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Strengthening children's rights and participation in family law: A submission on the Family Law Amendment Bill 2023 (Cth)

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee on the proposed amendments to the *Family Law Act 1975* (Cth) ('*Family Law Act*') in the Family Law Amendment Bill 2023 (Cth) ('Amendment Bill'). We are academics with expertise in children's rights and participation in family law decision-making. Our research aims to ensure that children who are the subject of family law disputes are given an opportunity to express their views and be heard in accordance with their right under Article 12 of the *UN Convention on the Rights of the Child* ('*CRC*').[1]

We would welcome the opportunity to appear at a public hearing of the Committee to discuss our submission.

About Us

Dr Georgina Dimopoulos is a Senior Lecturer in Law and a Research Associate, Centre for Children and Young People at Southern Cross University, and a member of the Policy Working Group of the Australian Child Rights Taskforce. She is a socio-legal researcher and an Australian lawyer who has worked across the higher education sector, government, courts, commercial legal practice and community organisations. Dr Dimopoulos' research expertise is in family law, children's rights, family violence and privacy. She holds a PhD from Melbourne Law School, University of Melbourne. Her book, *Decisional Privacy and the Rights of the Child* (Routledge, 2022), presents a new model for enabling and listening to children's voices in decision-making processes.

Dr Michelle Fernando is a Senior Lecturer in Law at the University of South Australia, Adelaide. She is a former family lawyer and former director of social justice organisations Anglicare Tasmania and Anglicare SA. Dr Fernando's research expertise is in family law and children's rights, including how children are heard in Australian family law matters and in matters concerning international child abduction. Her PhD entitled *Judicial Meetings with Children in Australian Family Law Proceedings: Hearing Children's Voices* was conferred by the University of Tasmania in 2011. Michelle is a co-author of *Family Law in Australia* (10th Ed, LexisNexis 2021).

[1] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').

Summary

Many of the proposed amendments to the *Family Law Act* will ensure that the law is focused on children's best interests, not the interests of parents. However, the Amendment Bill still promotes a welfare approach to decision-making in proceedings under Part VII of the *Family Law Act*, which is paternalistic and understands children as objects of adult concern.

The Amendment Bill does not do enough to promote children's rights and meaningful, safe participation in family law decision-making, because:

- It does not implement the *CRC* into the *Family Law Act*;
- It does not give children a *right* to express their views and be heard – the 'any views expressed by the child' general consideration when determining best interests does not provide this right;
- The requirement for Independent Children's Lawyers ('ICLs') to meet with children does not satisfy the *court's* obligation to give children an opportunity to express their views and be heard; and
- It does not repeal section 111B(1B) of the *Family Law Act*, which requires children's objections to being returned in Hague Convention cases to be of a particular 'strength of feeling' before they can be taken into account.

Overall, the Amendment Bill represents a missed opportunity to protect and uphold children's rights in the family law system, particularly their right to participation.

A children's rights-based approach to family law decision-making

The dominant approach to determining children's best interests in proceedings under Part VII of the *Family Law Act* is the welfare approach: the focus is on 'the best interests of the child' as 'the paramount consideration'.[2] But the 'dark side' of the welfare approach is that the obligation to promote and protect the child's best interests involves *adults* exercising the power to determine the content and nature of those interests.[3] Judges themselves have conceded that the best interests test is, 'by its very nature paternalistic and protective'.[4]

According to the Explanatory Memorandum to the Amendment Bill, the amendments to the *Family Law Act* will 'ensure the best interests of children are placed at its centre' (at [1]), so that Part VII operates effectively 'to safeguard the best interests of the children involved' (at [3]). The Explanatory Memorandum (at [4]) also stresses that:

> The Bill will make a number of amendments to simplify and clarify the pathway for decision-making in determining parenting arrangements to ensure that *children's safety and best interests are squarely and unequivocally the focus* (emphasis added).

A focus on protecting, promoting and upholding children's *rights* in Part VII decision-making is notably absent.

A children's rights-based approach, underpinned by the framework of the *CRC*, stands in contrast to the welfare approach. At its most basic, a children's rights approach requires that children participate actively, meaningfully and safely – and to the extent that they wish – in decision-making about matters

[2] *Family Law Act 1975* (Cth) ss 60CA, 67ZC ('*Family Law Act*').
[3] John Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2007) 13, 56.
[4] *Re Alex* (2004) 180 FLR 89, 116 [154] (Nicholson CJ).

that affect them, consistently with their evolving capacities, and with appropriate parental guidance and direction.

A children's rights approach recognises that children are vulnerable, but it also emphasises the *strengths* of each child, and the need for all adults in the decision-making process – including judges, lawyers, ICLs, mediators, family dispute resolution practitioners and parents – to develop the *capacity* to meet their obligations to respect, protect and uphold children's rights.[5]

Research in the family law context, both in Australia and overseas, has explained the value of children being given the opportunity to express their views and to have those views taken into account in decision-making about their best interests.[6] The benefits of children's participation include:

- Improving children's *capacity to make decisions independently* and helping them to feel *empowered* in the process;[7]
- Producing more *well-informed, relevant decisions*;[8]
- Improving *compliance with parenting orders*;[9] and
- Helping parents to *resolve their disputes more effectively*, because they are 'hearing what their children have to say'.[10]

Research has also found that many children feel marginalised and that perceive adults in the family law system do not listen to, take into consideration or care about their views.[11] Children have emphasised the importance of 'having "someone" to listen to their views and then communicate those views so that they could inform the decision making in their case'.[12] They have expressed a desire for 'a bigger voice more of the time' in family law decision-making processes that affect them.[13]

We set out below the reasons for our concern that the Amendment Bill will do little to disrupt the status quo, and will not markedly improve children's experiences of participation. Our view is that the Amendment Bill perpetuates the unhelpful distinction between protection and participation that persists in debates about involving children in family law decision-making.

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[5] See Georgina Dimopoulos, *Decisional Privacy and the Rights of the Child* (Routledge, 2022) ('*Decisional Privacy*'); John Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters involving Children?' (2009) 33(2) *Melbourne University Law Review* 579 ('Judging the Judges'); Jane Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era' (2006) 69(3) *Modern Law Review* 299; Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017); Michael Freeman, 'The Value and Values of Children's Rights' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate, 2011) 21.

[6] See, eg, Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Final Report, Australian Institute of Family Studies, 2018) ('*Separated Families*'); Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008); Judy Cashmore, 'Children's Participation in Family Law Decision-Making: Theoretical Approaches to Understanding Children's Views' (2011) 33(4) *Children and Youth Services Review* 515; Rachel Birnbaum, 'Views of the Child Reports: Hearing Directly from Children Involved in Post-Separation Disputes' (2017) 5(3) *Social Inclusion* 148; Anne B Smith, Nicola J Taylor and Pauline Tapp, 'Rethinking Children's Involvement in Decision-Making After Parental Separation' (2003) 10(2) *Childhood* 201.

[7] Parkinson and Cashmore (n 6) 67-8, 193-4.

[8] *Karamalis v Karamalis* (2018) 57 Fam LR 588, 591 [16] (Bennett J).

[9] Rachel Carson et al, *Compliance with and Enforcement of Family Law Parenting Orders: Final Report* (Research Report No 20, October 2022).

[10] Ibid 74.

[11] Australian Law Reform Commission ('ALRC'), *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, November 1997) [4.23].

[12] Carson et al, *Separated Families* (n 6) 44.

[13] Ibid 68.

The Amendment Bill does not implement the *CRC* into the *Family Law Act*

Currently, section 60B provides four objects and five underlying principles relating to Part VII of the *Family Law Act*. The 'additional object' in section 60B(4), which came into force in June 2012, is 'to give effect to the *Convention on the Rights of the Child*'.

As redrafted, the proposed objects clause sets out only two objects of Part VII: (a) to ensure that children's best interests are met, including by ensuring their safety; and (b) to give effect to the *CRC*.

We are concerned that the proposal to list only two objects will encourage decision-makers to continue applying a welfare-based approach, by dichotomising the child's best interests and the child's rights. Importantly, the two are not at odds; rather, the determination of a child's best interests must be informed by the child's rights under the *CRC*, particularly the child's right under Article 12 to express their views and be heard.[14] The UN Committee on the Rights of the Child ('CRC Committee') has explained that the 'best interests' principle in Article 3(1) and the right in Article 12 have 'complementary roles': the former 'aims to realize the child's best interests', while the latter 'provides the methodology' for hearing and including the child's views in the best interests assessment.[15]

Australia ratified the *CRC* on 17 December 1990 and it came into force for Australia on 16 January 1991. However, this Convention has not been incorporated into domestic law at the federal level. The Full Court of the Family Court of Australia has held that the *CRC* must be given 'special significance' when interpreting domestic law in light of its almost universal acceptance,[16] and that it 'is likely to be a fact or circumstance that the Court thinks is relevant in the absence of any inconsistent statutory provision'.[17]

A recent empirical study by Dr Dimopoulos examined all published judgments in Part VII proceedings from 1990 to 2021 that cited the *CRC*.[18] The study revealed considerable judicial scepticism about its role and relevance in Part VII decision-making. Judges commented, variously, that the *CRC* was 'not relevant'[19] or was of 'limited assistance' to resolving the issues before the court,[20] and that it was 'unlikely to be of great value in the adjudication of individual cases'.[21]

Dr Dimopoulos' study also found that the insertion of the 'additional object' into Part VII has not discernibly influenced judicial engagement with the *CRC*. There has been a noticeable decline in judges engaging with the *CRC* in their decision-making since 2017. This decline may have been influenced by remarks of the Full Court, variously, that references to the *CRC* were 'irrelevant' in the best interests assessment;[22] that the Convention applies 'only to the extent that it has been incorporated by specific provisions of the *Family Law Act*';[23] and that the *CRC* 'is given effect to in Australia by Part VII of the Act and is not to be given separate consideration'.[24]

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[14] Dimopoulos, *Decisional Privacy* (n 5) 71. See also Tobin, 'Judging the Judges' (n 5) 589.
[15] UN Committee on the Rights of the Child ('CRC Committee'), *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) [43].
[16] The USA is the only country that is yet to ratify the *CRC*.
[17] *In Marriage of B* (1997) 140 FLR 11, 82 (Nicholson CJ, Fogarty and Lindenmayer JJ).
[18] Georgina Dimopoulos, 'The Right Time for Rights? Judicial Engagement with the *UN Convention on the Rights of the Child* in Part VII Proceedings' (2023) 36(1) *Australian Journal of Family Law* (forthcoming).
[19] *Parris v Parris* [2021] FedCFamC2F 13, [174].
[20] *Farnell v Chanbua* (2016) 56 Fam LR 84, [341].
[21] *Zammit v Zammit* [2020] FamCA 950, [24] (Bennett J) ('*Zammit*').
[22] *Valentine v Lacerra* [2013] FamCAFC 53, [61]-[63].
[23] *Ralton v Ralton* [2017] FamCAFC 182, [18] (Bryant CJ, Strickland and Aldridge JJ).
[24] *Oram v Lambert* [2019] FamCAFC 4, 29 [156] (Ainslie-Wallace, Aldridge and Watts JJ).

Reference to the *CRC* in the objects of Part VII 'does not give any legally enforceable rights to children'.[25] Amending section 60B to list the *CRC* as one of only two objects of Part VII will not change the *status* of this international convention in Australian domestic law. The *CRC* will remain a limited 'interpretive aid to Part VII' only, as the Explanatory Memorandum to the Amendment Bill makes clear (at [18]).

In our view, the amended objects clause in section 60B will have no practical influence in Part VII proceedings unless there is an express reference to the *CRC* in the list of considerations when determining what is in a child's best interests.

Recommendations

- We recommend that the objects clause in section 60B be redrafted to a single object as follows:

  The object of this Part is to ensure that the best interests and safety of children are paramount and that the rights of children under the CRC are upheld.

- We recommend that the general consideration in section 60CC(2)(f) be amended to include an express reference to the *CRC* as follows:

  (f) anything else that is relevant to the particular circumstances of the child, taking into account the rights of the child under the CRC.

The Amendment Bill does not give children a right to express their views and heard

Children's right to participation is found in Article 12 of the *CRC*, which provides:

1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Together with the 'evolving capacities' principle in Article 5 of the *CRC*, this right recognises children 'as having agency and … a voice that must be listened to'.[26] The notion of evolving capacities supports the right of *all* children, regardless of their age, to experience increasing autonomy, responsibility and agency in enjoying their rights as they develop and mature.[27]

The proposed section 60CC(2)(b) – 'any views expressed by the child' – features as the second 'general consideration' in the streamlined list of matters that the court must consider in determining what is in the child's best interests.

[25] *Zammit* (n 21) [24]. See also Michelle Fernando, 'Express Recognition of the UN Convention on the Rights of the Child in the *Family Law Act*: What Impact for Children's Participation?' (2012) 36(1) *University of New South Wales Law Journal* 88.
[26] David Archard, 'Children, Adults, Best Interests and Rights' (2013) 13(1) *Medical Law International* 55, 58.
[27] See Sheila Varadan, 'The Principle of Evolving Capacities under the *UN Convention on the Rights of the Child*' (2019) 27 *International Journal of Children's Rights* 306; John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commen*tary (Oxford University Press, 2019) 159.

The Explanatory Memorandum to the Amendment Bill states that 'the requirement to consider any views expressed by the child recognises children's agency and their right to be heard in proceedings that affect them' (at [37]). With respect, that interpretation is incorrect.

The proposed section 60CC(2)(b) does not require the court to ascertain the views of a child; nor does it give the child the opportunity to express their views and be heard. Rather, it only requires the court to consider any views that the child has expressed.

The High Court of Australia in *Bondelmonte v Bondelmonte* confirmed that the equivalent current provision – section 60CC(3)(a) – does not expressly or impliedly require the court to seek the views of a child; it only requires that views that have been 'expressed' are considered.[28]

In *Duffy v Gomes*, Harman J said that to be given 'life or meaning', the right under Article 12 of the *CRC* demands 'active engagement with the child – meeting them, explaining their options to them and giving them the opportunity to participate how and should they wish'.[29]

Without an express right to be heard in Part VII proceedings, children are not afforded due process. As a result, the commitment that Australia has made to children in ratifying the *CRC* is not being met. The right under Article 12 of the *CRC* should be implemented in the legislative framework of Part VII, as the CRC Committee has recommended several times.[30]

Australia can be guided by other jurisdictions that have legislated to provide children with a right to express their views and to be heard:

- The *Care of Children Act 2004* (NZ) states that 'a child must be given reasonable opportunities to express views on matters affecting the child'; and 'any views the child expresses (either directly or through a representative) must be taken into account' (section 6(2)).
- The *Children (Scotland) Act 1995* (UK) states that a court 'taking account of the child's age and maturity, shall so far as practicable … [g]ive him [sic] an opportunity to indicate whether he wishes to express his views; If he does so wish, give him an opportunity to express them; and [h]ave regard to such views as he may express' (section 11(7)(b)).

<u>Recommendation</u>

We recommend that a new section be inserted into Part VII of the *Family Law Act*, as follows:

Child's right to express views and be heard

(a) In all proceedings under this Part, a child has a right to express their views in all matters affecting the child.

(b) For the purposes of subsection (a), a child will be provided with a reasonable opportunity to be heard in the proceedings, in a manner consistent with the child's evolving capacities.

This provision would not interfere with the current s 60CE which, appropriately, stipulates that children cannot be required to express their views.

[28] *Bondelmonte v Bondemonte* (2017) 259 CLR 662, 675 [43] (Kiefel, Bell, Keane, Nettle and Gordon JJ).
[29] *Duffy v Gomes* (2015) 52 Fam LR 562, 582 [106].
[30] CRC Committee, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) [22(a)] ('*Concluding Observations*').

Requiring ICLs to meet with children does not equate to giving children an opportunity to express their views and be heard

We welcome the proposed new section 68LA(5A)(a), which requires an ICL appointed to represent a child's best interests to meet with the child. This proposed addition to the specific duties of the ICL will go some way to addressing children's reported negative experiences of participation, including having minimal – and in some cases, no – contact with the ICL.[31] It will also enhance the accountability of ICLs to children,[32] and address the recommendation of the CRC Committee, in its 2019 concluding observations on Australia, that ICLs be provided with training and support 'to ensure that such lawyers have direct contact with the children they represent'.[33]

However, we are concerned about the proposed section 68LA(5A)(b), which states that the ICL must 'provide the child with an opportunity to express any views in relation to the matters to which the proceedings relate'. This provision appears to respond to the Australian Law Reform Commission's concern that there is currently no obligation to ensure that a child has in fact had the opportunity to express their views in Part VII proceedings.[34]

Although the *CRC* does not specify whether a 'best interests' model or a 'direct instructions' model of representation is required to satisfy Article 12(2),[35] ICLs meeting with children is *not* the same as giving children an opportunity to express their views in judicial proceedings affecting them. This is because:

- Not all children are appointed an ICL, and children have no say about whether an ICL is appointed for them. The wording of section 68LA(5A)(b) suggests that children who have not been appointed an ICL do not need to be given an opportunity to express their views in relation to the proceedings;
- The ICL 'is not the child's legal representative' and 'is not obliged to act on the child's instructions' (section 68LA(4)(a)-(b)). Rather, the ICL is 'a "best interests" advocate' for the child.[36] In light of this role, the purpose for which the ICL will ascertain the child's views is unclear.
- The ICL cannot give evidence to the court, nor are they compelled to make submissions which promote the child's views. The ICL can argue against the child's views and wishes if the ICL considers it to be in the child's best interests. The extent of the ICL's duties in relation to the child's views is that the ICL must ensure that any views expressed by the child are fully put before the court (section 68LA(5)(b)). In practice, this obligation is most often 'achieved' by the ICL being satisfied that there is a family report before the court that sets out the child's views. There is nothing in the Amendment Bill that indicates this position will change. The fact that ICLs must now meet with children will have no impact upon how their views are presented to or taken into account by the court.
- Meeting with an ICL does not satisfy children's right to have 'a reasonable opportunity to be heard' in the proceedings, as Article 12(2) of the *CRC* requires. It is the responsibility of the

[31] Rae Kaspiew et al, *Independent Children's Lawyers Study: Final Report* (Australian Institute of Family Studies, 2nd ed, 2014) 133-4, 142, 144; Carson et al, *Separated Families* (n 6) viii, 4, 51; ALRC, *Family Law for the Future - An Inquiry into the Family Law System* (Report No 135, March 2019) [12.59]; Joint Select Committee on Australia's Family Law System, *Improvements in Family Law Proceedings* (Second Interim Report, March 2021) 90-1 [4.52]-[4.54]; Joint Select Committee on Australia's Family Law System, *Improvements in Family Law Proceedings* (Interim Report, October 2020) 183 [8.65].
[32] See Kaspiew et al (n 31).
[33] CRC Committee, *Concluding Observations* (n 30) [22(c)].
[34] ALRC, *Family Law for the Future* (n 31) [10.105].
[35] See Nicola Ross, 'Images of Children: Agency, Article 12 and Models for Legal Representation of Children' (2005) 19 *Australian Journal of Family Law* 92.
[36] Kaspiew et al (n 31) ix.

court, and not the ICL, to ensure that children are given an opportunity to express their views and be heard. The proposed section 68LA(5A)(b) does not absolve the court of this responsibility.

The *Guidelines for Independent Children's Lawyers* ('*Guidelines*') set out the role and duties of the ICL, including an ICL's duties to a child if the child's views are considered to conflict with their best interests (at [5.4]). The *Guidelines* include both of the requirements that are sought to be introduced by the proposed section 68LA(5A). However, in the *Guidelines*, the requirements for an ICL to meet with the child (at [6.2]) and to 'seek to provide the child with the opportunity to express [their] views' (at [5.3]) are not linked. The ICL must generally meet with the child and must *also* seek to ensure that the child is provided with an opportunity to express their views. The meeting does not necessarily, and does not need to, discharge that duty.

The parenthetical phrase in the proposed section 68LA(5A) – 'not necessarily at the same time' – simply adds a temporal dimension to the ICL's duties. This provision does not reflect the position of the *Guidelines*, namely, that the duty to meet with the child and the duty to give the child an opportunity to express their views are independent of one another.

The *Guidelines* also set out circumstances in which an ICL is *not* expected to meet with a child: if the child is under school age; if there are 'exceptional circumstances'; or if there are 'significant practical limitations' such as geographic remoteness (at [6.2]). Importantly, the *Guidelines* provide as an example of 'exceptional circumstances' that would counter the expectation to meet with the child, 'where there is an ongoing investigation of sexual abuse allegations *and* in the particular circumstances there is a risk of systems abuse for the child' (at [6.2], emphasis added).

We are concerned about the proposed new section 68LA(5B), which provides that the ICL is *not* required to perform a duty if the child is under 5 years of age; or does not want to meet with the ICL or express their views; or there are 'exceptional circumstances' that justify the ICL not performing their duty. While a child should not be compelled to meet with an ICL or to express their views if they do not wish to, imposing an age restriction negates the presumption of Article 12(1) of the *CRC* that *all* children are capable of forming their own views.[37]

The 'exceptional circumstances' set out in the Amendment Bill are phrased in much broader terms than the *Guidelines*. In our view, they create an unduly low threshold for excusing the ICL from performance of their duties. The non-exhaustive list of 'exceptional circumstances' – which would justify the ICL not performing a duty – refers to exposing the child to 'the risk of physical or psychological harm that cannot be safely managed' or having 'a significant adverse effect' on the child's wellbeing (section 68LA(5C)).

The examples offered in the Explanatory Memorandum (at [291]-[293]) of matters that could be considered 'exceptional' to justify the ICL not performing their duties perpetuate the welfare-based approach to Part VII decision-making. This is because they 'substitute' one adult decision-maker (the ICL) for another (the court), 'rather than giving children the choice of deciding whether they like the conditions in which they find themselves'.[38] It is unclear whether – and if so, how – children's *own* assessment of their safety and wellbeing would be taken into account when the ICL or the court made a decision about the ICL meeting with the child or giving the child an opportunity to express any views (section 68LA(5D)).

[37] CRC Committee, *General Comment No 12 (2009): The Right of the Child to be Heard*, UN Doc CRC/C/GC/12 (20 July 2009) [20].
[38] Michael Wald, 'Children's Rights: A Framework for Analysis' (1979) 12(2) *University College Dublin Law Review* 255, 263.

Recommendations

- We recommend that a subsection be added to section 68LA to set out the process for assessing 'exceptional circumstances', as follows:

> *(5E) For the purposes of subsection (5C), the independent children's lawyer:*
> *(a) may consult any Family Consultant or other expert involved in the case; and*
> *(b) must consider whether additional support and safeguards may be put in place to ensure the child can safely meet with the independent children's lawyer and express their views.*

- We recommend that a section be inserted into the Part VII framework, as suggested above, which gives *all* children a reasonable opportunity to express their views and be heard, consistent with their evolving capacities.

The approach to the 'children's objection' exception is inconsistent with the Hague Convention and Article 12 of the CRC

We agree with the proposed repeal of section 68L(3) of the *Family Law Act*, which allows a court to appoint an ICL in a matter involving the *Hague Convention*[39] only in 'exceptional circumstances' (Sch 4 cl 5).

Independent representation for children is particularly significant when the taking parent raises an 'exception' under regulation 16(3) of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) (the Regulations) which, if established, would enliven the court's discretion to refuse to make a return order. These exceptions include where a child objects to being returned, or where there is a grave risk that returning the child would expose the child to harm or otherwise place them in an intolerable situation.

The High Court of Australia in *RCB v The Honourable Justice Forrest* ('*RCB*') noted that where an exception is raised, the interests and views of a child are relevant to Australia's obligation to return a child.[40] In any decision where a child's interests and views are relevant, the court should have the power to appoint an ICL. Otherwise, the nature of Hague Child Abduction cases is such that parents are unlikely to be able to represent the children's views and interests adequately.[41] The proposed new section 68L(1) appropriately recognises that children's right to participate should not be curtailed or prohibited by the nature of the proceedings.

However, the *Family Law Act* and the Regulations *need further reform* in relation to the treatment of children's views for the purposes of the 'children's objection' exception to mandatory return. Regulation 16(3)(c) reads:

> *A court may refuse to make [a return order] if a person opposing return establishes that each of the following applies:*
> *i. the child objects to being returned;*
> *ii. the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;*

[39] *Hague Convention on the Civil Aspects of International Child Abductio*n, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) ('*Hague Convention*').
[40] *RCB v The Honourable Justice Forrest* (2012) 247 CLR 304, 315-316 [22]-[23] ('*RCB*').
[41] Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Hart Publishing, 2013) 399.

> *iii. the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.*

The requirements of regulation 16(3)(c) are different from, and more stringent than, the requirements of the 'children's objection' exception as it appears in the *Hague Convention*. This is because the Regulations add a requirement that the child's objection 'shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes'. Many judges have interpreted the Regulations to require an additional test beyond that found in the *Hague Convention*. The plurality of the High Court in *RCB* explained:

> The court may also refuse to make a return order if a person opposing return establishes that the child objects to being returned, that the objection shows a strength of feeling beyond a mere expression of a preference or of ordinary wishes and that the child has attained an age and a degree of maturity at which it is appropriate to take account of his or her views.[42]

This requirement was inserted into the *Family Law Act* and the Regulations in 2000, following the High Court's judgment in *De L*.[43] When applied strictly, the 'strength of feeling' requirement creates an *additional hurdle* which children need to meet before their objections can be taken into account. This has led to situations where the views of children who express themselves in equivocal or less forceful terms are discounted on the basis that their objection lacks the requisite 'strength of feeling'.[44]

Dr Fernando's research[45] found that Australian courts were more likely to be satisfied that children's objections met the required 'strength of feeling' test where they were 'demonstrative of extreme or emotionally dysregulated behaviour'.[46] Paradoxically, objections expressed by children in extreme terms or with high emotion can alternatively be viewed as evidence of immaturity or parental manipulation. Further, there is a lack of clarity about precisely what threshold is required, and the difference between an objection that does not meet the requirement and one that does.[47] There is no 'clear standard with a readily identifiable border between ordinary wishes and wishes that are not ordinary, or when something moves beyond a mere preference'.[48]

The approach to the 'children's objection' exception in the *Family Law Act* and the Regulations runs contrary to the *Hague Convention*, which only requires that a child objects to being returned, and has attained an age and degree of maturity at which it is appropriate to take account of their views, before their views can be taken into account.[49] It also contrasts with the approach in similar jurisdictions to Australia with which there are frequent reciprocal cases. For example, in England and Wales, children's objections are readily taken into account and the strength of those objections is weighed, alongside other matters, in the court's determination of whether to exercise its discretion to refuse to return the child. This approach is in keeping with Article 12 of the *CRC* and it is 'undoubtedly to be preferred'.[50]

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[42] *RCB* (n 40) [19].
[43] *De L v Director-General, New South Wales Department of Community Services and Anor* (1996) 187 CLR 640.
[44] See, eg, *Director-General, Dept of Communities, Child Safety and Disability Services and Hughes* [2017] FamCA 509, [49].
[45] Michelle Fernando, 'Children's Objections in Hague Child Abduction Convention Proceedings in Australia and the "Strength of Feeling" Requirement' (2022) 30 *International Journal of Children's Rights* 729 ('Children's Objections').
[46] *Secretary, Department of Communities and Justice v Paredes* [2021] FamCA 128, [253] (Williams J).
[47] Fernando, 'Children's Objections' (n 45) 742.
[48] *Department of Communities and Justice v Sarapo (No 2)* [2019] FamCA 829, [18] (Gill J).
[49] *Hague Convention* (n 39) art 13.
[50] Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999) 188.

Recommendation

To the extent that they are inconsistent with the *Hague Convention* and Article 12 of the *CRC*, section 111B(1B) of the *Family Law Act* and the 'strength of feeling' requirement in regulation 16(3)(c)(ii) of the Regulations should be repealed.

Consultation with children and young people

Finally, we note the apparent absence of direct consultation with children and young people in the process of developing the Amendment Bill. Recognising that children and young people are experts by experience, and that parental separation has such profound impacts on their lives, proposed reforms to the *Family Law Act* must actively seek out, and engage meaningfully and directly with, their views and experiences.

Thank you for considering our submission. If you have any questions, please contact us on the details below. We are happy for this submission to be made public. As noted above, we would welcome the opportunity to appear at a public hearing.

Yours sincerely

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