

Centre for Children and Young People



RESULTS OF AN INTERNATIONAL SURVEY REGARDING CHILDREN'S PARTICIPATION IN DECISION-MAKING FOLLOWING PARENTAL SEPARATION

Childwatch
INTERNATIONAL
RESEARCH NETWORK

REPORT TO CHILDWATCH
INTERNATIONAL'S CHILDREN & THE LAW
THEMATIC STUDY GROUP

November 2009

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**Southern Cross
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PROJECT OVERVIEW

This report presents the results from a survey developed and conducted by the Childwatch International Research Network's *Children and the Law* Study Group. The survey explored how children's participation rights are respected in post-separation decision-making in international family law contexts, including a focus on the legislative mechanisms and on the factors that facilitated, or hindered, children's participation. The survey was distributed, in May 2009, to all organisations currently involved with the Childwatch International Research Network. To date, completed surveys have been received from 13 institutions, representing 30% of the 44 organisations and 37% of the 35 countries involved.

Given the trend, nationally and internationally, towards recognising the importance and benefits of children's participation, this project extends knowledge about how children's participation rights are currently applied in family law decision-making internationally. However, the results should not be interpreted as providing a globally-representative perspective on these issues. Rather, they represent individual respondents' understanding of the issues within their country, as they could best express them within the time and resources available to them and, likely, informed by their personal and professional backgrounds and experiences.

MAIN FINDINGS

JURISDICTIONAL CONTEXTS WITHIN WHICH FAMILY LAW DISPUTES ARE HEARD

All responding countries, except Northern Ireland, reported having specialised family court systems. However, family law disputes could also be heard throughout the various levels of each country's general court and appeal systems, including in religious and customary law courts in four countries. A wide diversity of laws were applied to family disputes but the same laws applied across all jurisdictions within a country, except for Canada. The most commonly-cited types of legislation related specifically to family law, to children's care, protection and/or rights or addressed a variety of issues relating to marriage and divorce. All countries also reported having non-adversarial family dispute processes available, with five countries having legislation requiring that families attempt these processes before taking a case to court. The most commonly-available types of alternative dispute resolution involved counselling or mediation and collaborative law processes.

LEGISLATIVE PROVISIONS REGARDING CHILD PARTICIPATION IN FAMILY LAW PROCEEDINGS

All responding countries, except India, reported having regulations regarding children's participation in adversarial family dispute processes. However, only New Zealand, Nigeria and Costa Rica had similar regulations regarding children's participation in non-adversarial family dispute processes and Israel was the only one of four countries with religious or customary law processes which had such regulations. Most countries reported that at least some of their courts had recognised children's right to be heard in family law disputes, usually referring to the United Nations Convention on the Rights of the Child in their decisions. Most also perceived that their legal system was moving towards greater recognition of children's participation rights, including in the weight given to children's views, but only three countries had progressed as far as developing law proposals regarding it.



FREQUENCY OF CHILD PARTICIPATION IN FAMILY LAW PROCEEDINGS

The frequency of child participation in adversarial family law disputes fell largely between two groups, being a relatively rare occurrence in about half of the responding countries but a relatively frequent event elsewhere. Most countries reported significant variation between judges but perceived similar opportunities were afforded to children from different social or cultural groups. Some countries perceived that levels of child participation had changed since 2000, based mostly on the introduction of relevant legislation or local research about the issue. Child participation was, however, a rare event in the few countries where religious courts adjudicated in adversarial family law disputes. Although most countries reported that children participated in alternative dispute resolution processes, less than half indicated children being involved in developing actual parental agreements.

HOW CHILDREN PARTICIPATE IN FAMILY LAW PROCEEDINGS

Most responding countries reported little structure regarding the timing of children's participation, which could occur whenever it was considered appropriate. Judges and other court officials were the people most commonly responsible for seeking children's participation although children, themselves, could request to participate in some countries. All countries, except Ireland and Japan, reported the availability of some form of support services for children involved in family law disputes, primarily to support the children's emotional wellbeing, to help them understand the dispute proceedings and, where necessary, to protect their welfare. Children could attend court hearings in most countries but only in Northern Ireland, Nigeria, Scotland and the USA did they have a right to speak directly to the court and only in Nigeria, Costa Rica and India did they regularly meet directly with the judge. Where children did represent themselves directly, it was usually to the full courtroom and with the support of at least one independent person assigned to assist them through the process. Their views were most commonly recorded through judicial notes or minutes. Children usually received information and explanations about the court's decision, most often from their representative, the judge or other court staff.

All countries, except Costa Rica and Japan, reported that children could be represented by their own lawyer, who would usually have a clearly-defined role in facilitating the child's participation, most often through a report prepared for the court, but may not be obliged to meet with the child. Not all countries had specific criteria for appointing a lawyer for the child but it occurred most commonly in complex and/or protracted disputes or when there were conflicts between children's and/or their parents' views. The other most commonly-appointed child representatives were court welfare officers and guardians ad litem. However, there was considerable variation in how these other representatives' roles were defined, including the extent to which they were expected to represent the child's views

Most responding countries reported that the confidentiality of children's views had been addressed by their courts or by local academics. However, there was considerable variation between countries regarding the extent to which their legislation conferred confidentiality on any information provided by children involved in family law disputes. Overall, Canada, Ireland, Nigeria, Northern Ireland, Scotland, the USA and Costa Rica offered the least confidentiality, with families usually having access to the full record of their children's views. Australia, England, New Zealand, India and Israel offered a degree of confidentiality, with families unable to access the full reports but entitled to receive summary information about their children's views. Only Japan reported full confidentiality, with parents having no access to any form of information about their children's views.



FACTORS INFLUENCING CHILD PARTICIPATION IN FAMILY LAW PROCEEDINGS

Respondents nominated a wide variety of factors which enhanced child participation, primarily relating to the culture and/or processes of their legal systems but also acknowledging the influence of a variety of external agencies. The most commonly-cited enhancers were: legislation requiring child participation; proactive judges encouraging and/or seeking children's views in their own courts; the empowerment afforded by the existence of the United Nations Convention on the Rights of the Child (UNCRC) and other human rights conventions; and supportive research, reviews and/or academic debate. Respondents nominated a similar variety of factors as barriers to child participation, again primarily relating to the culture and/or processes of their legal systems but also acknowledging the influence of some child and family related issues. The most commonly-cited barriers were: the considerable variation (between judges, courts, states and/or other jurisdictions) in the availability of the factors that enhance children's participation; that child participation is discretionary, rather than a right; resistance from some judges, lawyers and/or families; and limited acknowledgment of the UNCRC.

Eight countries nominated members of the legal system as the main proponents of child participation; five acknowledged the role played by various community groups; and four acknowledged the role of family law researchers. On the other hand, four countries nominated various community groups as the main opponents of child participation; three acknowledged the role played by members of the legal system; and four perceived little active opposition. Seven countries nominated capacity-related concerns as the main arguments put forward by those opposing children's participation, most commonly that it would require additional resources to achieve; and six nominated concerns about protecting children, most commonly that participation placed an undue burden of responsibility on the children.

CONCLUSIONS AND RECOMMENDATIONS FOR FUTURE RESEARCH

The results presented in this report confirm an increasing international commitment to enhancing children's participation in family law disputes, at least among the participating countries. They highlight a variety of mechanisms and approaches being used to achieve this, including much local research and innovative projects which will be reviewed in more depth in future activities of this Study Group. There is scope for further research exploring children's and families' views about child participation in family law disputes and, given their influential role as potential barriers or enhancers, to further explore the factors influencing judges' perceptions, and subsequent actions, regarding child participation. The diversity in the methods and extent of children's participation also invites further comparative research into each approach's impact on children's understanding, experiences of and outcomes (positive and negative) following the proceedings.



ABOUT THE STUDY GROUP

In 2005, a Childwatch International Study Group, *Children and the Law*, was convened by Australia's Centre for Children and Young People and New Zealand's Centre for Research on Children and Families. The Study Group aimed to explore how children's rights are respected in law across different countries. An invitation to all Childwatch Key Institutions resulted in researchers from nine other countries joining the Study Group:

- Dr Lenka Sulova from the Czech Republic's Charles University - Department of Psychology;
- Professor Asha Bajpai from India's Tata Institute of Social Sciences;
- Dr Tamar Morag from Israel's Center for Children & Youth;
- Dr Elisabeth Backe-Hansen from Norway's Norwegian Social Research;
- Ms Julia Sloth-Neilsen from South Africa's Child & Youth Research & Training Programme;
- Mr John Oziegbe & Ms Itoro Ezeanaba from Nigeria's Partnership for Justice;
- Professor Mark Small from the USA's Institute on Family & Neighbourhood Life; and
- Dr Jonathan Dickens from England's University of East Anglia - School of Social Work & Psychology.

ABOUT THIS PROJECT

At its first meeting, the Study Group identified children's participation rights within the context of family law as a priority for investigation internationally. The first phase of the project involved conducting and reporting a survey of Childwatch Key Institutions regarding children's participation in family law proceedings within their countries (Taylor et al., 2007). Responses from the 16 participating countries indicated a diverse range of family law decision making processes.

This report details the results from a second survey which was developed in response to the findings from phase one, following a meeting of the Study Group in Prague in September 2008. This survey, which was distributed in May 2009, aimed to investigate how children's participation rights are respected in post-separation decision-making in international family law contexts. It sought to compare the legislative mechanisms, structures and resources that facilitated, or hindered, children's participation within these different contexts.



SIGNIFICANCE & LIMITATIONS OF THIS PROJECT

Children's participation in family law decision-making processes is currently in a state of radical change, both in Australia and overseas. No longer objects of the law, children are increasingly considered as important subjects in the determination of decisions made on their behalf (Smart, 2002; Taylor, 2006). That the principle of children's participation in family law decision-making has gained such importance is evident in Australia, in the recent reforms to the Family Law Act 1975, which place considerable emphasis on the development and implementation of child-focused and child-inclusive family law decision-making processes. This is in both contested and non-contested matters. Further, children's participation rights, as stated in Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), are now understood as an important principle of family law decision-making, as evidenced in family law policy, legislation and caselaw internationally.

Notwithstanding this increased emphasis on children's rights in family law and policy, approaches to the inclusion of children in decision-making processes remain in their infancy. This was evident in Phase One of this project, which identified a diverse and uneven range of legislative mechanisms that effectively facilitate the inclusion of children's views. The importance placed on children's participation in family law is well supported by a considerable body of research that suggests the inclusion of children in decision-making holds significant and far-reaching benefits for the wellbeing of children and their families. Children attribute a great deal of importance to being recognised and acknowledged as individuals with opinions and feelings of their own and as able to constructively contribute to and shape decisions made in their everyday lives (Parkinson et al., 2008; Smart, 2002; Smith et al., 2003). The benefits for families include the improved likelihood of better decisions and outcomes and greater acceptance of decisions by all family members (Cashmore, 2003; Smith, 2002). Research further suggests children's participation contributes to the wellbeing of communities by making policy more sensitive to social needs, and therefore more likely to work and that it helps policy-makers to better understand the lives of children and young people (Davis et al., 2006; Wierenga et al., 2003). The participation of children in family law decision-making also acknowledges that adults, even parents, do not always act in the best interests of children (Cashmore, 2003).

Given the trend nationally and internationally towards recognising the importance and benefits of children's participation, this project is significant in that it extends our knowledge about how children's participation rights are currently applied in family law decision-making internationally.

However, the results presented throughout this report should not be interpreted as providing a globally-representative perspective on these issues. The small sample of participating individuals, organisations and countries represent self-selected sub-groups from the already purposive group of organisations invited to join the Childwatch International Research Network, in acknowledgment of their pre-existing commitments to recognising and promoting children's rights. In addition, the survey sought a considerable amount of information and detail, requiring some specialist knowledge and a reasonable time investment from those completing it. Therefore, the answers provided represent individual respondents' understanding of the issues within their country, as they could best express them within the time and resources available to them and, likely, informed by their personal and professional backgrounds and experiences, as well as their familiarity with the issues being explored.



ABOUT THE RESPONDING COUNTRIES

For ease of interpretation, responses throughout this report are presented in two groups. The first group includes countries whose family law processes fall entirely, or predominantly, under a common law system. The second group includes countries whose family law processes fall entirely, or predominantly, under a civil, religious or customary law system. As shown in the table below, completed surveys have, to date, been received from 13 institutions, representing 30% of the 44 organisations and 37% of the 35 countries involved with the Childwatch International (CWI) research network (see Appendix A for a copy of the cover letter and survey instrument). Two other countries, Norway and South Africa, have indicated that they intend to complete a survey and other countries are still encouraged to participate.

	COUNTRY		CHILDWATCH INTERNATIONAL ASSOCIATED INSTITUTION	STUDY GROUP INVOLVEMENT	
				CURRENT MEMBER	INTERESTED IN BECOMING A MEMBER
(PREDOMINANTLY) COMMON LAW SYSTEMS	Australia	AUS	Centre for Children & Young People, Southern Cross University	✓	
	Canada	CAN	International Institute for Child Rights & Development	✓	
	England	ENG	School of Social Work & Psychology, University of East Anglia	✓	
	Ireland	IRE	Children's Research Centre, Trinity College Dublin		✓
	New Zealand	NZ	Centre for Research on Children & Families, University of Otago	✓	
	Nigeria	NIG	Partnership for Justice	✓	
	Northern Ireland	NI	Institute of Child Care Research		✓
	Scotland	SCO	Centre for Rural Childhood, Perth College UHI		✓
	South Africa	SA	Child & Youth Research & Training Programme	✓	
	United States	USA	Institute on Family & Neighbourhood Life, Clemson University	✓	
OTHER SYSTEMS	Costa Rica	CR	Fundacion Paniamor		✓
	India	IND	Tata Institute of Social Sciences	✓	
	Israel	ISR	Brookdale Institute	✓	
	Japan	JAP	Child Research Network, Benesse Corporation		X
	Norway	NOR	Norwegian Social Research	✓	

Note: See Appendix B for a full list of the Childwatch International Associated Institutions

The 13 completed surveys provide information from 13 different countries, including:

- 9 countries with (predominantly) common law systems – representing 69% of the 13 such countries within the CWI network; and
- 4 countries with (predominantly) civil, religious or customary law systems – representing 18% of the 22 such countries within the CWI network.



JURISDICTIONAL CONTEXTS WITHIN WHICH FAMILY LAW DISPUTES ARE HEARD

COURTS AUTHORISED TO HEAR PRIVATE FAMILY DISPUTES

All responding countries, except Northern Ireland, reported having specialised family court systems. However, family law disputes could also be heard throughout the various levels of each country's general court and appeal systems, including in religious and customary law courts in four countries. Despite much uncertainty, the limited data available suggest that only a small minority of family law disputes are dealt with adversarially in countries with common law systems, compared to as many as two-thirds of such disputes in countries with other legal systems.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Have a specialised family court system	✓	✓	✓	✓	✓	X	✓	✓	✓	✓	✓	✓	✓
• Religious &/or customary courts can adjudicate	X	X	X	X	X	X	✓	✓	X	X	✓	✓	X
• Other courts that can also adjudicate:													
– Magistrate/ District/ Area/ Sheriff Court		•	•	•		•	•	•			•		
– High/ County/ State/ Superior Court	•	•	•	•	•	•	•		•		•		
– Federal Magistrate's Court	•								•				
– Court of Appeal/ Court of Session				•	•			•					
– Supreme Court/ Court of Final Appeal/ House of Lords				•	•			•		•	•		
• Proportion of private family law disputes dealt with adversarially	6%	10-15%	?	?	6%	?	?	?	?	60%	45%	?	30%

Note: Data drawn from responses to questions 1.1a, 1.1b, 1.1c & 1.6a

LAWS APPLYING TO PRIVATE FAMILY DISPUTES

Although responding countries reported a diversity of applicable laws (see Appendix C for full details), the same laws applied across all jurisdictions within a country, except for Canada. The most commonly-cited types of legislation related specifically to family law (8 countries) or to children's care, protection and/or rights (8 countries) or addressed various issues relating to marriage and divorce (7 countries).

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Laws named (see Appendix C)	✓5+	✓13	✓1	✓5	✓5	✓2	✓4	✓2+	✓1	✓8	✓17	✓1	✓1
– Family law legislation	•	•	•	•				•		•	•	•	
– Legislation relating to marriage & divorce (incl. property, child support, domestic violence, adoption)	•	•		•	•		•			•	•		
– Child care & protection legislation	•		•	•	•	•		•				•	
– Child rights legislation		•				•	•			•			
– Civil codes		•									•		•
– Criminal legislation											•		
– Religious &/or customary law legislation											•		
– The constitution							•						
• The same laws apply in all courts	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Note: Data drawn from responses to questions 1.1d & 1.1e



NON-ADVERSARIAL FAMILY DISPUTE RESOLUTION PROCESSES

All responding countries reported having non-adversarial family dispute processes available, with five countries having legislation requiring that families attempt these processes before taking a case to court. The most commonly-available types of alternative dispute resolution involved counselling or mediation (13 countries) and collaborative law processes (5 countries).

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Proportion of private family law disputes dealt with non-adversarially	85%	?	?	?	80%	?	?	?	?	15%	55%	?	70%
• Law requires separating parents to attempt Alternative Dispute Resolution (ADR) before taking a case to court	✓	✓	X	X	✓	X	✓	X	X	X	✓	X	X
• Customary/ Indigenous non-adversarial proceedings are available	X	X	X	X	X	X	✓	?	X	X	✓	X	X
• Types of ADR processes available:													
– Counselling/ mediation/ negotiation	•	•	•	•	•	•	•	•	•	•	•	•	•
– Collaborative law processes	•	•	•								•	•	
– Family group conferencing/ Parenting Coordinators		•						•					
– Arbitration – with decision made by neutral arbiter								•					

Note: Data drawn from responses to questions 2.1a, 2.1b, 2.1c & 2.1g



LEGISLATIVE PROVISIONS REGARDING CHILD PARTICIPATION IN FAMILY LAW PROCEEDINGS

CURRENT LEGISLATIVE PROVISIONS

All responding countries, except India, reported having regulations regarding children's participation in adversarial family dispute processes. However, only New Zealand, Nigeria and Costa Rica had similar regulations regarding children's participation in non-adversarial family dispute processes and Israel was the only one of four countries with religious or customary law processes which had such regulations.

Although nine countries acknowledged child participation in legislative criteria for determining their best interests, only six countries recognised child participation as a "right".

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Have regulations/ legislative provisions regarding child participation in family law disputes:													
– In adversarial dispute proceedings	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	X but proposed	✓	✓
– In non-adversarial dispute proceedings	X	X	X	X	✓ just	X	✓	?	X	✓	X	X	X
– In religious law & courts	---	X	---	---	---	---	X	---	---	---	X	✓	---
– In customary law & courts	---	X	---	---	---	---	---	---	---	---	X	---	---
• Child participation is recognised as a "right"	X	X	X	X	✓	✓	✓	✓	✓	✓	X	X	X
• Child participation is limited to children of a certain age/ maturity	X	✓ some settings	✓	X	X	✓	✓	✓ (12+)	✓	X	X	X	X
• Child participation is acknowledged in legislative criteria for determining the welfare & best interests of the child	✓	✓	✓	X	X	✓	✓	✓	✓	✓	✓	---	---
• Other legislative provisions relating to the child's wishes or views &/or the weight to be given to them:													
– Either the court or the child have the right to seek child's participation							•						
– Consent for adoption required from suitably-aged/mature children												•	
– Consent for religious conversion required from children aged 10+ years												•	
– Child views unlikely to be heard unless parents disagree about arrangements			•										
– Welfare of the child is court's paramount consideration, not child views			•			•							
– Hague Convention has resulted in a large increase in number of cases where child views are sought				•									
– Referred to UNCRC/ other legislation but provisions not specified	•				•					•			

Note: Data drawn from responses to questions 1.2a-g, 1.8a, 1.8c & 2.1f



SIGNIFICANT COURT DECISIONS

Most responding countries reported that at least some of their courts recognised children's right to be heard in family law disputes, usually referring to the United Nations Convention on the Rights of the Child in their decisions. Quotes from some relevant decisions (included in full in Appendix D & E), provided by six countries, highlight this focus on participation as a right, with many also recognising potential benefits for children's emotional wellbeing and the court's understanding of their best interests. However, three countries also acknowledged that participation could expose children to risk and/or stressed that it must be voluntary. Other issues discussed include a need for alternative methods of gathering children's views, that they can be sought without parental consent and form the primary consideration in court decisions.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM										(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA		CR	IND	ISR	JAP
• Courts recognise the child's right to be heard in family law disputes	✓	✓ some settings	✓	X	✓	✓	✓	✓	✓		✓	X but try to consider	✓	X
– Courts refer to UNCRC in decisions	✓	✓	✓	X	✓	✓	✓	✓	X		✓	✓	✓	---
– Courts have established age/ maturity criteria for child participation	X	X	X	X	X	X	✓ (12+)	✓ (12+)	X		X	✓ (5-17)	X	---
• Examples of court decisions relating to children's right to participate:														
– Decisions cited	✓ ₁	✓ ₈₊	✓ ₂	✓ ₂₊	✓ ₁	X	X	X	X		X	✓ ₄	✓ ₅₊	---
– Detailed quotes provided	✓	✓	X	✓	✓	X	X	X	X		X	✓	✓	---
• Issues discussed: (see Appendix D & E)														
– Child views should be heard & taken into account, as far as possible/ it's a right under the principle of natural justice	•	•		•	•							•	•	
– Child participation is important for mental wellbeing/ determining their best interest	•	•		•								•		
– Participating may not be in a child's best interest – judge must consider each case		•										•		
– Children should not be forced to express their views					•									
– Children may require multiple or varied opportunities in order to participate (eg: Judge overturned decision after seeing child's reaction to it)					•							•		
– Child views can be primary consideration				•									•	
– Child views can be sought without parental consent		•											•	
– Court should hear child directly													•	
– How child views have been considered should be explained in judgements, especially where they are rejected	•													

Eight countries indicated that their courts had articulated criteria for determining the weight to be given to children's views, with the most common being the child's age or capacity and whether they appeared to have been coached in their views. However, half also acknowledged judges' discretion to weigh up a child's view, alongside all the facts of the matter, in determining the best interests of that child. Example quotes from relevant decisions (included in full in Appendix D & E), provided by five countries, reinforce the potential impact of children's maturity levels and the freedom with which they can express their views. They also indicate the potential impact of the clarity and strength of children's views, their level of understanding and the perceived consequences for their wellbeing if their views are rejected.



✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM										(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP	
<ul style="list-style-type: none">• Courts have criteria regarding the weight to be given to children's views<ul style="list-style-type: none">– Child's age/ ability to form an intelligent opinion/ preference– Whether apparent tutoring by custodial parent/ guardian– To serve the child's best interest– Child's perceived/ real fear of a parent– Child's vulnerability to emotional harm– No age or other weighting criteria– At judges' discretion to consider overall circumstances & weigh all evidence, including child views	✓	✓	X	✓	✓	X	✓	X	X	✓	✓	✓	X	
		•		•							•	• was		
		•								•	•			
							•			•				
										•	•			
		•										• now		
	•	•			•							•		
<ul style="list-style-type: none">• Examples of court decisions regarding the weight to be given to child views:<ul style="list-style-type: none">– Cases cited– Detailed quotes provided	✓ ¹	✓ ²	---	✓ ¹	X	---	X	---	---	X	✓ ²	✓ ³	---	
	✓	✓	---	X	X	---	X	---	---	X	✓	✓	---	
<ul style="list-style-type: none">• Factors discussed: (see Appendix D & E)<ul style="list-style-type: none">– Child's age/ maturity– How freely (eg: from parental influence) child can express their views– Clarity & strength of the child's views– Child's apparent level of understanding– Perceived consequence for child's social-emotional welfare if their views rejected– Consistency of the child's views– Level of agreement between siblings– Court-perceived best interest of child can override the child's views	•	•		•							•	•		
		•		•							•	•		
		•		•							•			
	•	•		•										
		•												
	•	•									•			

Note: Data drawn from responses to questions 1.3a, 1.3b, 1.3c, 1.3e, 1.3f, 1.3g & 1.3h

REVIEWS/ DEVELOPMENTS IN PROGRESS

Most responding countries perceived that their legal system was moving towards greater recognition of children's participation rights, including in the weight given to children's views, but only three countries had progressed as far as developing law proposals regarding it.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM										(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP	
✓ = Yes, X = No, • = Open response ? = Don't know --- = Not applicable														
• Legal system is moving towards greater recognition of child participation rights	✓	✓	✓	✓	✓	✓	✓	?	✓	✓	✓	✓	X	
– There has been a change in the courts rhetoric/ policy on the matter since 2000	✓	✓	✓	X	✓	✓	?	X	X	X	X	✓	X	
– There has been a change in the weight courts give children's views since 2000	✓	X	✓	✓	✓	✓	✓	?	X	X	X	X	---	
– Governmental, professional or NGO committees been appointed to discuss it	X	✓	✓	✓	X	?	✓	?	X	✓	X	✓	✓	
– Law proposals regarding it have been drafted/ handed down by government	X	X	X	X	X	?	✓	?	?	✓	X	✓	X	

Note: Data drawn from responses to questions 1.3d, 1.3i, 1.10c, 3.3a & 3.3b



FREQUENCY OF CHILD PARTICIPATION IN FAMILY LAW PROCEEDINGS

IN ADVERSARIAL DISPUTES

The frequency of child participation in adversarial family law disputes fell largely between two groups, being a relatively rare occurrence in about half of the responding countries and a relatively frequent event in most of the other countries. Most countries reported significant variation between individual judges but perceived similar opportunities were afforded to children from different social or cultural groups. Some countries perceived that levels of child participation had changed since 2000, based mostly on the introduction of relevant legislation or local research about the issue. Child participation was, however, a rare event in the few countries where religious courts adjudicated on adversarial family law disputes.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Frequency of child participation in adversarial disputes (0= Never, 1= Occasionally, 2= Sometimes, 3= Often, 4= Always)	3	1	3	1	3	1	3	3	1	1	3	2	1
– Varies significantly between judges	✓	✓	✓	✓	✓	✓	X	?	✓	✓	X	✓	X
– Children from different social/ cultural groups have the same opportunities	✓	✓	✓	?	✓	?	✓	?	✓	✓	✓	X	✓
– There has been a change in the number of children participating since 2000	X	?	✓	X	✓	X	✓	?	X	X	X	✓	X
– There has been a change in the number meeting with the judge since 2000	✓	?	✓	X	✓	X	✓	?	X	X	X	✓	X
• Basis for any perceived changes:													
– After introduction of relevant legislation			•		•		•						
– Principal Family Court judge recommend judicial interviews with children					•								
– Local research/ pilot projects – discussing its potential/ reporting number of cases where child views are heard	•	•										•	
• Extent of child participation in adversarial disputes in religious courts (0= Never, 1= Occasionally, 2= Sometimes, 3= Often, 4= Always)	---	0	---		---		2	---	---	---	0	1	---
– Jewish law supports child participation												•	
– Possible in states with Sharia law							•						
– Considered by Sharia court but rejected		•											

Note: Data drawn from responses to questions 1.6b, 1.6d, 1.6e, 1.6f, 1.6g, 1.6h & 1.8b



IN NON-ADVERSARIAL DISPUTES

Although most responding countries reported that children participated in alternative dispute resolution (ADR) processes, less than half indicated children being involved in developing actual parental agreements.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Children participate in ADR processes	✓	✓ some times	✓ rarely	✓ some times	X	✓	✓	✓	✓	✓	✓	X	X
• Children participate in developing parental agreements	X	X	✓ rarely	X	X	✓	✓	✓	✓	X	X	X	X
• Children can participate in customary/ Indigenous non-adversarial proceedings	---	---	---	---	---	---	✓	---	---	---	X	---	---
• Perceived advantages of child participation in these proceedings:													
– Allows all parties to speak freely							•						
– Less daunting than main judicial process							•						
– Families are often reunited							•						
• Perceived disadvantages of child participation in these proceedings:													
– Child's views heard directly by all parties							•						
– Can endanger child if not well managed							•						

Note: Data drawn from responses to questions 2.1d, 2.1e, 2.1h, 2.1i & 2.1j



HOW CHILDREN PARTICIPATE IN FAMILY LAW PROCEEDINGS

PROCEDURAL ASPECTS

For most responding countries, there was little structure regarding the timing of children's participation, which could occur whenever it was considered appropriate. However, Australia and New Zealand indicated that child participation was sought only when conciliation processes failed, giving children no voice in the non-adversarial process. One particularly noteworthy process, reported by Northern Ireland and the USA, was that children had an opportunity to familiarise themselves with the court before actually participating.

Judges and other court officials were the people most commonly responsible for seeking children's participation although, in Australia, Canada, England, New Zealand and Scotland, children could request to participate on their own behalf.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM										(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA		CR	IND	ISR	JAP
• Timing of child participation:														
– When conciliation processes fail	•				•									
– Before – to view the court						•			•					
– In the early stages										•				
– At the end						•			•					
– No specific time/ at judge's discretion/ whenever decision being made		•	•	•		•	•	•	•	•	•	•	•	•
• Parental consent is required	X	X	X	X	X	X	X	X	X	X	X	X	X	X
• Person responsible for inviting children to participate:														
– Judge/ Magistrate/ the Court/ Sheriff		•			• can	•	•	•	•	•	•	•	•	•
– Child's legal representative	• usual				• usual									
– Child or family	• can	•	•		• can			•						
– Court welfare officer/ adviser			•			•			•					
– Social worker / Psychologist				•						•			•	
– Guardian ad litem				•		•			•					
– Solicitors/ lawyers		•				•			•					

Note: Data drawn from responses to questions 1.4a, 1.4b & 1.4c



All responding countries, except Ireland and Japan, reported the availability of some form of support services for children involved in family law disputes. These support services covered three main areas:

- Multi-disciplinary support to reduce any damage to children's emotional wellbeing;
- Legally-oriented support to assist children with understanding the dispute proceedings; and
- Welfare-focused support for any children whose safety was a concern.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Support services are available to children involved in family law disputes	✓	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	X
– Multi-disciplinary support units with child counsellors, social workers &/or psychologists		•				•			•	•	•	•	
– Support to understand & participate in dispute proceedings (eg: Children's Cases Program, Project Magellan, Child & Family Courts Advisory & Support Service, Family Justice Counsellors)	•	•	•										
– Child welfare-focussed support (only where child safety is a concern)			•		•		•						
– Child Access Room where non-custodial parent can meet child, supervised by counsellor											•		
– Family advocate (where parents unable to act in child's best interest)		•											
– NGO-based support services		•	•										
– Depends on size & resources of court								•					

Note: Data drawn from responses to questions 1.9a & 1.9b



DIRECT CHILD REPRESENTATION IN COURT

Most responding countries reported that children could attend court hearings but only in Northern Ireland, Nigeria, Scotland and the USA did children have a right to speak directly to the court and only in Nigeria, Costa Rica and India did children regularly meet directly with the judge.

Where children did represent themselves directly, it was usually to the full courtroom and with the support of at least one independent person assigned to assist them through the process. Children's views were most commonly recorded through judicial notes or minutes, although Canada, Ireland, New Zealand and India indicated that children's view were usually not recorded in writing or in any official record.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

✓ = Yes, X = No, • = Open response ? = Don't know --- = Not applicable	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Children's direct involvement:													
– Children can attend the actual hearing	✓	✓ some settings	✓	X	X	✓	✓	✓	✓	✓	X	✓	X
– Children have a right to speak directly to the court	X	X	X	X	X	✓	✓	✓	✓	X	X	X	X
– How often children meet directly with the judge (0= Never, 1= Occasionally, 2= Sometimes, 3= Often, 4= Always)	1	1	1	1	2	1	4	1	1	3	3	1	1
• Who conducts the child's hearing?													
– Judge/ Magistrate/ Sheriff	•	•	•	•	•	•		•	•	•	•	•	•
– Family court probation officer													•
– Child's lawyer							•						
• Others who may be present during the child's interview:													
– Child Support People (eg: social worker, psychologist, counsellor, legal representative, court welfare officer, welfare organisation rep)	•	•	•		•	•	•		•	•	•	•	
– Court Officials (eg: lawyers, solicitors, full court, court registrar, court reporter, police officer)		•	•		•		•	•	•				
– Child may be heard in private by Sheriff/ Court welfare officer			• but rare					•					
– Child's parent/ guardian							•						
– NOT parents			•										
– No-one indicated				•									•
• How children's views are recorded:													
– Judge's notes	•	•			•	•	•	•	•				
– Judicial record/ minutes					•					•		•	•
– Report prepared by a representative								•					•
– Electronically			•				•						
– Not usually in writing/ May or may not be an official record		•		•	•						•		

Note: Data drawn from responses to questions 1.4d, 1.4k, 1.4p, 1.4q, 1.4s & 1.6c



INDIRECT CHILD REPRESENTATION IN COURT

All responding countries, except Costa Rica and Japan, reported that children could be represented by their own lawyer, who would usually have a clearly-defined role in facilitating the child's participation, most often through a report prepared for the court, but may not be obliged to meet with the child. Not all countries had specific criteria for appointing a lawyer for the child but it occurred most commonly in complex and/or protracted disputes and when there were conflicts between children and/or their parents' views. Nigeria and Scotland indicated that having a lawyer, or not, was the child's choice. The other most commonly-appointed child representatives were court welfare officers and guardians ad litem. However, there was considerable variation in how these other representatives' roles were defined, including the extent to which they were expected to represent the child's views.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

✓ = Yes, X = No, • = Open response ? = Don't know --- = Not applicable	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM										(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP	
• A lawyer can be appointed for the child	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	✓	✓	X	
– Has a clearly defined role in facilitating the child's participation	✓	✓ some times	✓	X	✓	✓	✓	✓	✓	---	X	✓	---	
– Has a clear duty to meet with the child	✓	X	X	X	✓	✓	✓	✓	✓	---	X	✓	---	
• Criteria for appointing the child a lawyer:														
– In complex cases/ intractable disputes	•		•			•			•			•		
– If conflict of interests between child & parents/ different children		•	•									•		
– If considered in best interests of child	•		•											
– It is the child's choice							•	•						
– More detailed criteria being negotiated												•		
– No specific criteria stipulated/ Legally defined (no further info)		•		•	•			•			•			
• Profession of other child representatives:														
– Court welfare officer/ adviser			•	•		•	•	•	•					
– Guardian ad litem				•		•	•		•					
– Sheriff/ Judge		•						•						
– Lawyer/ social worker appointed by Office of the Children's Lawyer		•												
– Assessor/ interviewer/ expert witness		•												
– Youth advocacy representative			•											
• Defined roles of child representatives:														
– Lawyer for the child	•				•							• older kids • younger kids		
– Guardian ad litem				•		•								
– Form an independent view of what is in best interests of child	•		•											
– Act in best interests of child	•	•												
– Report child views/ ensure they're heard			•					•						
– Legally defined (no further info)/ Unclear					•		•		•					
• How children's views are recorded:														
– Report prepared by their representative	•	•	•		•	•		•	•			•		
– Judge's notes/ Court records gist		•					•	•						
– Electronically							•							
– Varies (no further information)				•										

Note: Data drawn from responses to questions 1.4i, 1.4j, 1.4m & 1.5a-d



CONFIDENTIALITY OF CHILDREN'S VIEWS

Most responding countries reported that the confidentiality of children's views had been addressed by their courts or by local academics. However, there was considerable variation between countries regarding the extent to which their legislation conferred confidentiality on any information provided by children involved in family law disputes. Overall, Canada, Ireland, Nigeria, Northern Ireland, Scotland, the USA and Costa Rica offered the least confidentiality, with families usually having access to the full record of their children's views. Australia, England, New Zealand, India and Israel offered a degree of confidentiality, with families unable to access the full reports but entitled to receive summary information about their children's views – either through a report prepared for the court or directly from the child's representative. Only Japan reported full confidentiality, with parents having no access to any form of information about their children's views.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Confidentiality of children's views has been addressed by the courts or academic writing	✓	✓	✓	X	✓	X	✓	✓	X	✓	✓	✓	X
– Transcript/ minutes are not accessible by parents (eg: kept in sealed envelope)										•	•	•	
– Judge assures child of confidentiality until decision made											•		
– Varies by how child's views are heard – some modes are confidential, others not	•	•											
– Usually not kept confidential		•						•					
• When children are heard through a representative:													
– Their views are confidential	X	X	X	✓ Judge's discretion	X	X	✓	✓ some times	X	---	---	✓	---
– Their parents have access to the full record of their views	X	✓ Judge's discretion	X	✓ Judge's discretion	X	✓	✓	✓ usually	✓	---	---	X	---
– Representative must provide parents with information about their child's views	X	X	X	X	X	✓	---	---	---	---	---	X	---
• When children are heard directly:													
– Their views are confidential	X	✓ Judge's discretion	X	✓ Judge's discretion	X	X	✓	X usually	X	✓ some times	✓	✓	✓
– Their parents have access to the full record of their views	X	✓ Judge's discretion	X	✓ Judge's discretion	X	✓	✓	✓ usually	✓	✓	X	X	X
– Representative must provide parents with information about their child's views	X	✓ Judge's discretion	✓	✓ Judge's discretion	X	✓	---	---	---	---	✓	✓	X

Note: Data drawn from responses to questions 1.4g, 1.4h, 1.4i, 1.4n, 1.4o, 1.4r, 1.4t & 1.4u



PROVIDING FEEDBACK TO PARTICIPATING CHILDREN

Many responding countries reported that children routinely receive information and explanations about the court's decision, most often from their legal representative, the judge or other court staff.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Children receive information and explanations about the court's decision	X	X	✓	X	✓	✓	✓	✓	✓	✓	✓	X	X
• Person responsible for explaining the decision to the child:													
– Child's legal representative			•		• usually			•					
– Judge/ the Court					• can		•			•			
– Court welfare officer/ Social worker			•			•			•				
– Guardian ad litem						•			•				
– Usually parent &/or lawyer							•				•		
– No set person											•		

Note: Data drawn from responses to questions 1.4e & 1.4f

FACTORS INFLUENCING CHILD PARTICIPATION IN FAMILY LAW PROCEEDINGS

TRAINING REGARDING CHILD PARTICIPATION FOR FAMILY LAW PRACTITIONERS

Only six responding countries reported specific child participation training having been offered to family law practitioners, although a further two countries had such training planned. In both New Zealand and Israel, all family court judges had been required to attend intensive two-day workshops.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Special training offered to judges/ other professionals during the last 5 years	✓	✓	X	X	✓	?	X but planned	X but planned	✓	X	X	✓	✓
– All family court judges required to attend					•							•	
– Available to family court officers	•												•
– Available to all legal professionals		•											
• Format of this training:													
– Workshops	•	•			•				•			•	•
– Roundtables/ seminars for sharing information & experiences		•											
• Content of this training:													
– Presentations re: legal issues relating to judicial interviews					•								
– Research evidence re: children's views & participation					•							•	
– Skills-based training in child interviewing techniques					•							•	•
– Followup sessions discuss experiences with implementing strategies												•	

Note: Data drawn from responses to questions 1.7a & 1.7b



FACTORS ENHANCING CHILD PARTICIPATION

Responding countries nominated a wide variety of factors which enhanced child participation in family law disputes, primarily relating to the culture and/or processes of their legal systems but also acknowledging the influence of a variety of external agencies. The most commonly-cited factors enhancing child participation were:

- The existence of legislation requiring it (9 countries);
- The existence of proactive judges encouraging and/or seeking children's views in their own courts (7 countries);
- The empowerment afforded by the existence of the United Nations Convention on the Rights of the Child and other human rights conventions (5 countries); and
- Supportive research, reviews and or academic debate (5 countries).

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Culture of the legal system:													
– Legislation requiring child participation as part of determining their best interests	•	•			•		•	•	•	•	•		•
– Proactive judges encouraging/ seeking children's views	•	•		•	•						•	•	•
– (Increasing) recognition of importance of child participation		•				•				•		•	
– Long history of child participation	•				•							•	
• Supportive legal system processes:													
– Children have own lawyer/ representative	•		•	•	•								
– Specialised family/ child courts & judges/ Establishing Family Relationship Centres, emphasising child-focus	•						•			•			
– Availability of support services for children		•	•								•		
– Guidelines for eliciting, recording & /or considering children's evidence, including informal methods for younger children								•			•		
– Targeted training		•							•				
– Child can challenge decisions if feel their views not taken into account								•					
– No age/ maturity restrictions regarding child participation					•								
• External demands for child participation:													
– Empowerment of legal culture through UNCRC/ Human Rights Conventions			•	•	•					•		•	
– Research, Commissions &/or academic debate recommending it	•	•	•			•					•		
– Research showing children want to	•				•						•	•	
– Strong, proactive civil society promotion of child rights &/or protection		•		•			•				•		

Note: Data drawn from responses to questions 1.10a, 1.10d & 3.3c



BARRIERS TO CHILD PARTICIPATION

Responding countries nominated a similar variety of factors which were barriers to child participation in family law disputes, again primarily relating to the culture and/or processes of their legal systems but also acknowledging the influence of some child and family related issues. The most commonly-cited barriers to child participation were:

- The considerable variation (between judges, courts, states and/or other jurisdictions) in the availability of the factors that enhance children's participation (10 countries);
- That child participation is discretionary, rather than a right (7 countries);
- Resistance from some judges and/or lawyers (7 countries);
- Resistance from some families (5 countries); and
- Limited acknowledgment of the United Nations Convention on the Rights of the Child (5 countries).

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
<ul style="list-style-type: none"> • Culture of the legal system: <ul style="list-style-type: none"> – Professionals' attitudes/ Some lawyers &/or judges' resistance – Little weight or interest given to UNCRC/ children not seen as rights-holders – Participation is more rhetoric than reality – Custody issues are ancillary to broader proceedings/ Lower status of "family" law – Perception of children as unreliable 	•	•	•	•	•	•						•	
	•			•					•	•		•	
	•	•										•	
		•									•		
		•											
<ul style="list-style-type: none"> • Unsupportive legal system processes: <ul style="list-style-type: none"> – Considerable variation in time, resources processes &/or expertise available to adequately facilitate child participation – Child participation is discretionary, not a right – Children's views are additional, not primary consideration – child may feel their wishes were not considered – Potential parental manipulation of child – may give decisions not in their best interest – Little child participation in non-adversarial proceedings – Some traditions applicable in religious &/or customary courts can hinder child participation (eg: age/ gender-based rules re: with whom child should live, rulings made by non-legal experts) – Lengthy time of some cases/ Need for repeated attendances by children – Children have to choose between parents 	•	•	•	•	•		•		•	•	•	•	
		•	•	•						•	•	•	•
	•			•							•	•	
								•			•		
	•				•								
							•				•		
											•		
<ul style="list-style-type: none"> • Child or family issues: <ul style="list-style-type: none"> – Family attitudes/ resistance to sharing power with children – Concern for emotionally-vulnerable children/ potential for inter-family conflict – Children's mental wellbeing/ capacity to participate 	•	•		•	•	•							
		•				•							
										•			

Note: Data drawn from responses to questions 1.10b, 1.10e & 3.4a



MAIN PLAYERS SUPPORTING LAW REFORM PROMOTING CHILD PARTICIPATION

Eight of the responding countries nominated members of the legal system as the main proponents of child participation in family law disputes; five countries acknowledged the role played by a variety of community groups; and four countries acknowledged the role of family law academics or researchers.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Members of the legal system:													
– Judicial Branch/ senior judges			•	• few	•					•		•	
– Legislative Branch/ Minister for Justice							•			•		•	
– Law Commission/ some lawyers			•	•							•		
– Family Law Court	•												
• Community groups:													
– Non-government organisations			•				•		•	•			
– Women's organisations											•		
– Community/ civil society organisations							•						
• Family law academics/ researchers	•		•		•							•	
• Child Right/ Protection agencies										•	•		
• Broad base of some from all stakeholder groups		•											
• Don't know/ no response						•		•					•

Note: Data drawn from responses to question 3.3d

MAIN PLAYERS OPPOSING LAW REFORM PROMOTING CHILD PARTICIPATION

Four of the responding countries nominated a variety of community groups as the main opponents of child participation in family law disputes; three countries acknowledged the role played by members of the legal system; and four perceived little active opposition.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
• Community groups and individuals:													
– Conservative political parties/ Some senior government officials		•								•			
– Some mental health professionals/ Health Board		•		•									
– Religious groups							•						
– Some adults										•			
• Members of the legal system:													
– Some lawyers/ judges		•										•	
– Religious Law Boards											•		
• None really/ More overlooked than opposed	•		•		•				•				
• Broad base of some from all stakeholder groups		•											
• Don't know/ no response						•		•					•

Note: Data drawn from responses to question 3.3e



MAIN ARGUMENTS FOR OPPOSING LAW REFORM PROMOTING CHILD PARTICIPATION

Seven of the responding countries nominated capacity-related concerns as the main arguments put forward by those opposing children's participation in family law disputes, most commonly that doing so would require additional resources to those currently available. Six countries nominated concerns in relation to protecting children, most commonly regarding participation placing an undue burden of responsibility on the children. In addition, five countries nominated a diversity of culturally-based concerns while three countries were unsure of the reasons for opposing child participation.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM										(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA		CR	IND	ISR	JAP
• Capacity-related concerns:														
– Additional time/ costs/ resources that would be required to involve children		•	•	•									•	
– Concern that judges/ lawyers lack skills to talk with children	•				•									
– Children are not mature/ capable of participation	•						•							
• Child protection concerns:														
– Places an undue responsibility/ burden on child	•		•		•								•	•
– Need to protect children from difficult/ stressful conflict		•	•											
– Participation places children at risk	•													
• Cultural concerns:														
– Religious sanctions/ grounds							•					•		
– Cultural attitudes re: not “spoiling” children											•			
– Oppose child's right to confidentiality from parents													•	
– Fear of change/ letting go of the old way of doing things		•												
– Fear of sharing power with children		•												
• Don't know/ no response						•		•	•					

Note: Data drawn from responses to question 3.3f



RESEARCH & INNOVATION AROUND CHILD PARTICIPATION IN FAMILY LAW PROCEEDINGS

The table below provides an initial overview of relevant activities and publications nominated by survey respondents, demonstrating considerable interest regarding children's participation in family law disputes. The nature, findings and recommendations of these activities will be reviewed in more depth in future publications. Appendices F and G include the full details supplied by survey respondents.

✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM										(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP	
• Local research has explored the issue	✓	✓	✓	✓	✓	✓	X	✓	✓	X	✓	✓	X	
• Local innovative or pilot projects have explored the issue	✓	X	X	X	✓	X	X	✓	X	✓	✓	✓	✓	
– Project has been evaluated	✓	---	---	---	?	---	---	X	---	?	X	✓ in progress	X	
• References cited: (Details in Appendix F & G)	More coming						---	X none cited	X none cited	X none available			X none available	
1 Agnes (99) Contesting rights over children: custody & guardianship in matrimonial disputes											•			
2 Bagshaw et al (06) Children & families in transition: towards a child-centred integrated model of practice	•													
3 Bajpai (05) Custody & guardianship of children in India											•			
4 Bala (06) Child representation in Alberta: responsibilities & role of counsel for the child in family proceedings		•												
5 Bala et al (07) Alienated children & parental separation: legal responses in Canada's family courts		•												
6 Bandhopadhyay (??) Family courts in Rajasthan											•			
7 Barwick et al (07) Family mediation: evaluation of pilot					•									
8 Bilson et al (05) Representing children's views & best interests in court: an international comparison						•								
9 CAFCASS (08) The children & family reporter: helping families to make arrangements for their children			•											
10 CAFCASS (09) Children in family conflict: how it is promoting the needs of children in family courts			•											
11 Campbell (04) The voice of the child in Australian family law: Whose right? Who's right?	•													
12 Carr (09) The voice of the child: the debate continues			•											
13 Chauhan (04) Interpretative analysis of judicial trends in deciding the custody in matrimonial disputes											•			
14 Choudhury (99) Custody of children: mother's role over father's monopoly in Indian family laws & trend of judicial attitude											•			
15 Cochrane (05) Judicial approaches to children's involvement in New Zealand family court processes					•									
16 Daly (09) ???				•										
17 Day et al (01) Social exclusion & welfare of the child			•											
18 DCA (06) Separate representation of children: consultation document			•											
19 DCSF (08) Parenting plans: putting your children first			•											
20 Diwan (89) Law of adoption, minority, guardianship & custody											•			
21 Douglas et al (06) Research into the operation of Rule 9.5 of the Family Proceedings Rules 1991			•											
22 Family Court of Australia (07) Finding a better way: a bold departure from the traditional common law approach to the conduct of legal proceedings	•													
23 Family Justice Council (08) Enhancing the participation of children & young people in family proceedings			•											
24 Fehlberg et al (08) Australian family law: the contemporary context	•													
25 Goldson (06) Hello, I'm a voice, let me talk: child-inclusive mediation in family separation					•									



✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
26 Goldson (09) Child-inclusion in dispute resolution in the New Zealand family court					•								
27 Gollop et al (00) Children's involvement in custody & access arrangements after parental separation					•								
28 Hecker (06) Distancing children from divorce												•	
29 HM Government (05) Parental separation: children's needs, parents' responsibilities: next steps			•										
30 IICRD (06) Through the eyes of young people: meaningful child participation in BC family court process		•											
31 IICRD (07) Hear the Child interviews: Kelowna pilot evaluation		•											
32 IICRD (08) An evaluation of the Hear the Child interview process: parent & child feedback		•											
33 IICRD (08) Ten tips for legal professionals: meaningful child participation in family justice processes		•											
34 India Development Gateway (09) Child Rights Handbook											•		
35 James et al (04) Turn up the volume: not hearing children in family proceedings			•										
36 Judicial Studies Board (06) Family bench handbook			•										
37 Mabon v Mabon (05) EWCA Civ 634			•										
38 Macdonald (09) The child's voice in private law: loud enough?			•										
39 Mantle et al (07) Whose wishes & feelings? Children's autonomy & parental influence in family court enquiries					•								
40 Mantle (07) Managing the tension between the child's agency & need for protection in family court enquiries					•								
41 May et al (04) Silence in court? Hearing children in residence & contact disputes			•										
42 McIntosh (03) Enduring conflict in parental separation: pathways of impact on child development	•												
43 McIntosh (06) The Children's Cases Pilot Project: an exploratory study of impacts on parenting capacity & child well-being	•												
44 McIntosh et al (07) Child inclusion as a principle & as evidence-based practice: applications to family law services & related sectors	•												
45 Morag (06) Judicial decisions after the international convention on rights of the child: indeed a new era?												•	
46 National Children's Office (04) Review of the Guardian Ad Litem service				•									
47 NYAS (06) Response to the DCA 'Separate Representation of Children' consultation			•										
48 O'Quigley (00) Listening to children's views: the findings & recommendations of recent research			•										
49 Parkinson et al (08) The voice of the child in parenting disputes	•												
50 Potter (08) Report on Private Law Program, Speech of Sir Mark Potter, President of Family Division			•										
51 President of Family Division (04) President's direction on representation of children in family proceedings			•										
52 President of Family Division (09) Direction on residence & contact orders: domestic violence & harm			•										
53 Schuz (08) The right of the child to participate: theory v. practice												•	
54 Smith et al (01) Children whose parents live apart: family & legal concepts					•								
55 Tapp et al (01) Agents or dependants: children & the family law system					•								
56 Tapp et al (01) Where should the focus be in the aftermath of parental separation: children's rights & interests, or parental responsibility/rights?					•								
57 Taylor et al (99) The role of counsel for the child: perspectives of children, young people & their lawyers					•								



✓ = Yes, X = No, • = Open response
? = Don't know --- = Not applicable

	(PREDOMINANTLY) COMMON FAMILY LAW SYSTEM									(PREDOMINANTLY) OTHER			
	AUS	CAN	ENG	IRE	NZ	NI	NIG	SCO	USA	CR	IND	ISR	JAP
58 Taylor et al (00) Children & young people's perspectives on the role of counsel for the child					•								
59 Taylor et al (00) Children's rights in New Zealand family law judgments					•								
60 Taylor et al (01) Childhood & family law: the rights & views of children					•								
61 Taylor (05) Care of children: families, dispute resolution & the family court					•								
62 Taylor (06) What do we know about involving children & young people in family law decision making?					•								
63 Taylor et al (07) Respecting children's participation in family law proceedings					•								
64 Timms (03) The silent majority: the position of children involved in the divorce & separation of their parents						•							
65 Timms et al (07) Your Shout too! Survey of views of children & young people involved in court proceedings when parents divorce or separate			•									•	
66 Timms (08) Children's views of decisions made by the court: policy & practice issues arising from the Your Shout Too! survey						•							
67 Trinder et al (06) Making contact happen or making it work? The process & outcomes of in-court conciliation			•										
68 Trinder et al (07) The longer-term outcomes of in-court conciliation			•										
69 Trinder (08) Conciliation, Private Law Programme & child wellbeing: two steps forward, one step back?			•										
70 Weatherall et al (08) Are we listening to children? An examination of the child's voice in social work reports to the court following parental separation disputes						•							
71 Williams (08) Perspective of the child in custody & access decisions: a best interests & rights of the child test		•											
72 Winter (06) The participation of 'looked after' children in public law proceedings						•							
• Copies of publications provided	To come	✓3	X	✓1	To come	✓5	---	X	X	X none available	X none available	X in Hebrew	X none available

Note: Data drawn from responses to questions 3.1a-d & 3.2a-e

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- Wierenga, A., Wood, A., University of Melbourne. Youth Research Centre & Foundation for Young Australians (2003) *Sharing a New Story: Young People in Decision-Making*, Parkville, Vic., Australian Youth Research Centre.



CHILDREN'S PARTICIPATION IN DECISION-MAKING FOLLOWING PARENTAL SEPARATION OR DIVORCE: COMPARATIVE INTERNATIONAL PERSPECTIVES

Introduction

The Childwatch International Study Group on Children and the Law has been established to explore how children's rights are respected in law across different countries. In 2005, the Study Group identified children's participation rights in family law systems as an internationally relevant area of children's rights requiring further critical examination. In Phase One of the project, a questionnaire on children's participation in family law proceedings was distributed to all Childwatch Key Institutions which resulted in a research report being produced in May 2007. A first meeting of the Study Group was then held in Prague in September 2008 where the second phase of the study was developed. This phase continues our work on children's participation in family law decision-making processes related to post-separation care arrangements. However, we are now particularly interested in the models of participation (formal and informal) in current practice around the world and the factors that facilitate or constrain children's participation rights. This includes an analysis of the mechanisms, structures and resources required to more effectively implement children's participation rights into practice.

2009 Questionnaire

This new questionnaire will enable deeper understanding and analysis of the current situation, internationally, regarding child participation in decision-making following parental divorce. The questionnaire focuses on the following issues:

- the current legal situation;
- changes in the implementation of existing legal arrangements;
- proposals for law reform;
- the scope and nature of the public debate; and
- successful models of participation developed in various countries.

We also seek to deepen our knowledge and understanding of factors assisting and/or preventing social change in this area. The Study Group will use the data and information gathered through this questionnaire for comparative analyses and as the basis for our presentation at the *Children's Rights at a Cross-Roads: A Global Conference on Research and Children's Rights* being held in Addis Ababa, Ethiopia, later this year. We hope to bring new partners on board at this conference and at the Childwatch Key Institutions Meeting which follows. In 2010 the Study Group will be looking to develop an empirical study related to children and the law – this will be built on the questionnaire data and other conceptual and literature review work we are currently undertaking. **All Childwatch KIs will be offered the opportunity to participate in this project.**



Given that the aim of the current phase of this project is to probe several legal systems in great detail, completing this questionnaire will require a time investment. We would be grateful if you could try to locate the requested information on this topic, ensuring that the picture about the situation in your country is as complete as possible. The inclusion of judicial decisions, reports, articles, or legislation on the subject would be greatly appreciated. Since children's participation in legal decision-making processes is now undergoing change in many countries, we would appreciate it if you could also provide detailed information on current proposals or new initiatives, and on the associated public and academic discussion.

You will find it helpful if you read through the entire questionnaire before answering it.

In this questionnaire **Private Family Law Proceedings** refers to disputes between parents/guardians concerning their children (i.e. guardianship, residence/custody, contact/ access/visitation following parental separation).

Thank you so much for your willingness to participate in this project. We look forward very much to receiving your completed questionnaire **by 31 July 2009**. This should be emailed to Professor Anne Graham – email: agraham@scu.edu.au

Kind regards

Nicola Taylor, Centre for Research on Children and Families, University of Otago, New Zealand

Anne Graham and Robyn Fitzgerald, Centre for Children and Young People, Southern Cross University, PO Box 157, Lismore, NSW 2480, Australia



CHILDWATCH INTERNATIONAL RESEARCH NETWORK CHILDREN AND THE LAW STUDY GROUP

INTERNATIONAL SURVEY ABOUT CHILDREN'S PARTICIPATION IN DECISION-MAKING FOLLOWING PARENTAL SEPARATION OR DIVORCE

All Key Institutions in the Childwatch International Research Network are invited to
complete and return this survey – by 31 July 2009

Return to: Professor Anne Graham at anne.graham@scu.edu.au
Centre for Children & Young People, Southern Cross University
PO Box 157, Lismore, NSW 2480, Australia

SURVEY OVERVIEW & ANSWERING INSTRUCTIONS

This section provides information you may find helpful while completing the survey. We suggest you familiarise yourself with it before starting the survey and return to it whenever you are unsure how to answer a question.

SURVEY OVERVIEW

ALL QUESTIONS: Relate to children's participation in decision-making following parental separation or divorce.

SECTION ONE: Asks about children's participation in adversarial private family law proceedings – through civil courts (including family courts) and through customary or religious courts.

SECTION TWO: Asks about children's participation in non-adversarial/conciliative private family law proceedings.

SECTION THREE: Asks about children's participation in family law disputes more generally.

NOTE: Private Family Law Proceedings refers to disputes between parents/guardians concerning their children (i.e. guardianship, residence/custody, contact/ access/visitation following parental separation)

ANSWERING INSTRUCTIONS

The questions in this survey require different amounts and types of answers. Please be guided by the space and any response options offered:

YES / NO OPTIONS & RATING SCALES: Simply **highlight**/ circle the answer which best describes the situation in your state/ country – or delete/ ~~strike out~~ the remaining option(s). Sometimes, there will also be a **NOT APPLICABLE** option – please select this option if the question is not relevant to you or your state/ country.

OPEN BOXES: Type or write in your answer ... the size of the box gives an idea of the amount of text expected in an average answer ... but you can expand the boxes (if completing electronically) or attach additional pages (if completing on paper).

ATTACHMENTS: Sometimes you will be asked to attach further information.
Please use the **YES / NO** options to indicate if you are able to do this.



SECTION ONE

CHILD PARTICIPATION IN ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

1.1 ADJUDICATION OF ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- a) Which courts are authorized to deal with private family disputes in your state/country?

- b) Is there a specialized family court system? YES NO

- c) Are religious or customary courts authorized to adjudicate in private family law disputes? YES NO

- d) What laws apply to family disputes?

- e) Do the same laws apply in all courts? YES NO

1.2 LEGISLATIVE PROVISIONS FOR ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- a) Are there legislative provisions regarding the child's right to be heard in private family law proceedings? YES NO

- b) Is the child's right to participate limited to children of a certain age/maturity? YES NO

- c) Does the law provide for child participation as a right? YES NO

- d) Have legislative criteria been established for determining the welfare and best interests of the child? YES NO

- e) **IF YES at d)** Is the child's wishes or views included within these criteria? YES NO Not Applicable

- f) Are there other legislative provisions relating to the child's wishes or views and/or the weight to be given to them? YES NO

- g) **IF YES at f)**
Please specify these provisions.



1.3 COURT DECISIONS REGARDING ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- | | | |
|---|-----|----|
| a) Has the child's right to be heard in private family law proceedings been recognized by the courts? | YES | NO |
| b) Have the courts referred to the UNCRC in their decisions? | YES | NO |
| c) Have the courts established age/maturity criteria regarding the child's right to be heard? | YES | NO |
| d) Has there been a change in the courts rhetoric/policy on the matter since 2000? | YES | NO |

- e) Please cite or provide full quotes of court decisions relating to children's right to participate, preferably of the highest courts dealing with family law matters in your state/ country.

- | | | |
|--|-----|----|
| f) Have the courts established criteria regarding the weight that is to be given to children's wishes/views? | YES | NO |
|--|-----|----|

- g) **IF YES at f)** Please specify these criteria.

- h) **IF YES at f)** Please identify one or two examples of cases incorporating courts' discussions of the weight to be given to the child's wishes/views and of the court's decision.

- | | | |
|---|-----|----|
| i) Is it your impression that there has been a change in the weight that courts have given to children's wishes/views since 2000? | YES | NO |
|---|-----|----|



1.4 WAYS CHILDREN ARE HEARD IN ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- a) Is parental consent required for child participation? YES NO
- b) At what stage during the court proceedings are children invited to participate?
- c) Who is responsible for inviting children to participate in the court proceedings?
- d) Can children attend the actual hearing? YES NO
- e) Do children receive information and explanations about the court's decision? YES NO
- f) **IF YES at e)** Who is responsible for explaining the decision to the child?
- g) Has the confidentiality of children's views in family courts been addressed by the courts or in academic writing? YES NO
- h) **IF YES at g)** Please specify how it has been addressed.

Where children are heard through a representative:

- i) What is the representative's profession?
- j) How is his/her role defined?
- k) If a child wishes to be heard directly by the court, does he/she have a right to do so? YES NO
- l) Are the child's views confidential? YES NO
- m) How are their views recorded?
- n) Do the child's parents have access to the full record of their views? YES NO
- o) **IF NO at n)** Is the representative obligated to provide them with information about the child's views? YES NO Not Applicable

Where children are heard directly by the courts:

- p) Who conducts this?
- q) Who else might be present during the court's interview with the child?
- r) Are the child's views confidential? YES NO
- s) How is the meeting recorded?
- t) Do the child's parents have access to the full record? YES NO
- u) **IF NO at t)** Is the court obligated to provide them with information about the child's views? YES NO Not Applicable



1.5 LAWYER FOR THE CHILD IN ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- a) Can a lawyer be appointed to represent the child in family law disputes? YES NO
- b) *IF YES at a)* What are the criteria for appointing a lawyer?
- c) *IF YES at a)* Does the lawyer have a defined role in facilitating the child's participation? YES NO
- d) *IF YES at a)* Is there a clear duty for the lawyer to meet with the child? YES NO

1.6 CHILD PARTICIPATION IN ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- a) What percentage of private family law disputes are dealt with in adversarial proceedings? %
- b) How often do children participate in family law disputes? NEVER OCCASIONALLY
SOMETIMES OFTEN ALWAYS
- c) How often do children meet directly with the judge? NEVER OCCASIONALLY
SOMETIMES OFTEN ALWAYS
- e) Has there been a change in the number of children who participate in family law disputes since 2000? YES NO
- f) Has there been a change in the number of children who meet with the judge in family law disputes since 2000? YES NO
- g) *IF YES at e) OR f)* Please specify the basis for your impressions on this matter.
- h) Are there significant differences between judges on this matter? YES NO
- i) Are children of different social/cultural groups given the same opportunity to participate in family court proceedings? YES NO

1.7 TRAINING REGARDING CHILD PARTICIPATION IN ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- a) Has any special training been offered to judges and other professionals regarding child participation in family law proceedings during the last five years? YES NO
- b) *IF YES at a)* Please specify the content of this training.
- a) *IF YES at a)* Please enclose a copy of the training schedule, if possible. YES NO Not Applicable



1.8 RELIGIOUS COURTS IN ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- a) Have any special provisions been established regarding child participation in religious courts? YES NO Not Applicable
- b) Please give a general analysis of the extent to which children participate in religious courts on matters relating to family disputes.
- c) Have any special provisions been established regarding child participation in customary law and/or customary courts? YES NO Not Applicable

1.9 SUPPORT SERVICES IN ADVERSARIAL PRIVATE FAMILY LAW PROCEEDINGS

- a) Are any support services available to children whose parents are engaged in family law/ court disputes over them? YES NO
- b) **IF YES at a)** Please describe these support services.

1.10 CONCLUSIONS ABOUT CHILD PARTICIPATION IN THE ADVERSARIAL LEGAL SYSTEM

- a) What are the main **advantages** of your legal system regarding child participation in family law proceedings?
- b) What are the main **disadvantages** of your legal system regarding child participation in family law proceedings?
- c) Is there a **process of change** in your legal system towards greater recognition of children's participation rights in legal proceedings relating to family law? YES NO
- d) What are the main factors **enhancing** recognition of children's participation rights in family law proceedings in your state/ country?
- e) What are the major **barriers** to children's participation in family law proceedings in your state/ country?



SECTION TWO

CHILD PARTICIPATION IN NON-ADVERSARIAL/CONCILIATIVE PRIVATE FAMILY LAW PROCEEDINGS

2.1 ALTERNATIVE DISPUTE RESOLUTION REGARDING FAMILY LAW PROCEEDINGS

a) What percentage of post-divorce parenting disputes is dealt with in non-adversarial proceedings?	%		
b) What are the main Alternative Dispute Resolution (ADR) procedures for resolving private family law disputes (eg: counselling, mediation, collaborative law processes, etc?)			
c) Is there a requirement established in the law for parents to resolve family law disputes through ADR before bringing the case to court?	YES	NO	
d) Do children participate in ADR proceedings?	YES	NO	
e) Do children participate in parental agreements and/ or their approval by the courts?	YES	NO	
f) Are there any regulations or legislation enabling child participation in ADR regarding family law disputes?	YES	NO	
g) Are there any customary/indigenous non-adversarial proceedings in your state/ country that are applied in family law disputes?	YES	NO	
h) IF YES at g) Are children given an opportunity to participate in such proceedings?	YES	NO	Not Applicable
i) IF YES at h) What are the advantages of child participation in these proceedings?			
j) IF YES at h) What are the disadvantages of child participation in these proceedings?			



SECTION THREE

CHILD PARTICIPATION IN FAMILY LAW DISPUTES

3.1 ACADEMIC RESEARCH

- a) Has the issue of child participation in family law proceedings been the focus of academic research in your state / country? YES NO

- b) **IF YES at a)**
Please describe in detail the main findings.

- c) **IF YES at a)**
Please provide the full reference(s) for the main research studies/ commentaries?

- d) **IF YES at a)** Please enclose a copy of the publication(s), if possible. YES NO Not Applicable



3.2 INNOVATIVE PROJECTS REGARDING CHILD PARTICIPATION IN FAMILY COURT AND ADR PROCEEDINGS REGARDING FAMILY LAW DISPUTES

- a) Have any innovative or pilot projects been conducted in your state/ country on child participation in adversarial and non-adversarial family law proceedings? **YES** **NO**

- b) **IF YES at a)** Please describe in detail the innovation or pilot project, with reference to questions 1.2 – 1.5 above .

- c) **IF YES at a)** Please provide the full reference(s) for these projects?

- d) **IF YES at a)** Please enclose a copy of any available written information about the pilot project, if possible. **YES** **NO** **Not Applicable**
- e) **IF YES at a)** Has an evaluation of the project been conducted? **YES** **NO** **Not Applicable**



3.3 LEGISLATIVE AND POLICY REFORM

a) Have any governmental, professional or NGO committees been appointed to discuss law and policy relating to child participation in family law matters? **YES** **NO**

b) Have any law proposals been drafted and/or handed down by the government or members of the parliament regarding child participation in civil/ family/ religious/ customary courts? **YES** **NO**

c) What are the main factors enhancing recognition of children's participation rights in family law proceedings in your state/ country?

--

d) Who are the main players who have supported law reform in this area?

--

e) Who are the main players who have opposed law reform in this area?

--

f) What are the main arguments raised by those opposing reform in this area?

--

3.4 GENERAL COMMENTS

a) Would you like to make any other comment about child participation in family law disputes in your state/ country?

--

b) Would you like to make any other comment about the work of the Childwatch Children and the Law Study Group?

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3.5 ABOUT YOU AND YOUR KEY INSTITUTION

a) Your name:

b) Your job title:

c) Your main duties:

d) Your Childwatch Key Institution:

e) Your email address:

f) Are you or your Key Institution interested in joining the Children and the Law Study Group (if you are not already members)?

YES NO

g) Will you, or a representative from your Key Institution, be attending the *Children's Rights at a Cross-Roads: A Global Conference on Research and Children's Rights* being held in Addis Ababa, Ethiopia from 30 Nov – 2 Dec 2009; followed by the triennial Childwatch Key Institutions Meeting?

YES NO

h) **IF YES at g)** Would you, or your KI representative, be interested in joining a meeting of the Children and the Law Study Group members, during the conference?

YES NO

Thank you so much for your time and your important contribution to the work of the Childwatch Study Group on Children and the Law.

We will collate your responses and may be back in touch with you by email to clarify any issues or seek further elaboration. We intend to present the survey findings from all participating Key Institutions at the conference in Ethiopia and will be pleased to provide you with a copy of the research report.



APPENDIX B: ALL CHILDWATCH INTERNATIONAL ASSOCIATED INSTITUTIONS

(PREDOMINANTLY) COMMON LAW SYSTEMS	
AUSTRALIA	Centre for Children & Young People
	The Social Justice & Social Change Research Center
CANADA	The Consultative Group on Early Childhood Care & Development
	Canadian Institute of Child Health
	International Institute for Child Rights & Development
ENGLAND	Centre for Family Research
	Programme on International Rights of the Child
	The School of Social Work & Psychosocial Sciences
HONG KONG	Centre for Child Development
IRELAND	Children's Research Centre
JAMAICA	Caribbean Child Development Centre
KENYA	Department of Educational Psychology
NEW ZEALAND	Centre for Research on Children & Families
NIGERIA	Partnership for Justice
NORTHERN IRELAND	Institute of Child Care Research
SCOTLAND	UHI Centre for Rural Childhood
SOUTH AFRICA	Child & Youth Research & Training Programme
USA	Chapin Hall at the University of Chicago
	The Children's Environments Research Group
	Family Life Development Center
	Institute on Family & Neighborhood Life

(PREDOMINANTLY) CIVIL LAW SYSTEMS	
AUSTRIA	Childhood & Youth Programme
BRAZIL	International Center for Research & Policy on Childhood
CZECH REPUBLIC	Charles University
CHILE	Centre for Research & Services for Children & Women
CHINA	Youth & Children Research Center
COLOMBIA	International Center for Education & Human Development
COSTA RICA	Fundación PANIAMOR
ISRAEL	Center for Children & Youth
ITALY	UNICEF Innocenti Research Centre
JAPAN	Child Research Net
MEXICO	Children's Documentation Centre
NORWAY	Norwegian Centre for Child Research
	Norwegian Social Research
PALESTINE	Child Research Unit
SENEGAL	Council for the Development of Social Science Research in Africa
SLOVAKIA	Institute for Labour & Family Research
SPAIN	Catalan Interdisciplinary Network on Children's Rights & Children's Quality of Life
THAILAND	National Institute for Child & Family Development
URUGUAY	Instituto Interamericano del Niño
VENEZUELA	Centre for Child & Family Research

(PREDOMINANTLY) RELIGIOUS/ CUSTOMARY LAW SYSTEMS	
INDIA	Tata Institute of Social Sciences
JORDAN	Information & Research Center, King Hussein Foundation
SRI LANKA	National Education Research & Evaluation Centre



APPENDIX C: LAWS APPLYING TO PRIVATE FAMILY DISPUTES

DETAILED RESPONSES TO QUESTION 1.1D		
AUSTRALIA	<ul style="list-style-type: none"> Family Law Act, 1975 (Cth) Marriage Act 1961 (Cth) Property (Relationships) Act 1984 (Cth) Child Support (Assessment) Act 1989 (Cth) Various state laws regarding care & protection. For example, in NSW, the Children & Young Persons (Care & Protection) Act 1998 	
CANADA	<ul style="list-style-type: none"> Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 (Canada) Family Law Act, S.A. 2003, c. F-4.5 (Alberta) Family Maintenance Act, C.C.S.M. c. F20 (Manitoba) Civil Code of Quebec, C.c.Q. CHAPTER II (Quebec) Children's Act, R.S.Y. 2002, c. 31 (Yukon Territory) Children's Law Act, R.S.N.L. 1990, c. C-13 (Newfoundland & Labrador) Children's Law Act, S.N.W.T. 1972, c. 14 (Northwest Territories & Nunavut Territory) Maintenance & Custody Act, R.S.N.S. 1989, c. 160 (Nova Scotia) Family Relations Act, RSBC 1996, Chap 128 (British Columbia) Family Services Act, S.N.B. 1980, c. F-2.2 (New Brunswick) Children's Law Reform Act, R.S.O. 1990, Chap C. 12 (Ontario) Family Law Act, RSPEI. 1988, c. F-2.1 (Prince Edward Island) Children's Law Act, 1997, S.S. 1997, c. C-8.2 (Saskatchewan) 	
COSTA RICA	<ul style="list-style-type: none"> Code of Family (1973) Code of Childhood & Adolescence (1998) Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador) (1998) Law 7688 on Identification Card for Costa Ricans above twelve & under eighteen years old Law 8032 on Inter-American Convention on International Return of Children Law of Alimony (1996) Law Against Domestic Violence (1996) Law of Responsible Paternity (2001) 	
ENGLAND	<p>Main Legislation:</p> <ul style="list-style-type: none"> Children Act, 1989 <p>This has been considerably amended over the years, but the core provisions for private & public law cases are unchanged. The main provisions for private law are known as 'section 8' orders – residence orders (where a child shall live); contact orders (with whom they shall have contact, & under what conditions); specific issues orders & prohibited steps orders. There are also special guardianship orders (usually used to give legal security to kinship care placements). Public law orders include care orders & supervision orders. Public law cases may end with private law orders. Most adversarial family law proceedings are for residence orders (approx 35,000 applications in 2007) & contact orders (approx 39,000 applications in 2007).</p>	
INDIA	<p>The Procedural laws are:</p> <ul style="list-style-type: none"> Family Courts Act, 1984 Code of Civil Procedure Code of Criminal Procedure Indian Evidence Act 	<p>The Substantive laws are:</p> <ul style="list-style-type: none"> Divorce Act, 1869 Special Marriage Act, 1954 Hindu Marriage Act, 1955 Guardians & Wards Act, 1890 Parsi Marriage & Divorce Act, 1936 Indian Christian Marriage Act, 1872 Hindu Minority & Guardianship Act, 1956 Hindu Adoption & Maintenance Act, 1956 Hindu Widows Re-marriage Act, 1856 Dissolution of Muslim Marriages Act, 1939 Muslim Personal Law (Shari'at) Act, 1937 Prohibition of Child Marriage Act, 2006 The Muslim Women (Protection of Rights on Divorce) Act, 1986
IRELAND	<ul style="list-style-type: none"> Guardianship of Infants Act 1964 Child Care Act 1991 Domestic Violence Act, 1996 Children Act 1997 Children Act 2001 	
ISRAEL	<ul style="list-style-type: none"> Capacity & Guardianship Code (1965) 	<p>According to section 25, child custody after divorce should be determined according to the "best interests of the child" but the application & interpretation of this principle often differs between religious & secular courts and, for children under six, the tender years presumption applies.</p>
JAPAN	<ul style="list-style-type: none"> The Civil Code 	<p>Which states that judges who make decisions on private family disputes with regard to the parent authority or the custody of the child must take into consideration of the best interests & welfare of the child.</p>
NEW ZEALAND	<p>Key statute</p> <ul style="list-style-type: none"> Care of Children Act 2004 	<p>Other statutes which can play a role in private family law disputes include:</p> <ul style="list-style-type: none"> Property (Relationships) Act 1976 Child Support Act 1991 Domestic Violence Act 1995 Adoption Act 1955
NIGERIA	<ul style="list-style-type: none"> The Child Rights Act The Constitution, if dispute touches on discrimination or other fundamental rights Marriage Act Matrimonial Causes Act 	
NORTHERN IRELAND	<ul style="list-style-type: none"> Children (NI) Order 1995 Human Rights Act 1998 	
SCOTLAND	<p>Scotland, as opposed to much of Europe, has a hybrid legal system influence by Roman Dutch civil law & the common law system, which is derived from English law. The common law is based upon what is termed "legal induction" & is created & shaped by individual court decisions on specific circumstances. These decisions create a precedent which is generally followed. This is in contrast to a civil law system, where principles were derived from scholars in a process of "legal deduction" & where general principles were decided & followed. This system was originally based upon Roman law & as previously mentioned, is the legal foundation of much of continental Europe.</p> <ul style="list-style-type: none"> Children (Scotland) Act 1995 Family Law (Scotland) Act 2006 Cases from the common law 	
USA	<ul style="list-style-type: none"> South Carolina Code 	



APPENDIX D: COURT DECISIONS RELATING TO CHILDREN'S RIGHT TO PARTICIPATE

DETAILED RESPONSES TO QUESTION 1.3E, WHERE PROVIDED

AUSTRALIA	<ul style="list-style-type: none"> While courts must take into account children's views, they do not refer to a child's right to participate as such. The Full Court of the Family Court has referred to the principle that children's views be taken into account in determining their best interests in <i>H v W</i> (1995) FLC 92-598 where Baker J states: "a child's wishes must not only be considered, but must be shown to have been considered, in the reasons for the judgement of the trial judge. Furthermore, if the trial judge decides to reject the wishes of a child, then clear & cogent reasons for such a rejection must be given particularly if, as in this case, the separate representative submits that the Court should give effect to such wishes" at 81, 967.
CANADA	<ul style="list-style-type: none"> It appears there is scant, if any, case law that expressly states it is a child's right to participate. However, to be certain an exhaustive research undertaking of all Canadian jurisdictions would be required – something we are not resourced to do. <p>Supreme Court of Canada – some relevant points:</p> <ul style="list-style-type: none"> The focus is on the best interests of the child, not the interests & rights of the parents. More particularly the judge should consider, inter alia: (a) the existing custody arrangement & relationship between the child & the custodial parent; (b) the existing access arrangement & the relationship between the child & the access parent; (c) the desirability of maximizing contact between the child & both parents; (d) the views of the child; (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child; (f) disruption to the child of a change in custody; (g) disruption to the child consequent on removal from family, schools, & the community he or she has come to know." <i>Gordon v. Goertz</i>, (1996) 2 S.C.R. 271996 at para 49 per McLachlin J. "Expert evidence, while helpful in some cases, is not routinely required to establish the best interests of the child. That determination is normally possible from the evidence of the parties themselves and, in some cases, the testimony of the children involved" <i>Young v Young</i>, (1993) 4 S.C.R. 3; (1993) S.C.J. No. 112 (S.C.C.) at para 247 per McLaughlin J. <p>British Columbia Supreme Court, as an example of one Canadian jurisdiction – some relevant points:</p> <ul style="list-style-type: none"> The possible purposes of a judge's interview (and parenthetically I would say of a "Views of the Child" report) were identified by Martinson J. in <i>L.E.G. v. A.G.</i>, 2002 BCSC 1455, at para. 15, as: ..obtaining the wishes of children; making sure children have a say in decisions affecting their lives; & providing the judge with information about the child. With respect to assisting the court to learn about the children, again I am of the view that there is little to be gained through either a judge's interview or a "Views of the Child" report. There will be a significant body of evidence in this case which will permit me to learn about the children. However, there is potentially something to be gained in this case by giving the children a say or a voice. As Martinson J. said in <i>L.E.G. v. A.G.</i>, supra, at para. 20: "There are indications in empirical studies that not listening to what children have to say during divorce processes has had unintended negative effects. As a result of their exclusion, children complain about feeling isolated & lonely during the divorce process & many older children express anger & frustration about being left out. There is also an indication that perceived control over decisions is related to positive mental health: See J.B. Kelly, "Psychological & Legal Interventions for Parents & Children in Custody & Access Disputes: Current Research & Practice", <i>The Virginia Journal of Social Policy & the Law</i>, in press. See also J. William, J. (Nova Scotia Supreme Court), "'If Wishes Were Horses, Then Beggars Would Ride' - Child Preferences & Custody/Access Proceedings", cited above. In this case, there is ample evidence that the children have expressed concern & frustration about their perceived inability to make themselves heard. Consequently, this is one purpose which could potentially be served in this case by ordering either a judicial interview or a "Views of the Child" report." <i>Gibb v. Gibb</i>, 2008 BCSC 966, paras. 3, 7, 8, 9 per Beames J. "By way of overview, I have concluded that the court's discretion to interview a child, even in the absence of consent, is based on its <i>parens patriae</i> jurisdiction (an inherent power to act in the best interests of children), & its statutory duty to act in the best interests of children: s. 24 of the Family Relations Act; s. 16(8) of the Divorce Act, <i>Young v. Young</i>, (1993) 4 S.C.R. 3; & <i>E. (Mrs.) v. Eve</i>, (1986) 2 S.C.R. 388. A judge must consider, on a case by case basis, whether conducting such an interview is in the best interests of the child in question." <i>L.E.G. v. A.G.</i>, 2002 BCSC 1455, para. 4 per Martinson J. "Vanessa's views on the proposed move are not disclosed in the affidavit material. The preference of a child of nine may be given some weight but it is not determinative. It is a matter of discretion as to whether the court takes the views of any child into account. The court is not bound by the preference of a child where it appears the best interest of the child lies in granting custody elsewhere. See <i>Gullett v. Gullett</i>, 2001 BCSC 1207 (B.C. S.C. (In Chambers)); <i>Sam v. August</i>, (1998) B.C.J. No. 2879 (B.C. S.C.) ; <i>Alexander v. Alexander</i> (1986), 3 R.F.L. (3d) 408 (B.C. C.A.) & <i>Jespersen v. Jespersen</i> (1985), 48 R.F.L. (2d) 193 (B.C. C.A.). I find that even if Vanessa expressed a view that she would prefer to reside with her father, that view would not be determinative in light of the fact she has not resided with him continuously for any extended period since the parties separated, but only during holidays & weekends, & therefore Vanessa has no appreciation of what the home routine with her father would be if her primary residence was with him." <i>Dove v. Dove</i>, 2002 Carswell BC 601 (B.C.S.C.), paras 42-42 per Edwards J. "In my opinion, the views of the child are not relevant in view of Liam's age (5 years old)." <i>Scheiber v. Phyll</i>, 2001 BCSC 565, (2001), 27 R.F.L. (5th) 182 at para. 21



DETAILED RESPONSES TO QUESTION 1.3E, WHERE PROVIDED

ENGLAND	<ul style="list-style-type: none"> Courts are increasingly mindful of the importance of hearing children's views. Key case in private law family proceedings is <i>Mabon v Mabon</i> (2005) EWCA Civ 634. Available on line: http://www.familylawweek.co.uk/site.aspx?i=ed393 There is a practice direction from the President of the Family Division (the top judge for child & family cases), April 2004. Available on-line: http://www.hmcourts-service.gov.uk/cms/949.htm
INDIA	<ul style="list-style-type: none"> <i>Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka</i> AIR 1982 SC 1276, paras 30, 31, 32, as per A.N.Sen & R.S. Pathak, JJ., "We may, however, point out that there cannot be any manner of doubt as to the Court's power of interviewing any minor for ascertaining the wishes of the minor, if the Court considers it so necessary for its own satisfaction in dealing with the question relating to the custody of the minor. In the facts & circumstances of this case we are however, not inclined to interview the minor daughter, as we are satisfied in the present case that the minor is not fit to form an intelligent preference which may be taken into consideration in deciding her welfare. Torn between her love for both her parents & the acrimonious dispute between them resulting in the minor being dragged from court to court, we can well appreciate that the sensitive mind of the minor girl is bound to be sadly affected. Though the girl is quite bright & intelligent as recorded by the learned Judges of the Bombay High Court in their orders after their interviews with the girl who is of a tender age & is placed in a very delicate & embarrassing situation because of the unfortunate relationship & litigation between her parents for both of whom she has great deal of affection, she is not in a position to express any intelligent preference which will be conducive to her interest & welfare. Mature thinking is indeed necessary in such a situation to decide as to what will ensure to her benefit & welfare. Any child who is placed in such an unfortunate position, can hardly have the capacity to express an intelligent preference which may require the Court's consideration to decide what should be the course to be adopted for the child's welfare. The letters addressed by the daughter to her mother from Panchgani & also a letter addressed by her to her aunt (father's sister) also go to show that the minor cannot understand her own mind properly & cannot form any firm desire. We feel that sending for the minor & interviewing her in the present case will not only not serve any useful purpose but will have the effect of creating further depression & demoralisation in her mind. We are, therefore, unable to accept the contention of Mr. Bhandare that there is any duty or obligation on the part of the Court to interview the minor for ascertaining the wishes of the minor before deciding the question of her custody, & that we should send for the minor in the present case & interview her to ascertain her wishes before we proceed to decide the question of her custody." <i>Nil Ratan Kundu v. Abhijit Kundu</i> (2008) 9 SCC 413, as per C.K. Thakker & D.K. Jain JJ., "In selecting proper guardian of a minor, the paramount consideration should be the welfare & well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction & is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development & favourable surroundings. But over & above physical comforts, moral & ethical values cannot be ignored. They are equally, or even more important, essential & indispensable considerations. If the minor is old enough to form an intelligent preference or judgement, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor." As per Dr. A. R. Lakshmanan & Altamas Kabir in <i>Lekha v. P. Anil Kumar</i> (2006) 13 SCC 555, paras 12, 13 & 23 that "the High Court, before setting aside the finding of the court below, ought to have interviewed the child before coming to a conclusion that for the welfare of the child the custody should be given to the father. The High Court committed grave error in not ascertaining the wishes of the minor, which has consistently been held by the courts to be of relevance in deciding grant of custody of minor children." <i>Mausami Moitra Ganguli v. Jayant Ganguli</i> AIR 2008 SC 2262, as per C.K. Thakker & D.K. Jain JJ., the judges stated that during the course of the hearing, the judges had not yet interviewed the child, but had suggested that it would be better if the child could stay with his mother for sometime. However, upon hearing the judges, the child started crying & whining & showed reluctance to go with the mother. On watching his reaction, the judges dropped the proposal. The judges concluded that the paramount consideration of the welfare of the child, & the child's welfare will be best served if he continues to be in the custody of the father with visitation rights to the mother. (para 17).



DETAILED RESPONSES TO QUESTION 1.3e, WHERE PROVIDED

IRELAND	<ul style="list-style-type: none"> High Court case of <i>FN & EB v CO, HO & EK</i> in which Finlay-Geoghegan J. found that the children aged 13 & 14 respectively were of the age & had the maturity to have their wishes taken into account in a custody dispute. There was extensive consultation with the children involved in this case. The court ordered an assessment of each of the girls under s. 47 of the Family Law Act, 1995... The judge was satisfied that their views were independently formed. In particular, in relation to the older child, the judge stated that: "I am satisfied on the evidence that to now move E against her wishes & at this particular point in her development would as a matter of probability cause significant damage to her educational & social development & in that sense to her welfare." The judge was of the opinion that, although the father was a fit person to have custody, it would be detrimental to the welfare the girls if they were to be required to move to live with their father in England against their wishes. In this case the views of the children appear to be the main factor in the decision-making process of the judge, rather than just one of many factors, as in the previous case of <i>M.W.P. v T.K.P.</i> Finlay-Geoghegan J. adopted a similar approach in <i>RW v CC</i>. This case concerned two girls aged 13 ("A.") & 14 ("N.") who had resided with their maternal aunt since the death of their mother. The case in the Irish High Court concerned the fact that the girls were unhappy with the accommodation arrangements for the visits with their father in London. The judge concluded that there had been a change of circumstances in respect of each of the girls, who no longer wished to travel to London to see their father. Given these changes in circumstances, she determined that it was no longer in accordance with the welfare of either of the girls that the order of the English court be enforced. Finlay-Geoghegan J. did state that it was desirable that they continue to be encouraged to have contact with their father, but that to force the children to see him would be damaging to their welfare: "It is a matter of common sense that to force either of the girls (and in particular A who is now 14½) to travel to London to see the applicant in such circumstances against their express wishes & in light of the reasons for their objections would, as a matter of high probability, be damaging to their welfare & manifestly no longer in accordance with their welfare." The judge felt that it was so obvious that it would be damaging to the girls to go against their expressed wishes that it was "common sense". She also uses such language throughout the judgment as "the girls' right to choose where they should stay whilst in London," indicating a high level regard for the rights of these children to influence their own situation in her approach to the judgment. The cases of <i>F.N., E. B. v C. O., H.O., E. K. & R.W. v C.C.</i>, both from 2004, indicate a child-rights oriented approach from Finlay-Geoghegan J. However the approach of this judge has not been replicated by other judges & consulting children simply does not happen in the Family Law courts.
ISRAEL	<ul style="list-style-type: none"> The children's right to participation is clearly recognized, as evident in a series of decisions issued by the Israeli Supreme Court. The rhetoric of the Supreme Court has also changed in recent years in two directions. One is the recognition of the child's right to an independent hearing on issues of custody. Thus, for instance, in Civil Further Hearing 7015/93, <i>Doe v. Doe</i>, Justice Dorner states: "From a perception of the child as an independent entity follows a recognition of the child's right to have his wishes & desires taken into account as far as possible. This view is acknowledged in section 12 of the International Convention of the Rights of the Child." Justice Procaccia states: "The right to be heard is one granted to children & parents as part of the principles of natural justice" (Leave for Civil Appeal 3009/02, <i>Doe v. Doe</i>). Judge Rotlevi, of the Tel Aviv District Court, states: "The central idea of the Convention is that respect is due to the child by hearing his view, even if it is ultimately not accepted, & that recognition of the minor's right to a hearing is an independent right, which he may enforce, & not a right ensuing from the agreement of others, even if they are his parents" (CA Tel Aviv-Jaffa 90/97, <i>Moran v. Feldman</i>). The other direction of change touches on the pattern of minors' hearings. Unlike the previous case-law, emphasis is now placed on the court hearing children directly (see <i>Moran v. Feldman</i>). On this issue, see Justice Arbel's statement in ## 27/06, <i>Doe v. Doe</i>: "The minor's right to participate, as expressed in section 12 of the International Convention of the Rights of the Child, conveys a perception of the child as autonomous & as an independent bearer of rights, with an independent will... I hold that the court's direct & independent impression is important in order to assess the authenticity of his refusal to return to Belgium & of his stance vis-à-vis the defendant & the petitioner." # 6696/06- <i>Doe v. Doe & others</i>. ## 5194, (3) 2006. Justice Eliyakim Rubinstein: "It is reasonable that within the bounds of proper judicial policy, as the girl grows up & approaches the age of twelve, & should significant judicial decisions become necessary, the court should be given the possibility of obtaining direct impression of her testimony."
NEW ZEALAND	<ul style="list-style-type: none"> See information on The Child's Views from pages 317-326 of Henaghan, R.M. & Atkin, B. (Eds), (2007). <i>Family Law Policy in New Zealand</i>(3rd edition). Wellington: LexisNexis. Will bring to 2010 meeting
SCOTLAND	<ul style="list-style-type: none"> Please see http://www.scotland.gov.uk/Publications/2002/09/14905/6743 for a list of cases concerning the issue of children's interests & their impact upon litigation.



APPENDIX E: COURT DISCUSSIONS ABOUT THE WEIGHT TO BE GIVEN TO CHILD VIEWS

DETAILED RESPONSES TO QUESTION 1.3H, WHERE PROVIDED

AUSTRALIA	<ul style="list-style-type: none"> In Russell & Russell & Anor (2009) FamCA 28 (22 January 2009), Ryan J, has discussed the weight to be afforded to the child's views: By s 60CC(3)(a) where a child expresses views about his or her welfare, the child's views must be considered together with any factors the Court feels are relevant to the weight given to the child's views. Previously the Family Law Act referred to a child's wishes. The new terminology appears to be a response to concerns expressed by academics & others that the word "wishes" potentially trivialises a child's opinion on matters concerning the child's welfare. In some quarters it was perceived as having a narrow rather than broad ambit. The new terminology does not change the substantive law concerning the manner in which the Court should treat a child's views. The Full Court explained that the correct approach to a child's wishes in R v R Children's Wishes (2000) FamCA 43; (2000) FLC 93-000. Their Honours cited with approval the following statement of principle drawn from the joint judgment of Fogarty & Kay JJ in H v W (1995) FamCA 30; (1995) FLC 92-598: "The wishes of children are important & proper & realistic weight should be attached to any wishes expressed by children." Once a child's views are established, the next part of the exercise requires analysis of the views, including any factors such as the child's maturity or level of understanding. This is followed by a balancing exercise measured against other factors relevant to the child's welfare.
CANADA	<ul style="list-style-type: none"> Dobranski v. Dobranski, 2008 CanLII 70848, (2008) O.J. No. 5451, (On. S.C.)(QL), per MR. JUSTICE FLYNN: The Appellant argued that the motions judge placed too much weight on the perceived wishes of the child, instead of the best interests of the child, in spite of allegations of alienation. But a plain reading of the motions judge's Reasons demonstrates that while Alyssa's views did play an important role in his decisions, he considered several other factors when deciding that Alyssa's primary residence should be with her father so as to best meet her needs. The motions judge specifically noted that the constant changing between her parents' homes heightened Alyssa's stress & anxiety & that her best interests required that she have one permanent, stable residence. The motions judge also noted that Alyssa's close & loving relationship with her brother, Nicolas, was an important factor, this despite allegations by the Appellant of the Respondent's success in alienating Nicolas from his mother. In essence, it was argued before me by the Appellant that Nicolas' manifest alienation from his mother is proof in itself of the likely outcome of Alyssa's case & is one strong reason for putting less weight on her views & preferences. While the Appellant complains that the motions judge erred by not considering the evidence of alienation & manipulation by the Respondent & the undermining effect of that conduct on the wishes of the child Alyssa & her relationship with her mother, I agree with counsel for the child that the motions judge's Reasons disclose that the motions judge not only considered that evidence, but used it as one of the bases for his decision to maintain the joint custody regime. The motions judge quite properly found that both parents had acted reprehensibly from time to time & he was obviously disturbed by the Respondent's "litigation tactics", his "manufacturing of the July 7, 2006 incident" & his negative comments to Alyssa about the Applicant. The Appellant conceded that Alyssa is a fairly normal 11½ year old girl, engaged in age-appropriate conduct & things, who has an artistic bent & who has developed & matured in spite of the position into which she has been placed by her feuding parents. She is articulate & has a strong willed personality. The Appellant stresses that the motions judge gave improper weight to some of the factors, specifically that he put too much weight on the views & preferences of the child. Of course, the determination of these matters is always a question of balance. The weight to be given to the views & preferences of any child is to be found on a continuum between almost "no weight" & "considerable weight" depending on a number of factors: (i) the age & maturity of the child; (ii) the consistency of the child's views & preferences; (iii) the context in which the child's views & preferences were articulated; & (iv) the strength of the child's views. (Not only does the fresh evidence show Alyssa to be an articulate & strong willed 11½ year old, but I agree with counsel for the child when she argues that Alyssa is on the maturity "cusp" in terms of making her own decision to "vote with her feet". In an exchange with the court, Appellant's counsel agreed that age & maturity & circumstances can tip the balance totally in favour of the views & preferences of the child. But she was not able to tell me at what age that balance would be tipped in this case. Her basic position was it hasn't been tipped here for this 11½ year old. The clinical investigator conducted three separate interviews with the child in August, September & October 2008 in three different locations, including separate interviews in the residence of each of the parties & the child's views were always the same: namely, that she wanted to live primarily with her father. Alyssa articulated a number of reasons why she prefers living primarily with her father instead of her mother, including her relationship with her brother, her concern about her mother's interrogations & the things she hears her mother say about Ms. McGrath (her father's new partner). She told the clinical investigator that a weight has been lifted off her shoulders when she's at her father's. How strong are Alyssa's views? On a satisfaction scale of 1 – 10, the child rates the current arrangement (primarily with her father) at 10 & only rates the mother's proposal (reversing the primary residence) at 4. Most significantly, she showed her dissatisfaction with the previous "share-care" arrangement at a rating of only 2. It seems to me that the motions judge was perfectly right to give the child's views & preferences considerable weight. I would have done the same & I do so now. Cavanaugh v. Balkaron, 2008 ABQB 151, per Madam Justice Veit: The parties are the parents of two children, one who was 17 on her last birthday & the other who was 13 last birthday. The principal issue on this application is whether the court should order shared parenting of the younger child. The mother argues that she has been the children's primary caregiver; this is disputed by the father. The 13 year old son, who is separately represented, does not want shared parenting & would prefer to see his father only when the son chooses. The court orders shared parenting of the younger child. Because he is 13, in addition to the child's best interests, the child's wishes in the matter of the parenting regime must be taken into account. Here, the child expresses a wish not to participate in shared parenting and, indeed, not to have a parenting schedule of any kind. However, the child's expressed wishes are based on certain misconceptions - relating, for example, to his father's wishes & his father's work schedule. Given that: the son's reasons to reject a shared parenting arrangement appear to be based in part on misunderstandings; the son is a very bright & capable child; no objective harm to the son's interests has been established either by the mother or by the son; ... CONTINUES over the page ...



DETAILED RESPONSES TO QUESTION 1.3H, WHERE PROVIDED

	<p>... CONTINUES from previous page ...</p> <p>and, a shared parenting regime would give each of the parents the most realistic opportunity to contribute in a meaningful way to the development of their child's life, the younger child's best interests are best served by the imposition of a shared parenting schedule. The child in question is 13 years old; his wishes must therefore be taken into account in deciding on a parenting regime. The child does not want a shared parenting regime. However, this appears to be based on some misunderstandings: first, & most important, the son appears to believe that the father is essentially content with virtually no parenting contact. Nothing could be further from the truth. Second, the son believes that shared parenting would not work because of his father's work schedule. It appears that the son has not been told that the father has quit his second job so that he can spend more time with his children. Third, the son believes that he may forget things in one residence or the other. Given the child's acuity, this is extremely unlikely. A great many children, many of whom are not as intellectually bright & goal driven as this child, manage shared parenting regimes; there is no objective reason to believe that shared parenting will be difficult for this child. As the child himself acknowledged, his wish to continue to see his friends - an apparently entirely reasonable wish - can be accommodated within a shared parenting regime. Apart altogether from discounting the child's concerns, the court must also be sensitive to those advantages of shared parenting that would not be obvious to a child, even a bright & mature child such as this one. A shared parenting regime would give each of the parents the most realistic opportunity to contribute in a meaningful way to the development of their child's life. Each of the parents has had an important role in their son's development to date.</p>
INDIA	<ul style="list-style-type: none"> In Ramesh Tukaram Gadhwé & ors. v. Sumanbai Gondkar & anr., decided on 24th October 2007, 2008 (2) MahL.J. 347, the Mumbai High Court, Aurangabad Bench, per Kingaonkar J. held that "the willingness of the minor is one of the factors to be considered under Section 17(3) of the Guardian & Wards Act. However, it is not the sole criteria. The welfare of the minor is the only criteria while determining the question of custody. The minors are gullible & are likely to express the thoughts & wishes of those who are in dominating position to tutor them. The influence of tutoring process is likely to impair the testimony of the minor. The willingness of the minor cannot, therefore, be the significant factor in such a situation." In C. Chenna Basappa v. Smt. Lingamma & ors., decided 6th June 2007, AIR 2007 Karnataka 130, as per H.N. Nagamohan Das J. of the Karnataka High Court held that "while ascertaining the wishes of the minor the Court shall take into consideration the age of minor & the custody of minor at time of interview & immediately prior to it. Even then the wishes of the minor shall not control the discretion of the Court. Wishes of the minor shall not be the sole factor to be taken into account in adjudging proper custody of minor. There is a greater responsibility on the Court to assess the entire facts & circumstances of the case, in appropriate cases, can even disregard the wishes & preference expressed by the minors, especially when Court is of the impression that the minors have not given answer on the question of their wish voluntarily, but under influence & tutoring." (para 5).
IRELAND	<ul style="list-style-type: none"> In Hague Convention cases, judges refer to UK criteria. In the case of D vD (2008) the judge cited the UK case of S. v. S., whereby a nine year old girl was considered to have achieved enough maturity to have her views taken account. Furthermore, her objection to return was not solely related to a desire to remain with a particular parent. He stated that the evidence in relation to D. fell short of these tests.
ISRAEL	<ul style="list-style-type: none"> Earlier Supreme Court case law, dated prior to the Convention, set age criteria. Thus for example in CA 352/80, Zuckerman v. Zuckerman, Justice Ben Porat stated: "The wishes of a child older than ten are a most serious, & at times a decisive consideration on the matter of his custody." Justice Bejski stated: "In the 10-12 age range, & until ages 14-16, courts will be inclined to give greater weight to the child's preference for one parent over the other" (CA 503/60, Wolf v. Wolf). In later decisions, however, issued after Israel had ratified the Convention, no age criteria were set in weighing the child's will, & emphasis shifted to the very recognition of the child's right to a hearing. The significant change in judicial policy appears to be in the recognition of the right to participation, placing less emphasis on the weight to be assigned to the child's wishes. On the absence of criteria concerning the weight of the child's testimony, see Tamar Morag, "Judicial Decisions after the International Convention on the Rights of the Child: Indeed a New Era?" (in Hebrew), Ha-Mishpat, 22 July 1996, page 22 Rhona Schuz, "The Right of the Child to Participate: Theory v. Practice" (in Hebrew), The Family in Law 2 (2008), page 208.
NEW ZEALAND	<ul style="list-style-type: none"> C v S (P Orders) (2006) NZFLR 745 – this was the first case since the Care of Children Act 2004 was enacted to come to the appeal courts on children's views. Randerson J held that the obligation to give reasonable opportunity for a child to express a view is mandatory "but the child is not bound to express views if he or she does not wish to do so." He accepted that babies or young children with impaired speech or other disabilities can still express views in a non-verbal manner & that "observation by a suitably skilled or experienced person of a child's behaviour in the company of a parent or caregiver may give valuable insights into the child's preferences." The obligation to provide reasonable opportunities for a child to express their views may necessitate more than one opportunity. Randerson J also contrasted the word 'views' with 'wishes' (used in the previous statute – the Guardianship Act 1968) & said that 'views' cover a wider range of matters such as "an assessment of the advantages & disadvantages of being in the care of one party or another, what the child enjoys or does not enjoy about his or her relationship with the adults in question, what matters are important to the child & what are not." The statutory wording directs that the child's view 'must' be taken into account & this is stronger than the previous 1968 wording of 'have regard to' but does not go as far as to oblige the decision-maker to act in accordance with them.



APPENDIX F: ACADEMIC RESEARCH REGARDING CHILD PARTICIPATION IN FAMILY LAW

DETAILED RESPONSES TO QUESTION 3.1B & 3.1C, WHERE PROVIDED

AUSTRALIA	<ul style="list-style-type: none"> Parkinson & Cashmore (2008). Children, parents, counsellors, & lawyers were interviewed concerning their views about the value & risks attached to children being involved in decisions that are made about the arrangements for them after their parents separate. Children, parents, counsellors - & lawyers to lesser extent - generally agreed that it is important to hear children's views & for children to feel that they have been heard & taken seriously. Working out the issues on which to involve children is as important as the means of so doing. Listening to children sensitively, & with awareness of the kinds of decisions in which they are best able to participate, is the key to resolving the tension between participation & protection. Bagshaw, Quinn & Schmidt (2006) Children & Families in Transition (CAFIT) - Children were identified as being voiceless in the separation process, despite their view that they have the right to contribute to decisions that affect them; they were not given enough information or support to enable them to cope with the family transition. They wanted more information about the reasons for their parents' separation & what would happen to them in the process. A lack of support for children & parents during the separation process in general, including around issues of grief & loss. Parents & children had trouble accessing appropriate services, including counselling & legal information & advice, either because of long waiting lists or because they did not know where to go to get help. Cambell (2004) The social construction of children in family law continues to position them as vulnerable & incompetent. Constructs of 'competence', 'age' & 'maturity' are not useful indicators of children's abilities to make decisions; thus, a 'new' construction of children, based on greater adult understanding of their unique experiences & understandings, is suggested. Creative initiatives that reflect the children's views are explored in the thesis. Research by the CCYP on children's experiences of participation in family law. Will bring all along to 2010 meeting <p>References</p> <ul style="list-style-type: none"> – Bagshaw, D., Quinn, K. & Schmidt, B. (2006, May). Children & families in transition: towards a child-centred integrated model of practice. (Research Report by the Hawke Research Institute for Sustainable Societies, University of South Australia). Magill: Uni of SA. – Campbell, A. (2004). The voice of the child in Australian family law: Whose right? Who's right? (D Phil Thesis, Uni of SA). – Parkinson, P. & Cashmore, J. (2008). The voice of the child in parenting disputes. Canada: Oxford University Press.
CANADA	<ul style="list-style-type: none"> The main body of work referred to comes from the International Institute of Child Rights & Development's report: "Through the Eyes of Young People: meaningful child participation in BC family court processes". This report provides a summary of a series of interviews with children, parents, lawyers, judges, & other individuals involved in custody & access hearings. The project was focused on bringing forward the perspective of young people in examining their participation in British Columbia's family court system, identifying existing strengths, & building on those strengths. The project found young people do not always get information about what is going on in a way understandable to them & adults (i.e. lawyers, parents & judges) don't always listen to their views. At the same time most young people want decision-makers to consider their views when making decisions about their lives. Further, most lawyers have had direct experience with young people's involvement in family proceedings at various stages (e.g. case conferences through to trial). Lawyers see themselves as playing an important role in young people's participation; however, lawyers expressed deep reservations about the participation of young people. In particular, they stated that (1) judges should not speak to young people directly because they are not adequately trained; (2) s. 15 Family Relations Act reports (e.g. assessments by psychologists) are too costly, slow & dependent upon the quality of the interviewer; & (3) involving young people in processes could be harmful to the young people, particularly in situations of abuse or improper influence by a parent or caregiver. Judges obviously have an important role to play in BC family courts, & have the responsibility for making decisions based on young people's best interests, which includes taking account of their views. The factors stated by a number of judges included age, maturity, potential for emotional harm to the young person, & the ability of the young person to express his or her own views. However, there are many judges who hesitate to speak to young people directly & identify procedural rules, lack of training, lack of resources, & lack of time as barriers. Typically, judges will identify the former family advocate, existing duty counsel & family justice counsellors as good resources that could be reinstated or expanded to assist them in supporting young people's participation. Finally, youth service providers stated frustrations in the patchwork approach to young people's participation in BC family court processes, encouraging more advocacy support, education & practice standards to improve the situation. Executive Summary, the International Institute of Child Rights & Development, below. <p>References</p> <ul style="list-style-type: none"> – The International Institute of Child Rights & Development, "Through the Eyes of Young People: meaningful child participation in BC family court process" (2006), University of Victoria, online: <http://www.iicrd.org/system/files/Meaningful%20Child%20Participation.pdf> – Williams, Suzanne, "Perspective of the Child in Custody & Access Decisions: implementing a best interests & rights of the child test" (2008) 86:3 Can. Bar Rev. 633 – Nicholas Bala, "Child Representation in Alberta: role & responsibilities of counsel for the child in family proceedings", (2006) 43 Alta. L. Rev. 845 – 870 – Nicholas Bala, Barbara-Jo Fidler, Dan Goldberg, & Claire Houson, "Alienated Children & Parental Separation: legal responses in Canada's family courts" (2007), 33 Queen's L.J. 79 – 137 – IICRD (07) Hear the Child interviews: Kelowna pilot evaluation – IICRD (08a) An evaluation of the Hear the Child interview process: parent & child feedback – IICRD (08b) Ten tips for legal professionals: meaningful child participation in family justice processes



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ENGLAND

- (Bandhopadhyay) There should be a training programme in the nature of discussion with eminent personalities & experts in family laws for the officers, before calling them to preside over Family Courts. Special powers should have been given by the Family Courts Act to judges to hold proceedings at any convenient place where children are the matters of dispute. Dispute regarding children should be tackled carefully. A congenial room or toy-room should be provided for the children who accompany their parents to the Family Courts. There should be a counselling & mediation for reconciliation of disputing parties by the social workers appointed by the Government before & after a case is instituted in the Family Court. There is also a strong need for post-reconciliation counselling & supervision of the parties. The Act should have provided that communication between disputing parties & the counsellors would be privileged communications under the Indian Evidence Act. A psychologist & a doctor should also be appointed by the Government to assist the Family Court judge & he shall visit such Court for an hour at least twice a week.
- (Diwan) It is a well established principle that in custodial disputes, the wishes of the child should be taken into consideration if s/he has attained the age of discretion, though it is equally well established that if their wishes go against their welfare, they should be disregarded. There is no fixed age of discretion, courts adopt a flexible approach that it is not age but mental development which is the deciding factor whether the child's wishes should be ascertained. But of course, the court cannot force a child to go into the custody of a person 'whose kindness he does not admit, whose religion he abhors & whose way of thinking does not suit him.'
- (Agnes) Since the child remains unrepresented by an independent lawyer or guardian ad litem in custody disputes, it is the duty of the court to ensure the child's interests are not harmed or negated. In many cases, it is found that ascertaining the child's wishes becomes meaningless as children usually reflect opinions of the custodial parent towards the non-custodial parent. They are also usually tutored by the custodial parent as to what to say to the judge, when asked their preferences.
- (Choudhury) In adjudicating any matter relating to children, the matrimonial court should consider the wishes of the children apart from the parents' respective financial position, suitability of the person who claims the custody & the age & sex of the child for deciding what is best for the welfare of the child. In custody disputes, the child should be treated as an independent party & should be represented separately by a lawyer/representative. It is advisable to campaign for a uniform code for matters relating to the custody, access & adoption of children which would apply to people of all religions. It is judicial activism that has given shape to the sparse legislative enactments in the matter of children in custody disputes. ... CONTINUES over the page ...

INDIA



DETAILED RESPONSES TO QUESTION 3.1B & 3.1C, WHERE PROVIDED

... CONTINUES from previous page ...

- (Chauhan) Though the law & the courts observe the best interests of the child to be the paramount consideration when deciding custody disputes, the procedure followed is neither child-centric nor child-centred. For example, the child in such disputes has no right to be heard & his/her wishes are only ascertained if the court calls for this. Judges usually want custody disputes to be settled by mutual consent between the parties & are not as concerned about the wishes of the child. In some cases, the judge interviews the child in open court, after asking the lawyers & the parents to withdraw, but the atmosphere in the court is not a happy one for the child in which s/he is comfortable & at ease. There must be special rooms/play spaces where the child is interviewed, either by the counsellor or the judge where the atmosphere is child-friendly. There is no provision in the law for the counsellor to monitor how the custody arrangement is working for the child after the order for custody is passed. This is a crucial drawback which needs to be rectified.

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IRELAND

- I have an article myself in the Irish Journal of Family law in January 2009, & a handful of other articles have been written.
- It has been addressed in a very progressive manner by commentators (in favour of the right) despite poor effort by the legal system. Research by Capita is only quantitative research I know of& it indicates that less than half of children are appointed guardians ad litem (usually the only way for a child to be heard) in child care cases, & almost none in family law cases.
- **Reference:** National Children's Office, Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in Association with the Nuffield Institute for Health, (National Children's Office, Dublin 2004)

ISRAEL

- Three main studies have so far appeared on children's participation in custody proceedings in Israel, all in Hebrew.
- (Hecker) This is a sociological study that examined 360 divorce files of Jewish couples at the archive of the rabbinic court & at the Ramat-Gan family court (a city in central Israel) from 1996-1998. Forty in-depth interviews were also conducted with divorced parents. Hecker points out the significant emphasis on children's rights in Supreme Court decisions in recent years, & notes the recourse to a rights' discourse among some of the interviewees. Nevertheless, she claims that the study of the divorce files, as well as the statements of the parents & the professionals suggest that the declarations on children's right to participation remained at the level of rhetoric. Her main findings: a) Interviews with parents show they do not consult with their children concerning divorce proceedings. b) Children are not included in post-divorce family arrangements agreed through mediation procedures. c) Children are kept away from lawyers' offices & from negotiation processes. Hecker claims that lawyers were the strongest opponents of meetings with children. Interviews with judges exposed a wide divergence of views. Note that Hecker's study ended in 1998 & its findings are not up-to-date.
 - (Donaldson et al.) The study examines the Convention's impact on Israeli case law, at the level of rhetoric & of practice. On the courts' attitude to the principle of children's participation, it points out that the Supreme Court had already recognized in the 1950s a right of children to participation. The Court's concern with this topic ebbed in 1970s-1990s, but has grown in importance during the last decade. Family courts have also increased the number of children's hearings. Whereas decisions in the 1950s & 1960s emphasized mainly the weight that should be given to the child's will, & considered it crucial in some cases, decisions in the last decade are not concerned at all with the weight of children's desires & focus almost exclusively on the actual hearing. Significant differences were also found among various family court judges.
 - (Schuz) This study has two aims. One is the examination of the theoretical basis of the right to influence & of the advantages & disadvantages of children's direct hearings by judges, which the article supports. The second aim of the study is to examine the extent to which family courts actually implement the child's right to participation. The study concludes that, despite considerable differences between various judges, the courts have tended to increase the number of children's hearings, although gaps were found between the recognition of the children's right to participate & insufficient recognition of the children's right to have their views taken into account.

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DETAILED RESPONSES TO QUESTION 3.1B & 3.1C, WHERE PROVIDED

NEW ZEALAND	<ul style="list-style-type: none"> Goldson (2006) - Child inclusive mediation in family separation - 17 families at different stages of parental separation were interviewed following attendance at a mediation process. Children had attended parts of this mediation with their parents. The families were recruited from Family Court referrals under Section 9 of the Family Proceedings Act 1980. The 26 children ranged in age from six to 18 years. Findings have indicated a high level of satisfaction with this process from both children & parents. Parents registered a heightened awareness of the effects of conflict on their children, recognition of a child's need for parental co-operation & an enhanced ability to make agreements about co-parenting with their former partner. Children in the study felt that their strong need for a voice & for information from within the familial context was satisfied by this involvement. They reported a decrease in anxiety about the emotional & practical issues facing them as their family life was rearranged. Parents also commented on how much less anxious their children were. Research by the Children's Issues Centre (Smith, Taylor, Gollop) & associates (Tapp & Henaghan) on a variety of child-inclusive issues – role of lawyer for the child, children's voices & participation in parental separation & family law proceedings. Will bring all along to 2010 meeting <p>References</p> <ul style="list-style-type: none"> Goldson, J., & Taylor, N.J. (2009). Child-inclusion in dispute resolution in the New Zealand Family Court. New Zealand Family Law Journal. Taylor, N.J., Tapp, P., & Henaghan, R.M. (2007). Respecting children's participation in family law proceedings. The International Journal of Children's Rights, 15(1), 61-82. Taylor, N.J. (2006). What do we know about involving children & young people in family law decision making? A research update. Australian Journal of Family Law, 20(2), 154-178. Goldson, J. (2006). 'Hello, I'm a voice, let me talk'. Child-inclusive mediation in family separation (Innovative Practice Report No. 1/06). Wellington: Families Commission. Taylor, N.J. (2005). Care of children: Families, dispute resolution & the Family Court. PhD thesis, Dunedin: University of Otago. Tapp, P., Taylor, N.J., & Henaghan, R.M. (June 2001). Agents or dependants - Children & the family law system. Butterworths Family Law Journal, 3(10), 245-254. Tapp, P.F., & Taylor, N.J. (2001). Where should the focus be in the aftermath of parental separation: Children's rights & interests, or parental responsibility/rights? Childrenz Issues, 5(1), 10-15. Taylor, N.J., Smith, A.B., & Tapp, P.F. (2001). Childhood & family law: The rights & views of children. Dunedin: Children's Issues Centre. (ISBN 0 9583595 7 1) Smith, A.B., Taylor, N.J., & Tapp, P.F. (2001). Children whose parents live apart: Family & legal concepts. Dunedin: Children's Issues Centre. (ISBN 0 9583595 9 8) Taylor, N.J., Gollop, M., Tapp, P., Gaffney, M., Smith, A.B., & Henaghan, R.M. (2000, July). Children's rights in New Zealand family law judgments: Research report. Dunedin: Children's Issues Centre, University of Otago. Taylor, N.J., Gollop, M., & Smith, A.B. (2000). Children & young people's perspectives on the role of counsel for the child. Butterworths Family Law Journal, 3(6), 146-154. Gollop, M., Smith, A.B., & Taylor, N.J. (2000). Children's involvement in custody & access arrangements after parental separation. Child & Family Law Quarterly, 12(4), 383-399. Taylor, N.J., Gollop, M., Smith, A.B., & Tapp, P.F. (1999, April). The role of counsel for the child - Perspectives of children, young people & their lawyers: Research report. Wellington: Department for Courts. Cochrane, M. (2005). Judicial approaches to children's involvement in New Zealand Family Court processes.
NORTHERN IRELAND	<p>References</p> <ul style="list-style-type: none"> Winter, K (2006) The participation of 'looked after' children in public law proceedings. In D. Iwaniec (ed) Children's Care Pathways. London: John Wiley. Weatherall, K & Duffy, J (2008) Are we Listening to Children? An Examination of the Child's Voice in Social Work Reports to the Court following Parental Separation Disputes. Child Care in Practice, 14 (3), July 2008, pp. 275 – 292. Bilson & White (2005) Representing children's views & best interests in court: An international comparison. Child Abuse Review, 14, 220-239 Mantle et al (2007) Whose wishes & feelings? Children's autonomy & parental influence in family court enquiries. British Journal of Social Work, 37 785-805 Mantle (2007) Managing the tension between the child's agency & the need for protection in family court enquiries. Ethics & Social Welfare, 1, 163-175 Timms (2003) The silent majority: The (position of children involved in the divorce & separation of their parents. Child Care in Practice, 9, 162-174 Timms (2008) Children's views of decisions made by the court: Policy & practice issues arising from the Your Shout Too! Survey. Child Care in Practice, 14, 257-274.



APPENDIX G: INNOVATIVE OR PILOT PROJECTS REGARDING CHILD PARTICIPATION IN FAMILY LAW

DETAILED RESPONSES TO QUESTION 3.2B & 3.2C, WHERE PROVIDED

AUSTRALIA	<p>Adversarial</p> <ul style="list-style-type: none"> • Contact Orders Program has been developed by the Family Court to focus more on the needs of children in highly conflicted families. Children's perspectives & needs are placed onto the agenda by providing information to parents about what their children have identified as their worries & feelings & their views on any effect that conflict is having on them. • Project Magellan is a pilot project initiated by the Family Court to address concerns that Court delays, lack of coordinated services & the adversarial nature of proceedings have potentially dangerous implications for children (Family Court of Australia, 2007; Fehlberg & Behrens, 2008). The project is now being implemented across all states, & recent evaluations of the Magellan project reveal it has been successful in bringing about a child focus (Family Court of Australia, 2007). • During 2004, the Family Court also introduced the Children's Cases Program, which 'set about providing a highly supportive, consensual & less formal process for separating parents to follow, to maximise their chances of settling their dispute effectively, & without full adversarial armoury' (McIntosh, 2006, p. 6). Children are interviewed separately to their parents, & are provided with feedback. Children are also allocated a family consultant for the duration of their matter. The family consultant provides information back to the judge, & assists with referrals to community organisations & prepares a family report if necessary (Family Court of Australia, 2007). <p>Non- adversarial</p> <ul style="list-style-type: none"> • Children in Focus: Child-focused & child-inclusive dispute resolution. Jennifer McIntosh & Laurie Maloney. Two 'treatments' (child-focused & child-inclusive) aimed at improving 'the psychological resolution of parental conflict with associated reduction of distress for their children' (McIntosh, Wells & Long, 2007, p.8): child-focused practice is defined as 'finding the voice in the absence of the child', & should aim to encourage disputing parents to consider the needs of their children by facilitating a parenting agreement that preserves significant relationships & supports children's psychological adjustment to the separation. Child-inclusive practice is defined as 'finding the child's voice, in the presence of the child'. Child inclusive practice aims to form a strategic therapeutic loop back to the child's parents by consulting with the child in a supportive, developmentally appropriate manner about their experiences of family separation & dispute in a way that avoids & removes any burden of decision-making. McIntosh (2003) emphasises that an important aspect of child-inclusive practice is that it is two-dimensional in its intent & effect, in that it aims to give children a voice & to provide parents with skilled & sensitive feedback, which has an informative & therapeutic intent. These interventions have been shown to significantly reduce conflict between parents following separation, (McIntosh, Wells & Long, 2007, p.10). McIntosh (2003). <p>– References - Will bring all along to 2010 meeting</p>
INDIA	<ul style="list-style-type: none"> • Child Guidance Centre at Family Court, Mumbai - MUSKAAN <p>The Family Court at Mumbai invited the Tata Institute of Social Sciences (TISS), Mumbai to start counselling services for children in adversarial proceedings at the court premises. In November 2003, the medical & psychiatric centre & the Health & Mental Health centre at TISS started the intervention programme called "Muskaan" for children with psychiatric problems, educational problems, children of litigants who are traumatised & need counselling. The marriage counsellors are mandated & appointed for marriage counselling under the Family Courts Act, but they are not really trained in child counselling. Therefore, Muskaan filled the gap of providing counselling to the children & their parents, as parents, & not as husband & wife.</p> <p>Earlier Muskaan started with providing counselling just one or two days a week at the Family Court, Mumbai. However, over the years, as the referrals to them has increased, they are providing counselling for almost 5 days a week as the judges, lawyers, & marriage counsellors have understood the role & importance of child counsellors at the Family Court.</p> <p>The object of this intervention is to deal with children who are traumatised & have behavioural, emotional & scholastic problems which may have arisen due to the animosity between the parents. They do not really interfere with the process of law & the judiciary. The counsellors speak to the children individually; speak to each of the parents individually & then jointly too. They try to explain to the parents to see through the child's perspective & the impact that their behaviour has on the child. They try to explain to the parents that the future of the child is important & it is for them to think how they want the child to grow & up & what they want the child to become when s/he grows up. Some parents come with prejudice & even threaten the counsellors, some have so much animosity that they are not willing to change their attitudes, whereas some parents are immediately able to see the child's perspective & are willing to change their attitudes. There have been instances where there is a mutual consent divorce, & the parents have on their own approached Muskaan to understand how to explain or communicate to the child about the divorce.</p> <p>There have been some cases where the children have been dragged & seen by different counsellors & that now they are averse to meeting any counsellor. Children get into loyalty issues of parents. Some children develop anti-social behaviour, whereas some are very forthcoming & spontaneous. The counsellors are able to make out that the child has been tutored and/or from whom the child has picked up language, words, etc. that the child would otherwise not know of. Parents should be one as far as the child is concerned. Parents need to understand this, as the child looks for stability & security. Children's future, growing up, establishing relationships, etc. will all have an impact on the children who are the silent sufferers.</p> <p>The counsellors at Muskaan try & assess the child, how the child is affected, what s/he is thinking, feeling. They use play therapy for the younger children. For this they have a play room, used for intensive therapy to understand why the child is behaving in a particular manner. The older children are able to articulate their thoughts & verbalise it. The general rule is the Counsellors at Muskaan do not give a written report to the judge. They do verbally speak to the judge & the marriage counsellors as to how the child is coping & their general assessment of the situation. However, sometimes the judges ask for a written report, which they do provide to the judges. The problem that the counsellors at Muskaan face is that they do not have the immunity the marriage counsellors have, as the latter are mandatorily appointed by the statute. ... CONTINUES over the page ...</p>



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The other problem they may face in giving written reports is that the parents have access to the reports from the courts, & that could cause some amount of an adverse effect, even on the child as it may complicate the issues. Nevertheless, the judge should follow up with the child & the progress of the child, which is reported verbally to the judge. Nevertheless, sometimes if the judge gives access, or overnight access of the child to the non-custodial parent & if the child is not comfortable yet with them, the counsellors from Muskaan do inform the judge, explain the apprehensions of the child & to take it step by step by first granting access, or supervised access, & then once the child becomes comfortable, then to give overnight access, as that would be in the best interest of the child.

The child's wishes & views are confidential & are shared only with the marriage counsellors & the judges. Sometimes judges ask for the reports in writing. The counsellors at Muskaan are not provided with a copy of the judgement as they do not really play a major role in the judicial proceedings. However, if the parents inform the counsellors about the judgement, the counsellors then do explain to the child the judgement. The ideal situation would be that the counsellors are given an opportunity to explain the judgement to the child.

In December 2007, Muskaan held a one day workshop with judges, after which some of the judges have understood the role of Muskaan in the Family Court & refer cases of children to them & have called upon Muskaan to play a more active role in the issues relating to children. The Counsellors also play a role in supervised access, as well as make home visits to assess the situation & environment in which the child lives. Sometimes, if the judge so desires, he may call the counsellor from Muskaan to be present while the judge is interviewing the child. Some judges do feel that wherever there is a child involved, just as the parties in a marital dispute are sent to the marriage counsellors, similarly the child in custodial disputes should be sent to the child counsellors at Muskaan.

Now even lawyers have started to play a role in asking their clients to bring their children to Muskaan or just going & meeting the counsellors at Muskaan. This has taken place after speaking to the members of the bar association & explaining to the lawyers the importance of counselling for the children & their parents. Now Muskaan is well established at the Family Court. They, along with the marriage counsellors, have started to celebrate some festivals like Children's Day, etc. which helps children & helps all the players to accept the role of the counsellors at Muskaan.

- **References** - Muskaan does not have any written material or evaluation yet, they are in the process of documenting their work.

• **Pilot Project on Child Participation in Family Courts**

The aim of the pilot project on child participation was to implement the recommendations of the legislative subcommittee on children & their families. The subcommittee was part of a larger legislative initiative to re-evaluate Israeli child law in light of the UN Convention on the Rights of the Child (henceforth the UNCRC Legislative Initiative). The UNCRC Legislative Initiative was chaired by Judge Rotlevi of the Tel Aviv District Court. Dr. Tamar Morag served as vice-chair & as chair of the subcommittees on children & their families & on child participation & representation. The mandate of the UNCRC Legislative Initiative was: to develop a new theoretical foundation children's rights based, for Israeli child law; to prepare specific & comprehensive proposals for law reform; & to evaluate the need for bodies & mechanisms seeking to promote children's rights.

The UNCRC operated through six subcommittees. The task of the subcommittee on children & their families was to deal both with the theoretical foundations of parental responsibility & with children's participation in family disputes. The subcommittee prepared a detailed proposal on child participation in family courts, which was endorsed by the Minister of Justice. A pilot program based on the committee's proposal was launched in September 2007 & operates in two family courts, one in Haifa, & one in Jerusalem. Special regulations were enacted in order to enable the pilot's operation.

As a result of the project's success, the Minister of Justice recently decided to extend its regulations & gradually apply the model to all family courts in Israel. An evaluation study accompanied the pilot project and, based on its results, the pilot's steering committee is currently in the process of drafting the final version of the regulations to be extended to the entire system.

The procedure for child participation proposed by the committee was the following. In the context of the pilot, departments for children's participation were set up in the welfare units operating in these courts, staffed by a social worker (henceforth PSW) & a clinical psychologist. The participation team worked 25 hours a week. Children aged 6-18 involved in custody, visitation, immigration, & education agreements are invited to participate in the legal proceedings. Referrals to the department of children's participation follows a decision of the judge, who also sets a date for it. PSWs send an invitation & an explanation on participation to the parents & to the child. They also establish contact with the child's parents, in order to coordinate the child's visit at the participation department. At this meeting, PSWs explain to the children their right to express their feelings, thoughts, & positions concerning the conflict between their parents. PSWs explain to the children that they can realize their right to participation in several ways: talk to the judge, talk to the PSW, write a letter, & so forth. If children choose to see only the PSW, they hold a lengthy meeting together. At the end, the PSW checks with the child what of its contents can be transmitted to the judge & gives the judge a record of the meeting as agreed with the child. The records of the participation meetings are confidential & kept in the court's safe in case they are required on appeal, & are not disclosed to the parties in conflict or to their lawyers. The court, however, can decide to disclose all or part of the meeting's contents if the child agrees & if the court found that disclosure would be helpful in promoting the child's best interests. In the appeal instance, only the judge is allowed access to the minutes of the meeting with the child, but not the lawyers. Although judges do not disclose the contents to the parents, they must record their impression of the child in the judicial decision, in their own words.

After the meeting or meetings with the children, PSWs may establish contact with the parents to tell them their own impressions of the children's emotional state & needs, as well as transmit any messages & contents that the child consented to share. If necessary, the psychologist will meet with the child or with one or both parents for a short-term intervention. According to the pilot model, when the judicial decision is made, the judges and/or the PSW are supposed to explain to the children the pertinent aspects of the decision in ways appropriate to the child's age & level of maturity, unless the court decides this is unnecessary.

Following are the interim regulations enacted for the operation of the pilot project. Changes will be introduced in the final version of the regulations in accordance with the findings of the evaluation study.

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ISRAEL



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• **Chapter 20 (2): Children's Participation**

258(33)1. (a) "Welfare unit worker" in this chapter—a social worker or psychologist of the welfare unit adjacent to the family court, who was trained for children's hearings in court. (b) The provisions of ordinance 258a apply to this chapter as well.

258(33)2. A court dealing with a complaint on family matters as per Section 1(6)(c) of the law, bearing on children, will give the child an opportunity to express his feelings, views, & desires on the matter before it (henceforth—child participation) & give them suitable weight in its decision, according to the child's age & level of maturity. The court, however, for special arguments that will be recorded, may decide that a child will not be heard if it is persuaded that implementing the child's right to be heard will cause the child greater harm than the one that inflicted through the denial of this right.

258(33)3. (a) The child will be heard by the judge who deals with the matter or by the welfare unit worker, according to the provisions in these regulations. (b) The court will hear a child who is at least six years old but, if it sees fit, is also allowed to hear a child who is not yet six if the child's older siblings are invited to a hearing or for other reasons. (c) The child will be heard without his parents or their representatives being present. (d) As far as possible, a child will be heard separate from his siblings, & the court or the welfare unit worker are allowed, as pertinent, to decide to hear several siblings together.

258(33)4. (a) The decision to give the child an opportunity to have a hearing & about the stage the child will be heard will be issued at a preliminary stage, according to regulation 258(11) or at a later stage, as determined by the court. The court will explain to the parents the gist of the hearing proceedings & its aim. (b) Without detracting from the provisions of regulation (a) above, the court is allowed to decide to hear the child again, at any stage of the proceedings.

258(33)5. If the court decides to hear the child, the welfare unit will send his parents an invitation to a preliminary meeting, together with an explanation to the child & an explanation to his parents on the child hearing proceedings & their aim. If the parents are represented by a lawyer, the invitation & the explanation will be sent to the lawyer, who will transfer it to the child's parents.

258(33)6. (a) The preliminary meeting with the child will be arranged by the welfare unit worker & will take place with the child alone, insofar as possible. (b) At the meeting, the welfare unit worker will explain to the child, in a way adapted to the child's age & level of maturity, his right to be heard by the judge who is dealing with the case or by the welfare unit worker, as he chooses, the purpose of the hearing, its course, & the rules of confidentiality & disclosure that will apply to the meeting & the hearing, including according to regulation 258(33)9. The worker will also explain to the child that he is allowed to renounce his right to be heard, or choose to tell the judge in writing or in other ways, through the welfare unit worker.

258(33)7. Should the child choose to be heard before a judge, present at a hearing will be the judge & the welfare unit worker, & in the absence of the welfare unit worker—another employee of the court. The court will record the essence, of the child's statements.

258(33)8. Should the child choose to be heard by a welfare unit worker, the worker will give the court a record of what the child asked to transmit to the court, together with the worker's professional impression about the behavior & the situation of the child at the meeting.

258(33)9. The record of the court or of the welfare unit worker, or what the child sought to tell the court, as pertinent & as noted in regulations 258(33)7, 258(33)8 or 258(33)6(b), will be kept in the court's safe & will be confidential, except for the court of appeal. A court that heard a child will not report the child's statements in its decisions, but the court may decide to disclose all or some of them if the child agreed & the court found that the disclosure will advance the child's best interests.

258(33)10. If the child was heard by a judge or by a welfare unit worker, the judge will explain to the child when issuing the decision or closely after, directly or through the welfare unit worker, the principles of the decision pertinent to him, in a way appropriate to his age & his level of maturity, unless the court decides it is unnecessary to invite the child to hear the decision in the circumstances of the case.

258(33)11. (a) Should the court be asked to ratify an agreement according to section 3(c) of the law on the matters discussed in regulation 258(33)2, the court will send the child's parents explanations on the importance of hearing the child on issues pertinent to him, before bringing the agreement to the ratification of the court. If the parents are represented by a lawyer, the explanations will be sent to the lawyer who will deliver them to the parents. (b) At the ratification of the agreement, the court will establish whether the child has been heard. Should the court establish that the child should be heard, the court may direct the parents to the welfare unit so that the parents will be given information & guidance on the hearing of the child & on its implementation.

258(33)12. Should one of the spouses submit a request to settle the conflict according to section 258(20), the welfare unit may, with the parents' consent, invite the child to a hearing at the unit on matters in the conflict that are pertinent to him. The child's statements are covered by the rules of confidentiality that apply to what is said at the welfare unit, according to section 258(19)1(b) & according to section 3a of the decree of the family court (establishing the welfare unit, its actions & its arrangements), 5756-1996.

258(33)13. These regulations do not detract from the court's authority to hear children in any hearing conducted before it, according to every law.

References

– None available.



DETAILED RESPONSES TO QUESTION 3.2B & 3.2C, WHERE PROVIDED

JAPAN	<ul style="list-style-type: none"> • In our country, recently academic discussion by scholars, judges & lawyers was made about the amendment of the Family Affairs Determination Law which provides the procedure of the determination & the conciliation . The discussion covers many matters described in the law. Among these matters the issue of child participation in those procedures mentioned above is involved. Now the law has a provision which requests the judge to hear with the child over 15 years of age before making a judgement on a dispute about the parental authority or the custody of the child. However, in our country the child has no representative for the procedure of determination or conciliation. At the discussion one proposal was made that under either the determination procedure or the conciliation procedure the child must be represented by a lawyer who has had studied also about the child-psychiatry & the skill for counselling through training courses. The proposal says that because we must have the system allowing the child to express his/her wishes & opinions throughout the procedures & the judgement should be made after the consideration of these wishes & opinions, we need the representative for the child. • Major opinions at the discussion were that if such matters are decided basing on the opinion of the child the internal burden of the child might be too heavy, that if the representative system might be established the judgement might be based on the wishes & opinions of the child presented by the representative, & that when the judge wants to know the wishes & opinions of the child he may order the family court probation officers, who have had intensive special trainings for specialists in the National Training Institute, to have an interview with & watch the child & to understand the mind of the child. • Now the decision has not been made as to the proposal & it was agreed that more examinations & discussions are needed. • Recently national projects to discuss about the amendment of the Family Affairs Determination Law has been initiated under the leadership of the Ministry of Justice. I expect the issue of the child representative to be discussed more deeply. <p>References</p> <ul style="list-style-type: none"> – None available.
NEW ZEALAND	<ul style="list-style-type: none"> • Goldson (2006) – see outline above • The non-judge led mediation pilot project conducted in 4 Family Court districts did allow for children to be included. However, the evaluation (Barwick & Gray, 2007) showed that few children actually participated. • The forthcoming implementation of recent legislative changes will enable children to participate in counselling & mediation – see Goldson & Taylor (2009). Will bring all along to 2010 meeting. <p>References</p> <ul style="list-style-type: none"> – Barwick, H., & Gray, A. (2007). Family mediation - Evaluation of the pilot. Wellington: Ministry of Justice. – Goldson, J. (2006). 'Hello, I'm a voice, let me talk'. Child-inclusive mediation in family separation (Innovative Practice Report No. 1/06). Wellington: Families Commission. – Goldson, J., & Taylor, N.J. (2009). Child-inclusion in dispute resolution in the New Zealand Family Court. New Zealand Family Law Journal.

