021 and the hearing became an obligation of the judges rather than being up to their discretion. Now, the child's voice must be heard and considered unless extreme exceptions occur. Also, the voices of young children are considered now due to the abolishment of the age threshold. [67] Before the reform, children that were not able to express their wishes – due to age, mental or physical factors – were often not heard and their voices not considered. Since the introduction of the obligation to gain a personal impression in section 159 paragraph 1 FamFG, the wishes of the child must be analysed, even when the child cannot express them. [68] The judge also must consider non-verbal communication and cannot jump to the conclusion that a child cannot express his or her wishes just because they are not transferred verbally.[69]

For children, the physical setting during the questioning plays a big role and can prevent them from expressing freely their opinions and wishes. This must be respected in setting up the court room, but also in having the hearing without parents being present.[70] Furthermore, different people – from the Youth Welfare Office, the guardian *ad litem* and the judge – must speak to the child in different settings, which makes it more likely that the child is able to speak to at least one of the involved people.[71]

If the competent judge is trained to interact with children and conducts the questioning in a child-friendly manner, the hearing of the child's voice is facilitated greatly. The family court judge Jürgen Schmid created a specific sequence that the judge is advised to stick to. The child should first be asked simple questions about his or her daily life to create a connection between the judge and the child and to lose fear. An additional reason for this warming up is that the judge can gain an impression of whether the child is in general capable of expressing his or her wishes. Then, the judge is supposed to ask open (and not suggestive) questions in a language that is suitable for the child. At the end, the judge is supposed to explain what is going to happen next without making any promises about the outcome of the proceeding.[72] This approach is supposed to facilitate the hearing for a child.

In 2022, Hammer published a welfare report in which he analysed 92 cases of family law proceedings that were heard between 1998 and 2021 in front of the Federal Court ("Bundesgerichtshof") or the Federal Constitutional Court

[67] R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal number 6; T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1596.
[68] Compare BVerfG, *FamRZ 2008* at p 246; BGH, *FamRZ 2011* at p 796 marginal number 46 ; BGH, *FamRZ 2010* at p 1060 marginal numbers 40 ff; BGH, *FamRZ 1985* at p 169; KG, *FamRB 2014* at p 459; T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1597.
[69] R Schlünder, "§ 159 FamFG" (2023) *BeckOK FamFG* marginal number 6.
[70] V Bodensteiner, J Müller & J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".
[71] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1597.
[72] J Schmid, "Familiengerichtliche Kindesanhörung in sexualisierten Gewaltfällen" (2021) 88 *Kinderschutz stärken* at p 158.

("Bundesverfassungsgericht").[73] According to his report, in 66% of the cases, a child over the age of three was heard and the judge tried to find out the will of the child.[74] It must be considered though, that the law reform that obliges judges to hear children took place in 2021[75] and that the study took place before the reform. On average, 148,600 custody and access proceedings take place each year, with most children being infants or toddlers when the first proceedings begin.[76] Due to overwork and lack of qualifications, judges are consulting reports of assessors at an increasingly early stage.[77] Judges have to provide detailed reasons why they do not request a report of an assessor, which is why 270,000 expert opinions were requested by family courts in 2015.[78]

However, 84% of judges stated that they do not believe that reports of assessors have benefited the children. Prolonging court proceedings would not benefit the best interests of the child, yet reports of assessors are obtained in most cases.[79] Hammer concludes that it is more about relieving judges of work and giving legitimacy to judgements.[80] It must be noted that Hammer's study was criticized because he just used 92 cases, and just cases from the Federal Court and the Federal Constitutional Court (which deal with cases with high conflict potential and not the average ones).[81]

An older study was published by Karle, Gathmann and Klosinski in 2010, who interviewed more than 1,000 judges and the involved children and parents between 2007 and 2010. [82] This study took place before the law reform in 2021. 53.4% of the judges who participated stated that they obtained a report from an assessor in 5% of the cases.[83] For the year 2007, 10.5% of the judges stated that they had never refrained from holding a child hearing, 33.6% stated that they had not held a hearing in a maximum of 5% of the cases. 39.6% had not conducted a hearing in up to half of all cases and 16.3% had waived a hearing in more than 50%.[84]

The most common reasons for not holding a hearing were that the judges considered the child to be too young (80.3%) and that the parents had already reached an

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[73] W Hammer, *Familienrecht in Deutschland – Eine Bestandsaufnahme* (2022) at p 2.
[74] *Ibid* at p 17.
[75] See heading number 1.
[76] W Hammer, *Familienrecht in Deutschland – Eine Bestandsaufnahme* (2022) at pp 13 and 15.
[77] *Ibid* at p 28.
[78] Statista GmbH, *Gutachten durch Sachverständige pro Jahr in Deutschland nach Gerichtsart* (2015), available at https://de.statista.com/statistik/daten/studie/454023/umfrage/gutachten-durch-sachverstaendige-pro-jahr-in-deutschland-nach-gerichts-art/#professional.
[79] J Schmidt, "Will das Kind sein Wohl?" (2020) *Die Rolle von Gutachtern in familiengerichtlichen Verfahren* at p 322f, 340f.
[80] W Hammer, *Familienrecht in Deutschland – Eine Bestandsaufnahme* (2022) at p 31f.
[81] Family Law Group of the New Association of Judges ("Fachgruppe Familienrecht der Neuen Richtervereinigung"), *Die Bestandsaufnahme von Dr. Hammer stimmt nicht!* (press release, 2022).
[82] M Karle, S Gathmann & G Klosinski, *Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach 50B FGG* (Bundesanzeiger-Verlag, 2010).
[83] *Ibid* at p 85.
[84] *Ibid* at p 63ff.

agreement (75.8%). It should be emphasised that the reasons that the child was too young and that a hearing would be too stressful for the child (26.3%) were only given by judges who had no or little further training and/or little professional experience.[85] 63.6% stated that the child hearing could never be replaced by expert opinions or statements by the guardians *ad litem*.[86]

When documenting the hearing of the child, half of the judges in a study by Carl and Karle stated that they made notes to write the protocol of the court proceeding later; 30% wrote a memory protocol. They described that the reason was to not disturb the hearing by documenting. Carl and Karle point out that the child can be pressured when the protocol is dictated in their presence and that they feel responsible for the outcome of the proceeding and they might say less due to this feeling. A huge disadvantage of not protocoling immediately is that judges forget what exactly the child said.[87]

Graf-van Kesteren conducted semi-structured guided interviews with 48 children and young people aged between 4 and 17 who had been heard in court in 2015 within the framework of a study for the European Agency for Fundamental Rights.[88] In those interviews, children stated that they were insufficiently informed and did not always understand what was happening. They often said that they got most of their information from their parents. The experiences at the hearings varied greatly. Some children complained of being constantly interrupted; of having the feeling that they were only being heard because it was obligatory, but that the judges already had a firm opinion beforehand; that they were rude and did not listen properly and just carried on, even though the child needed a break; and that the conversation was either directed too much, so that there was no room to tell what the child wanted to tell, or too little and the child was overwhelmed with what to tell. It was also criticised that many judges did not inform about what would be used from the child's statements. Also, some children had the impression that the judge and/or the guardian *ad litem* would try to influence the child or that it was implied that the child had been influenced by the parents. Children who attended several hearings described that sometimes there were changing excuses: first, they were too young to understand the situation and then they were going through puberty. This was used to justify not taking the child's opinion into account. Children also criticised the fact that things had to be told several times to different people.[89] Children perceived the questioning by the police as more pleasant than by the judges.[90] Guardians *ad litem* were perceived by some children as a great support and by others as misunderstood

[85] *Ibid* at p 64ff.
[86] *Ibid* at p 65.
[87] E Carl, M Clauß & M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (CH Beck 2015) marginal number 389.
[88] A Graf-van Kesteren, *Kindgerechte Justiz – Wie der Zugang zum Recht für Kinder und Jugendliche verbessert werden kann* (Deutsches Institut für Menschenrechte, 2015).
[89] *Ibid* at p 17ff.
[90] *Ibid* at p 15ff.

and only objectively but not subjectively represented. For many children, the role of the guardian *ad litem* seemed to be inadequately explained. [91]

7.5 Documented Negative Impacts on Children

From the point of view of the majority of parents who participated in the study of Gathmmann, Klosinski and Karle in 2010, children are neither deprived nor burdened by the hearing. [92] Parents consider a hearing of children under six years of age to be mostly not useful and over six years of age to be useful.[93] 90% of the judges asked stated that the hearing of the child is crucial for their decision.[94] 59.3% stated that they assume a heavy burden on children due to the child hearing, but at the same time 43.2% assume a clear relief for children. [95] The reasons for the relief were mostly found in knowing what is going on and feeling respected.[96] As reasons for the burden, loyalty conflicts, a new situation and the need to talk to unknown people were stated. [97] 14.3% of the judges assumed that a child hearing is not associated with any disadvantages. [98] 56.5% of the judges stated that children would not talk freely, because they are in a conflict of loyalty, meaning they want not to hurt their parents. [99]

On average, a child hearing lasts 25 minutes (between 5 minutes and 2 hours).[100] 46.2% of the judges set separate dates for the child hearing, so that the child hearing does not simultaneously take place with the hearing of others.[101] In 41.7% of the cases, a child hearing is held in the judge's office, in 18% in the courtroom, in 17.6% in a special playroom and in 22.7% outside the court building (mostly at the home of the child).[102] In one third of the cases the child is heard alone, in another third together with the guardian *ad litem*; in 0.7% of cases, parents are present.[103] In half of the hearings, aids such as games, picture painting materials and picture books or tests are used.[104]

During this study, parents and children were asked to describe their feelings. Children have different levels of stress at different times according to the interviews.[105] Stress is

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[91] *Ibid* at p 19ff.
[92] M Karle, S Gathmann and G Klosinski, *Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach 50B FGG* (Bundesanzeiger-Verlag, 2010) at p 66.
[93] *Ibid* at p 84.
[94] E Carl, M Clauß and M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (C.H. Beck 2015) marginal number 405.
[95] M Karle, S Gathmann and G Klosinski, *Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach 50B FGG* (Bundesanzeiger-Verlag, 2010) at p 123.
[96] E Carl, M Clauß and M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (CH Beck 2015) marginal number 404.
[97] *Ibid* marginal number 403.
[98] M Karle, S Gathmann & G Klosinski, *Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach 50B FGG* (Bundesanzeiger-Verlag, 2010) at p 150.
[99] *Ibid* at p 63.
[100] *Ibid* at p 150.
[101] *Ibid*
[102] *Ibid* at p 151.
[103] *Ibid*.
[104] *Ibid* at p 152.
[105] *Ibid* at p 153ff.

at its highest immediately before the hearing.[106] Especially girls at the end of elementary school were described as scared and unsure before the hearing by their parents, but the girls themselves did not agree.[107] Children described feeling anxious immediately before the hearing and the feeling vanishing after it was over.[108] The parents agreed, but not the parents that felt themselves very stressed. In general, the description of the parents of their children really depended on the parents' own feelings. Young children felt less anxious and scared than older ones.[109] Boys described themselves more scared than girls.[110] Parents were in general very content with the hearing of their child. Even though some children felt a little scared and anxious before the hearing, the extent was always moderate.[111] According to this study, a hearing of a child is more a relief than a burden and children were able to cope with the stress caused by it.[112] Excitement, uncertainty and anxiety immediately before the hearing are common, but are compared more to the feeling of exam anxiety. Professional experience, further training and female judges have a positive influence on the perception of the child hearing.[113]

7.6 Reform Recommendations

In Germany, the last reform of hearing the voice of the child was in 2021.[114] In this reform (section 159 paragraph 1 FamFG), the obligation of the judge to hear the child was added to the obligation to also gain a personal impression of the child. Furthermore, any age threshold was abolished. [115] Because this reform took place this recently, there are no studies yet regarding the consequences of the reform and there are not many new reform recommendations published since then. However, some recommendations exist in the literature.

First, some people criticise the hearing of children in general. According to them, the hearing is a too high burden and children are influenced too easily. Sociologist Wolfgang Hammer stated – based on his study mentioned above – that in 77% of the cases the will of the child is influenced by the parents and that statements by children (especially younger ones) are often momentary snapshots that do not describe the general situation.[116] Additionally, conflicts of loyalty often begin with the proceeding

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[106] *Ibid* at p 155.
[107] E Carl, M Clauß & M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (C.H. Beck 2015) marginal number 407.
[108] *Ibid*.
[109] *Ibid*.
[110] M Karle, S Gathmann & G Klosinski, *Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach 50B FGG* (Bundesanzeiger-Verlag, 2010) at p 154.
[111] E Carl, M Clauß & M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (C.H. Beck 2015) marginal number 407.
[112] *Ibid* marginal number 409.
[113] M Karle, S Gathmann & G Klosinski, *Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach 50B FGG* (Bundesanzeiger-Verlag, 2010) at p 155.
[114] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1595.
[115] *Ibid*.
[116] According to statements of the guardian ad litem; W Hammer, *Familienrecht in Deutschland – Eine Bestandsaufnahme* (2022) at p 17, 22.

and the relationship to the parents could be harmed.[117] The child takes responsibility for his or her statements and is according to Hammer often not ready for this.[118] This could lead to a feeling of guilt.[119] He also criticises to hear children at their homes, because safe spaces could be linked to the conflict afterwards.[120] As mentioned above, the study of Hammer has been criticised, however, due to the small number of court proceedings that were examined, as well as the limitation to cases from the Federal Court and the Federal Constitutional Court (which tend to be the highest conflict cases).[121]

Second, children can be influenced not only by their parents, but also by the judge. Often, this influence is not even intended; the questions asked can influence the responses of the child. This is the reason why judges and other practitioners that work with children must be trained to interview children without influencing them.[122] At the moment, training opportunities only exist for sitting family judges; there is no training beforehand to make sure that judges not just learn by doing, but are qualified when they start working with children.[123] Just three states in Germany introduced an obligation for family judges to take part in training in state law, but the training also takes place when they are already a judge and not beforehand. [124] Also, this training just consists of few classes every two years to keep up with changing laws and new approaches to children and families.[125] This contradicts the results of studies, that professional experiences with children and specific training have a positive influence on the perception of the child hearing.[126] The presiding judge at the Higher Regional Court of Frankfurt Stefan Heilmann argues that family judges need to be trained beforehand and be qualified to work with children.[127]

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[117] W Hammer, *Familienrecht in Deutschland – Eine Bestandsaufnahme* (2022) at pp 17 and 22ff.
[118] *Ibid* at p 22ff.
[119] *Ibid* at p 20.
[120] *Ibid* at pp 16 and 21.
[121] Family Law Group of the New Association of Judges ("Fachgruppe Familienrecht der Neuen Richtervereinigung"), *Die Bestandsaufnahme von Dr. Hammer stimmt nicht!* (press release, 2022).
[122] V Bodensteiner, J Müller and J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".
[123] S Heilmann, "Die Qualifikation der Richterschaft in der Familiengerichtsbarkeit" (2019) *Fachgespräch "Kindgerechte Justiz – Fortbildung und Qualifikation von Richterinnen und Richtern*" at p 7.
[124] Baden-Württemberg, Nordrhein-Westfalen and Sachsen-Anhalt; see S Heilmann, "Die Qualifikation der Richterschaft in der Familiengerichtsbarkeit" (2019) *Fachgespräch 'Kindgerechte Justiz – Fortbildung und Qualifikation von Richterinnen und Richtern'* at p 7.
[125] Office of the Child Protection Commission Ministry of Social Affairs and Integration Baden-Württemberg ("Geschäftsstelle der Kommission Kinderschutz Ministerium für Soziales und Integration Baden-Württemberg"), *Abschlussbericht der Kommission Kinderschutz* (Baden-Württemberg, 2019) at p 81.
[126] M Karle, S Gathmann and G Klosinski, *Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach 50B FGG* (Bundesanzeiger-Verlag, 2010) at p 155.
[127] S Heilmann, "Die Qualifikation der Richterschaft in der Familiengerichtsbarkeit" (2019) *Fachgespräch "Kindgerechte Justiz – Fortbildung und Qualifikation von Richterinnen und Richtern*" at p 7.

Third, the new provision of section 159 FamFG has been criticized because it is absolute and the judge always has to gain a personal impression – even when (for example) the child is still in the clinic after birth and the personal impression does not provide new information and therefore does not contribute at all to the decision. But the law cannot foresee every situation and regulate when a personal impression and a hearing could be waived. Before the law reform in 2021, when it was in the discretion of the judge when to hear and have a look at the child, the personal impression did not have enough importance and often was not considered.[128]

Fourth, the information provided to children before the hearing has been criticised. How children need to be informed is not regulated by law. At the moment, it depends greatly on the judge and the guardian *ad litem* to what extent the child is informed and whether this is in a child-friendly manner. As a result, according to Annemarie Graf-van Kesteren, children's information depend on their parents' level of knowledge. She criticises this and recommends an obligation to inform the child, especially because the dependence on the parents also favours the danger of manipulation.[129]

7.7 Conclusion

The central provision concerning the voice of the child in private family law proceedings in German law is section 159 FamFG. This provision requires the judge to hear the child and gain a personal impression of him or her, independent of the age of the child. There are just very few exceptions, in which the judge can waive those practices. The personal impression was added to section 159 FamFG in a major law reform in 2021. [130]

In addition to those requirements for the judge to consider the children's wishes, the Youth Welfare Office, assessors and the guardian *ad litem* are responsible to ensure the inclusion of the voice of the child. The guardian *ad litem* accompanies the child normally to the court proceeding and represents his or her interests. The Youth Welfare Office is responsible for the protection of the child and is sometimes even responsible for the court proceeding. The assessor is supposed to gain an insight of the life of the child outside of the court room. Since a very recent law reform, the assessor cannot just make an objective report, but also – when ordered by the judge – try to achieve an agreement between the parties. [131]

There is no published study since the reform in 2021, but older studies came to the conclusion, that children are able to cope with the stress and that the hearing has

[128] V Bodensteiner, J Müller and J P Reuß, 14 May 2022. "Familiensachen – der FamRZ-Podcast" Episode 7 "Kindeswille und Kindesanhörung".
[129] A Graf-van Kesteren, *Kindgerechte Justiz – Wie der Zugang zum Recht für Kinder und Jugendliche verbessert werden kann* (Deutsches Institut für Menschenrechte, 2015) at p 15.
[130] T Kischkel, *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis* (FamRZ, 2021) at p 1595.
[131] K Schulte-Bunert & G Weinreich, *FamFG*, (Wolters Kluwer, 2023) § 163, marginal 4.

more advantages than disadvantages for them.[132] Expertise and training of the judge have positive impacts on the experience of the hearing for the child and the determination of his or her voice.[133]

[132] E Carl, M Clauß & M Karle, *Kindesanhörung – Rechtliche und psychologische Vorgaben sowie praktische Durchführung* (C.H. Beck 2015) marginal number 409.

[133] M Karle, S Gathmann & G Klosinski, *Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach 50B FGG* (Bundesanzeiger-Verlag, 2010) at p 155.

Discussion

As noted at the outset, the purpose of this comparative to provide an insight into the processes and structures for the ascertaining the views of children in private family law proceedings in six jurisdictions (Ireland, England and Wales, Australia, New Zealand, Ontario, and Germany), with a view to identifying common challenges, the strengths and weaknesses of different approaches, and variations in law and practice. The analysis was conducted through the lens of several headings, including 1) the mechanisms used to facilitate child participation in private family law proceedings; 2) resourcing of child participation mechanisms, and the costs to parties; 3) the accreditation and regulation of professionals involved; 4) the effectiveness of existing arrangements; any documented negative impacts on children; and 5) any reform recommendations that have been made in each jurisdiction.

Section 1 outlined the relevant international law obligations arising under the CRC and the ECHR. It was seen that there is a clear international law obligation on all of the jurisdictions considered to facilitate children in expressing their views in the course of private family law proceedings, with due weight being afforded to those views in accordance with the age and maturity of the child. Key elements of the effective implementation of this obligation include ensuring a child-friendly courtroom environment and procedures; accessible information for children; and adequate training for professionals charged with facilitating child participation.

Section 2 examined the current position in Ireland. It was noted that since 2015, the Constitution has obliged the Oireachtas to legislate to make it obligatory to ascertain the views of children capable of forming views in all proceedings concerning guardianship, custody and access. Legislation enacted in 2015 has given courts a discretion to appoint an expert for this purpose, while separate pre-existing legislation empowers courts to commission a welfare report. However, concerns remain about the effectiveness of this legislation, since courts may decide not to appoint an expert, and no default mechanism for ascertaining the views of the child in such cases is stipulated. Moreover, the fees of procuring reports are payable by the parties to the litigation, raising difficulties around access to such reports in cases where parents do not have the means to pay for them. Judges are mostly unwilling to meet with children due to a lack of training in judicial interviews, and court facilities are often highly unsuitable for children. As such, significant concerns exist around the extent to which the constitutional obligation is being implemented in practice, and there remains much room for Ireland to learn from the experiences of other jurisdictions, notwithstanding the fact that the 2015 reforms are relatively recent. At the same time, while some limited empirical data points to an absence of child participation in a not insignificant number of cases in which the constitutional obligation applies, the evidence base is very narrow at present, and further research is needed to inform future changes to law, policy and practice.

Sections 3-7 examined how the challenge of ensuring that children's views are effectively ascertained in private family law proceedings has been addressed in five other jurisdictions (four common law and one civil law). A range of different models were evident, with most jurisdictions providing more than one avenue through which the views of the child can be ascertained. Strengths and weaknesses have been

identified in all of the jurisdictions examined. England and Wales has utilised the independent CAFCASS service and drawn praise for the dual representation model that allows for children to have both a solicitor and a guardian *ad litem*; but criticism has been directed at the under-resourcing of the service, a "pro-contact" stance that can lead to the child's views being disregarded, and at a lack of co-ordination between services. These factors combine to undermine the effectiveness of CAFCASS in practice.

Australia primarily relies on expert reports and independent children's lawyers; judicial interviews are permissible, but rare in practice. Challenges have included the relative lack of regulation and quality control of experts charged with producing reports, and a failure by independent children's lawyers to prioritise spending time with the child they represent over other tasks. Gaps in funding for services and training for professionals have also been highlighted.

In New Zealand, mediation plays an especially important role in private family law cases; however, to date, child participation in mediation has been limited. In cases that go to court, the legislation in New Zealand is particularly strong and is seen internationally as an exemplar of how Article 12 of the CRC can be implemented in domestic family law. A "team" approach is employed to ascertain the views of children that utilises a combination of expert report, judicial interviews and the appointment of a lawyer for the child. The use of judicial interviews is more common in New Zealand than in other jurisdictions, although it is still some way short of being standard practice. Nonetheless, in spite of evident strengths, concerns remain in New Zealand about the adequacy of the training provided to professionals; the failure of some lawyers to meet with the child; and whether the views of children are always accurately conveyed to the court.

In Ontario, judges retain discretion as to whether to ascertain the views of children in private family law proceedings. A statutory Office of the Children's Lawyer has been established to act as litigation guardian of a minor or other person who is a party to a proceeding. Cases are referred to the office by judges, but due to budget constraints, the office is only able to accept around half of the private family law cases referred to it. However, there are a number of alternative mechanisms for ascertaining the views of children in private family law proceedings, including interviews with children during parenting plan assessments; voice of the child reports prepared by social workers; child-inclusive mediation; and judicial interviews (although in common with other jurisdictions, these are relatively rare in practice). Parenting plan assessments are expensive and beyond the reach of many litigants; they also take a considerable period of time and can delay proceedings. Voice of the child reports are comparatively cost-effective and timely, but are not necessarily suitable for every case.

Finally, in Germany, reforms in 2021 have significantly enhanced child participation in private family law proceedings, which is secured through the imposition of a legal obligation on family law judges to hear the views of all children capable of forming views (unless it is not in the child's best interests), as well as an obligation "to gain a personal impression of the child" in every case. The latter includes the gathering of the statements of the child as well as an observation of the child's behaviour, body language and reactions. Courts can order assessment reports of children, or appoint

a guardian *ad litem* when this is necessary to guard the interests of the child. The results of the hearing of the child and of the procedure when gaining a personal impression must be documented and communicated to everyone involved. All costs of the participation of a child are part of the court proceeding and are either paid by the parties or by legal aid. Children are heard by courts using the above procedures in the majority of cases. Training and guidelines provided to judges in respect of interviewing children appears to be a positive and effective feature of the system where provided; but some judges still choose to rely heavily on assessor reports, either due to a lack of training or overwork. Other barriers to effective participation include a shortage of supply of qualified assessors and a lack of child-friendly information provided to children to assist them to understand proceedings.

The analysis indicates that the legal framework setting out the obligations on courts to ascertain the views of children during private family law proceedings, while an important element of the implementation of international law obligations, are just one part of a complex picture. Even the strongest legislative provisions may have limited effect if the necessary architecture is not in place to ensure their effective operation in practice. There is no one mechanism that stands out as the most effective means of facilitating child participation; all jurisdictions employ a variety of mechanisms, which is positive insofar as it allows for flexibility to tailor the approach the needs of the child, the family and the proceedings in question.

Many of the same practical challenges have been encountered across all six jurisdictions. The most prominent issues are the resourcing of child participation mechanisms so that all children can avail of services within a reasonable timeframe, and the training of professionals involved in private family law proceedings so that they are aware of the importance of child participation and possess the soft skills needed to facilitate it. The need to properly regulate professionals engaged in facilitating child participation also emerged as a significant point; this can include stipulating minimum qualifications and CPD requirements, as well as setting out professional guidelines governing how children's views are to be ascertained and communicated to the court. New Zealand goes a step further than other jurisdictions by setting requirements of minimum professional experience in the specific area of family law for lawyers who wish to practice as independent children's lawyers. Finally, it is essential to take steps aimed at ensuring an adequate supply of professionals qualified to produce reports, as the experience in Germany demonstrates the negative consequences that can flow from a shortfall in this regard.

All of the above points should form an important part of the implementation of the Family Justice Strategy in Ireland in the coming years.[1] Importantly, however, many key components of the realty of current practice remain somewhat obscure at present due to the narrow evidence base that is available. This includes the frequency with which children's views are ascertained in private family law proceedings; the frequency with which each of the available mechanisms is employed, and the reasons for same; the strengths and weaknesses of each mechanism; and regional variations in practice (which have been identified as a major issue in other areas of child and family law in Ireland). Moreover, additional

[1] Government of Ireland, *Family Justice Strategy 2022-2025*, available at https://assets.gov.ie/239772/7a41d453-19b8-403d-8022-296322e796f8.pdf.

concerns may exist which have not yet been captured within the available literature. In order to ensure that the precise gaps that exist in Irish law, policy and practice are identified, and solutions tailored to those gaps, it will be necessary to generate robust empirical evidence of the reality of child participation in private family law proceedings in Ireland. Phases 2 and 3 of *Child Participation in Family Court Proceedings in Ireland* will pursue this goal through a national survey of practitioner and stakeholder, and observing a representative sample of guardianship, custody and access proceedings in a range of District and Circuit Court venues. The aim is to publish the results of this research in late 2024.