

# Submission to the Australian Law Reform Commission Review of the Family Law System

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Thank you for the opportunity to make a submission to this review. I am a lecturer and researcher in Australian family law with particular interest in children's participation in contested family law matters.

## Scope of submission

My submission relates to Questions 34-36 of the Issues Paper. Children must be given greater opportunities to participate and 'have a say' in family law matters, including parenting disputes, welfare jurisdiction and Hague international child abduction matters. Children have a right to express their views under Article 12 of the *United Nations Convention on the Rights of the Child* (UNCRC). Giving them opportunities to participate will improve experiences for children, who often feel as if they are given no say and that their views are not taken into account (even when this is not the case). Research suggests that children who feel that they have been given a say are more likely to comply with a decision, even when the decision does not accord with their views.<sup>1</sup>

Giving children greater opportunities to participate can be achieved by:

1. Enshrining the child's right to be heard in the *Family Law Act 1975* ('FLA');
2. Judges meeting with children in appropriate cases, including the promulgation of guidelines, the inclusion of judicial meetings with children in s60CD of the FLA and judicial education on how to speak with children and interpret their views; and
3. Independent Children's Lawyers ('ICLs') taking a greater role in meeting with children, explaining legal processes and the ways children may participate, and advocating children's views

My submission relates to 1 and 2 above. Others have undertaken much valuable research on the role of ICLs and I will leave the issues in 3 to them.

## Enshrining the child's right to be heard in the FLA

Article 12 of the UNCRC gives children the right to express their views and the opportunity to be heard in any proceedings affecting them, their views to be given due weight according to their age and maturity. As signatory to the UNCRC, Australia has undertaken to implement those rights (Article 4). However, despite a specific recommendation to Australia to implement Article 12 from the UN Committee on the Rights of the Child,<sup>2</sup> the child's right to be heard does not appear in the FLA. The legislation does not give children the right to 'express their views', nor the 'opportunity to be heard'. The only protection given to children in this regard is that 'the Act requires the family

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<sup>1</sup> J Cashmore, 'Children's Participation in Family Law Matters' in Hallet and Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (2003), 159.

<sup>2</sup> United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, 40<sup>th</sup> sess, UN Doc CRC/C/15/Add.268 (20 October 2005) [30].

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courts to have regard to the views of the child when deciding their best interests' (Issues Paper, [256]; referring to FLA s60CC(3)(a)).

The Issues Paper noted, '[t]he [FLA] recognises the rights accorded to children and young people under the *Convention on the Rights of the Child*.' This is in reference to a new subsection 60B(4) of the FLA, inserted in 2012, which reads:

An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.

However, as I argued in a 2013 article,<sup>3</sup> the reference to the UNCRC in s60B(4) is unlikely to have great effect on children's participation. It is well-known that, where the court's paramount consideration is the best interests of the child (s60CA), the objects in s60B are 'unlikely to be of great value in the adjudication of individual cases'.<sup>4</sup>

The Australian situation can be contrasted with New Zealand and Scotland, for example, where the child's right to be heard is enshrined in family law legislation. The New Zealand *Care of Children Act 2004* states that a child must be given reasonable opportunities to express views on matters affecting the child (s6(2)(a)). The *Children (Scotland) Act 1995* (UK) ensures that a court will, taking account of a child's age and maturity, give the child to express his or her views if they wish to do so (s11(7)).

Enshrining a child's right to express their views and be given the opportunity to be heard in the FLA ensures that their rights pursuant to Article 12 are complied with and allows an appeal to be brought on the basis that a child has been denied that right, as occurred in the New Zealand case of *Carpenter v Armstrong* (Unreported, High Court of New Zealand, Heath J, 31 July 2009).

This can be achieved by inserting a new section in Part VII of the FLA:

#### **Children's right to express their views**

- a) In all proceedings under this Part, a child has a right to express his or her views in all matters affecting the child.
- b) For the purposes of subsection (a), a child will be provided with reasonable opportunities to be heard in the proceedings.

This will not interfere with the current s60CE which, appropriately, stipulates that children cannot be required to express their views.

#### **Judicial meetings with children**

Meeting with a judge gives a child an opportunity to express their views directly to a court without filtering by a third party. It satisfies the child that their views have been heard by the decision-maker. Research findings have indicated that children want to have the opportunity to meet with a

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<sup>3</sup> M Fernando, 'Express Recognition of the UN Convention on the Rights of the Child in the Family Law Act: What Impact for Children's Participation?' (2013) 36 *New South Wales Law Journal* 88.

<sup>4</sup> *B v B: Family Law Reform Act 1995* (1997) FLC 92-755, [9.54] (Nicholson CJ, Fogarty and Lindenmayer JJ).

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judge.<sup>5</sup> They want themselves and their views acknowledged and think that meeting with judges will result in better decisions being made. They want the judge to hear their views without filtering, 'mixed messages or misinterpretation'.<sup>6</sup> The UN Committee on the Rights of the Child has recommended that, wherever possible, children must be given the opportunity to be directly heard in proceedings.<sup>7</sup>

Having the opportunity to see, interact with and hear from children may better equip judges to focus on individual children's needs and make a decision that promotes their best interests. Judges can explore possible options and outcomes with the child.<sup>8</sup>

In 2010 I surveyed all family law judicial officers in Australia about their views and experiences of meeting with children. Of the 44 judicial officers who responded,<sup>9</sup> 48 percent agreed or strongly agreed that meeting with children may provide judges with useful evidence of children's views and nearly 40 percent agreed or strongly agreed that meeting with a child may give judges greater understanding of a child's needs and best interests than other methods of hearing children's views.<sup>10</sup> This is despite the fact that 86.4 percent had never met with a child for the purposes of hearing a child's views.<sup>11</sup>

In Australia, judges have occasionally met with children in chambers in the presence of a family consultant. The family consultant plays an important role in ensuring the child's well-being and in the treatment and communication of any evidence collected.

Judges should be encouraged to consider, in every case, meeting with the child who is the subject of proceedings. As noted in my proposed guidelines (below), this would include consideration of such things as the age and maturity of the child, the purpose of such meeting, whether the child has requested a meeting and whether a meeting would be in the best interests of the child. The child must consent to the meeting at all times.

#### Amending section 60CD of the FLA to include judicial meetings with children

The Issues Paper stated at [257], '[a] third mechanism provided for in the *Family Law Act* involves the judicial officer meeting directly with the child'. However, judicial meetings with children are not specifically referred to, either in the FLA or in the *Family Law Rules 2004* (Cth) ('the Rules').

Rule 15.03 (formerly 15.02) of the Rules was removed in August 2010 by the *Family Law Amendment Rules 2010* (Cth) ('the Amendment Rules') and was not replaced. The rule stated:

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<sup>5</sup> P Parkinson, J Cashmore and J Single, 'Parents and Children's Views on Talking to Judges' (2007) 21 *International Journal of Law, Policy and the Family* 84; D Bagshaw et al, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006' (2011) 86 *Family Matters* 49.

<sup>6</sup> Parkinson, Cashmore and Single, *ibid* at 89-90.

<sup>777</sup> United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to be Heard*, 51<sup>st</sup> sess, UN Doc CRC/C/GC/12 (20 July 2009), [35].

<sup>8</sup> See M Fernando, 'Conversations between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters' (2009) 23 *Australian Journal of Family Law* 48.

<sup>9</sup> Constituting a response rate of nearly 48 percent.

<sup>10</sup> M Fernando, 'What do Australian Family Law Judges Think about Meeting with Children?' (2012) 26 *Australian Journal of Family Law* 51, 64-65.

<sup>11</sup> *Ibid*, 58.

### **Rule 15.03 Interviewing a child**

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

The explanatory statement to the Amendment Rules stated that the rule 15.03 was removed '[t]o reflect that a Judge interviewing a child subject to proceedings is most unusual'<sup>12</sup> and because, '[t]his does not generally occur and when it does can be the subject of case specific orders'.<sup>13</sup> Nevertheless, there is nothing prohibiting a judge from meeting with a child, and it is generally accepted that judges retain discretion to meet with children.

Section 60CD(2) of the FLA lists the methods by which a court may inform itself of a child's views. This includes 'subject to the applicable Rules of Court, by such other means as the court thinks appropriate' (s60CD(2)(c)), which allows judicial meetings with children to occur. Meetings between judges and children, while not common, are an accepted means by which the court may receive evidence of children's views and it is appropriate this expressly appear in s60CD(2). The section could be amended as follows:

### **60CD(2) How the court may inform itself of views expressed by a child**

The court may inform itself of views expressed by a child:

- a) by having regard to anything contained in a report given to the court under subsection 62G(2); or
- b) by making an order under section 68L for the child's interests in the proceedings to be independently represented by a lawyer; or
- c) by a meeting between the judicial officer and the child; or
- d) subject to the applicable Rules of Court, by such other means as the court thinks appropriate.

### **Guidelines for judges meeting with children**

The Issues Paper stated at [257], '[t]wo recent reports have recommended the development of guidelines for judicial interactions with children and young people where judicial officers wish to do this'.

I wrote draft guidelines for judges meeting with children which were published in an article in 2012.<sup>14</sup> I've reproduced those guidelines in full at the end of this submission.

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<sup>12</sup> Explanatory Statement, *Family Law Amendment Rules 2010* (Cth), 2.

<sup>13</sup> *Ibid*, Sch 1 [16].

<sup>14</sup> M Fernando, 'Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings' (2012) 2 *Family Law Review* 213.

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The stated purpose of the guidelines is to give guidance to judges in deciding whether to meet with a child and in conducting meetings with children. The guidelines emphasise that it is not intended that judicial meetings with children replace or diminish the value of reports from family consultants or other child welfare experts, or the role of the ICL. The guidelines are intended to give effect to Article 3 (the 'best interests' principle) and Article 12 of the UNCRC.

#### Judicial education on speaking with children and interpreting their views

It is perceived by many, and often by judges themselves, that judges lack the skills and training to speak with children appropriately and to accurately interpret their views.<sup>15</sup> Over 80 percent of judicial officers who responded to my 2010 survey agreed that judicial officers should undergo training before meeting with children.<sup>16</sup> Judges who wish to participate should be offered training to develop skills to speak with children and understand their circumstances and development, including the different ways in which children may express themselves.

Former Chief Justice of the Family Court Nicholson CJ (as he then was) endorsed the concept of judges undergoing training in speaking with children.<sup>17</sup> In *ZN and YH*<sup>18</sup> his Honour said that the Family Court 'already offers regular judicial training to judges and there is no reason why such training should not be offered as part of that programme (sic)'.<sup>19</sup>

Thank you for considering my submission. Please let me know if I can assist further.

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<sup>15</sup> J Cashmore, 'Children's Participation in Family Law Matters' in Hallet and Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (2003), 167; R Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197, 203; J Kelly, 'Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice' (2002) 10 *Virginia Journal of Social Policy and the Law* 129, 154.

<sup>16</sup> M Fernando, 'What do Australian Family Law Judges Think about Meeting with Children?' (2012) 26 *Australian Journal of Family Law* 51, 73.

<sup>17</sup> Chief Justice A Nicholson (as he then was), 'Family Law Reform: How Much Real Reform is Involved? Does It Take Us Forward or Backwards?' (Paper presented to the ACT Council of Social Services, Canberra, 17 August 2006), 22.

<sup>18</sup> *ZN and YH and Child Representative* (2002) FLC 93-101.

<sup>19</sup> *Ibid*, [109] (Nicholson CJ).

## Draft Guidelines for Judges Meeting with Children

From M Fernando, 'Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings' (2012) 2 *Family Law Review* 213

### 1. Purpose

These guidelines are for the use of judges deciding children's matters under Part VII of the *Family Law Act 1975* (Cth) ('the FLA').

They are intended to give guidance to judges in deciding whether to meet with a child and in conducting meetings with children. The guidelines recognise that, in some cases, it may be in the best interests of a child to meet with a judge. For example:

- A child may wish to meet with a judge, in order to meet the person who is making decisions for the child's life. The child may wish to satisfy themselves that their views will be heard by the decision-maker and will be taken seriously;
- Hearing directly from a child may give a judge greater understanding of a particular child's needs and interests. Meeting with a child may better enable a judge to determine what is in the child's best interests.

These guidelines are not intended to have the effect of a Practice Direction. The extent to which the guidelines, or any of them, will be followed is within the discretion of individual judges.

### 2. Introduction

In making an order under Part VII of the FLA, the court is required to consider any views expressed by the child (s60CC(3)(a)). Meeting with a child is one method by which the court can inform itself of children's views. Even in circumstances where the court is not seeking to inform itself of a child's views, these guidelines recognise that, in certain situations, it may benefit children to meet with a judge.

Ways in which the court may inform itself of the views expressed by a child are listed in s60CD(2) of the FLA and include having regard to a report from a family consultant, ordering that the child's interests be represented by an Independent Children's Lawyer ('ICL') and other means as the court thinks appropriate, subject to the applicable Rules of Court. A judicial meeting with a child is no longer specifically provided for in the *Family Law Rules 2004* (Cth).<sup>20</sup> Nevertheless, the option of meeting with a child is still within the discretion of the court in individual cases.

In most cases, the court is informed of children's views through a report by a family consultant or other expert in children's welfare. ICLs also play a valuable role in ensuring the court is informed of children's views. Nothing in these guidelines is intended to replace or diminish the value of reports from family consultants or other child welfare experts, or the role of ICLs. The guidelines relate to circumstances in which a judge determines that a meeting may be an appropriate complement to other methods of hearing children's views.

### 3. Statement of principles

A judicial meeting with a child is one means of giving effect in family law proceedings to select Articles of the *United Nations Convention on the Rights of the Child* which state:

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<sup>20</sup> Rule 15.03 of the *Family Law Rules 2004* (Cth), which specifically referred to a judicial officer 'interviewing' a child, was omitted by the *Family Law Amendment Rules 2010* (Cth).

### **Article 3**

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

### **Article 12.1**

Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

### **Article 12.2**

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

## **4. Deciding whether to meet with a child**

4.1 In all cases under Part VII of the FLA, at any time before judgment is delivered, a judge should consider meeting with the child or children who are the subject of the proceedings.

4.2 In considering whether to meet with a child, a judge may take into account:

- a) whether the child has requested to meet with the judge;
- b) the opinions of the family consultant (or other expert in children's welfare, if applicable) and the ICL (if one has been appointed) as to whether the judge should meet with the child;
- c) the age and maturity of the child;
- d) the purpose of any meeting;
- e) the timing and location of any meeting;
- f) the opinion of the parties as to whether the judge should meet with the child;
- g) any other circumstances the judge considers relevant.

4.3 A judge should not meet with a child if to do so would be contrary to the best interests of the child.

4.4 A judge should not meet with a child unless the child has consented to the meeting.

4.5 A judge is entitled to expect that the ICL or family consultant (or other expert in children's welfare) will advise the court as to whether or not the child wishes to meet with the judge.

4.6 A judicial meeting with a child should not be used in substitution for a family report or other expert report as a method for hearing children's views, except in circumstances where a report is not reasonably available.

4.7 A judge may consider recording in the judgment the reasons for his or her decision to meet with the child or, alternatively, to not meet with the child in any given case.

4.8 If a judge denies a child's request to meet with the judge, the judge should consider providing to a child a brief explanation in writing for his or her decision to deny the child's request.

## **5. General procedures to be followed if a judge decides to meet with a child during the proceedings**

### **5.1 Meeting with a child during proceedings**

5.1.1 The judge may determine the circumstances of a meeting with a child, including:

- a) at what stage of the proceedings the meeting should take place;
- b) when the meeting is to take place;
- c) where the meeting is to take place (ie in the judge's chambers, in a closed court or elsewhere);
- d) the purpose of the meeting;
- e) who will be present during the meeting;
- f) who will prepare the child or children for the meeting;
- g) whether to meet with children individually, or in sibling groups, or both;
- h) how the meeting will be recorded.

5.1.2 Other than in exceptional circumstances, a judge should meet with a child in the presence of a family consultant or other expert in children's welfare. The family consultant or other expert may assist during the meeting by reassuring and explaining matters to the child, facilitating the discussion and assisting the judge to ascertain whether any views expressed by the child are genuinely held.

5.1.3 A judge may consider whether to ask the ICL to be present at the meeting. A judge should not meet with a child in the presence of the child's parents or their legal counsel. A judge should never meet with a child alone.

5.1.4 A judicial meeting with a child should be recorded by audio or audio-visual means.

5.1.5 Prior to the commencement of the meeting, the judge should inform the child:

- a) of the purpose of the meeting;
- b) that the child can withdraw their consent to the meeting at any time during the meeting;
- c) that the meeting will be recorded;
- d) that confidentiality cannot be guaranteed, and that the child's parents and other parties will receive an account of the meeting. The judge should obtain the child's agreement to this;
- e) that it is the judge's responsibility, and not the child's, to make the ultimate decision;
- f) of how the outcome of the decision will be communicated to the child.

### **5.2 Report to the parties**

5.2.1 The judge should ensure that the parties receive an accurate account of the judicial meeting with the child.

5.2.2 The judge may ask the family consultant or other expert in children's welfare to provide the court with an oral or written report about the judicial meeting with the child.

5.2.3 A judge may consider whether to release an audio or video recording, or transcript, or part thereof, of the judicial meeting with the child to the parties.

5.2.4 The parties should be given an opportunity to respond to the judicial meeting with the child. This may be by way of oral evidence, submissions or cross-examination of the family consultant or other expert in children's welfare.

### **5.3 Disclosures by children**

5.3.1 If a child, during a meeting with a judge, makes a disclosure and requests it to remain confidential from one or both of their parents or other parties:

- a) if the disclosure is one of child abuse, the judge should explain to the child that the disclosure cannot remain confidential and may be subject to mandatory reporting procedures.
- b) if the disclosure is not one of child abuse, the judge should remind the child of their agreement that confidentiality cannot be guaranteed. If the child does not agree to the disclosure being revealed to the parties, the judge should decide whether to keep the disclosure confidential or whether to reveal the disclosure, notwithstanding the child's request to keep the disclosure confidential.

5.3.2 Where the disclosure is not one of child abuse:

- a) if the disclosure is influential to the decision, the judge may decide to keep the disclosure confidential.
- b) if the disclosure is influential to the decision, the judge should reveal the disclosure to the parties.

if the judge decides to reveal the disclosure to the parties, the judge should inform the child of his or her decision.

## **6. Meeting with a child after the conclusion of proceedings**

6.1 A judge may decide to meet with a child after the conclusion of proceedings for the purpose of explaining the court's orders and reasoning to the child.

6.2 The judge retains discretion in all circumstances of the meeting, including where the meeting is to take place, when the meeting is to take place (before or after the court's judgment is delivered), who is to be present and whether the meeting is to be recorded.

6.3 No evidence may be gathered during a meeting with a child conducted after the conclusion of proceedings, as the proceedings have ended. If a child expresses any views during the meeting, the judge should disregard those views for the purposes of the decision.

6.4 A judge may meet with a child after the conclusion of the proceedings, notwithstanding the fact that the judge may have previously met with the child during the course of the proceedings.