

EXPRESS RECOGNITION OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN THE *FAMILY LAW ACT*: WHAT IMPACT FOR CHILDREN'S PARTICIPATION?

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I INTRODUCTION

In June 2012 substantial amendments to Part VII of the *Family Law Act 1975* (Cth) ('the Act') came into effect. Part VII governs parenting arrangements for children whose parents have separated. The reforms aim to provide better protection from risk of violence and abuse for children and families undergoing family separation.¹ This article looks at one reform: the inclusion of a new 'object' of Part VII which specifically references the *United Nations Convention on the Rights of the Child*.² This is the first time since the commencement of the Act that the *UNCRC* has been mentioned in Part VII. This article examines what significance the new section 60B(4) has for the rights of children who are the subject of family law proceedings, with particular focus on the child's right to be heard.³

The inclusion of the *UNCRC* in the Act has been lauded by some family law experts as a significant development in how children's rights will be recognised in family law matters.⁴ Patrick Fitzgerald, senior in-house counsel at the Legal Aid Commission of Tasmania, argued that by including section 60B(4), Parliament expects the family law courts to apply the *UNCRC* as a powerful interpretive aid when examining the rights of children, and that section 60B(4) brings into stark focus the right of the child to be involved (if the child chooses)

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1 Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) ('Outline').

2 Opened for signature 20 November 1989, 1557 UNTS 3 (entered into force 2 September 1990) ('*UNCRC*').

3 *UNCRC* art 12.

4 ABC Radio National, 'The Voices of Children in Family Law Cases', *The Law Report*, 26 June 2012 (Stephen O'Ryan, former Family Court Judge); Patrick Fitzgerald, 'Children's Participation in Part VII Proceedings and Section 60B(4): Be Careful What You Wish For Cause You Just Might Get It!' (Paper presented at the Family Law Practitioners Association of Tasmania Conference, Freycinet, 14 May 2011).

in the process undertaken by the court. Fitzgerald opined that, if his analysis was correct:

we are lead [sic] to the proposition that there is a *statutory imperative* that children be actively engaged in the process; that the old paradigm is reversed so that instead of starting from the assumption [that] there are disadvantages we commence from the presumption ... that there are *advantages* to children directly participating in the Court process.⁵

This article paints a less optimistic picture. The article looks at the scope of section 60B(4) and the significance of its inclusion as an ‘object’ of Part VII. It argues that section 60B(4) is unlikely to have great impact on the courts’ decision-making and that children will not be able to rely on the new subsection for statutory protection of a right to participate. This argument has three bases. First, despite the inclusion of section 60B(4), the *UNCRC* is not part of Australian domestic law and its actual influence on decision-makers is minimal. Second, while some specific rights of children contained in the *UNCRC* have been implemented in the Act, the right of children to express their views and participate in decision-making has not. Third, as section 60B is an ‘objects and principles’ section, its impact on the adjudication of individual decisions is limited.

This article will argue that the intention of the inclusion of section 60B(4) was to confirm the common law position that the *UNCRC* is to be used as an aid to interpreting Part VII, to the extent that it does not conflict with the Act. The article concludes that on the basis of this legislative amendment there will be no discernible change in how decisions under Part VII are made. The article makes recommendations for how children’s rights can be better recognised in our family law system and notes that one (perhaps unintended) consequence of section 60B(4) may be to put the principles of the *UNCRC* in the minds of decision-makers and those working in the family law system. This may ultimately influence outcomes and experiences for children.

II BACKGROUND TO SECTION 60B(4)

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) (‘the amendments’) commenced on 7 June 2012. The purpose of the amendments was to protect children from harm and improve the family law system’s response to family violence and abuse.⁶

The amendments made a number of changes to Part VII of the Act. These changes included:

- Specifying that a court is to give greater weight to the need to protect children from harm than to the benefit to the child of maintaining a

⁵ Fitzgerald, above n 4, 21 (emphasis in original).

⁶ Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) (Outline).

meaningful relationship with both parents when determining what is in a child's best interests (section 60CC(2A));

- Expanding the definitions of family violence and abuse to reflect current social science and approaches to child protection⁷ and encompass a wider range of behaviour experienced by victims (section 4(1), section 4AB);⁸
- Changing the informing and reporting obligations of those who work within the family law system to better protect the safety of children (section 60CH, section 60CI, section 67ZBA); and
- A new subsection 60B(4) which refers to the *UNCRC*.

Section 60B of the Act (as amended) reads:

Objects of Part and principles underlying it

- (1) The objects of this Part are to ensure that the best interests of children are met by:
 - (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
 - (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
 - (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
- (2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):
 - (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
 - (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and
 - (c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and
 - (d) parents should agree about the future parenting of their children; and
 - (e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).
- (3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
 - (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.

⁷ Ibid [8].

⁸ Ibid [17]–[18].

- (4) *An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.*⁹

Before section 60B(4) commenced in 2012, there was no reference to the *UNCRC* in the Act. When significant reforms were made to the Act in 1995, a first draft of the Family Law Reform Bill 1994 (Cth) contained explicit references to articles of the *UNCRC*, but these references were removed in subsequent drafts.¹⁰

Mere reference to the *UNCRC* does not implement any of the rights contained therein in the Act. While section 60B(4) states that an object of Part VII is to ‘give effect’ to the *UNCRC*, it does not give statutory force to the *UNCRC* or incorporate the articles of the *UNCRC* into the Act.¹¹ This was put beyond doubt by the Replacement Explanatory Memorandum to the amendments which stated that section 60(4) ‘is not equivalent to incorporating the Convention into domestic law.’¹²

III THE *UNCRC* AND AUSTRALIAN LAW

The *UNCRC*, adopted by the United Nations General Assembly in 1989, ‘marked the full transformation, and complete emergence, of the idea of children as rights bearers at the international level’.¹³ The *UNCRC* grants a wide range of rights¹⁴ to all children under the age of 18 years in ratifying countries.¹⁵ Lansdown wrote that the principles contained in *UNCRC* can be broken down into three main categories: provision, protection and participation:

The **provision** Articles recognize the social rights of children to minimum standards of health, education, social security, physical care, family life, play, recreation, culture and leisure.

The **protection** Articles identify the rights of children to be safe from discrimination, physical and sexual abuse, exploitation, substance abuse, injustice and conflict.

⁹ *Family Law Act 1975* (Cth) s 60B, as amended by *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) s 13 (emphasis added).

¹⁰ *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755, [3.4]–[3.8] (Nicholson CJ, Fogarty and Lindenmayer JJ). The removal of these references was apparently in response to concerns that the Act would otherwise incorporate these *UNCRC* articles into domestic law: Margaret Harrison and Regina Graycar, ‘The Family Law Reform Act: Metamorphosis or More of the Same?’ (1997) 11 *Australian Journal of Family Law* 327.

¹¹ *Family Law Act 1975* (Cth) s 60B(4).

¹² Replacement Explanatory Memorandum, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (Cth) [24].

¹³ John Tobin, ‘The Development of Children’s Rights’ in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 26.

¹⁴ Margaret Otłowski and B Martin Tsamenyi, ‘Parental Authority and the United Nations Convention on the Rights of the Child: Are the Fears Justified?’ (1992) 6 *Australian Journal of Family Law* 137, 140.

¹⁵ *Ibid* 141; *UNCRC* art 1.

The **participation** Articles are to do with civil and political rights. They acknowledge the rights of children to a name and identity, to be consulted and to be taken account of, to physical integrity, to access to information, to freedom of speech and opinion, and to challenge decisions made on their behalf.¹⁶

Ratifying a treaty makes it binding on Australia in international law, but the treaty does not become part of Australian domestic law unless it is given the force of law by statute.¹⁷ A treaty that has not been incorporated into domestic law does not affect the rights or liabilities of Australian citizens.¹⁸ By ratifying the *UNCRC* in December 1990, Australia agreed to undertake all appropriate legislative, administrative and other measures to implement the rights contained in it.¹⁹ Although some domestic laws have been made or amended to give effect to principles of the *UNCRC*, the Australian government has not enacted or proposed to enact legislation directly implementing the *UNCRC*. This is hardly a singular event, as Australia has ratified all seven of the international human rights conventions but has not given the force of law to any of these statements of rights.²⁰ Victoria and the Australian Capital Territory have taken the initiative of enacting statements of rights.²¹ Nevertheless, there is no bill of rights at a federal level and Australia remains the only modern liberal democracy in the world without a national statement of rights.²² Tobin wrote:

Although there is evidence of a trend to recognise the rights of children within the legal systems of some states, Australia has remained obstinate in its refusal to implement the [UN]CRC. This is not to say that children do not have human rights in Australia ... or that articles under the [UN]CRC have not informed, or are incompatible with, discrete aspects of legislation and policy within some jurisdictions within Australia. On balance, however, there has been no deliberate

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- 16 Gerison Lansdown, 'Children's Rights' in Berry Mayall (ed), *Children's Childhoods: Observed and Experienced* (Falmer Press, 1994) 36 (emphasis in original).
- 17 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J), 298 (Toohey J), 304 (Gaudron J), 315 (McHugh J) ('*Teoh*'); Sir Harry Gibbs, '*Teoh*: Some Reflections' (Paper presented at the Fifteenth Conference of the Samuel Griffith Society, Adelaide, 23–5 May 2003) <<http://www.samuelgriffith.org.au/papers/html/volume15/v15chap7.html>>.
- 18 *Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224 (Mason J).
- 19 *UNCRC* art 4.
- 20 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *UNCRC; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 1997, [2008] ATS 12 (entered into force 3 May 2008); Attorney-General's Department, Australian Government, *Human Rights Treaty Body Reporting* <<http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/default.aspx>>.
- 21 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).
- 22 Judith Bessant and Rob Watts, 'Children and the Law: An Historical Overview' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2008) 21.

or concerted effort to use the [UN]CRC and the notion of children as rights bearers as the benchmark against which to develop, implement and monitor laws and policies affecting children.²³

In the absence of statutory incorporation, the effect of the *UNCRC* on Australian law is extremely limited.²⁴ Where there is ambiguity in domestic legislation, an interpretation of that legislation which complies with the *UNCRC* should be adopted. Further, principles contained within international instruments can be used in exercising judicial discretion and as a guide to developing the common law.²⁵

In *Teoh* the majority of the High Court affirmed the Federal Court's decision that the ratification of an international treaty gives rise to a legitimate expectation that decision-makers will act in accordance with the principles of the convention.²⁶ In their joint judgment, Mason CJ and Deane J said:

ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent any statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention.²⁷

The High Court emphasised that the existence of a legitimate expectation does not compel the decision-maker to act in accordance with a convention. However, where the decision-maker proposes to act contrary to the expectation, principles of procedural fairness dictate that parties must be given notice and adequate opportunity to present submissions against the proposed course.²⁸

Following this decision, both the government of the day and its successor released statements seeking to dispel any notion of a legitimate expectation with regard to international instruments.²⁹ Bills have been introduced with the intention of giving legislative effect to these statements but no Act has been passed.³⁰ The government statements alone are ineffective to reverse the effect of the High Court's decision in *Teoh*.³¹ Nevertheless, some members of the High

23 Tobin, above n 13, 24.

24 With the exception of the State and Territory that have enacted statements of rights that will have force in matters under their jurisdiction: see *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

25 *Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J); *Dietrich v The Queen* (1992) 177 CLR 292, 321 (Brennan J); *Murray v Director, Family Services, ACT* (1993) FLC ¶92-416 (Nicholson CJ and Fogarty J) [80255].

26 (1995) 183 CLR 273.

27 *Ibid* 291.

28 *Ibid* 291-2 (Mason CJ and Deane J), 302 (Toohey J), 305 (Gaudron J).

29 Minister for Foreign Affairs, Senator Gareth Evans and Attorney-General, Michael Lavarch, 'International Treaties and the High Court Decision in *Teoh*' (Media Release, M44, 10 May 1995). A similar statement was issued by the then Minister for Foreign Affairs, Alexander Downer and the Attorney-General Daryl Williams in 1997: Gibbs, above n 17.

30 Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth). A similar Bill was introduced in 1999: Philip Lynch, 'Human Rights Law Resource Manual' (Human Rights Law Resource Centre, September 2006) 21; Gibbs, above n 17.

31 *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431, 437-8 (Hill J); *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80, 103 (Goldberg J).

Court have made remarks in obiter questioning the correctness of the decision in *Teoh* and the principle of legitimate expectation.³² The Australian Government's opinion is that, if a party in a future case were to rely on *Teoh* to support an argument of legitimate expectation, the Court would likely overturn the concept of legitimate expectation arising out of international treaties.³³

Therefore, the *UNCRC* remains 'an aspirational document'³⁴ in that its impact for Australian citizens is confined to circumstances where individual articles have been implemented (as some have been, for example, in Part VII of the Act) or where the *UNCRC* acts as an aid in statutory interpretation and development of the common law. This position was confirmed by the Replacement Explanatory Memorandum to the amendments, which states that the purpose of section 60B(4) is:

to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention. The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail.³⁵

It is clear that the inclusion of section 60B(4) as a 'object' of Part VII has not in any way affected the common law position whereby decision-makers are required to interpret Part VII in a way that is consistent with the *UNCRC* to the extent allowed by the Act.

There is no individual complaints mechanism for Australian children who perceive that their rights under the *UNCRC* have been violated.³⁶ States Parties are required to report regularly to the United Nations Committee on the Rights of the Child ('UN Committee') to advise of ways in which that State has taken steps to implement the Convention.³⁷ The UN Committee is a body of independent experts which monitors implementation of the *UNCRC* by States Parties and publishes its interpretation of human rights provisions.³⁸ The only sanction is an unfavourable report by the UN Committee, which lacks punitive or legal power. Amendments were recently made to the *Australian Human Rights Commission*

32 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1 27–34 (McHugh and Gummow JJ), 45–9 (Callinan J). See also Gibbs, above n 17.

33 United Nations Committee on the Rights of the Child, *Second and Third Periodic Reports of States Parties Due in 1998 and 2003, Australia*, UN Doc CRC/C/129/Add.4 (29 December 2004) [40]. Given the reactions to *Teoh* from both major political parties, it is unlikely the subsequent change in government has affected this view.

34 Moira Rayner, 'Why Children Need to Know their Rights' (2003) 5(2) *Newcastle Law Review* 23, 28.

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

36 The *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 28 February 2012, A/Res/66/138 (not yet in force), allows children to submit complaints to the UN Committee about violations of their rights under the *UNCRC*. Australia is not a signatory to the *Optional Protocol*.

37 *UNCRC* art 44.

38 Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of the Child* <<http://www2.ohchr.org/english/bodies/crc/>>.

Act 1986 (Cth) to establish a National Children's Commissioner.³⁹ One role of the Commissioner is to monitor Commonwealth legislation, including the Act, and make recommendations to the relevant Minister where the Commissioner believes that the rights of children are not being promoted.⁴⁰

IV ARTICLE 12 OF THE *UNCRC* AND THE *FAMILY LAW ACT 1975* (CTH)

Several articles of the *UNCRC* have significance for children whose parents have separated and who are the subject of proceedings under Part VII of the Act. These include the articles which govern relationships between children and their parents. Many principles embedded in the articles of the *UNCRC* have been included, or were already present, in the Act. For example, section 60CA requires the court to regard the best interests of the child as the paramount consideration. This reflects article 3.1. The 'objects' in section 60B(1) and the 'primary considerations' in section 60CC(2) (which emphasise the benefit to children of having a meaningful relationship with both parents and the need to protect children from harm) are reflective of articles 9.3 and 19.1 respectively. Article 18.1 is reflected in the acknowledgement in section 61C that each parent of a child has parental responsibility for that child. Some reforms to the Act made by the *Family Law Reform Act 1995* (Cth), such as the inclusion of section 60B, were made to directly implement principles of the *UNCRC*. While these aspects of the *UNCRC* have been implemented in the Act, article 12 has not.

Article 12 of the *UNCRC* reads:

- 12.1 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.
- 12.2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.⁴¹

Taking a simple and literal reading of article 12, children have a right to express their views and, therefore, children who are the subject of family law disputes must be provided with the opportunity to be heard in the proceedings. Article 12 has been broadly conceptualised as children's right to 'participate', although this term does not appear in the text of article 12.⁴²

There is no section of the Act which expressly affords to a child who is the subject of proceedings the right to 'participate' or 'express their views', or the

39 The amendments made by the *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth) commenced 1 July 2012.

40 *Australian Human Rights Commission Act 1986* (Cth) s 46MB.

41 *UNCRC* art 12.

42 United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to be Heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009) [3].

‘opportunity to be heard’. The only sections which deal with the expression of children’s views are sections 60CC(3)(a), 60CD and 60CE. In making an order for parenting arrangements for a child, the court must regard the best interests of the child as the paramount consideration.⁴³ In determining what is in a child’s best interests, the court will have regard to a number of factors listed in section 60CC. These are divided into ‘primary’ and ‘additional’ considerations. Section 60CC(3)(a) appears in the list of additional considerations and requires the court to consider ‘any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views’.⁴⁴ Section 60CD outlines the methods by which a court may inform itself of views expressed by a child. These are said to be by having regard to a report given to the court under section 62G(2), by making an order that the child’s interests be independently represented by a lawyer or by any other means as the court thinks appropriate, subject to the Rules of Court.⁴⁵ Section 60CE qualifies these sections by noting that a child may not be required to express his or her views in relation to any matter.

It is clear from the wording of these sections and the absence of any other references to the treatment of child’s views that Part VII does not implement article 12 of the *UNCRC*. While children’s views must be taken into account, a child is not afforded a right to be heard. This view is strengthened when considered in the context of the significant guidance given by the UN Committee on how the rights in article 12 are to be complied with.

A Giving Children a Right to Be Heard and Opportunities to Express Their Views

The UN Committee has decreed that ‘all children involved in judicial and administrative proceedings must be informed in a child friendly manner about their right to be heard, modalities of doing so and other aspects of the proceedings’.⁴⁶ The UN Committee also noted that expressing their views is a choice for children, not an obligation, and children are entitled to choose not to exercise their right to be heard. It is up to States Parties to ‘ensure that the child receives all necessary information and advice to make a decision in favour of his or her best interests’.⁴⁷

While section 60CE ensures that children can choose not to express their views, no provision of the Act ensures that children have a right to be heard, are informed about that right or receive all necessary information to make a decision about whether or not to be heard. In New Zealand and Scotland, the child’s right

43 *Family Law Act 1975* (Cth) s 60CA.

44 *Family Law Act 1975* (Cth) s 60CC(3)(a).

45 *Family Law Act 1975* (Cth) s 60CD.

46 United Nations Committee on the Rights of the Child, *Day of General Discussion on the Right of the Child to be Heard*, 43rd sess, (29 September 2006) [40] <<http://www2.ohchr.org/english/bodies/crc/discussion2013.htm>>.

47 United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to be Heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009) [16].

to be heard has been enshrined in the relevant family law legislation. The New Zealand *Care of Children Act 2004* (NZ) states that a child must be given reasonable opportunities to express views on matters affecting the child.⁴⁸ This reflects the wording in article 12 of the *UNCRC*. Similarly, the *Children (Scotland) Act 1995* (UK) ensures that a court will, taking account of a child's age and maturity and so far as practicable, give the child an opportunity to indicate whether he or she wishes to express their views and, if so, give the child an opportunity to express his or her views.⁴⁹

While all three jurisdictions ensure that children's views are taken into account in decision-making, Scotland and New Zealand differ from Australia in that they have granted children a right to be given opportunities to express their views. Therefore, an appeal could be brought in Scotland and New Zealand, but not in Australia, on the basis that a child has been denied that right.

In the New Zealand case of *Carpenter v Armstrong* a seven year old child had not been directly asked by the psychologist involved in the case or by the lawyer for the child about his views on his mother's proposed relocation to the United Kingdom or whether he wished to express any views.⁵⁰ The High Court⁵¹ found that section 6 of the *COCA* had not been complied with because the child had not been afforded reasonable opportunities to express his views.⁵² The Court held that children may not be prepared to engage in discussion, or may have insufficient understanding to express reliable views. Nevertheless, they need to be offered a 'reasonable opportunity' to express their views.⁵³

In Australia a successful appeal can be brought on the grounds that a child's views have not been heard,⁵⁴ or have not been given proper and realistic weight.⁵⁵ However, this would be framed in terms of the court not having properly considered 'any views expressed by the child' (as required by section 60CC(3)(a)) and not in terms of a child having been denied a reasonable opportunity to express their views.

B Taking Children's Views into Account

Article 12 does not state that a decision-maker is in any way bound by the views expressed by a child, but only that the views of the child are to be 'given due weight in accordance with the age and maturity of the child'.⁵⁶ What constitutes 'due weight' is not specified.

48 *Care of Children Act 2004* (NZ) ('*COCA*') s 6(2)(a).

49 *Children (Scotland) Act 1995* (UK) c 36, s 11(7).

50 Unreported, High Court of New Zealand, Heath J, 31 July 2009.

51 The High Court hears appeals from the Family Court of New Zealand: *Care of Children Act 2004* (NZ) s 143.

52 *Carpenter v Armstrong* (Unreported, High Court of New Zealand, Heath J, 31 July 2009) [83].

53 *Ibid* [80].

54 *Joannou and Joannou* (1985) FLC ¶91-642.

55 *H v W* (1995) FLC ¶92-598.

56 *UNCRC* art 12.

The UN Committee has described children's enjoyment of article 12 to be in three distinct phases: '[t]o speak, to participate, to have their views taken into account.'⁵⁷ Therefore, it is not enough to 'hear' a child, and then disregard their views. The UN Committee has also affirmed that a child's age should not be a barrier to the child's right to fully participate in judicial processes.⁵⁸

This is one matter on which the UN Committee's view and the courts' approach to Part VII of the Act coincide. While section 60CC(3)(a) does not contain a 'right' for children to be heard, case authority has confirmed that a court must have regard to children's views, regardless of their age.⁵⁹ In *H v W* the Full Court noted that the Court will attach varying degrees of weight to a child's wishes depending upon, amongst other factors, the strength and duration of their wishes, their basis and the maturity of the child.⁶⁰

C Direct or Indirect Representation of Children

The wording of article 12.2 does not make clear whether children are entitled to be heard directly, or whether article 12.2 is complied with even in circumstances where a child wants to be heard directly but is instead heard through a 'representative or appropriate body'. This is particularly relevant in Australian family law matters, as children's views are very rarely heard directly by the decision-maker and are most often presented through evidence from experts, the parties and witnesses.⁶¹

The UN Committee is of the opinion that children who wish to participate in the proceedings should have the choice of whether to be heard directly, or through a representative or appropriate body.⁶² The child must receive information about both options and be made aware of the possible consequences of each.⁶³ The UN Committee recommended that, wherever possible, children must be given the opportunity to be directly heard in proceedings.⁶⁴

This interpretation of article 12 is not followed in Australia's family law system. Children are not routinely given a choice as to how their views are to be heard and it is very unusual for a child to be heard directly.⁶⁵ Children's views are most commonly heard via a report written by a family consultant who has spoken with the child, evidence of parents and other witnesses who report what

57 United Nations Committee on the Rights of the Child, above n 46, [5].

58 Ibid [51].

59 *Joannou and Joannou* (1985) FLC ¶91-642.

60 *H v W* (1995) FLC ¶92-598, 81,947-8 (Fogarty and Kay JJ).

61 See Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 2-3.

62 United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to be Heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009), [35]-[36].

63 Ibid [41].

64 Ibid [35].

65 Michelle Fernando, 'Conversations Between Judges and Children: An Argument in Favour of Judicial Conferences in Contested Children's Matters' (2009) 23 *Australian Journal of Family Law* 48; Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13 *Australian Journal of Family Law* 197.

the child has said to them,⁶⁶ and evidence led by an Independent Children's Lawyer.⁶⁷ These all constitute indirect methods of hearing children's views.

Judges hear direct evidence from children on very rare occasions. In a survey of all Australian family law judicial officers conducted by the author in 2010, 86 per cent of respondents indicated that they had never met with a child for the purpose of hearing the child's views.⁶⁸ This is in stark contrast to judges in New Zealand, where 65 per cent indicated in a recent study that they often, very often or always meet with a child who is the subject of a parenting dispute.⁶⁹

Cases where a child is joined as a party to proceedings or is called as a witness are extremely uncommon,⁷⁰ as there is a perception that involving children so closely in adversarial proceedings between their parents can be harmful for children.⁷¹ Section 60CD, which sets out how a court may be informed of children's views, does not make reference to evidence of children's views being heard directly by the court. However, it does not rule it out, as the court may hear a child's views by 'such other means as the court thinks appropriate', subject to the Rules of Court.⁷²

The UN Committee, in reviewing Australia's commitment to the *UNCRC*, noted its concern that children's views are not always sufficiently taken into account in Australian judicial and administrative proceedings affecting children.⁷³ It recommended that the right of children to express their views in all matters affecting them should be expressly provided for in family law reform.⁷⁴ Despite this recommendation, the child's right to be heard has not been implemented in Australian family law.

V THE IMPACT OF THE 'OBJECTS AND PRINCIPLES' SECTION ON DECISION-MAKING

The title of section 60B is 'Objects of Part and Principles Underlying It'. Section 60B(4) has been included as an 'additional object' of Part VII. In

66 Evidence from others about representations from children may be admissible notwithstanding the rule against hearsay: *Family Law Act 1975* (Cth) s 69ZV.

67 An Independent Children's Lawyer is not appointed in every case and is a 'best interests' representative. The lawyer does not act on instructions from the child but acts in accordance with what he or she believes is in the child's best interests: *Family Law Act 1975* (Cth) s 68LA.

68 Michelle Fernando, 'What do Family Law Judges Think about Meeting with Children?' (2012) 26 *Australian Journal of Family Law* 51, 58. The survey's response rate was approximately 48 per cent: at 57.

69 John Caldwell, 'Common Law Judges and Judicial Interviewing' (2011) 23 *Child and Family Law Quarterly* 41, 57–8. The survey response rate was 71 per cent: at 57.

70 Chisholm, above n 65, 207; Chief Justice Diana Bryant, 'The Role of the Family Court in Promoting Child-Centred Practice' (2006) 20 *Australian Journal of Family Law* 127, 134.

71 Chisholm, above n 65, 203, 208; Bryant, above n 70, 135; Julie Redman, 'The Voice of the Children in Family Disputes' (1997) 12(1) *Australian Family Lawyer* 29, 30.

72 *Family Law Act 1975* (Cth) s 60CD(2)(c).

73 United Nations Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005) [29].

74 *Ibid* [30].

deciding what parenting orders to make for a child under Part VII, the court must apply a rigorous decision-making process.⁷⁵ In this discussion, it is important to note the role that the ‘objects and principles’ section plays in that process. If section 60B does not have much bearing on the decision a court will ultimately make, the impact of the new section 60B(4) on outcomes will be minimal.

Section 15AA of the *Acts Interpretation Act 1901* (Cth) states that where an Act contains a purpose or object, an interpretation of the legislation which promotes the purpose or object is to be preferred to one which does not. As section 60B(4) states that an ‘additional object of this Part is to give effect to the Convention on the Rights of the Child’,⁷⁶ this would mean that the court should prefer an interpretation of Part VII that promotes ‘giving effect’ to the *UNCRC* to one which does not. Notwithstanding the enactment of section 60B(4), this approach is in keeping with the common law position in relation to the relevance of international treaties in interpreting an Australian statute.

Further, case law has affirmed that while section 60B is useful to provide context to decisions made under Part VII, the objects and principles section does not play a great role in the final outcome of cases. In *B v B: Family Law Reform Act 1995* the Full Court of the Family Court of Australia said that section 60B represents a deliberate statement by the legislature of the object and principles which the court is to apply in proceedings under Part VII.⁷⁷ The Full Court confirmed that section 60B provides guidance and context to the court when determining what is in the best interests of a child. But it is the ‘best interests’ principle that ‘defines the essential issue’.⁷⁸ The Full Court held that where there are no countervailing factors the section 60B principles may be decisive, not only because they are contained in section 60B but because they accord with what is in the best interests of the particular child.⁷⁹ Accordingly, the Full Court held that section 60B(1) can be regarded as an optimum outcome but is ‘unlikely to be of great value in the adjudication of individual cases’.⁸⁰ Similarly the principles in section 60B(2) are more specific but are not exhaustive and ‘their importance will vary from case to case’.⁸¹

Following significant amendments to the Act in 2006, the Full Court again elucidated the significance of section 60B. The 2006 reforms introduced a presumption of equal shared parental responsibility in cases where there is no family violence or abuse and,⁸² in cases where an order for equal shared parental responsibility is made, a requirement that the court consider making orders for equal time or substantial and significant time.⁸³ The best interests of the child

75 See generally *Goode and Goode* (2006) FLC ¶93-286.

76 *Family Law Act 1975* (Cth) s 60B(4).

77 *B v B: Family Law Reform Act 1995* (1997) FLC ¶92-755 [9.54] (Nicholson CJ, Fogarty and Lindenmayer JJ).

78 *Ibid* [9.54].

79 *Ibid* [9.54]–[9.60].

80 *Ibid* [9.54].

81 *Ibid*.

82 *Family Law Act 1975* (Cth) s 61DA.

83 *Family Law Act 1975* (Cth) s 65DAA.

remain the paramount consideration⁸⁴ and the factors listed in section 60CC guide the court in determining what is in a child's best interests. All of the objects in section 60B(1) are reflected to some extent in the section 60CC factors such as the benefit to the child of having a meaningful relationship with each parent,⁸⁵ and the need to protect the child from physical or psychological harm.⁸⁶ In this regard the objects in section 60B(1) do significantly influence decision-making. Additionally, the Full Court in *Goode and Goode* set out the correct approach to decision-making under Part VII and said that section 60B provides the context to examine the section 60CC factors.⁸⁷ The court said, 'the child's best interests are ascertained by a consideration of the objects and principles in section 60B and the primary and additional considerations in s 60CC.'⁸⁸

Therefore it can be seen that the main purpose of section 60B is to provide context to the courts' decision-making, and particularly when determining what is in a child's best interests. Aside from the extent to which the objects are also contained in the section 60CC factors, section 60B does not directly affect what is in a child's best interests and the section does not play a large role in the outcomes of decisions. The new section 60B(4) which states that an additional object of Part VII is to 'give effect' to the *UNCRC* is therefore unlikely to lead to any change in the way decisions are made. The impact of section 60B as explained by the Full Court in *B and B: Family Law Reform Act 1995*⁸⁹ and *Goode and Goode*⁹⁰ was confirmed by the legislature in the Replacement Explanatory Memorandum which stated: '[t]he reference to the Convention in section 60B does not adversely affect [the "best interests"] provisions in Part VII or dilute the meaning of "paramount consideration"'.⁹¹

VI THE INTENTION OF SECTION 60B(4)

Some argue that the fact that Parliament legislated to insert section 60B(4) in the Act means that the legislature intended that the subsection have a purpose beyond merely confirming the common law position.⁹² Former Family Court judge the Hon Stephen O'Ryan stated:

84 *Family Law Act 1975* (Cth) s 60CA.

85 *Family Law Act 1975* (Cth) s 60CC(2)(a).

86 *Family Law Act 1975* (Cth) s 60CC(2)(b).

87 *Goode and Goode* (2006) FLC ¶93-286 [10] (Bryant CJ, Finn and Boland JJ).

88 *Ibid* [65] (Bryant CJ, Finn and Boland JJ).

89 (1997) FLC ¶92-755.

90 (2006) FLC ¶93-286.

91 Replacement Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) [25].

92 See, eg, Fitzgerald, above n 4.

I think the fact of ... incorporating a reference to the Convention clearly has a purpose ... in the interpretation of our legislation, and I think that's very important. I'm going to assume that it will have a significant impact because of its insertion, and for my part I would hope that's correct.⁹³

Unfortunately, with respect, that view is not sustainable, particularly in light of Parliament's own explanation of the effect of the subsection. The Replacement Explanatory Memorandum to the amendments states:

Item 13 inserts a new subsection into section 60B of the Act to provide that a further object of Part VII of the Act is to give effect to the United Nations *Convention on the Rights of the Child* (the Convention). The purpose of this object is to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia's obligations under the Convention. The Convention may be considered as an interpretive aid to Part VII of the Act. To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law.⁹⁴

It can therefore be established that the legislature did not intend to incorporate the *UNCRC* into domestic law, and the enactment of section 60B(4) was intended to have no more effect than to confirm the common law position that, in cases of ambiguity, the provisions of Part VII are to be interpreted consistently with the *UNCRC*, to the extent permitted by the Act.

Section 60B(4) does not change the law. However, one possible effect of its implementation is that it will put the principles of the *UNCRC* firmly in the mind of decision-makers. Indeed, perhaps this was the legislature's intention in introducing section 60(4), although such intention is not clear from the Replacement Explanatory Memorandum. The use of the *UNCRC* as an interpretive aid to Part VII and the desirability of upholding the *UNCRC* where it does not conflict with the Act have been confirmed by the Full Court in numerous decisions.⁹⁵ In *B and B and Minister for Immigration & Multicultural & Indigenous Affairs* the majority of the Full Court held that the *UNCRC* had been incorporated into domestic law by the *Family Law Reform Act 1995* (Cth).⁹⁶ However, this was not a matter discussed by the High Court in rejecting the Full Court's decision.⁹⁷

93 ABC Radio National, above n 4.

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

95 *B v B: Family Law Reform Act 1995* (1997) FLC ¶92-755; *In the marriage of McCall, WG and McCall, RA: State Central Authority (Applicant); A-G (Intervener)* (1995) FLC ¶92-551; *Director General, Department of Community Services v De Lewinski, FB* (1996) FLC ¶92-674; *Murray, GF v Director, Family Services, ACT* (1993) FLC ¶92-416; *H v W* (1995) FLC ¶92-598.

96 *B and B and Minister for Immigration & Multicultural & Indigenous Affairs* (2003) FLC ¶93-141 [183], [288] (Nicholson CJ and O'Ryan J).

97 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.

VII RECOMMENDATIONS

There are many steps that can be taken to implement and protect a child's right to be heard in Australian family law. These include statutory recognition of article 12 and amending section 60CD(2) to refer to direct participation by children.

As discussed, the child's right to be heard is not recognised in Australian family law, despite recommendation from the UN Committee that this be rectified.⁹⁸ As party to the *UNCRC*, Australia has agreed to take all measures to implement the rights recognised therein.⁹⁹ It is recommended that Australia implement article 12 of the *UNCRC* in the Act as a matter of priority. This could be achieved by inserting a new section in Part VII of the Act:

Children's right to express their views

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

This section is similar to the New Zealand equivalent in that it grants children 'reasonable opportunities' to be heard.¹⁰⁰ The proposed section does not contain the qualification that a child has the right to express his or her views 'either directly or through a representative or appropriate body', which is the wording that appears in article 12. The UN Committee has made clear that whether a child expresses themselves directly or through a representative is a matter for the child to decide.¹⁰¹ However, there are many reasons why it may be in children's best interests for their views to be heard indirectly, such as through a report prepared by a child welfare expert (discussed below). While the proposed section does not stipulate that children are to be given the choice of whether to be heard directly or indirectly, it deliberately omits a qualification which may be misinterpreted and lead to an assumption that to hear from a child indirectly is always sufficient.

The section, as drafted, means that children, regardless of their age, maturity or circumstances, have the right to express their views and must be given reasonable opportunities to do so. This is in keeping with leading case authority on children's views in Australia. Cases such as *Joannou and Joannou*¹⁰² and *H v W*¹⁰³ affirmed that a court must ascertain and consider a child's views regardless of the age of the child.¹⁰⁴

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

99 *UNCRC* art 4.

100 *Care of Children Act 2004* (NZ) s 6(2)(a).

101 United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to Be Heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009) [35]–[36].

102 (1985) FLC ¶91-642, [80182]–[80183] (Pawley, Fogarty and McGovern JJ).

103 (1995) FLC ¶92-598 [81944]–[81948] (Fogarty and Kay JJ).

104 This is subject to the qualification that no-one can require a child to express his or her views in relation to any matter: *Family Law Act 1975* (Cth) s 60CE.

It is also recommended that section 60CD(2), which lists the various ways in which a court may inform itself of views expressed by a child, be amended to specifically refer to a meeting between a judge and a child. This would give statutory recognition to a child's ability to present their views directly to the judge. It is suggested that the section be amended to read:

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

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

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

Meetings between judges and children are within the inherent discretion of the court but are very rarely utilised.¹⁰⁵ The possibility of a judge meeting with a child was previously mentioned in the *Family Law Rules 2004* (Cth),¹⁰⁶ but the reference was omitted in 2010.¹⁰⁷ Studies have shown that children want to be given the opportunity to meet with the judge who is making decisions about their lives,¹⁰⁸ and that children benefit from feeling they have been involved in the decision-making process.¹⁰⁹ It is appropriate that section 60CD(2) be amended to conform with article 12 and the UN Committee's view that children should be given the option to express their views directly.¹¹⁰ The use of a judicial meeting with a child to give effect to the child's right to be heard is a factor that has been recognised by judges in the past.¹¹¹

105 *KS v DS* (1999) 25 FLC ¶92-860 [35] (Nicholson CJ); Explanatory Statement, *Family Law Amendment Rules 2010* (Cth) sch 1 [16].

106 Rule 15.03.

107 Rule 15.03 was removed by the *Family Law Amendment Rules 2010* (Cth) and was not replaced.

108 Patrick Parkinson, Judy Cashmore and Judi Single, 'Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia' (2007) 21 *International Journal of Law, Policy and the Family* 84, 88–9. See also Chief Justice A Nicholson, 'Children and Young People: The Law and Human Rights' (Paper presented at the Law Society of the ACT, Sir Richard Blackburn Lecture, Canberra, 14 May 2002) 17–18; Judy Cashmore, 'Children's Participation in Family Law Matters' in Christine Hallet and Alan Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (Routledge Falmer, 2003) 167.

109 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [13.55]; Joan B Kelly, 'Legal and Educational Interventions for Families in Residence and Contact Disputes' (2001) 15 *Australian Journal of Family Law* 92, 113; Anne B Smith, Nicola J Taylor and Pauline Tapp, 'Rethinking Children's Involvement in Decision-Making after Parental Separation' (2003) 10 *Childhood* 201, 204; Parkinson and Cashmore, above n 61, 67–8.

110 United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to be Heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009) [35]–[36].

111 *ZN and YH and Child Representative* (2002) FLC ¶93-101, [112] (Nicholson CJ); *N and N* (2000) FLC ¶93-059 (Mullane J); Baroness Hale of Richmond, 'Children's Participation in Family Law Decision Making: Lessons from Abroad' (2006) 20 *Australian Journal of Family Law* 119, 125–6.

This inclusion is not intended to detract from the other very important and established methods of hearing children's views. In particular, it is not suggested that a judicial meeting with a child should be in substitution for a report prepared by a family welfare expert (known as family consultants in Australia) which contains observations of the child and the parents, an account of the child's views, the report writer's expert opinion about whether those views are genuinely held and their recommendations for the child's parenting arrangements.¹¹² It is submitted that a judicial meeting with a child can be a valuable complement to the other methods of hearing children's views.¹¹³

VIII CONCLUSION

The new section 60B(4) does not incorporate the *UNCRC* in Australian family law. Children will not be granted a right to be heard and will not be able to appeal on that basis. Children will not have a right to be directly represented as a result of this amendment. Section 60B(4) does no more than confirm the common law position that the *UNCRC* can be used as an interpretive aid to Part VII of the Act and that an interpretation that upholds the principles of the *UNCRC* is to be preferred unless it conflicts with the Act. Thus, section 60B(4) does not change the law and, based on the arguments raised, significant change in the way decisions for children are made is unlikely.

However, specific reference to the *UNCRC* in the Act is a step in the right direction. While the reference in itself may have no legislative power, section 60B(4) constitutes an important acknowledgement of children's rights in a statutory instrument. Section 60B of the Act provides the 'objects and principles' to Part VII. While the section may be more aspirational than substantive, it nevertheless provides context to the entirety of the court's deliberations in making decisions for children and, in particular, in determining what is in a child's best interests.

While the statutory force of section 60B(4) is unlikely to have a great impact on the outcomes of individual cases, the main effect of the subsection may be to put the principles of the *UNCRC* firmly in the minds of judges. As a result, we may see increased references to the *UNCRC* in judgments and careful deliberations as to whether court procedures and proposed orders uphold the articles of the Convention. This may lead to positive outcomes for children. Specific reference to the *UNCRC* may also influence how Independent Children's Lawyers and others working in the family law system view their

112 See Fernando, 'Conversations between Judges and Children', above n 65, 51–2.

113 For detailed discussion about the perceived benefits and limitations of judicial meetings with children, including judges' views about the practice, see Fernando, 'Conversations between Judges and Children', above n 65; Fernando, 'What do Family Law Judges Think About Meeting with Children?', above n 68.

role.¹¹⁴ This may lead to changes in the way these people relate to children and improve the experiences of children who are the subject of family law litigation. The 2012 amendments to the Act made substantial changes to Part VII. No doubt those changes, and particularly those that relate to family violence, will lead to differences in the way judges make decisions for children. It remains to be seen whether the inclusion of section 60B(4) will lead to greater recognition of children's rights, or whether the new subsection will have no discernible impact on decision-making.

114 Fitzgerald argues, for example, that Independent Children's Lawyers will need to give greater consideration to the views of children rather than just their 'best interests' and where the two are in conflict, will need to consider whether the child should be joined as a party to proceedings: Fitzgerald, above n 4.