

# WRITING FAMILY LAW JUDGMENTS FOR CHILDREN

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*This article examines the practice of Australian family law judicial officers writing judgments for children. Just three published judgments to date in proceedings under pt VII of the Family Law Act 1975 (Cth) have contemplated children as an audience. Informed by a children's rights-based approach, the article articulates the nexus between children's participation in court proceedings and effective communication of the court's decision and reasoning. It explains the value of, and identifies barriers to, judicial officers writing judgments for children in Australian family law. Finally, the article proposes five overarching principles that may guide the development of resources to support this judicial practice. Amidst a climate of family law reform, this article prompts discussion about the role of judgments for children as a strategy for improving children's experiences of participation.*

## CONTENTS

I	Introduction.....	386
II	The Participation–Communication Nexus: Children's Views as a 'Two-Way Street'.....	388
	A Children's Right to Participation under the United Nations <i>Convention on the Rights of the Child</i> .....	391
	B Children's Participation in Proceedings under Part VII of the <i>Family Law Act</i> .....	393
III	An 'Innovation in Judicial Writing': Who (Else) Benefits from Judgments Written for Children?.....	395

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A	Fostering Parental Insight and Improved Parent–Child Relationships.....	399
B	Challenging Conventional Thinking about Children’s Participation.....	403
C	Promoting Compliance with Parenting Orders.....	405
IV	Overcoming Barriers to Writing Judgments for Children in Australian Family Law.....	409
A	Children’s Rights as a New Way of Thinking for Judicial Officers .....	409
B	A Dearth of Confidence and Skills .....	410
C	Beyond the Job Description? .....	412
D	The Risks of Unwanted Publicity .....	416
E	Maintaining the Integrity of Judgments as a Feature of the Administration of Justice .....	418
V	Starting the Effective Communication Conversation: Guiding Principles for Judicial Officers.....	419
A	Principle 1: Context .....	419
B	Principle 2: Content .....	423
C	Principle 3: Chronology .....	427
D	Principle 4: Collaboration.....	429
E	Principle 5: Closure.....	431
VI	Conclusion .....	432

## I INTRODUCTION

In 2012, a judgment of the Federal Magistrates Court of Australia garnered ‘some widespread publicity’ for the manner in which it was written and to whom it was communicated.<sup>1</sup> The judgment of Altobelli FM in *Gaylard v Cain* (*‘Gaylard’*) included a letter written by his Honour to the children, which sat above the reasons for judgment.<sup>2</sup> Eleven years later, O’Brien J in *Worrall v*

<sup>1</sup> *Rimington v Healey* [2012] FamCA 810, [286] (Watts J), citing *Gaylard v Cain* [2012] FMCAfam 501 (*‘Gaylard’*).

<sup>2</sup> *Gaylard* (n 1) sch B. At the time of writing, Altobelli J sits on the Federal Circuit and Family Court of Australia (‘FCFCOA’) (Division 1), whereas in 2012, when *Gaylard* (n 1) was delivered, his Honour was a Federal Magistrate: see ‘Hon Tom Altobelli: Vice President’, *Association of Family and Conciliation Courts* (Web Page) <<https://www.afccnet.org/About/Board-of-Directors/hon-tom-altobelli>>, archived at <<https://perma.cc/Q2GW-9RTC>>.

Bartley ('Worrall')<sup>3</sup> also adopted this 'innovation in judicial writing'.<sup>4</sup> A precis of the Family Court of Western Australia's judgment was prepared to enable the young person to be 'informed, in an age-appropriate manner, of the decisions made by the Court ... and the central reasons for those decisions'.<sup>5</sup> Most recently, Judge Harland in *Lavigne v Gavin [No 2]* ('*Lavigne [No 2]*') wrote a 'short explanation' to the children in the form of a letter that appeared at the end of the judgment.<sup>6</sup> To the best of the author's knowledge, *Gaylard*, *Worrall* and *Lavigne [No 2]* are the only published judgments in proceedings under pt VII of the *Family Law Act 1975* (Cth) ('*Family Law Act*') that have contemplated children as an audience.<sup>7</sup>

This article examines whether and how judicial officers of the Australian family courts may more effectively communicate their decisions to children in pt VII proceedings by writing judgments *for* children.<sup>8</sup> It begins by explaining the nexus between children's right to participation in court proceedings and effective communication of the outcome to children. Informed by a children's rights-based approach to participation, and developing the work of leading

<sup>3</sup> [2023] FCWA 2 ('Worrall').

<sup>4</sup> Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 53, 83 ('Children's Rights Judgments'); *ibid* annex A. See also Justice Debbie Mortimer, 'Some Thoughts on Writing Judgments in, and for, Contemporary Australia' (2018) 42(1) *Melbourne University Law Review* 274, 292–5.

<sup>5</sup> *Worrall* (n 3) [381] (O'Brien J).

<sup>6</sup> [2024] FedCFamC2F 737 [123] ('*Lavigne [No 2]*').

<sup>7</sup> Not all judgments of the FCFCOA and the Family Court of Western Australia ('FCWA') are published, so there may be other instances of judicial officers writing to children that are not captured in this article: see 'Judgments', *Family Court of Western Australia* (Web Page, 24 September 2024) <<https://www.familycourt.wa.gov.au/J/judgements.aspx>>, archived at <<https://perma.cc/5D6Z-T7CH>>; Lyn Newlands, 'Publishing Family Court Judgments: Problems and Solutions' (2016) 24(2) *Journal of Law, Information and Science* 81, 83.

<sup>8</sup> The term 'Australian family courts' is used to refer collectively to the FCFCOA and the FCWA, noting that state courts of summary jurisdiction can also exercise pt VII jurisdiction: *Family Law Act 1975* (Cth) s 69J(1) ('*Family Law Act*'). For convenience, the terms 'child', 'children', 'young person' and 'young people', rather than the composite phrases 'child or young person' and 'children and young people', are used throughout this article. However, the significance of the distinction between these terms is acknowledged: see Georgina Dimopoulos, *Decisional Privacy and the Rights of the Child* (Routledge, 2023) 128–9 ('*Decisional Privacy*'); Family Law Council, 'Involving and Representing Children in Family Law' (Discussion Paper, May 1995) 31; *Duffy v Gomes [No 2]* (2015) 299 FLR 108, 155 [72] (Judge Harman).

children's rights scholars,<sup>9</sup> this article engages with published examples of judgments written for children in family law proceedings in Australia and other jurisdictions to articulate the value of this practice.

Appreciating the 'empirical realities' of judicial decision-making in Australian family law, the article then identifies barriers that may explain the reluctance of judicial officers to adopt the practice of writing judgments for children, and it suggests how these may be addressed.<sup>10</sup> Finally, five overarching principles are proposed — the 'five Cs' of context, content, chronology, collaboration and closure — to guide the development of practical resources to support family law judicial officers in writing judgments for children. Amidst a climate of legislative reform and a renewed policy focus on upholding children's rights in the Australian family law system, this article serves to stimulate discussion about the role of judgments for children as a strategy for improving children's experiences of participation in proceedings under pt VII of the *Family Law Act*.<sup>11</sup>

## II THE PARTICIPATION–COMMUNICATION NEXUS: CHILDREN'S VIEWS AS A 'TWO WAY STREET'<sup>12</sup>

Research on children's participation in Australian family law decision-making has focused largely on 'voice': the processes and practices for hearing, listening

<sup>9</sup> See, eg, Helen Stalford and Kathryn Hollingsworth, "This Case Is about You and Your Future": Towards Judgments for Children' (2020) 83(5) *Modern Law Review* 1030 ('This Case Is about You'); Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017); John Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33(2) *Melbourne University Law Review* 579 ('Judging the Judges'); Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3<sup>rd</sup> ed, 2009); Michael Freeman (ed), *Children's Rights: Progress and Perspectives* (Martinus Nijhoff Publishers, 2011); Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right To Be Heard* (Brill Nijhoff, 2018).

<sup>10</sup> See Tobin, 'Judging the Judges' (n 9) 581.

<sup>11</sup> See generally *Family Law Amendment Act 2023* (Cth) ('*Family Law Amendment Act*'); *Family Law Amendment (Information Sharing) Act 2023* (Cth); 'Family Law Has Been Overhauled: With the New Changes about To Kick In, How Will They Affect Children?', *The Conversation* (Web Page, 22 April 2024) <<https://theconversation.com/family-law-has-been-overhauled-with-the-new-changes-about-to-kick-in-how-will-they-affect-children-227154>>, archived at <<https://perma.cc/HT9Y-J96U>>.

<sup>12</sup> *Karamalis v Karamalis* (2018) 57 Fam LR 588, 591 [16] (Bennett J) ('*Karamalis*').

to and taking into account children's views and wishes.<sup>13</sup> Such research has examined the practice of judicial officers meeting with children, the role of an Independent Children's Lawyer ('ICL') and child-inclusive mediation.<sup>14</sup> The value of children being given the opportunity to express their views and having those views considered in decision-making about their best interests is well-established.<sup>15</sup>

<sup>13</sup> See generally Rachel Carson et al, Australian Institute of Family Studies, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Final Report, 2018) <[https://aifs.gov.au/sites/default/files/publication-documents/1806\\_children\\_and\\_young\\_people\\_in\\_separated\\_families\\_report\\_0.pdf](https://aifs.gov.au/sites/default/files/publication-documents/1806_children_and_young_people_in_separated_families_report_0.pdf)>, archived at <<https://perma.cc/8L45-QEB5>> ('*Separated Families*'); Michelle Fernando, 'Children's Direct Participation and the Views of Australian Judges' [2013] (92) *Family Matters* 41 ('Children's Direct Participation'); Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) ('*Voice of a Child*'); Judy Cashmore, 'Children's Participation in Family Law Decision-Making: Theoretical Approaches to Understanding Children's Views' (2011) 33(4) *Children and Youth Services Review* 515 ('Children's Participation'); Richard Chisholm, 'Children's Participation in Family Court Litigation' (1999) 13(3) *Australian Journal of Family Law* 197; Michelle Fernando, 'What Do Australian Family Law Judges Think about Meeting with Children?' (2012) 26(1) *Australian Journal of Family Law* 51 ('Family Law Judges'); Michelle Fernando, 'How Can We Best Listen to Children in Family Law Proceedings?' [2013] (3) *New Zealand Law Review* 387; Robyn Fitzgerald, 'How Are Children Heard in Family Law Proceedings in Australia?' (2002) 6 *Southern Cross University Law Review* 177.

<sup>14</sup> See, eg, Fernando, 'Children's Direct Participation' (n 13) 43–6; Fernando, 'Family Law Judges' (n 13) 57–68; Rae Kaspiew et al, Australian Institute of Family Studies, *Independent Children's Lawyers Study* (Final Report, 2<sup>nd</sup> ed, June 2014) <<https://aifs.gov.au/sites/default/files/2022-06/IndependentChildrensLawyerStudyFinalReport.pdf>>, archived at <<https://perma.cc/6EVH-FPP2>> ('*Children's Lawyers*'); Nicola Ross, 'Independent Children's Lawyers: Relational Approaches to Children's Representation' (2012) 26(3) *Australian Journal of Family Law* 214; Anthony Grimes and Jennifer McIntosh, 'Emerging Practice Issues in Child-Inclusive Divorce Mediation' (2004) 10(1) *Journal of Family Studies* 113; Jennifer E McIntosh et al, 'Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment' (2008) 46(1) *Family Court Review* 105.

<sup>15</sup> See, eg, Chisholm (n 13) 214–15; Parkinson and Cashmore, *Voice of a Child* (n 13) 4–13, 67–8, 193; Carson et al, *Separated Families* (n 13) 29–32; Dimopoulos, *Decisional Privacy* (n 8) 59–66, 80–1; Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report No 135, March 2019) 362 [12.20] <[https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_report\\_135\\_final\\_report\\_web-min\\_12\\_optimized\\_1-1.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135_final_report_web-min_12_optimized_1-1.pdf)>, archived at <<https://perma.cc/88PX-3QZ9>> ('*Family Law for the Future*'); Cashmore, 'Children's Participation' (n 13); Anne Graham and Robyn Fitzgerald, 'Taking Account of the "To and Fro" of Children's Experiences in Family Law' (2006) 31(2) *Children Australia* 30; Rachel Birnbaum, Nicholas Bala and Francine Cyr, 'Children's Experiences with Family Justice Professionals in Ontario and Ohio' (2011) 25(3) *International Journal of Law, Policy and the Family* 398; Bren Neale, 'Dialogues with Children: Children, Divorce and Citizenship' (2002) 9(4)

This article focuses on a feature of children's participation that remains overlooked in the Australian family law jurisdiction: effective judicial communication of decisions to children themselves.<sup>16</sup> In *Karamalis v Karamalis* ('*Karamalis*'), Bennett J described the ascertainment of a child's views in proceedings under pt VII of the *Family Law Act* as a 'two way street[:]' ... children should be accorded the respect of having the outcome notified to them in an appropriate manner.<sup>17</sup> Obligations to provide children with clear, accessible and accurate explanations of court decisions exist internationally, including in family law legislation<sup>18</sup> and 'child-friendly justice' guidelines.<sup>19</sup> The communication of court decisions to children as a feature of their participation has also been considered in the context of child protection and youth justice in Australia.<sup>20</sup> As the next section explains, providing children with a 'clear and accurate explanation of [any] decision[s] made' logically and chronologically flows from their participation in proceedings.<sup>21</sup> Together, these dual

*Childhood* 455; Anne B Smith, Nicola J Taylor and Pauline Tapp, 'Rethinking Children's Involvement in Decision-Making after Parental Separation' (2003) 10(2) *Childhood* 201, 211; Georgina Dimopoulos, 'Children's Participation in Family Law Proceedings: Are We (Still) Not Listening?' (2023) 32(1) *Australian Family Lawyer* 33, 36; Rachel Carson et al, Australia's National Research Organisation for Women's Safety To Reduce Violence against Women & Their Children, *Compliance with and Enforcement of Family Law Parenting Orders: Final Report* (Research Report, October 2022) 16, 20 <<https://arrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2022/10/23163803/4AP.2-Kaspiew-RR2-Family-Law-Parenting-Orders.pdf>>, archived at <<https://perma.cc/4CMH-977S>> ('*Parenting Orders*'); Rae Kaspiew et al, Australia's National Research Organisation for Women's Safety To Reduce Violence against Women & Their Children, *Compliance with and Enforcement of Family Law Parenting Orders: Views of Professionals and Judicial Officers* (Research Report, January 2022) 13–14 <<https://aifs.gov.au/sites/default/files/2022-04/Compliance-enforcement-of-FL-PO.pdf>>, archived at <<https://perma.cc/9SYR-ZHVY>> ('*Views*'); E Kay M Tisdall, 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38(4) *Journal of Social Welfare and Family Law* 362.

<sup>16</sup> See Helen Stalford, Liam Cairns and Jeremy Marshall, 'Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information' (2017) 5(3) *Social Inclusion* 207, 211.

<sup>17</sup> *Karamalis* (n 12) 591 [16]. See also at 590 [11] (Bennett J), citing *Family Law Act* (n 8) s 60B.

<sup>18</sup> See, eg, *Children (Scotland) Act 2020* (Scot) s 20(2); *Care of Children Act 2004* (NZ) s 55(3).

<sup>19</sup> See, eg, Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (Monograph No 5, October 2011) 20–1 [1]–[5], 31 [75], 58 [50], 59 [54]–[55] <<https://rm.coe.int/16804b2cf3>>, archived at <<https://perma.cc/F26C-6VQP>>.

<sup>20</sup> See, eg, Judith Cashmore, Peiling Kong and Meredith McLaine, 'Children's Participation in Care and Protection Decision-Making Matters' (2023) 12(3) *Laws* 49:1–26, 19; Chris Cunneen, Barry Goldson and Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 173, 179.

<sup>21</sup> See Carson et al, *Separated Families* (n 13) ix.

commitments to participation and communication lay the foundation for post-separation parenting outcomes that respect children's rights in the decision-making process.<sup>22</sup>

*A Children's Right to Participation under the United Nations Convention on the Rights of the Child*

A children's rights-based conceptual approach to participation requires that children participate meaningfully, safely and to the extent that they wish to in decision-making about matters that affect them, consistently with their evolving capacities and with appropriate guidance and direction.<sup>23</sup> It also requires that adults develop the capacity to meet their obligations to respect, protect and uphold children's rights.<sup>24</sup> The conceptual foundations of the practice of writing judgments for children lie in the legal and normative framework of the United Nations ('UN') *Convention on the Rights of the Child* ('CRC').<sup>25</sup> While the CRC's vision of children's rights remains subject to criticism, it is the most widely ratified international human rights treaty.<sup>26</sup>

The right to participation manifests in art 12(1) of the CRC, which gives a child who is capable of forming their own views the right to express their views freely in all matters affecting the child and for those views to be given due weight in accordance with the child's age and maturity. Article 12(2) requires that the child be provided with the opportunity to be heard in judicial and administrative proceedings affecting them, either directly or through a representative or an appropriate body. The UN Committee on the Rights of the Child has identified the right to freedom of expression (art 13) — which includes the freedom to seek, receive and impart information — and the right to

<sup>22</sup> See *ibid* 39–50.

<sup>23</sup> See Dimopoulos, *Decisional Privacy* (n 8) 63–6.

<sup>24</sup> See, eg, *ibid* ch 2; John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84(2) *Nordic Journal of International Law* 155, 177; Michael Freeman, 'The Human Rights of Children' (2010) 63 *Current Legal Problems* 1, 29 ('Human Rights').

<sup>25</sup> See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CRC'). See especially at art 12. See also Stalford and Hollingsworth, 'This Case Is about You' (n 9) 1031–2.

<sup>26</sup> See, eg, Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandeveld, 'Between "Believers" and "Opponents": Critical Discussions on Children's Rights' (2012) 20(1) *International Journal of Children's Rights* 155. Only the United States of America is yet to ratify the CRC (n 25): 'Children's Human Rights', *Amnesty International* (Web Page) <<https://www.amnesty.org/en/what-we-do/child-rights/>>, archived at <<https://perma.cc/JGE7-EBR6>>.

access information (art 17) as two ‘crucial prerequisites’ for children to exercise their right to participation under art 12 effectively.<sup>27</sup>

While Australia has ratified the *CRC*, this international convention has not been incorporated into domestic law at the federal level.<sup>28</sup> However, the growing influence of the *CRC* in Australia is evident in policy statements, frameworks and plans developed by governments at the federal and state levels that have embraced the language of children’s rights. For example, *The National Plan To End Violence against Women and Children 2022–2032* provides that ‘Australia is a signatory and is committed to upholding the rights of children’ including their right to be protected from violence under art 19 of the *CRC*.<sup>29</sup> *Safe and Supported: The National Framework for Protecting Australia’s Children* (‘*Safe and Supported*’) aims ‘to help children express their views in developing and implementing activities’ and is said to be ‘consistent with the [*CRC*] and its [four] core principles’, including ‘respect for the views of the child and devotion to the best interest[s] of the child.’<sup>30</sup> *Safe and Supported* is underpinned by the guiding principle, amongst others, of ‘[l]istening and responding to the voices and views of children and young people’: they ‘have the right to participate in decisions that affect them.’<sup>31</sup>

In Australian family law, the two objects of pt VII of the *Family Law Act* are ‘(a) to ensure that children’s best interests are met, including by ensuring their

<sup>27</sup> Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child To Be Heard*, 51<sup>st</sup> sess, UN Doc CRC/C/GC/12 (20 July 2009) 19 [80] (‘*General Comment No 12*’). See also at 19 [81].

<sup>28</sup> See Human Rights and Equal Opportunity Commission, *A Last Resort? National Inquiry into Children in Immigration Detention* (Report, April 2004) 91 [4.2] <[https://humanrights.gov.au/sites/default/files/document/publication/alr\\_complete.pdf](https://humanrights.gov.au/sites/default/files/document/publication/alr_complete.pdf)>, archived at <<https://perma.cc/CKU9-ZWR3>>; ‘Convention on the Rights of the Child’, *Department of Foreign Affairs and Trade* (Web Page, 14 March 2007) <<https://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/E123F4F71DCAE3E7CA256B4F007F2905>>, archived at <<https://perma.cc/2BFQ-MPGF>> (‘Convention’). Australia ratified the *CRC* (n 25) on 17 December 1990 and it came into force for Australia on 16 January 1991: ‘Convention’ (n 28).

<sup>29</sup> Department of Social Services (Cth), *The National Plan To End Violence against Women and Children 2022–2032* (Report, 2022) 103 <<https://www.dss.gov.au/system/files/resources/national-plan-end-violence-against-women-and-children-2022-2032.pdf>>, archived at <<https://perma.cc/26EF-FQBM>>, discussing *CRC* (n 25) art 19.

<sup>30</sup> Department of Social Services (Cth), *Safe and Supported: The National Framework for Protecting Australia’s Children: 2021–2031* (Report, 2021) 14 <<https://www.dss.gov.au/system/files/documents/2024-10/dess5016-national-framework-protecting-childrenaccessible.pdf>>, archived at <<https://perma.cc/3S89-UV3W>>.

<sup>31</sup> *Ibid* 36.

safety; and (b) to give effect to the [CRC].<sup>32</sup> However, the latter object ‘is not equivalent to incorporating the CRC into domestic law’,<sup>33</sup> such that the CRC, even through that object, ‘does not give any legally enforceable rights to children.’<sup>34</sup> Rather, the object serves to ‘confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII ... consistently with Australia’s obligations under the CRC.’<sup>35</sup>

### B *Children’s Participation in Proceedings under Part VII of the Family Law Act*

Research has found that many children are dissatisfied with the processes by which they participate or are communicated to in Australian family law proceedings: they ‘often feel unheard’<sup>36</sup> or marginalised and perceive that adults do not listen to, take into consideration or care about their views.<sup>37</sup> The findings of Rachel Carson et al’s 2018 study (to ‘[g]ive children a bigger voice more of the time’)<sup>38</sup> and the author’s 2025 study (highlighting children’s desire to be ‘completely, all the time, 100% in the loop’ and have their ‘direct words heard’)<sup>39</sup> encapsulate critical unmet needs of children and young people in Australia’s family law system. Children in the latter study highlighted the significance of information about, and understanding of, family law processes for their well-being and in addressing their feelings of being ‘kept in the dark’,<sup>40</sup> having ‘no

<sup>32</sup> *Family Law Act* (n 8) s 60B.

<sup>33</sup> Explanatory Memorandum, Family Law Amendment Bill 2023 (Cth) 18 [18] (‘Explanatory Memorandum’).

<sup>34</sup> *In Marriage of B* (1997) 140 FLR 11, 89 (Nicholson CJ, Fogarty and Lindenmayer JJ).

<sup>35</sup> Explanatory Memorandum (n 33) 18 [18].

<sup>36</sup> See *Lavigne [No 2]* (n 6) [123] (Judge Harland).

<sup>37</sup> See Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, November 1997) 97 [4.23] (‘*Seen and Heard*’); Kaspiew et al, *Children’s Lawyers* (n 14) 133–4, 142, 144; Carson et al, *Separated Families* (n 13) viii, 4, 30–1, 51; *Family Law for the Future* (n 15) 364–5 [12.28]–[12.31]; Joint Select Committee on Australia’s Family Law System, *Improvements in Family Law Proceedings: Second Interim Report* (Report, March 2021) 91 [4.53] <[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024551/toc\\_pdf/Improvementsinfamilylawproceedings.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024551/toc_pdf/Improvementsinfamilylawproceedings.pdf;fileType=application%2Fpdf)>, archived at <<https://perma.cc/9BKJ-EZKJ>>; Georgina Dimopoulos et al, “‘Talk to Us, Not about Us’: Children’s Understandings and Experiences of Participation in Australian Family Law’ (2025) *Child and Family Social Work* (advance), 2.

<sup>38</sup> Carson et al, *Separated Families* (n 13) 84, quoting Alana, aged 12–14 years.

<sup>39</sup> Dimopoulos et al (n 37) 5, quoting Jade, aged 16. See also at 4.

<sup>40</sup> *Ibid* 6, quoting Nathan, aged 15. See also at 4.

clue what was going on<sup>41</sup> and that they were left ‘playing the guessing game.’<sup>42</sup> Adults reflecting on their childhood experiences of the Australian family courts have expressed similar feelings of powerlessness and distress.<sup>43</sup>

Children’s feelings of invisibility and silence can be magnified in post-separation parenting disputes litigated in the family courts, as children cannot give evidence or be present in court without leave.<sup>44</sup> In determining what is in a child’s best interests in proceedings under pt VII of the *Family Law Act*, the court must consider ‘any views expressed by the child.’<sup>45</sup> This second general consideration in the best interests assessment is consistent with — although arguably does not incorporate — the child’s right to participation provided by art 12 of the *CRC*.<sup>46</sup> This is because it does not require the court to ascertain the views of children or ‘to ensure that a child has in fact had the opportunity to express [their] views.’<sup>47</sup>

Children’s experiences of participation in proceedings under pt VII of the *Family Law Act* are further coloured by adult ‘filter[ing]’ of their views.<sup>48</sup> The court may inform itself of any views expressed by a child by having regard to reports by family consultants,<sup>49</sup> by making an order for independent legal representation of the child’s interests<sup>50</sup> or ‘by such other means as the court thinks appropriate.’<sup>51</sup> However, there is no obligation on the court in pt VII

<sup>41</sup> Ibid 6, quoting Olive, aged 11. See also at 4.

<sup>42</sup> Ibid 6, quoting Leo, aged 13. See also at 4.

<sup>43</sup> Camilla Nelson, ‘*They Thought It Was Safe — But It Wasn’t.: Recognising Children’s Rights as a Means of Securing Children’s Safety in Australia’s Family Law System* (Report, May 2022) 5, 11 <<https://www.flipsnack.com/whitlam/they-thought-it-was-safe-but-it-wasn-t/download-pdf>>, archived at <<https://perma.cc/8SMD-ACVQ>>.

<sup>44</sup> See *Family Law Act* (n 8) ss 100B(1)–(2).

<sup>45</sup> Ibid s 60CC(2)(b). See also at s 60CC(1)(a).

<sup>46</sup> Ibid s 60CC; 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?’ (2013) 36(1) *University of New South Wales Law Journal* 88, 89–90, 95–6.

<sup>47</sup> *Family Law for the Future* (n 15) 324 [10.105]. See also at 323–4 [10.102]–[10.104]; *Bondelmonte v Bondelmonte* (2017) 259 CLR 662, 675 [43] (Kiefel, Bell, Keane, Nettle and Gordon JJ).

<sup>48</sup> Dimopoulos, *Decisional Privacy* (n 8) 83, quoting Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1055. See also Tobin, ‘Judging the Judges’ (n 9) 591; Kaspiew et al, *Children’s Lawyers* (n 14) 41, 135–6.

<sup>49</sup> *Family Law Act* (n 8) ss 60CD(2)(a), 62G(2).

<sup>50</sup> Ibid ss 60CD(2)(b), 68L.

<sup>51</sup> Ibid s 60CD(2)(c). However, nothing in pt VII ‘permits the court or any [other] person to require the child to express [their] views in relation to any matter’: at s 60CE.

proceedings to notify the child of any decision made or of how the child's views were considered and weighed in the decision-making process.

Improving children's experiences of participation — including through the provision of information about court processes and outcomes — is a current policy priority in Australian family law.<sup>52</sup> The *Terms of Reference* of the Family Law Council include consideration of

[h]ow to ensure that children, including those who are not independently or separately represented, are informed about family law processes (including court proceedings) concerning their best interests and the outcomes of those processes.<sup>53</sup>

This article commenced with an introduction to three judgments in proceedings under pt VII of the *Family Law Act* that did endeavour to inform children of the outcome. The unique, shared feature of the judgments of Altobelli FM in *Gaylard*, O'Brien J in *Worrall* and Judge Harland in *Lavigne [No 2]* is that they are the only published Australian judgments written *for* children. The next Part of this article engages with these judgments to articulate the value of effective judicial communication of family court decisions to children.

### III AN 'INNOVATION IN JUDICIAL WRITING':<sup>54</sup> WHO (ELSE) BENEFITS FROM JUDGMENTS WRITTEN FOR CHILDREN?

Without being prescriptive about the exact features of a judgment written for children, Helen Stalford and Kathryn Hollingsworth have sought to bring the form, presentation and substance of judicial decisions into sharper focus in furthering children's access to justice.<sup>55</sup> In so doing, they have advocated for a shift

<sup>52</sup> See, eg, 'A Safe, Accessible and Inclusive Family Law System', *Victoria Legal Aid* (Web Page, 25 November 2024) <<https://www.legalaid.vic.gov.au/safe-accessible-and-inclusive-family-law-system>>, archived at <<https://perma.cc/2SDK-XET2>>.

<sup>53</sup> Family Law Council, *Terms of Reference* (Terms of Reference, 13 September 2022) 2 <<https://www.ag.gov.au/sites/default/files/2022-09/family-law-council-terms-of-reference.pdf>>, archived at <<https://perma.cc/9VP3-VAUZ>>.

<sup>54</sup> Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4) 83. See also Justice Mortimer's description of the letter to Sam (describing the letter to Sam as an 'innovation in judgment writing'): Mortimer (n 4) 292–3.

<sup>55</sup> Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4); Stalford and Hollingsworth, 'This Case Is about You' (n 9).

in terminology away from ‘child-friendly’ justice and judgments<sup>56</sup> towards the need for ‘justice for children’ and, correspondingly, ‘judgments for children.’<sup>57</sup> The essence of a judgment written for a child is that it actively recognises that child as an *audience* of the judgment.<sup>58</sup> The judgment may take the form of a letter from the judicial officer to the child or an abridged version or accessible summary.<sup>59</sup> The written judgment might even be converted into an infographic, a cartoon or a video to ensure that children with diverse needs can access the court’s decision and reasoning, although a published judgment of this nature is yet to manifest in practice.<sup>60</sup> A judgment for the child would also be accessible in its design and appealing to the child; it would accommodate the child’s preferences for receiving information, such as in a hard copy format or through online or digital platforms.<sup>61</sup> Lesley-Anne Barnes Macfarlane has suggested that children should be given the opportunity to ‘pre-select from a standard “menu” their preferred means of communication of the judgment concerning them.’<sup>62</sup>

In *Gaylard*, Altobelli FM wrote a letter to the children, who were aged 11 years and 6 years at the time the judgment was delivered.<sup>63</sup> His Honour devoted a section of the judgment to justifying his decision to write this letter; the letter was to be provided to each child when they turned 14 years of age in a

<sup>56</sup> See, eg, Council of Europe (n 19); *General Comment No 12*, UN Doc CRC/C/GC/12 (n 27) 12 [34]. See also Stalford, Cairns and Marshall (n 16).

<sup>57</sup> Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1032.

<sup>58</sup> See Hollingsworth and Stalford, ‘Children’s Rights Judgments’ (n 4) 82–4. See also Baroness Hale, ‘Children’s Participation in Family Law Decision Making: Lessons from Abroad’ (2006) 20(2) *Australian Journal of Family Law* 119, 119; Dimopoulos, *Decisional Privacy* (n 8) 89–95.

<sup>59</sup> Dimopoulos, *Decisional Privacy* (n 8) 89.

<sup>60</sup> See *ibid*; Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1056; Lesley-Anne Barnes Macfarlane, ‘*Patrick v Patrick* and *Re A Letter to a Young Person*: Judicial Letters to Children’ (2018) 22(1) *Edinburgh Law Review* 101, 107.

<sup>61</sup> See European Commission, *Creating Child-Friendly Versions of Written Documents: A Guide* (Guide, 2021) 4 <<https://www.qub.ac.uk/research-centres/CentreforChildrensRights/CCRFilestore/Fileupload,1269252,en.pdf>>, archived at <<https://perma.cc/9TM9-DMUU>>; Stalford, Cairns and Marshall (n 16) 211; Ton Liefwaard, ‘Access to Justice for Children: Towards a Specific Research and Implementation Agenda’ (2019) 27(2) *International Journal of Children’s Rights* 195, 217; Ursula Kilkelly, *Listening to Children about Justice: Report of the Council of Europe Consultation with Children on Child-Friendly Justice* (Report, 5 October 2010) 23 <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f81d>>, archived at <<https://perma.cc/2YNT-CB7P>>.

<sup>62</sup> Barnes Macfarlane (n 60) 107.

<sup>63</sup> *Gaylard* (n 1) [2], sch B.

therapeutic context.<sup>64</sup> In *Worrall*, O'Brien J communicated to the young person, aged 13 years, via an 'age-appropriate précis of the relevant information' about the court's decision and reasoning.<sup>65</sup> His Honour ordered that the précis be provided to the young person's therapist to give to her 'if and when [the therapist] consider[ed] it appropriate to do so'.<sup>66</sup> In *Lavigne [No 2]*, Judge Harland wrote a letter to the four children, aged between six and 13 years, to explain the interim decision.<sup>67</sup> Her Honour directed the ICL to meet with the children to explain the orders and to provide them with a copy of the letter.<sup>68</sup>

Judgments for children have also emerged in family law proceedings beyond Australia, including in the United Kingdom,<sup>69</sup> the Netherlands<sup>70</sup> and Taiwan.<sup>71</sup> The judgment that has received the most scholarly attention is *Re A (Letter to a Young Person)* ('*Re A*'), in which Peter Jackson J of the Family Division of the High Court of England and Wales published his Honour's decision in the form of a letter to the 14-year-old young person, Sam.<sup>72</sup> The letter to Sam explained why Peter Jackson J was writing to him: '[t]his case is about you and your future'.<sup>73</sup> In *Lancashire County Council v M*, Peter Jackson J also wrote the

<sup>64</sup> Ibid [82]–[102].

<sup>65</sup> *Worrall* (n 3) [416]. See also at annex A.

<sup>66</sup> Ibid [387]. See also at [416] (O'Brien J).

<sup>67</sup> *Lavigne v Gavin* [2024] FedCFamC2F 353, [13] (Judge Harland), quoted in *Lavigne [No 2]* (n 6) [1] (Judge Harland). See also at [123] (Judge Harland).

<sup>68</sup> *Lavigne [No 2]* (n 6) [123].

<sup>69</sup> See, eg, *Re A (Letter to a Young Person)* [2017] 3 FCR 323, 326–30 ('*Re A*'); *Lancashire County Council v M* [2016] EWFC 9, [1] (Peter Jackson J) ('*Lancashire County Council*'); *Patrick (a pseudonym) v Patrick (a pseudonym)* [2017] Family Law Reports (Scotland) 128, 129–30 ('*Patrick*'); *D v D* [2022] EWFC 164 (B), app 1.

<sup>70</sup> See *Rechtbank Rotterdam* [District Court of Rotterdam], 518353, ECLI:NL:RBROT:2017:911, 2 February 2017 [tr Helen Stalford and Kathryn Hollingsworth], cited in Stalford and Hollingsworth, 'This Case Is about You' (n 9) 1032.

<sup>71</sup> See «甲訴乙» [A v B], 高雄少年及家事法院 [Kaohsiung Juvenile and Family Court], 109年度婚字第401號 [2020 Marriage Case No 401], 110年度家親聲字第369號 [2021 Non-Litigious Custodian–Child Case No 369], 30 December 2021 [tr Jasmine Cheng and Joseph Zivny] <<https://judgment.judicial.gov.tw/FILES/KSYV/109%2c%e5%a9%9a%2c401%2c20211230%2c1.pdf>>, archived at <<https://perma.cc/3A88-6Y28>> ('*A v B*'), discussed in George Liao, 'Judge Includes "Letter" to Child in Divorce Case Ruling in South Taiwan', *Taiwan News* (online, 13 January 2022) <<https://www.taiwannews.com.tw/en/news/4408987>>, archived at <<https://perma.cc/NUX6-VHE4>>.

<sup>72</sup> *Re A* (n 69) 325 [1], [3]; Stalford and Hollingsworth, 'This Case Is about You' (n 9) 1030. See also Barnes Macfarlane (n 60); Carla Ditz, 'More "Dear Sam" Letters?' (2017) 161(33) *Solicitors Journal* 26.

<sup>73</sup> *Re A* (n 69) 326.

primary judgment for the children, noting that it was ‘as short as possible so that the mother and the older children [could] follow it’.<sup>74</sup> Sheriff Anwar in *Patrick (a pseudonym) v Patrick (a pseudonym)* (‘Patrick’) penned a letter to the two eldest children coupled with a case summary that preceded the letter in the published judgment.<sup>75</sup> Most recently, Recorder McKendrick QC in *D v D* wrote a letter to brothers ‘A’ and ‘B’, aged 11 and 8 years respectively, after raising concerns that their views and wishes had been significantly influenced by their mother.<sup>76</sup>

While there may be ‘nothing particularly remarkable’ about the substantive decisions made by the court in each of these cases,<sup>77</sup> judgments written for children have been described as ‘an innovation in judicial writing’<sup>78</sup> that may serve as ‘a model of how to communicate with children.’<sup>79</sup> Commenting upon Altobelli FM’s letter to the children in *Gaylard*, former Chief Justice of the Family Court of Australia, Alastair Nicholson, was reported to have said: ‘I certainly think that what [Altobelli FM has] done in terms of the letter is quite innovative.’<sup>80</sup>

Stalford and Hollingsworth have articulated the value of this judicial practice for children themselves through ‘four potential functions’:<sup>81</sup> the ‘communicative’ function helps ‘children to understand and accept the [court’s] final decision’;<sup>82</sup> the ‘developmental’ function contributes to the child’s ‘development, sense of identity and legal citizenship’;<sup>83</sup> the ‘instructive’ function assists children’s ‘legal literacy’ and engagement;<sup>84</sup> and the ‘legally transformative’ function prompts more substantive judicial engagement with children’s rights

<sup>74</sup> *Lancashire County Council* (n 69) [1]. His Honour’s judgment also referenced the ‘smiley’ emoji, which was significant to the evidence of a text message exchange: at [27]. His Honour stated: ‘I don’t agree that the ☺ is winking. It is just a ☺.’

<sup>75</sup> *Patrick* (n 69) 128–9 [1]–[10], 129–30.

<sup>76</sup> *D v D* (n 69) [1], [4], [55], app 1.

<sup>77</sup> See Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1031.

<sup>78</sup> Hollingsworth and Stalford, ‘Children’s Rights Judgments’ (n 4) 83. See also Mortimer (n 4) 292–3.

<sup>79</sup> See Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1031.

<sup>80</sup> ‘Magistrate Praised for Kids Letter on Custody Call’, *ABC News* (Web Page, 7 June 2012) <<https://www.abc.net.au/news/2012-06-07/magistrate-praised-for-letter-to-kids-on-custody-call/4057526>>, archived at <<https://perma.cc/KMZ8-KQYB>>.

<sup>81</sup> Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1032.

<sup>82</sup> *Ibid* 1046. See also at 1047–50.

<sup>83</sup> *Ibid* 1050. See also at 1051–2.

<sup>84</sup> *Ibid* 1045. See also at 1052–4.

principles, methods and values throughout the decision-making process.<sup>85</sup> This article supports Stalford and Hollingsworth's aim 'to serve wider calls to render judicial decision-making more accountable and meaningful to all those — adults and children alike — who may be involved in legal proceedings'.<sup>86</sup>

It is argued below that the value of judgments written for children extends *beyond* the benefit to children themselves. Such judgments simultaneously bear value for separated parents accessing the family courts to resolve their disputes, for judicial officers and other professionals involved in the decision-making process and for the family courts as an institution. The diverse beneficiaries of judgments for children arguably highlight the transformative potential of this practice for promoting a family law system that recognises and respects children's rights and in which children feel respected and heard.

#### *A Fostering Parental Insight and Improved Parent–Child Relationships*

Children and young people who are the subject of family law proceedings usually 'are not there because they want to be' but rather because their parents are in high conflict.<sup>87</sup> This reality was articulated in Peter Jackson J's letter to Sam. His Honour compared the seemingly 'normal' circumstance of parents amicably making arrangements for their children following separation with Sam's 'unusual' experience:

Normally, even when parents are separated, they manage to agree on the best arrangements for their children. If they can't, the court is there as a last resort. Unfortunately, in your case, there have been court orders since you were one year old ... What this shows is how very difficult your parents have found it to reach agreements. This is unusual, but it is how you have grown up. The danger is you get used to it.<sup>88</sup>

Many families accessing Australia's family courts for the resolution of their post-separation parenting disputes have complex needs. These families may be affected by family violence, including physical, emotional and sexual abuse; concerns about child safety and neglect; and serious mental health and

<sup>85</sup> Ibid 1054. See also at 1055.

<sup>86</sup> Ibid 1032.

<sup>87</sup> See *Seen and Heard* (n 37) 95 [4.16].

<sup>88</sup> *Re A* (n 69) 327.

substance abuse issues.<sup>89</sup> The Australian Law Reform Commission (‘ALRC’) has observed that ‘whilst the parties to a matter before the family courts are adversaries by definition ... [t]he legislation requires that the children are the “winners”’.<sup>90</sup> Within this context of complex family dynamics and needs, judgments for children ‘can convey important messages to the adults charged with their care’, as the following examples illustrate.<sup>91</sup>

In the letter to Sam, Peter Jackson J commented on the ‘self-centred ... behaviour’ of Sam’s father who had ‘in some ways lost sight of what [was] best for [Sam]’.<sup>92</sup> His Honour implicitly cautioned Sam’s parents to enhance their focus on their child, irrespective of their acceptance of the orders made: ‘I hope they have the dignity not to impose their views on you, so that you can work things out for yourself’.<sup>93</sup> In *Patrick*, Sheriff Anwar’s letter told the children that their parents’ behaviour, which included saying ‘some nasty things about each other’, was ‘not right and ... not nice. It shouldn’t happen. You should not have to hear any of that. That is for the adults to sort out.’<sup>94</sup>

In crafting a letter to the children in *D v D*, Recorder McKendrick QC elected to go beyond merely informing the children of what would happen to them. His Honour pointedly chose to tell the children that he had ‘asked ... Mum and Dad to behave a bit better’ and ‘told [the parents] to stop “the crap”’.<sup>95</sup> According to the child welfare officer’s report, child A had expressed

<sup>89</sup> See Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Final Report, June 2016) ii <<https://www.ag.gov.au/sites/default/files/2020-03/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>>, archived at <<https://perma.cc/BF4B-FB8Y>>. According to the FCFCOA, various ‘major risk factors’ are alleged in a majority of parenting matters filed in the Court: family violence in 80% of matters; child abuse or risk of child abuse in 70%; and mental health issues and drug, alcohol or substance misuse harming a child or putting a child at risk in 58% and 53% of matters respectively: 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) 2 <<https://www.fcfoa.gov.au/sites/default/files/2022-12/mr051222.pdf>>, archived at <<https://perma.cc/8PV9-U99N>>. Two-thirds (66%) of matters in the relevant period had four or more risk factors disclosed, while almost 80% of all parenting matters filed ‘were referred to State or Territory child welfare agencies due to the risks alleged’.

<sup>90</sup> *Family Law for the Future* (n 15) 65 [2.35].

<sup>91</sup> Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1057.

<sup>92</sup> *Re A* (n 69) 328.

<sup>93</sup> *Ibid* 330.

<sup>94</sup> *Patrick* (n 69) 130.

<sup>95</sup> *D v D* (n 69) app 1.

frustration at his parents' 'arguing and all of [the] crap that [was] going on'.<sup>96</sup> Recorder McKendrick QC expressly acknowledged child A's views by stating 'you are right to describe it ... as "crap"', even though the child had used a 'naughty word'.<sup>97</sup> It may be inferred from these choices of language and content that the judicial officer in each case sought to impart a message of hope and empowerment upon the children: that they should not feel relegated to being 'pawn[s] being moved in a game between [their] separated parents'.<sup>98</sup>

In *Lavigne [No 2]*, Judge Harland accepted that all four children wanted to spend time with their father.<sup>99</sup> Her Honour also observed that the children had been 'experiencing emotional pressures that they need to be relieved of'.<sup>100</sup> In making interim orders for ongoing supervised time, Judge Harland noted that the reasons for judgment 'may be confronting for the father'.<sup>101</sup> Yet her Honour expressed hope that the father could engage with family therapy and other supports to enable him to 'prioritise the children's psychological needs above his own'.<sup>102</sup> Her Honour's letter to the children reassured them: 'Your parents are seeking help from other adults to make things better for all of you'.<sup>103</sup> Her Honour's judgment was sharper in its observation that, for family therapy to be beneficial, 'both parents need[ed] to take responsibility for their dysfunctional communication and their part in the conflict rather than externalis[e] it and blam[e] the other parent'.<sup>104</sup>

However, a cautionary note is warranted where a letter or judgment written for the child(ren) extends beyond communicating the decision by offering what may be construed as therapeutic advice or guidance. In circumstances where the judicial officer does not have a therapeutic relationship with the child, and therefore cannot know how they will respond, the principle of collaboration, discussed at Part V(D) below, serves to ensure that the child's receipt of the judicial communication is accompanied by appropriate support from a trusted adult with whom the child has an established (often therapeutic) relationship.

<sup>96</sup> Ibid [28] (Recorder McKendrick QC). See also at [27] (Recorder McKendrick QC).

<sup>97</sup> Ibid app 1.

<sup>98</sup> *In the Marriage of Wotherspoon v Cooper* (1980) 7 Fam LR 71, 76 (Wood SJ).

<sup>99</sup> *Lavigne [No 2]* (n 6) [121].

<sup>100</sup> Ibid. See also at [119] (Judge Harland).

<sup>101</sup> Ibid [122].

<sup>102</sup> Ibid.

<sup>103</sup> Ibid letter.

<sup>104</sup> Ibid [101].

In *Gaylard*, Altobelli FM identified a ‘poignancy’ in his legislative obligation to consider any views expressed by the children<sup>105</sup> in circumstances where his Honour was ‘contemplating orders that would probably mean these children would not see their father for many, many years, and possibly ... [n]ever again’;<sup>106</sup> yet there was expert evidence that the children would likely want to re-establish a relationship with their father in the future.<sup>107</sup> His Honour pondered the potential for his letter to shape the children’s relationship with each parent:

Could that letter accelerate or act as a catalyst for repair or restoration of their relationship with their father? Perhaps the mere fact of the existence of the letter would give hope to the father? Perhaps the letter would make the mother more accountable and sensitive for what she might say and do, between now and the date the letter is read by the children?<sup>108</sup>

His Honour’s musings support the argument that judgments written for *children* bear the potential to motivate behavioural change in *parents* and thereby foster improved parent–child relationships by prompting parents to reflect and (re)focus on their children. Further, these illustrations practically reinforce the suggestion of a young person, in Carson et al’s study, who was troubled by her parents’ communication with each other following their separation: ‘If they had just had someone to tell them that that’s wrong and they need to act like adults at home until they figure out whatever they need to.’<sup>109</sup> A judgment written for children may have an educative influence on parents by encouraging greater parental appreciation that their dispute ‘is, and has always been, ... about [the] children [and] their rights.’<sup>110</sup>

<sup>105</sup> *Gaylard* (n 1) [85].

<sup>106</sup> *Ibid* [82].

<sup>107</sup> *Ibid* [85].

<sup>108</sup> *Ibid* [83].

<sup>109</sup> Carson et al, *Separated Families* (n 13) 35, quoting Rose, aged 15+ years.

<sup>110</sup> See *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, 271 [71] (Baroness Hale). Of course, Baroness Hale also acknowledged that the case was about ‘the rights of the [children’s] parents and teachers’. See also *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42, 69 [49] (Baroness Hale); *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536, 543 [6] (Baroness Hale).

### B Challenging Conventional Thinking about Children's Participation

As explained in Part II above, the concept of children's 'participation' in proceedings under pt VII of the *Family Law Act* has become synonymous with 'voice'. Children's voices are captured by the legislative requirement to take into account any views expressed by the child in the assessment of the child's best interests.<sup>111</sup> This one-directional, linear and seemingly extractive understanding of children's participation is reinforced by the author's published research examining judicial engagement with the *CRC* in pt VII decision-making. This research found that judicial understandings of children's right to participation under art 12 of the *CRC* have centred upon the mechanisms available to enable children's views to be put before the court.<sup>112</sup>

In *Gaylard*, Altobelli FM considered that the proceedings challenged 'conventional thinking about children's participation', as the expert evidence was 'so clear about the possibility of a change of views, and the probability of the children one day reading these reasons'.<sup>113</sup> His Honour mused on whether the letter would be 'a more child-focussed way for the children [to understand] why a life-changing decision was made about them, particularly compared to reading (perhaps surreptitiously) these reasons for judgment'.<sup>114</sup> His Honour was also pragmatic about the likelihood of the children making their own enquiries about their father given that they 'belong to the Facebook and Twitter generation of instantaneous communication and limitless access to, and uninhibited sharing of, information'.<sup>115</sup> In *Lavigne [No 2]*, Judge Harland observed that '[t]elling children nothing at all can increase their anxiety and sense of lack of control' following family law proceedings.<sup>116</sup> Her Honour's letter to the children may be construed as an attempt to remedy children's lack of agency in these circumstances, appreciating that '[c]hildren often feel unheard in family law proceedings'.<sup>117</sup>

<sup>111</sup> See *Family Law Act* (n 8) ss 60CC(1)(a), (2)(b).

<sup>112</sup> Georgina Dimopoulos, 'The Right Time for Rights? Judicial Engagement with the *UN Convention on the Rights of the Child* in Part VII Proceedings' (2023) 36(1) *Australian Journal of Family Law* 63, 76–7 ('Right Time for Rights').

<sup>113</sup> *Gaylard* (n 1) [86].

<sup>114</sup> *Ibid* [83].

<sup>115</sup> *Ibid* [84].

<sup>116</sup> *Lavigne [No 2]* (n 6) [123].

<sup>117</sup> See *ibid*.

The UN Committee on the Rights of the Child has explained that children's right to participation captures

ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.<sup>118</sup>

Just as decision-making about families in proceedings under pt VII of the *Family Law Act* is 'dynamic and not static'<sup>119</sup> so too is the right under art 12 of the *CRC*. Indeed, a child being told 'what the judge has decided and why' in proceedings determining their best interests forms a vital component of the child's ongoing 'intellectual participation' in the proceedings.<sup>120</sup> In *Karamalis*, Bennett J appreciated that the consideration of children's views when determining their best interests in proceedings under pt VII of the *Family Law Act* 'imposes certain responsibilities on decision makers and on the professionals.'<sup>121</sup> Her Honour explained:

If the children's views are sought before the final hearing then children should be accorded the respect of having the outcome notified to them in an appropriate manner. ... Children should be accorded the respect which they will be expected to show to others throughout their lives. This includes taking account of their views and opinions in a dynamic sense, not only when convenient and certainly not to just tick the box next to the numerous additional considerations which we are required to take into account.<sup>122</sup>

A written judicial explanation of the court's decision and reasoning to the child requires *all* adults in the decision-making process to reflect on whether and how the child has participated throughout that process. Put differently, embracing Richard Chisholm's 'story' metaphor:

<sup>118</sup> *General Comment No 12*, UN Doc CRC/C/GC/12 (n 27) 5 [3]. See also Chisholm (n 13) 213; Gary B Melton, 'Parents and Children: Legal Reform To Facilitate Children's Participation' (1999) 54(11) *American Psychologist* 935, 936.

<sup>119</sup> See *Gaylard* (n 1) [85] (Altobelli FM).

<sup>120</sup> Sir James Munby, 'Unheard Voices: The Involvement of Children and Vulnerable People in the Family Justice System' (Observatory on Human Rights of Children Annual Lecture, Swansea University, 25 June 2015) 5 <<https://www.swansea.ac.uk/media/Sir-James-Munby-Transcript.pdf>>, archived at <<https://perma.cc/KFX4-BC4X>> ('Unheard Voices').

<sup>121</sup> *Karamalis* (n 12) 591 [16]. See also at 590 [11]–[12] (Bennett J).

<sup>122</sup> *Ibid* 591 [16]–[17].

We must think in terms of children's participation at various stages in the story. At different stages, different people will be in a position to consider the question. Initially it will be a matter for parents and other family members: what do we tell the children? Once counsellors, lawyers and others are involved, they will have an opportunity to consider the question. ... When the question is being considered later on, one of the key questions will be the extent to which children have *already* been involved.<sup>123</sup>

The practice of judicial officers writing judgments for children may therefore be 'transformative', as 'the very process of crafting a judgment in a way that children can understand shines a light on the judge's approach to reasoning and adjudication' and, by extension, on the extent to which children have participated in the decision-making process to inform that reasoning and adjudication.<sup>124</sup> As Anne Hollingworth has argued in the context of child protection proceedings, communicating the court's decision to the child 'enacts the child's entitlement to personal accountability from the writer, making the child a participant in a conversation rather than the object of gossip'.<sup>125</sup> The value of prompting a more nuanced and expansive understanding amongst judicial officers and professionals of children's right to participation is magnified by '[c]hildren's limited capacity to enjoy and assert their rights independently of adults'.<sup>126</sup> It is also particularly significant in cases where the court's decision and orders diverge from the child's expressed views and wishes, as the next section explains.

### C Promoting Compliance with Parenting Orders

The preceding two sections have articulated the value of judgments written for children for other individuals in proceedings under pt VII of the *Family Law Act*: parents, judicial officers and family law professionals involved in the decision-making process. This section identifies a macro-level benefit of this judicial practice for the family courts as an institution, namely, to promote compliance with parenting orders. In post-separation parenting disputes, having the decision-maker clearly explain the decision and reasoning in a way that the

<sup>123</sup> Chisholm (n 13) 213 (emphasis in original).

<sup>124</sup> Stalford and Hollingsworth, 'This Case Is about You' (n 9) 1055.

<sup>125</sup> Anne Hollingworth, 'A Modest Proposal for Treating Children with Respect in Care Proceedings' (2015) 9(1) *Communities, Children and Families Australia* 5, 14.

<sup>126</sup> See Dimopoulos, *Decisional Privacy* (n 8) 6.

child or children can understand may encourage greater ‘buy-in’, ‘acceptance’ of and ‘long-term compliance’ with orders.<sup>127</sup> The concomitant value for the family courts may be enhanced public confidence in their decision-making at a time when ‘[t]here is little public understanding of, or confidence in, the current family law system.’<sup>128</sup>

Recent Australian research has identified children ‘voting with their feet’ or resisting as a cause of non-compliance with parenting orders.<sup>129</sup> Rae Kaspiew et al observed that ‘limited measures’ for supporting children’s participation in decision-making, ‘including in terms of explaining court outcomes, [result in] orders susceptible to implementation difficulties.’<sup>130</sup> Carson et al concluded that compliance may be enhanced where children feel that they have been given the opportunity to participate, their views have been listened to and outcomes have been explained to them in a way that they can understand.<sup>131</sup> As one parent surveyed for that study urged:

The court MUST start listening to the child far more and at the beginning of proceedings so then agreed orders could possibly be more closely complied with. ... [G]ive the child more credit for how they feel and what they want and treat each child as an individual and not as a number or statistic based on their age. This approach may well again support compliance as [it is horrendous and harmful for] a child [to be] forced emotionally and or physically to spend time with a person ... they do not wish to ...<sup>132</sup>

Several children interviewed by the author about their experiences of participation in family law processes disclosed their intentional non-compliance with

<sup>127</sup> Tom R Tyler, ‘Procedural Justice, Legitimacy, and the Effective Rule of Law’ (2003) 30 *Crime and Justice* 283, 286. See also at 284; Nicola Taylor, Pauline Tapp and Mark Henaghan, ‘Respecting Children’s Participation in Family Law Proceedings’ (2007) 15(1) *International Journal of Children’s Rights* 61, 73–4; Ton Liefwaard, ‘Child-Friendly Justice: Protection and Participation of Children in the Justice System’ (2016) 88(4) *Temple Law Review* 905, 924. See generally Tom R Tyler, ‘Social Justice: Outcome and Procedure’ (2000) 35(2) *International Journal of Psychology* 117.

<sup>128</sup> See *Family Law for the Future* (n 15) 30 [1.2].

<sup>129</sup> Carson et al, *Parenting Orders* (n 15) 64; Dimopoulos et al (n 37) 8. See also Nelson (n 43) 11; Judy Cashmore and Patrick Parkinson, ‘Children’s and Parents’ Perceptions on Children’s Participation in Decision Making after Parental Separation and Divorce’ (2008) 46(1) *Family Court Review* 91, 94 (‘Children’s and Parents’ Perceptions’).

<sup>130</sup> Kaspiew et al, *Views* (n 15) 13–14.

<sup>131</sup> Carson et al, *Parenting Orders* (n 15) 147. See also *Vickery v Vickery [No 2]* [2019] FCCA 3951, [137]–[138] (Judge Harman) (‘*Vickery [No 2]*’); Hale (n 58) 124.

<sup>132</sup> Carson et al, *Parenting Orders* (n 15) 65.

parenting orders because ‘if they can’t listen to me, I’m not going to listen to them.’<sup>133</sup> The value of children’s meaningful participation for compliance with parenting orders is also reflected by 14-year-old Rani in Patrick Parkinson and Judy Cashmore’s study: ‘I know if I got a judgment that I wasn’t completely happy with, but I had an active role in the process, I might not have resented it so much, because I would have felt, OK at least my voice was properly heard.’<sup>134</sup>

Macfarlane’s analysis of the letters written to the children and young people in *Patrick* and *Re A* identifies a ‘tacit acknowledgement that the child’s investment in any such solution was crucial to its success.’<sup>135</sup> In *Re A*, Peter Jackson J’s letter to Sam acknowledged Sam’s desires: ‘Sam, I realise that this order is not the one that you said you wanted me to make, but I am confident that it is the right order for you in the long run.’<sup>136</sup> Sheriff Anwar in *Patrick* told the two eldest children, to whom the letter was addressed, that she understood their position: ‘you don’t want to see your dad.’<sup>137</sup> The Sheriff also explained why the decision was inconsistent with the children’s position: ‘I think that it is better for you to get to know your dad again and to give him a chance to make things better.’<sup>138</sup> Both judicial officers might be interpreted as conveying to the child(ren) that ‘judge knows best, and better than you do’ — although some children may indeed appreciate that it is the judicial officer’s role to make a decision. However, in expressly acknowledging the children’s views and wishes, and in providing ‘clear and cogent reasons’ for rejecting them, the letters of Peter Jackson J and Sheriff Anwar align with the recognised importance of demonstrating that children’s views and wishes have not been ‘discounted simply because they are expressed by children.’<sup>139</sup>

Two further examples from published Australian family law judgments support this argument. In *Vickery v Vickery*,<sup>140</sup> Judge Harman approved consent

<sup>133</sup> Dimopoulos et al (n 37) 8, quoting Ava, aged 13. See also at 4.

<sup>134</sup> Parkinson and Cashmore, *Voice of a Child* (n 13) 67, quoting Rani. See also Cashmore and Parkinson, ‘Children’s and Parents’ Perceptions’ (n 129) 97.

<sup>135</sup> Barnes Macfarlane (n 60) 105, discussing *Patrick* (n 69), *Re A* (n 69).

<sup>136</sup> *Re A* (n 69) 330.

<sup>137</sup> *Patrick* (n 69) 130.

<sup>138</sup> *Ibid.*

<sup>139</sup> *In Marriage of Harrison v Woollard* (1995) 126 FLR 159, 199 (Baker J) (‘*In Marriage of Harrison*’), cited in Dimopoulos, *Decisional Privacy* (n 8) 93. See also John Tobin, ‘Justifying Children’s Rights’ (2013) 21(3) *International Journal of Children’s Rights* 395, 431–2.

<sup>140</sup> [2018] FCCA 4023 (‘*Vickery*’).

orders ‘without the child’s voice heard in the proceedings’:<sup>141</sup> no ICL was appointed and no family report was prepared due to the ‘zealous desire by all to conclude business quickly’.<sup>142</sup> In the ensuing contravention application, Judge Harman acknowledged that actively seeking out the child’s views prior to approving the consent orders ‘might have avoided ... the 12 months or more of litigation in which the family [had] been involved’.<sup>143</sup> In *Karamalis*, Bennett J declined to make the final parenting orders that had been agreed upon by the parties and supported by the ICL, because they were ‘contrary to the view consistently maintained by the youngest child ... and no one [had] informed him of the resolution to which his parents [had] agreed’.<sup>144</sup> Her Honour did not want to ‘ride roughshod over what [that] young man [had] expressed as a consistent view’.<sup>145</sup> Her Honour adjourned the proceedings to enable the child to meet in person with a psychologist who would explain the proposed final orders.<sup>146</sup> These illustrations are suggestive of judicial understanding that compliance hinges, at least in part, on the child’s comprehension and acceptance of the outcome.

The above analysis has sought to demonstrate that there is much to be gained from the practice of judicial officers writing judgments for children — not only for children, but also for parents, judicial officers, family law professionals and the family courts themselves. Yet the rarity of this practice in Australian family law warrants examination. The next Part of this article suggests how the ‘empirical realities’ of judicial decision-making in proceedings under pt VII of the *Family Law Act* might accommodate the practice of writing judgments for children.<sup>147</sup>

<sup>141</sup> *Vickery [No 2]* (n 131) [137] (Judge Harman), discussing *ibid*.

<sup>142</sup> *Vickery [No 2]* (n 131) [138] (Judge Harman), discussing *Vickery* (n 140). See also *Vickery [No 2]* (n 131) [137] (Judge Harman).

<sup>143</sup> *Vickery [No 2]* (n 131) [138]. See also at [137] (Judge Harman).

<sup>144</sup> *Karamalis* (n 12) 589 [4]. See also at 591 [15], 592 [21] (Bennett J).

<sup>145</sup> *Ibid* 592 [21]. See also *Dreher v Colombero* [2020] FamCA 1020, [26], in which Bennett J observed: ‘Australia is a signatory to the [CRC]. Pursuant to that, we have an obligation to inform children of the progress of proceedings, and to seek their views in relation to the subject matter of the proceedings.’

<sup>146</sup> *Karamalis* (n 12) 592 [21]–[22], [24].

<sup>147</sup> See Tobin, ‘Judging the Judges’ (n 9) 581.

#### IV OVERCOMING BARRIERS TO WRITING JUDGMENTS FOR CHILDREN IN AUSTRALIAN FAMILY LAW

John Tobin has argued that there is

a strong onus on proponents of a more active judicial approach in [the] area [of children's rights] to recognise the nature and extent of ... potential obstacles and to articulate a coherent vision of how [they] might be overcome in order to facilitate more effective and systematic judicial involvement.<sup>148</sup>

This Part identifies and addresses five potential barriers to Australian family law judicial officers writing judgments for children. These barriers intersect with various 'individual' and 'structural' factors<sup>149</sup> that may 'constrain or embolden judges in their ability and motivation to adopt a children's rights approach.'<sup>150</sup> 'Individual' barriers arise from the judicial officer as writer, while 'structural' barriers are 'beyond the individual judge', such as those associated with the formal origin and status of the judgment itself.<sup>151</sup>

##### *A Children's Rights as a New Way of Thinking for Judicial Officers*

Australian family law judicial officers' understanding and acceptance of children's rights may influence their willingness to embrace the practice of writing judgments for children. The author's research has exposed considerable judicial scepticism about the relevance of the *CRC* to decision-making in proceedings under pt VII of the *Family Law Act* and concerns about bestowing children with rights.<sup>152</sup> There is a way to go to transform children's rights 'from abstract expressions into meaningful, fruitful and enduring commitments' in Australian family law.<sup>153</sup> The potential to achieve this transformation in practice —

<sup>148</sup> Ibid.

<sup>149</sup> Dimopoulos, *Decisional Privacy* (n 8) 67.

<sup>150</sup> Ibid 66–7. See also Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 30–50; Tobin, 'Judging the Judges' (n 9) 581.

<sup>151</sup> See Dimopoulos, *Decisional Privacy* (n 8) 67.

<sup>152</sup> See Dimopoulos, 'Right Time for Rights' (n 112) 83–5.

<sup>153</sup> See Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, 'Introducing *Children's Rights Judgments*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 3, 7 ('Introducing *Children's Rights*').

including through judicial officers writing judgments for children — hinges in part upon deconstructing the ingrained dichotomy between promoting children's right to participation and protecting children from perceived harms 'through anxiety, loyalty conflicts, or damage to family relations if the right ... is applied *carte blanche*'.<sup>154</sup> Appreciating that the *CRC* is yet to prompt a 'change in thinking'<sup>155</sup> in the 'general intellectual environment'<sup>156</sup> of Australian family law, the success of any endeavours to promote the practice of judgment writing for children may require accompanying judicial education and training in children's rights and the *CRC*.<sup>157</sup>

### B *A Dearth of Confidence and Skills*

A second barrier to Australian family law judicial officers writing judgments for children is their ability to communicate with children or to understand children's views, particularly in circumstances that may prompt a child to become anxious, upset or distressed.<sup>158</sup> Judicial officers themselves have conceded a 'legitimate concern that judges may not have the training and skills to elicit and interpret the views of children'.<sup>159</sup> A majority (24/44 = 55%) of Australian family law judicial officers surveyed by Michelle Fernando regarding the practice of judicial meetings with children believed that they lacked the necessary 'skills and/or training to speak with children and interpret their views, even with a family consultant present'.<sup>160</sup> One judicial officer of the (then) Family Court of Australia described the chasm between the skills and expertise possessed and

<sup>154</sup> *Dylan v Dylan* [2007] FamCA 842, [220] (Carmody J) ('*Dylan*').

<sup>155</sup> But see Parkinson and Cashmore, *Voice of a Child* (n 13) 12.

<sup>156</sup> See Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 88.

<sup>157</sup> For a fuller discussion of judicial engagement with the *CRC* (n 25) in proceedings under pt VII of the *Family Law Act* (n 8), see Dimopoulos, 'Right Time for Rights' (n 112).

<sup>158</sup> See Karni Perlman and Tamar Morag, 'Seen and Heard: A New Look at Child Participation in Family Disputes' (2021) 59(3) *Family Court Review* 508, 514; Fernando, 'Children's Direct Participation' (n 13) 44–7; Judy Cashmore, 'Children's Participation in Family Law Matters' in Christine Hallett and Alan Prout (eds), *Hearing the Voices of Children: Social Policy for a New Century* (RoutledgeFalmer, 2003) 158, 167.

<sup>159</sup> *ZN v YH* (2002) 167 FLR 366, 378 [109] (Nicholson CJ) ('*ZN*'); *Dylan* (n 154) [219] (Carmody J); Justice Alastair Nicholson, 'Children and Children's Rights in the Context of Family Law' (Speech, LAWASIA Conference, 21 June 2003) 7 <[https://canadiancrc.com/PDFs/Childrens\\_Rights\\_Family\\_Law\\_Australia\\_Justice\\_Nicholson\\_21JUN03.pdf](https://canadiancrc.com/PDFs/Childrens_Rights_Family_Law_Australia_Justice_Nicholson_21JUN03.pdf)>, archived at <<https://perma.cc/K8VX-V8J7>>.

<sup>160</sup> This majority comprised 24 of the 44 judges surveyed (55%): Fernando, 'Children's Direct Participation' (n 13) 45. See also at 44.

those required for this task: ‘just about as scary as handing me a scalpel and saying “Just a bit of brain surgery before lunch please, Judge”’.<sup>161</sup> This sentiment likely explains the exceedingly rare incidence of judicial meetings with children in the Australian family law jurisdiction.<sup>162</sup> A similar outcome may eventuate for the practice of writing judgments for children given that the task is ultimately one of communication albeit in a different form.

An obvious solution to this barrier is the development of practical measures, including guides and judicial training programs, to equip judicial officers with the skills required to communicate effectively with children. This is by no means a novel suggestion. The ALRC in 1997 recommended that family law judicial officers receive training in children’s matters, including ‘communication skills and appropriate language for communicating with children.’<sup>163</sup> In *ZN v YH*, Nicholson CJ considered that the ‘legitimate concern’ that judicial officers ‘may not have the training and skills to elicit and interpret the views of children’ could be addressed through such training.<sup>164</sup>

The Family Law Council’s current *Terms of Reference*, noted in Part II(B) above, identify the need to ‘enhance the capacity of professionals ... to support children to participate in family law processes.’<sup>165</sup> Such capacity building for family law judicial officers will contribute to assembling the ‘necessary scaffolding around children’ to strengthen their participation in proceedings under pt VII of the *Family Law Act*.<sup>166</sup> The National Judicial College of Australia delivers judicial education and training programs on ‘Writing Better Judgments’, noting that training in judgment writing was the ‘most demanding unmet need’

<sup>161</sup> Ibid 45. Cf *Re W* [2008] 2 FLR 1170, 1182 [57], in which Wilson LJ described a willingness to meet with the children shortly after delivering the judgment ‘in order to explain to them the reasons for [his Lordship’s] decision.’ See generally ‘Family Court Merger Becomes Official’ [2021] (81) *Law Society Journal* 20.

<sup>162</sup> See Fernando, ‘Children’s Direct Participation’ (n 13) 44–5; Fernando, ‘Family Law Judges’ (n 13) 57–8, 65–7, 76.

<sup>163</sup> *Seen and Heard* (n 37) 386. See also at 385 [15.71]–[15.74]. Notably, this recommendation was not made in ch 16, titled ‘Children’s Involvement in Family Law Proceedings’: at chs 15–16.

<sup>164</sup> *ZN* (n 159) 32 [109]. Cf Fernando, ‘Children’s Direct Participation’ (n 13) 46. According to one judicial officer surveyed by Michelle Fernando: ‘To dictate to a judge [that they should undergo training before speaking with children] is not only improper, it is impractical. One cannot make somebody conform to the beliefs and attitudes of others.’

<sup>165</sup> Family Law Council, *Terms of Reference* (n 53) 2.

<sup>166</sup> See *Bryce v Bryce* [2020] FamCA 653, [40] (Bennett J).

identified by judicial officers in its 2022 Judicial Education Needs Survey.<sup>167</sup> There may be scope to incorporate an additional module into this existing training program given that judgments written for children are underpinned by the core features of a well-written judgment: they should be ‘concise, clear, interesting and accessible.’<sup>168</sup> Such training may also be informed by how-to guides for the creation of ‘child-friendly’ written documents that have been developed in recent years for civil society practitioners and governments.<sup>169</sup>

### C Beyond the Job Description?

Judicial officers may consider the practice of writing judgments for children to sit outside of the core requirements of their role. This view emerged in Fernando’s study regarding judicial meetings with children, with one judicial officer adamant: ‘Judges cannot be social workers and psychologists as well!’<sup>170</sup> This barrier is reinforced by the contemporary climate of family law decision-making in which the Australian family courts report growing volumes and increasing complexity of matters.<sup>171</sup> Recent research has highlighted workload

<sup>167</sup> See National Judicial College of Australia, *Writing Better Judgments II: 13–14 June 2024* (Flyer) <<https://www.njca.com.au/wp-content/uploads/2023/03/Early-Bird-WBJ-2-Marketing-Flyer-June-2024.pdf>>, archived at <<https://perma.cc/DDX4-KWTU>>. See generally ‘Judicial Education Programs’, *National Judicial College of Australia* (Web Page) <<https://www.njca.com.au/judicial-education-programs/>>, archived at <<https://perma.cc/DD3Q-TSKK>>.

<sup>168</sup> See Erika Rackley, ‘The Art and Craft of Writing Judgments: Notes on the Feminist Judgments Project’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 44, 48, quoting Justice Roslyn Atkinson, ‘Judgment Writing’ [2010] *Queensland Judicial Scholarship* 3:1–10, 3. See also Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1056.

<sup>169</sup> See Laura Lundy, *How To Write a Child-Friendly Document* (Guide, 2022) <<https://dylbw5db8047o.cloudfront.net/uploads/How-to-write-a-child-friendly-document.pdf>>, archived at <<https://perma.cc/M9LX-PMBN>>; European Commission (n 61).

<sup>170</sup> Fernando, ‘Children’s Direct Participation’ (n 13) 46. See also Allan Borowski and Rosemary Sheehan, ‘Magistrates’ Perspectives on the Criminal Division of the Children’s Court of Victoria’ (2013) 66(3) *Australian Social Work* 375, 385.

<sup>171</sup> See Federal Circuit and Family Court of Australia, *Annual Reports 2021–22: Annual Report of the Federal Circuit and Family Court of Australia (Division 1) & Annual Report of the Federal Circuit and Family Court of Australia (Division 2)* (Report, 2022) 85 <[https://www.fcfoa.gov.au/sites/default/files/2022-10/fcfoa\\_annual\\_report\\_21-22.pdf](https://www.fcfoa.gov.au/sites/default/files/2022-10/fcfoa_annual_report_21-22.pdf)>, archived at <<https://perma.cc/6NJ8-Z978>>; Family Court of Western Australia, *Annual Review: 2021* (Report, 2021) 1 <[https://www.familycourt.wa.gov.au/\\_files/Publications\\_Reports/FCWA\\_Annual\\_Review\\_2021.pdf](https://www.familycourt.wa.gov.au/_files/Publications_Reports/FCWA_Annual_Review_2021.pdf)>, archived at <<https://perma.cc/YL54-5SXM>>. See

pressures, time constraints, stress, fatigue and adverse impacts of resourcing challenges and endeavours to monitor and measure the ‘efficiency’ of judicial performance on the health and wellbeing of judicial officers.<sup>172</sup> These concerns are not easily solved or new nor are they unique to family law in Australia.<sup>173</sup> Yet the increasingly complex and demanding decision-making landscape may account for limited judicial appetite for the practice of writing judgments for children, bolstering the argument that it may be perceived as a time-consuming and superfluous venture.<sup>174</sup>

A seemingly valid response to this ‘not in my job description’ barrier is that the task of communicating family court decisions to children more appropriately aligns the role of the ICL, who is appointed to represent the child’s best interests in proceedings under pt VII of the *Family Law Act*.<sup>175</sup> In *Worrall*, the court expert voiced concerns about the ability of certain kinds of professional to communicate necessary information to children in an age-appropriate manner: ‘With all due respect to lawyers, you might be able to come up with a nice précis but the child friendly aspect needs to come from a psychologist.’<sup>176</sup> This ‘understandable concern’ was accepted by O’Brien J: ‘a précis prepared by a lawyer, or by me, might not be expressed in a way that [was] most useful for [the young person].’<sup>177</sup> In extending the potential for communicative shortcoming to include himself as a judicial officer, O’Brien J may be taken to have been suggesting that drafting a judgment for the young person lay beyond the scope

generally Felicity Bell, ‘A Tale of Two Courts’ (2020) 29(3) *Journal of Judicial Administration* 118, 124.

<sup>172</sup> See Gabrielle Appleby et al, ‘Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption’ (2019) 42(2) *Melbourne University Law Review* 299, 306, 340–5, 354–5; Carly Schrever, Carol Hulbert and Tania Sourdin, ‘Where Stress Presides: Predictors and Correlates of Stress among Australian Judges and Magistrates’ (2022) 29(2) *Psychiatry, Psychology and Law* 290, 293, 298–300, 314–16; Carly Schrever, Carol Hulbert and Tania Sourdin, ‘The Psychological Impact of Judicial Work: Australia’s First Empirical Research Measuring Judicial Stress and Wellbeing’ (2019) 28(3) *Journal of Judicial Administration* 141, 163–5; Sarah Murray, Ian Murray and Tamara Tulich, ‘Court Delay and Judicial Wellbeing: Lessons from Self-Determination Theory To Enhance Court Timeliness in Australia’ (2020) 29(3) *Journal of Judicial Administration* 101, 106–7, 111.

<sup>173</sup> See Chief Justice Alastair Nicholson and Margaret Harrison, ‘Family Law and the Family Court of Australia: Experiences of the First 25 Years’ (2000) 24(3) *Melbourne University Law Review* 756, 769–72; Tin Bunjevac, ‘Court Governance: The Challenge of Change’ (2011) 20(4) *Journal of Judicial Administration* 201, 212, 223.

<sup>174</sup> See Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1040.

<sup>175</sup> See *Family Law Act* (n 8) ss 68L–68LA.

<sup>176</sup> *Worrall* (n 3) [385] (O’Brien J). See also at [8] (O’Brien J).

<sup>177</sup> *Ibid* [388].

of his Honour's role. However, his Honour made clear that judicial approval of the precis would 'ensur[e] that [the child therapist] can tell [the young person] that the explanation comes from the Court'.<sup>178</sup>

The *Guidelines for Independent Children's Lawyers* ('*Guidelines*') provide that 'where possible or by Order of the Court, the ICL has a responsibility to explain to the child, or to facilitate an explanation by a Family Consultant, Single Expert or other appropriate expert' of the court orders, their effect and the reasons for any submissions made that were contrary to the child's views.<sup>179</sup> While recent reforms to the *Family Law Act* have expanded the ICL's role to include a requirement to meet with the child and to give the child an opportunity to express their views, there remains no legislative obligation for the ICL to explain the court's decision to the child.<sup>180</sup> These reforms may prompt 'new thinking' about the scope of the ICL's role, though their transformative potential to extend to communicating judgments to children may take some time.<sup>181</sup>

<sup>178</sup> Ibid [389].

<sup>179</sup> Federal Circuit and Family Court of Australia, *Guidelines for Independent Children's Lawyers* (Guidelines, 2024) 20 [7.13.2] <[https://icl.gov.au/wp-content/uploads/2024/10/icl\\_guidelines\\_2024\\_update.pdf](https://icl.gov.au/wp-content/uploads/2024/10/icl_guidelines_2024_update.pdf)>, archived at <<https://perma.cc/WWG5-A3RQ>> ('*Guidelines*'). These guidelines also require the Independent Children's Lawyer ('ICL') to determine, in consultation with a family consultant or appropriate expert in the case, the most appropriate person to explain the orders to the child: at 20 [7.13.3].

<sup>180</sup> See *Family Law Act* (n 8) s 68LA(5A), as inserted by *Family Law Amendment Act* (n 11) s 3, sch 4 pt 1 item 2. The Australian Law Reform Commission had recommended that s 68LA(5) of the *Family Law Act* (n 8) be amended to include a specific duty for ICLs to comply with the *Guidelines* (n 179) in their entirety: see *Family Law for the Future* (n 15) 371. Cf *Care of Children Act 2004* (NZ) s 55(4), which requires a lawyer acting for a child (or any other person representing the child) to take 'all reasonable steps' to ensure that the effect of a parenting order made under s 48 is explained 'to an extent and in a manner and in language that the child understands'. In 2023, this Act was amended to introduce a new obligation upon lawyers appointed to represent children to explain the nature of proceedings in a way that children are 'most likely to understand' if it is 'reasonably practicable to do so having regard to the age and maturity of the child': at s 7AA, as inserted by *Family Court (Supporting Children in Court) Legislation Act 2021* (NZ) s 8. See also 'Key Initiatives: Family Justice Initiatives', Ministry of Justice (NZ) (Web Page) <<https://www.justice.govt.nz/justice-sector-policy/key-initiatives/family-justice-initiatives/>>, archived at <<https://perma.cc/5E44-MHXF>>. The policy intent of this and other amendments was to give better effect to children's rights under the CRC (n 25) — particularly their right to participation: see Explanatory Note, *Family Court (Supporting Children in Court) Legislation Bill 2021* (NZ) 2; New Zealand, *Parliamentary Debates*, House of Representatives, 24 June 2021 (Kris Faafoi, Minister of Justice) 3654–6.

<sup>181</sup> See *Family Law for the Future* (n 15) 375 [12.62], quoting National Legal Aid, Submission No 163 to Australian Law Reform Commission, *Review of the Family Law System* (2018) 89 <[https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law-164\\_national\\_legal\\_aid\\_submission\\_pdf.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law-164_national_legal_aid_submission_pdf.pdf)>, archived at <<https://perma.cc/FEP8-PSWS>>.

However, it is argued that shifting the burden of effectively communicating decisions to children from judicial officers to ICLs is inadvisable. First, not all children are appointed an ICL.<sup>182</sup> Children also have no say about whether one will be appointed for them.<sup>183</sup> Secondly, there has been a historical lack of compliance by ICLs with their *Guidelines* in communication with children as part of their role to facilitate children's participation in proceedings.<sup>184</sup> Many children have reflected negatively on their experiences with ICLs for reasons including having had minimal, and in some cases no, contact with the ICL appointed to represent their best interests.<sup>185</sup> Kaspiew et al's study found that the dominant approach to the ICL's direct contact with a child, which can occur for familiarisation, consultation and explanation, was a cautious one — primarily to enhance familiarisation and, 'to a lesser extent if at all', explanation.<sup>186</sup> Thirdly, demands placed upon ICLs amidst the growing complexity of post-separation parenting matters, and a 'shrinking' service delivery footprint due to workforce shortages and reduced legal aid funding,<sup>187</sup> trigger justifiable concerns about vesting 'considerable faith in practitioners' ability' and capacity to add communicating judgments to children to their role.<sup>188</sup>

The author has argued elsewhere that 'judges have substantial discretion in lowering the barriers to children's participation' in family law decision-making.<sup>189</sup> Writing judgments for children can be seen as a 'responsibility' bestowed upon judicial officers 'to address and perhaps even minimise children's social, legal and political marginalisation.'<sup>190</sup> Judicial officers play a central role in

<sup>182</sup> Kaspiew et al, *Children's Lawyers* (n 14) 3–5.

<sup>183</sup> See *ibid.*

<sup>184</sup> See *Family Law for the Future* (n 15) 372–4 [12.53]–[12.59].

<sup>185</sup> See Kaspiew et al, *Children's Lawyers* (n 14) 132–9, 142; Carson et al, *Separated Families* (n 13) vi, viii, 4, 51; *Family Law for the Future* (n 15) 374 [12.59]; Joint Select Committee on Australia's Family Law System (n 37) 90–1 [4.52]–[4.54]; Dimopoulos et al (n 37) 5.

<sup>186</sup> Kaspiew et al, *Children's Lawyers* (n 14) 52. See also at 37–9.

<sup>187</sup> See Emily Millane, Angela Jackson and Nathan Blane, *Justice on the Brink: Stronger Legal Aid for a Better Legal System* (Report, November 2023) 23 <<https://nla-production-assets.s3.ap-southeast-2.amazonaws.com/public/Reports/november-2023-justice-on-the-brink-final-report-1-v2.pdf>>, archived at <<https://perma.cc/5728-3TAF>>.

<sup>188</sup> See Stalford and Hollingsworth, 'This Case Is about You' (n 9) 1038.

<sup>189</sup> Dimopoulos, *Decisional Privacy* (n 8) 85, citing Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4) 78.

<sup>190</sup> See Stalford and Hollingsworth, 'This Case Is about You' (n 9) 1039. See also Tobin 'Judging the Judges' (n 9) 581, 586.

protecting children's rights and promoting children as active legal subjects.<sup>191</sup> Writing judgments for children affords judicial officers the opportunity to champion children's rights in the family law jurisdiction — should the judicial officer's 'own convictions'<sup>192</sup> determine that path to be one that enables the judicial officer 'to sleep at night'.<sup>193</sup>

#### D *The Risks of Unwanted Publicity*

The Australasian Institute of Judicial Administration's *Guide to Judicial Conduct* advises judicial officers that

[i]t is likely that at some time in a judicial career, a case to be decided (or similar cases) will have been the subject of discussions in the media, sometimes calculated to arouse and even to inflame public opinion. On occasions a judge may be subjected to personal and hostile criticism by the press, by politicians, in social media, in print and electronic media. Sometimes the criticism will reveal that the critic does not understand the relevant principles or law, or that the critic is ill-informed and unfair. Public scrutiny, fair or unfair, informed or not, goes with the exercise of the judicial office.<sup>194</sup>

The judgment of Altobelli FM in *Gaylard* attracted considerable unfavourable media attention.<sup>195</sup> While the letter to the children piqued the interest of the mainstream press, it was the substance of the decision that became the subject of censure. His Honour was criticised on the front page of *The Advertiser*, a tabloid newspaper, for the 'extraordinary step' that explained 'why [Altobelli FM] gave sole custody to [the children's] mother — even though [his

<sup>191</sup> See Stalford, Hollingsworth and Gilmore, 'Introducing *Children's Rights*' (n 153) 5; 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, 402.

<sup>192</sup> See Dworkin (n 156) 87.

<sup>193</sup> See Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4) 60, quoting Sir Mark Hedley.

<sup>194</sup> Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (Guide, 3<sup>rd</sup> rev ed, 31 October 2023) 7 <[https://aija.org.au/wp-content/uploads/2024/04/Judicial-Conduct-guide\\_revised-Dec-2023-formatting-edits-applied.pdf](https://aija.org.au/wp-content/uploads/2024/04/Judicial-Conduct-guide_revised-Dec-2023-formatting-edits-applied.pdf)>, archived at <<https://perma.cc/UE5W-BF37>>.

<sup>195</sup> See, eg, Dean Mason, 'A Happy Father's Day Ahead: Well, for Some Men at Least', *The Age* (Melbourne, 30 August 2012) 13, discussing *Gaylard* (n 1).

Honour didn't] accept her claims their father abused them'.<sup>196</sup> The judgment was also appropriated to support the agenda of fathers' rights groups.<sup>197</sup> One article described Altobelli FM as being 'reduced to writing a letter to two children'; the decision was said to form 'part of a painful pendulum shift in Australian family law ... to a new paradigm in which fathers fear they are being excluded'.<sup>198</sup>

At first blush, it is easy to empathise with a perceived fear of judgments written for children 'burdening' the judiciary with the additional consideration of unwanted publicity.<sup>199</sup> However, the nature of the family law jurisdiction is such that it 'really intrudes into people's lives'.<sup>200</sup> Judicial officers in proceedings under pt VII of the *Family Law Act* 'make orders that tell people where they can and can't live, how often or if they will see their children at all'.<sup>201</sup> Given the capacity of children's cases to be 'contentious, emotionally-charged, value-ridden and life-changing', there is a particularly strong imperative for judicial officers to persuade separated parents and their children.<sup>202</sup> As Baroness Hale suggested, 'judges could make a start by producing a version of [their] decision which makes sense to the person most closely affected by it': the child.<sup>203</sup> Judicial officers who write judgments for children should be commended

<sup>196</sup> Padraic Murphy, 'Why You Can't See Dad: Magistrate's Letter to Children Explains Custody Ruling', *The Advertiser* (Adelaide, 7 June 2012) 3, discussing *Gaylard* (n 1).

<sup>197</sup> See, eg, Jim Muldoon, 'Altobelli's Dilemma: The Failure of Australian Family Law', *A Voice for Men* (Web Page, 24 June 2012) <<https://avoiceformen.com/family-courts/altobellis-dilemma-the-failure-of-australian-family-law/>>, archived at <<https://perma.cc/2EHT-7VML>>, citing *Gaylard* (n 1).

<sup>198</sup> Miranda Devine, 'Kids Need To Know Their Father's Love', *Sunday Herald Sun* (Melbourne, 10 June 2012) 84, discussing *Gaylard* (n 1).

<sup>199</sup> See Murray, Murray and Tulich (n 172) 106.

<sup>200</sup> 'Retiring Chief Justice Reflects on Thirteen Years in the Family Court', *The Law Report* (ABC Radio National, 19 September 2017) 0:01:30–0:01:34 <<http://www.abc.net.au/radio-national/programs/lawreport/2017-09-19/8956300>>, archived at <<https://perma.cc/2Q8F-XYRH>>.

<sup>201</sup> See *ibid* 0:01:36–0:01:44. See also *Sofia v Treacy [No 2]* [2025] FedCFamC1A 10, [2]–[8] (Austin, Harper and Strum JJ), discussing *Family Law Act* (n 8) pt VII.

<sup>202</sup> See Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4) 79.

<sup>203</sup> Hale (n 58) 119. Similar sentiments have been expressed elsewhere. In *Patrick* (n 69), Sheriff Anwar wrote: 'I think that as my decision is all about you, it is only fair that I should write to you': at 129. In *A v B* (n 71), it was said that 'I feel that I have a responsibility to say something to you in particular because you are the one who has been most deeply affected by this case. You are the one who is most affected by this case, and you should never be just a name mentioned in the judgment': at 22–3 (庭法官朱政坤 [Chu Jheng-Kun JJ]) [tr Jasmine Cheng and Joseph Zivny].

for their courage as ‘protagonists of justice’ rather than publicly censured for making doctrinally sound innovations to their method in support of children’s participation.<sup>204</sup>

E *Maintaining the Integrity of Judgments as a Feature of the Administration of Justice*

Adapting a judgment for children might be viewed as undermining its ‘legal integrity’; this concern is amplified if the judgment has ‘precedential potential.’<sup>205</sup> Challenges exist in ‘translating complex legal decisions into a language, structure and style that children can understand’ without compromising the integrity of the underpinning law and legal principles.<sup>206</sup> Yet this concern should not be overstated. As Stalford and Hollingsworth have argued:

([E]specially) in key decisions on children’s rights ... the obligation for transparency and clarity ... is about ensuring, as far as possible, that judgments are comprehensible to children as a wider community of legal citizens affected by the decision. This must include a commitment to developing a ‘children’s jurisprudence’, particularly where the outcome of a decision has long term ramifications for their rights.<sup>207</sup>

A judgment written for a child is not akin to a language translation: it would not be a replica of the original decision.<sup>208</sup> Rather, the judgment written for the child would sit above or below the court’s main reasons for judgment, as they did in *Gaylard* and *Lavigne [No 2]*, or be an annexure to the judgment, as it was in *Worrall*.<sup>209</sup> To avoid ambiguity about its legal status, the judgment written for the child may also be prefaced by a statement, like those that accompany judgment summaries prepared by some Australian superior courts, that it is not intended to be a substitute for the court’s reasons or to be used in subsequent consideration of those reasons.<sup>210</sup>

<sup>204</sup> See Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1039.

<sup>205</sup> *Ibid* 1041.

<sup>206</sup> *Ibid* 1054.

<sup>207</sup> *Ibid* 1053.

<sup>208</sup> Hollingsworth and Stalford, ‘Children’s Rights Judgments’ (n 4) 83.

<sup>209</sup> See, eg, *Gaylard* (n 1) sch B; *Lavigne [No 2]* (n 6) letter; *Worrall* (n 3) annex A.

<sup>210</sup> See, eg, High Court of Australia, *Elisha v Vision Australia Ltd [2024] HCA 50* (Judgment Summary, 11 December 2024) <<https://www.hcourt.gov.au/assets/publications/judgment->

## V STARTING THE EFFECTIVE COMMUNICATION CONVERSATION: GUIDING PRINCIPLES FOR JUDICIAL OFFICERS

This Part progresses from the ‘why’ of writing judgments for children to the ‘how’. It proposes five overarching principles — the ‘five Cs’ of context, content, chronology, collaboration and closure — that may assist in the development of guidelines or other judicial resources to facilitate and encourage this practice in Australian family law proceedings. These principles have been informed by children’s rights under the *CRC* and scholarship that engages with children’s right to decisional privacy,<sup>211</sup> their ‘evolving capacities’ for decision-making<sup>212</sup> and their right to information as a fundamental tenet of access to justice.<sup>213</sup> They also draw upon guides to writing ‘child-friendly’ documents<sup>214</sup> and bench books and guidelines for Australian judicial officers.<sup>215</sup>

### *A Principle 1: Context*

The first principle to guide judicial officers in the practice of writing judgments for children is context: an appreciation of the unique circumstances, needs and experiences of the individual child. A practical challenge for judicial officers when writing a judgment for a child is the diversity that exists within the umbrella term ‘children’. Perhaps the most obvious factors impacting accessibility

summaries/2024/hca-50-2024-12-11.pdf>, archived at <<https://perma.cc/8PY2-F27C>>; Supreme Court Victoria, *Summary of Judgment: Andrianakis v Uber Technologies Inc and Others (Settlement Approval)* [2024] VSC 733 (Summary, 2 December 2024) <<https://www.supremecourt.vic.gov.au/sites/default/files/2024-12/Summary%20of%20judgment%20-%20Andrianakis%20v%20Uber%20Technologies%20Inc%20and%20Others%20%5B2024%5D%20VSC%20733.pdf>>, archived at <<https://perma.cc/F3EE-FWCY>>.

<sup>211</sup> See Dimopoulos, *Decisional Privacy* (n 8).

<sup>212</sup> See *CRC* (n 25) art 5; John Tobin and Sheila Varadan, ‘Article 5: The Right to Parental Direction and Guidance and Consistent with a Child’s Evolving Capacities’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159; Brian Sloan and Claire Fenton-Glynn (eds), *Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child* (Brill Nijhoff, 2021); Sheila Varadan, ‘The Principle of Evolving Capacities under the UN Convention on the Rights of the Child’ (2019) 27(2) *International Journal of Children’s Rights* 306.

<sup>213</sup> *CRC* (n 25) Preamble para 2, art 13(1). See generally Stalford, Cairns and Marshall (n 16).

<sup>214</sup> See European Commission (n 61); Lundy (n 169).

<sup>215</sup> See Judicial Commission of New South Wales, *Equality before the Law: Bench Book* (24<sup>th</sup> rev ed, October 2023) (*Equality Bench Book*); Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts: Updated March 2020* (March 2020) (*Bench Book for Children*); Attorney-General’s Department (Cth) et al, *National Domestic and Family Violence Bench Book* (June 2023) (*NDFV Bench Book*).

are the child's age and evolving capacities.<sup>216</sup> Additional intersectional nuances that judicial officers must carefully accommodate when writing a judgment for children include the experiences of Aboriginal and Torres Strait Islander children,<sup>217</sup> children of culturally and linguistically diverse backgrounds,<sup>218</sup> children with disabilities,<sup>219</sup> children who are transgender<sup>220</sup> and children with histories of trauma.<sup>221</sup>

A New South Wales bench book, *Equality before the Law* ('Equality'), reminds judicial officers that children's 'comprehension and communication abilities will vary considerably, even among children of the same age, depending on their background, physical and mental health and experiences.'<sup>222</sup> Notably, this diversity amongst children is framed as a 'barrier' to their participation in court.<sup>223</sup> Family law judicial officers writing judgments for children must be alive to such contextual considerations if their explanation is to be accessible to, and meaningfully made sense of by, the child.

For judicial officers to overlook these intersectional factors — and indeed the fact that 'it is the life of a *real* child at stake'<sup>224</sup> — risks succumbing to the

<sup>216</sup> See Dimopoulos, *Decisional Privacy* (n 8) 94.

<sup>217</sup> See *Family Law for the Future* (n 15) 171–2 [5.67]–[5.72], 183–5 [5.122]–[5.131]; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients: A Report to the Attorney-General Prepared by the Family Law Council* (Report, February 2012) <<https://www.ag.gov.au/sites/default/files/2020-03/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf>>, archived at <<https://perma.cc/B46V-RH49>>.

<sup>218</sup> See Family Law Council, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds: A Report to the Attorney-General Prepared by the Family Law Council* (Report, February 2012) <<https://www.ag.gov.au/sites/default/files/2020-08/ImprovingtheFamilyLawSystemforClientsfromCulturallyandLinguisticallyDiverseBackgrounds.PDF>>, archived at <<https://perma.cc/6MNZ-AFZE>>.

<sup>219</sup> See Jo Bridgeman, 'Transforming Family Responsibilities: Children with Disabilities, Parental Responsibility and Family Life' in Beverley Clough and Jonathan Herring (eds), *Disability, Care and Family Law* (Routledge, 2021) 120.

<sup>220</sup> See Georgina Dimopoulos, 'Rethinking *Re Kelvin*: A Children's Rights Perspective on the "Greatest Advancement in Transgender Rights" for Australian Children' (2021) 44(2) *University of New South Wales Law Journal* 637.

<sup>221</sup> Judge P Hora, 'The Trauma-Informed Courtroom', *Judicial Commission of New South Wales* (Web Page, October 2021) <[https://www.judcom.nsw.gov.au/publications/benchbks/judicial\\_officers/trauma\\_informed\\_courtroom.html](https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/trauma_informed_courtroom.html)>, archived at <<https://perma.cc/8ZMA-99LS>>.

<sup>222</sup> *Equality Bench Book* (n 215) 6106.

<sup>223</sup> *Ibid* 6104–6.

<sup>224</sup> See Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4) 81 (emphasis in original).

law's 'generalizing impulse'.<sup>225</sup> It does so by abstracting and obscuring the 'intersectionalities and differences' within the 'group' or 'cohort' of children affected by the court's decision.<sup>226</sup> Additionally, it risks leaning into judicial constructions of an 'image' of a child and an 'ideal' of childhood — for example, one characterised by 'innocence, dependence, vulnerability or danger' — which can be 'misleadingly present[ed] as universal'.<sup>227</sup> As Chisholm has observed, 'the great differences between individual children are sometimes lost sight of as we try to find patterns and guidelines for our decisions and policies'.<sup>228</sup> In *Lavigne [No 2]*, Judge Harland's letter to the children reassured them that it was 'alright' that '[e]veryone in the family might feel differently about [the separation]'.<sup>229</sup> Her Honour expressly told the children that she had considered them as individuals with distinct feelings, views, needs and experiences of their parents' separation:

[I]t is most likely you will each have your own feelings about what is going on in your family. Some of those feelings will be the same for all of you, and some feelings may be ones that only you have. I listened to what the experts had to say about each one of you, and I thought about you as individuals as well as a group of siblings when I made my decision about your living arrangements.<sup>230</sup>

Another significant contextual consideration for family law judicial officers when writing judgments for children is the potential for the child's expressed views and wishes to have been coloured by parental influence. A common thread running through the judgments examined in this article is that the disputes involved children who had experienced an 'unhealthy degree of parental pressure'.<sup>231</sup> The judgments written for the child(ren) were arguably an attempt to 'circumvent negative parental influence' in circumstances where neither

<sup>225</sup> See Paul Gewirtz, 'Narrative and Rhetoric in the Law' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 2, 3. See also Eric J Mitnick, *Rights, Groups, and Self-Invention: Group-Differentiated Rights in Liberal Theory* (Ashgate, 2006) 55.

<sup>226</sup> Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4) 80.

<sup>227</sup> *Ibid.*

<sup>228</sup> Chisholm (n 13) 217.

<sup>229</sup> *Lavigne [No 2]* (n 6) letter.

<sup>230</sup> *Ibid.*

<sup>231</sup> Barnes Macfarlane (n 60) 105, discussing *Patrick* (n 69), *Re A* (n 69).

parent was considered capable of communicating the contents of the judgment in an objective and unbiased manner.<sup>232</sup>

For instance, in *Worrall*, the young person's views 'significantly' informed the 'steps' to inform the young person of the parenting orders,<sup>233</sup> even though O'Brien J gave 'minimal weight' to those views<sup>234</sup> in light of the court expert's opinion that they had been 'exaggerated or fabricated' to demonstrate the young person's 'loyalty and devotion' to her mother.<sup>235</sup> The ensuing precis expressed hope: '[it could] help you understand what has happened, and not just rely on what Mum or Dad tell you, because it can be hard to know who to believe.'<sup>236</sup> Comparable concerns were raised by Peter Jackson J: 'So I respect your views, but I don't take them at face value because I think they are significantly formed by your loyalty to your father.'<sup>237</sup>

In *D v D*, the evidence indicated that the children had been subject to 'quite significant influencing' from their mother's words and actions,<sup>238</sup> while, in *Gaylard*, Altobelli FM's letter to the children was 'an attempt to restore, at some future time, the father's involvement in the children's lives, and to reinstate their relationship' in circumstances where the mother had alienated the children from their father.<sup>239</sup> In *Patrick*, Sheriff Anwar had 'no confidence that the parties would not provide the children with selective quotes from a full written decision ... to vindicate themselves or to apportion blame.'<sup>240</sup> The expert who had met with the children in that case explained that the children held 'entrenched views' such that 'it was important for them to hear the decision from a neutral third person, who was not allied to either parent.'<sup>241</sup>

Judge Harland's letter to the children in *Lavigne [No 2]* also served to allay any feelings of responsibility or guilt for the parental separation. Her Honour sought to ensure that the children appreciated that they were not alone in their experience, because '[c]hildren sometimes feel responsible for how their

<sup>232</sup> See Barnes Macfarlane (n 60) 105.

<sup>233</sup> *Worrall* (n 3) [364] (O'Brien J). See also at [381]–[391] (O'Brien J).

<sup>234</sup> *Ibid* [364].

<sup>235</sup> See *ibid* [361].

<sup>236</sup> *Ibid* annex A [3].

<sup>237</sup> *Re A* (n 69) 328.

<sup>238</sup> *D v D* (n 69) [55] (Recorder McKendrick QC).

<sup>239</sup> *Gaylard* (n 1) [98] (Altobelli FM). See also at [2] (Altobelli FM).

<sup>240</sup> *Patrick* (n 69) 129 [6].

<sup>241</sup> *Ibid* 129 [9] (Sheriff Anwar).

parents feel as they love them and want them to be happy.<sup>242</sup> The letter emphasised to the children that were blameless: ‘it isn’t anyone’s fault. Nothing you said or did caused it.’<sup>243</sup> These judicial words of comfort were significant given evidence of the father’s ‘inappropriate conversations’ with the children, during supervised visits, that caused them to feel responsible for the parental separation and their parents’ feelings.<sup>244</sup>

Collectively, these illustrations suggest that judicial officers in family law proceedings may be more motivated to write directly to the child or children where they feel the impartiality of the court is required to deliver just outcomes for the child and to demonstrate that the court has not ‘taken sides.’<sup>245</sup> Indeed, Peter Jackson J’s letter to Sam explained the role of his impartiality: ‘When I was appointed as a judge, I took the oath that every judge takes to apply the law in a way that is fair to everybody.’<sup>246</sup> Recorder McKendrick QC reminded the children in *D v D* of his role in the judgment: ‘I have made the decision ... not your Mum or your Dad.’<sup>247</sup> The final paragraph of Judge Harland’s letter to the children begins in almost identical terms: ‘This is a decision I have made, not your mum or your dad.’<sup>248</sup>

### B Principle 2: Content

The second principle to guide family law judgments for children is content: the ‘what’ and ‘how’ of judicial communication. This principle emerges in a context of increasing scrutiny of the ‘art and craft’ of judgment writing,<sup>249</sup> with judicial officers themselves calling for improved clarity, accessibility and simplicity of language.<sup>250</sup> As Altobelli FM acknowledged in *Gaylard*,

<sup>242</sup> *Lavigne [No 2]* (n 6) letter.

<sup>243</sup> *Ibid.*

<sup>244</sup> See *ibid* [78] (Judge Harland). See also at [63], [65], [118], [120]–[121] (Judge Harland), letter.

<sup>245</sup> See Stalford and Hollingsworth, ‘This Case Is about You’ (n 9) 1048.

<sup>246</sup> *Re A* (n 69) 326.

<sup>247</sup> *D v D* (n 69) app 1.

<sup>248</sup> *Lavigne [No 2]* (n 6) letter.

<sup>249</sup> See Rackley (n 168) 45.

<sup>250</sup> See, eg, Mortimer (n 4) 296; Chief Justice Anne Ferguson, ‘Remarks of the Hon Anne Ferguson, Chief Justice of Victoria on the Occasion of a Welcome Sitting in the Banco Court’ (Speech, Supreme Court of Victoria, 12 October 2017) 1–2 <<https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/10/50/d6bbec9d8/RemarksOfFergusonCJatwelcomesitting.pdf>>, archived at <<https://perma.cc/T2WU-NKGD>>; Katrina Banks-

traditional reasons for judgment are not usually written with the audience of the children in mind. The language and format of reasons are, more often than not, styled for an audience consisting of the parents, the lawyers involved in the case, and an appellate court.<sup>251</sup>

This principle comprises three elements: language, format and narrative. Guidelines for judicial communication with children in the courtroom may be a useful starting point. The *Bench Book for Children Giving Evidence in Australian Courts* recognises that ‘[k]nowing a particular child’s language skills is important for understanding and communicating with the child’.<sup>252</sup> It explains that children being raised in an ‘adverse environment’, such as one involving abuse, can ‘hinder their language development’<sup>253</sup> and might necessitate communicating at a more simplified level.<sup>254</sup> The *Equality* bench book refers to children’s ‘greater dependence on context’ in comprehending language and concepts, their reduced capacity to ‘sequence events’ and their shorter attention span.<sup>255</sup>

Children and young people themselves have identified two key features of a ‘child-friendly’ document: first, language and terminology that they can understand and that is easy to follow (‘condensing key information into bullet points. Not a mountain of paper. Not university-style writing. Simple words. Short sentences. Definitions of things that might be hard to understand’); secondly, a design and presentation of content that is accessible and visually appealing to children (‘[u]se of child-friendly imagery ... [a] clear font with lots of spacing’).<sup>256</sup>

However, as Stalford et al recognise, using ‘simple language’ and presenting information in ‘an appealing format are important, [but] they are just two (relatively superficial components) that need to be present’ when

Smith, ‘More than Just Precedent: Perspectives on Judgment Writing’ (Honourable David Malcolm Annual Memorial Lecture, Notre Dame University School of Law, 9 October 2019) [42]–[48] <[https://www.fedcourt.gov.au/\\_\\_data/assets/rtf\\_file/0003/60069/Banks-Smith-J-20191009.rtf](https://www.fedcourt.gov.au/__data/assets/rtf_file/0003/60069/Banks-Smith-J-20191009.rtf)>, archived at <<https://perma.cc/3BYS-HRH7>>; Lady Justice Arden, ‘Judgment Writing: Are Shorter Judgments Achievable?’ (2012) 128 (October) *Law Quarterly Review* 515, 516–18. See generally Christopher Williams, *The Impact of Plain Language on Legal English in the United Kingdom* (Routledge, 2023).

<sup>251</sup> *Gaylard* (n 1) [87].

<sup>252</sup> *Bench Book for Children* (n 215) 66.

<sup>253</sup> *Ibid* 68.

<sup>254</sup> See *ibid* 66, 68, 73.

<sup>255</sup> *Equality Bench Book* (n 215) 6105.

<sup>256</sup> European Commission (n 61) 4.

communicating decisions to children.<sup>257</sup> More significantly, a judgment written for children must offer them a process for ‘contextualising’ the court’s decision and reasoning.<sup>258</sup> This is the role of narrative, which focuses on ‘facilitating understanding, rather than just conveying information.’<sup>259</sup>

Narrative is fundamental to a child’s ‘inner life.’<sup>260</sup> As ‘a textual means by which a child’s identity can be shaped and constructed,’<sup>261</sup> a judgment may assist the child in acquiring ‘[k]nowledge of who one is, who one’s family is or was, why one has arrived at where one is’ and, consequently, in making sense of their life history.<sup>262</sup> Sheriff Anwar in *Patrick* appreciated the scope for a family court judgment to influence children’s identity formation. The Sheriff did not consider it in the children’s best interests for a detailed record or summary of the evidence and the parties’ allegations to be produced, as exposure to such details risked ‘undermining [the children’s] sense of identity and self-worth.’<sup>263</sup>

Narrative also enables the judicial officer to tell and centre the *child’s* story which necessarily sharpens focus on the impacts of the orders on the child.<sup>264</sup> It reminds all adults in the proceedings that the child is ‘a real person, rather than ... the object of other people’s disputes or concerns.’<sup>265</sup> Stalford et al emphasise the need for any resource written for children to be relevant to their lives and ‘to respond to the reality of children’s everyday experiences.’<sup>266</sup> They suggest that moving from the ‘abstract’ to the meaningful can be achieved through the use of examples.<sup>267</sup> Sheriff Anwar’s letter to the children in *Patrick* does this effectively. The letter lists specific instances where the father had sometimes ‘not been very good’ at doing his parental ‘job’ to demonstrate Sheriff Anwar’s understanding that the children did not want to see their father:

<sup>257</sup> Stalford, Cairns and Marshall (n 16) 212.

<sup>258</sup> See *ibid.*

<sup>259</sup> See *ibid* 213.

<sup>260</sup> Hollingworth (n 125) 9.

<sup>261</sup> Dimopoulos, *Decisional Privacy* (n 8) 90, citing Dawn Watkins, ‘The Shaping and Misshaping of Identity through Legal Practice and Process: (Re)discovering Mr Kernott’ (2014) 8(2) *Law and Humanities* 192, 192–3.

<sup>262</sup> Munby, ‘Unheard Voices’ (n 120) 6; Cashmore, Kong and McLaine (n 20) 19, citing Anne Hollingworth (n 125) 14; Dimopoulos, *Decisional Privacy* (n 8) 90, citing Watkins (n 261) 192–3.

<sup>263</sup> *Patrick* (n 69) 129 [6].

<sup>264</sup> See Hollingsworth and Stalford, ‘Children’s Rights Judgments’ (n 4) 80.

<sup>265</sup> See Hale (n 58) 124.

<sup>266</sup> Stalford, Cairns and Marshall (n 16) 213.

<sup>267</sup> *Ibid.* See also at 214.

‘He has locked you in your rooms when you have been naughty. ... He has sworn at you sometimes ... When you were younger, he washed you and he was a bit rough.’<sup>268</sup>

According to Baroness Hale, a child involved in family law decisions ‘needs a friend, someone who can explain to [them] what is going on and why, and above all what the decision is and why.’<sup>269</sup> The processes of judicial reflection and self-examination inherent in judgment writing may go some way in assisting the judicial officer to engage meaningfully with any views expressed by the child,<sup>270</sup> for ‘the very exercise of writing ensures more careful thinking and re-thinking.’<sup>271</sup> For instance, Chu Jheng-Kun J in the Kaohsiung Juvenile and Family Court of Taiwan described his Honour as ‘uncle judge’ in his Honour’s letter to an eight-year-old child, which featured in the Court’s judgment.<sup>272</sup> By stepping out of a position of reverence and into the child’s shoes, Chu Jheng-Kun J assisted the child in making sense of his challenges following his parents’ separation: ‘When I was your age, all I had to think about every day was where to play after school and what to eat for dinner. But you’ve been bearing pressure and experiencing hardship that you shouldn’t have to bear at this age.’<sup>273</sup> In making an effort to humanise themselves when communicating decisions to children, judicial officers can simultaneously humanise the child and validate their experiences.

The validation of children’s experiences through a judgment written for them is also consistent with trauma-informed practice. The *National Domestic and Family Violence Bench Book* (‘*NDFV Bench Book*’) advises that a ‘trauma-informed judicial officer will ... explain why particular orders are made.’<sup>274</sup> Although the *NDFV Bench Book* is directed to litigants’ experiences of fairness and safety in court processes and practices, judicial officers should be alive to ways in which engagement with the family court may ‘exacerbate or prolong’ trauma

<sup>268</sup> Patrick (n 69) 130.

<sup>269</sup> Hale (n 58) 119.

<sup>270</sup> See Nicholas Hasluck, ‘A Judicial Dilemma: Will It Write?’ (2017) 44(8) *Brief* 34, 34, cited in Mortimer (n 4) 286; Stephen Gageler, ‘Why Write Judgments?’ (2014) 36(2) *Sydney Law Review* 189, 203, discussing Sir Frank Kitto, ‘Why Write Judgments?’ (1992) 66(12) *Australian Law Journal* 787. See especially at 794.

<sup>271</sup> See Kitto (n 270) 792.

<sup>272</sup> *A v B* (n 71) 22 (朱政坤法官 [Chu Jheng-Kun JJ]) [tr Jasmine Cheng and Joseph Zivny]. See also at 5 (朱政坤法官 [Chu Jheng-Kun JJ]) [tr Jasmine Cheng and Joseph Zivny].

<sup>273</sup> *Ibid* 22 (朱政坤法官 [Chu Jheng-Kun JJ]) [tr Jasmine Cheng and Joseph Zivny].

<sup>274</sup> *NDFV Bench Book* (n 215) 2394.

for children including the trauma that emerges from experiences of family breakdown and family violence.<sup>275</sup> In *Re A*, Peter Jackson J's letter to Sam lamented the omnipresence of the family court in Sam's life and the 'danger' that he would 'get used to it'.<sup>276</sup> In *Worrall*, O'Brien J's letter to the young person expressed similar hope: 'you will ... not have to worry about Court being a thing in your life anymore'.<sup>277</sup> Judge Harland shared with the children her optimism that the interim arrangement was temporary: '[it] won't be in place forever and is just ... whilst your mum and dad get more help [and] support for them and for you'.<sup>278</sup> The practice of writing judgments for children may also assist judicial officers to meet the *NDFV Bench Book* guidance that, where practicable and where resources permit, 'any adverse consequences associated with court processes are addressed or at least mitigated'.<sup>279</sup>

### C Principle 3: Chronology

The principle of chronology requires judicial officers 'to be attuned to the 'ethical considerations' of 'what to tell the child and when'.<sup>280</sup> Sir James Munby, former President of the Family Division of the High Court of England and Wales, has asked:

Should the judge be writing a letter for the child to read today, written in the language appropriate to the child having regard to their present age or understanding? Or, should the judge be writing a letter for the child to be read by the [child] at some, and if so at what[,] point in the future?<sup>281</sup>

This posed a dilemma for Altobelli FM in *Gaylard* given his Honour's observation of the 'obvious intrinsic difficulty in giving weight to a child's possible

<sup>275</sup> See *ibid* 2393.

<sup>276</sup> *Re A* (n 69) 327.

<sup>277</sup> *Worrall* (n 3) annex A [30].

<sup>278</sup> *Lavigne [No 2]* (n 6) letter.

<sup>279</sup> See *NDFV Bench Book* (n 215) 2393.

<sup>280</sup> See Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4) 84.

<sup>281</sup> Munby (n 120) 6. See generally Sir James Munby, '16th View from the President's Chambers: Children and Vulnerable Witnesses', *Family Law* (Web Page, 20 January 2017) <[https://www.familylaw.co.uk/news\\_and\\_comment/16th-view-from-the-president-s-chambers-children-and-vulnerable-witnesses-where-are-we](https://www.familylaw.co.uk/news_and_comment/16th-view-from-the-president-s-chambers-children-and-vulnerable-witnesses-where-are-we)>, archived at <<https://perma.cc/2Y5K-TKS9>>.

future views in reasons for judgment written today.<sup>282</sup> His Honour articulated the challenge inherent in facilitating the children's 'final participation' in the decision-making process as follows:

It is no answer to say ... the [ICL] can explain [the court's decision and reasons] to them now, or in the near future, because [the children] are so alienated [from the father] it will make no difference, and be of no use to them. Even if that were not the case, the children's developmental stages make participation, in the sense of understanding reasons, unlikely if not impossible.<sup>283</sup>

His Honour had sought the expert report writer's views about at what age the children should be provided with the letter.<sup>284</sup> The expert agreed with his Honour's suggestion that provision of the letter 'should be at a time when the children's developmental stage involved individuation',<sup>285</sup> acknowledging similar sentiments to his Honour's that 'children as they individuate deserve in some way to get some objective perspective about why decisions have been made about them'.<sup>286</sup> His Honour accepted the expert's view that 14 years of age would be appropriate, because the eldest child would have sufficient maturity 'to not only deal with the letter itself, but understand the need not to discuss it' with the younger child.<sup>287</sup>

Although adults tend to 'underestimate children's capacities', Altobelli FM's careful consideration of the issue of chronology refreshingly accords with a children's rights-based approach to participation.<sup>288</sup> It is suggestive of judicial appreciation that children's development of their various capacities — including their capacity to understand court decisions made about them — is 'dynamic [and] interactional'<sup>289</sup> and adopts 'an evolving, albeit not necessarily linear' course with age.<sup>290</sup> By contrast, Recorder McKendrick QC in *D v D* did not consider it necessary to delay the children's access to the letter, which was to be

<sup>282</sup> See *Gaylard* (n 1) [85].

<sup>283</sup> *Ibid* [86].

<sup>284</sup> *Ibid* [89]. See also at [4] (Altobelli FM).

<sup>285</sup> *Ibid* [92].

<sup>286</sup> *Ibid* [90].

<sup>287</sup> *Ibid* [99].

<sup>288</sup> See Parkinson and Cashmore, *Voice of a Child* (n 13) 4. See also at 3, 196–7; Freeman, 'Human Rights' (n 24) 22, discussing Onora O'Neill 'Children's Rights and Children's Lives' (1988) 98(3) *Ethics* 445; Tobin and Varadan (n 212) 161, 167.

<sup>289</sup> See Parkinson and Cashmore, *Voice of a Child* (n 13) 4.

<sup>290</sup> See Tobin and Varadan (n 212) 173.

provided to them *before* the judgment was formally delivered.<sup>291</sup> For Recorder McKendrick QC, it was imperative that the children be ‘promptly informed’ of the Court’s decision to give them an opportunity to ‘absorb and understand it’ before they commenced their next school terms.<sup>292</sup>

In *Worrall*, O’Brien J stipulated that the precis was to be provided initially to the young person’s therapist and that it would only be provided to the young person ‘if and when [the therapist] considers it appropriate to do so.’<sup>293</sup> Such deference to the therapist to make this determination suggests that O’Brien J was acutely aware of the importance of the principle of chronology. His Honour sought to ensure that the precis would be received by the young person at a time, and in a way, that would be productive for her wellbeing.

Such variation in the approaches of judicial officers to the issue of *when* such a judgment should be provided demonstrate that the decision will be influenced by factors including the child’s age, identity and evolving capacities, the availability and need for professional therapeutic supports and practical considerations such as impacts on the child’s schooling or living arrangements.

#### D Principle 4: Collaboration

The task of writing a judgment for children need not be one for the judicial officer to undertake alone. As the examples of *Gaylard*, *Worrall* and *Lavigne [No 2]* illustrate, the final product may indeed benefit from the multidisciplinary expertise of the ICL, the family consultant, a court child expert, any other relevant experts (such as the child’s therapist or counsellor) and submissions from the parties. In *Gaylard*, Altobelli FM expressed appreciation for the ‘thoughtful and thought provoking’ written submissions of the mother, the father and the ICL regarding his idea to write a letter to the children.<sup>294</sup> His Honour’s decision to write the letter was further informed by both expert evidence about the very concept of communicating the decision to the children and also the potential risks and benefits of doing so.<sup>295</sup> His Honour was also

<sup>291</sup> *D v D* (n 69) [4].

<sup>292</sup> *Ibid* [3].

<sup>293</sup> *Worrall* (n 3) [387]. See also at [37] (O’Brien J).

<sup>294</sup> *Gaylard* (n 1) [97]. See also at [94]–[96] (Altobelli FM).

<sup>295</sup> *Ibid* [4], [89]–[91], [93].

guided by the expert in deciding the age at which the children should have access to the letter.<sup>296</sup>

In *Worrall*, O'Brien J took into account the views of the child therapist and the court expert in determining whether an age-appropriate precis of the judgment should be produced.<sup>297</sup> Concluding that it should be, O'Brien J proposed that the precis be drafted by the ICL, discretionarily drawing on assistance from counsel and non-lawyers with social work or similar backgrounds as well as input from the father, the court expert and the child therapist in relation to the content and wording of the draft.<sup>298</sup> The draft precis would then be reviewed and finalised by his Honour.<sup>299</sup> In *Lavigne [No 2]*, Judge Harland 'conferred' with a court child expert about the content and language of the letter to the children.<sup>300</sup>

Beyond the judgment writing task itself, the principle of collaboration may involve a network of key persons working together to support the child's understanding of the decision and reasoning. This has manifested in various ways across the judgments written for children. In *Gaylard*, Altobelli FM's orders required the parents, when each child turned 14 years of age, to facilitate each child meeting with a counsellor or therapist who would read the letter with or to them.<sup>301</sup> Anticipating that the young person would have questions about the precis, O'Brien J in *Worrall* invited the young person to discuss it with her therapist: '[the therapist] is allowed to give you more information and show you some more stuff about Court if she thinks that is a good idea.'<sup>302</sup> His Honour also deferred to the child therapist about whether and when it would be appropriate to provide this precis to the young person and authorised the child therapist 'to consult with the [court expert] ... to the extent ... that would be helpful.'<sup>303</sup> In *Patrick*, Sheriff Anwar provided a draft letter to the expert clinical psychologist to 'ensure that the communication was age appropriate and would not cause the children further distress or alarm.'<sup>304</sup> Similarly, Judge Harland in

<sup>296</sup> *Ibid* [89], [92], [99]. See above Part V(C).

<sup>297</sup> *Worrall* (n 3) [385]–[386]. See also at [8], [37] (O'Brien J).

<sup>298</sup> *Ibid* [8], [37], [388]–[389].

<sup>299</sup> *Ibid* [389]. The parties were afforded the opportunity to make submissions in relation to the precis before it was finalised.

<sup>300</sup> *Lavigne [No 2]* (n 6) [123].

<sup>301</sup> *Gaylard* (n 1).

<sup>302</sup> *Worrall* (n 3) annex A [29].

<sup>303</sup> *Ibid* [387]. See also at [8], [37] (O'Brien J). See above Part V(C).

<sup>304</sup> *Patrick* (n 69) 129 [9]. See also at 129 [10] (Sheriff Anwar).

*Lavigne [No 2]* facilitated the children's ability to speak to a trusted adult about their feelings: 'You can talk to adults you trust about these issues and feelings, like your teachers and your counsellor whenever you want to.'<sup>305</sup>

These examples reinforce the argument that protecting and promoting children's right to participation is a collective, rather than merely judicial, responsibility. Collaboration between judicial officers and professionals can scaffold children's understanding of family law processes and outcomes.<sup>306</sup>

### E Principle 5: Closure

According to Chisholm, the pt VII legislative framework for determining post-separation parenting disputes 'does not fit the reality very well', for it 'presupposes a set of procedures directed towards and culminating in the trial, a single period of oral evidence and argument followed by a judgment; end of story'.<sup>307</sup> For children, however, the 'reality' is that a family court judgment is but a *chapter* of their story of change and adjustment following their parents' separation: 'the trial will be an important episode, but by no means the end of the story'.<sup>308</sup> As explained at Parts III(B)-(C) above, there is both academic and judicial recognition of the importance of judicial officers effectively communicating their decision and reasons to children in circumstances where children's express wishes have been rejected.<sup>309</sup> One justification for this practice is to ensure that the child understands that a court's lack of adherence to their views and wishes is not simply caused by their status as a child.<sup>310</sup> Another justification, which has significant implications for the child's future (including their wellbeing and capacity for resilience following their experience of parental separation), is that the child's ability to gain a sense of closure should be supported.<sup>311</sup>

In *Worrall*, O'Brien J proposed a creative and self-proclaimed 'unusual' mechanism through which the young person could have access to his Honour.<sup>312</sup> His Honour decided against meeting with the young person directly but

<sup>305</sup> *Lavigne [No 2]* (n 6) letter.

<sup>306</sup> See Taylor, Tapp and Henaghan (n 127) 80.

<sup>307</sup> See Chisholm (n 13) 213 (emphasis omitted). See also at 200, discussing *Family Law Act* (n 8).

<sup>308</sup> Chisholm (n 13) 213.

<sup>309</sup> See, eg, Barnes Macfarlane (n 60) 105.

<sup>310</sup> See *In Marriage of Harrison* (n 139) 199 (Baker J).

<sup>311</sup> See Smith, Taylor and Tapp (n 15) 204.

<sup>312</sup> *Worrall* (n 3) [391].

left the door open for the therapist, who would provide the precis to the young person, to request a meeting.<sup>313</sup> His Honour expressed commitment to ‘any reasonable step’ that had potential to enhance the ‘positive impact’ of the information being received by the young person.<sup>314</sup> This attempt to create a meaningful ‘feedback loop’ with the judicial officer, albeit through a third party, was underpinned by a concern to facilitate a degree of acceptance of, and closure from, the court’s decision. Indeed, the precis for the young person concluded with a message of hope that the court chapter of her ‘story’ was now complete:

All the people involved in helping your family at Court really hope that Court is now finished. ... They want you to have a great life, a wonderful future and to get on with being a teenager, while knowing that a final decision has been made. Even though you may not like some of the things said in this letter, the Judge hopes you can now understand things a bit better. He also hopes that you will learn to be okay with how things are for now and not have to worry about Court being a thing in your life anymore.<sup>315</sup>

In *Re A*, Peter Jackson J demonstrated a similar concern to impart a ‘right of reply’ following a decision that was contrary to the young person’s wishes.<sup>316</sup> The letter to Sam signed off by affording him the opportunity to write back: ‘if you want to reply to this letter, I know that your solicitor will make sure that your reply reaches me’.<sup>317</sup> A child may not wish to engage at all with the judicial officer who has written to them. Yet by equipping the child with information to form a view about the outcome and an avenue through which to express that view to the decision-maker, the child’s participation in the court proceedings concludes, thereby allowing the child to take a crucial step towards closure.

## VI CONCLUSION

This article has advocated for the practice of family law judicial officers writing judgments for children in proceedings under pt VII of the *Family Law Act*. The principles developed — the ‘five Cs’ of context, content, chronology, collaboration and closure — intend to inform and support the effective judicial

<sup>313</sup> Ibid [390]–[391].

<sup>314</sup> Ibid [391].

<sup>315</sup> Ibid annex A [30].

<sup>316</sup> See Barnes Macfarlane (n 60) 106.

<sup>317</sup> *Re A* (n 69) 330.

communication of family court decisions to children. Collectively, these principles serve as a ‘gateway’ to improving children’s access to justice, by enabling them to understand the court’s decision and reasoning.<sup>318</sup> The focus is timely, given the UN Committee on the Rights of the Child announcement that its 27<sup>th</sup> General Comment on children’s right to access justice and effective remedies will address ‘the procedural right[s] of children such as ... the right to be fully informed throughout the entire procedure ... including information on their rights and decisions that could affect them.’<sup>319</sup> It is also timely given the publication of *Writing to Children* by the President of the Family Division of the High Court of England and Wales, Sir Andrew McFarlane, in February 2025.<sup>320</sup> Developed with the Family Justice Young People’s Board, that publication serves as guidance for judges on when, how and why to write to children in family court proceedings, and it does so as a ‘first step’ to ‘promote discussion and support practice development’ and to encourage judicial learning.<sup>321</sup> Two limitations of writing judgments for children must be acknowledged. The first is that the practice may not be in a child’s best interests in every case. The principles presented in this article may assist in determining the threshold question of whether a judicial officer *should* write a judgment for the child or children in proceedings under pt VII of the *Family Law Act*. The second limitation concerns the role of judgments for children in the process of children’s participation. Without children’s meaningful participation in proceedings, judgments seemingly written ‘for’ them may evoke understandable scepticism that judicial attempts to reflect children’s lived experiences, views and wishes in the

<sup>318</sup> See Stalford, Cairns and Marshall (n 16) 208.

<sup>319</sup> Committee on the Rights of the Child, *Concept Note: General Comment on Children’s Rights to Access to Justice and Effective Remedies* (Note) 2 [13] <<https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/gcomments/gc27/gc27-concept-note.pdf>>, archived at <<https://perma.cc/RNM3-UNSG>>; Committee on the Rights of the Child, *Summary Record (Partial) of the 2786<sup>th</sup> Meeting*, 95<sup>th</sup> sess, 2786<sup>th</sup> mtg, UN Doc CRC/C/SR.2786 (7 February 2024) 2 [5].

<sup>320</sup> President of the Family Division (UK) and Family Justice Young People’s Board, *Writing to Children: A Toolkit for Judges* (Toolkit, February 2025) 1–2 <<https://www.judiciary.uk/wp-content/uploads/2025/02/Writing-to-Children--A-Judges-Toolkit-V1.7-1.pdf>>, archived at <<https://perma.cc/7AMJ-8X5K>>. See generally, ‘President of the Family Division’, *Courts and Tribunals Judiciary* (Web Page) <<https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judges/profile-pfd/>>, archived at <<https://perma.cc/3XMT-KD4D>>; ‘The Family Division and the Family Court’, *Courts and Tribunals Judiciary* (Web Page) <<https://www.judiciary.uk/courts-and-tribunals/family-law-courts/family-division-and-family-court/>>, archived at <<https://perma.cc/8AQV-UHAW>>.

<sup>321</sup> President of the Family Division (UK) and Family Justice Young People’s Board (n 320) 20. See also at 1–2.

judgment are disingenuous, 'inauthentic' or 'tokenistic'.<sup>322</sup> The task of effective judicial communication must be 'more than a superficial exercise in rebranding' or simplifying language and judgment length.<sup>323</sup> Indeed, when participation is understood as 'a fluid process, rather than a singular event', the task requires genuine engagement with children and their views at *all* stages of the judicial decision-making process; this engagement will be reflected in the judgment as the final product of that process.<sup>324</sup>

Notwithstanding the policy emphasis on children's participatory rights in Australian family law, this article has not been so ambitious as to propose that the practice of writing judgments for children should be translated into a legislative obligation.<sup>325</sup> Yet by challenging 'conventional thinking about children's participation',<sup>326</sup> it is hoped that this article may encourage judicial officers to attempt this 'innovation in judicial writing' in proceedings under pt VII of the *Family Law Act*.<sup>327</sup> For as Altobelli FM recognised in *Gaylard*:

<sup>322</sup> Stalford and Hollingsworth, 'This Case Is about You' (n 9) 1050.

<sup>323</sup> *Ibid* 1057.

<sup>324</sup> See Dimopoulos, *Decisional Privacy* (n 8) 65; Chisholm (n 13) 213.

<sup>325</sup> See above Part II(A). Relevantly, there are obligations to communicate court outcomes and reasons in state and territory child protection and youth justice legislation: see, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 10(1)(e) ('NSW Children Act'); *Children (Criminal Proceedings) Act 1987* (NSW) s 12(3)(b); *Care and Protection of Children Act 2007* (NT) s 11(a)(i); *Children, Young Persons and Their Families Act 1997* (Tas) s 10F(a); *Children, Youth and Families Act 2005* (Vic) ss 522(1), 527(1) ('Vic Children Act'); *Children and Community Services Act 2004* (WA) s 10(1)(e). Two especially illustrative examples are s 10(1)(e) of the *NSW Children Act* (n 325), which requires the Secretary of the Department of Communities and Justice, defined in s 3 (definitions of 'Secretary' and 'Department'), to provide the child or young person with 'information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision', and s 527(1) of the *Vic Children Act* (n 325), which requires the court to explain the meaning and effect of any order made 'as plainly and simply as possible and in a way which it considers the child ... will understand'. However, research into children's participation in multiple jurisdictions in Australia has exposed a disjunct between law and policy on the one hand and practice on the other: see Cashmore, Kong and McLaine (n 20) 3, discussing *NSW Children Act* (n 325); Briony Horsfall, 'Children's Participation Rights during Child Protection Proceedings: Recognition, Legal Representation, and the Redistribution of Care in Victoria's Children's Court' (PhD Thesis, Swinburne University of Technology, January 2016) 257–8, discussing *Vic Children Act* (n 325); Patrick Parkinson, 'The Child Participation Principle in Child Protection Law in New South Wales' (2001) 9(3) *International Journal of Children's Rights* 259, discussing *NSW Children Act* (n 325). In Cashmore, Kong and McLaine (n 20) it is specifically argued that 'in practice, it is very unclear how well these provisions are met and how well they result in children being heard and their views considered': at 3, discussing *NSW Children Act* (n 325).

<sup>326</sup> See *Gaylard* (n 1) [86] (Altobelli FM).

<sup>327</sup> See Hollingsworth and Stalford, 'Children's Rights Judgments' (n 4) 83; Mortimer (n 4) 292.

If [children's] right to be heard in proceedings relating to them is conceptualised into the perhaps more general right to participate in these proceedings, arguably the final act of participation will not occur until they have read and understood these reasons.<sup>328</sup>

<sup>328</sup> *Gaylard* (n 1) [86].