The right time for rights? Judicial engagement with the *UN Convention on the Rights of the Child* in Part VII proceedings

Georgina Dimopoulos[*]

This article examines the use of the UN Convention on the Rights of the Child ('CRC') in judicial decision-making in proceedings under Part VII of the Family Law Act 1975 (Cth). It presents the findings of an empirical study of published judgments at first instance from 1990–2021 that refer to the CRC, offering quantitative and qualitative insights into how judges have engaged with this international convention. Two key conclusions are drawn. The first is that children's rights are not yet a way of thinking for judges in Part VII proceedings. Secondly, further judicial engagement with children's right to express their views and be heard could improve children's meaningful, safe participation in decision-making about their best interests. This article stimulates dialogue about whether, and if so, how the CRC can be incorporated more robustly into Australian family law policy and practice.

I Introduction

The role of the judiciary in upholding and advancing children's rights has become a subject of increasing scholarly attention.[1] Judges are said to 'step in where other adults ... fail or disagree on how to give effect to children's rights', particularly given children's 'invisibility and vulnerability' under the

* PhD (Law) (Melb), LLB (Melb), BA (Media & Comm) (Melb), GDLP. Senior Lecturer in Law, Faculty of Business, Law and Arts and Research Associate, Centre for Children and Young People, Southern Cross University. Email: georgina.dimopoulos@scu.edu.au. The author received funding for this research from the Socio-Legal Studies Association Research Grants Scheme. The author thanks Harrison Cant and David Wang for their research and editorial assistance, participants at the ANU Family Law Symposium (ANU, Canberra, 18 November 2022) for their comments on a working draft, and the anonymous reviewers for their insightful suggestions.

1 See, eg, Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing, 2011); John Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23(1) *International Journal of Children's Rights* 3; Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill Nijhoff, 2017); Jane Fortin, 'A Decade of the HRA and its Impact on Children's Rights' (2011) 41 *Family Law* 176 ('A Decade of the HRA and its Impact on Children's Rights'); Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) ('*Rewriting Children's Rights Judgments*'); 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').

law and their limited capacity to assert their rights independently of adults.[2] However, there remains 'an unfortunate disjunction' between children rights 'theory' and judicial 'practice'.[3]

This article examines the underexplored[4] subject of how the *United Nations Convention on the Rights of the Child* ('*CRC*')[5] has been used in judicial decision-making in proceedings under pt VII of the *Family Law Act 1975* (Cth) ('*Family Law Act*'). It begins with an overview of the status of the *CRC* in Australian domestic law and its relevance to decision-making in Part VII proceedings. It then outlines the aims and methodology of the empirical study and presents quantitative and qualitative insights into how judges have engaged with the *CRC*. Two key conclusions are drawn. The first is that children's rights are not yet a 'way of thinking'[6] for judges in Part VII proceedings, despite an express legislative commitment to give effect to the *CRC*.[7] Secondly, further judicial engagement with children's right to express their views and be heard[8] could improve children's meaningful, safe participation in Part VII proceedings. However, conceptual and practical impediments to implementing this right remain. This article offers a 'testing ground'[9] for applying the conceptual framework of children's rights to judicial decision-making in Part VII proceedings. It also serves to enhance academic debate and to inform judicial thinking about whether, and if so how, the *CRC* can be incorporated more robustly into Australian family law policy and practice.

II The status of the *CRC* in Australian domestic law and its role in family law decision-making

This article focuses on children's rights embodied in the legal and normative framework of the *CRC*. As the most widely ratified international human rights

2 Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Stalford, Hollingsworth and Gilmore, *Rewriting Children's Rights Judgments* (n 1) 17, 21; *W v G [No 1]* (2004) 35 Fam LR 417, 431 [117] (Carmody J) ('*W v G*').

3 Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3rd ed, 2009) 29 ('*Children's Rights and the Developing Law*'). See also Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, 'Introducing *Children's Rights Judgments*' in Stalford, Hollingsworth and Gilmore, *Rewriting Children's Rights Judgments* (n 1) 1, 6 ('Introducing *Children's Rights Judgments*').

4 For similar studies from other jurisdictions, see Stephen Gilmore, 'Use of the UNCRC in Family Law Cases in England and Wales' (2017) 25(2) *International Journal of Children's Rights* 500; Sue Farran, 'Exploring the Engagement of Pacific Island Judges with the Convention on the Rights of the Child' (2022) 30(1) *International Journal of Children's Rights* 72; Julia Sloth-Nielsen and Benyam D Mezmur, '2 + 2 = 5? Exploring the Domestication of the CRC in South African Jurisprudence (2002–2006)' (2008) 16(1) *International Journal of Children's Rights* 1.

5 *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*').

6 Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 3) 31–2.

7 See *Family Law Act 1975* (Cth) s 60B(4) ('*Family Law Act*').

8 *CRC* (n 5) art 12.

9 Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 3) 7.

treaty,[10] this convention is 'a canonical statement of children's rights' with increasing influence on domestic law and policy.[11] However, scholarly debates persist regarding the very concept of 'children's rights',[12] and the *CRC*'s vision of children's rights remains criticised.[13]

Australia ratified the *CRC* on 17 December 1990. It came into force for Australia on 16 January 1991. While this Convention has not been incorporated into domestic law at the federal level, Australia's ratification of the *CRC* is important for statutory interpretation.[14] The *CRC* must be bestowed 'special significance' when interpreting domestic law, given its almost universal acceptance, 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'.[15] However, recent decisions emphasise that Australia has not formally implemented the *CRC*.[16]

The *Family Law Act* establishes 'the need to protect the rights of children and to promote their welfare' as a principle to be applied by courts.[17] Various principles in the *CRC* are incorporated into Part VII and embedded in court processes.[18] There is also an express legislative commitment to make the *CRC* relevant to judicial decision-making under pt VII of the *Family Law Act*, through the insertion of an 'additional object' into the objects that Part.[19] Section 60B(4), which came into force in June 2012, provides that '[a]n additional object of this Part is to give effect to the Convention on the Rights of the Child'. However, this 'is not equivalent to incorporating the Convention into domestic law'.[20] Rather, its purpose is 'to confirm, in cases of ambiguity, the obligation ... to interpret Part VII of the [Family Law] Act, to the extent its language permits, consistently with Australia's obligations' under the

10 The United States of America is the only country yet to ratify the *CRC*.

11 David Archard, 'Children, Adults, Best Interests and Rights' (2013) 13(1) *Medical Law International* 55, 56.

12 See, eg, Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21(2) *International Journal of Children's Rights* 177; John Tobin, 'Justifying Children's Rights' (2013) 21(3) *International Journal of Children's Rights* 395 ('Justifying Children's Rights').

13 See, eg, Priscilla Alderson, 'Common Criticisms of Children's Rights and 25 Years of the IJCR' in Michael Freeman (ed), *Children's Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) 39; Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'Between "Believers" and "Opponents": Critical Discussions on Children's Rights' (2012) 20(1) *International Journal of Children's Rights* 155.

14 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J) ('*Teoh*').

15 *In Marriage of B* (1997) 140 FLR 11, 82 (Nicholson CJ, Fogarty and Lindenmayer JJ).

16 *Ralton v Ralton* [2017] FamCAFC 182, [18] (Bryant CJ, Strickland and Aldridge JJ) ('*Ralton*'). See also *Oram v Lambert* [2019] FamCAFC 4, [156] (Ainslie-Wallace, Aldridge and Watts JJ) ('*Oram*').

17 *Family Law Act* (n 7) s 43(c).

18 See ibid ss 60B(1)(a)–(b), 60CC(2)(a)–(b), 60CC(3)(a), 60CC(3)(ca), 60CC(3)(d), 60CC(3)(g)–(h), (6), 60CC(3)(i); *CRC* (n 5) arts 9(3), 19(1), 12, 27(4), 9(3), 30, 18.

19 Section 60B(4) was inserted by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) s 13.

20 Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) 7 [24].

CRC.[21] While the status of the additional object as a limited interpretive tool can make applying the *CRC* to Part VII proceedings 'uncertain and contentious',[22] its insertion is significant. This is because it embeds the notion of children's rights into the legislative framework of Part VII.

III Aims and method of the empirical study

The aim of this study was to examine how trial judges have engaged with the *CRC* in their decision-making in proceedings under pt VII of the *Family Law Act* through a quantitative and qualitative analysis of published judgments. It sought to identify: (i) in what contexts the *CRC* has been cited and when; (ii) who has invoked the *CRC* in the proceedings; (iii) which judges have engaged with the *CRC*; (iv) which Articles of the *CRC* have been cited; and (v) how judges have used the *CRC* to inform their reasoning and conclusions.

The study focused on judicial engagement with the *CRC* at first instance for two reasons. First, the determination of what is in 'the best interests of the child' involves the exercise of judicial discretion, such that 'predictions, perceptions, assumptions and within reason even intuition and guesswork can all play a part in the reasoning process'.[23] Established legal principles limit interference with such 'discretionary' judgments in appellate proceedings.[24] Therefore, appellate judgments shed less light on how judges use the *CRC* when undertaking the best interests assessment. Secondly, an academic tendency to cite appeal decisions[25] has left a dearth of research — empirical or otherwise — into how Australian family law trial judges use the *CRC*.

The context of the judgments search encompassed structural reforms to the Australian family court system over the period captured by this study.[26] Judgments were located by the author using keyword searches in the Westlaw AU legal database for case law in the 'Commonwealth of Australia' jurisdiction, to capture judgments of the federal family courts — namely, the Federal Circuit and Family Court of Australia ('FCFCOA') (Division 1 and Division 2 — Family Law), the Family Court of Australia ('FCoA'), the Federal Circuit Court of Australia ('FCCA'), and the Federal Magistrates

21 Ibid 6–7 [24].

22 Patrick Parkinson, 'The Family Law Act and the UN Convention on Children's Rights: A New Focus on Children?', *Right Now* (Web Page, 13 July 2012) <https://rightnow.org.au/opinion-3/the-family-law-act-and-the-un-convention-on-childrens-rights-a-new-focus-on-children/>. 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 ('Express Recognition of the UN Convention on the Rights of the Child in the Family Law Act').

23 *Dylan v Dylan* [2007] FamCA 842, [58] (Carmody J) ('*Dylan*'), citing *CDJ v VAJ [No 1]* (1998) 197 CLR 172, 213.

24 See *Scranton v Scranton* [2012] FamCAFC 54, [42] (Finn, Ainslie-Wallace and Loughnan JJ).

25 See, eg, Michael Kirby, 'Chief Justice Nicholson, Australian Family Law and International Human Rights' (2004) 5(1) *Melbourne Journal of International Law* 221, 228–32, 239; Tobin, 'Judging the Judges' (n 1) 598–9, 605; Fernando, 'Express Recognition of the UN Convention on the Rights of the Child in the Family Law Act' (n 22) 97–8, 100–3.

26 State courts of summary jurisdiction can also exercise jurisdiction under the *Family Law Act*, however the judgments of these courts have been excluded from this study.

Court of Australia ('FMCA'). Search terms used were any one or more of 'convention on the rights of the child', 'convention on the rights of children', 'convention of children's rights', '*CRC*', 'CROC' and 'UNCROC', and the phrase 'family law', for the range 1 January 1990–31 December 2021 inclusive. The above search was repeated for the Family Court of Western Australia ('FWCA') jurisdiction. The initial search yielded 476 judgments. This set of judgments was cross-checked against a list derived from searches of another three databases: Lexis Advance Pacific, the Australasian Legal Information Institute database, and the eCourts Portal of Western Australia. These supplementary searches yielded a handful of additional judgments.

A judgment fell within the sample if it: (i) referred to the *CRC*; and (ii) concerned proceedings heard and determined under pt VII of the *Family Law Act*. Both substantive proceedings and proceedings for related procedural or jurisdictional issues were included. Results were filtered manually to exclude judgments that:

- were not first instance judgments of the FCFCOA, FCoA, FCCA, FMCA or FCWA;
- concerned a jurisdictional issue only and the court determined that it did not have jurisdiction to hear the matter under pt VII of the *Family Law Act*;[27]
- concerned an application for costs subsequent to an application for parenting orders;
- referred to the *CRC* in a peripheral context (such as the child attending a human rights workshop); or
- only contained the acronym '*CRC*' or 'CROC' in an irrelevant context (such as a case file number or the term 'crocodile').

Applying these criteria yielded 308 judgments in 296 separate proceedings that had been published as of 31 May 2022, for the timespan of this study. Approximately half (156/308) of these were FCCA judgments; one-third (102/308) were FCoA judgments; and almost one-sixth (43/308) were FMCA judgments. FCWA (4/308) and FCFCOA (3/308) judgments comprised a tiny portion of the sample. The small number of FCFCOA judgments is explained by the timing of the commencement of this Court on 1 September 2021, as the product of the FCoA and the FCCA coming together under a unified administrative structure.[28] Division 1 of the FCFCOA continues the FCoA, while Division 2 continues the FCCA. The FCCA was previously known as the FMCA.[29] The FMCA operated from 2000–13. The FCWA is the only State-based family court in Australia.[30]

---

27 Or the equivalent provisions of the *Family Court Act 1997* (WA).

28 The change was effected by the *Federal Circuit and Family Court of Australia Act 2021* (Cth) and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth).

29 The name change came into force on 12 April 2013, effected by the *Federal Circuit Court of Australia Legislation Amendment Act 2012* (Cth) and the *Federal Circuit Court of Australia (Consequential Amendments) Act 2013* (Cth).

30 The FCWA exercises jurisdiction under the *Family Law Act* and *the Family Court Act 1997* (WA).

The dataset was quantitatively and qualitatively analysed. First, a content analysis was undertaken.[31] Judgments in the sample were coded to develop an understanding of patterns of judicial use of the *CRC* in Part VII proceedings.[32] Data collected from each judgment were: the jurisdiction and registry location; the judge; the date of judgment; the nature of the proceedings; the nature of the reference to the *CRC*; which particular Articles, if any, were cited; and by whom the *CRC* was invoked. Also recorded were any judicial comments regarding the relevance and significance of the *CRC* to the proceedings at hand or more generally, or its status in Australian domestic law. This method was complemented by a textual and thematic analysis of judicial engagement with the *CRC*,[33] informed by scholarship examining children's rights in the context of judicial proceedings.[34]

The limitations of this study must be noted. First, the four legal databases used to locate the judgments do not contain all judgments of the family courts that have been handed down. While almost all judgments of the FCoA were published from 2007 onwards, previously, only those considered to be of significant public interest or jurisprudential value were published.[35] Similarly, not all judgments of the FCCA and the FMCA were published, due to a lack of court resources to anonymise the reasons for judgment.[36] Only selected judgments of the FCWA are published online.[37] Therefore, judgments of the FCFCOA, the FCoA before 2007, and the FCWA, represent a biased sample of more complex matters, while judgments of the FCCA and the FMCA are a biased sample of less complex matters. Furthermore, the study findings capture a particular period and the search was conducted at a particular point in time. If the search were to be repeated for the same period, additional judgments may have been published.

Another limitation is that the *CRC* is not 'the be all and end all of a children's rights judgment'.[38] It is possible that judgments have engaged with the rights of children without referring to the *CRC*, although this study has not captured these judgments. Finally, any attempt to draw conclusions about judicial engagement with the *CRC* solely from the text of published judgments

31 See Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63.

32 The author conducted data coding with the help of a research assistant. The author checked all judgments coded by the research assistant and made amendments as required. Each judgment was reviewed at least three times.

33 See Gregory C Sisk, 'The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making' (2008) 93(4) *Cornell Law Review* 873.

34 Tobin, 'Judging the Judges' (n 1) 593–604; Stalford, Hollingsworth and Gilmore, *Rewriting Children's Rights Judgments* (n 1); Fortin, 'A Decade of the HRA and its Impact on Children's Rights' (n 1); Fortin, *Children's Rights and the Developing Law* (n 3); Daly (n 1).

35 See Lyn Newlands, 'Lifting the Veil — The Changing Face of Judgments Publishing in the Family Court of Australia' (2009) 17(4) *Australian Law Librarian* 250.

36 Anonymisation is required to comply with s 121 of the *Family Law Act* (n 7). See also Grant Riethmuller, 'Improving the Use of Court Decisions in the Federal Circuit Court' (Research Paper, Law via the Internet 2015 Conference, Sydney, 10 November 2015).

37 'Judgments', *Family Court of Western Australia* (Web Page, 5 December 2019) <https://www.familycourt.wa.gov.au/J/judgements.aspx>.

38 Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Stalford, Hollingsworth and Gilmore, *Rewriting Judgments* (n 1) 53, 58.

does not paint a complete picture of the 'empirical realities'[39] of judicial decision-making.[40] This includes a range of personal, procedural, practical and institutional factors that may shape judges' willingness and ability to engage with the *CRC* in Part VII proceedings.[41]

IV Results: Judicial engagement with the *CRC* in Part VII proceedings

A In what contexts has the *CRC* been cited?

Judicial references to the *CRC* in the judgments analysed took one or more of the following forms:[42]

(i) citation of the *CRC only* in the context of providing an excerpt of s 60B of the *Family Law Act*, or paraphrasing the 'additional object' in s 60B(4) (n=105);

(ii) a reference to specific Articles of the *CRC* and/or its Preamble, either explicitly or implicitly (n=135);

(iii) a general reference to the *CRC*, that is, no express or implied reference to a particular Article or to the Preamble (n=48);

(iv) an excerpt or quotation of a judgment, document or agreement that itself cited or referred to the *CRC* (n=21); and

(v) a reference to parties' submissions, evidence or orders sought that cited the *CRC* (n=13).

Notably, while judgments of the FCCA comprised approximately half of the sample, in 57.1% of these (89/156), *CRC* engagement was limited to form (i) above. By contrast, 87.3% of FCoA judgments (89/102), 93.0% of FCMA judgments (40/43), and all FCFCOA (3/3) and FCWA (4/4) judgments, engaged with the *CRC* in one or more of the forms listed in (ii) to (v) above. The ensuing quantitative and qualitative findings focus on this subset of 203 judgments which refer to the *CRC* not simply as an extract or paraphrasing of s 60B(4). The overwhelming majority of these judgments (189/203 = 93.1%) concerned parenting orders, one concerned child maintenance,[43] and the remainder were special medical procedure applications under s 67ZC or concerned the exercise of the *parens patriae* jurisdiction (13/203 = 6.4%).

39 Tobin, 'Judging the Judges' (n 1) 581.

40 See Antonia Glover, 'What's Plainly Wrong in Australian Law? An Empirical Analysis of the Rule in *Farah*' (2020) 43(3) *University of New South Wales Law Journal* 850, 870–1; Caroline Hunter, Judy Nixon and Sarah Blandy, 'Researching the Judiciary: Exploring the Invisible in Judicial Decision Making' (2008) 35 *Journal of Law and Society* 76, 80, 89–90.

41 See Georgina Dimopoulos, *Decisional Privacy and the Rights of the Child* (Routledge, 2022) 66–75 ('*Decisional Privacy and the Rights of the Child*').

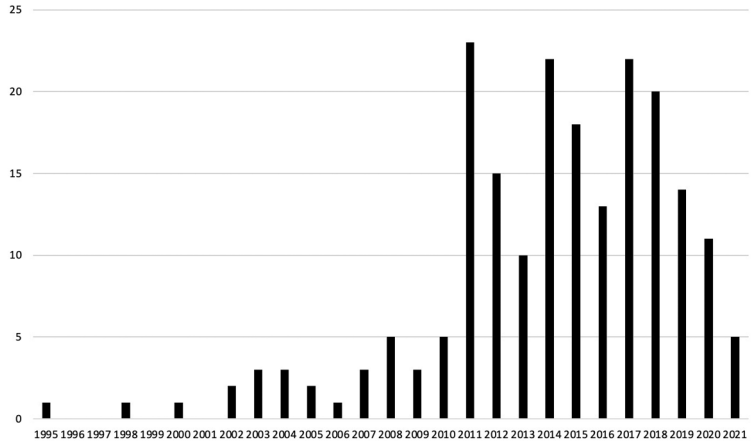
42 Some judgments evinced more than once kind of judicial engagement listed from (ii) to (v) inclusive. In one judgment, the *CRC* was referred to in the list of authorities cited, but it did not feature in the judgment itself: see *Newport v Newport* [2018] FamCA 472.

43 *Parris v Parris* [2021] FedCFamC2F 13 ('*Parris*').

B When has the *CRC* been cited in judgments?

Figure 1 shows how many judgments across all courts in the study have referred to the *CRC* by year. It demonstrates a general upward trend between 2002 and 2017, peaking in 2011 with 23 judgments. However, these results must be interpreted in light of the judgments publication policies of the courts, noted above. The insertion of the 'additional object' into pt VII of the *Family Law Act*, which commenced on 7 June 2012, does not appear to have discernibly influenced judicial engagement with the *CRC*. Although the overall trend remained relatively steady since this amendment, there has been a noticeable decline since 2017. This decline may have been influenced by remarks of the FCoA Full Court, variously, that a Federal Magistrate's references to the *CRC* were 'irrelevant' in the best interests assessment;[44] that 'the Convention is applicable only to the extent that it has been incorporated by specific provisions of the *Family Law Act*';[45] and that the *CRC* 'is given effect to in Australia by Part VII of the Act and is not to be given separate consideration'.[46]

Figure 1: Number of judgments citing the CRC by year



C Who has invoked the *CRC*?

The judgments analysed reveal that the *CRC* has been raised predominantly by a small number of judges. Table 1 identifies by court by whom the *CRC* has been raised in the proceedings.[47] An acknowledged limitation of basing this analysis on court judgments alone is that judgments are 'the product of

44 *Valentine v Lacerra* [2013] FamCAFC 53, [61]–[63] ('*Valentine*').

45 *Ralton* (n 16) [18].

46 *Oram* (n 16) [156].

47 In two judgments, the *CRC* was raised independently by both the judge and a party: see *Aiken v Aiken* [2011] FMCAfam 910 ('*Aiken*'); *Zanda v Zanda* [2014] FCCA 1326 ('*Zanda*').

judicial selectivity and filtering'.[48] Documents filed by the parties and contained on the court file, or the transcript of proceedings, may more fully capture submissions made to the court which invoke the *CRC*.

Table 1: By whom the CRC is raised by court

	FCFCOA	FCoA	FCCA	FMCA	FCWA	Total
Judge	3	70	63	39	2	**177**
Mother	0	9	1	1	0	**11**
Father	0	5	3	1	0	**9**
Human Rights Commission (Intervener)	0	3	0	0	1	**4**
Child	0	1	0	0	0	**1**
Government department	0	0	0	0	1	**1**
Grandparent	0	0	1	0	0	**1**
Non-biological parent(s)	0	1	0	0	0	**1**
Independent Children's Lawyer	0	0	0	0	0	**0**

The *CRC* was evidently raised by a party or an intervener in only 13.8% (28/203) of judgments. Mothers and fathers invoked the *CRC* in 11 and 9 judgments respectively. They cited the *CRC* across different contexts including in the orders sought;[49] in written submissions or a case outline;[50] in the evidence of their witnesses,[51] in a document or legislative provisions they relied on;[52] in their own evidence;[53] or in cross-examination of a witness.[54] The party referring to the *CRC* was self-represented in 60.0% of these judgments (12/20; mother = 6/11; father = 6/9). Irrespective of legal representation status, in only two of the judgments did the judge acknowledge the *CRC*'s relevance or favourably engage with the party's reference to the *CRC*.[55] In the majority

48 Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 91.

49 See, eg, *Goudarzi v Bagheri* [2018] FamCA 217; *Langmeil v Grange [No 4]* [2011] FamCA 605 ('*Grange [No 4]*'); *Lac v Yau* [2018] FCCA 3851.

50 See, eg, *Tomas v Murray* [2011] FamCA 641, [126]; *Nevsky v Scott* [2002] FamCA 860, [25] ('*Nevsky*'); *Dalton v Nagle* [2021] FamCA 376, [3], [41] [123] ('*Nagle*'); *Bale-Sutch v Bale-Sutch* [2008] FamCA 564, [34]–[36] ('*Bale-Sutch*').

51 *Licha v Wunscher* [2007] FamCA 357, [267]; *Mankus v Matulis* [2016] FamCA 799, [72], [82]–[83].

52 *Nandi v Listberg* [2011] FamCA 861, [15].

53 *Seaward v MacDuff* [2011] FMCAfam 986, [28].

54 *Prantage v Prantage [No 2]* [2014] FamCA 563, [15].

55 *Mafton v Salmet [No 2]* [2020] FCCA 903, [9]–[10]; *Aiken* (n 47) [44], [85].

of these judgments, the parties' *CRC*-based arguments were rejected as misguided,[56] unhelpful,[57] not relevant,[58] or an abuse of process.[59]

The *CRC* was also raised by a child in proceedings between her parents over her future parenting arrangements. The child sought orders that the Independent Children's Lawyer ('ICL') be discharged and that she have her own legal representation, 'in line with' Article 12 of the *CRC*.[60] In dismissing the application, Hogan J did not engage with the *CRC*. Rather, her Honour found that there was already evidence before the Court that contained the child's wishes; there was no evidence that the child would or could be capable of conducting the case as a party; and that to permit her to do so 'would be seen as falling within the category of exposing her to a form of emotional harm and/or abuse'.[61] While an ICL featured in 62.0% (126/203) of judgments, the *CRC* was not raised by the ICL in any of these.

The Australian Human Rights Commission ('AHRC'),[62] in its capacity as intervener, made submissions that invoked the *CRC* in each of the four proceedings in which it had intervened, comprising 4 of the 203 judgments.[63] Importantly, these judgments prompted the most meaningful judicial analysis of child rights-based arguments. In *Ellison v Karnchanit*,[64] the AHRC relied on several Articles of the *CRC* to support the application for a declaration of parentage. Ryan J set out in full the AHRC's 'well articulated' submissions and made the declaration.[65]

D Which judicial officers have engaged with the *CRC*?

The 203 published judgments in which the *CRC* was cited substantively were of 54 different judicial officers. Table 2 identifies by court which judges cited the *CRC* in at least three judgments.[66] It shows that 61.6% were judgments of three judges alone: Harman FM/J (84/203 = 41.4%), McClelland DCJ/J (23/203 = 11.3%) and Bennett J (18/203 = 8.9%). The results reinforce the view that 'it matters who the judge is',[67] because their engagement with children's rights is 'grounded in [their] own convictions'.[68] However, two limitations of these data must be noted. As identified earlier, judges may be

56 *Langmeil v Grange [No 2]* [2012] FamCA 588, [26]; *Langmeil v Grange* [2012] FamCA 498, [18]–[22]; *Bale-Sutch* (n 50) [34]–[36]; *Scollan v Allamby* [2020] FCCA 2398, [85]–[92].

57 *Gatenby v Chisler [No 2]* [2019] FamCA 443, [252]–[255] ('*Gatenby [No 2]*').

58 *Nevsky* (n 50) [25]–[27], [36]–[37].

59 *Nagle* (n 50) [123]–[146].

60 *Vale v Vale [No 8]* [2016] FamCA 992, [1]–[4].

61 Ibid [8]–[9], [11]–[13].

62 Or its predecessor, the Human Rights and Equal Opportunity Commission.

63 See *Re Alex* (2004) 180 FLR 89, 127–8 [220] ('*Alex 2004*'); *Ellison v Karnchanit* (2012) 48 Fam LR 33, 54 [85] ('*Ellison*'); *Farnell v Chanbua* (2016) 56 Fam LR 84, 148 [335] ('*Farnell*'); *Re Alex* (2009) 248 FLR 312, 353–4 [178], [180] ('*Alex 2009*').

64 (2012) 48 Fam LR 33.

65 Ibid 54 [85], 58 [101]–[102].

66 Many of these judges have also been found to use social science literature in children's cases: see Zoe Rathus, 'Mapping the Use of Social Science in Australian Courts: The Example of Family Law Children's Cases' (2016) 25(3) *Griffith Law Review* 352.

67 Stalford and Hollingsworth, 'Judging Children's Rights' (n 2) 48.

68 Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 88.

engaging with and giving effect to children's rights without specific reference to the *CRC*. Additionally, the extent to which judicial officers sit in parenting matters may vary.

Table 2: Judges who engaged with the CRC in at least three judgments

Court	Magistrate or Judge	No. of judgments	% of Court total
FMCA	Harman FM	**26**	**65.0%**
	Brown FM	**5**	**12.5%**
	Ryan FM	**4**	**10.0%**
FCoA	McClelland DCJ/J	**23**	**25.8%**
	Bennett J	**18**	**20.2%**
	Johns J	**7**	**7.9%**
	Benjamin J	**3**	**3.4%**
	Carmody J	**3**	**3.4%**
	Nicholson CJ	**3**	**3.4%**
FCCA	Harman J	**58**	**86.6%**
	Morley J	**3**	**4.5%**

Harman FM/J demonstrated both the most frequent and the most substantive engagement with the *CRC*. His Honour's judgments comprised 65.0% of all judgments of the FMCA and 86.6% of all judgments of the FCCA in the study. Harman FM/J repeated the view that the *CRC* has been 'incorporated in its entirety' or 'totality' into the *Family Law Act* by the objects and principles of Part VII.[69] Twenty-three judgments of McClelland DCJ/J referred to the *CRC*, comprising 25.8% of all judgments of the FCoA in the study. In over half (13/23 = 57.0%) of these judgments, his Honour's approach was to paraphrase s 60B(4) and to quote Article 19 of the Convention, in outlining the concepts and principles relevant to Part VII proceedings. Bennett J engaged with the *CRC* in 18 judgments, comprising 20.2% of all FCoA judgments in the study. Twelve of her Honour's judgments adopted a similarly formulaic approach to the *CRC*.[70] Her Honour's substantive engagement with the *CRC* most commonly occurred in the context of the child's right to express their views and be heard under Article 12.[71]

69 See, eg, *Gabel v Meltzer* [2014] FCCA 604, [231]; *Hanley v Hanley* [2014] FCCA 293, [230] ('*Hanley*'); *Knightley v Brandon* [2013] FMCAfam 148, [29]; *Kenneally v Kenneally* [2012] FMCAfam 921, [49]; *Payne v Payne* [2014] FCCA 2319, [124]; *Briggs v Hinkley* [2014] FCCA 2410, [49] ('*Briggs*').

70 See, eg, *Grall v Hackett* [2015] FamCA 540, [48]–[49]; *Shoretsky v Shoretsky [No 2]* [2015] FamCA 1026, [61]–[62]; *Watson v Peterson* [2013] FamCA 541, [23]–[24]; *Xiu v Hodges* [2019] FamCA 251, [39], [41] ('*Xiu*'); *Gatenby v Chisler* [2017] FamCA 1109, [39]–[40]; *Missiakos v Missiakos* [2015] FamCA 1187, [65]–[66] ('*Missiakos*'); *McCallan v Roche* [2016] FamCA 860, [72]–[73].

71 See, eg, *Xiu* (n 70) [39]; *Fowles v Fowles [No 4]* [2018] FamCA 711, [61] ('*Fowles*'); *Cousins v Peake* [2018] FamCA 671, [103] ('*Cousins*'); *Zammit v Zammit* [2020] FamCA 950, [23]–[24] ('*Zammit*'); *Bryce v Bryce* [2020] FamCA 653, [37]–[38] ('*Bryce*'); *Karamalis v Karamalis* (2018) 57 Fam LR 588, 592 [18] ('*Karamalis*').

E Which Articles of the *CRC* have been cited?

In addition to the Preamble, 22 substantive Articles in pt I of the *CRC*, and one Article in pt II,[72] were cited across the 203 judgments. Table 3 shows the frequency of citation of the Preamble and Articles of the *CRC*. An 'express' reference is where a particular Article number of the *CRC* was identified in the judgment. An 'implied' reference is where the content of a particular Article was discussed, although without a numerical reference. The ensuing discussion highlights the nature of judicial engagement with the Preamble and Articles that were cited at least 10 times across the judgments.

Table 3: Frequency of citation — Articles of the CRC and Preamble

Article of *CRC* or Preamble	**No of judgments (express reference)**	**No of judgments (implied reference)**	**Total**
Art 12 (participation)	28	35	**63**
Art 3 (best interests)	11	32	**43**
Art 27 (standard of living)	2	19	**21**
Art 9 (maintain relationship with both parents)	11	8	**19**
Art 19 (protection from violence)	14	2	**16**
Art 30 (culture)	9	7	**16**
Preamble	10	5	**15**
Art 7 (know and be cared for by both parents)	7	7	**14**
Art 8 (identity)	8	6	**14**
Art 18 (parental responsibilities)	10	0	**10**

72 *CRC* (n 5) pt II (arts 42–5) and pt III (arts 46–54) set out the implementation, monitoring and entry into force of the *CRC*.

Art 26 (social security)	2	6	**8**
Art 2 (non-discrimination)	2	3	**5**
Art 16 (privacy)	5	0	**5**
Art 6 (right to life)	2	2	**4**
Art 13 (freedom of expression)	4	0	**4**
Art 5 (family guidance and evolving capacities)	3	0	**3**
Art 20 (state care)	3	0	**3**
Art 23 (children with disabilities)	2	0	**2**
Art 10 (contact with parents across countries)	0	1	**1**
Art 24 (health)	1	0	**1**
Art 34 (protection from sexual abuse)	1	0	**1**
Art 35 (child abduction)	1	0	**1**
Art 37 (children in detention)	0	1	**1**
Art 43 (Committee on the Rights of the Child)	1	0	**1**

Article 12 and Article 3: Children's views and best interests

Article 12 and Article 3 of the *CRC* were the two most cited articles in the judgments analysed, appearing 63 and 43 times respectively. Article 12(1) gives children who are capable of forming a view the right to express their views freely in all matters affecting them, with those views being given due weight in accordance with the child's age and maturity. Article 12(2) provides children with the opportunity to be heard in legal proceedings affecting them, either directly or through a representative or an appropriate body. Article 3(1) of the *CRC* enshrines the principle of 'the best interests of the child' as 'a primary' consideration. The UN Committee on the Rights of the Child ('CRC Committee') has observed that these two articles 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.[73]

The child's right under Article 12 of the *CRC* finds expression in pt VII of the *Family Law Act* in the first additional consideration in s 60CC(3).[74] Article 12 was commonly cited in the judgments in the context of the mechanisms available to enable the child's views to be put before the court. Discussion of the role of the ICL to facilitate the child's participation featured in a number of these judgments.[75] In six judgments, the court's orders stated that the appointment of an ICL was made on the basis (among others) that the child was 'of an age and apparent maturity whereby the [*CRC*] would require that [the child] have a voice in the proceedings and with respect to decisions that will affect [the child's] future'.[76] The extent to which the current ICL model satisfies Australia's obligations under the *CRC* continues to be challenged.[77] Although some children have reflected positively on their

73 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].

74 *Family Law Act* (n 7) s 60CC(3)(a).

75 See, eg, *Parer v Taub [No 2]* [2012] FMCAfam 1250, [438]; *Lopeman v Brandon* [2012] FamCA 368, [117]; *Souter v Barnard* [2014] FCCA 3139, [20]–[31] ('*Souter*'); *Gamage v Gamage* [2017] FamCA 742, [149]–[153]; *Bennet v Carter* [2013] FMCAfam 149, [42], [48]–[49] ('*Bennet*'); *Epstein v Epstein* [2014] FCCA 3053, [16]–[18] ('*Epstein*'); *Orbach v Schroder* [2014] FCCA 3056, [5]–[13] ('*Orbach*'); *Proctor v Proctor* [2014] FCCA 3122, [57]–[64] ('*Proctor*').

76 *Waleys v Waleys* [2020] FCCA 841, Order 18(f); *Newton v Newton [No 2]* [2019] FCCA 3391, Order 22(e); *Waine v Ferber* [2018] FCCA 2959, Order 7(c); *Epstein* (n 75) Order 7(c); *Orbach* (n 75) Order 2(b); *Culpin v Trouton* [2014] FCCA 3176, Order 5(c) ('*Culpin*').

77 See, eg, 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) 5 [22(c)]; Rae Kaspiew et al, *Independent Children's Lawyers Study* (Final Report, June 2014) ix; Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Final Report, June 2018) 52 ('*Children and Young People in Separated Families*').

experiences with ICLs,[78] others have reflected negatively.[79] These concerns were highlighted in a number of judgments in the present study.[80]

In other judgments, the child's right to express their views and to have those views taken into account was held to have been facilitated by the preparation of a family report,[81] participation in a Child Inclusive Conference,[82] or by the judge meeting with the children.[83] A consistent view that emerged from the judgments citing Article 12 of the *CRC* is that a child's views cannot be determinative of their best interests: children have 'a voice in the proceedings but not necessarily a choice'.[84] Bennett J commented that a child's views 'are not determinative but they are of significant importance'.[85] In the only judgment presenting a contrasting view, Carmody J asserted that '[t]he law relating to children in this country now unequivocally and unapologetically treats children as active shapers of their own lives and able to make decisions independently of adults'.[86] This remains a live issue in the context of defining the scope of children's right to participation,[87] acknowledging that in Part VII proceedings, children's views 'are but one consideration of a number to be taken into account in the overall assessment of a child's best interests'.[88]

Article 3 of the *CRC* was referred to in the judgments in a less substantive manner than Article 12. It was cited in the context of remarking upon delays in the finalisation of proceedings[89] or parties gaining access to a children's

78 Kaspiew et al (n 77) 132, 136–7, 144–5.

79 Ibid 132–6, 142; Carson et al, *Children and Young People in Separated Families* (n 77) viii, 4, 51; Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Final Report No 135, March 2019) 374 [12.59] ('*Family Law for the Future*'); 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].

80 See *Epstein* (n 75) [16]–[18]; *Orbach* (n 75) [5]–[13]; *Proctor* (n 75) [57]–[64]; *Duffy v Gomes* [2015] FCCA 1121, [77]–[123].

81 See, eg, *Acton v Hammer* [2013] FCCA 1174, [159]–[160] ('*Acton*'); *Morris v Mills* [2016] FCCA 633, [61]; *Sleiman v Ganim* [2020] FCCA 3309, [82]; *Benson v Higgins* [2019] FamCA 331, [49]–[50]; *Missiakos* (n 70) [66]; *Bryce* (n 71) [37]–[38]; *Duffy v Gomes [No 2]* [2015] FCCA 1757, [62] ('*Duffy*').

82 *Zanda* (n 47) [126]; *Bennet* (n 75) [42]; *Keenan v Keenan* [2018] FCCA 3094, [4]; *Aiken* (n 47) [85].

83 *ZN v YH* [2002] FamCA 453, [112]–[115]; *Duffy* (n 81) [63]–[67], [77]–[117]. See also Baroness Hale of Richmond, 'Children's Participation in Family Law Decision Making: Lessons from Abroad' (2006) 20(2) *Australian Journal of Family Law* 119; Michelle Fernando, 'What do Australian Family Law Judges Think about Meeting with Children?' (2012) 26(1) *Australian Journal of Family Law* 51; Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 55–8, 158–88.

84 *Epstein* (n 75) [17]. See also *Garnet v Karsten* [2015] FCCA 3639, [128]; *Wood v Wood* [2014] FCCA 1772, [143].

85 *Fowles v Fowles [No 4]* [2018] FamCA 711, [61].

86 *W v G* (n 2) 430 [108].

87 See, eg, Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 172–202; Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 410–12, 428–9, 431–2.

88 *Bondelmonte v Bondemonte* (2017) 259 CLR 662, 673 [34] (Kiefel, Bell, Keane, Nettle and Gordon JJ). See *Family Law Act* (n 7) s 60CC(3)(a).

89 *Otto v Brindle [No 2]* [2015] FCCA 2979, [49]–[50] ('*Otto*').

contact service;[90] in observing the change in terminology from 'welfare' to 'best interests' in Part VII to bring the *Family Law Act* in line with the *CRC*;[91] in noting that parenting orders made were within the meaning of Article 3;[92] and in emphasising the need for children's best interests to be treated as paramount.[93]

Article 7 and Article 9: Respecting the child's right to know and be cared for by their parents and to maintain regular contact with both parents

Articles 7 and 9 of the *CRC* were cited a total of 14 and 19 times respectively. Article 7(1) gives children the right 'to know and be cared for' by their parents, while Article 9(2) requires States to respect the right of a child who is separated from one or both parents to maintain a relationship and direct contact with their parents on a regular basis, except if it is contrary to the child's best interests.

Four judgments in the study implicitly acknowledged that the child's rights under Articles 7 and 9 of the *CRC* are interdependent and interrelated.[94] A 'protectionist' instinct emerged in a small number of judgments that cited these Articles. Judges highlighted that '[t]he need to protect these children and the only parent that they have available to them is manifest', notwithstanding the child's right to a relationship with both parents;[95] and that while a 'curtailment of the children's relationship with their father is an option of last resort ... there is no presumption that every child benefits from a relationship with their parents'.[96] These remarks reflect the requirement for the court to give greater weight to the protection of children from harm from abuse, neglect or family violence over the promotion of meaningful parent-child relationships, when balancing the primary considerations in the best interest assessment.[97]

Article 19: Recognising the judicial role to protect children from violence, abuse and neglect

Article 19 of the *CRC* was cited in 16 judgments, 13 of which were judgments of McClelland DCJ/J. His Honour observed that this Article imposes a

90 *Hoban v Herbert* [2015] FCCA 3514, [19].

91 *Russell v Russell* [2009] FamCA 28, [136], quoted in *Oldfield v Oldfield* [2012] FMCAfam 22, [134]; *MDB v JMO* [2005] FMCAfam 75, [11]; *G v S* [2004] FMCAfam 286, [75]; *CV v MD* [2003] FMCAfam 266, [53].

92 *Coggins v Tebbitt* [2019] FCCA 3930.

93 *Verboom v Verboom* [2019] FCCA 3941, [55]; *Beaumond v Hardiman* [2013] FCCA 1173, [12]. See *Family Law Act* (n 7) ss 60CA, 67ZC.

94 *Angeli v Farina* [2020] FamCA 975, [20] ('*Angeli*'); *Lambard v Lambard* [2020] FamCA 405, [21] ('*Lambard*'); *Newman v Tate* [2020] FamCA 1114, [20] ('*Newman*'), each quoting *O v S FC Palmerston North* (FAM 2003-054-000859, 21 January 2005) [38]; *Fairbank v Fairbank* [2020] FamCA 644, [51] ('*Fairbank*'), quoting *GO v CS* [2005] NZFC 1, [38]. See John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23(1) *Harvard Human Rights Journal* 1, 37–9; Michael Freeman, 'The Human Rights of Children' (2010) 63(1) *Current Legal Problems* 1, 16 ('The Human Rights of Children').

95 *Thompson v Dean* [2011] FMCAfam 1074, [74(b)].

96 *Gray v Gray* [2012] FCWA 44, [207], [209].

97 See *Family Law Act* (n 7) s 60CC(2A).

requirement on States to take steps, 'including through "judicial involvement"', to protect children from violence, abuse, neglect or maltreatment while in the care of their parents or guardians.[98] McClelland DCJ/J also recognised a nexus between Article 19 of the *CRC* and the court's responsibility in exercising its jurisdiction to 'protect the rights of children and to promote their welfare' and to 'ensure protection from family violence'.[99] The other three judgments that cited Article 19 of the *CRC* did so in a less substantive manner. In one, Article 19 appeared in a footnote that listed the rights said to be given effect to by the orders;[100] in another, the judge recognised that the need for the court to give greater weight to protecting the child from harm when applying the primary considerations was 'entirely consistent' with the *CRC*;[101] and the third judgment merely quoted the orders sought by the mother, which referred to the *CRC*.[102]

Article 30: The right of indigenous children to enjoy their culture

Article 30 of the *CRC* provides for the right of indigenous children 'in community with other members of [their] group' to enjoy their own culture, to profess and practise their own religion, and to use their own language. This Article was cited in 16 judgments in the study. Six of these stated that the Part VII provisions addressing an Aboriginal or Torres Strait Islander child's right to enjoy their culture[103] are 'consistent with' Article 30 of the *CRC*,[104] while one observed that the relevant additional consideration in the predecessor provision to s 60CC 'was influenced by' the Convention.[105]

The judgments engaged meaningfully with these cultural and identity rights in the context of variously considering 'the potential loss to the children of kinship; the opportunity to identify themselves from an indigenous point of view; and to follow cultural practices within country to which they have a connection' as a result of the children's relocation;[106] the opportunity for the children 'to develop or fully enjoy their Aboriginal culture and ... a full knowledge of what it means to be an indigenous Australian' if they were denied time with their maternal grandparents;[107] and 'how best the children's relationship with their family can be maintained, against a background of ... complex cultural considerations', including the children's 'firmly fixed'

98 See, eg, *Judd v Judd* [2017] FamCA 785, [72] ('*Judd*'); *Peroni v Runting* [2017] FamCA 743, [29] ('*Peroni*'); *Janssen v Janssen [No 2]* [2016] FamCA 796, [89] ('*Janssen*'); *Amir v Magid* [2018] FamCA 696, [51] ('*Amir*').

99 *Family Law Act* (n 7) ss 43(1)(c), (ca). See, eg, *Judd* (n 98) [73]; *Peroni* (n 98) [30]; *Janssen* (n 98) [90]; *Amir* (n 98) [52].

100 *Cribb v Lankester* [2017] FCCA 1629, [391] n 47 ('*Cribb*').

101 *Nash v Murray* [2014] FCCA 3171, [80].

102 *Grange [No 4]* (n 49) [4].

103 *Family Law Act* (n 7) s 60B(2)(e). Ibid ss 60B(3), 60CC(6). Ibid s 61F. Ibid s 60CC(3)(h).

104 See *Offer v Wayne* [2012] FMCAfam 912, [89] ('*Offer*'); *Verran v Hort* [2009] FMCAfam 1, [259] ('*Verran*'); *Keene v Ballard* [2012] FMCAfam 185, [95]; *Skinner v Corbin [No 2]* [2014] FCCA 3135, [39] ('*Skinner [No 2]*'). Referring to the earlier provision, s 68F(2)(f): *P v F* [2005] FMCAfam 393, [166] ('*P v F*'); *Tuite v Wall* [2003] FMCAfam 262, [81] ('*Tuite*').

105 *H v H* [2003] FMCAfam 31, [25].

106 *Tuite* (n 104) [81]. See also *P v F* (n 104) [166].

107 *Kane v Sackett* [2011] FMCAfam 468, [109].

'Aboriginal sense of identity'.[108] These judgments reinforce Titterton's observation that 'judicial officers have developed a sophisticated understanding of the cultural and identity rights of Indigenous children and their families in family law proceedings'.[109]

In *Skinner v Corbin [No 2]*,[110] Harman J appreciated that the child's right to maintain a connection with her Aboriginal culture derived from her father was 'profound and important'.[111] His Honour found that this right was 'far more abundant' when the child was living in her father's care, and that it would be 'negatively impacted' by returning to her mother's care.[112] Notably, Harman J contextualised the personal and structural difficulties that the child faced, by acknowledging the 'historical disadvantage to the entire Aboriginal population through 226 years of settlement, legislation and practices'.[113] His Honour elaborated on this disadvantage in *Skinner v Corbin [No 3]*,[114] noting that the Court was 'highly conscious of the significant statistical over representation, in populations of disadvantage of Aboriginal children and adults principally arising from difficulties in care arrangements during childhood'.[115] Harman J's observations are consistent with the CRC Committee's comment that 'indigenous children face significant challenges in exercising their rights'.[116]

References to Article 30 of the *CRC* also arose outside the context of Aboriginal or Torres Strait Islander children.[117] In *Abdoo v Essey*,[118] the mother sought orders that would allow her and the child to holiday in Lebanon. Harman FM remarked that the 'philosophical basis' of Article 30 'applies to all cultures',[119] in reasoning that the father effectively sought to deny the child the right provided under the *CRC* 'of experiencing his culture ... in a cultural and geographical context'.[120] In *Heiden v Kaufman*,[121] Harman FM reached a different conclusion, determining that the children's safety 'must outweigh any potential benefit that these children would have from being exposed to the deep, rich and profoundly ancient culture of [the father's] Palestinian heritage'.[122]

---

108 *Offer* (n 104) [139], [179], [181].
109 Adelaide Titterton, 'Indigenous Access to Family Law in Australia and Caring for Indigenous Children' (2017) 40(1) *University of New South Wales Law Journal* 146, 165.
110 *Skinner [No 2]* (n 104).
111 Ibid [65].
112 Ibid [39], [69].
113 Ibid [67].
114 [2014] FCCA 3136.
115 Ibid [41].
116 CRC Committee, *General Comment No 11 (2009): Indigenous Children and Their Rights under the Convention*, UN Doc CRC/C/GC/11 (12 February 2009) [5].
117 *Family Law Act* (n 7) s 60CC(3)(g).
118 [2011] FMCAfam 772 ('*Abdoo*').
119 Ibid [44]–[45].
120 Ibid [26].
121 [2011] FMCAfam 478.
122 Ibid [135(h)].

Preamble: The need for 'special protection' of children and a family environment of 'happiness, love and understanding'

Fifteen judgments cited or quoted from the Preamble to the *CRC*. Some of these used the Preamble as an aspirational comparator, to lament the circumstances of the child's family environment.[123] These judgments remarked variously that the child 'has grown up in a fractured and damaged family where there is nothing resembling peace or cooperation, merely discord, distrust and active conflict';[124] and that the parents' 'irresolvable conflict ... deprives this child of happiness and understanding and of a family environment which contains those elements'.[125]

The *CRC* Preamble embodies a 'normative commitment to [protecting] the family'.[126] Accordingly, the Preamble was also used to sound caution about 'any interference with that family unit, or the exercise of authority therein without good reason',[127] and the perceived irony of parents' willingness 'to seek the interference of external agencies ... when such interference is opposed with the vigour of those presently manning barricades in Kiev when the family is intact'.[128] However, it was also acknowledged that 'the right of interference' by courts was 'inherently recognised' in international conventions including the *CRC*.[129]

Article 8: The child's right to identity

Article 8(1) of the *CRC* provides for the child's right 'to preserve [their] identity, including nationality, name and family relations as recognized by law without unlawful interference'. This Article was cited in 14 judgments in diverse contexts, including for the authorisation of medical treatment for children experiencing gender dysphoria;[130] to determine whether to introduce children to their donor siblings[131] or to disclose to the child the identity of their biological father;[132] in applications by a grandparent to spend time and communicate with their grandchildren;[133] to determine whether a child should be issued with a passport;[134] to support an order that the child's birth certificate be changed to record the details of each biological parent;[135] and to determine parenting arrangements for a child born overseas through a commercial

123 See *Sercombe v Wenfeld* [2019] FCCA 3525, [40] ('*Sercombe*'); *Geisler v Geisler* [2018] FCCA 3959, [51]; *Meier v Meier* [2018] FCCA 3978, [42]–[43]; *Searson v Managan* [2019] FCCA 3950, [51]; *Searson v Searson* [2018] FCCA 4038, [43], [72]–[73] ('*Searson*').

124 *Sercombe* (n 123) [40].

125 *Searson* (n 123) [43].

126 Tobin, 'Justifying Children's Rights' (n 12) 423, 425.

127 *Lacerra v Valentine* [2012] FMCAfam 414, [107] ('*Lacerra*'). These remarks were criticised by the Full Court in *Valentine* (n 44) [61]–[62].

128 *Hanley* (n 69) [231].

129 *Lacerra* (n 127) [108].

130 *Alex 2004* (n 63) 127–8 [220]; *Alex 2009* (n 63) 354 [180].

131 *Gatenby [No 2]* (n 57) [255].

132 *W v G* (n 2) 429 [103].

133 *Church v T Overton* [2008] FamCA 965; *Church v M Overton* [2008] FamCA 953; *Church v S Overton* [2008] FamCA 952; *Maynard v Marchand* [2018] FCCA 2954.

134 *Kadni v Keerthi* [2018] FCCA 3425, [26]–[28]; *Wang v Lo* [2014] FCCA 1624, [58]–[61].

135 *Van v Nord* [2017] FCCA 2727, [15]–[16].

surrogacy arrangement.[136] This assortment of references to Article 8 reflects the nebulous nature of the concept of 'identity' in the Convention, which has been described as a 'constellation' of 'inter-related aspects ... which contribute to a sense of self, self-knowledge and self-awareness',[137] and 'historical and evolving characteristics' that offer children an understanding of 'where they have come from, who they are, and the right to decide who they will become'.[138]

Article 18 and Article 27: Parental responsibilities and obligations to maintain the child

Article 18(1) of the *CRC* provides that both parents have common responsibilities for their child's upbringing and development, with the best interests of the child being their basic concern. This Article was cited in 10 judgments. Almost half of these references were recitations of another judgment,[139] while another four referred to or quoted the text of Article 18 without further discussion of its relevance to the proceedings.[140] In *W v R*,[141] Carmody J noted that s 61C of the *Family Law Act* 'reflects the emphasis given to joint parental responsibility for the upbringing and development of children' in Article 18 of the *CRC*.[142]

Article 27 of the *CRC* imposes a specific responsibility upon parents or carers — 'to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development' — to enable the child to enjoy their right to 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development'.[143] This Article was cited in 21 judgments, which considered the extent to which each parent had fulfilled, or failed to fulfil, their obligation to maintain the child.[144] These judgments described the child's right under Article 27 as 'a legal and moral right' which 'is not something which comes into being only through the completion of an assessment by the Child Support Registrar',[145] and which created a reciprocal obligation that 'falls upon parents'.[146]

---

136 *Farnell* (n 63) [335]–[340].

137 Judith Masson and Christine Harrison, 'Identity: Mapping the Frontiers' in Nigel Lowe and Gillian Douglas (eds), *Families Across Frontiers* (Martinus Nijhoff, 1996) 277, 278.

138 John Tobin and Jonathan Todres, 'Article 8: The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 281, 285.

139 See *Newman* (n 94) [20]; *Angeli* (n 94) [20]; *Fairbank* (n 94) [51]; *Lambard* (n 94) [21].

140 *Cainey v Cainey* [2017] FCWA 118, [55]; *W v G* (n 2) 429 [105]; *Cribb* (n 100) [391]; *Ellison* (n 63) 54 [85].

141 [2006] FamCA 25.

142 Ibid [39].

143 *CRC* (n 5) arts 27(1), (2).

144 *Family Law Act* (n 7) s 60CC(3)(ca). See, eg, *Whitehouse v Whitehouse* [2015] FCCA 3621, [307]–[312] ('*Whitehouse*'); *Meredith v Meredith* [2015] FCCA 2152, [255]; *Madsen v Fancher* [2016] FCCA 142, [83]; *Rigg & Stilwell [No 4]* [2016] FCCA 2205, [521]–[522].

145 *Whitehouse* (n 144) [311].

146 *Bradfield v Laurens* [2018] FCCA 1784, [234].

V Discussion: Are Australian family law judges 'taking children's rights seriously' in Part VII proceedings?[147]

Two conclusions are drawn from the empirical study findings. The first is that children's rights are not yet a 'way of thinking'[148] for judges in Part VII proceedings, despite the express legislative commitment to give effect to the *CRC* through the 'additional object' in s 60B(4). The second conclusion is that further judicial engagement with children's right to express their views and be heard under Article 12 of the *CRC* could improve children's meaningful, safe participation in Part VII proceedings, if conceptual and practical obstacles can be overcome. However, the author reiterates a limitation of the data in supporting these conclusions, namely that judges may be giving effect to children's participatory rights without specific reference to the *CRC*.

A Overcoming judicial scepticism about the *CRC*'s relevance and the notion of children as rights-bearers

According to Harman FM, Australian family law jurisprudence has been 'slower to adopt' the *CRC* 'as applicable to each decision that this court makes without specific enabling domestic legislation' than other jurisdictions.[149] Reinforcing this observation, this study has revealed divergent judicial views about how international conventions can be used in domestic law, including to resolve ambiguities in the interpretation of legislation; to fill 'gaps' in that legislation; and to articulate and develop the common law.[150]

Several judgments in the study acknowledged that in light of High Court and Full Court authorities,[151] the *CRC* is 'of some relevance' to the interpretation and application of substantive provisions of the *Family Law Act*,[152] and that Australia's international obligations 'must inform and provide the context and spirit for the operation and interpretation of the legislation'.[153] However, Bennett J conceded that the additional object in s 60B(4) of the *Family Law Act* 'does not give any legally enforceable rights to children and

147 See Michael Freeman, 'Why it Remains Important to Take Children's Rights Seriously' (2007) 15(1) *International Journal of Children's Rights* 5.

148 Stalford and Hollingsworth, 'Judging Children's Rights' (n 2) 31–2.

149 *Udall v Oaks* [2010] FMCAfam 1482, [28]. Cf Juliet Behrens and Phillip Tahmindjis, 'Family Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law — Principles, Practice and Potential* (Federation Press, 1998) 169, 182.

150 *Murray v Director of Family Services (ACT)* (1994) 116 FLR 321, 338 (Nicholson CJ and Fogarty J). See also Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 457.

151 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J); *Teoh* (n 14) 287; *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 604, 649 [274], 651 [288].

152 See, eg, *Kavan v Hawkins* [2012] FMCAfam 1421, [268]; *D'Abreo v Cantwell* [2011] FMCAfam 1504, [175]; *Landin v Eades* [2013] FCCA 1276, [70]; *Acton* (n 81) [135]; *Trejo v Avalos* [2011] FMCAfam 1348, [109]; *Deacon v Castle* [2013] FCCA 691, [449].

153 *Madley v Madley* [2011] FMCAfam 1007, [21]. See also *Richards v Scott* [2011] FMCAfam 861, [76]–[78]; *Abdoo* (n 118) [45]; *Gatenby [No 2]* (n 57) [255]; *W v G* (n 2) 429 [100].

is unlikely to be of great value in the adjudication of individual cases'.[154] This approach manifested in a number of judgments.

In *Parris v Parris*,[155] Kelly J found that provisions of the *CRC* were simply 'not relevant' to an application for the variation of orders for child support made by the Superior Court of California.[156] In *Farnell v Chanbua*,[157] which concerned parenting arrangements for a child born in Thailand through a commercial surrogacy arrangement, Thackray CJ held that the 'human rights issues' were of 'limited assistance in disposing of the primary issues', due to a perceived incongruity between the 'very general application' of the *CRC* and the 'construction of specific statutes ... in very specific and unusual factual circumstances'.[158] Brewster J expressed ever greater scepticism about the role of the *CRC* in *Needham v Cassidy*,[159] remarking '[h]ow a treaty that is not part of Australian domestic law can legitimately be used to fill a lacuna in legislation is unclear to me. It seems as if one would be using a treaty to amend an Act by adding to it'.[160]

Harman J articulated several difficulties with addressing Part VII proceedings by reference to children's rights,[161] reinforcing a judicial tendency to dichotomise the child's rights and their best interests.[162] One such difficulty was that 'rights carry with them duties and responsibilities. Children are incapable of fulfilling the duties that would attach to their rights'.[163] Harman J cited a US appeal decision regarding the legal status of a chimpanzee named Tommy to observe that 'the child would not be considered a "person" as they are unable to comprehend or fulfil their duties. Thus, they would have no rights, no more than Tommy'.[164] Aside from the troubling comparison drawn between the child and a chimpanzee, Harman J's concern is inconsistent with the justification of human rights as moral rights. The Preamble to the *CRC* refers to 'the equal and inalienable rights of all members of the human family', rather than any principle of reciprocity.[165] Harman J was further concerned about the 'potential for parents to conflate their own rights, duties and interests with those of the children', because children's rights 'are to be fulfilled by the very parents who are in dispute as to what those rights are and how they might best be met'.[166] While this concern has been acknowledged in

154 *Zammit* (n 71) [23]–[24].
155 *Parris* (n 43).
156 Ibid [174].
157 *Farnell* (n 63).
158 Ibid [341].
159 [2016] FCCA 1477.
160 Ibid [70].
161 See *Dawes v Dawes* [2014] FCCA 3154, [88]–[89] ('*Dawes*'); *Culpin* (n 76) [82]; *Briggs* (n 69) [45]–[51].
162 See Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 69–73.
163 *Dawes* (n 161) [88]. See also *Culpin* (n 76) [82(c)].
164 *Dawes* (n 161) [88].
165 See Freeman, 'The Human Rights of Children' (n 94) 16; John Eekelaar, 'Invoking Human Rights' in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 336, 340.
166 *Dawes* (n 161) [89]. See also *Culpin* (n 76) [82(a)]; *Briggs* (n 69) [50(b)].

family law and children's rights scholarship,[167] it is argued that the remedy is for the court to engage meaningfully with children's views and wishes.[168]

B Promoting children's meaningful, safe participation in Part VII proceedings

Research concerning children's experiences of participation in family law decision-making has exposed a gap between principle and practice.[169] Concerns persist 'about the extent to which existing ... measures are sufficient in fulfilling Australia's [*CRC*] obligations with respect to the participation of children and young people in decision making in the family law context'.[170] Children and young people want 'a bigger voice more of the time',[171] with some feeling marginalised and perceiving that adults, including judges, do not listen to or care about their views.[172] The second conclusion drawn from the empirical study findings is that further judicial engagement with the child's right to express their views and be heard[173] could enhance children's meaningful, safe participation in Part VII proceedings, thereby improving children's experiences of the decision-making process.

Article 12 of the *CRC* was the most cited article across a promising range of 14 different judicial officers. These quantitative observations are supported by the nature of judicial engagement with Article 12. This engagement organically reinforces an appreciation of the value of children's participatory rights in Part VII proceedings: to show to children that they have a 'place of participation in society as of right';[174] to encourage children's development of autonomy;[175] and to promote 'positive parenting outcomes ... if children feel they have been consulted about future arrangements'.[176] This latter value is supported by recent research into compliance with and enforcement of family law parenting orders.[177]

---

167 See, eg, Barbara Bennett Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' (1992) 14(6) *Cardozo Law Review* 1747, 1820; John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84(2) *Nordic Journal of International Law* 155, 177; Parkinson and Cashmore (n 83) 12–18, 114–15; Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13(3) *Australian Journal of Family Law* 197, 215–16.

168 Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 78.

169 See, eg, Carson et al, *Children and Young People in Separated Families* (n 77) 30; Kaspiew et al (n 77) xii; Parkinson and Cashmore (n 83) 4, 196–7.

170 Carson et al, *Children and Young People in Separated Families* (n 77) 3.

171 Ibid 68, quoting Alana, aged 12–14 years.

172 Ibid 63, 64, 66; Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, November 1997) [4.23]–[4.25]. See also Parkinson and Cashmore (n 83) 73–5.

173 *CRC* (n 5) art 12.

174 *Dylan* (n 23) [180]. See also *Karamalis* (n 71) 591 [17].

175 *Dylan* (n 23) [180].

176 Ibid [178].

177 Rachel Carson et al, *Compliance with and Enforcement of Family Law Parenting Orders: Final Report* (Research Report No 20, October 2022) ('*Compliance with and Enforcement of Family Law Parenting Orders*') 147.

Karamalis v Karamalis[178] offers a compelling example of a judge engaging meaningfully with the child's right to express their views and be heard. The parties, supported by the ICL, had reached agreement about final parenting orders. However, Bennett J declined to make the orders, because they were 'contrary to the view consistently maintained by the youngest child ... and no one has informed him of the resolution to which his parents have agreed'.[179] Bennett J did not want to 'ride roughshod over what this young man has expressed as a consistent view'.[180] Her Honour's approach is consistent with a substantive children's rights approach, which requires that the child be advised, 'in age-appropriate language, of the court processes followed, including how the child's views have been taken into account in the determination of their best interests'.[181] Her Honour adjourned the proceedings to enable the child to meet in person with a psychologist, who would explain the proposed final orders.[182] This example suggests that 'judges have substantial discretion in lowering the barriers to children's participation' in the decision-making process.[183] Importantly, however, judicial willingness to enable children's meaningful, safe participation is not the only 'precondition' to children's ability to exercise their right under Article 12 of the *CRC*.[184] Other preconditions include the provision of age-appropriate information about all stages of the decision-making process; presenting children with choices about how they might be involved; and transparency about how the information children share may be used.[185]

The empirical study findings have also exposed ongoing conceptual and practical barriers to more effectively implementing the right provided by Article 12 of the *CRC* in Part VII proceedings. Judgments reinforced the long-standing tension between protection and participation,[186] highlighting concerns about harms 'through anxiety, loyalty conflicts, or damage to family relations if the right to participation is applied carte blanche'.[187] Bennett J cautioned that '[h]earing the voice of a child must be a process which is emotionally safe for children and does not leave them feeling exposed or vulnerable'[188] or 'responsible for the happiness or disappointment of their parents or the outcome of ... proceedings'.[189] However, her Honour also reflected that 'protection by ignorance has significant downsides for children

178 *Karamalis* (n 71).
179 Ibid 589 [4]. See also 591 [15], 592 [21].
180 Ibid 592 [21].
181 Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 92.
182 *Karamalis* (n 71) 592 [22].
183 Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 85, citing Hollingsworth and Stalford (n 38) 78.
184 Parkinson and Cashmore (n 83) 63. See also Gerison Lansdown, 'Children's Rights to Participation and Protection: A Critique' in Christopher Cloke and Murray Davies (eds), *Participation and Empowerment in Child Protection* (Pitman, 1995) 19.
185 Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 65–6; Parkinson and Cashmore (n 83) 63–4.
186 See, eg, Parkinson and Cashmore (n 83) 13–18, 40; Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 70, 80, 155.
187 *Dylan* (n 23) [220]. See also *Bauer v Steggall* [2011] FMCAfam 728, [31].
188 *Bryce* (n 71) [41].
189 *Karamalis* (n 71) 592 [18].

in cases involving intractable parental conflict', and that 'protection conferred by allowing ... some involvement in the process would have been more efficacious, as well as more humane'.[190] These observations expose a fraught balance between protecting children from parental conflict and fulfilling their participatory rights in family law decision-making, which is coloured by judicial understandings of the relationship between children's rights and best interests.[191]

Two judgments that engaged with Article 12 of the *CRC* identified a dearth of resources for providing the 'necessary scaffolding around children'[192] so they can exercise their right to participation effectively. In *Vickery v Vickery [No 2]*,[193] Harman J conceded that 'self-criticism' was warranted for his approval of consent orders 'without the child's voice heard in the proceedings'.[194] There was no ICL appointed and no family report prepared, owing to 'the zealous desire by all to conclude business quickly'.[195] In the ensuing contravention application, the mother submitted that the eldest child's refusal to spend time with his father amounted to a 'reasonable excuse'. Harman J acknowledged that actively seeking out the child's views before approving the consent orders 'might have avoided this controversy, and the 12 months or more of litigation in which the family has now been involved'.[196] His Honour described it as 'a cautionary tale, perhaps, for ... all, that sometimes ... to fully meet children's best interests ... time must be taken, and even though they are scarce and difficult to find, resources applied and extended'.[197] Compounding these resource constraints is the 'elaborate legislative pathway' of Part VII, which 'falls short of providing measures by which it is safe for children to express [their] views'.[198] The practical effect of these various impediments to children's meaningful, safe participation in Part VII proceedings is that they 'distort' the way that children's rights are 'argued, adjudicated and ultimately, protected'.[199]

The proposed amendments to the *Family Law Act,* as contained in the Family Law Amendment Bill 2023 (Cth), to a limited extent promote children's rights in Part VII decision-making. In its amended form, the objects clause elevates the 'additional object' in s 60B(4) to one of 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*.[200] While this streamlined objects clause in s 60B appears to afford greater prominence to the *CRC*, it does not change the *status* of this international convention in Australian domestic law. The proposed amendments also expand the specific

190 *Zammit* (n 71) [25].
191 See Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 69–72.
192 *Bryce* (n 71) [40].
193 [2019] FCCA 3951 ('*Vickery*').
194 Ibid [137].
195 Ibid [138]. Cf *Otto* (n 89) [151]–[155].
196 *Vickery* (n 193) [138]. See also Carson et al, *Compliance with and Enforcement of Family Law Parenting Orders* (n 177) 147.
197 *Vickery* (n 193) [138].
198 *Bryce* (n 71) [40].
199 Stalford and Hollingsworth, 'Judging Children's Rights' (n 2) 37.
200 Family Law Amendment Bill 2023 (Cth) sch 1 item 4.

duties of the ICL, by requiring the ICL to meet with the child and to provide the child with an opportunity to express any views.[201] However, these additions to the ICL's duties arguably do not equate to the child exercising their right under Article 12 of the *CRC* to express their views and be heard in judicial proceedings, for they do not impose an obligation on the *court* to *seek* the child's views. As the author argues elsewhere, the proposed reforms represent a missed opportunity to embed children's direct, meaningful participation into the legislative framework for determining children's best interests.[202]

VI Conclusion

The 'visibility' of human rights treaties in judicial decision-making is a powerful 'litmus test' for the effective implementation of human rights norms, and the extent to which such norms have been 'brought to life' at the domestic level.[203] Former FCoA Chief Justice, Alastair Nicholson, rued the 'marginal legal importance of international human rights instruments in Australia'.[204] This article has offered empirical insights into whether one such instrument — the *CRC* — has instigated a 'change in thinking'[205] in the 'general intellectual environment'[206] of Australian family law trial judges.

References to the *CRC* in judgments in Part VII proceedings may suggest that judges appreciate children as active, rights-bearing subjects and that they seek to engage with children's rights meaningfully. However, 'substantive engagement with children's rights requires more than token references to the *CRC* and an account of the rights that the judge considers are relevant to the proceedings'.[207] Examples of judges adopting a 'substantive' children's rights approach,[208] which encompasses conceptualisation of the issues from the child's perspective, procedures that facilitate the child's meaningful participation, and reasoning that cogently balances competing interests and rights, were few and far between.[209] The findings suggest that judicial freedom to engage with the *CRC* will necessarily be constrained by the framework of Part VII. Judges cannot simply 'drop inconvenient lines of precedent' or 'plant the flag' of their own moral convictions over existing legal structures.[210] Various provisions of the *Family Law Act* may appear to implement some of the *CRC* rights. However, this study has exposed a healthy amount of judicial

201 Ibid sch 4 item 2.

202 See Georgina Dimopoulos, 'Children's Participation in Family Law Proceedings: Are We (Still) Not Listening?' (2023) 32(1) *Australian Family Lawyer* (forthcoming).

203 Stalford and Hollingsworth, 'Judging Children's Rights' (n 2) 21; Tobin, 'Judging the Judges' (n 1) 580.

204 Alastair Nicholson, 'Australian Judicial Approaches to International Human Rights Conventions and "Family Law"' (Speech, Miller Du Toit and Law Faculty of the University of Western Cape Family Law Conference, 26 March 2002) 45.

205 Parkinson and Cashmore (n 83) 12.

206 Dworkin (n 68) 88.

207 Dimopoulos, *Decisional Privacy and the Rights of the Child* (n 41) 87.

208 See Tobin, 'Judging the Judges' (n 1) 593–603.

209 *Karamalis* (n 71)*; Alex 2004* (n 63); *Alex 2009* (n 63).

210 Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7(1) *International Journal of Constitutional Law* 2, 13; Dworkin (n 68) 211.

scepticism about its relevance to the resolution of issues, and concerns about bestowing children with rights.

This study has also found that judges appreciate the importance of children's right under Article 12 of the *CRC* to express their views and to be heard. Yet implementing this right more effectively requires a deconstruction of the ingrained dichotomy between protection and participation, and an investment in the family courts to enable skills and resource development.[211] The Family Law Council's current Terms of Reference include advising on 'support for children and young people ... and strengthening their voices' in family law decision-making processes.[212] Importantly, the Terms of Reference identify the need to enhance the capacity of professionals — including ICLs, Court Child Experts, family report writers, judicial officers and family dispute resolution practitioners — to support children's participation. Such capacity-building will be fundamental to the effectiveness of any measures to improve children's participation, given that adult 'scaffolding' for children requires the skills and resources to provide 'child-friendly' processes,[213] as well as an 'authorising environment' that embraces child-centred practices and procedures.[214] This capacity-building for family law professionals may build on recent initiatives directed to enhancing the safety of children in Part VII proceedings, including the expansion of the Lighthouse Model, the Evatt List and associated case management procedures.[215] It may also feature in ongoing professional development, such as training for judicial officers and Court Children's Service staff by the Safe & Together Institute, to improve understandings of the impacts of family violence on children.[216] This article hopes to stimulate debate about how the *CRC* can be incorporated more robustly into Australian family law policy and practice, thereby 'transposing rights from abstract expressions into meaningful, fruitful and enduring commitments by all of those associated with the child' in Part VII proceedings.[217]

---

211 On the need for the latter, see Australian Law Reform Commission, *Family Law for the Future* (n 79) [1.8].

212 Family Law Council, 'Terms of Reference' (Report, 13 September 2022).

213 Parkinson and Cashmore (n 83) 63–4.

214 Cathy Humphreys et al, *Safe & Together Addressing ComplexitY for Children (STACY for Children)* (Research Report No 22, October 2020) 12.

215 See Federal Circuit and Family Court of Australia, 'Federal Circuit and Family Court of Australia Launches Major Family Law Reform to Improve Safety and Support for Children and Families' (Media Release, 5 December 2022).

216 See Family Court of Australia and Federal Circuit Court of Australia, 'The Courts Engage Internationally Recognised Expert to Undertake Family Violence Focussed Training' (Media Release, 21 April 2021).

217 Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights Judgments*' (n 3) 7.