

Article

# Children's Participation in Care and Protection Decision-Making Matters

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**Abstract:** Laws and policies in different jurisdictions provide a range of mechanisms that allow children involved in child protection processes and care proceedings to express their views when decisions that affect them are being made. Whether these mechanisms facilitate children's involvement and whether they result in children's views being heard and "given due weight in accordance with the age and maturity of the child", as required by article 12 of the UN Convention on the Rights of the Child, is the focus of this article. The law, policy and practice in New South Wales, Australia, are used to provide a contextual illustration of the wider theoretical and practical issues, drawing on international comparisons and research. It is clear there is still some way to go to satisfy the requirements of article 12 in Australia and other jurisdictions. These mechanisms often do not provide the information children need to understand the process, nor do they consistently encourage meaningful participation through trusted advocates who can accurately convey children's views to those making the decisions. It is generally unclear how children's views are heard, interpreted, and weighted in decision-making processes. The research findings from a number of countries, however, are clear and consistent that children often feel 'unheard' and that they have had few opportunities to say what is important to them. A number of conclusions and practice suggestions are outlined for how the law could better accommodate children's views.

**Keywords:** child participation; children's views; child protection; care and protection; procedural fairness; respect; legal representation; culturally appropriate mechanisms; article 12 UN CRC; feedback loops



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## 1. Introduction

The decisions that are made about children's care and protection can have long-term and potentially life-long consequences affecting who children live with during their childhood and beyond, which community they live and go to school in, which members of their family they have contact with, and even, when decisions about guardianship and adoption are made, who constitutes their family. These decisions are made by caseworkers, legal professionals and courts within a legal framework that may provide for children to provide their views and have them taken into account, but this varies greatly; depending on the jurisdiction, the legal and other professionals involved, and on the child's age and developmental capacity, and opportunities to express their view.

At the broadest level, the frequently cited article 12 of the UN CRC is relevant to children's right to participation, forming a two-fold obligation on state parties. Article 12(1) outlines the obligation to ensure that the child's views and opinions about any matters that concern them are ascertained and that these views are taken into consideration during adult decision-making, with due regard to the child's age and maturity. Article 12 (2) requires that the child is afforded the opportunity to be heard in decisions that affect them, whether

directly or through a representative or ‘an appropriate body’. These participatory rights co-exist with, and should not be treated as severable from, the best interests principle (article 3) and children’s right to protection from harm (article 19) (Lansdown 2011; Lundy et al. 2019; Tobin and Cashmore 2019b; United Nations Committee on the Rights of the Child 2009). While these CRC articles assume a child’s vulnerability and dependency on adults, article 12 is premised on children having a contingent degree of self-determination. Despite this tension between dependency and autonomy, the right to be heard is considered integral to the proper realisation of the child’s best interests (Kosher and Ben-Arieh 2020a; Lundy et al. 2019). Other articles, particularly articles 5, 8 and 20, provide important context in relation to the primary consideration of the child’s best interests, the importance of family responsibilities, parental guidance and cultural connections for children’s wellbeing and development (article 5) and children’s right to identity (article 8) and to maintain connections with their family for those children who are unable to live with their family (articles 19 and 20) (Tobin 2019; Tobin and Cashmore 2019a).

This article addresses four main questions in Sections 2–5 of this paper. First, what opportunities are there for children to express their views in care and protection matters in both pre-court processes and court proceedings? Second, to what extent are children’s views ‘heard’ and taken into account—by lawyers, in assessment and expert reports, and by judicial officers? Third, how are child participation processes implemented in practice, whether these processes align with children’s experience of ‘being heard’, and make a difference for them? Finally, how can the law better accommodate children’s views?

A range of mechanisms exists in different jurisdictions that may allow children to express their views when decisions are made in relation to statutory intervention in children’s care and protection. Whether these mechanisms facilitate children’s participation and whether they result in children’s views being heard and considered at different stages at which decisions are made is another matter. This is an area in which the tension between children’s safety, well-being and autonomy is most pronounced, given the nature of the concerns about children’s safety and wellbeing, the long-term consequences and the typically young age and vulnerability of children whose exposure to adverse family circumstances has resulted in statutory intervention (Archard and Skivenes 2009; Tisdall 2018).

The article brings together a number of aspects of the decision-making process at different stages, using the law, policy and practice in New South Wales, Australia, as a case example, in relation to the first question to provide some substance to the law and practice, but also bringing in international comparisons. It begins by providing an overview of the opportunities for child participation in the child protection system in New South Wales, Australia, according to its legislative, policy, and practice framework. Some common elements in other systems and the relevant implications for child-inclusive and child-centred practice are discussed within an international context, drawing on socio-legal research literature. The following three questions are addressed by reference to the international socio-legal and social science and social work literature, including comparative cross-country studies and research findings from English and non-English speaking countries, including Australia, New Zealand, England and Scotland, United States, Canada, Germany, Norway, Sweden, Spain and the Netherlands.

## **2. What Opportunities Are There for Children to Express Their Views on Care and Protection Matters? An Australian Case Example with International Comparisons**

This section details opportunities for children and their families to express their views at different stages of care and protection matters, including pre-court processes and formal court processes. The child protection legal system in New South Wales, Australia, is used as a case example of the implementation and limitations of processes for children’s participation, with some reference to international comparisons and to findings from socio-legal and other research. Australia does not have uniform or national legislation governing statutory care and adoption systems. Each state and territory in Australia has its own [public law] care and protection system, which is separate from the federal private law

jurisdiction dealing with parental separation and divorce. While there are similarities between key principles guiding legislation between jurisdictions, there are also variations in the way children participate across the six states and two territories.

In New South Wales, the *Children and Young Persons (Care and Protection) Act 1998* ('the Care Act') establishes the primary legislative framework for child protection in the most populous state of Australia. This Act deals exclusively with the state's intervention in families to protect children at risk of harm. Children's participatory rights are provided for in sections 9 and 10 of the Care Act in relation to decisions concerning a child's safety, welfare and wellbeing (s 9) that are likely to have a significant impact on the life of a child or young person (s 10). The 'participation principle' in s 10 enshrines the basic elements of article 12 of the CRC: making the statutory agency responsible for informing children about the decisions to be made, explaining the process and the outcomes and reasons for the decision, and providing children with the assistance and opportunity to express their views and to respond to these decisions—with 'due regard for the child's age and developmental capacity' (s 10(2)). The Court itself has a responsibility to take 'reasonably practicable' steps to assist the child in understanding the proceedings and, more broadly, to ensure that the child has the opportunity to participate and be heard (s 95). There are further provisions for children's legal representation (s 99–99D) and the child's right of appearance (s 98). Despite the various requirements in the Act and associated regulations, *Child Safe Standards* and the *Charter of Rights for Children in Care* ([New South Wales Department of Communities and Justice 2019b](#)), in practice, it is very unclear how well these provisions are met and how well they result in children being heard and their views considered.

The particular rights of Aboriginal and Torres Strait Islander children, parents, and their families to participate in child protection decision-making are recognised in Australian law and policy. In recognition of children's right to maintain a connection to their culture, identity, and community, a key aspect of casework and care plans for Indigenous children in Australia is the requirement for the plan, the process, and any placement out of the child's home to follow the Aboriginal and Torres Strait Islander Child Placement Principle ([SNAICC 2021](#)). In New South Wales, for example, amendments to the Care Act in late 2022 have made this more explicit with a legislative requirement that all decisions under the Act must consider the five elements (prevention, placement, partnership, participation, and connection) of the Aboriginal and Torres Strait Islander Children and Young Persons Principle. The extent to which this legislative reform is and may be effective in increasing participation and compliance with the overall principles in relation to Indigenous children is yet to be tested, but it is clear that across Australia, compliance with implementing the principle in practice has been poor and real opportunities for child and family participation rare ([Davis 2019](#); [Newton et al. 2023](#); [SNAICC 2021](#)).

### 2.1. Pre-Court Processes

Before the matter reaches the Children's Court in New South Wales for determination, older children and adolescents may be informed about the outcomes of case conferences and may attend family group conferences. If they are not directly involved in these pre-court processes, their views may be represented by parents, other family members, carers and caseworkers, but children may not know how this is done and exactly what is said on their behalf. Typically, caseworkers, the family group conference facilitator, and parents may decide whether and how children can participate and what they are told about the outcome. Children who are the subject of legal disputes often know 'something is going on' and decisions are being made about them; not being appropriately informed is conducive to fear and imagining the 'worst' ([Bell 2002](#)).

#### Family Group Conferences

Family group conferences, based on the New Zealand model, provide a "space before the law is involved" in New South Wales and other states, involving family members in an informal but structured alternative dispute resolution decision-making process

(Connolly 2013). These conferences are conducted by an independent external facilitator and involve parents, family, kin, and other significant people in the child's life. Children may attend, depending on "their age, maturity and what needs to be discussed" as well as their desire to do so; the decisions about who is included are made by parents, carers and family in conjunction with the facilitator. If children do not attend in person, New South Wales government policy and practice directions for Family Group Conferencing indicate "the caseworker should help the child to 'write down their thoughts and feelings', to be read out by another person attending the conference" (cited in the *Family is Culture* report (Davis 2019, p. 310)).

Various evaluations and commentators in Australia and internationally have pointed out the need for careful consideration of children's 'participation' and other ways their views might be included without them being present at long meetings and being exposed to distressing discussions and difficult family dynamics (Boxall et al. 2012; Conley Wright et al. 2022; Dawson and Yancey 2006; Giovannucci and Largent 2009; Holland and O'Neill 2006). A recent evaluation of family group conferences in New South Wales (Conley Wright et al. 2022) and the comprehensive review of practice with Aboriginal families in the definitive *Family is Culture* (2019) report indicate disparate experiences and views about the value of family group conferences, particularly for Aboriginal families and children. There were positive comments about independent Aboriginal facilitators, who demonstrated cultural safety and respect, being able to engage kin and other important people in the child's life and address the power imbalances between the statutory department and Aboriginal families. But there were also criticisms of tokenistic consultation by caseworkers (Davis 2019, pp. 310–13) and limited integration of the Aboriginal and Torres Strait Islander Child Principles of participation, partnership, placement and connection (Conley Wright et al. 2022, pp. 46–52).

## 2.2. Court Processes

While children may be involved in some pre-court processes, they generally do not attend court and rarely give direct evidence in care and protection proceedings in Australia or in England and Wales, New Zealand and Canada; it is, however, more common for children to attend hearings in the United States (Ananth 2014; Beckhouse 2016; Quas et al. 2009) and typical in Scotland's quasi-judicial tribunals' Children's Hearings (Griffiths 2009; Marshall 2011). In jurisdictions in which children do not generally attend, children's views, 'wishes' and needs are conveyed to the Court by their legal representative (in some states of Australia) and sometimes via expert evidence. Caseworker reports and the in-court evidence of the statutory authority usually refer to the child's wishes or views. The evidence of parents or guardians may provide yet another perspective but is not necessarily an accurate and unbiased representation. Although legal proceedings in the care jurisdiction are intended to be non-adversarial (e.g., s 93 of NSW Care Act), they are widely perceived to adopt many elements of an adversarial approach in practice (Fernandez et al. 2013; Ross 2013; Sheehan and Borowski 2013; Sheehan 2013; Thomson et al. 2017; Tilbury 2013; Walsh and Douglas 2011). The evidence and arguments of each party are typically those that support that party's position rather than representing a unified inquiry into the interests, needs and wishes of the child. This section provides an overview of the ways in which children's views are represented and conveyed to the court in New South Wales but also highlights some of the challenges to effective child participation.

### 2.2.1. Caseworker Reports

Children's views in care and protection matters are typically outlined in case plans in pre-court case conferences and family group conferences and conveyed to the court in caseworker affidavit material and via oral evidence (New South Wales Department of Communities and Justice 2019a). Care plans are needed to support the department's application to the court, outlining the proposed arrangements for meeting the child's long-term needs, including permanency planning and any re-allocation of parental responsibility.

Children's views may be included to support care plans and to inform the court about children's adjustment to care, including details about their placement, the nature of their interactions and time with parents, any emotional or behavioural difficulties, and additional needs (Luu et al. 2019; Sheehan and Borowski 2013). As judicial officers do not typically meet with children in care matters in New South Wales, a comprehensive care plan should detail the caseworker's communication with children and observations of the children's interactions with parents, siblings, and significant others. A description of the child's views, wishes, and needs in a well-written care plan can then provide "a window into the life of the child" and the basis for "a meaningful plan for their future" (New South Wales Department of Communities and Justice 2019a). While children's views may be included in these documents, research and reviews of practice indicate that they are often framed in ways that support the caseworker reports and the statutory department's recommendations and that the children's actual views may not be recorded (Hoikkala and Pösö 2020; NSW Advocate for Children and Young People ACYP 2022).

Although various research studies indicate that child protection professionals seem to recognise the contribution of children's views in decision-making, a review of the Australian literature highlights the implementation gap between the rhetoric and practice of child participation. Consistent with findings from the international literature, the identified barriers to caseworkers seeking and involving children's views in decision-making include children's ages and perceived vulnerabilities (Harkin et al. 2020; van Bijleveld et al. 2014, 2015; Ogle et al. 2022; Witte et al. 2020; Woodman et al. 2018), caseworkers' varying conceptualisation and implementation of child participation (Križ and Skivenes 2015; Woodman et al. 2023), and the competing demands for caseworkers' time and attention and staff turn-over and whether and how the child's views were recorded on the child's file (Harkin et al. 2020; Hoikkala and Pösö 2020; Kratky and Schröder-Abé 2020; Woodman et al. 2018). Cultural factors may also play a role. A qualitative analysis of caseworkers' consultation with Aboriginal children in the *Family is Culture* (2019) report found that only just over half of the children were interviewed in the risk assessment process, and there was little variation by age. Children's views about placement or other child protection casework decisions were often not sought in cases where risk issues were identified "despite children being identified as being above an appropriate age to be consulted" (p. 315).

A recent NSW care judgment provides a concerning example of the consequences for children's safety, wellbeing, and stability when children's views and needs are unheard and ignored. The matter involved four children, Finn (11 years) and Lincoln (9 years), and twins Blake and Marina (8 years). Notwithstanding the frequent turnover of caseworkers and support workers and inadequate care plans, the judgment was critical of the lack of response from the Department to the children's repeated disclosures and reports about their needs and emotional and physical safety in their placement. Finn and Lincoln, for example, had reported several incidences where they were 'physically grabbed and pushed by a worker'. When found in possession of a pocketknife, Finn reported that it was to 'protect himself as he does not feel safe'. Caseworker documentation indicated that Lincoln's mental health deteriorated in 'care' and that he had 'expressed suicidal ideation' and felt 'very sad and depressed'. Sibling contact between the older children (Finn and Lincoln) and their younger siblings (Blake and Marina) only occurred following Finn's report to the Department that he had not seen his siblings for five months. Despite the older siblings' reports, however, it was clear that the children were not consulted, and their views were inadequately heard by the Department. The school principal's emails to the Department stated, 'I am unsure that the boys are being consulted about what they would actually like to eat' in response to Lincoln experiencing hunger pains (*Finn, Lincoln, Marina and Blake Hughes* [2022] NSWChC 4).

### 2.2.2. Alternative Dispute Resolution Processes

In New South Wales, Alternative Dispute Resolution (ADR) processes are methods used to resolve disputes outside of formal court proceedings, including child protection

proceedings. Alternative Dispute Resolution uses an independent third party to resolve conflicts and promote resolution through non-litigious means. In addition to Family Group Conferences or other forms of dispute resolution prior to a court application being made, a Dispute Resolution Conference ('conference') *during* the course of the court proceedings has become 'an integral' though discretionary part of the system in New South Wales. They are facilitated by a Children's Registrar in a conciliation model to negotiate an agreement or narrow the issues in dispute before a matter proceeds to a contested hearing (s 65) (Judge [Johnstone 2013](#), para. 71). Ordinarily, the child's participation at the conference is indirect via their lawyer; children's attendance in person is rare ([Morgan et al. 2012](#)), though children may attend if they wish to do so with advance notice to address 'any concerns about the appropriateness' of their presence (Children's Court of New South Wales, *Practice Note No. 3*). How well these processes work to facilitate children's participation in NSW is unclear, but in New Zealand and other countries where they are used, the immediate benefits are seen to be largely for family members rather than for children ([Connolly 2013](#); Judge [Johnstone 2013](#), para. 73).

There have also been recent changes to provide more culturally aligned processes and hearings for Aboriginal children and families, both in New South Wales (Aboriginal or Koori care list) and in an innovative therapeutic approach, *Marram-Ngala Ganbu*, in the Children's Court in Victoria. *Marram-Ngala Ganbu* is designed to provide a more appropriate and less formal way to engage with Aboriginal families and communities and to deal with the over-representation of Aboriginal children in the child protection system and out-of-home care. *Marram-Ngala Ganbu* has embedded child-inclusive practices in a significant departure from the typical care proceedings in Australia ([Sheehan and Borowski 2013](#)) and has introduced "processes which are not fully dependent on adult representation for children to truly have their voices heard" (Evaluation of *Marram-Ngala Ganbu* 2019, p. 22).

### 2.2.3. Reports from Authorised Clinicians and Other Expert Professionals

Courts may order assessment reports by mental health and other professionals for guidance in determining the child's best interests by providing information on specified issues such as the parents' parenting capacity, the child's safety and wellbeing, and the child's relationships with their parents, carers and family members and community ([Johnstone 2018](#); [Tilbury 2019](#)). These assessments rely on social science and health expertise and provide specialised knowledge to assist the court ([Freckleton and Selby 2009](#); [O'Neill et al. 2018](#); [Tilbury 2019](#)). They typically involve interviews with biological parents, the child and their siblings, and observations of the child with their parents or caregivers. They may also include interviews with carers, teachers, health professionals, and other significant people in the child's life. In New South Wales and Victoria, 'authorised clinicians' are contracted by the Children's Court Clinic to conduct these assessments and provide independent, specialist advice and guidance to the Court.

These reports have a similar function to family reports in private family law matters in Australia (in relation to children following parental separation) and to social worker reports in New Zealand (s 186 *Oranga Tamariki Act 1989* without the requirement to include children's views), and to CAFCASS (Children and Family Court Advisory and Support Service) reports in England and Wales in assisting the court's deliberations in relation to the best interests and participation of the children involved in either public or private family law matters ([Jacobson and Cooper 2020](#), p. 31).

Consistent with the participation principles outlined in article 12 of the UNCRC and s 10 of the Care Act, authorised clinicians in New South Wales are requested to assess the child's maturity, the child's understanding of their current situation, any views that the child may wish to express, as well as the weight that is to be afforded to the child's views. Authorised clinicians also offer expertise in their assessment of the child's relationship with siblings, parents, and caregivers, which offers additional opportunities for information about the child's non-verbal cues and body language to be presented to the court.

There is some evidence in Australia, England, and Wales that these reports and the in-court evidence of expert report writers can be quite influential (Cashmore et al. 2021; Patel and Choate 2014; Waller and Daniel 2004). International studies estimate that recommendations from expert reports in family law and child welfare proceedings influence judges 79–90% of the time (Bala and Leschied 2008; Saini 2008). In care and protection and family law proceedings in Australia, it appears that the court generally accepts the position of the expert report though any recommendations, if provided, are not necessarily determinative (Johnstone 2018; Cashmore and Parkinson 2014; Cashmore et al. 2021; Fernandez et al. 2013; O'Neill et al. 2018, 2022). The then President of the Children's Court in New South Wales (Johnstone 2018, para 62–63) clearly endorsed the value of the Children's Court Clinic and the independent guidance these reports provide to the court:

In addition to providing the court the benefit of their expertise, clinicians in the Children's Court have another very important facet to the way they assist the court. They provide information, not necessarily in the form of an opinion, but a hybrid factual form of evidence, which can greatly assist the judicial officer. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, they can provide the court with insights and nuances that might not otherwise come to its attention. They can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the "snapshot" nature of a court hearing, the benefit of which it would not otherwise have.

There is, however, very limited empirical evidence about the quality and content of these reports, and there have been criticisms of these reports and the role and value of social science evidence more broadly, both in the Children's Courts and in family law matters (Australian Law Reform Commission 2019; Cashmore and Parkinson 2014; O'Neill et al. 2018, 2022; Rathus 2018; Tilbury 2019). These criticisms concern the 'non-normal' or artificial and stressful context of one-off meetings, interviews, and observations of the interactions between parents and children, particularly in assessing children's views and 'attachment quality'. Applying these approaches and generalising to people with different racial and cultural backgrounds is recognised both in Australia and elsewhere to be particularly problematic (Budd et al. 2002; Cashmore and Parkinson 2014; Luu and Kong 2023; O'Neill et al. 2018; Tilbury 2019). Similar and broader concerns are clearly outlined in the landmark article by Forslund et al. (2022) on the role of attachment (theory) in court decision-making.

#### 2.2.4. Children's Legal Representatives

In many jurisdictions, children are legally represented, though the role of the child's lawyer varies both within Australia and internationally. In child protection proceedings in New South Wales, for example, children from the age of 12 years are presumed to be able to instruct a lawyer 'directly' though this presumption is rebuttable. The direct legal representative must act on the child's instructions, conveying the child's views to the Court and ensuring relevant evidence is adduced and tested. Children under 12 years are represented on the 'best interests' model with the lawyer advocating for the child, based on an independent assessment of relevant evidence and the lawyer's own considerations about what is in the best interests of the child; the role also includes presenting evidence of the child's wishes to the Court (ss 99 A–D). Although the appointment of a lawyer for the child is expressed in the Act as a discretionary decision for the court (s 99), in practice, all children are legally represented in these proceedings (Children's Court of New South Wales, Practice Note 5: *Case Management in Care Proceedings*). The situation in other jurisdictions in Australia varies. In Victoria, for instance, children from the age of 10 years are represented on the 'direct instructions' model, while the 'best interests' model

may apply for children under 10 who are usually unrepresented except in exceptional circumstances at the magistrate's discretion (Victoria Legal Aid 2019). Other permutations of children's representation occur in other Australian care jurisdictions and in contested parental separation family law matters (Ross 2017).

Inquiries, research and reviews indicate that there is wide variation in practice and disparate views about whether children's legal representatives, both in care and family law matters, should meet with children, regardless of their age, and advocate for their views as well as best interests (Australian Law Reform Commission 2019; Bell 2016; Carson et al. 2018; Ross 2013). As Ross (2013) pointed out, there are "tensions caused by the intersection of different perspectives: a welfare discourse underpinning the child protection system; the adversarial nature of child protection proceedings; and recognition of children's human rights, including children's rights to express a view and be heard as part of decision-making processes" (p. 333). There does, however, appear to have been considerable progress from the situation several decades ago in which most lawyers interviewed in a study in New South Wales seemed to have "an underlying attitude that children did not need to understand court proceedings" and "did not believe that children had a right to be present or should be present at court"; nor had a number "really thought about the way children perceive them or the proceedings" (Cashmore and Bussey 1994, p. 334).

#### 2.2.5. Guardians Ad Litem

Children's best interests and/or their views may also be represented in court in some systems via a non-legal professional such as a social worker (the children's guardian in England), a spokesperson in Norway (Berrick et al. 2019) or a guardian ad litem in 'special circumstances' in New South Wales (s 98(2), s 100). The 'special circumstances' may relate to the needs of a child with a disability or other impediments to the child's capacity to instruct a lawyer (s 100(2)). The legal representative of a child to whom a guardian ad litem is appointed is bound by the instructions of the guardian ad litem (ss 99D(b)(i), 100(3)(b), 100 (4), instead of making independent submissions to the Court. While the Act does not specify the means by which guardians ad litem are to carry out their prescribed functions of safeguarding the child's interests and instructing the lawyer, it is understood that in order to form a view, they will review case material and interview the child (Legal Aid NSW 2021).

#### 2.2.6. Evidence from Other Proceedings

Children's views may also be considered by the Children's Court in cases in which the child has previously given evidence to child protection workers or to a third party, such as the police or a criminal court. An analysis of a small number of published judgments in the Children's Court of New South Wales, in which the Court assessed the risk to the child and whether the child could be returned home, considered the Court's perceptions of the weight and reliability of the child's evidence in relation to their allegations of physical or sexual abuse (McLaine forthcoming). Most of these cases demonstrated a thorough, considered approach to weighing the evidence of the child's allegations against a parent's conflicting version of events.

Without children giving direct evidence in the care proceedings, the Court is reliant on a variety of, often extensive, documentary sources of the child's allegations and perspectives. In the sampled cases, the reasons the Court provided for giving credence to the child's disclosures, after analysing the child's "evidence" in some detail, included their unsolicited nature, consistency over time, a "remarkable" degree of detail and specificity, "corroboration by incidental details," and, where available, medical corroboration of physical injury.

In the case of *Y (Y v The Secretary, Department of Communities and Justice (No 6) [2021] NSWDC 392)*, comprehensive accounts of evidence surrounding the child's disclosures of physical assaults were preferred to her father's unpersuasive exculpatory testimony. The expressed reasoning for the Court's finding that there was an "unacceptable risk"

was the father's refusal to acknowledge the harmful nature of physical abuse justified as "discipline", combined with the child's adamant opposition to restoration and her associated distress and diagnosed anxiety and depression, such that "any benefit to the child [of restoration] would be unlikely, and would be overwhelmingly outweighed by the likely risks to [her] physical and mental wellbeing".

In the case of *A (A v Secretary, Department of Communities and Justice (No 4) [2019] NSWSC 1872)*, involving the young person's sexual assault allegations against her stepfather, the Court made a positive finding that the sexual abuse occurred as described by the young person and that even in the absence of such a finding, there was "sufficient material" to satisfy a finding of unacceptable risk of future sexual abuse. The mother's "continued refusal, or inability, to deal empathetically with [the child] and her unwavering support for [her husband] mark her out as incapable of providing protection for the children and, therefore, also an unacceptable risk of harm". These case examples indicate an attentive evaluation of children's credibility, respecting children as having an inherent capacity for truthfulness and treating their allegations and the impact of abuse seriously. This raises the question about the extent to which children's views are adequately 'heard' and whether children's views are afforded consultative value in decision-making.

### 3. To What Extent Are Children's Views 'Heard' and Taken into Account?

As outlined above, there is a range of mechanisms available in child protection case-work, legislation, policy and in court-related processes in different jurisdictions that are intended to provide the means for children to express their views in decisions concerning their care and protection (i.e., 'space' and 'voice' in Lundy's (2013) model of participation).

The critical issue, however, is not just whether children's views are sought but whether and how well these processes allow children's views to be heard and given due weight (i.e., 'influence' and a 'receptive audience' (Cashmore 2002; Lundy 2013)). Children generally want 'to have a say' about matters that are important to them and to have their views recognised, such as time with family and siblings (ACYP 2022; Graham and Fitzgerald 2011), their placements (ACYP 2022; Bessell 2011), connection to their culture and identity (ACYP 2022), and their ability to engage with their caseworker (ACYP 2022; Bessell 2011).

If children's views are sought, but decision-makers have little regard for them or give them little or no weight in making their decisions or in their practice, this may leave children feeling marginalised in what then becomes a tokenistic exercise in simply 'ticking the boxes' (ACYP 2022). Indeed, Gerdts-Andresen (2021) questions "the ethics of professional practice where the child is misled in their participation" if children are invited to participate in legal proceedings "without having the intention to give it 'due weight'" (p. 11).

There is a substantial body of Australian and international research indicating that, for various reasons, these processes for 'hearing' and having due regard to children's views in care and protection decision-making do not necessarily translate well into practice (Stafford et al. 2021). The research evidence comes from a range of sources: children's experiences and accounts, the views of caseworkers, guardians ad litem, lawyers, expert report writers, and judicial decision-makers, as well as court file reviews and observation studies about how children's views are sought and considered. It is not always easy, however, to 'tie down' what 'taken into account' and 'given due weight' means in practice and whether and to what extent children's views have some influence on the decisions (Cashmore et al. 2021). 'Influence' is not simply the alignment or coincidence of the decision with the child's views. Those who make decisions about children's care and protection are governed by legislation and policies in New South Wales and many jurisdictions that require the child's best interests to be the primary or paramount consideration so that children's views are one factor in the mix. It is not surprising, then, that when children's views are perceived by professionals, including judicial officers, to be at odds with their best interests, the decision is less likely to align with the child's views (Cashmore 2016; MacDonald 2017; Vis and Fossum 2013). While this does not necessarily mean that children's views have no value or have not been taken into account, there are two risks where children's views

are over-ridden, particularly where there is no explanation given to children (Thomas and Percy-Smith 2010).

The first and somewhat dangerous supposition is that children lack the maturity to either express or have their views taken into account because their views are considered by “adult gatekeepers” not to be consistent with their best interests or even because they are regarded as “problem” children or “disruptive” (Križ and Roundtree-Swain 2017, p. 38). Second, that conclusion “may well fly in the face of research which indicates that children are more capable than adults give them credit for and that their capacity for decision-making increases in direct proportion to the opportunities offered to them” (Lundy 2013, p. 938). Children living the experiences that lead them to a particular view may have a better handle on what is workable and safe for them than adult professionals who do not have an accurate window into the child’s world. If children are strongly opposed to decisions made about their living, contact and other arrangements, their consequent behaviours may undermine the workability of the arrangements.

### 3.1. *Lawyers Taking Children’s Views into Account*

It is reasonable to expect that lawyers or advocates as direct legal representatives representing children should present the child’s view to the court or decision-making body in a direct manner and comprise content as agreed with the child. Whether or not they do so may be difficult to assess because it requires a comparison of what children say they want, what they said to their lawyer or advocate, and how that was presented to the court or decision-making body. To date, there do not appear to be any studies that have made those comparisons, and it would not be a straightforward venture. There may, for example, be a gap between what children want and what they tell the lawyer/advocate because they are not comfortable talking with a professional person they do not know and do not want their parents and carers and others to know what they said (Cashmore and Bussey 1994). Ideally, there should not be a disparity between what children tell their lawyer/advocate and agree should be said on their behalf, but communication between adult professionals and children may miscarry. This may be more likely, and the strength of the way they represent those views may be at variance, where the lawyer/advocate is concerned about children’s views not being in their best interests.

With that qualification in mind, Horsfall’s (2016) study of children’s participation in care proceedings in Victoria, Australia, found that children’s independent legal representation was able to ‘safeguard and uphold the integrity’ of children’s wishes, which were otherwise subject to being misconstrued or inaccurately reported by child protection workers (pp. 174–77). Contrary to commonly held assumptions about children in care matters being uncritically biased towards and influenced by their parents, children were only marginally more likely to want to return to their parent(s) than to remain in care (pp. 218, 271). Children’s instructions to their lawyers often reflected a self-aware concern for their own safety. Their wishes or views were not fully aligned with those of either their parents or the statutory authority and were influential in modifying proposals for contact with a parent who had been abusive or violent or in drawing the court’s attention to safety risks in out-of-home care in some cases. This was instrumental in shaping a negotiated or judicially-determined outcome, adapted to the child’s safety and needs in ways the adult parties had not advocated for.

Horsfall (2016) also concluded, however, that the extent to which individual magistrates accommodated the evidence of children’s views and wishes varied and was less likely to occur for younger children and those without direct representation. This is consistent with other research about the ‘effect’ of age and perceived maturity. In general, age is a clear factor, with older children more likely to be consulted about their views and to have their views considered; conversely, children who are considered ‘too young’, and typically under 12 years of age, are often excluded from discussions (Berrick et al. 2015; Cashmore et al. 2021; Karmen 2021).

### 3.2. Courts Taking Children's Views into Account

Court file data and judgments can provide some insight into whether children's views are recorded and referred to in judicial decision-making, although it is often not clear what weight their views are given and how they were taken into account, along with the other evidence before the court or decision-making body. Many of the studies in this area were conducted in Scandinavia, particularly Norway, over the last decade, analysing County Board, child welfare board hearings and court decisions (Gerdts-Andresen and Hansen 2020 cited by [Gerdts-Andresen 2021](#); [Hoikkala and Pösö 2020](#); [Magnussen and Skivenes 2015](#); [Pösö and Enroos 2017](#); [Röbäck and Höjer 2009](#); [Vis and Fossum 2013](#)) and court of appeal judgments including family law custody disputes ([Skjørten 2013](#); [Skjørten and Sandberg 2019](#)).

A systematic review of these studies ([Gerdts-Andresen 2021](#)) concluded that there was an increase over time in the likelihood that the views of children above the age of seven were included "as a factor in the decision", but it is unclear whether their views were "weighted or simply noted" (p. 1). In most of the decisions which did reference a child's views, the basis on which those views were considered and weighed was usually not explained, consistent with Horsfall's finding. Typically, where the child's view was referred to, in a minority of cases, it was evaluated in relation to the child's age and maturity and the "consistency, clarity, and trustworthiness" of the child's statements—or sometimes the lack of these—in combination with other factors in the decision-making process including the risks for the child ([Magnussen and Skivenes 2015](#), p. 719).

[Vis and Fossum \(2013\)](#) analysed 151 randomly-drawn cases in 2011 and found that the Norwegian child welfare board rulings were in line with the wishes of children in 39% of the cases. They concluded that:

Children's views can be quite effective in blocking certain decisions but are less effective if the child requests a specific change. If a child does not want to stay with his or her birth parents, then the odds that the birth parents will be granted custody is minimal. (p. 2101)

When an expert assessment was commissioned, however, the likelihood was reduced that a ruling would be consistent with what a child wanted (p. 2107). As [Vis and Fossum](#) pointed out, this may be associated—confounded—with the seriousness of the risk to the children and the greater weight that was then given to the children's safety (p. 2107). [Vis and Fossum \(2013\)](#) also concluded that the advocate for the child seemed to be effective in eliciting children's views, with more than 95% of cases involving an advocate and 90% of children "expressing opinions about where they wanted to live and about two-thirds expressing opinions about parental visitations" (p. 2103). The level of independent advocacy in these hearings indicates a positive trend, with a substantial increase from 15% of the cases in 1998 having an independent advocate. This is also in line with an increase over the period in which the Norwegian studies were conducted in the extent to which children's views were referred to and 'heard' in formal hearings both in child welfare ([Magnussen and Skivenes 2015](#); [Gerdts-Andresen 2021](#)) and family law parental separation matters ([Gerdts-Andresen 2021](#); [Skjørten 2013](#); [Skjørten and Sandberg 2019](#)).

### 4. How Does This Fit with Children's Experience of 'Being Heard'?

Children's experiences and feelings provide the litmus test. While children may not have been informed about whether and how their views were considered and taken into account, they can speak to their own experience of what information they were given and what options and opportunities to express their views were provided; they can also speak to their perceptions and feelings as to whether they were heard and believed. Research, including systematic reviews of research and formal inquiries in different countries, has found that many children involved in child protection and family law matters have 'felt they were not being asked, listened to or heard, in some cases even regarding harmful and unsafe situations' ([Bessell 2011](#); [Block et al. 2010](#); [Carson et al. 2018](#); [Cossar et al. 2016](#);

Dillon 2021; Falch-Eriksen et al. 2021; Križ and Roundtree-Swain 2017; Fox and Berrick 2006; Mateos et al. 2017; Morrison et al. 2020; Murray and Hallett 2000; Pert et al. 2017; Toros et al. 2018; Woolfson et al. 2010). These findings are long-standing, quite consistent and from various jurisdictions despite legislative and policy requirements and despite caseworkers and legal professionals acknowledging the rights and the benefits of children's participation (Kosher and Ben-Arieh 2020b; van Bijleveld et al. 2020; Woodman et al. 2018, 2023). These benefits arguably include the value of the perspective and 'evidence' children can offer, improving the quality and legitimacy of decision-making together with the respect and recognition that involving children in decisions that affect their lives affords them, particularly in care and protection matters (Cashmore and Parkinson 2009, p. 15; Enroos et al. 2017, p. 8; Graham and Fitzgerald 2011; McTavish et al. 2022). Pert et al. (2017) cautioned, however, that while professionals may find "case reviews of use in helping them fulfil their role towards the child, children and young people may feel like outsiders in a meeting of professionals" (p. 8).

Many children do want to participate in decision-making, to be listened to, and to have their views considered but generally do not expect that their views will be determinative (Chaplan 1996). The value of being 'heard' is clear in studies that have directly sought children's perceptions about decision-making at different stages of the process. A number of these studies are small-scale qualitative studies, so there may be some concern about their selective bias of which children choose to participate in these studies; however, the degree of consistency across a body of research and the insights these children and young people give, into what works and what does not, is instructive.

In relation to casework, for example, children who said they were given little, if any, information or were not asked for their views and did not have the chance to be involved in any important decisions felt frustrated, confused, "powerless and angry" (ACYP 2022, p. 25; Diaz et al. 2018; Falch-Eriksen et al. 2021; Munford and Sanders 2016). In contrast, children who felt that their views were considered by their caseworkers reported feeling a greater sense of empowerment and agency, as well as positive emotional well-being, compared with children who did not feel that they have any say or agency over their own lives across a number of countries (ACYP 2022; Balsells et al. 2017; Cossar et al. 2016; Lauri et al. 2021; Leeson 2007; Munford and Sanders 2016; Diaz et al. 2018). This feeling was not, however, commonplace and particularly not among Aboriginal and Torres Strait Islander children in New South Wales, Australia. In a recent report by the NSW Advocate for Children and Young People (ACYP 2022), children of Indigenous backgrounds felt that discussions with caseworkers were tokenistic and did not meaningfully consider their views and perspectives. They also reported feeling fearful of "how much power [our caseworker] had" and therefore felt the need to 'rehearse' and 'practice answering' questions about where they wanted to live (ACYP 2022, p. 36).

Similar conclusions apply to children's feelings about their involvement in pre-court case conferences and family group conferences and to their experience with advocates or legal representation in more formal hearings. Where children typically are not present to speak to their own issues, they have to rely on their lawyer or advocate (spokesperson in Norway or guardian ad litem) to present their views and to explain the outcome, often with adjournments over a reasonably lengthy process. Since children are often not in attendance, they may not know what was said on their behalf; even when they are present, they may not understand the process and what transpired (Block et al. 2010; Cashmore and Bussey 1994; Kennan et al. 2018; Quas et al. 2009). They may have had only one or few meetings with their lawyer or advocate, and sometimes just before the hearing. It is not surprising then that some children reportedly complain about not seeing their lawyer, not being able to get hold of them, not having time to ask questions, or feeling that their lawyer does not really know their situation" or "do what they want" (Paré and De Bellefeuille 2021, p. 138).

It is also clear that children's trust in their lawyers may, understandably, be qualified by the child's lack of understanding of the lawyer's role and confidentiality (Buss 1996). In an early and sole Australian study, for example, only about half the children (53%)

said that they would give their lawyer information that they did not want the people in court to know (Cashmore and Bussey 1994). Children who said they would not tell the lawyer generally explained that they did not feel they could trust the lawyer and that the information might get someone (a parent) into trouble. Older children were more likely not to tell than younger children (Cashmore and Bussey 1994, p. 327). Similarly, in a more recent small-scale qualitative study in the US, Križ and Roundtree-Swain (2017) reported young people's divergent experiences with their lawyers, including one who was "proactive in advocating for me" and another who "was going to the court and saying everything completely opposite of what I was saying" (p. 38).

Paré and De Bellefeuille's (2021) study involving 10 children aged 12–17 years, 12 judges, and 17 caseworkers in Quebec is one of the few recent empirical studies with children who have attended child protection court proceedings. That study reported that children were more strongly in favour of children over the age of 10 years attending court than were the judges and caseworkers:

"many of the children . . . believed strongly that it is important for children to come to court and to be heard because the proceeding is about their life: 'We need to be listened to'; 'they should listen to us more'." (p. 142)

Another reason for attending court was wanting to understand what was happening once in court despite not understanding the explanations given before the hearing. On the other hand, being present did "not necessarily mean having the opportunity to be heard", with one child expressing frustration:

"You are in a courtroom; you are not really comfortable saying 'I have something to add' [ . . . ] Children don't really have the right to express themselves . . . You know, you are just there to be there". (p. 155)

Another relatively recent study by Quas et al. (2009) interviewed 94 children aged 4 to 15 years involved in ongoing dependency (care and protection) proceedings, mostly review hearings while waiting for their hearing. In Los Angeles County, where this study was conducted, "children are expected to attend hearings (and their attorney is expected to relate their wishes to the court) by the time they are four years of age" (p. 115). Quas et al. (2009) reported that only 33% of 12–17-year-old children and 44% of 8–11-year-olds were accurate in saying what the judge had decided; 67% of children were accurate, however, in knowing where they would be living after the hearing. Their emotional reactions to their court experience were more negative for older than for younger children, "regardless of the length of time they had spent in the system" (Quas et al. 2009), but those who were "more knowledgeable about the legal system were less distressed" (p. 97).

Similarly, based on a dependency court sample of 85 children aged 7–10 years interviewed in the 1980s in LA county (where children do appear in court), Block et al. (2010) reported that nearly two-thirds of the children "felt they did not get to tell the judge what they wanted", nearly 30% reported that they were not able to tell the attorney what they wanted to happen, and "32% felt that the attorney failed to tell the judge what the child wanted" . . . and "37% did not feel believed or listened to" (p. 667). While professionals, in general, tend to express concern about the impact on children of attending court, Block et al. (2010) found that 61% "indicated they felt quite positive about seeing their parent(s) in court, and 75% . . . did not hear anything about their parents that they did not already know" (p. 667).

In a positive contrast with these findings, the experience of Aboriginal children in *Marram-Ngala Ganbu*, a Koori-designed court process in Victoria, Australia, indicated that the Koori young people who participated reported:

"feeling that they and their families were provided with more support (than in mainstream court); they were more relaxed being in court and did not feel 'out of place'; being treated like an equal to other participants; feeling part of the court process; their voice being heard and privileged; and feeling less stressed and worried about the process and outcomes." (Arabena et al. 2019, p. 35)

In the words of a 16-year-old female participant:

“She [the judge] just wanted to put the lawyers away and [Victorian statutory department, DHHS] and the parents and just talk to us kids, and she was really nice and really calm and just treating us like equals and like everyone else in the room and I wasn’t even 16 years old yet, I was 14–15 years old and to be treated like that by an actual judge who doesn’t see us as just foster kids, it was really nice to sit there and talk to her about how we feel about foster care and our parents and DHS . . . . It came as a shock to all of us that she wanted to speak with us like we were privileged.” (Arabena et al. 2019, p. 35)

#### *So What Makes a Difference?*

The main messages from children about what matters at different stages of the decision-making process—in whether they were able to express their views and whether they felt heard—have been quite consistent over time and across jurisdictions. These messages align with the criteria for participation (Lundy 2013), but the critical aspects are relational and focus on trust and respect. Children generally want to have a say but may not be willing to do so if they do not trust the invitation, the process, the person, or the audience involved. Understandably, children, like adults, prefer to talk with someone they trust, and they want to know who will hear or know what they have said and what difference it might make (Tyler 2000):

“People only value the opportunity to speak to authorities if they believe that the authority is sincerely considering their arguments. They must trust that the authority sincerely considered their arguments, even if they were then rejected, before having had the chance to participate leads to the evaluation of procedures as fairer.” (Tyler 2000, p. 122)

As McTavish et al. (2022) concluded on the basis of their meta-analysis of qualitative studies, a “priority for children was the quality of their relationships”, including “appreciation, availability, belonging, connection, confidentiality, inclusivity, honesty, fairness, shared power, understanding, and trust” (p. 5). The other key theme concerned the information they received, such as who the informants were, what they “were told (developmental appropriateness, choices), when they were told (timing), and how they communicated with meaningful adults (access to technological means)” (p. 5). This is very consistent with the major themes emerging from research on children’s perspectives across different stages of the child protection decision-making process, especially listening, availability, and trust (Chaplan 1996; Cossar et al. 2016; Dillon 2021; Falch-Eriksen et al. 2021; Sæbjørnsen and Willumsen 2017). The question then arises as to what can be done to effect these changes and what, in particular, the law and related processes for children involved in the child protection system can do to accommodate children’s views.

### **5. How Can Law Better Accommodate Children’s Views?**

There are a number of ways in which the law, broadly speaking, could better accommodate children’s views, both in terms of providing authentic opportunities for them to express their views, if they wish to do so, but more importantly, to take their views seriously and treat them with respect.

#### *5.1. More Child-Focused, Less Adult-Centric*

The child’s safety, welfare and well-being, or best interests, are presumably the principal concern in care and protection decision-making and often, as specified in the New South Wales legislation, the ‘paramount concern’. One criticism in a substantial body of literature, however, is that decisions in care proceedings are adult-centric, pre-occupied with assessments of parental capacities, behaviours and circumstances and focused on the views of other adults, such as workers and carers, to the neglect of the child’s perspective or specific needs (Magnussen and Skivenes 2015; Sheehan 2003; Skivenes and Tonheim

2018). To some extent, this is unsurprising because it is the ‘inadequacy’ of the care and protection provided by parents that brings the children and their families to the attention of the statutory department and the court. But it does not mean that children’s views should be side-lined or ignored or obtained merely to satisfy professionals’ procedural or statutory requirements (Pert et al. 2017; Woolfson et al. 2010). Importantly, children’s concerns do not necessarily align with those of their parents or the statutory department and may provide useful information not otherwise available to the decision-maker. Discounting the views of children living with family violence on the basis that they are “overly involved” in “adult concerns” and likely “being manipulated” is of particular concern (MacDonald 2017; Morrison et al. 2020, p. 413).

### 5.2. Perceptions of Children’s Capacities

Article 12 refers to children who are capable of forming their own views having the opportunity to express those views freely in all matters affecting them, and ‘due weight’ being given to those views ‘in accordance with their age and maturity’. There is no reference to any age thresholds or limits. In practice, however, as outlined earlier, the child’s capacity is often defined by arbitrary age cut-offs (Cashmore et al. 2021; Skivenes 2020; Tisdall 2018). There is also little consensus among decision-makers such as judicial officers, legal representatives, expert witnesses, child protection professionals, and caseworkers as to the age or criteria used to seek or weigh children’s views (Cashmore et al. 2021; Daly 2018; Hultman et al. 2020; Pölkki et al. 2012). Lawyers and judges have also articulated their concerns and discomfort in talking with children, particularly about sensitive issues, because of their lack of training and skills to do so (Bell 2016; Dillon 2021). Adults and professionals who are comfortable and skilled in communicating with children and clear on purpose in doing so are critical in facilitating children’s willingness and opportunity to participate. Since children can ‘perform’ at a more skilled level with the scaffolding provided by skilled adults and mentors, the adults involved should be more concerned with children’s “willingness to participate and ability to communicate . . . rather than any assessment of the ‘good judgment’ or level of maturity of the child”, as recommended in inquiries and standards for legal representation in Australia several decades ago.

Just as lawyers require specialised training and skills to represent children, judicial officers require guidance and experience in understanding the context and ‘value’ of children’s views and in considering what role they can play in various aspects of the decision-making process and the weight to give them. This is particularly important for matters involving Indigenous children and those of other cultural backgrounds.

### 5.3. Focus beyond Verbal Articulate Children

Children can be ‘heard’ in different ways—but legal proceedings are mostly focused on their verbal statements, typically of older children. The Committee on the Rights of the Child (CRC) General Comment No. 12 (2009) emphasises that children’s views, whether expressed verbally or non-verbally, should be taken into consideration by decision-makers. The primary focus on children’s verbally expressed views is problematic, as it excludes the participation of younger children who may not have developed verbal skills, children with cognitive and language difficulties or disabilities, children with mental health presentations that affect their verbal skills, and children for whom English may not be their first language (Bruce 2014; Henderson-Dekort et al. 2022; Lundy et al. 2019). The Committee (2009) emphasises that children’s views, whether expressed verbally or non-verbally, such as via written statements and drawings, should be taken into consideration during decision-making. Non-verbally expressed views may include the nature of children’s interactions with caregivers (such as proximity seeking, avoidance, and even ambivalence), written statements, and drawings (Davies and Wright 2008) and be represented in expert reports and assessments.

On the other hand, it is important for courts and legal professionals to understand and ask questions about the use and interpretation of parent-child interactions in artifi-

cial unfamiliar and testing environments, particularly “attachment” assessments (Conley Wright and Kong 2023; Forslund et al. 2022). Forslund et al. (2022) provide an extensive review of the (mis)use and misassumptions of attachment theory in child protection and family proceedings and the implications of the misapplication of attachment theory on procedural outcomes. The child’s relationship with his or her caregiver is often the focus of care proceedings and used as a basis to determine the child’s sense of safety and best interests (Forslund et al. 2022). Often, assessments or observations of the child and caregiver/parent are made in highly structured settings such as supervised family visits or expert assessments of the child and their families. Although understanding children’s relationships with their parents, caregivers, and significant others is important, Forslund et al. (2022) caution against the generalisation from observations conducted on one-off interactions as being an accurate reflection of the child-caregiver relationship in its entirety.

In some cases, caseworkers and experts may administer psychometric testing during the assessment of children to assess concerns about behavioural functioning, mental health or cognitive functioning (O’Neill et al. 2018). Often, this information may assist judicial decision-making regarding children’s wellbeing and access to therapeutic supports (Johnstone 2018). However, it is particularly important to avoid the use of assessment measures that may be culturally inappropriate, particularly for Indigenous children and children of ethnic minority cultural backgrounds (Conley Wright and Kong 2023; Luu and Kong 2023).

#### 5.4. Representation and Interpretation

Since children are often not directly involved in the fora in which key decisions are made about their welfare and wellbeing, their views are generally conveyed by lawyers or advocates, as well as caseworkers and ‘expert’ assessors. It is problematic if children’s views are filtered or ‘interpreted’ without discussion with children as to what and how their views will be conveyed in the decision-making process and who will hear what they have said. This leaves considerable room for inaccurate adult-centric assumptions about what is important to children and what aspects of the decisions might be amenable to what children are seeking. Magnussen and Skivenes (2015), for example, were critical of the way that children’s perceived wishes and circumstances were ‘described’ from an adult perspective rather than allowing the child’s perception of their situation to be conveyed, unfiltered to the decision-making board. As a marker of respect and recognition, the professionals involved should be clear with children about what information will be shared with others, what can be confidential, and what information children wish to be conveyed on their behalf.

#### 5.5. The ‘Abstract Child’ vs. This Particular Child

It is a truism to state that children vary in a host of ways, including temperament, intellectual and socio-emotional development, family background and community and cultural context—and interest in being involved and willingness to talk with adults and professionals or expressing their views about decisions that affect them (Henderson-Dekort et al. 2022). The views, wishes and needs of different children therefore need to be taken into account and respected. Chisholm’s (1999) earlier careful exposition of children’s participation in family law matters in Australia is still apposite:

“... great differences between individual children are sometimes lost sight of as we try to find patterns and guidelines for our decisions and policies. ... Some children will be outraged if they don’t get to say their piece: others would shrink from the prospect. And there will be endless variation in their capacities to participate, their insight, their honesty, and the like ... In my view, the great differences between individual children are sometimes lost sight of as we try to find patterns and guidelines for our decisions and policies.” (p. 21)

This sentiment echoes in the words of a young person, Joseph, in the US, cited by Križ and Roundtree-Swain (2017):

“we are merchandise on this conveyor belt, and I feel like there is a tendency to use a cookie-cutter method. What I would like to see is for the system to adjust that understanding and use different tools for different ‘merchandise’.” (p. 32)

This means that it is very important for professionals working with or representing children to actually meet the child, arguably regardless of age, so that that child is a real person, not just the name on a file. Baroness Hale (2006), a distinguished English judge and former President of the Supreme Court, extended this to the court. She argued that the first of many advantages of courts being more willing to see the child is that “the court will then see the child as a real person, rather than as the object of other people’s disputes or concerns” (p. 124). She cited other advantages or reasons in terms of the value of the court learning “more about the child’s wishes and feelings than is possible at second or third hand” as well as the impact on the child of feeling “respected, valued and involved” (p. 124).

#### 5.6. *Respect, Recognition and Relational Issues*

Hale’s (2006) point about children “feeling respected, valued and involved” is crucial to facilitating meaningful participation for children. Ideally, this is achieved through an interactive, reciprocal, and ‘ongoing process’ involving the exchange of information and dialogue between children and adults that is based on mutual respect. A substantial body of research and theoretical development points to the importance of participation being an active process rather than a singular meeting so that children are afforded opportunities to develop an understanding of their situation before making informed decisions about whether and how they express their views (Cashmore 2002; Lundy 2007; Skivenes 2020).

Child protection and court processes do not, however, typically provide the sort of ongoing opportunities that help build trusting relationships between children and their caseworker, lawyer or advocate. The transactional and short-term nature of these relationships, the high turn-over of caseworkers, funding and time restraints, and children’s fear of the consequences of sharing information about their circumstances stymie the development of trusting relationships that encourage understanding, honesty and transparency. Children are sensitive to and reactive against tokenistic transactional conversations that are solely focused on extracting information from them (Cossar et al. 2016; Tisdall 2017).

While the unfortunate realities, including time and resource constraints, of the child protection system do not facilitate children’s trust in relationships with their caseworkers, advocates, and legal professionals, there are several considerations that could help. The first is to prioritise the time that caseworkers and lawyers spend talking with children and getting to know them rather than keeping records and meeting the system’s needs for information. This would make these professional roles more rewarding and may assist in reducing turn-over.

The second involves multi-disciplinary teams in children’s legal representation, focusing on continuity for children across different stages of the process as well as skills training to meet the range of needs for the children and families involved (Beckhouse 2016).

Third, specialist courts or quasi-judicial boards, ideally with a therapeutic or problem-solving approach, would focus on procedural justice, provide some continuity, treat children and their families with dignity and respect, and give them a voice to express their concerns in culturally appropriate ways, and taking into account the potential impact of the process on their emotional and psychological well-being.

Fourth, it is important to provide some oversight to monitor the way that children are involved and ‘heard’ in the system. For example, the legislation in NSW is clear and quite prescriptive about the various requirements to facilitate children’s participation, but little is known about how effective this is. No data are collected, there is no monitoring of practice, and there are few, if any, avenues for children to register any dissatisfaction or complain. A recent report has, however, recommended that to enhance children’s participation in legal proceedings, the “views of children and young people are recorded in their own words, and where appropriate, provided to the Court, included in child protection proceedings, and considered in decision-making (ACYP 2022, p. 12). Various feedback tools have been

used in the US, Canada, and the UK which seek the views of children, including client satisfaction surveys (Beckhouse 2016).

### 5.7. Culturally Appropriate Approaches

The opportunities for children—and their families—to express their views and be heard clearly need to be culturally appropriate. Despite the disproportionate representation of Aboriginal and Torres Strait Islander children in Australian statutory child protection systems, for example, there is a strong inclination for the statutory departments and courts to take a one-size-fits-all approach and one that is determined by the dominant culture and the dominance of ‘white’ Western theories of child development, attachment, and care-giving (Davis 2019; Luu and Kong 2023; Sawrikar and Katz 2014). A very welcome exception is *Marram-Ngala Ganbu* in Victoria, Australia, as outlined earlier.

Child participation in family law, care, and adoption proceedings is often conceptualised within an imperialist and individualistic rights framework (Keddell 2023), such that legal professionals and experts are focused on the child’s ability to express their ‘independent’ views free of the influence of parents, caregivers, and family. Often, the views of children perceived to be influenced by parents or family or in the presence of caregivers are considered less reliable and not accurately representing the child’s ‘authentic’ views. Individualistic child participation approaches value the child’s autonomy and often emphasise the importance of interviewing or speaking to children away from parents and family members. In contrast, collectivist cultures such as Aboriginal and Torres Strait Islander and ethnic-minority families value children’s interconnectedness and how the shared and combined views of children’s parents, family, and communities are likely to strengthen children’s views (Keddell 2023; Luu and Kong 2023; Sawrikar and Katz 2014).

Like minority group children elsewhere, Indigenous children and young people in Australia have clearly articulated the need for cultural safety to express their views openly, citing the power dynamics between child welfare services and their family and community (rather than adult-child power relations in Westernised constructs of child participation) as one of the most significant barriers to participation (ACYP 2022). Indigenous children’s experiences when engaging with caseworkers highlight their mistrust of child protection services. They reported avoiding open communication with caseworkers for fear of caseworkers misinterpreting what was said and using their conversations to justify removal.

“Because we were already removed from mum, my nan was really fearful that they would have removed us from her . . . there wasn’t a lot of communication with our case worker just because there was a lot of fear around how much power they had.”

“How are you going? How is school going? How is the house going? And it was more just like, yeah, do you like it here and like it was just kind of like questions of like . . . they felt like trap questions, if that makes sense, of like if I answer this wrong, I can get trapped and then I’m leaving my grandparents, and I don’t want to do that.” (ACYP 2022, p. 36)

Extending Lundy’s (2007) model of participation, child protection services and professionals need to assist children in creating not just a ‘safe space’ but also a culturally safe space to express their views and for their families and communities to be involved in a meaningful and collaborative way. This means developing “an Indigenous pathway for participating in the care and protection of Indigenous children”, not just providing “an avenue for Indigenous participation in the mainstream departmental process” (Libesman and McGlade 2019, p. 62). This goes beyond child participation, “cultural planning”, and partnership to self-determination, as argued by Davis (2019) in her powerful introduction to the *Family is Culture* review of Aboriginal children in the child protection system in NSW:

“The right to self-determination is not about the state working with our people in partnership. It is about finding agreed ways that Aboriginal people and their communities can have control over their own lives and have a collective say in the future well-being of their children and young people.”

As the Uluru Statement from the Heart implores:

‘When we have power over our destiny, our children will flourish. They will walk in two worlds, and their culture will be a gift to their country.’” (Davis 2019, p. xviii)

#### 5.8. Feedback Loops and Responsibilities—Informing and Checking with Children

In addition to providing children with developmentally and culturally appropriate information about the decisions to be made and their own role in the process, it is important that children are informed about how and why a particular decision was made. Tyler (2000) concluded in relation to the perceived fairness of authorities:

“How can authorities communicate that they are trying to be fair? A key antecedent of trust is justification. When authorities are presenting their decisions to the people influenced by them, they need to make clear that they have listened to and considered the arguments made. They can do so by accounting for their decisions. Such accounts should clearly state the arguments made by the various parties to the dispute. They should also explain how those arguments have been considered and why they have been accepted or rejected.” (p. 122)

This is particularly important for children who are removed from their families with long-term consequences for where they live, how they can maintain family and cultural connections, and where they go to school. As Hollingworth (2015) stated:

“... if the state interferes in a child’s family life, then helping professionals involved in the process owe it to the subject children to communicate court decisions to the children and to ensure that informational resources are created and preserved, which will assist young people and adults to (retrospectively) make sense of childcare proceedings that took place when they were too immature to understand or remember properly.” (p. 5)

Hollingworth (2015) suggested that specific-purpose ‘letters for children’ in their files, given to young people involved in care proceedings—at a designated age or when they left out-of-home care—could provide them with a ‘narrative’ not available in case and court documentation, to help children make sense of their identity and understand their own life history.

“Receiving a letter specifically written to meet a child’s need to know can be liberating for a young person who has hitherto felt disregarded and subject to arbitrary authority without consultation. The letter enacts the child’s entitlement to personal accountability from the writer, making the child a participant in a conversation rather than the object of gossip.” (p. 14)

In short, treating children with respect, with an eye to the future. There is precedent for judicial letters in several family law matters in England to explain the reasons to children for making the decision, particularly when that went against the children’s wishes (Barnes Macfarlane 2018; *Re A: Letter to a Young Person*, aged 14 years) and in Australia cited in ABC News (Australian Broadcasting Commission 2012). Some judges in adoption matters in NSW also adopt a personal approach in writing a letter or meeting with and holding a ceremony in court for children and their adoptive parents to celebrate the finalisation of the adoption.

## 6. Conclusions

Legislation and policy in various jurisdictions are explicit in outlining and requiring measures that should allow children to have the opportunity to express their views on

child protection matters. These include requirements for children to be informed about their rights in this regard, including charters of rights and standards, the provision of advocates, spokespersons or legal representatives, and in some jurisdictions, being present at case conferences, case reviews, informal and more formal hearings, or court. This does not necessarily, and often does not, mean that children feel free to express their views 'freely'. It does not mean that they trust the person charged with presenting their views to the decision-making forum or that their views are conveyed accurately or as they would wish to the person or body making the decision. There may be considerable filtering or interpretation of their views in accordance with what their caseworker or legal advocate regards as being in their best interests. The difficulty, then, is often not so much in the legislation and policy but in practice, and there is little monitoring of practice in relation to child participation (Sinclair 2004).

While children's 'capacity' and maturity are often in question, there is often much less concern about the skills and competence of the adults involved to communicate with children and advocate on their behalf. Children's competence is often a function of the competence of the adults who communicate with and represent them (Cashmore 2002). With appropriate 'scaffolding' by skilled adults and trusted mentors, children are often more capable and understand their own situation and what they need and want better than the adults involved give them credit for.

Even if children can express their views 'freely', the critical issue is whether children's views are heard and given due weight. To what extent do their views find a receptive audience, and how seriously are they considered? It is often not clear what weight children's views were given and how they were taken into account along with the other evidence before the court or decision-making body. It is not at all easy to determine what 'taken into account' and 'given due weight' means in practice and to what extent children's views have some influence on the outcomes. There is, however, evidence from a body of research based on children's experiences and accounts, as well the views of caseworkers and legal and judicial professionals, that these processes for 'hearing' and giving due regard to children's views do not necessarily translate well into practice. Children's accounts from a number of studies in different countries with different types of decision-making bodies indicate that children often do not feel 'heard' or that their views are respected.

The main messages from children are that—like adults—they generally want to have a say in decisions that affect them but need to be able to trust the process, the adults involved, and how their views will be treated. Trust and meaningful relationships are pivotal but not easy to achieve with caseworkers and advocates who 'turn over' and do not have the time, resources, funding, or even the inclination to spend time talking with children in a way that would encourage a transparent and meaningful conversation.

While there are some indications of change over the last few decades of better practice and more commitment to children's participation, there remain a number of challenges. There is a well-recognised need to balance children's safety, welfare and well-being with their involvement in child protection processes; there is also a tension between children's need for trusted professional advocates and the meaningfulness and duration of those 'relationships'. Some of these professionals are, understandably, 'transients' in children's lives, serving a specific purpose at particular times of their lives when crucial decisions are being made. Nevertheless, they need to fulfill their role in a relational manner, with skill, respect, and a duty of care.

A number of suggestions were outlined as to how these professionals, and the law, can better facilitate children's participation and accommodate children's views and needs. Key among these are the relational aspects, respect and recognition, closing the feedback loops and, in particular, respecting the cultural practices and perspectives of people with diverse cultural backgrounds.

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