

# Enhancing the Participation of Children and Young People in Family Proceedings: Starting the Debate

## Introduction

1. The UK incorporated the European Convention on Human Rights and Fundamental Freedoms into domestic law in passing the Human Rights Act 1998. In addition, the UK has ratified the UN Convention on the Rights of the Child.<sup>1</sup> While the UN Convention has not been specifically incorporated into UK law, its concepts and provisions are nevertheless reflected in much of the domestic law relating to children.<sup>2</sup> These two Conventions, the case law of the ECHR and current notions of good practice have, over the last quarter of a century, led to some fundamental changes in attitude. The view that children should be 'seen and not heard' has given way to children being regarded as active bearers of rights. The approach of courts and professionals involved in children's cases has become more child-centred, and the principle that children should be able to participate, to give their views and to have those views considered in relation to decisions that affect their lives, has been widely accepted.<sup>3</sup>
2. The degree to which it is desirable to involve children<sup>4</sup> in family proceedings<sup>5</sup> is a difficult and contentious issue facing those involved in the family justice system., especially in relation to whether children are entitled to be present in court if they so wish and whether judges should see children in private during the course of proceedings. Article 6 ECHR provides that '*in the determination of his civil rights and obligations..... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*' The right to family life contained in Article 8 ECHR is, of course, a civil right. In the criminal context, the European Court of Human Rights has read a right to be present in court into the rights conferred by Article 6. Although the right to be present has not been recognised to the same extent in civil cases, fairness may nevertheless require presence, especially where this is requested.
3. Article 12 of the UN Convention on the Rights of the Child adds to this debate. It provides that the state shall assure to the child who is

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<sup>1</sup> The UK ratified this treaty in 1991

<sup>2</sup> For instance the Children Act 2004 provides that in raising awareness of children's views and interests, the Children's Commissioner must have regard to the United Nations Convention on the Rights of the Child and also Children Act 1989 s.1(3).

<sup>3</sup> See for instance, Draft Cafcass and OFSTED Children's Rights in Practice which include: the right to be seen and heard; the right of reply, the right to be fully informed; the right to be actively involved and the right not to be put under pressure.

<sup>4</sup> All references to "child" or "children" are intended to include "young person" or "young people"

<sup>5</sup> "Family proceedings" includes both public and private law cases

capable of forming his or her own views the right to express those views freely in all matters affecting them, the views of the child being given due weight in accordance with the age and maturity of the child. In addition, Article 12(2) provides that, for this purpose, the child shall in particular be afforded 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. The UN Committee on the Rights of the Child has emphasised that a child is an active subject of rights, and thus where a child is old enough to express his or her views; he or she should be encouraged to do so directly as an active participant rather than through an intermediary. The Committee sees listening to children not as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights.

4. The argument for allowing children to attend a court hearing where the case impacts on their right to family life under Article 8, appears to be relatively straightforward. Being denied the right to attend could constitute a violation of Article 6 ECHR and S.6(1) Human Rights Act 1998. The situation in relation to a judge<sup>6</sup> seeing children in private is less clear in England and Wales. Decided authority,<sup>7</sup> albeit of some age, has previously established that although a judge has discretion to see a child, that discretion is to be exercised with caution. However, it must be recognised that the climate of opinion on these matters is beginning to change. There is an increasing body of research evidence which demonstrates that children want more involvement in the court process. Recent papers include the NSPCC's 'Your Shout', 'Your Shout 2' and the Cardiff University research into the operation of rule 9.5. The consistent message of this research is that children wish for greater engagement. A common theme in the feedback from interviews with children who have experienced family proceedings is that they felt that the proceedings were 'happening' to them and that they felt excluded, powerless to influence, contribute to or even to make their voice heard in the process.
5. Addressing this issue is also timely, as the government is currently considering the issue of transparency of the family courts. Consultation with children<sup>8</sup> on transparency indicated a real desire on their part to be active participants in family proceedings that affected them.
6. The President has indicated that he views an enhanced level of participation by children as desirable. We wish to stimulate debate on how, in the future, the voices of individual children can best be heard during proceedings so intimately concerned with their welfare.

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<sup>6</sup> "Judges" includes lay magistrates in the Family Proceedings Courts

<sup>7</sup> B v B (minors)[1994]2FLR 489, Re M (a Minor) (Justices Discretion) 1993 2FLR 706

<sup>8</sup> See 'Confidence and Confidentiality: Improving Transparency and Privacy in Family Courts Response to Consultation Code No CP(R)11/06, DCA and HMCS (obtainable from [www.dca.gov.uk](http://www.dca.gov.uk))

## Forms of participation

7. The nature and extent of involvement in the court process which might be appropriate for any individual child is likely to vary greatly, dependent on age and maturity. Research evidence shows, however, that participation in decisions that affect their lives can be very positive for children, but recognises that not all children will want to participate directly in proceedings. Many will be too young (approximately 60% of children who are the subject of care proceedings are under the age of 6), and some will prefer to have their views and interests conveyed to the court through a Cafcass Officer.
8. Where children do want to participate directly, social workers and Cafcass Officers still continue to have the primary responsibility for ascertaining the needs, wishes and feelings of children. They are trained in the skills of listening to children, and are able to offer a considered and broader expert assessment of the child's needs alongside his expressed views. Such a professional will be able to meet a child in an appropriately relaxed setting, making use of play materials and other facilitative techniques to enable children, especially younger children, to express themselves. Children may well require more than one meeting for their story to be told.
9. We anticipate that many children will be content for a Cafcass officer or social worker to represent their views. However, some children may wish to:
  - complete a needs, wishes and feelings statement with the Cafcass Officer, which is filed with the court and for the judge's consideration;
  - write a letter to the judge;
  - visit the court premises;
  - in private law cases, be separately represented within the proceedings under Rule 9.5, an extremely useful and important resource in more difficult cases;
  - perhaps meet "a" judge, not necessarily the judge involved in their case;
  - meet the judge responsible for the child's case;
  - receive a copy of the court's judgment, appropriately edited; and
  - attend proceedings.
10. There will also be children who choose not to attend the court hearing, or who are not a party to the proceedings, who would like to meet the judge responsible for the decision in their case at some stage during, or

after, the proceedings. It would be important for the Cafcass officer to clarify with the child, in advance, what purposes for meeting the judge the child has in mind so that the judge may be informed before any such meeting.

Ultimately, whether an individual judge decides to see an individual child must remain a matter for judicial discretion. However, we would anticipate that where such a meeting is considered appropriate by professionals involved with the child, if a judge declined to meet that child he would give brief reasons for that decision; reasons which could be conveyed to the child.

11. As a broad proposition, we consider that there are good reasons why judges should be less reluctant to see children than has hitherto been the case. These include:

- to enable the child to have a picture of the judge in their mind by actually seeing them; and
- to enable the child to tell the judge directly about specific issues or to express his/her wishes;
- to reassure the child that they are/have been at the centre of the decision making process and that the judge has understood and will take into account what they have said, as well as the representations made on behalf of the child;
- following the judgment, to enable the judge to explain their decision to the child, thereby helping the child to understand the process and hopefully assisting them to accept the outcome;
- to promote and implement the child's human rights in terms of their involvement in the process of decision as set out within our domestic legislation and strengthened by the UK Government's ratification of the UN Convention of the Rights of the Child.

## **The child attending court during proceedings**

12. Finally, there will be a small number of children who are parties to the proceedings who will wish to attend some or all of the hearing. If that is the case, being denied the right to attend (at least without consideration of the child's welfare interests) could involve a violation of their Art 6 rights. However, consideration would need to be given in each case to the stage of the hearing at which it would accord the child's welfare interests to be present.

## **Practical issues in relation to judges seeing children**

13 A judge seeing a child is not a forensic exercise – all those involved should be clear on this. Save in exceptional circumstances judges

should **not** see children as an alternative to the skilled work of the Cafcass Officer. It is not the task of the judge to ascertain the wishes and feelings of the child.

14. It is important to bear in mind that there are distinctions between the child's position in public and private law proceedings. In public law cases, children are parties; they are represented by a Cafcass officer and a lawyer. In most private law cases, none of these factors is usually present. Indeed, in some private law cases, the child may have no neutral adult to explain the proceedings to them and may derive particular benefit from access to an impartial authority figure such as the judge. In all cases it will be important for parents to be consulted as to the appropriate level of a child's participation, but in private law cases, where parental responsibility remains exclusively with parents, then the obligation is all the clearer.

15. Other practical issues include:

- it will be important to ensure that the child does not find himself or herself being held responsible by either parent for the outcome of the case;
- there must be flexibility as to when is the appropriate time for a judge to see a child. Cafcass officers, social workers, legal representatives and the judge will need to consider the options for each child individually;
- if a child is to meet the judge in person it must be made clear that this is not a confidential process. Judges should stress to the child that they cannot keep secrets. The issue of confidentiality should be explored fully and explained to the young person prior to any meeting with the judge;
- Preparation for the meeting and the provision of appropriate information to the child should be the duty of the Cafcass Officer. In some cases a judge may need specific information and guidance from professionals and family members in finding a way to communicate effectively with a child;
- careful consideration should be given to who should be present at the meeting. It will usually, but not always be appropriate for a Cafcass officer to be present;
- venue will be important. For example, combined courts, where criminal proceedings are also heard, and perhaps armed police may be present, are unlikely to provide appropriate surroundings. It may be that arrangements will need to be made for the meeting to take place in a Cafcass office etc; and

- a note should be made, by the child's solicitor, Cafcass officer or other appropriate person, of the discussion between the young person and the judge.

## Resource implications

16. Enhancing the participation of children in proceedings, in terms of judges seeing children, will have resource implications, including:
- there may be a need to develop, in some courts, a safe and suitable environment for judges to meet children;
  - in comparison to judges in Scotland, judges in England and Wales are currently given no training in the skills of listening to and talking with children. There are clear implications for the Judicial Studies Board. Judges may also benefit from training in how to deal with unexpected and sensitive issues that may come up in the course of meetings with children;
  - additional resources for Cafcass and the court will be required to facilitate joint meetings with judges as part of the engagement process, and;
  - it may be necessary for Cafcass to agree a protocol setting out the best practice and standards which young people can expect.

## The way ahead

17. The Cafcass officer could ask all children over the age of 7 years whether, and if so, how they would like to be involved in the court process and prompt the child by suggesting the possibilities detailed above.

18. It would be highly desirable for data to be collected prospectively with the introduction of these initiatives, for audit and evaluation purposes. Specifically it would be important to ascertain the extent to which individual children's reasons for wishing to participate in particular ways will have been met.

19. Facilitating the fuller participation of children in family proceedings can be achieved only through a phased implementation programme, and with training for judges who require it in communicating with children. We are keen to seek the views of local family justice councils, the judiciary and organisations which would be directly affected by the issues raised in this paper

20. Our proposal, subject to further consultation, is to provide general, overall encouragement to judges to ensure that children are permitted to

attend court where they are a party to proceedings and wish to attend, and to facilitate children who wish to see a judge in private.

21 It will be important to establish the reasons and purpose for the child to attend court and to specify which parts of the proceedings would, and would not, be appropriate and in the child's interest to attend. The Council would propose, subject to the President's approval and further discussion, identifying a number of 'trailblazer' courts in appropriate geographical areas who will seek to establish good practice in listening to children. This will require the support of local judiciary, Cafcass, the relevant local authority and legal practitioners. We now look forward to hearing the views of others working in the family justice system.

### **Voice of the Child Sub Group**

The members of the Sub-Group are:

Nicholas Crichton (Chair) (District Judge, Inner London Family Proceedings Court)

Paul Clark (Director, Children's Services, LB Harrow)

Professor Carolyn Hamilton (Professor of Law, University of Essex & Office of the Children's Commissioner for England)

Professor Judith Masson (Professor of Socio-Legal Studies, Bristol University)

Lesley Newton (Circuit Judge, Manchester)

Beverley Sayers (Family Mediator Member)

Christine Smart (Children's Rights Director, Cafcass)

### **Family Justice Council**