

# **The Child's Right to Representation of Article 12 UNCRC in Family Law Proceedings:**

A comparison and evaluation of the legal frameworks in  
Australia, France, the Netherlands and South Africa



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## List of Abbreviations

AFLA	Australian Family Law Act 1975
AHA	Ad hoc administrator [France; <i>administrateur ad hoc</i> ]
Art.	Article
AU	Australia
CAL	Curator ad litem [South Africa]
CCPA (NSW)	Children and Young Persons (Care and Protection) Act 1998 (NSW)
CL	Children's lawyer [France; <i>avocat d'enfant</i> ]
DCC	Dutch Civil Code [ <i>Burgerlijk Wetboek</i> ]
DCCP	Dutch Code of Civil Procedure [ <i>Wetboek van Burgerlijke Rechtsvordering</i> ]
DLR	Direct legal representative [New South Wales, Australia]
FA	Family advocate
FamR	Family report
FCC	French Civil Code [ <i>Code Civil</i> ]
FCCP	French Code of Civil Procedure [ <i>Code de procédure civile</i> ]
FCPC	French Code of Criminal Procedure [ <i>Code de procédure pénale</i> ]
FR	France
FGAL	Filiation guardian ad litem [The Netherlands; <i>bijzondere curator ex. Art. 1:212 DCC</i> ]
GGAL	General guardian ad litem [The Netherlands; <i>bijzondere curator ex. Art. 1:250 DCC</i> ]
GAL	Guardian ad litem [New South Wales, Australia]
ICL	Independent children's lawyer [Australia]
ILR	Independent legal representative [New South Wales, Australia]
JM	Judicial Meetings
LOVF	<i>Landelijk Overleg Vakinhoud Familie- en Jeugdrecht</i> (the National Consultations on Family and Child Law matters)
LR	Legal representative [South Africa]
NL	The Netherlands
NSW	New South Wales, Australia
S.	Section
SA	South Africa
SACA	South African Children's Act 2005
UK	United Kingdom
UNCRC	United Nations Convention on the Rights of the Child
WR	Welfare report

# 1. Introduction

*'Children should be seen and not heard' – Victorian proverb*

In Victorian times, when children were seen as property, the maxim that children should be silent was promoted.<sup>1</sup> In modern times this maxim has been turned on its head, by ending children's silence and stimulating – if not requiring – adults to hear children. While children have gradually been recognized as legal subjects, not objects, Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) has served as the real catalyst for change regarding children's right to be heard.<sup>2</sup> Article 12 determines that children should be provided the opportunity to express their views in all matters concerning them and that these views should be given due weight. More specifically, in paragraph 2 of the article, the child's right to be heard, whether directly or through a representative, in any judicial and administrative proceedings affecting the child is safeguarded.

Family law proceedings are the most common judicial proceedings concerning children. Family law proceedings concern, for example, custody following the separation of parents, matters of filiation, or child protection cases. They are not only the most common judicial proceedings concerning children, but they also have a profound impact on a child's life. As emphasized by Baroness Hale, Justice of the UK Supreme Court, in many family law proceedings it is vital that courts do not lose sight of the fact that it is ultimately the child's future that is being decided upon.<sup>3</sup> When a child and its future is at the center of proceedings, it is necessary to take into account his or her views. Especially because existing psychological research has revealed the developmental and practical benefits of letting children participate in family law proceedings.<sup>4</sup>

The question is, how can or should children participate in family law proceedings? The UNCRC leaves a great deal of discretion as to how the right to participation should be given shape nationally. However, the Committee on the Rights of the Child has given some guidance. Amongst others, the child should be able to choose how he or she wants to be heard, directly or through a representative, if at all.<sup>5</sup> With regards to representatives, the Committee notes that it can be the parent(s), a lawyer or another person. However, there is often the risk that there is a conflict between the child and the most obvious representative, the parent(s), and thus another form of representation might be required.<sup>6</sup> According to the Committee the representative should have sufficient knowledge and experience in working with children in legal proceedings and should exclusively represent the interests of the child and not those of other persons.<sup>7</sup> Besides these remarks, it remains open to national discretion how representation for children in judicial proceedings is set up. While children

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<sup>1</sup> Fortin 2005, p. 11.

<sup>2</sup> Parkes 2013, p. 91.

<sup>3</sup> Hale 2006 as cited by Parkes 2013, p. 90.

<sup>4</sup> See, for example, Ballard et al. 2014; and Parkinson & Cashmore 2008.

<sup>5</sup> UNCRC General Comment No. 12 2009, para. 35.

<sup>6</sup> UNCRC General Comment No. 12 2009, para. 36.

<sup>7</sup> UNCRC General Comment No. 12 2009, para. 36 and 37.

have the right to be heard, they remain dependent on adults, as parents, judges and lawmakers, as to whether and how they can be heard or represented.<sup>8</sup>

### **Children's right to representation**

The topic of this research is children's right to representation in family law proceedings. Representation is one of the forms of child participation. In the following, the choice for the topic of child representation will be explained.

Children's right to be heard and to have a representative has become widely accepted, in part due to the UNCRC, but also on the regional level the child's right to participate has been gaining traction.<sup>9</sup> Therefore, the discussion on how children should be able to participate in family law proceedings is thriving around the world. Because 'there is a world of difference' between having the child speak to the judge individually, having the child's views represented by a third party, or having the child represented by a lawyer directly, a core question concerns the forms of participation.<sup>10</sup> In legal proceedings children can participate in a variety of ways, for example by speaking with the judge directly in a judicial meeting. In general, participation in family law proceedings can very roughly be separated into four forms: children's litigation on their own behalf, judicial meetings, best-interests representation, and separate legal representation.<sup>11</sup>

This research focuses on the latter two representation forms of participation. There are four main reasons why the representation forms are the most interesting forms of participation to study. The first two reasons concern the UNCRC. As discussed above, Article 12 explicitly mentions representation as a means for the child to express his or her views. Representation can be a very suitable means because it can mitigate the fears of placing children in a burdensome position in family law proceedings.<sup>12</sup> Secondly, it also plays into the UNCRC's aim of having 'an equilibrium between respecting children as human persons and not abandoning them to their autonomy at too early a stage'.<sup>13</sup> Children are not yet adults, they are still gradually acquiring autonomy, capabilities and competences and must therefore to some extent be protected. The third reason to focus on representation is because existing research in social sciences has shown the beneficial effects of providing children with a representative.<sup>14</sup> In proceedings where a child's life is profoundly affected,

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<sup>8</sup> Daly 2016, p. 2; and Lundy 2007, p. 920.

<sup>9</sup> On the African regional level: African Charter on the Rights and Welfare of the Child (ACRWC), adopted July 1990 (entered into force 29 November 1999) OAU Doc.CAB/LEG/24.9/49 (1990). On the European level: European Convention on the Exercise of Children's Rights 1996, ETS No. 160 and the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), CM/Del/Dec(2010)1098/10.2abc-app6. On the EU level: Art. 24 of the Charter of Fundamental Rights of the European Union.

<sup>10</sup> Sutherland 2012, p. 28.

<sup>11</sup> These are the generally sketched four levels of participation as can be found in literature. See, amongst others, Daly 2016; Fernando 2013; Koh Peters 2005; Parkes 2013; and Parkinson & Cashmore 2008.

<sup>12</sup> Sutherland 2012, p. 28.

<sup>13</sup> Lücker-Babel 1995, p. 404.

<sup>14</sup> See, for example, Ballard et al. 2014; Birnbaum & Bala 2009; Cashmore 2011; Tisdall et al. 2004; and Tisdall & Morrison 2012.

a child's representative can function as their friend or their champion.<sup>15</sup> The representative can actively ensure that the parents and judge are aware of and understand the child's view. Finally, the choice to focus on representation is made because consensus on the topic is still far-sought. The discussion regarding whether or not to have children's representatives and if so, what the form, function, tasks and other specifics should be, is taking place in the Netherlands,<sup>16</sup> but is also the subject of lively debate in many other jurisdictions.<sup>17</sup>

### **Aim of this research**

This exploratory research aims to contribute to the current academic and political debate through a comparative legal overview and evaluation in light of Article 12 UNCRC. As the evaluative framework, Article 12 of the UNCRC forms a core aspect of this research. The UNCRC is one of the many international instruments which does not aim for the harmonization of law, but promotes and imposes common human rights standards.<sup>18</sup> These human rights standards ought to be complied with in all areas of national law. As Krause remarked, because UN treaties recognize individual rights in abstract terms, they have a 'significant impact in encouraging commonalities in family law principles across national boundaries'.<sup>19</sup> More specifically, the ratification of the UNCRC starting in the 1990s stimulated the creation and implementation of formal mechanisms for children's representation in many jurisdictions.<sup>20</sup> Therefore, this research departs from the hypothesis that the child's right to be heard, according to Article 12 UNCRC also through a representative, has led to a convergence in the national family and procedural laws of jurisdictions in providing children with a representative in family law proceedings.<sup>21</sup>

However, the research also departs from the understanding that Article 12 UNCRC leaves some leeway as to how States Parties implement the international human rights standard.<sup>22</sup> The content of the rights contained in the UNCRC are *minimum* human rights standards. Minimum in the sense that States may provide more advantageous rights to children. States are given a margin of discretion in how they implement these rights, but the minimum standard must be provided. Therefore, this research aims to see to what extent the legal framework in four jurisdictions, all similarities and differences included, comply with the minimum standard provided by Article 12 UNCRC and to study how the jurisdictions have colored in the (relatively) open framework.

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<sup>15</sup> Hale 2011, p. 3.

<sup>16</sup> See, for example, De Graaf & Limbeek 2011; Kentie & Hendriks 2013; Pieters 2012; and van Teeffelen 2008.

<sup>17</sup> See, for example, Atwood 2011; Bala, Birnbaum & Bertrand 2013; Elrod 2007; and Tisdall et al. 2004.

<sup>18</sup> Sutherland 2012, p. 10.

<sup>19</sup> Krause 2006, p. 1099.

<sup>20</sup> Bilson & White 2005, p. 222.

<sup>21</sup> This hypothesis is in line with the trend that Nicola describes: 'With the rise of international human rights conventions addressing the family [...], lawyers are increasingly addressing the convergence of family law regimes through the language of universal and individual rights.' See, Nicola 2010, p. 805.

<sup>22</sup> Parkes 2013, p. 255.

This research also aims to conduct novel research to add to the existing body of knowledge on this topic. There is a clear ‘Anglocentric focus in much of the international literature’<sup>23</sup> as most comparative articles focus on common law jurisdictions, especially the United Kingdom, Australia, New Zealand, Canada and the United States. This research will include civil law and mixed jurisdictions, to see what similarities and differences exist and whether common law, civil law and mixed jurisdictions can learn from one another.

Besides expanding the geographical scope, this research also expands the scope with regards to the areas of family law proceedings. Existing comparative work is more limited, focusing only on the representation of children in specific types of family law proceedings, for example in custody cases or child protection cases.<sup>24</sup> This research has a broader scope, including all family law proceedings. While ‘what should be considered as ‘family law’ is highly debated’,<sup>25</sup> in this research ‘family law proceedings’ are understood to include proceedings on horizontal and vertical family relations and both proceedings of a ‘private’ as well as ‘public’ nature, as the distinction between private and public law varies per jurisdiction. More specifically, as the topic concerns contentious family law proceedings concerning children, these are proceedings on the matters of: custody, parental authority, contact and access, maintenance, parentage, adoption, child protection, (temporary or alternative) care, and international child abduction. Succession law and property law relating to children are left out of the picture. An all-round understanding of how children are represented in all sorts of family law proceedings allows for a combined evaluation as to whether the standard in Article 12 UNCRC is complied with.

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<sup>23</sup> Bilson & White 2005, p. 223.

<sup>24</sup> For example, an international comparison only for public law cases: Bilson & White 2005; or the comparison only for custody cases following divorce: Rešetar & Emery 2008.

<sup>25</sup> Scherpe 2016, p. ix.

## 1.1. Research Questions

The main research question to be answered is: To what extent is the minimum international human rights law standard for child representation provided by Article 12 UNCRC complied with by the legal framework for family law proceedings in four jurisdictions?

To answer the main research question the following five sub-questions have been formulated:

1. What is the protected minimum standard of the child's right to representation in family law proceedings in the UN Convention on the Rights of the Child?

The first sub-question addresses the international human rights framework in the UN Convention on the Rights of the Child. The sub-question outlines the evaluative criteria for the main research question. The thesis will commence with a chapter devoted to this sub-question, addressing what Article 12 UNCRC provides for, how it should be understood and what its relationship is to other rights protected in the UNCRC.

This sub-question will primarily be answered using primary sources, such as the Convention text, the General Comments of the Committee on the Rights of the Child, and the Reports of the Working Group when drafting the Convention. The primary sources will be supplemented by secondary sources, e.g. legal explanatory texts on the UNCRC.

2. What forms of representation are available for children in family law proceedings in the different jurisdictions and how are they regulated?
3. What is the task of the child's representative in family law proceedings in the different jurisdictions?

The second and third sub-questions divide the subject of child representation into smaller parts to allow for a uniform comparison, this is also known as the Cartesian method.<sup>26</sup> The extended answers to these sub-questions, which form the basis for the comparative chapter, will be included per jurisdiction in the annexes to allow for a more compact comparison.

The two sub-questions concern the manner in which states regulate the representation of children in family law proceedings. The questions focus on the "five Ws" regarding child representation: who, what, when, where and why? Both sub-questions cover the main points of discussion in academic and political debates.<sup>27</sup>

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<sup>26</sup> Boele-Woelki 2008, p. 7.

<sup>27</sup> See for example, Australian Law Reform Commission 1997; Bilson & White 2005; Daly 2016, p. 5-6; and Pathways for Children 2004.

2. What forms of representation are available for children in family law proceedings in the different jurisdictions and how are they regulated?
  - a. When were the forms of representation introduced or amended?
  - b. In which types of cases can children be represented in family law proceedings in the different jurisdictions?
  - c. When can children be represented in family law proceedings?
  - d. What requirements are set for the children, e.g. age, level of maturity?
  - e. What other requirements are applied, e.g. conflict of views between child and parents?
  - f. Who decides whether the child will be represented?
  - g. How is the child's representative financed?

In sub-question two the available forms of representation and the manner in which they are regulated are studied. Question 2(a) looks at the historical development of the forms of representation. This sub-question informs the comparison and analysis, to allow for an explanation of differences and similarities and to determine the impact of the UNCRC in domestic laws. Question 2(b) is the elaboration of the decision not to limit the scope of the research to a specific type of family law proceeding. As previously discussed, this decision was made because comparative research on how the forms of representation are available in different types of family law proceedings is lacking. When discussing and evaluating the ways in which children can be represented in family law proceedings it is important to research the complete picture, to be able to determine whether differences are made between types of family law proceedings, and if so, why these differences have been made and whether it is reasonable to do so in relation to Article 12 UNCRC. Questions 2(c), (d), (e), (f), and (g) are questions which are often raised in the academic debates.<sup>28</sup>

3. What is the task of the child's representative in family law proceedings in the different jurisdictions?
  - a. What are the function requirements for the child's representative?
  - b. How should the child's representative complete their task?
  - c. Is the child representative the only option to be heard, are other options available and can they be complementary?

Sub-question three goes into the task of the different children's representatives, also looking at the function requirements of the child representative and how they are to execute their task. What the task of the child representative is or ought to be is one of the main points of discussion in the academic

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<sup>28</sup> See, for example, Bilson & White 2005; Daly 2016, p. 5-6; Ross 2013b, p. 333; and van Teeffelen 2008.

debate and therefore requires a sub-question.<sup>29</sup> Question 3(c) is included to mitigate the decision to limit the scope of the research to representation of children, as described above, for four main reasons. The additional, more practical, reason is that it would be too extensive to map out all the different ways in which children can be heard in four jurisdictions. As this limitation creates the risk of overlooking the grey area of ‘almost’ representation, question 3(c) not only addresses whether the forms of representation can be complementary, but also briefly what the other options for children to be heard are in the four jurisdictions.

Both sub-questions will be answered through the use of primary sources of law, including legislation and – for the common law and mixed jurisdictions – leading case-law, primary sources of legislative history for sub-question 2(a), as well as primary sources such as guidelines on legal aid or the functioning of the representative. This will be combined with secondary sources to ensure a correct understanding of the foreign law.

4. What are the similarities and differences between the jurisdictions with regards to sub-questions 2 and 3 and how can they be explained?

Sub-question four is the comparison, bringing together all the information collected through sub-questions two and three. The comparison will form the third chapter of this research. The comparison will be presented simultaneously per theme and the similarities and differences between jurisdictions will be discussed. At the same time an effort will be made to provide an explanation for these similarities and differences, by also looking at the historical developments in the jurisdictions and the effects of the UNCRC.

5. To what extent do the legal frameworks of the forms of representation in the four jurisdictions comply with the minimum international human rights law standard provided in Article 12 UNCRC?

The fifth sub-question analyses the comparison made in sub-question four and evaluates to what extent the differences and similarities in regulating child representation comply with the minimum human rights standard in Article 12 UNCRC and how the leeway afforded by the standard is filled in. This evaluation will be included within the third chapter, combining the comparison and the evaluation to avoid unnecessary repetition. The third chapter will be followed by the fourth chapter consisting of a summary and conclusion. The main sources for this evaluation will be what has previously been covered in the discussion on Article 12 UNCRC and in the comparison. In addition,

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<sup>29</sup> See, for example, Atwood 2011; Bala, Birnbaum & Bertrand 2013; Bilson & White 2005; Elrod 2007; Strutz & Verhagen 2015; and Taylor et al. 2012.

some other sources will also be referred to, such as the concluding observations of the Committee on the Rights of the Child to the periodic reports of the included jurisdictions and secondary sources.

## 1.2. Methodology

The goal of this research, to compare the ways in which a children's representation in family law proceedings can be given form and to evaluate the conformity thereof with the norms of Article 12 UNCRC, denotes the use of the comparative legal method. According to Glenn, comparative law can have four aims: (i) the general scientific goals of increasing knowledge and better understanding law, (ii) the evolutionary aim of establishing a taxonomy, and finally the pragmatic and utilitarian aims of (iii) contributing to better knowledge of the national law and thus to law reform and (iv) the regional or international harmonization of law.<sup>30</sup> The aim of this research falls within three of these categories. Firstly, this research aims to increase knowledge in a field which has been dominated by international literature on the common law jurisdictions by taking into account a wide range of jurisdictions. Secondly, this research can contribute to law reform in various jurisdictions as it looks at how other jurisdictions have addressed child representation. According to Sutherland, this aim of comparative research 'provides an opportunity to be critically selective' as to the methods used in foreign jurisdictions.<sup>31</sup> This research aims to provide suggestions for national law reform in light of the leeway provided by the human rights standard of Article 12 UNCRC. However, it cannot provide empirically tested suggestions for law reform, as that would require further research. Finally, while this research does not formally aim to harmonize the law, it does aim to examine the effect of international human rights law in how jurisdictions have given form to the child's right to be heard through a representative in family law proceedings and whether this has led to convergence amongst these jurisdictions. The research will also look at whether this convergence can further help clarify the human rights standard in Article 12 UNCRC or if the differences require further guidance by the Committee on the Rights of the Child.

Within the comparative law methodology, a plurality of approaches exists.<sup>32</sup> The so-called functional-institutional approach will be used in this research. The functional-institutional approach, introduced by Öricü, answers the question 'Which institution in system B performs an equivalent function to the one under survey in system A?'.<sup>33</sup> In this approach the legal institution forms the starting point of the comparison, instead of, for example, a specific problem in the problem-solving approach.<sup>34</sup> The functional-institutional approach fits best with the goal of this research as the child's representative, in the broad sense, is the institution that will be compared in all the chosen jurisdictions.

Due to the choice for the functional-institutional method, the *tertium comparationis*, the object to be compared, is the institution with the similar function.<sup>35</sup> Therefore, the *tertium comparationis* will be the legal institutions which function as a form of child representation in family

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<sup>30</sup> Glenn 2012.

<sup>31</sup> Sutherland 2012, p. 2.

<sup>32</sup> Oderkerk 2015, p. 590-591.

<sup>33</sup> Öricü 2007, p. 33.

<sup>34</sup> Oderkerk 2015, p. 612.

<sup>35</sup> Oderkerk 2015, p. 610.

law proceedings. With this *tertium comparationis*, the research will be a micro-level comparison as it focuses on one form of legal institution within the legal systems.<sup>36</sup>

The object to be compared, the ‘child representatives’, need not be named the same in the different jurisdictions. Firstly, due to the issue of translation<sup>37</sup> and secondly, because there is no universally accepted definition of what constitutes a child representative or guardian ad litem<sup>38</sup> and there are many different terms used to refer to similar institutions, e.g. independent children’s lawyer.<sup>39</sup>

### 1.2.1. Choice of Jurisdictions

Perhaps the most important decision made within comparative research is the choice of jurisdictions to be compared. In principle, as a starting point all jurisdictions in the world are eligible for selection.<sup>40</sup> A selection must be based on the aim and topic of the research and must be in line with the methodological choices with regards to the approach and the *tertium comparationis*.<sup>41</sup> The aim of evaluating the conformity of child representation forms with Article 12 UNCRC already excludes one country, the United States, as it is the only country in the world that has not ratified the UNCRC.<sup>42</sup> The functional-institutional approach and the *tertium comparationis* in this research require the jurisdictions selected to have a form of child representatives in family law proceedings. Thus, for the selection only jurisdictions with at least one form of child representative have been chosen.<sup>43</sup> The form of child representative and the family law proceedings in which they operate have been taken in the broadest sense of the words.

The second selection guideline was to include jurisdictions from different legal-technical traditions,<sup>44</sup> to add to the existing body of research by shifting away from a complete ‘Anglocentric focus’. At first the selection of jurisdictions was more extensive: Canada, Chile, England & Wales and Scotland were also included. However, due to time constraints and the (in part, unforeseen) complexity of the topic a more restricted selection had to be made. The choice for Australia as the common law jurisdiction was made because it is known for its well-developed child participation regime.<sup>45</sup> The final selection includes one common law jurisdiction, two civil law jurisdictions and one jurisdiction with a mixed legal system. The selection was also made to include jurisdictions from different parts of the world, including two European jurisdictions, one African jurisdiction, and one

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<sup>36</sup> Örucü 2007, p. 31.

<sup>37</sup> Oderkerk 2015, p. 616.

<sup>38</sup> Bilson & White 2005, p. 223; and Parkes 2013, p. 99.

<sup>39</sup> Parkinson & Cashmore 2008, p. 49.

<sup>40</sup> Oderkerk 2001, p. 295-298.

<sup>41</sup> Oderkerk 2015, p. 603-605.

<sup>42</sup> The United States of America is the only nation in the world that has not ratified the UNCRC, both Somalia and South-Sudan, have ratified the Convention in 2015, making the UNCRC an almost universal treaty.

<sup>43</sup> As a starting point the international research of Koh Peters (2005) was used to determine which jurisdictions had representation for children in family law proceedings.

<sup>44</sup> De Boer 1992, p. 43.

<sup>45</sup> Barrie 2013; and Parkinson & Cashmore 2008.

Oceanian jurisdiction. Due to the personal language skills of the researcher and the available time and sources, the selection does not include any Asian, South American, North-American or Middle-Eastern countries.

The final selection thus includes four jurisdictions with forms of child representatives – see Table 1 below. With regards to one of these jurisdictions, Australia, a specific state has been selected. This selection is required as Australia is a federation, with a division of power between the federal legislature and the state and territory legislatures. In Australia, family law is federal law, so for a large part this research concerns all the states and territories.<sup>46</sup> However, each state and territory has its own child protection and adoption legislation, although they all provide for the child’s view to be heard.<sup>47</sup> Therefore, the state jurisdiction of New South Wales, the most populous state, will be taken as the example. South Africa, the Netherlands, and France are unitary states. This means that although each of these countries have local governments in their respective provinces, departments and/or municipalities, they are not federations. Thus, in all three jurisdictions family law is a matter for the national legislature.

Table 1: Final selection of jurisdictions for comparison

Jurisdiction	Type of legal system	Form of Child Representation
<b>Australia (New South Wales)</b>	Common law	Federal: Independent children’s lawyer NSW: Independent legal representative, direct legal representative & Guardian ad Litem
<b>France</b>	Civil law	Ad hoc administrator ( <i>Administrateur ad hoc</i> ) & Children’s lawyer ( <i>avocat d’enfant</i> )
<b>The Netherlands</b>	Civil law	General and Filiation guardian ad litem ( <i>Bijzondere curator</i> ) & separate legal representation
<b>South Africa</b>	Mixed legal system	Legal representative & Curator ad litem

### 1.2.2. Sources

A wide array of sources will be used in this comparative research, as discussed above per sub-question. With regards to the methodology, a potential validity threat regarding the sources is the issue of language. I can read the sources in the original language easily for most jurisdictions, for some other jurisdictions I am also sufficiently capable of reading the language (French) to make use of primary sources. In addition, enough source material is available to me in other languages allowing me to be able to check the correctness of the claims made in the sources.<sup>48</sup> Therefore, the falsifiability of the claims is protected.

This research is exploratory and limited to the law in the books in order to be able to describe how child representation is regulated. Although these sources may suffice to discuss how it is regulated,<sup>49</sup> no conclusions can be drawn with regards to which regulation works best. The child

<sup>46</sup> See Section 51(xxi) and (xxii) of the Constitution of Australia.

<sup>47</sup> Shackel 2016, p. 47.

<sup>48</sup> De Boer 1992, p. 46.

<sup>49</sup> Oderkerk 2015, p. 616.

representative may look very promising on paper, but not function at all in practice. I hope to be able to further empirically investigate one or two of the forms of child representation abroad in follow-up doctoral research. In light thereof, this research aims to make the first step, by evaluating how child representation is regulated in jurisdictions across the world in light of Article 12 UNCRC, and not to determine a 'better law', because an evaluation of the law in action will not be made.

### 1.3. Terminology

The core subject of this research is representation for the child, which falls within the ambit of child participation and the child's right to be heard. The right to be heard which is referred to as concerning the child's 'views' in the text of Article 12 UNCRC, but is also referred to as concerning the child's 'voice', 'wishes' or 'opinions', terms which had been used in previous iterations.<sup>50</sup> Various terms are used, often interchangeably, without taking into account the nuanced differences and without clarifying what is understood under the term, e.g. 'the right to be heard' and 'the right to participate'.<sup>51</sup> In this section, a few brief remarks will be made with regards to the terminology in this research.

The use of various shorter and interchangeable terms to convey the content of Article 12 UNCRC has been strongly criticized by Lundy. Although she recognizes that it is more convenient and catchy to use other terms to refer to the child's right to express his or her own views freely and for those views to be given due weight,<sup>52</sup> she highlights the potential dangers of doing so. Firstly, that substitutes potentially weaken the impact of the right by incorrectly summarizing what the content of the right is.<sup>53</sup> Secondly, the shortened versions, e.g. 'the right to be heard' or 'the voice of the child', weaken the impact of the right because they only concern specific individual aspects of Article 12 UNCRC and not the right as a whole. Both of these dangers lead to an even greater danger, that the popularity of the shorter terms can overshadow the – perhaps less popular – changes which need to be achieved in order to correctly implement the right of Article 12 UNCRC.<sup>54</sup> To address this problem, Lundy does not argue for the consistent use of the phrase 'the child's right to express his or her own views freely' or to get rid of all the shorter popular terms and phrases in circulation, but instead proposes a model to conceptualize Article 12 UNCRC. While this model is compelling, the four interconnected factors of which it consists (Space, Voice, Audience and Influence) do not provide new short, catchy, and convenient terms or phrases which are immediately understandable in texts. As the Committee on the Rights of the Child itself, as well as a multitude of other organizations use the shorter phrases in all variations to refer to Article 12 UNCRC, it appears a necessary risk to take until a suitable user-friendly replacement is found.

The term 'participation' is frequently used in the debate on how to understand and implement Article 12 UNCRC.<sup>55</sup> This is curious, because the term itself does not appear in the text of Article 12.<sup>56</sup> The Committee also drew attention to this fact in the General Comment on Article 12, noting that the implementation of Article 12 'has been broadly conceptualized as participation' and that the

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<sup>50</sup> Sutherland 2013, p. 342.

<sup>51</sup> Cashmore 2011, p. 515.

<sup>52</sup> Lundy 2007, p. 930 and 933.

<sup>53</sup> Lundy 2007, p. 930.

<sup>54</sup> Lundy 2007, p. 931-933.

<sup>55</sup> See, for example, Cleophas & Assim 2015; Hale 2006; Kaufman & Flekkoy 1998; Lowe & Murch 2001; Morag, Rivkin & Sorek 2012; Pérez Manrique 2007; Smits 2015; Taylor, Tapp & Henaghan 2007; Taylor et al. 2012; Tisdall & Morrison 2012; and Tisdall et al. 2004.

<sup>56</sup> Krappmann 2010, p. 501.

term ‘participation’ is ‘now widely used’.<sup>57</sup> The term ‘participation’ is, according to Milne, a ‘buzzword’ which is vague as it captures ‘both everything and nothing’.<sup>58</sup> On a more positive note, various authors have noted that ‘participation’ is a ‘multi-faceted concept’<sup>59</sup> or a ‘container concept’,<sup>60</sup> and is potentially much broader than the right provided for in Article 12 UNCRC.<sup>61</sup> In any case, one can conclude that it is a comprehensive and complex term, as Herbots and Put pose it is ‘not easily encapsulated by a single definition’.<sup>62</sup> However, they themselves are one of the various academics who have critically examined the term ‘participation’ to form a ladder,<sup>63</sup> disc,<sup>64</sup> or other model of participation.<sup>65</sup>

While these models will not be discussed in this research, it is interesting to note that most focus on participation in the sense of democratic participation in communities, not on participation of children individually in legal proceedings. Hart’s ladder was based on a citizenship model and applies best to (community) projects,<sup>66</sup> Treseder’s and Shier’s models were both geared to organizations aiming to work with or already working with children,<sup>67</sup> Thomas’ theory only concerns collective decision-making,<sup>68</sup> and Lundy’s model was developed in the context of education.<sup>69</sup> This shows how the term ‘participation’ has, to a certain extent, been appropriated by the discussions on children’s citizenship and their role in public life. However, participation not only applies to community decision-making, but also to individual decision-making on the level of the child,<sup>70</sup> e.g. in family law proceedings. This is also acknowledged and included in the participation disc proposed by Herbots and Put. One of the four components of their disc is ‘the context of participation’.<sup>71</sup> The disc differentiates between the social level at which the participation is to take place, e.g. whether at the micro system level of the family or the macro system level of the community, as well as between private or public topics concerning the child.<sup>72</sup> The meaning designated to ‘participation’ by the Committee also does not focus on one topic or level of participation. Instead, ‘participation’ is understood to: ‘describe ongoing processes, which include information-sharing and dialogue between

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<sup>57</sup> UNCRC General Comment No. 12 2009, para. 3.

<sup>58</sup> Milne 2015, p. 88.

<sup>59</sup> Sutherland 2013, p. 354.

<sup>60</sup> Herbots & Put 2015, p. 166.

<sup>61</sup> Parkes 2013, p. 15.

<sup>62</sup> Herbots & Put 2015, p. 156.

<sup>63</sup> Based on Arnstein’s ladder of citizen participation, Hart’s ladder of child participation is perhaps the most well-known model of participation (Hart 1992, see p. 8 for a figure of the ladder). This ladder has been further adopted and redesigned by, amongst others, Treseder (1997). See also, Parkes 2013, p. 16-20.

<sup>64</sup> Herbots & Put 2015, see p. 167 for a figure of their participation disc.

<sup>65</sup> Other models include Shier’s model (Shier 2001, see p. 111 for a figure), Thomas’ theory (Thomas 2007) or Lundy’s model of child participation (Lundy 2007, see p. 932 for a figure of the model).

<sup>66</sup> Hart 1992. See also Black 1994, p. 29 in which this was seen as a limit to Hart’s ladder.

<sup>67</sup> Treseder 1997; and Shier 2001.

<sup>68</sup> Thomas 2007, p. 199.

<sup>69</sup> Lundy 2007.

<sup>70</sup> Thomas 2007, p. 199.

<sup>71</sup> Herbots & Put 2015, p. 156.

<sup>72</sup> Herbots & Put 2015, p. 158-159.

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>73</sup>

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<sup>73</sup> UNCRC General Comment No. 12 2009, para. 3.

## **2. Children’s right to representation in the UN Convention on the Rights of the Child**

The most-widely ratified international human rights treaty, the UN Convention on the Rights of the Child safeguards children’s rights to provision, protection and participation. The right to participation is safeguarded in Article 12 which determines that children should be provided the opportunity to express their views in all matters concerning them and for these views to be given due weight. More specifically, in ‘any judicial and administrative proceedings affecting the child’, the child must be provided the opportunity to be heard, whether directly or through a representative.

In this chapter, some general remarks with regards to Article 12 of the UNCRC will first be made in section 2.1. This is followed by section 2.2, which further dissects Article 12 and section 2.3 on the relationship between Article 12 and the other rights contained in the UNCRC. Finally, a summary of this chapter is included in section 2.4. The conclusions made in this chapter will be used to analyze the legal frameworks of child representation in Australia, France, the Netherlands and South Africa.

## 2.1. General remarks on Article 12 UNCRC

The Committee on the Rights of the Child has emphasized that the Convention has four general principles.<sup>74</sup> These general principles are those rights in the Convention which are vital for the effective implementation of all the rights guaranteed by the Convention. The right to be heard (Art. 12) is one of these four general principles, together with the principle of non-discrimination (Art. 2), the principle that the best interests of the child should be a primary consideration (Art. 3) and the right to life, survival and development (Art. 6). As one of the general principles, the right to be heard, often referred to as the right to participation, provides a vehicle for children to exercise all the other rights contained in the UNCRC.<sup>75</sup> This means that Article 12 not only provides a substantive right as a means in itself, but also that it is a procedural right in relation to the other articles of the UNCRC.<sup>76</sup> Therefore, the correct implementation of Article 12 UNCRC at a national level assists the functioning of many other rights contained in the UNCRC.

Besides being a general principle, Article 12 UNCRC – and the right of participation that it provides for – is considered to be a core right of the Convention.<sup>77</sup> A principal goal of the Convention is to clarify that children also have human rights. Previously, the child's welfare perspective was predominant, because children were seen as 'incomplete' human beings: incompetent subjects who required protection.<sup>78</sup> The Convention departs from that long-standing view, in recognizing that, just like adults, children are individuals and subjects who hold rights.<sup>79</sup> In this regard, a lot of emphasis has been placed on the right of participation. Acknowledging that children have their own feelings and views and specifically listening to them, represents 'the recognition of, and respect for, the child's separate identity'.<sup>80</sup> As the Committee highlights, Article 12 UNCRC is a right granted to children based on their autonomous status as individuals, unlike most other rights which are based on either children's vulnerability – the protection rights – or children's dependency on adults – the provision rights.<sup>81</sup> Therefore, according to the Committee the right 'should establish a new social contract' and it can be seen as the symbol for the recognition of children as right holders.<sup>82</sup>

Article 12 UNCRC grants a right to participation in line with the understanding that children have competences, but also recognizes the limits of these competences and therefore does not grant a right to self-determination.<sup>83</sup> Children are recognized as full members of society, but they are not yet

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<sup>74</sup> UNCRC General Comment No. 5 2003, p. 3-4.

<sup>75</sup> Parkes 2013, p. 5.

<sup>76</sup> Hodgkin & Newell 2007, p. 150.

<sup>77</sup> See Parkes 2013, p. 6.

<sup>78</sup> Krappmann 2010, p. 502.

<sup>79</sup> Hodgkin & Newell 2007, p. 149; and Lansdown 2016, p. 31.

<sup>80</sup> Sutherland 2014, p. 155.

<sup>81</sup> UNCRC General Comment No. 12 2009, para. 18.

<sup>82</sup> UNCRC Recommendations: Day of General Discussion 2006, Preamble.

<sup>83</sup> Hodgkin & Newell 2007, p. 150; and Herbots & Put 2015, p. 160.

given the full responsibilities.<sup>84</sup> This is because the view remains that children need to be protected and provided for and that this must be simultaneously provided together with the autonomy.<sup>85</sup> Although the UNCRC and Article 12 thereof do grant children more rights than before, a difference remains with adults. Children still have to grow, so they gradually acquire autonomy, competences and the right to self-determination throughout childhood.<sup>86</sup> Article 12 is one way in which children are granted the right to have a chance to exert their autonomy, through participation, in a safe environment, while they are not responsible for the final decision.

The movement started by the UNCRC towards recognizing children as rights holders is generally lauded. But, according to Milne, the movement is unfinished, as the focus on protection and provision remains controlling.<sup>87</sup> The critique is that most UNCRC rights objectify children because instead of recognizing the same rights as granted to adults for children, the UNCRC gives a comparable but not identical protection to children.<sup>88</sup> According to Milne, Article 12 only grants children a certain independence from adults and their opinion of what is best for children.<sup>89</sup> This issue is further discussed in section 2.3.2 below, in light of the relationship between Article 12 and Article 3 UNCRC. At this point it is important to note that while Article 12 gives an impetus for legal and social change, in family law proceedings, adults as lawmakers, judges and representatives, often still determine how, when and if a child can participate. In the following section, the legal framework of Article 12 UNCRC within which these adults must offer children the chance to participate and be represented will be discussed.

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<sup>84</sup> Herbots & Put 2015, p. 181.

<sup>85</sup> Herbots & Put 2015, p. 160.

<sup>86</sup> Lansdown 2016, p. 31.

<sup>87</sup> Milne 2015, p. 15.

<sup>88</sup> Milne 2015, p. 16.

<sup>89</sup> Milne 2015, p. 18.

## 2.2. Understanding Article 12 UNCRC

In this section Article 12 UNCRC will be dissected and analyzed. To come to a complete understanding, amongst others, the Committee Comment no. 12 will be considered and, most importantly, the text of Article 12, which states:

### *Article 12*

*1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

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

### 2.2.1. Article 12 paragraph 1 UNCRC

The first paragraph of Article 12 UNCRC contains the general right of the child to express his or her views and for those views to be taken seriously in all matters concerning the child. By starting with the phrase ‘**shall assure**’, Article 12 imposes a strict legal obligation on the State parties to take proactive steps.<sup>90</sup> As no State parties have made an express reservation regarding Article 12, this obligation must be implemented no matter potential cultural or traditional reasons not to.<sup>91</sup> The cultural and traditional attitudes towards children are a serious obstacle towards implementing Article 12 successfully universally, as remarked by the Committee.<sup>92</sup> It is questionable whether the attitudes are actually determined culturally, as the traditional attitude in all State parties has been not to hear children. The aim of the UNCRC and in particular of Article 12 is to shift these attitudes towards the acceptance of providing children an opportunity to express their views.

The next part of the first paragraph of Article 12, namely that this right concerns the child ‘**capable of forming his or her own views**’, should not be seen as a limitation, according to the Committee.<sup>93</sup> It is not, and should not, lead to an age limit – in law or in practice – on the right of children to express their views.<sup>94</sup> Governments, courts and others should always start with the presumption that the child is capable of forming his or her own views,<sup>95</sup> instead of assuming that the

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<sup>90</sup> UNCRC General Comment No. 12 2009, para. 19; Lundy 2007, p. 933-934; and Sutherland 2013, p. 341.

<sup>91</sup> See the United Nations Treaty Collection website for all the reservations and declarations made regarding the UNCRC, at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en) (last visited 19 March 2017).

<sup>92</sup> UNCRC Recommendations: Day of General Discussion 2006, para. 9.

<sup>93</sup> UNCRC General Comment No. 12 2009, para. 20.

<sup>94</sup> UNCRC General Comment No. 12 2009, para. 21.

<sup>95</sup> Lansdown 2011, p. 20.

child is incapable.<sup>96</sup> This means that it is the State's duty to determine whether or not the child is capable of forming a view, the child does not have the duty to prove his or her capability.<sup>97</sup> As the UNCRC aims to remove the longstanding binary view of capacity and capability, that children do not have the capacity to form and express views at all, it should not be the case that Article 12 creates a new binary in the form of a lower age limit. The Committee finds that 'age should not be a barrier to the child's right to participate fully in the justice process'.<sup>98</sup> An age limit to determine capability or capacity would also contradict the findings developmental psychologists have made about the gradual development of children's capacities over time.<sup>99</sup> The Committee also refers to developmental findings, emphasizing that all children – including very young and disabled children – are capable of forming views and thus, that non-verbal or other expression forms must be taken into account.<sup>100</sup>

So, when is a child capable of forming their own views? According to the Committee, it is 'not necessary that the child has comprehensive knowledge of all aspects of the matter affecting him or her'.<sup>101</sup> This means that a child does not need to be able to understand all the aspects of the matter or be able to foresee the consequences of his or her views, instead it is sufficient if the child has 'sufficient understanding' to make his or her own views,<sup>102</sup> which also include their own feelings, insights and concerns.<sup>103</sup> Furthermore, States should not make use of the protectionist argument that it is contrary to the child's best interest to withhold children the opportunity to express their views.<sup>104</sup> The mainly negative explanation of Committee as to when a child is capable of forming his or her own views in effect leaves it undefined. Does the Committee require a standard for capability relative to the matter and decision to be made? Or is it not of great importance, because the Committee actually aims at a very low standard of capability to ensure the inclusion of many children in the scope of the right? It remains unclear. Of importance, and strongly worded by Archard and Skivenes, is that 'a child should not be judged against a standard of competence by which even most adults would fail'.<sup>105</sup>

This inclusive approach to granting all children, no matter their age, the right to express their views does not mean that these views should always be determinative in the matter concerned. Firstly, because, as previously discussed, Article 12 UNCRC is a right to participation not a right to self-determination. More importantly, because the first paragraph of the article determines that the due weight to be given to these views should be '**in accordance with the age and maturity of the child**'. On the one hand this limits the weight given to the child's expressed views on grounds of age and

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<sup>96</sup> UNCRC General Comment No. 12 2009, para. 20.

<sup>97</sup> Krappmann 2010, p. 507.

<sup>98</sup> UNCRC Recommendations: Day of General Discussion 2006, para. 51.

<sup>99</sup> Parkinson & Cashmore 2008, p. 4.

<sup>100</sup> UNCRC General Comment No. 12 2009, para. 21.

<sup>101</sup> UNCRC General Comment No. 12 2009, para. 21.

<sup>102</sup> UNCRC General Comment No. 12 2009, para. 21.

<sup>103</sup> Lansdown 2011, p. 20.

<sup>104</sup> Hodgkin & Newell 2007, p. 153.

<sup>105</sup> Archard & Skivenes 2009, p. 10.

maturity. On the other hand, this phrase is an obligation for States to give serious consideration to the child's views when making a decision.<sup>106</sup> As the Committee notes, 'simply listening to the child is insufficient'.<sup>107</sup>

The phrase refers to the 'age and maturity' of the child instead of repeating the term 'capable'. Instead of referring to capability, the phrase 'age and maturity' refers to the capacity of the child according to the Committee.<sup>108</sup> The phrase consists of two factors, because age, by itself, is insufficient to determine the child's capacity or the significance that should be attributed to his or her views.<sup>109</sup> A child's capacity does not only evolve with age, as is the case with capabilities, but also depends on the child's individual situation (e.g. environment and culture) and experiences.<sup>110</sup> The capacity of a child can also be limited due to disabilities, although the Committee urges States to ensure that children with disabilities are provided with the necessary means to be able to express their views.<sup>111</sup> The second mentioned factor to determine the child's capacity is maturity. What is maturity? Even the Committee recognizes that it 'is difficult to define', but states that in this regard it concerns the child's ability 'to understand and assess the implications' of the matter and whether the child can express his or her views 'in a reasonable and independent manner'.<sup>112</sup>

The combination of age and maturity requires that the capacity of the child and his or her views expressed have to be assessed case-by-case.<sup>113</sup> It is important to do so more thoroughly the greater the impact the final decision has on the child's life.<sup>114</sup> It must especially be done carefully, because determining the child's capacity is generally dependent on adults' perceptions and adults may underestimate the capacity of a child.<sup>115</sup> That is why Archard and Skivenes recommend that the assessment of the child's maturity 'be made independently of an evaluation of the child's opinion', because otherwise immaturity may be concluded simply because the adult disagrees with the child's view.<sup>116</sup>

There are two final important phrases in the first paragraph of Article 12 UNCRC. The phrase that children have the right to '**express those views freely**' express two vital points. Firstly, that the child has the choice whether or not to exercise his or her right to express his or her views.<sup>117</sup> It is a right for the child to participate, not an obligation. Secondly, it expresses the fact that the views should be expressed without the child being placed under any pressure or influence.<sup>118</sup> The child should be able

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<sup>106</sup> Lansdown 2011, p. 23.

<sup>107</sup> UNCRC General Comment No. 12 2009, para. 28.

<sup>108</sup> UNCRC General Comment No. 12 2009, para. 28.

<sup>109</sup> UNCRC General Comment No. 12 2009, para. 29.

<sup>110</sup> UNCRC General Comment No. 12 2009, para. 29.

<sup>111</sup> UNCRC General Comment No. 12 2009, para. 78.

<sup>112</sup> UNCRC General Comment No. 12 2009, para. 30.

<sup>113</sup> UNCRC General Comment No. 12 2009, para. 29.

<sup>114</sup> Lansdown 2011, p. 23.

<sup>115</sup> Lundy 2007, p. 937-938.

<sup>116</sup> Archard & Skivenes 2009, p. 10.

<sup>117</sup> UNCRC General Comment No. 12 2009, para. 16 and 22; and Sutherland 2013, p. 344.

<sup>118</sup> UNCRC General Comment No. 12 2009, para. 22.

to express their views in a safe space, where they are encouraged and supported instead of fearing criticism or punishment.<sup>119</sup>

The second and final important phrase is that the child has the right to express their views in **‘all matters affecting the child’**. This phrase gives the right to participation protected in Article 12 UNCRC a very broad application.<sup>120</sup> Considering the history of this phrase makes it even more valuable. Article 7 of the revised Polish draft of the Convention of 1979 was the conception of what is now in Article 12 UNCRC. In that first version, the right was limited to expressing views ‘in matters concerning his own person, and in particular, marriage, choice of occupation, medical treatment, education and recreation.’<sup>121</sup> During the 1981 Working Group discussions, the United States suggested a revised version of Article 7, expanding the list of matters by adding: ‘religion, political and social beliefs, matters of conscience, cultural and artistic matters, ...’.<sup>122</sup> However, most delegations<sup>123</sup> were of the opinion that the right should not ‘be subject to the limits of a list’ and thus called for the deletion of the list.<sup>124</sup> The Working Group thus opted to remove the list and instead adopt the text with the phrase ‘in all matters’.<sup>125</sup> Later, in the second reading and the Working Group discussion of 1989, Finland suggested adding to the phrase ‘affecting the child’.<sup>126</sup> It was discussed whether or not it should be ‘affecting the child’ or ‘affecting the rights of the child’, but finally, the Working Group adopted the phrase as: ‘in all matters affecting the child’.<sup>127</sup> According to the Finnish observer, that phrase could be interpreted as including matters affecting the rights of the child.<sup>128</sup> The phrase remained unchanged in the final text and thus went from a limited list to ensuring the broad application of the first paragraph of Article 12 UNCRC.<sup>129</sup>

### 2.2.2. Article 12 paragraph 2 UNCRC

The second paragraph of Article 12 UNCRC contains the child’s right to be heard in judicial and administrative proceedings. The paragraph was first introduced in 1981 by the United States as a paragraph in Article 3.<sup>130</sup> While some, at that time, were of the opinion that the paragraph added nothing new as the child’s right to express views was already incorporated in another article, most were in agreement that the specific reference to legal proceedings had added value and that it was logical to include it in Article 3 as the views of the child would be a way to ascertain their best

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<sup>119</sup> Lansdown 2011, p. 22.

<sup>120</sup> Sutherland 2013, p. 343-344.

<sup>121</sup> UNCHR Question of a Convention on the Rights of the Child 1980.

<sup>122</sup> UNCHR Report of the Working Group 1981, para. 76.

<sup>123</sup> It is not stated which delegations these were, but representatives of twenty-one States attended the Working Group meetings in 1981, see: UNCHR Report of the Working Group 1981, para. 5.

<sup>124</sup> UNCHR Report of the Working Group 1981, para. 76.

<sup>125</sup> UNCHR Report of the Working Group 1981, para. 79 and 80.

<sup>126</sup> UNCHR Report of the Working Group 1989, para. 235.

<sup>127</sup> UNCHR Report of the Working Group 1989, para. 253.

<sup>128</sup> UNCHR Report of the Working Group 1989, para. 242 and 243.

<sup>129</sup> Krappmann 2010, p. 504.

<sup>130</sup> UNCHR Report of the Working Group 1981, para. 20.

interests.<sup>131</sup> However, in 1989 the Working Group did decide to move the paragraph to, what is now, Article 12 UNCRC, because the scope overlapped and it was more logical to include it in the general participation principle.<sup>132</sup> The fact that this paragraph fits in Article 12 UNCRC is emphasized by the starting phrase ‘for this purpose’ and the phrase ‘shall in particular’. This shows that the second paragraph contains the specific right for children to express their views and have them taken into account in legal proceedings.

What does the second paragraph provide for specifically as a right? First of all, **‘the opportunity to be heard’**. The term ‘opportunity’ signals that children can make use of their right to be heard if they so wish. The right to be heard in legal proceedings must therefore be made accessible and child-appropriate, barriers, such as costs and lack of legal counsel, must be eliminated.<sup>133</sup> The phrase ‘to be heard’ is more judicial than the phrases expressing and giving due weight to the expressed views as used in the first paragraph, but it encompasses the same even if in most jurisdictions conditions are attached to the right to be heard and not to the right to express views.<sup>134</sup>

Secondly, the right is provided for **‘in any judicial and administrative proceedings affecting the child’**. The Committee explicitly emphasizes that this means ‘all relevant judicial proceedings affecting the child, without limitation’, referring as an example to, amongst others, family law proceedings such as the separation of parents, custody, care and adoption, but also to criminal law, health care and refugee cases.<sup>135</sup> The Committee also clarified that no distinction should be made between proceedings initiated by the child him- or herself or those initiated by others.<sup>136</sup>

The next phrase – perhaps the most important in light of this research – is that the opportunity to be heard should be provided **‘either directly, or through a representative or an appropriate body’**. Before discussing what this means, it is interesting to briefly look at the *travaux préparatoires* concerning this phrase. In the first version of the paragraph, the opportunity was to be granted to the child ‘as an independent party to the proceedings’.<sup>137</sup> The representative of the Netherlands then suggested that the phrase, ‘directly or indirectly through a representative’ be added, with other representatives agreeing with the addition that ‘independent’ be removed.<sup>138</sup> The phrase after the first reading thus read that children should be provided the opportunity to be heard, ‘either directly or indirectly through a representative, as a party to the proceedings’.<sup>139</sup> The final transformation to the phrase as it stands today occurred when the Finnish representative (on behalf of a drafting group)

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<sup>131</sup> UNCHR Report of the Working Group 1981, para. 27 and 28.

<sup>132</sup> UNCHR Report of the Working Group 1989, para. 128 and 236. See also, Hodgkin & Newell 2007, p. 155.

<sup>133</sup> UNCRC General Comment No. 12 2009, para. 34; and Lansdown 2011, p. 52.

<sup>134</sup> Krappmann 2010, p. 506.

<sup>135</sup> UNCRC General Comment No. 12 2009, para. 32.

<sup>136</sup> UNCRC General Comment No. 12 2009, para. 33.

<sup>137</sup> UNCHR Report of the Working Group 1981, para. 20.

<sup>138</sup> UNCHR Report of the Working Group 1981, para. 30.

<sup>139</sup> UNCHR Draft Convention on the Rights of the Child 1987, p. 6.

proposed to move the paragraph from Article 3 to – what is now – Article 12 UNCRC.<sup>140</sup> In doing so, the phrase ‘as a party to the proceedings’ was removed and ‘or an appropriate body’ was added. It is unclear what motivated these changes, just as it is unclear what the Committee means with ‘an appropriate body’.<sup>141</sup> In any case this phrase now provides a child with another choice. Once he or she has opted to be heard in a proceeding, he or she should be provided the opportunity to decide how to be heard.<sup>142</sup> According to Parkes, the paragraph implies that having a representative must be available as an option to children in proceedings.<sup>143</sup> Newell and Hodgkin interpret it differently, stating that States have the discretion to determine how the child’s views should be heard.<sup>144</sup> Although neither the Article itself, nor the Committee, goes so far as to put an obligation on States to provide for a form of child representation in legal proceedings, it does not seem to be the case that States can simply decide to provide children with only one manner in which to be heard. The remark of Newell and Hodgkin would mean that the child does not have a choice in how to be heard, while the Committee specifically has stated that the child should and that the alternative mechanism, e.g. representation, should be accessible and effective.<sup>145</sup>

Concerning the representative, the Committee makes a few remarks. The Committee notes that various persons can be the representative of a child in proceedings: the parent(s), a lawyer or another person.<sup>146</sup> However, one must be cautious with having the parent(s) as a representative. Although they are the most obvious representatives, there is often the risk in proceedings that there is a conflict between the child and the parent(s), or between the two parents who ought to represent the child’s interests jointly.<sup>147</sup> In those cases another representative is required. With regard to the duties of such a representative, the Committee notes that they should have sufficient knowledge and understanding of the proceeding and have experience in working with children.<sup>148</sup> The representative should ensure that the views of the child are ‘transmitted correctly to the decision maker’ and thus should also exclusively represent the interests of the child and not those of other persons.<sup>149</sup> With regards to the latter, it is important that the representative does not confuse his or her role with the obligation contained in Article 3 UNCRC (see also section 2.3.2).<sup>150</sup> The representative should represent the child’s views and not merely his or her own views as to what is in the best interests of said child. Finally, the Committee notes that codes of conduct should be developed for these representatives.<sup>151</sup>

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<sup>140</sup> UNCHR Report of the Working Group 1989, para. 235.

<sup>141</sup> Parkes 2013, p. 255.

<sup>142</sup> UNCRC General Comment No. 12 2009, para. 35.

<sup>143</sup> Parkes 2013, p. 98.

<sup>144</sup> Hodgkin & Newell 2007, p. 157.

<sup>145</sup> Sutherland 2013, p. 345.

<sup>146</sup> UNCRC General Comment No. 12 2009, para. 36.

<sup>147</sup> UNCRC General Comment No. 12 2009, para. 36.

<sup>148</sup> UNCRC General Comment No. 12 2009, para. 36.

<sup>149</sup> UNCRC General Comment No. 12 2009, para. 36 and 37.

<sup>150</sup> Lansdown 2011, p. 25.

<sup>151</sup> UNCRC General Comment No. 12 2009, para. 37.

The final phrase of Article 12 paragraph 2 UNCRC is that all the above should be provided **‘in a manner consistent with the procedural rules of national law’**. As stressed by the Committee, this should not be read as permitting procedural rules of national law to restrict or prevent the enjoyment of the child’s right to be heard.<sup>152</sup> Instead, the States are encouraged to ensure that the child’s right to be heard complies with ‘the basic rules of fair proceedings’.<sup>153</sup>

### 2.2.3. How to implement Article 12 UNCRC

In General Comment No. 12, the Committee on the Rights of the Child not only gave its interpretation of Article 12 UNCRC, but also outlined five steps that should be undertaken to ‘effectively realize’ the child’s right to be heard in proceedings or other contexts. These five steps are: (1) sufficient preparation of the child through informing him or her of the available options and the impact it will have,<sup>154</sup> (2) the hearing of the child in an enabling and encouraging context,<sup>155</sup> (3) the case-by-case assessment of the capacity of the child and due weight given thereto,<sup>156</sup> (4) the information about the weight given to the views of the child (the feedback) given to the child to guarantee that his or her views have been taken seriously,<sup>157</sup> and (5) the provision of complaints, remedies and redress procedures to children when their right to be heard has been breached or violated.<sup>158</sup> This fifth step has also been emphasized by the Committee with regards to the general measures of implementation of the UNCRC as a whole. State parties have to provide child-friendly access to complaints, remedies or redress procedures for when a child’s right is breached, especially due to children’s ‘special and dependent status’.<sup>159</sup>

Of recurring importance in the implementation of Article 12 is the child’s right to information. Information is essential for the child to be able to decide whether or not to freely express his or her views<sup>160</sup> as well as how he or she wishes to do so.<sup>161</sup> Prior to the proceedings, the child should be informed in a child-friendly manner, inter alia, on how the proceeding will go, what the (potential) role of his or her representative is, what degree of confidentiality will be afforded to their views, how the decision will be made and what role his or her views will play in the reaching of that decision.<sup>162</sup> Once the decision has been made, the right to information takes the form of the right to receive feedback, either by the decision maker or the child’s representative, on how weight has been given to

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<sup>152</sup> UNCRC General Comment No. 12 2009, para. 38.

<sup>153</sup> UNCRC General Comment No. 12 2009, para. 38; and Lansdown 2011, p. 26.

<sup>154</sup> UNCRC General Comment No. 12 2009, para. 41.

<sup>155</sup> UNCRC General Comment No. 12 2009, para. 42.

<sup>156</sup> UNCRC General Comment No. 12 2009, para. 44.

<sup>157</sup> UNCRC General Comment No. 12 2009, para. 45.

<sup>158</sup> UNCRC General Comment No. 12 2009, para. 46 and 47.

<sup>159</sup> UNCRC General Comment No. 5 2003, para. 24.

<sup>160</sup> UNCRC General Comment No. 12 2009, para. 25.

<sup>161</sup> Hodgkin & Newell 2007, p. 159.

<sup>162</sup> Lansdown 2011, p. 51-52 and p. 64.

the child's views and how the child may be able to take further measures.<sup>163</sup> The importance of the child's right to information is also emphasized by the fact that the core obligations of State parties is, according to the General Comment, 'to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.'<sup>164</sup>

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<sup>163</sup> Lansdown 2011, p. 57.

<sup>164</sup> UNCRC General Comment No. 12 2009, para. 48.

### 2.3. Article 12 and its relationship to other UNCRC articles

All the rights provided in the Convention on the Rights of the Child are interrelated. Especially the four general principles of the UNCRC, including Article 12 UNCRC, play an important role in relation to all other rights guaranteed. Therefore, Article 12 cannot be read in isolation and as its relation to some of the other rights are of extra significance,<sup>165</sup> these will briefly be discussed in this section.

#### 2.3.1. Article 2 and Article 12 UNCRC

The right to non-discrimination in Article 2 UNCRC is also applicable in the context of Article 12 UNCRC. As the Committee stresses, the right provided in Article 12 must be provided to children without discrimination on grounds of race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.<sup>166</sup> Therefore, States must also pay extra attention that vulnerable or marginalized groups of children are afforded the opportunity to be heard.<sup>167</sup>

#### 2.3.2. Article 3 and Article 12 UNCRC

The principle of Article 3 UNCRC, that the best interests of the child shall be a primary consideration in all actions concerning children, is interdependent with Article 12 UNCRC according to the Committee.<sup>168</sup> Both the General Comment on Article 12 as well as the General Comment concerning Article 3 UNCRC stress the importance of the relationship between the two articles. In the General Comment on the best interests of the child, the Committee emphasizes that the child should be provided a representative, either legal or as a guardian ad litem, in judicial proceedings concerning their interests.<sup>169</sup> In the General Comment on Article 12 UNCRC the importance of the hearing child's views as a method in determining the best interests of the child is also emphasized: 'there is no tension between articles 3 and 12, only a complementary role'.<sup>170</sup> The Committee stressed the symbiotic relationship between the two articles, in which Article 3 reinforces Article 12 by placing the child at the center of decisions concerning them and the right to be heard of Article 12 is indispensable for the correct application of Article 3.<sup>171</sup> Accepting the complementary role of the two articles is crucial to effect the right to be heard, as the best interests principle should not be used to 'trump' the child's right to be heard.<sup>172</sup>

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<sup>165</sup> Lückner-Babel 1995, p. 393.

<sup>166</sup> UNCRC General Comment No. 12 2009, para. 75.

<sup>167</sup> Lansdown 2011, p. 32; and UNCRC General Comment No. 12 2009, para. 77 and 78.

<sup>168</sup> UNCRC General Comment No. 12 2009, para. 68; and UNCRC General Comment No. 14 2013, para. 43.

<sup>169</sup> UNCRC General Comment No. 14 2013, para. 90 and 96.

<sup>170</sup> UNCRC General Comment No. 12 2009, para. 74.

<sup>171</sup> UNCRC General Comment No. 12 2009, para. 74.

<sup>172</sup> Lansdown 2011, p. 33.

However, in practice the relationship might not be as harmonious as presented by the Committee.<sup>173</sup> For example, one can say there is a tension between Article 3 and Article 12 because the determination of the best interests of the child in a legal proceeding is up to the discretion of the judges and can completely diverge from the views expressed by the child.<sup>174</sup> But, this is in fact not a tension. As discussed above Article 12 is not a right to self-determination, children are not granted the right to make a choice in the decision, instead Article 12 is a procedural right. As long as the child has been granted the opportunity to express his or her views and these views have been given due weight in the decision-making process, it is acceptable that the judge's decision in the best interests of the child diverges from the child's view on the matter.

Another practical tension between Article 3 and Article 12 UNCRC is that certain assumptions about the best interests of the child can limit the meaningful participation of the child in proceedings.<sup>175</sup> This tension arises because the UNCRC requires adults to paternalistically determine the best interests of the child while at the same time considering the child's – potentially contradictory – views.<sup>176</sup> An example of this practical tension is that when the child's competence has to be determined, adults often have the tacit assumption that when 'children use different criteria for making choices, those are necessarily defective or at least inferior to adult criteria.'<sup>177</sup> Therefore, the adults' assumption of what is in the best interests of the child can cut-off the child's opportunity to express his or her views. Although it is very likely and understandable that this 'tension' occurs in practice, the Articles themselves and the understanding thereof as held by the Committee require adults, especially decision-makers, to provide children with child-friendly, enabling and encouraging opportunities to express their views and require these adults to also take these views seriously. One can therefore conclude, that the view of the Committee that there is 'no tension' between Article 3 and Article 12, is perhaps a tad idealistic but should be strived for.

### 2.3.3. Article 5 and Article 12 UNCRC

Article 5 UNCRC concerns parental guidance and the child's evolving capacities, providing that the State parties shall respect the parents' responsibilities, rights and duties to give direction and guidance to the child in the exercise of his or her rights. The continually shifting equilibrium between children and their parents due to the child's evolving capacities as protected in Article 5 is closely linked to Article 12 UNCRC.<sup>178</sup> According to the Committee, the latter stimulates the requirement in Article 5 for parents to listen to the child and to, finally, exchange views with them on an equal footing.<sup>179</sup> The

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<sup>173</sup> Lückner-Babel 1995, p. 394; Lundy 2007, p. 938; and Sutherland 2013, p. 347.

<sup>174</sup> Raitt 2004, p. 153.

<sup>175</sup> Raitt 2004, p. 153.

<sup>176</sup> Archard & Skivenes 2009, p. 2.

<sup>177</sup> Thomas & O'Kane 1998, p. 151.

<sup>178</sup> Lansdown 2011, p. 36-37.

<sup>179</sup> UNCRC General Comment No. 12 2009, para. 84 and 85.

relationship between Articles 5 and 12 UNCRC does not have a specific relation to the right to representation in family law proceedings, but it does emphasize the emancipation of children.<sup>180</sup>

#### 2.3.4. Articles 13 and 17 and Article 12 UNCRC

Two of the other civil rights and freedoms articles in the UNCRC are closely linked to Article 12, Articles 13 and 17 UNCRC. Both these articles are ‘crucial prerequisites’ for the child to effectively exercise his or her right to be heard, according to the Committee.<sup>181</sup> Article 13 contains the right to freedom of expression. The difference between Articles 12 and 13 is that the latter is more broad because it concerns the child’s right to hold and express any and all opinions without any restriction by the State, while Article 12 concerns the right to express views in specific matters concerning the child. Although both articles are very different, the combined effort of the Articles to afford children the (safe) space to express their views is important.<sup>182</sup>

Article 17 provides for the child’s right to have access to appropriate information. The article mostly focuses on (mass) media, but also provides for the right to information relating to their rights, proceedings affecting them, national legislation, available services, etc.<sup>183</sup> Especially the latter is, as discussed above, of importance in the implementation of Article 12. If the child is not informed, he or she cannot freely exercise the right to be heard.

While both Article 13 and Article 17 UNCRC are linked to the child effectively exercising the right to express his or her views, they are not of great relevance for the right of the child to representation in family law proceedings. As both articles concern the child’s civil rights and freedoms they are more related to the child’s right to participate in more public situation, for example in school and at the community level. With regards to the right of the child to representation in family law proceedings, Article 13 does signal the emancipation of children and Article 17 does emphasize the right to information, but both of those aspects are also covered by Article 12 specifically.

#### 2.3.5. Other Articles and Article 12 UNCRC

In various other articles of the UNCRC relating specific situations, the child’s right to be heard, as generally protected in Article 12 UNCRC, is reaffirmed. In proceedings where the child is to be separated from his or her parents and placed in alternative care, Article 9(2) UNCRC requires that ‘all interested parties shall be given an opportunity to participate in the proceedings and make their views known’. The child who is the subject of the proceedings is one of these interested parties and thus must be given the opportunity to be heard.<sup>184</sup> Article 21(a) UNCRC concerning adoption (or *kafalah* in Islamic law) proceedings also states that the ‘persons concerned’ must have given their informed

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<sup>180</sup> Lansdown 2011, p. 37.

<sup>181</sup> UNCRC General Comment No. 12 2009, para. 80.

<sup>182</sup> UNCRC General Comment No. 12 2009, para. 81.

<sup>183</sup> Lansdown 2011, p. 36.

<sup>184</sup> Lansdown 2011, p. 66.

consent to the adoption. This article does not specifically mention the child, but ‘persons concerned’ can be read to include the child<sup>185</sup> and the Committee has underscored the vital importance of hearing the child in adoption proceedings with regards to Article 3 and Article 12 UNCRC.<sup>186</sup> Lastly, in penal judicial proceedings the rights afforded by Article 12 and Article 40 are of importance.<sup>187</sup> Child offenders have the right to be heard and the correspondent right to remain silent throughout the – entire – penal judicial process.<sup>188</sup> They also, following Article 40(2)(b)(ii) and (iii) UNCRC, have the right to legal assistance in the preparation and presentation of their defence and during the hearing.

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<sup>185</sup> Ferreira 2013, p. 377.

<sup>186</sup> UNCRC General Comment No. 12 2009, para. 55 and 56.

<sup>187</sup> UNCRC General Comment No. 10 2007, para. 43-45.

<sup>188</sup> UNCRC General Comment No. 12 2009, para. 58.

## 2.4. Summary

This section will summarize the most important conclusions made in this chapter for the continuation of the thesis. The child's right to representation in judicial proceedings is predominantly safeguarded by Article 12 UNCRC. This article contains one of the four general principles, therefore playing a crucial role in the understanding and implementation of all other UNCRC rights. It is also a core right of the UNCRC in the sense that it stresses the general aim of the UNCRC to recognize children as individuals with rights, competences, and capabilities, albeit to some extent limited by the other key aim of the UNCRC, namely protecting children.

In understanding the text of Article 12 multiple key aspects were analyzed in both paragraphs of the article. In the first paragraph of Article 12, five aspects are important in understanding the scope of the right. Firstly, that Article 12 contains a strict legal obligation for all State parties. That the requirement of the child being capable of forming his or her views should not be seen as a limitation. There should be no age limit or assumption of incapability, as all children are to some extent capable of forming views. However, it remains unclear where the Committee places the dividing line between a child being capable or not, as well as how the Committee expects the capability to be determined. What is emphasized is that it is important to determine the capability of the child within the context of the proceeding on a case-by-case basis. Thirdly, an important aspect concerns a similar threshold, capacity, as due weight should be given to the views of the child in accordance with their age and maturity. This capacity must be determined by both factors on a case-by-case basis as reaching a specific age by itself is insufficient and maturity is 'difficult to define', but concerns the child's ability to understand and assess independently and reasonably the issue at hand. The last two important aspects are that children should be able to express the views 'freely' and that they must be able to do so in 'all matters affecting the child'.

The second paragraph of Article 12 UNCRC contains three aspects of importance, the first being that it is a more specified right for the child to be heard, namely in any judicial and administrative proceedings affecting the child. This means no limitations are placed on the types of proceedings, thus including all sorts of family law proceedings. Secondly, the right contained in Article 12(2) UNCRC must be provided in a manner consistent with the basic rules of fair proceedings in national law. The last aspect, that the child should be provided the opportunity to be heard either directly or through a representative, is of greatest importance in this research. Article 12 thus provides that the child should have a choice how to be heard, if they want to be heard. Therefore, it appears that State parties ought to provide for a form of child representation in legal proceedings. According to the Committee, if a form is provided then the representative must potentially be someone other than the child's parent(s), must have sufficient knowledge, understanding and experience in working with children in legal proceedings, must represent the child's views not merely

his or her own views of what is in the best interests of the child. The analysis in the following chapters will consider whether the various jurisdictions comply with these Committee guidelines.

Finally, in this chapter it has become clear that Article 12 should be applied without discrimination (ex. Art. 2 UNCRC), considering the child's evolving capacities (ex. Art. 5 UNCRC) and in combination with the child's right to information and freedom of expression (ex. Art. 17 and 13 UNCRC). With respect to the relationship between having the best interests of the child be a primary consideration in all aspects concerning them (Art. 3 UNCRC) and Art. 12 UNCRC, it can be concluded that although the Committee is convinced of their harmonious symbiotic relationship, practical tensions do arise on the one hand because the paternalistic welfare view of children remains more common than the view of children as capable right-holders and because it is not possible to determine in absolute terms what is in the best interests of the child.

### **3. Comparison and evaluation of the legal framework of child representation**

In this chapter the legal framework of child representation in Australia (New South Wales), France, the Netherlands and South Africa will be compared and evaluated in light of the international human rights standard of Article 12 UNCRC. For each separate jurisdiction a report has been written answering the second and third sub-questions separately. These reports can be found as annexes attached to this research. Based on the information contained in these reports, a simultaneous comparison per theme will discuss the similarities and differences between jurisdictions. Each comparison will be combined with the direct evaluation of the legal frameworks. This evaluation is based on the conclusions drawn in the previous chapter regarding the minimum international standard of child representation afforded by the UNCRC. A summarized and combined overall evaluation will be included in the final section of this chapter (section 3.6).

The twelve questions of sub-questions 2 and 3 which have shaped the reports per jurisdiction, have been combined into five themes for the comparison. The researcher has determined these themes as the overarching issues included in the sub-questions. The first theme being the forms of representation (section 3.1), combining the answers to sub-questions 2, 2a, 3, and 3c on the forms of representation, their historical development, their general task and their complementarity to other manners in which children can be heard. The second theme, the types of proceedings in which children can be represented (section 3.2), compares the answers to sub-question 2b. The requirements applied to child representation is the third theme (section 3.3). It compares the answers to the two sub-questions 2d and 2e. The fourth theme concerns the decisions regarding child representation (section 3.4). This combines the sub-question 2f on who decides whether the child may be represented and sub-question 2c on when they can make this decision and until when the representative must act. Finally, the fifth theme covers three practical issues: what are the function requirements for child representatives, how should they execute their task, and who pays them (section 3.5). Thereby combining and comparing the answers to sub-questions 3a, 3b and 2g.

### 3.1. Forms of representation

All four jurisdictions have at least two forms of child representation alongside other options for the child's views to be expressed in family law proceedings. The forms of child representation in each of the jurisdictions can best be introduced and recognized by their general task, whether they are a best interests representative, representing and advancing the child's best interests, or a separate legal representative, representing the child's views by acting on their instructions. Distinguishing the forms of representation by these two general tasks occurs both in academic literature,<sup>189</sup> as mentioned in the introduction, as well as in the national jurisdictions themselves.<sup>190</sup> Thus, Table 2 below includes an overview of all the forms of representation per jurisdiction and their general task.<sup>191</sup>

Table 2: The forms of representation and their general task per jurisdiction

	Forms of representation		General task	
			Best interests representative	Separate legal representative
<b>Australia (AU)</b>	Federal	Independent children's lawyer (ICL)	X	
	New South Wales	Independent legal representative (ILR)	X	
		Direct legal representative (DLR)		X
		Guardian ad litem (GAL)	X	
<b>France (FR)</b>	Ad hoc administrator (AHA)		X	
	Children's lawyer (CL)			X
<b>The Netherlands (NL)</b>	General guardian ad litem (GGAL)		X	
	Filiation guardian ad litem (FGAL)		X	
	Separate legal representative (SLR)			X
<b>South Africa (SA)</b>	Legal representative (LR)		X*	X
	Curator ad litem (CAL)		X	

\*Only in exceptional circumstances.

Due to the division of powers in Australia, there is one form of representation provided in federal law and three other forms in the state of New South Wales. The federal independent children's lawyer and the independent legal representative in New South Wales are relatively similar in their task of representing the child's best interests in family law proceedings. The guardian ad litem in New South Wales also has a similar general task, but the execution of that task is different from that of the independent children's lawyer and the independent legal representative, as will be discussed later. In France and in the Netherlands there is a clear division of the general task between the two forms of child representation. Both have a best interests representative who represents the child's interests, respectively the *administrateur ad hoc* (hereafter: ad hoc administrator) and the *bijzondere curator* (hereafter: guardian ad litem<sup>192</sup>) in both the general (Art. 1:250 Dutch Civil Code (DCC)) and filiation

<sup>189</sup> See, amongst others, Daly 2016; Fernando 2013; Koh Peters 2005; Parkes 2013; and Parkinson & Cashmore 2008.

<sup>190</sup> See, for example, the difference between the independent legal representative and the direct legal representative in New South Wales, Australia in section 5.1.2 of the annexes.

<sup>191</sup> For extended information see sections 5.1.1 and 5.1.2 (AU); 5.2.1 and 5.2.2 (FR); 5.3.1 and 5.3.2 (NL); and 5.4.1 and 5.4.2 (SA) of the annexes.

<sup>192</sup> The translation of *bijzondere curator* as guardian ad litem has been chosen, because it is the translation adopted by the Dutch government. See, for example, UNCRC Third Periodic Report of the Netherlands 2008, para. 63.

form (Art. 1:212 DCC), and a separate legal representative acting on the instructions of the child, respectively the *avocat d'enfant* (hereafter: children's lawyer) and the separate legal representative. The South African curator ad litem represents the child's best interests, the legal representative will also do so if the child is very young and cannot give instructions, but generally the legal representative is a client-directed advocate representing the child's views.

Although it is interesting to note these different general tasks of the child representatives, it is potentially troublesome, considering Article 12 UNCRC and the analysis in the previous chapter, that most forms represent the child's best interests instead of being client-directed forms of representation sticking solely to the child's views. According to the Committee on the Rights of the Child the representative should exclusively represent the child.<sup>193</sup> This has been interpreted by Lansdown as meaning that the representative should not confuse their role of transmitting the views of the child with the obligation contained in Article 3 UNCRC that the child's best interests be a primary consideration.<sup>194</sup> However, it can also be interpreted as meaning that the child's representative may not also represent a parent at the same time. In that case there would be no issue with best interests representative, as long as they correctly transmit the child's views to the court and solely represent the child's interests.<sup>195</sup> It remains uncertain, however.<sup>196</sup>

On a more positive note, the fact that each jurisdiction has multiple forms of representation available to children complies with Article 12(2) UNCRC, which requires that children should be able to decide how they wish to be heard according to the Committee.<sup>197</sup> As discussed in section 2.2.2, neither the Article nor the Committee explicitly require representation forms to be available to children. It is required however that the child has a choice between various mechanisms of being heard. Having two or more forms of representation available in each jurisdiction is the first step to achieving this. It remains the question, however, whether the alternative mechanisms are accessible and effective and which other mechanisms aside from representation are available. The latter will be answered in section 3.1.3 below. The accessibility and effectiveness depends in part on whether these forms of representation are available in the same proceedings, which will be examined in section 3.2, and in part on whether the children themselves have the choice between alternative mechanisms, which will be discussed in section **Error! Reference source not found.**

### 3.1.1. Historical development

To fully understand the forms of representation and the evaluation thereof with the minimum standard of Article 12 UNCRC, the historical development of the representations forms must be considered.

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<sup>193</sup> UNCRC General Comment No. 12 2009, para. 37.

<sup>194</sup> Lansdown 2011, p. 25.

<sup>195</sup> UNCRC General Comment No. 12 2009, para. 36; see section 2.2.2 of the annexes.

<sup>196</sup> Parkes 2013, p. 253-254.

<sup>197</sup> UNCRC General Comment No. 12 2009, para. 35.

The historical development also informs the explanation of the similarities and differences between the jurisdictions in the comparison.

In each jurisdiction, there is one of form of representation with a longstanding history. Both the Dutch guardians ad litem and South African curator ad litem have Roman law origins. The *curator* in the Roman-Dutch law of the 17<sup>th</sup> and 18<sup>th</sup> centuries had the duty to assist the minor in litigation.<sup>198</sup> This form of participation stayed throughout Old Dutch law and can be found in the Dutch codes of the 19<sup>th</sup> and 20<sup>th</sup> century before the introduction of the modern guardians ad litem.<sup>199</sup> With the transplant of Roman-Dutch law to South Africa, the curator ad litem continued its existence in the common law of South Africa.<sup>200</sup> It was the English common law, which introduced its historic guardian ad litem to Australia prior to the codified Australian Family Law Act of 1975 (hereafter AFLA 1975).<sup>201</sup> France has the youngest oldest form of representation, with the ad hoc administrator being introduced as a representative to mitigate paternal power over children's property in 1901.<sup>202</sup>

Since the 1970s, child representation has gained more traction in the four jurisdictions studied. This has led to the introduction of new forms of representation as can be seen in the timeline below (Figure 1).<sup>203</sup> The French children's lawyer and South African legal representative were both introduced prior to the adoption of the UNCRC, albeit for specific types of proceedings, namely divorce proceedings and child protection proceedings. All the other forms of representation first saw the light of day after the ratification of the UNCRC in each of the jurisdictions. In most cases, it can be concluded that the UNCRC has prompted the introduction of explicit legislation on child participation. That would be fitting with the strict legal obligation of Article 12 UNCRC that States should take proactive steps to 'assure' the child's right to be heard.<sup>204</sup>

Take Australia, for example, although the AFLA 1975 very generally introduced representation for children in family law disputes, it was not until after the ratification of the UNCRC and an explicit recommendation by the Committee on the Rights of the Child that the independent children's lawyer was introduced.<sup>205</sup> The independent legal representative and direct legal representative were introduced eight years following the ratification of the UNCRC.<sup>206</sup> The French legislature also aimed to conform to the obligations contained in Article 12 UNCRC when introducing the ad hoc

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<sup>198</sup> De Bruin 2010, p. 65; and Helmholtz 1978, p. 229-230 and 232. See sections 5.3.1.1 and 5.4.1.1 of the annexes.

<sup>199</sup> Asser 1957, p. 472-473 and 597; Helmholtz 1978, p. 229-230 and 232; Veegens 1923, p. 223 and 256. See section 5.3.1.1 of the annexes.

<sup>200</sup> De Bruin 2010, p. 50 and 371. See section 5.4.1.1 of the annexes.

<sup>201</sup> Australian Law Reform Commission 1997, para. 13.10; and Bates 2013, p. 48. See section 5.1.1.1 of the annexes.

<sup>202</sup> Loi du 6 avril 1910 pour la bonne administration des biens des mineurs. See Grevot 2010, p. 12; Fédération nationale des administrateurs ad hoc 2009, p. 12; and section 5.2.1.1 of the annexes.

<sup>203</sup> For the more extended historical background of each of the forms of representation see sections 5.1.1.1, 5.2.1.1, 5.3.1.1, and 5.4.1.1 of the annexes.

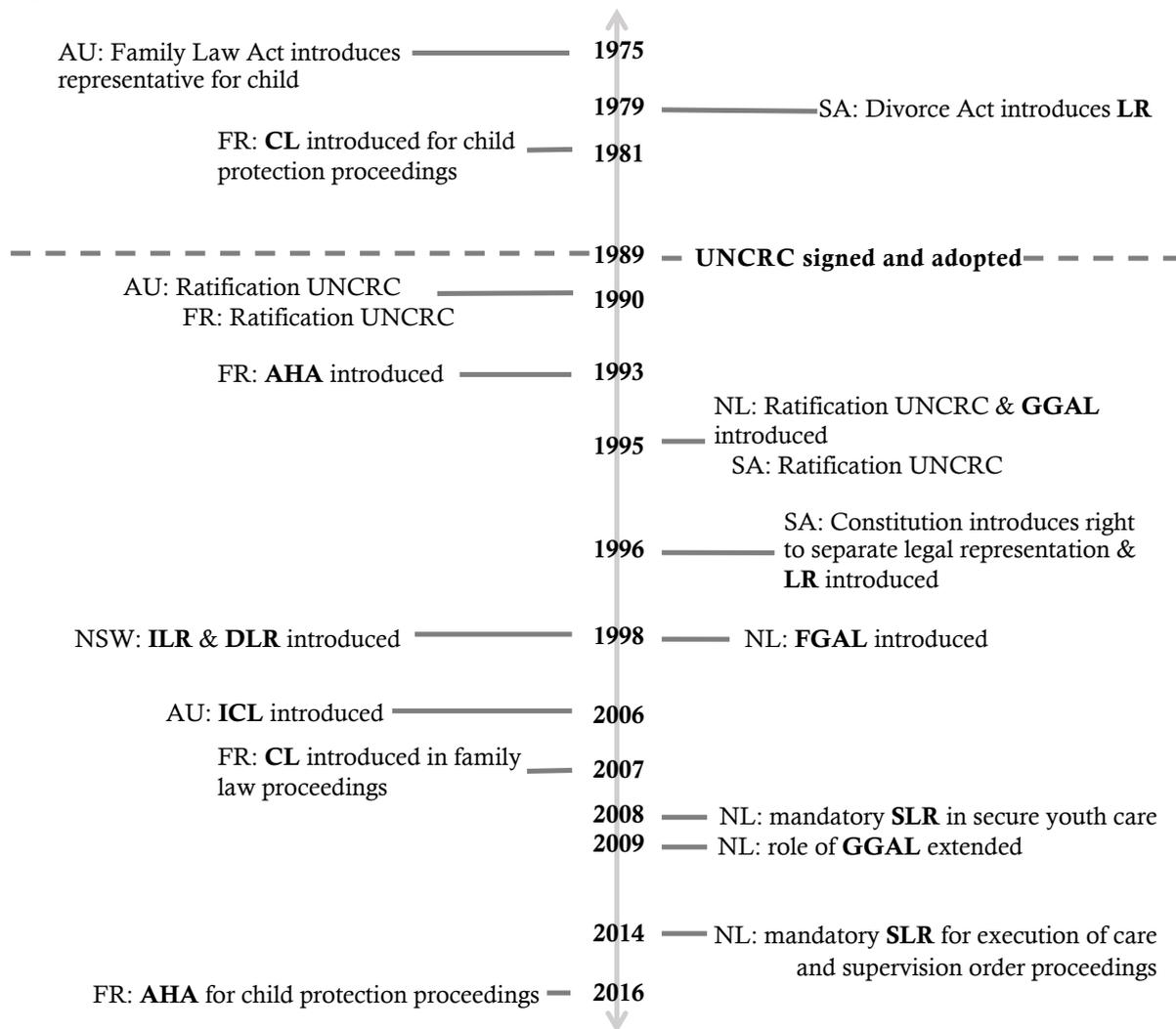
<sup>204</sup> UNCRC General Comment No. 12 2009, para. 19. See also Lundy 2007, p. 933-934; Sutherland 2013, p. 341; and section 2.2.1.

<sup>205</sup> UNCRC Concluding Observations Australia 2005, para. 30. See also the Family Law Amendment (Shared Parental Responsibility) Act 2006; Bell 2015, p. 3; and section 5.1.1.1 of the annexes.

<sup>206</sup> See Ross 2013b, p. 334; and section 5.1.1.1 of the annexes.

administrator in 1993.<sup>207</sup> More specifically, the amendments of 2007 which introduced the children’s lawyer for family law proceedings were inspired, according to the French government, by the terms of Article 12 UNCRC.<sup>208</sup>

Figure 1: Timeline of the introduction of representation forms in the jurisdictions



Abbreviations:

AHA: Ad hoc administrator	FGAL: Filiation guardian ad litem	ILR: Independent legal representative
CAL: Curator ad litem	GAL: Guardian ad litem	LR: Legal representative
CL: Children’s lawyer	GGAL: General guardian ad litem	SLR: Separate legal representative
DLR: Direct legal representative	ICL: Independent children’s lawyer	

Of all four jurisdictions, the UNCRC had the most impact in South Africa where it was the first international human rights treaty to be ratified by its first universally elected democratic government.<sup>209</sup> In 1996, the South African Constitution embedded a multitude of children’s rights,

<sup>207</sup> See Attias 2012; Bazin 2014; Fédération nationale des administrateurs ad hoc 2009, p. 12; Grevot 2010, p. 12; Le Mintier 1994, p. 1; and section 5.2.1.1 of the annexes.

<sup>208</sup> UNCRC Third and Fourth Periodic Report of France 2008, para. 196. See also Loi n°2007-308 du 5 mars 2007 portant réforme de la protection juridique des majeurs; and section 5.2.1.1 of the annexes.

<sup>209</sup> Sloth-Nielsen 1996, p. 323.

including the right to representation, in s. 28.<sup>210</sup> This was an unequivocal response by the South African government to the international human rights obligations contained in the UNCRC.<sup>211</sup> The Constitutional protection advanced further specific provisions, such as the introduction of the legal representative into the Child Care Act (which later became the Children's Act of 2005).<sup>212</sup>

In contrast, although the Dutch forms of representation were introduced in the decades following the ratification of the UNCRC, it was not necessarily because of it as the Dutch government did not consider reforms necessary to conform to the UNCRC.<sup>213</sup>

### 3.1.2. Sources of law

The historical background of each of the representation forms combined with the legal tradition of the jurisdictions, has influenced in which sources of law the regulation of the forms of representation are contained. Discussing the sources of law shows to what extent each of these regulations are crystallized by law and to what extent legal doctrinal writing is important in understanding the forms of representation.

In **Australia**, specifically New South Wales, the independent children's lawyer, independent legal representative and dependent legal representative are regulated extensively in statutes. For example, the section on the independent children's lawyer in the AFLA 1975 is three pages long and five sections are dedicated to the independent legal representative and the dependent legal representative in the Children and Young Persons (Care and Protection) Act 1998 (NSW) (hereafter CCPA (NSW)). In addition, for these three forms of representation clear guidelines exist: the federal Family Court's Guidelines for Independent Children's Lawyers and the New South Wales' Representation Principles for Children's Lawyers and the Care and Protection Practice Standards.<sup>214</sup> Thus, with the detailed statutes and guidelines available few gaps remain. For the New South Wales' guardian ad litem, the situation is a bit different. It's common law background explains why the statutes have remained brief regarding the guardian ad litem. In addition, there are no guidelines on the task of the guardian ad litem, requiring case law and doctrine for clarification.<sup>215</sup>

In **South Africa** the situation is similar. On the one hand, the legal representative has been regulated in detail in the Children's Act of 2005 (hereafter SACA 2005), albeit less extensively compared to Australia. On the other hand, the curator ad litem is grounded in common law, which means that case law is crucial as statutes or written guidelines are lacking.<sup>216</sup>

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<sup>210</sup> UNCRC Initial Periodic Report of South Africa 1998, para. 1. See section 5.4.1.1 of the annexes.

<sup>211</sup> UNCRC Initial Periodic Report of South Africa 1998, para. 1. See also the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)* (CCT 53/06) [2007] ZACC 18 (26 September 2007), para. 16. Referred to in: Liefwaard & Doek 2015.

<sup>212</sup> Zaal & Skelton 1998, p. 541. See section 5.4.1.1 of the annexes.

<sup>213</sup> Limbeek & Bruning 2015, p. 89; and Liefwaard & Vonk 2016, p. 314. See section 5.3.1.1 of the annexes.

<sup>214</sup> Guidelines for Independent Children's Lawyers 2013; Representation Principles for Children's Lawyers 2014; and Care and Protection Practice Standards 2015.

<sup>215</sup> See Bao-Er 2006, p. 4; and section 5.1.2.2 of the annexes.

<sup>216</sup> See sections 5.4.1.1 and 5.4.1.2 of the annexes.

The two civil law jurisdictions, **France** and **the Netherlands** have less extensive and detailed statutes. Instead, in both jurisdictions, there is simply one article in the civil code per form of representation, e.g. Article 1:250 DCC and Article 388-2 French Civil Code (*Code Civil*; hereafter FCC). In addition, some more general articles concerning legal aid may be applicable and in the Netherlands, there are two guidelines of the *Landelijk Overleg Vakinhoud Familie- en Jeugdrecht* (the National Consultations on Family and Child Law matters, hereafter: LOVF) concerning the guardians ad litem.<sup>217</sup> This means that legal doctrinal literature is crucial for the full understanding of the French and Dutch child representatives.

### 3.1.3. Relation to other manners of hearing the child's views

In addition to representation, all four jurisdictions also offer other possibilities for the child's views to be heard. Children can directly express their views to the judge in judicial meetings in Australia, France, and the Netherlands.<sup>218</sup> The form and execution of these judicial meetings varies in the three jurisdictions. The other general option is a welfare report including the child's views. In Australia family consultants can be requested to write a family report which should include the child's views on the matter.<sup>219</sup> In the Netherlands the Child Care and Protection Board (*Raad voor de Kinderbescherming*) can advise the court on the welfare of the child and should speak to the child, although this is not legally required.<sup>220</sup> In South Africa the family advocate can make enquiries and collect information to report to the court about the child's welfare.<sup>221</sup> In doing so, the family advocate will generally interview the child, although they are not obliged to.

### **Complementarity of participation forms**

Aside from knowing which forms of representation and other means of hearing the child's views in family law disputes exist in the four jurisdictions, it is also relevant to see whether these forms can simultaneously play a role. In Table 3 below, the complementarity of the manners in which the child can be represented or heard is displayed, with the non-representation forms shaded in dark.<sup>222</sup> In general, the table shows that the representation forms do not function in a complementary fashion, but that it is possible for the non-representation forms to supplement the representatives. The latter is especially the case in the Netherlands and South Africa. South Africa being the only jurisdiction where all the forms of children being heard can function together. The forms of representation in Australia and France are not often supplemented by other forms of hearing the child, because of the

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<sup>217</sup> See Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014; and Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014.

<sup>218</sup> S. 60CD(2)(c) AFLA 1975, Art. 388-1 FCC, and Art. 809 DCCP. See sections 5.1.2.3, 5.2.2.3, 5.3.2.3, and 5.4.2.3 of the annexes.

<sup>219</sup> S. 62G(2) AFLA 1975. See section 5.1.2.3 of the annexes.

<sup>220</sup> Art. 810 DCCP. See section 5.3.2.3 of the annexes.

<sup>221</sup> S. 4 of the Mediation in Certain Divorce Matters Act 1987. See section 5.4.2.3 of the annexes.

<sup>222</sup> For the extended information see sections 5.1.2.3 (AU), 5.2.2.3 (FR), 5.3.2.3 (NL), and 5.4.2.3 (SA) of the annexes.

different types of proceedings in which representation, welfare reports or judicial meetings are called for.

*Table 3: Overview of complementarity of forms by which children can be heard in each of the jurisdictions*

<b>Australia (NSW)</b>							<b>France</b>			
	ICL	ILR	DLR	GAL	JM	FamR		AHA	CL	JM
ICL	-	-	-	-	X	X	AHA	-	-	-
ILR	-	-	-	X	-	-	CL	-	-	X
DLR	-	-	-	X	-	-	JM	-	X	-
GAL	-	X	X	-	-	-				
JM	X	-	-	-	-	-				
FamR	X	-	-	-	-	-				
<b>The Netherlands</b>							<b>South Africa</b>			
	GGAL	FGAL	SLR	JM	WR		LR	CAL	FA	
GGAL	X	-	X	X	X	LR	-	X	X	
FGAL	-	-	-	X	X	CAL	X	-	X	
SLR	X	-	-	X	X	FA	X	X	-	
JM	X	X	X	-	X					
WR	X	X	X	X	-					

Abbreviations:

AHA: Ad hoc administrator	FamR: Family report	ILR: Independent legal representative
CAL: Curator ad litem	FGAL: Filiation guardian ad litem	JM: Judicial meetings
CL: Children's lawyer	GAL: Guardian ad litem	LR: Legal representative
DLR: Direct legal representative	GGAL: General guardian ad litem	SLR: Separate legal representative
FA: Family advocate	ICL: Independent children's lawyer	WR: Welfare report from CCPB

The complementarity of forms by which children can be heard is relevant as it clarifies whether children have an actual choice in how their views are heard. As discussed in section 3.1 above, the Committee's understanding of Article 12 UNCRC requires that alternative mechanisms are available for the child to choose between. For this, the existence of multiple forms of representation is important, but also whether these forms are available complementarily together with other mechanisms by which the child's views can be heard. Having complementary mechanisms available increases the child's options. For example, in the Netherlands children can be heard by judges themselves in a judicial meeting, but may at the same time have a general guardian ad litem who represents their best interests in court. Therefore, the manner in which children can opt to express their views in the Netherlands and South Africa in combination with representation, is positive. The options for children in Australia and France are in that sense, much more limited.

### 3.2. Types of proceedings

All the forms of representation mentioned in the previous section function in family law proceedings, but in which types of proceedings? The types of family proceedings included in the scope of this research and in which children can be represented can be divided into five categories.

The first category is proceedings concerning **parental authority**. All jurisdictions have at least one form of representation available in this type of proceeding. In Australia, the independent children's lawyer can be appointed for proceedings concerning parental authority, parental plans, parenting orders and child maintenance orders.<sup>223</sup> In France a children's lawyer can assist the child and an ad hoc administrator may be appointed in cases concerning parental authority, e.g. the litigation of custody and access after parental separation.<sup>224</sup> In the Netherlands it is the general guardian ad litem who may be appointed in proceedings concerning custody, residence and access.<sup>225</sup> In South Africa both the curator ad litem and the legal representative can be appointed in proceedings concerning parental authority, for the legal representative this is specifically proceedings on the termination, extension, suspension or restriction of parental responsibilities and rights, the assignment of care and contact, guardianship, maintenance, custody and access.<sup>226</sup>

The second category of proceedings are those concerning **parentage**. In Australia the independent children's lawyer and in the Netherlands the filiation guardian ad litem can function in all forms of parentage proceedings, ranging from recognition proceedings to denial of parentage.<sup>227</sup> In France and South Africa the role of representative is more limited in this category. The ad hoc administrator can represent the child in establishing or contesting parentage and the South African legal representative only plays a role in confirmation of paternity proceedings.<sup>228</sup>

The third category is **child protection** proceedings. These proceedings are different from other family law disputes in the sense that the state plays an active role in these types of proceedings through interfering in the family to protect the child. In Australia, France and South Africa the available forms of representation are involved in a wide range of these proceedings. The independent legal representative, direct legal representative and guardian ad litem in New South Wales can all function in proceedings ranging from emergency care orders, the provision of counselling or treatment services, and the development and review of care orders.<sup>229</sup> The French ad hoc administrator and children's lawyer can both function in child protection proceedings, which of the two represents the child in these proceedings depends on the child's discernment (see section 3.3.1).<sup>230</sup> In South

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<sup>223</sup> S. 68L AFLA 1975. See section 5.1.1.2 of the annexes.

<sup>224</sup> Art. 388-1 FCC. See also, UNCRC Third and Fourth Periodic Report of France 2008, para. 197; Gouttenoire 2006, p. 62; Grevot 2010, p. 12; and section 5.2.1.2 of the annexes.

<sup>225</sup> Art. 1:250 DCC. See *Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014*, p. 5; *Kamerstukken II 2004/05*, 301245, 3, p. 7; Ter Haar 2015; and section 5.3.1.2 of the annexes.

<sup>226</sup> S. 29(6)(a) SACA 2005 and S. 6(4) Divorce Act of 1979. See section 5.4.1.2 of the annexes.

<sup>227</sup> S. 69P to 69ZD AFLA 1975 and Art. 1:212 DCC. See sections 5.1.1.2 and 5.3.1.2 of the annexes.

<sup>228</sup> Art. 325 and 327 jo. Art. 328 or 334 FCC and S. 26(b) SACA 2005. See sections 5.2.1.2 and 5.4.1.2 of the annexes.

<sup>229</sup> S. 10 CCPA (NSW). See section 5.1.1.2 of the annexes.

<sup>230</sup> Art. 375 jo. 388-2 FCC and Art. 375 FCC jo. 1186 FCCP. See section 5.2.1.2 of the annexes.

Africa the legal representative can represent the child in protection and well-being, support, provision of development or intervention services, temporary safe care or alternative care proceedings and in civil proceedings on child maltreatment, neglect and abuse.<sup>231</sup> In the Netherlands both the general guardian ad litem and the separate legal representative can play a role in child protection proceedings, but both in different sorts of proceedings. The general guardian ad litem may be appointed in proceedings concerning family supervision and placement orders, conflicts regarding foster care and when there is an injunction to request treatment. The separate legal representative is mandatory in authorization for secure youth care proceedings and in disputes on the execution of care and supervision orders and may be involved in proceedings on the termination of care and supervision orders, the revocation of written instructions concerning these orders, the adjustment of care orders due to changed circumstances and in requests to end or shorten the placement in care.<sup>232</sup>

The last two categories, **international child abduction** and (international and national) **adoption** proceedings, are more narrow. All jurisdictions have one form of representation available in international child abductions proceedings, the Australian independent children's lawyer, the French children's lawyer, the Dutch general guardian ad litem and the South African legal representative.<sup>233</sup> Child representation in adoption proceedings is less uniform in the four jurisdictions. In New South Wales, Australia all three forms of child representation (independent legal representative, direct legal representative & guardian ad litem) can be appointed, just as in South Africa, where both a legal representative or curator ad litem can be appointed.<sup>234</sup> In the Netherlands, only the filiation guardian ad litem can be appointed in adoption proceedings.<sup>235</sup> Finally, in France representation can only occur in one very specific national adoption proceeding, namely in the revocation of a simple adoption both the ad hoc administrator and children's lawyer can represent the child.<sup>236</sup>

The similarities and differences between jurisdictions in the categories of cases in which a child can be represented, the different forms of representation and the different general tasks of these representation forms combined lead to a variety of representations as presented in Table 4.

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<sup>231</sup> S. 55 jo. 45 and 150 to 160 SACA 2005. See section 5.4.1.2 of the annexes.

<sup>232</sup> Art. 6.1.10(4) Youth Care Act, Art. 1:262b jo. 1:265k(1), Art. 1:261, 1:264, 1:265d and 1:265g(2) DCC. See section 5.3.1.2 of the annexes.

<sup>233</sup> S. 68L(3) AFLA 1975, Art. 388-1 FCC, Art. 1:250 DCC, and S. 279 SACA 2005. See sections 5.1.1.2, 5.2.1.2, 5.3.1.2 and 5.4.1.2 of the annexes.

<sup>234</sup> S. 9 Adoption Act 2000 and S. 233(1)(c) SACA 2005. See sections 5.1.1.2 and 5.4.1.2 of the annexes.

<sup>235</sup> See Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 4 and 6; and section 5.3.1.2 of the annexes.

<sup>236</sup> Art. 307-1 FCC. See section 5.2.1.2 of the annexes.

Table 4: Forms of representation available in different categories of proceedings in each jurisdiction per type of representation

Categories of proceedings	Jurisdictions	General type of representation	
		Best interests representative	Separate legal representative
Parental Authority	Australia	X (ICL)	
	France	X (AHA)	X (CL)
	The Netherlands	X (GGAL)	
	South Africa	X (CAL)	X (LR)
Parentage	Australia	X (ICL)	
	France	X (AHA)	
	The Netherlands	X (FGAL)	
	South Africa		X (LR)
Child Protection	Australia	X (NSW: ILR, GAL)	X (NSW: DLR)
	France	X (AHA)	X (CL)
	The Netherlands	X (GGAL)	X (SLR)
	South Africa		X (LR)
International Child Abduction	Australia	X (ICL)	
	France		X (CL)
	The Netherlands	X (GGAL)	
	South Africa		X (LR)
Adoption	Australia	X (NSW: ILR, GAL)	X (NSW: DLR)
	France	X (AHA)	X (CL)
	The Netherlands	X (FGAL)	
	South Africa	X (CAL)	X (LR)

Abbreviations:

AHA: Ad hoc administrator

CAL: Curator ad litem

CL: Children's lawyer

DLR: Direct legal representative

FGAL: Filiation guardian ad litem

GAL: Guardian ad litem

GGAL: General guardian ad litem

ICL: Independent children's lawyer

ILR: Independent legal representative

LR: Legal representative

SLR: Separate legal representative

Three evaluative conclusions can be drawn from the table and discussion above and by considering Article 12 UNCRC.

Firstly, that in all five categories of proceedings each jurisdiction has **at least one form of representation for children**. At first sight, it thus appears to comply with Article 12 UNCRC which grants children the right to express their views in 'all matters affecting the child' (para. 1) and more specifically, 'in any judicial and administrative proceedings affecting the child' (para. 2). There should be no limitation to the types of proceedings in which children can be heard.<sup>237</sup> With regards to representation in the family law proceedings studied in this research, only one jurisdiction fulfills this requirement. In New South Wales, Australia, there are no limits to the types of proceedings in the five categories above. That is not the case in France, the Netherlands or South Africa. For example, in France representation in parentage and adoption proceedings is limited and in the Netherlands representation in child protection proceedings is only available in select types of proceedings. According to the Committee, there should also be no distinction made between proceedings initiated

<sup>237</sup> UNCRC General Comment No. 12 2009, para. 32. See section 2.2.1 and 2.2.2 of the annexes.

by the children themselves or those initiated by others.<sup>238</sup> This requirement is met in all the jurisdictions.

The second conclusion that can be drawn is that there are **differences between the types of proceedings in how children can be represented**. There is a clear difference between the horizontal ‘private’ family law disputes, e.g. parental authority and parentage proceedings, and the vertical and more ‘public’ family law disputes, e.g. child protection and adoption proceedings. In the latter it is more common to provide children with a form of separate legal representation, instead of the best interests representation more generally afforded in disputes between parents. Why? Generally, it is considered that in vertical proceedings the child may require more procedural protection from the state interference in their private family matters and that the effects of the decision are more severe, e.g. children may be removed from their families. However, taking horizontal family law disputes less seriously and thereby differentiating between the two general types of proceedings, is not in conformity with Article 12 UNCRC.<sup>239</sup> It is interesting to note that in the category of international child abduction proceedings, the split is equal between best interests and separate representation. Only South Africa provides for a strong mandatory right to representation.<sup>240</sup> Australia applies additional requirements making an appointment exceptional, in France the child can only be assisted in their right to be heard, and in the Netherlands representation is possible in theory but in practice rarely employed due to the short timeframe available for international child abduction proceedings.<sup>241</sup>

The third and final conclusion concerns the **division of tasks and types of cases**. In some jurisdictions there is a clear division of tasks between the forms of representation and there is a clear division between the types of cases, while in other jurisdictions there is a clear division of tasks but no division between types of cases as both forms of representation can function in similar proceedings. Whether these divisions do or do not exist is relevant with regards to the children’s right to choose the manner by which their views are heard as provided by Article 12 UNCRC. As discussed in section 3.1 above, the existence of multiple forms of representation in principle provides for a choice, but the actual choice depends on whether multiple forms of representation are accessible in the same types of proceedings. The clearest division of both tasks and types of proceedings is in the Netherlands, in each sort of proceeding there is only one available form of representation, except in a few very limited and exceptional child protection proceedings.<sup>242</sup> This means that, in practice, there is no choice for the child between the types of representation. In Australia there is the clear division of types of proceedings between the federal form of representation, the independent children’s lawyer, and the New South Wales’ forms of representation, the independent legal representative, the direct legal representative and the guardian ad litem. The latter forms are available in similar proceedings,

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<sup>238</sup> UNCRC General Comment No. 12 2009, para. 33.

<sup>239</sup> Daly 2016, p. 7.

<sup>240</sup> S. 279 SACA 2005. See section 5.4.1.2 of the annexes.

<sup>241</sup> S. 68L(3) AFLA 1975, Art. 388-1 FCC, and Jonker et al. 2015, p. 45. See sections 5.1.1.2, 5.2.1.2 and 5.3.1.2 of the annexes.

<sup>242</sup> See sections 5.3.1.2 and 5.3.2.3 of the annexes.

therefore appearing to grant children a choice in the manner of representation. However, this choice may be limited by the further requirements discussed in the next section. Having two (or more) forms of representation available in the same types of proceedings also occurs to a limited extent in both France and South Africa. Again, providing the appearance of a choice, although in both these jurisdictions the question which of the forms of representation is actually available to the child in a specific procedure depends on the further requirements discussed below.

### 3.3. Requirements for representation

If children are involved in one of the proceedings described above in which representation is available, then the question remains whether children are always represented? There are only three situations in which child representation is mandatory. These are the appointment of a filiation guardian ad litem in pending parentage proceedings and the appointment of a separate legal representative in authorization of secure youth care proceedings in the Netherlands,<sup>243</sup> and the French ad hoc administrator who must be appointed if requested by the child's parent(s) within the framework of Article 383 FCC.<sup>244</sup> By making representation mandatory in these proceedings, the Dutch and French legislatures must have considered these situations extraordinary. With regards to the separate legal representative in the authorization of secure youth care proceedings in the Netherlands, it was indeed the case that the legislature wanted to provide extra protection to the child due to the drastic effect of the decision.<sup>245</sup>

Although it is commendable that representation is not limited to any specific requirements in these situations, it does conflict with one of the core values of Article 12 UNCRC. Article 12 UNCRC comprises a right for the child to participate in proceedings, not an obligation.<sup>246</sup> A child should have the option not to express his or her views. Therefore, it may be problematic that in the three above mentioned situations, children have mandatory representation. However, mandatory representation does not have to mean that children are obliged to express views. As long as children can opt not to express their views even though they are represented in these three situations, the standard of Article 12 UNCRC is not threatened.

A second issue concerning the mandatory representation and Article 12 UNCRC is that according to the Committee there should be no distinction made between proceedings initiated by the child versus those initiated by others.<sup>247</sup> In the Netherlands, the distinction made between the mandatory filiation guardian ad litem in pending proceedings versus child related requirements for the appointment of a filiation guardian ad litem when proceedings are to be instituted by the child is contrary to Article 12(2) UNCRC. A filiation guardian ad litem should be mandatory no matter who institutes the proceedings. By applying additional requirements when the child initiates the proceedings, the Netherlands limits the child's opportunity to participate in parentage proceedings.

Aside from these three situations, further requirements are applied for all other types of proceedings and forms of representation. These requirements can either be child related, e.g. determining from what age or level of maturity children can be represented, or conflict related, e.g. determining when a representative can be appointed. Both sorts of requirements will be discussed in the following section for all jurisdictions and forms of representation.

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<sup>243</sup> Art. 1:212 DCC and Art. 6.1.10(4) Youth Care Act. See section 5.3.1.5 of the annexes.

<sup>244</sup> Massip 1995; and Fédération nationale des administrateurs ad hoc 2009, p. 42 and 44. See section 5.2.1.5 of the annexes.

<sup>245</sup> *Kamerstukken II* 2005/06, 30644, 3, p. 23. See also, Van Teeffelen 2008; and section 5.3.1.1 of the annexes.

<sup>246</sup> UNCRC General Comment No. 12 2009, para. 16 and 22; Sutherland 2013, p. 344; and section 2.2.1.

<sup>247</sup> UNCRC General Comment No. 12 2009, para. 33.

### 3.3.1. Child related requirements for representation

In the four studied jurisdictions, there are three ways in which child related factors play a role as a requirement or otherwise.

First of all, it is possible that there is **no explicit child related requirement**, although child related factors, such as the age of the child, may still influence the appointment or the general task of the representative. In Australia, the independent children's lawyer is not subject to specific child related requirements, but the criteria from the *Re K* decision by which judges determine whether or not to use their discretion, do contain two child related factors.<sup>248</sup> This means that the appointment can be set aside if it is considered inappropriate due to the child's age or maturity or that the appointment may be required because the child is of mature years and has strong views. The South African curator ad litem is not restricted by any child related factors and the legal representative is also appointed regardless of the age or maturity of the child.<sup>249</sup> However, the role of the legal representative is dependent on child related factors.<sup>250</sup> If the child is sufficiently mature, developed and wishes to participate directly then the legal representative takes instructions from the child. If not, when the child is very young and unable to give instructions, the legal representative may still be appointed but will function as a best interests advocate. In the Netherlands, the general guardian ad litem is appointed at the discretion of the court and the child's age or level of maturity can be a factor taken into account, in addition to other relevant circumstances, but is not a hard requirement.<sup>251</sup>

Secondly, child related factors can be a requirement which must be achieved, a **'positive' requirement** in the sense of children having capability or having reached a certain age. The simplest version hereof, is that children must be 12 years or older to have a separate legal representative in the Dutch care and supervision order proceedings.<sup>252</sup> For the appointment of a filiation guardian ad litem to initiate parentage proceedings on behalf of the child the Dutch courts have discretion. A general requirement often applied by the Dutch courts is that the child should be sufficiently able to foresee the consequences of the application in the parentage proceedings.<sup>253</sup> In New South Wales, Australia, the direct legal representative will be appointed if the child is presumed capable of giving proper instructions<sup>254</sup> and in France, if the child is *'capable de discernement'* a children's lawyer can represent the child.<sup>255</sup>

The last option is that child related factors are used as a **'negative' requirement**, meaning that the child is considered incapable or too young and thus requires a representative. This is the case for both the New South Wales' independent legal representative and the French ad hoc administrator

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<sup>248</sup> S. 6(a) AFLA 1975. *Re K* [1994] FLC 92-461; Inquiry into the Australian Legal Aid System 1997, para. 5.16; Carson et al. 2014, p. 59; and Kaspiew et al. 2013, p. xi. See sections 5.1.1.4 and 5.1.1.5 of the annexes.

<sup>249</sup> See section 5.4.1.4 of the annexes.

<sup>250</sup> See Boezaart 2013a, p. 369; Cleophas & Assim 2015, p. 300; and section 5.4.2 of the annexes.

<sup>251</sup> See Jansen 2016b; and section 5.3.1.4 of the annexes.

<sup>252</sup> Art. 1:261, 1:262b, 1:264, 1:265d and 1:265g DCC. See section 5.3.1.4 of the annexes.

<sup>253</sup> See Schrama 2015; and section 5.3.1.4 of the annexes.

<sup>254</sup> S. 99A(1)(a) and 99A(2)(a) CCPA (NSW) and S. 122(3)(c)(i) Adoption Act 2000. See section 5.1.1.4 of the annexes.

<sup>255</sup> Art. 388-1 FCC and Art. 1182 FCCP. See section 5.2.1.4 of the annexes.

who are both appointed when the requirements for, respectively, the direct legal representative or children’s lawyer are not met. If the child is not presumed capable of giving proper instructions then an independent legal representative will be appointed.<sup>256</sup> In France, if the child is not ‘*capable de discernement*’ then an ad hoc administrator can be appointed for the child.<sup>257</sup> Lastly, in New South Wales, Australia a guardian ad litem can be appointed if there are special circumstances which warrant the appointment, these special circumstances include when the child has special needs because of their age, disability or illness, and in child protection procedures, when the child is not capable of giving proper instructions.<sup>258</sup>

In Table 5 below, the three ways in which child related factors can play a role as a requirement discussed above have been presented per jurisdiction. The table shows that while in the Netherlands and South Africa the task of the representatives has no impact on the requirements applied, in Australia – specifically, New South Wales – and France there is a difference. The separate legal representatives, the direct legal representative and the children’s lawyer, require capability (as defined in italics), while the best interests representative, the independent legal representative and the ad hoc administrator, require incapability. Thus, in these two jurisdictions more developed children who are capable of giving instructions or expressing their views are granted the chance to instruct their representative, while the (generally younger) children who are incapable of doing so are not.

Table 5: The role of child related requirements for the representation forms in the different jurisdictions\*

	<b>Australia</b>	<b>France</b>	<b>The Netherlands</b>	<b>South Africa</b>
No (explicit) requirement	ICL	-	GGAL	LR CAL
‘Positive’ requirement	DLR	CL	FGAL SLR	-
	<i>Capability of giving proper instructions</i>	<i>Capable de discernement</i>	-	-
‘Negative’ requirement	ILR GAL	AHA	-	-

\* The different forms of representation have been shaded according to their general task:

Light gray = best interests representatives    Dark gray = separate legal representatives

**Abbreviations:**

- |                                  |                                    |                                       |
|----------------------------------|------------------------------------|---------------------------------------|
| AHA: Ad hoc administrator        | FGAL: Filiation guardian ad litem  | ILR: Independent legal representative |
| CAL: Curator ad litem            | GAL: Guardian ad litem             | LR: Legal representative              |
| CL: Children’s lawyer            | GGAL: General guardian ad litem    | SLR: Separate legal representative    |
| DLR: Direct legal representative | ICL: Independent children’s lawyer |                                       |

**Open requirements for representation**

Three of the child related requirements discussed above are open requirements, leaving a certain discretion to judges. All three of these are linked to capability: the New South Wales’ requirement of

<sup>256</sup> S. 99A(1)(a) and 99A(2)(a) CCPA (NSW) and S. 122(3)(c)(i) Adoption Act 2000. See section 5.1.1.4 of the annexes.

<sup>257</sup> Art. 388-1 FCC and Art. 1182 FCCP. See section 5.2.1.4 of the annexes.

<sup>258</sup> S. 123(2) Adoption Act 2000 and s. 100(2) CCPA (NSW).

being ‘capable of giving proper instructions’, the French requirement of being ‘*capable de discernement*’ and the Dutch requirement of ‘being sufficiently able to foresee the consequences of a parentage application’. What is meant by these requirements?

In New South Wales, the requirement of being capable of giving proper instructions is supplemented by rebuttable presumptions in the legislation and guidelines in the Representation Principles for Children’s Lawyers. A child is presumed capable from the age of 12 onwards in child protection proceedings and from the age of 10 onwards in adoption proceedings.<sup>259</sup> The capability must be determined per child, by considering their willingness to participate, ability to communicate, age, level of education, cultural context and degree of language acquisition, and not by assessing the child’s ‘good judgment’ or level of maturity.<sup>260</sup>

The French requirement of being ‘*capable de discernement*’ is taken directly from the French version of Article 12 of the UNCRC. In France, there is no age requirement applied to the determination of the child’s capability to express their views. The judge must determine the child’s capability individually in each separate case. Generally, however, children are considered capable from the age of 7 onwards.<sup>261</sup>

In the Netherlands, the requirement of being sufficiently able to foresee the consequences of an application only concerns limited cases, when a filiation guardian ad litem is requested to initiate proceedings on behalf of the child. In these situations, generally children from the age of 12 onwards are considered sufficiently capable, although in exceptional cases the requirement has been circumvented to allow for the appointment of a guardian ad litem for (very) young children, even if they are not sufficiently able to foresee the consequences.<sup>262</sup>

### **Evaluation of requirements in light of Article 12 UNCRC**

Article 12 UNCRC refers to child related factors twice: the capability of the child and the capacity of the child. Regarding when children should be provided with a means to participate, only the capability of the child is relevant. The issue of capacity only concerns that weight should be given to the child’s views ‘in accordance with the age and maturity of the child’. This is for the decision maker to decide after hearing the views of the child. On the other hand, the right to be heard should be granted to the child ‘capable of forming his or her own views’, according to Article 12 UNCRC. So how do the child related requirements in the four jurisdictions relate to the capability requirements contained in the UNCRC?

Firstly, it is crucial that there should not be an age limit in law or in practice.<sup>263</sup> Age should not be an automatic barrier.<sup>264</sup> Of the representation forms discussed, only one has a simple age limit

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<sup>259</sup> S. 99A(1)(a) and 99A(2)(a) CCPA (NSW) and S. 122(3)(c)(i) Adoption Act 2000. See section 5.1.1.4 of the annexes.

<sup>260</sup> Principles C1 and C2 of the Representation Principles for Children’s Lawyers 2014. See section 5.1.1.4 of the annexes.

<sup>261</sup> See Attias 2012; Rongé 2008, p. 45; and section 5.2.1.4 of the annexes.

<sup>262</sup> See Van Teeffelen 2008; Schrama 2015; and section 5.3.1.4 of the annexes.

<sup>263</sup> UNCRC General Comment No. 12 2009, para. 21.

in law – the Dutch separate legal representative in care and supervision order proceedings. This runs contrary to Article 12 UNCRC. Of course, in other jurisdictions age limits are also seen applied in practice as a means by which to elucidate open requirements. For example, in New South Wales the rebuttable presumptions in legislation consist of an age limit. Compared to the age limit for the Dutch separate legal representative, this is not a ‘barrier’ as it is a presumption which must be tested per child in combination with other factors, e.g. the child’s ability to communicate, and can therefore be debunked.

A second important aspect is that decision makers, e.g. the courts, should start with the presumption of a capable child and then determine on a case-by-case basis whether the child is not capable.<sup>265</sup> Whether this occurs can, generally, not be found specifically in the requirements themselves, as it is a mindset that must be adopted by judges. However, it would be good if the necessity of such a mindset was made more explicit.

The final issue regarding capability, is how it should be understood. As discussed in section 2.2.1, how the UNCRC understands capacity remains unclear. According to the Committee, the child need only have a ‘sufficient understanding’, but what this means exactly is vague.<sup>266</sup> The same can be said about the French requirement of being ‘*capable de discernement*’ and the Dutch requirement of being sufficiently able to foresee the consequences. Both remain vague. In fact, the Committee has criticized the French requirement, stating that in practice the interpretation and determination of this requirement may possibly discriminate and deny the child of their right to be represented and heard.<sup>267</sup> It is ironic that the Committee does so, when not providing for any clarity themselves. The manner in which New South Wales has elaborated their open requirements of being capable of giving proper instructions is commendable. Although the child’s ability to communicate and their willingness to participate may be open to discussion, clarifying specific factors creates legal equality between children in the assessment of their capability.

### 3.3.2. Conflict related requirements

In addition to certain specific child related factors, in some jurisdictions other requirements must also be met for the appointment of a representative for the child. These can be classified as conflict related requirements, as the specifics of the conflict make it so that the child requires representation. The additional requirements found in all four jurisdictions are similar, in the sense that they can be classified as one of the two conflict related requirements.

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<sup>264</sup> UNCRC Recommendations: Day of General Discussion 2006, para. 51.

<sup>265</sup> UNCRC General Comment No. 12 2009, para. 20. See also, Krappmann 2010, p. 507; Lansdown 2011, p. 20; and section 2.2.1.

<sup>266</sup> UNCRC General Comment No. 12 2009, para. 21.

<sup>267</sup> UNCRC Concluding Observations France 2004, para. 21. s

### Necessary in the child's best interests

The first shared conflict related requirement is that representation is necessary in the child's best interests. This requirement is applied to all the Australian representation forms. With regards to the independent children's lawyer, the independent legal representative, and the direct legal representative the non-exhaustive criteria provided for in *Re K* guide the courts in deciding whether the child's interests require representation.<sup>268</sup> The courts can appoint a representative, according to these criteria, for example if there are allegations of abuse, issues of parental alienation or significant medical, psychiatric or psychological illnesses or disorders involved. In international child abduction proceedings these criteria are supplemented by the extra requirement of 'exceptional circumstances'.<sup>269</sup> The New South Wales' guardian ad litem also requires special circumstances, namely that the court is of the opinion that the child will benefit from the appointment.<sup>270</sup> In the Netherlands, the appointment of the general guardian ad litem is also subject to the requirement that it is necessary in the best interests of the child.<sup>271</sup> This is also the case for the South African legal representative.<sup>272</sup> The appointment of a South African curator ad litem is also solely guided by the best interests of the child, although the additional requirement is that the conflict must be one of four specific instances.<sup>273</sup> One of these falls under the second shared conflict related requirement discussed in the following, the other three are that the child does not have a parent or guardian, that the parent or guardian cannot be found or that the parent or guardian unreasonably refuses to assist the minor in the legal proceedings.

The requirement that representation should be in the child's best interests for the appointment to occur, ties into the symbiotic relationship between Article 3 and Article 12 UNCRC.<sup>274</sup> While it is positive that the best interests of the child guide the appointment of a representative as a requirement in the situations above, it should not be too high of a hurdle in practice. States should not use the best interests principle to withhold children the opportunity to express their views or to trump their right to be heard.<sup>275</sup> This is especially so, because an adult's – subjective – assumption of what is in the best interests of the child can impede the child's opportunity to participate in proceedings.<sup>276</sup> The requirement of representation being necessary in the child's best interests should therefore be used cautiously. The courts in Australia, the Netherlands and South Africa should not abuse the requirement to prevent the representation of children.

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<sup>268</sup> S. 68L(2) AFLA 1975, S. 99(1) CCPA (NSW), S. 122(2)(b) Adoption Act 2000, and *Re K* [1994] FLC 92-461. See also, UNCRC Initial Periodic Report of Australia 1996, para. 248; and section 5.1.1.5 of the annexes.

<sup>269</sup> S. 68L(3) AFLA 1975. See section 5.1.1.5 of the annexes.

<sup>270</sup> S. 100(1)(B) CCPA (NSW) and S. 123(1)(B) Adoption Act 2000.

<sup>271</sup> See section 5.3.1.5 of the annexes.

<sup>272</sup> S. 6(4) Divorce Act 1979 and S. 55 SACA 2005. See section 5.4.1.5 of the annexes.

<sup>273</sup> See *Ter Haar* 2016; and section 5.4.1.5 of the annexes.

<sup>274</sup> UNCRC General Comment No. 12 2009, para. 74.

<sup>275</sup> Hodgkin & Newell 2007; Lansdown 2011, p. 33; and section 2.3.2.

<sup>276</sup> See Archard & Skivenes 2009, p. 2; Raitt 2004, p. 153; Thomas & O'Kane 1998, p. 151; and section 2.3.2.

### **Conflict of interests**

The second shared conflict related requirement is the requirement of a conflict of interests between the child and the parent(s) or guardian(s). This requirement is found explicitly in France for the ad hoc administrator and for the Dutch general guardian ad litem. In France, the conflict of interests must actually exist for the appointment according to Article 383 FCC. For the appointment on the basis of Article 388-2 FCC, it is sufficient that it appears to exist or is highly likely to arise. While the requirement of a conflict of interests is relatively subjective and vague, in France the conflict must be between the child and the parent(s) and must be sufficiently contradictory or divergent. A conflict between the parents is not enough for the appointment of an ad hoc administrator.<sup>277</sup> In the Netherlands, the requirement of a conflict of interests is understood broadly. It includes both conflicts between the child and the parent(s) or conflicts between the two parents.<sup>278</sup> The requirement of a conflict of interests also plays a role in Australia and South Africa, albeit more limited. In Australia, the *Re K* criteria include the situation of an intractable conflict between the parents involving the child, and in South Africa, one of the instances in which the curator ad litem can be appointed is when the interests of the child clash with those of the parents or guardians or if the possibility of a clash exists.<sup>279</sup>

The requirement of a conflict of interests between the child and the parent(s) or between the two parents is a logical one. The Committee itself has emphasized that there is often a risk in matters concerning children that there is a conflict between the child and their parent(s) or between the two parents themselves.<sup>280</sup> Therefore, in those situations it is vital to appoint a representative, who is not a family member, for the child.

#### 3.3.3. Combined requirements for representation

Other than the three specific situations in which the appointment of a representative is mandatory, all the other representation forms in each of the four jurisdictions are subject to either child related or conflict related requirements or a combination of both as shown in Table 6.

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<sup>277</sup> See Fédération nationale des administrateurs ad hoc 2009, p. 23-24; and section 5.2.1.5 of the annexes.

<sup>278</sup> Werkproces benoeming bijzondere curator o.g.v. Art. 1:250 BW 2014, p. 3. See also, Jansen 2016a, p. 2179; Ter Haar 2015; and section 5.3.1.5 of the annexes.

<sup>279</sup> See *Re K* [1994] FLC 92-461; Boezaart & de Bruin 2011, p. 422-423; Boezaart 2013b, p. 709-710; and sections 5.1.1.5 and 5.4.1.5 of the annexes.

<sup>280</sup> UNCRC General Comment No. 12 2009, para. 36.

Table 6: Requirements for the forms of representation per jurisdiction

Forms of representation		Child related requirements			Conflict related requirements			
		'Positive'	'Negative'	Not explicit	Necessary in child's interests	Conflict of interests	None	
AU	ICL			X	X	(x)		
	NSW	ILR		X	X	(x)		
		DLR	X			X	(x)	
		GAL		X		X		
FR	AHA*		X			X		
	CL	X					X	
NL	GGAL			X	X	X		
	FGAL*	X					X	
	SLR*	X					X	
SA	LR			X	X			
	CAL			X	X	(x)		

(x): Is a factor but not a hard requirement.

\* In three situations the appointment is mandatory: the AHA when requested in Art. 383 FCC; the FGAL in pending parentage proceedings; and the SLR in the authorization of secure youth care proceedings.

Abbreviations:

AHA: Ad hoc administrator

CAL: Curator ad litem

CL: Children's lawyer

DLR: Direct legal representative

FGAL: Filiation guardian ad litem

GAL: Guardian ad litem

GGAL: General guardian ad litem

ICL: Independent children's lawyer

ILR: Independent legal representative

LR: Legal representative

SLR: Separate legal representative

### 3.4. Appointment of a child representative

Knowing which forms of representation are available, in which types of proceedings they are available and what the applicable requirements are in those situations must be accompanied by an understanding of who makes the decision to appoint a child representative and at which point in the proceedings this decision can be made. This section covers these two aspects, first discussing who can request and/or appoint a child representative and then discussing when the appointment can occur and when the task of the representative ends.

#### 3.4.1. Who appoints the child representative

In all four jurisdictions, it is either the court or the child who can opt to appoint a representative, with the court capable of doing so either *ex officio* or on request. An overview hereof is included in Table 7.<sup>281</sup>

Table 7: Decision maker for each form of representation per jurisdiction

Forms of representation		Court		Child
		<i>Ex officio</i>	At the request of:	
AU	ICL	X	X: child, welfare organization, any other person	
	NSW	ILR	X?	X <sup>1</sup>
		DLR	X?	X <sup>1</sup>
		GAL	X?	
FR	AHA	X	X: mandatory at the request of a legal representative, discretion at the request of the child or public prosecutor	
	CL			X
NL	GGAL	X	X: child, legal representative, person with 'family life', guardianship agency, or other interested party	
	FGAL	X: mandatory when pending	X: child, legal representative, legal parent without parental authority, natural father with 'family life'	
	SLR	X: mandatory in authorization of secure youth care proceedings		X
SA	LR	X		X <sup>2</sup>
	CAL	X	X: child, child's relative, other persons with an interest	

?: Unclear whether, but likely, possible at request and unclear that if so, at whose request.

<sup>1</sup>: Requires leave of court.

<sup>2</sup>: Requires consent from the Legal Aid Board and in divorce, care or maintenance cases written consent from the Regional Operations Executive.

Abbreviations:

AHA: Ad hoc administrator

CAL: Curator ad litem

CL: Children's lawyer

DLR: Direct legal representative

FGAL: Filiation guardian ad litem

GAL: Guardian ad litem

GGAL: General guardian ad litem

ICL: Independent children's lawyer

ILR: Independent legal representative

LR: Legal representative

SLR: Separate legal representative

<sup>281</sup> For further information see sections 5.1.1.6 (AU), 5.2.1.6 (FR), 5.3.1.6 (NL), and 5.4.1.6 (SA) of the annexes.

The table shows that the decision is mostly in the hands of the courts, with the Australian and South African exceptions requiring the leave of court or consent from the Legal Aid Board. Children are only free to appoint the most traditional lawyer forms – the French children’s lawyer and the Dutch separate legal representative – themselves without requiring any further consent. From the table it can also be concluded that when the representative can be requested, the child is always offered the opportunity to request the court appointment of a representative.

### **Evaluation in light of Article 12 UNCRC**

Neither Article 12 UNCRC nor the General Comments made by the Committee, refer to whom may or should request and/or appoint a representative for the child. It appears to be a decision left to the State parties and perhaps falls under the requirement that the child’s right to be heard in judicial proceedings should be provided ‘in a manner consistent with the procedural rules of national law’. What has been said by the Committee on this topic, however, related to the French situation in which the hearing and representation of a child through the children’s lawyer is subject to the child’s own request. The Committee was concerned, saying that this ‘may give rise to discrimination and inconsistencies in practice’.<sup>282</sup> This concern can equally apply to the Dutch separate legal representative. Therefore, it seems that having the court decide whether to appoint a representative, with the opportunity for the child to request the appointment, is the most appropriate framework. Even though, according to Milne, this only grants children a limited amount of independence as they remain dependent on the court as to whether they can participate.<sup>283</sup>

#### **3.4.2. Duration of child representation**

The timing of child representation in family law proceedings lacks a clear structure in most jurisdictions.<sup>284</sup> In **South Africa** it is unclear from what moment the legal representative or curator ad litem can be appointed and when their function ends. In practice, they are generally appointed at the start of proceedings, although it can be earlier as their role can be to assist the child in getting access to court.<sup>285</sup> The start and end of the **French** children’s lawyer’s function is also unclear, more clarity exists with regards to the ad hoc administrator.<sup>286</sup> The appointment of an ad hoc administrator on the ground of Article 388-2 FCC can only occur in an ongoing procedure, while the appointment on the ground of Article 383 can also be prior to the proceedings. In both situations the mission of the ad hoc administrator is limited and the completion of the mission means the end of their appointment.<sup>287</sup>

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<sup>282</sup> UNCRC Concluding Observations France 2009, para. 39.

<sup>283</sup> Milne 2015, p. 18. See also section 2.1.

<sup>284</sup> Taylor et al. 2012, p. 669.

<sup>285</sup> S. 14 SACA 2005. See section 5.4.1.3 of the annexes.

<sup>286</sup> See section 5.2.1.3 of the annexes.

<sup>287</sup> See Fédération nationale des administrateurs ad hoc 2009, p. 10-11; Lebrun 2001, p. 33; and section 5.2.1.3 of the annexes.

The **Dutch** guardians ad litem also have limited tasks, making the duration of their task dependent on the assignment description given by the court.<sup>288</sup> The general guardian ad litem can be appointed at any phase of the procedure, including prior to the start of proceedings in theory.<sup>289</sup> The filiation guardian ad litem will always be involved from the very start of proceedings, either being appointed to initiate proceedings on behalf of the child or being immediately appointed once proceedings have been initiated by another party. The Dutch separate legal representative will also be immediately appointed at the start of authorization for secure youth care proceedings, but can become involved at any point in other proceedings as children are free to decide.<sup>290</sup>

In **Australia**, the timing of the representatives is most clearly defined. The independent children's lawyer, independent legal representative, direct legal representative and the guardian ad litem can all be appointed in the early phases of proceedings.<sup>291</sup> The appointment of an independent children's lawyer ends when a final decision has been made or when they seek the court to discharge them of their appointment.<sup>292</sup> Both the independent legal representative and direct legal representative can be dismissed by the courts at any time for any reason and the direct legal representative can also be dismissed by the child personally.<sup>293</sup> The guardian ad litem's function will generally end after the court's decision, although they may commence an appeal on behalf of the child.<sup>294</sup>

All in all, the child representation forms in all four jurisdictions generally function from the start of family law proceedings until a decision has been made or they have been discharged by the court or due to the completion of their mission. Whether this complies with Article 12 UNCRC is difficult to say, as it is a subject which is not discussed by the Article or by the Committee. However, having representation available from the start of proceedings but also allowing for the appointment of a representative at a later point in time makes representation more accessible than a more limited frame within which a representative could be appointed. This accessibility supports the 'opportunity' for the child to be heard in judicial proceedings as required by Article 12(2) UNCRC.<sup>295</sup>

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<sup>288</sup> See De Graaf & Limbeek 2011; and section 5.3.1.3 of the annexes.

<sup>289</sup> *Kamerstukken II* 2004/05, 301245, 3, p. 13; *Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW* 2014, p. 5.

<sup>290</sup> Art. 6.1.10(4) Youth Care Act. See section 5.3.1.3 of the annexes.

<sup>291</sup> See Care and Protection Practice Standards 2015, principles 2.2.2(1), 2.2.4, 2.3.2(1), and 2.3.4; Kaspiew et al. 2013, p. 18; and section 5.1.1.3 of the annexes.

<sup>292</sup> Guidelines for Independent Children's Lawyers 2013, para. 6.6.

<sup>293</sup> See the explanatory text relating to Principle J2 of the Representation Principles for Children's Lawyers 2014; and section 5.1.1.3 of the annexes.

<sup>294</sup> Bao-Er 2006, p. 5.

<sup>295</sup> See UNCRC General Comment No. 12 2009, para. 34; Lansdown 2011, p. 52; and section 2.2.2.

### 3.5. The function, work and payment of the child’s representative

The general task of child representatives is important, but cannot be fully understood without knowing which function requirements are attached, how their task ought to be completed and who bears the costs of their work. This section will delve into each of these three aspects separately.

#### 3.5.1. Function requirements

For the function of a child representative in each of the four jurisdictions a variety of requirements are applied. The function can be fulfilled by different types of practitioners or even by lay persons. Although it might be expected that the function of all forms of child representatives are fulfilled by a legal practitioner, this is not always the case.

In Table 8, the required professional background of each form of representation and whether they must be registered on some form of list or as a member of a panel is presented.

*Table 8: Function requirements of which type of practitioners and their registration in relation to the forms of representation*

Forms of representation		Type of practitioner			Register
		Legal practitioner	Social or behavioral science practitioner	Other	
AU	ICL	X			X
	NSW	ILR	X		X
		DLR	X		X
		GAL		X	X
FR	AHA	X	X	X: family member or person close to the child	X
	CL	X			(X: voluntary)
NL	GGAL	X	X		X
	FGAL	X			X
	SLR	X			
SA	LR	X			
	CAL	X			

**Abbreviations:**

AHA: Ad hoc administrator  
 CAL: Curator ad litem  
 CL: Children’s lawyer  
 DLR: Direct legal representative  
 FGAL: Filiation guardian ad litem  
 GAL: Guardian ad litem  
 GGAL: General guardian ad litem  
 ICL: Independent children’s lawyer  
 ILR: Independent legal representative  
 LR: Legal representative  
 SLR: Separate legal representative

The table evidently shows that most forms of representation require a legal practitioner.<sup>296</sup> There are three exceptions. The guardian ad litem in New South Wales cannot be a legal practitioner, but must be a person with the necessary qualification and experience in social, health, or behavioral sciences.<sup>297</sup> Both the French ad hoc administrator and the Dutch general guardian ad litem can either be a legal practitioner or another person. The ad hoc administrator will generally be a family member or other person close to the child, unless the judge finds this not to be in the interests of the child, in which

<sup>296</sup> For the extended information see sections 5.1.2.1 (AU), 5.2.2.1 (FR), 5.3.2.1 (NL), and 5.4.2.1 (SA) in the annexes.

<sup>297</sup> See section 5.1.2.1 of the annexes.

case a natural or legal person will be appointed from a special list provided for by law.<sup>298</sup> The natural or legal person can have a legal, social or behavioral sciences background.<sup>299</sup> In the Netherlands in theory, anyone can be appointed as a general guardian ad litem. However, the list of guardians ad litem from which the court chooses, includes both legal practitioners, mediators and experts from the social and behavioral sciences.<sup>300</sup>

With regard to the (professional) background of child representatives, the Committee on the Rights of the Child has not placed any restrictions. Instead it has stated that parents, lawyers or other persons are suitable, although parents less so due to the risk of conflict with – the views of – their child. Thus, the options of legal practitioners and social or behavioral practitioners are both suitable. However, the fact that in South Africa, both the legal representative and the guardian ad litem can only be legal practitioners and that the Constitution specifically refers to legal practitioners, has been deemed contradictory to the UNCRC by Sloth-Nielsen.<sup>301</sup> She argues that this limits what was originally meant by the drafters of the Convention. This may be the case, although it is also rare that other professionals are appointed in the other jurisdictions and the Committee has, as of yet, not criticized this status quo. That the French ad hoc administrator may be a parent, unless a judge finds this ill-advised, in which case another professional will be appointed, does appear to fit well within the guidance of the Committee.

### **Registers of child representatives**

Table 8 also shows that most representatives are appointed from a register. More specifically, various types of registers exist. In New South Wales, Australia the independent children's lawyer, direct legal representative and independent legal representative are all either 'inhouse' practitioners or on the panel for appointment.<sup>302</sup> Guardians ad litem must also be chosen from the panel to which they can be appointed. In France, the ad hoc administrator with a professional nature can only be appointed from the list created per Article R. 53 French Code of Criminal Procedure (*Code de procédure pénale*; hereafter FCPC).<sup>303</sup> A children's lawyer can voluntarily join the regional bar group of children's lawyers provided for by the national charter on the role and functioning of the children's lawyer of 2008.<sup>304</sup> For the Dutch guardians ad litem there are also two lists composed by the Legal Aid Board to which professionals can be added.<sup>305</sup> In South Africa, both forms of representative are not registered.

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<sup>298</sup> Art. R. 53 FCPC. See section 5.2.2.1 of the annexes.

<sup>299</sup> See section 5.2.2.1 of the annexes.

<sup>300</sup> See section 5.3.2.1 of the annexes.

<sup>301</sup> Sloth-Nielsen 2008, p. 498.

<sup>302</sup> See Kaspiew et al. 2013, p. 15; Ross 2013b, p. 335; and section 5.1.2.1 of the annexes.

<sup>303</sup> See section 5.2.2.1 of the annexes.

<sup>304</sup> Charte nationale de la défense des mineurs 2008. See section 5.2.2.1 of the annexes.

<sup>305</sup> See Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 6; Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 3; and section 5.3.2.1 of the annexes.

Although a curator ad litem will generally be an advocate of the High Court, an attorney can also fulfill the function.<sup>306</sup>

The existence of panels or registers of child representatives is positive, as it provides for experienced and skilled representatives. In addition, once appointed to the register or panel it is often the case that the representatives must adhere to certain codes of conduct. For example, in New South Wales the representatives must adhere to the practice standards once appointed to the panel and in France many children's lawyers have voluntarily bound themselves to best practice guidelines.<sup>307</sup> This follows the Committees recommendation that codes of conduct should be developed for child representatives in accordance with Article 12 UNCRC.<sup>308</sup>

### **Required experience and skills of a child representative**

For most forms of representation certain experience and skills are required. The most common being that the representative must be able to communicate effectively with the child and other parties,<sup>309</sup> must have knowledge of and experience with the issues facing the child, e.g. parental conflicts,<sup>310</sup> must have knowledge of and experience with the law,<sup>311</sup> and should have mediation and advocacy skills.<sup>312</sup> In Australia, an independent children's lawyer must also complete a training program and can follow a professional development program.<sup>313</sup> These required skills tie in perfectly with what the Committee has said about the topic. Namely, that the representative should have sufficient knowledge and understanding of the proceedings and have experience in communicating and working with children.<sup>314</sup>

#### **3.5.2. The work of the child representatives**

Knowing who can function as a child representative is important, knowing how they ought to complete their task as child representative even more so. As was previously discussed in section 3.1, the forms of representation can be categorized by their general task of either representing the child's best interests or representing the child's views as directed. But how ought the general task of these forms of representation to be completed in the four jurisdictions?

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<sup>306</sup> See Boezaart 2013b, p. 713-714; and section 5.4.2.1 of the annexes.

<sup>307</sup> Kaspiew et al. 2013, p. 103; and Chartre nationale de la defense des mineurs 2008. See sections 5.1.2.1 and 5.2.2.1 of the annexes.

<sup>308</sup> UNCRC General Comment No. 12 2009, para. 37.

<sup>309</sup> See, for example, the Australian ICL, ILR, DLR and GAL in section 5.1.2.1, the Dutch GGAL in section 5.3.2.1, and the South African LR in section 5.4.2.1 of the annexes.

<sup>310</sup> See, for example, the Australian ICL, ILR, DLR and GAL in section 5.1.2.1, the French AHA in section 5.2.2.1, and the Dutch GGAL in in section 5.3.2.1 of the annexes.

<sup>311</sup> See, for example, the Australian GAL in section 5.1.2.1, the Dutch FGAL in in section 5.3.2.1, and the South African LR in section 5.4.2.1 of the annexes.

<sup>312</sup> See, for example, the Australian GAL in section 5.1.2.1, the Dutch GGAL and FGAL in in section 5.3.2.1, and the South African LR in section 5.4.2.1 of the annexes.

<sup>313</sup> See Carson et al. 2014, p. 60; Kaspiew et al. 2013, p. 107; and section 5.1.2.1 of the annexes.

<sup>314</sup> UNCRC General Comment No. 12 2009, para. 36.

An important part of the answer to this question concerns how the representatives ought to **communicate with the child**. All eleven forms of representative are advised to speak to the child in person and must inform the court of the child's views.<sup>315</sup> For some forms of representation, additional requirements are in place for hearing the child. For example, the Dutch general guardian ad litem is advised to speak to children from the age of 12 onwards themselves, but to involve a psychologist when speaking to younger children.<sup>316</sup> Or, in Australia, the direct legal representative and independent legal representative, must use language appropriate for the specific child, employing an interpreter if necessary. This means that (potentially) vulnerable or marginalized children are also considered, a positive detail considering the right to non-discrimination in Article 2 UNCRC and its relationship to Article 12 UNCRC.<sup>317</sup>

In addition to hearing the child's views, most forms of representation are required to **inform the child** on their task, the course of the proceedings, and the decision made by the court.<sup>318</sup> Again some restrictions may apply. For example, in France children should only be informed of the final decision once they have reached the age of six and should not be informed of the specific contents of the files in child protection proceedings by the children's lawyer.<sup>319</sup> Some forms of representation – the Australian independent children's lawyer, independent legal representative and direct legal representative, the French children's lawyer, the Dutch separate legal representative and the South African legal representative – specifically ought to have continued contact with the child throughout the proceedings.<sup>320</sup> This means that the child will have a sort of 'lawyer-client' relationship with the representative, can contact them with questions and will be informed of all steps taken.<sup>321</sup>

Aside from contact with the child, most forms of representatives will also be required to **obtain and review further relevant information or evidence**. One aspect hereof is that the representative may need to speak to other involved parties or persons about the conflict or the situation of the child. This may, for example, be included in the instructions for the Dutch guardians ad litem.<sup>322</sup> The representative may also be required to draw certain evidence to the courts attention, e.g. concerning situations of domestic abuse.<sup>323</sup>

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<sup>315</sup> See sections 5.1.2.2 (AU), 5.2.2.2 (FR), 5.3.2.2 (NL), and 5.4.2.2 (SA) of the annexes.

<sup>316</sup> See *Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014*, p. 10; and section 5.3.2.2 of the annexes.

<sup>317</sup> UNCRC General Comment No. 12 2009, para. 77 and 78. See section 2.3.1.

<sup>318</sup> See sections 5.1.2.2 (AU), 5.2.2.2 (FR), 5.3.2.2 (NL), and 5.4.2.2 (SA) of the annexes.

<sup>319</sup> Art. 1187 FCCP. See section 5.2.2.2 of the annexes.

<sup>320</sup> See sections 5.1.2.2 (AU), 5.2.2.2 (FR), 5.3.2.2 (NL), and 5.4.2.2 (SA) of the annexes.

<sup>321</sup> See e.g. the DLR in New South Wales, Australia, Principle D2 of the Representation Principles for Children's Lawyers 2014; Care and Protection Practice Standards 2015, para. 2.2.3; and section 5.1.2.2 of the annexes.

<sup>322</sup> See *Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014*, p. 7; and section 5.3.2.2 of the annexes.

<sup>323</sup> See e.g. the ICL in Australia, Guidelines for Independent Children's Lawyers 2013, para. 7; and section 5.1.2.2 of the annexes.

### **Evaluation in light of the implementation steps for Article 12 UNCRC**

The above corresponds with three of the Committee on the Rights of the Child's five steps to 'effectively realize' the child's right to be heard in proceedings.<sup>324</sup> The first step, the **preparation** of children through informing them of the available options, the consequences thereof and the impact of their views on the proceedings, ties in to the obligation of representatives to inform the child at the start of the proceedings.<sup>325</sup> The second step, **hearing the child**, is clearly provided for as all eleven representation forms must speak to the child in person to obtain their views. The Committee requires that this must be done in an 'enabling and encouraging' context, in which the representative seriously listens to and talks to the child.<sup>326</sup> Taking the child seriously, by having a continued dialogue, is provided for by the forms of representation mentioned above who must have continued contact with the child throughout the proceedings. Another good example are the Australian representatives, who ought to 'strive for a relationship of trust and respect' and should, when speaking to the child, encourage them to ask further questions and answer these appropriately.<sup>327</sup> Lastly, the fourth step, **giving feedback** to the child regarding how their views have been taken into account, is also covered by the requirement that the representatives inform the child about the decision of the court.<sup>328</sup>

The third and fifth steps of the Committee's five steps are not covered by the work obligations of representatives above. The third step, the **assessment of the capacity** of the child, is not included, because it is generally the decision-maker, e.g. the court, who must determine the capacity of the child and the weight to be accorded to their views (see also section **Error! Reference source not found.** above).<sup>329</sup> Only in South Africa, do legal representatives themselves need to determine the capacity of the child. As discussed in section 3.3.1 above, this is because their role is dependent on whether the child is sufficiently mature, developed and wishes to participate. If this is the case, then the legal representative is a client-directed representative, if not then a best interests representative. The legal representative needs to determine the child's capacity at the outset of the proceedings on a case-by-case basis, thereby conforming to the step provided by the Committee.<sup>330</sup> Whether children are provided **access to complaints, remedies and redress procedures** if their right to be heard has been breached, the fifth step, has not been explored in this research.<sup>331</sup>

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<sup>324</sup> UNCRC General Comment No. 12 2009, para. 40. See section 2.2.3.

<sup>325</sup> UNCRC General Comment No. 12 2009, para. 41.

<sup>326</sup> UNCRC General Comment No. 12 2009, para. 42.

<sup>327</sup> See Guidelines for Independent Children's Lawyers 2013, para. 6.6; Care and Protection Practice Standards 2015, para. 2.2.3 and 2.3.3; and section 5.1.2.2 of the annexes.

<sup>328</sup> UNCRC General Comment No. 12 2009, para. 45.

<sup>329</sup> UNCRC General Comment No. 12 2009, para. 44.

<sup>330</sup> See Boezaart 2013a, p. 369; Cleophas & Assim 2015, p. 300; and section 5.4.2 of the annexes.

<sup>331</sup> UNCRC General Comment No. 12 2009, para. 46 and 47. See section 2.2.3.

### **Additional specific duties of representatives**

The type of general task determines some additional specific duties of the representatives. These will be discussed per type of general task.

#### Specific duties for the separate legal representatives

With regards to representation forms functioning as a separate legal representative – the Australian direct legal representative, French children’s lawyer, Dutch separate legal representative and South African legal representative – it is logical that they must seek the child’s instructions. How? By speaking to the child directly. In Australia, it is also emphasized that the direct legal representative should ensure that the child understands the instructions they are giving.<sup>332</sup> In South Africa, legal representatives also ought to apply their legal knowledge and expertise to ‘translate’ the child’s views to legal jargon.<sup>333</sup> The general task of a separate legal representative also calls for these forms of representation to appear in court and function either directly as a lawyer in the proceedings or to accompany the child and assist them in court.<sup>334</sup> Only the South African legal representative does not function as a lawyer in court, but will make submissions to the court.<sup>335</sup>

#### Specific duties for best interests representatives

On the other hand, the forms of representation functioning as a best interests representative do not generally function as a lawyer in court (except the independent legal representative in Australia). Instead, the Dutch guardians ad litem and the South African curator ad litem are required to submit a written report to the court, the Australian independent children’s lawyer makes oral submissions to the court, and the Australian guardian ad litem, French ad hoc administrator and South African curator ad litem instruct a lawyer to act in accordance with their instructions.<sup>336</sup>

The most interesting question is how these representatives determine what they ought to represent, namely how do they determine what is in the best interests of the child? A few common standards apply. The first standard is that the representatives must work independently, acting impartially from the court and other parties.<sup>337</sup> Exclusively representing the interests of the child is in line with the Committee’s understanding of Article 12 UNCRC.<sup>338</sup> Secondly, the best interests must be determined objectively, taking into account the available information and the child’s views but not the representatives ‘own opinion’.<sup>339</sup> The latter is important for compliance with Article 12 UNCRC.

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<sup>332</sup> Principle D2 of the Representation Principles for Children’s Lawyers 2014 and Care and Protection Practice Standards 2015, para. 2.2.3. See section 5.1.2.2 of the annexes.

<sup>333</sup> See Sloth-Nielsen 2008, p. 504; and section 5.4.2.2 of the annexes.

<sup>334</sup> See sections 5.1.2.2 (AU), 5.2.2.2 (FR), and 5.3.2.2 (NL) of the annexes.

<sup>335</sup> See Boezaart 2013a, p. 369; and section 5.4.2.2 of the annexes.

<sup>336</sup> See sections 5.1.2.2 (AU), 5.2.2.2 (FR), 5.3.2.2 (NL), and 5.4.2.2 (SA) of the annexes.

<sup>337</sup> See the Australian ICL and ILR in section 5.1.1, the French AHA in section 5.2.2.2, and the Dutch FGAL in section 5.3.1 of the annexes.

<sup>338</sup> UNCRC General Comment No. 12 2009, para. 36 and 37.

<sup>339</sup> See the Australian ICL, ILR and GAL in sections 5.1.1 and 5.1.2.2, the French AHA in section 5.2.2.2, the Dutch FGAL and GGAL in section 5.3.1 and 5.3.2.2, and the South African CAL in section 5.4.1 of the annexes.

It is crucial that the representative does not merely represent their own opinion regarding the child's situation, but takes into account the child's views.<sup>340</sup> Specifically, the representative ought to transmit the child's views correctly to the court according to the Committee.<sup>341</sup> In Australia and France, this is explicitly reaffirmed by requiring the representative to inform the court of the child's views when they differ from their view of what is in the child's best interests.<sup>342</sup> Finally, in the Netherlands, it is also emphasized that the filiation guardian ad litem should take into account both the immediate short term and the long term interests of the child.<sup>343</sup> For example, by considering the effects of the child having only one legal parent following the denial of parentage. The Australian independent legal representative should also aim at achieving what is in the long term best interests of the child.<sup>344</sup>

### 3.5.3. Payment of the child representatives

The payment of the child representatives is a very practical question. However, it is important as it indicates how accessible the representation is for children. As Article 12 paragraph 2 refers to an 'opportunity to be heard', the Committee has noted that representation in legal proceedings must be accessible and barriers, such as costs, must be eliminated.<sup>345</sup> If there is no legal aid available and the parties are ordered to pay all the costs, then the representation is less accessible and might be limited to children of well-off parents.<sup>346</sup>

Of all the forms of representation in the jurisdictions, only one is always automatically fully financed by the State: the guardian ad litem in New South Wales, Australia. An allowance is paid by the panel of the Department of Justice directly.<sup>347</sup> For all other forms of representation the child or the parties will be required to pay the costs with, or without, legal aid available. In the most generous situation, legal aid is provided without any further requirements. This is the case for the independent and direct legal representatives in New South Wales in child protection proceedings, the Dutch separate legal representative in secure youth care proceedings, and the French children's lawyer provided for in the framework of Article 388-1 FCC.<sup>348</sup> On the opposite end of the scale is the French ad hoc administrator, for which no legal aid is available, although the State Treasury does advance the payment before recovering the costs from the party ordered to pay.<sup>349</sup>

In all the other situations and for the other forms of representation legal aid is available depending on varying requirements. The most common requirement being the general means and

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<sup>340</sup> See Lansdown 2011, p. 25; and section 2.2.2.

<sup>341</sup> UNCRC General Comment No. 12 2009, para. 36 and 37.

<sup>342</sup> See Guidelines for Independent Children's Lawyers 2013, para. 5.1, 5.3 and 5.4; Fédération nationale des administrateurs ad hoc 2009, p. 62; and sections 5.1.2.2 and 5.2.2.2 of the annexes.

<sup>343</sup> See Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 6; Schrama 2015; Vlaardingebroek 2001, p. 105; and section 5.3.2 of the annexes.

<sup>344</sup> See Principle B3 and the explanatory text accompanying Principle E2 (part 2) of the Representation Principles for Children's Lawyers 2014; and section 5.1.2.2.

<sup>345</sup> UNCRC General Comment No. 12 2009, para. 34.

<sup>346</sup> Daly 2016, p. 6.

<sup>347</sup> See Guardian ad Litem Handbook 2012, para. 35; and section 5.1.1.7 of the annexes.

<sup>348</sup> See sections 5.1.1.7 (AU), 5.2.1.7 (FR), and 5.3.1.7 (NL) of the annexes.

<sup>349</sup> Art. 1210-3 FCCP. See section 5.2.1.7 of the annexes.

merits test, applied to the Australian independent children's lawyer in child maintenance and international child abduction proceedings and the independent and direct legal representatives in adoption proceedings, the South African curator ad litem, and the Dutch filiation guardian ad litem, and the Dutch general guardian ad litem when it does not concern a conflict between the child and the parent(s).<sup>350</sup> If the proceedings do concern a conflict between the child and their parent, then legal aid is automatically available for the Dutch general guardian ad litem without any further requirements.<sup>351</sup> Legal aid can be granted in parental authority related proceedings when an Australian independent children's lawyer is appointed by the court and legal aid is considered reasonable.<sup>352</sup> Legal aid is provided for the South African legal representative upon court order in most types of proceedings if the 'substantial injustice' test is fulfilled.<sup>353</sup> The 'substantial injustice' test is contained in the South African constitution but remains ambiguous.<sup>354</sup> Finally, in divorce proceedings the South African courts cannot appoint a legal representative at state expense, but children may directly request a representative at the legal aid board themselves.<sup>355</sup>

The practical issue of legal costs can be a major obstacle for the child to exercise their right to representation. However, other than for the French administrator ad hoc, either legal aid is available for the child to cover the costs or the representative works at State expense. This appears to alleviate the potential issue of accessibility. In practice, it remains the question whether legal aid boards accept the application and have the resources to fund child representation in family law disputes.

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<sup>350</sup> See sections 5.1.1.7 (AU), 5.3.1.7 (NL), and 5.4.1.7 (SA) of the annexes.

<sup>351</sup> See UNCRC Third Periodic Report of the Netherlands 2008, para. 63; and section 5.3.1.7 of the annexes.

<sup>352</sup> See Policies Legal Aid New South Wales, 5.3.3 and 5.4.4; and section 5.1.1.7 of the annexes.

<sup>353</sup> See Legal Aid Guide 2014, para. 4.18.1, p. 65; and section 5.4.1.7 of the annexes.

<sup>354</sup> S. 28(1)(h) South African Constitution 1996. See section 5.4.1.5 of the annexes.

<sup>355</sup> See Heaton 2012, p. 402; Legal Aid Guide 2014, para. 4.18.7, p. 70; and section 5.4.1.7 of the annexes.

### 3.6. Summary and combined evaluation

In this chapter the legal frameworks of child representation in Australia, France, the Netherlands and South Africa have been compared systematically and evaluated in light of the child's right to be heard and represented in Article 12 UNCRC. In this section, the information from the above is summarized and compiled in the form of a compliance with the UNCRC 'report card' per jurisdiction as shown in Table 9 below.

In Chapter 2 on children's right to participation in the UN Convention on the Rights of the Child, Article 12 was analyzed to determine the key standards set by the UNCRC. The UNCRC standards formed the criteria by which the legal frameworks of the four jurisdictions were evaluated. These standards together also form the subjects on the 'report card' below. There are nine main criteria (in bold), which often consist of multiple sub-criteria. For example, the main criteria of capability, that the child is capable of forming his or her own views, consists of three sub-criteria. The Committee has clarified that there should be no age limit and that decision-makers should start from a presumption of capability to determine capability on a case-by-case basis. For the rest, the Committee remains vague on how States ought to determine capability. That is why the fourth criteria is whether in the jurisdiction the requirement of capability is 'less ambiguous than the Committee'. The compliance with these standards will now be summarized and briefly discussed.

#### **'Assure' the child's right to be heard**

The first main criterion is that State parties ought to 'assure' the child's right to be heard, creating a strict legal obligation and requiring them to take proactive steps in assuring this right. The strict legal obligation of having a manner by which children are heard or represented in family law proceedings is met by all jurisdictions as they have at least two forms of representation and additional means by which children can express their views. With regards to proactive steps, differences could be found between the jurisdictions, explaining the differences in grading. While South Africa actively and promptly reformed their legal framework in response to the UNCRC, Australia and France took more time to respond to the requirements of Article 12 UNCRC, and the Netherlands did not consider reform necessary solely on the ground of the UNCRC.

#### **In all matters and proceedings affecting the child**

The second main criterion is that children have the right to be heard in 'all matters affecting the child', according to Article 12 paragraph 1, and in 'any judicial and administrative proceedings affecting the child', according to Article 12 paragraph 2. The Committee thrice emphasizes that there should be no limitations or distinctions. Firstly, there should be no limits regarding the types of proceedings. Regarding family law proceedings, this is only the case in Australia. In France, the Netherlands and South Africa there are representatives in all categories of proceedings, but there are

limitations. In various proceedings representatives are not provided for, as discussed in section 3.2. Secondly, there should be no distinctions between the types of proceedings. In all jurisdictions, there is not an extensive distinction, but there is a clear preference for providing separate legal representation forms in vertical family law disputes and more best interests representation forms in the horizontal family law disputes. Finally, there should be no distinction with regards to whom initiated the proceedings. In Australia, France and South Africa this does not occur. In the Netherlands, there is a distinction made regarding the filiation guardian ad litem and the requirements that must be met for appointment (see section 3.3).

Table 9: Compliance of the legal representation frameworks in four jurisdictions with Article 12 UNCRC

	AU (NSW)	FR	NL	SA
<b>'Assure' child's right:</b>				
- Strict legal obligation	++	++	++	++
- Take proactive steps	+	+	~	++
<b>In all matters &amp; proceedings affecting child:</b>				
- No limits regarding types of proceedings	++	+/-	+/-	+/-
- No distinction between types	+	+	+	+
- No distinction between who initiated	++	++	+	++
<b>Capability:</b>				
- No age limit	+	+	-	++
- Presumption of capability case-by-case	~	~	~	~
- Less ambiguous than the Committee	++	-	-	n.a.
<b>Capacity:</b> applicable?				Role of LR ++
<b>'Freely' &amp; 'opportunity':</b> Not an obligation	++	+/-	+/-	++
<b>Through a representative:</b>				
- Choice for child	+	+/-	-	+/-
- Represent child's views, not own views	+	+	+	+
- (Potentially a) professional	++	++	++	++
- Knowledge, understanding & experience	++	+	++	++
<b>Accessibility:</b>				
- Legal costs	++	+/-	+	+
- Child may request	++	++	++	++
- Not dependent on a decision	-	+/-	-	-
<b>Child's best interest:</b> not protectionist	~	++	~	~
<b>Implementation steps:</b>				
- Prepare and inform the child	+	+	+	+
- Hear child directly	++	++	++	++
- Give feedback to child	+	+	+	+

++: Very good

+/- : Both sufficient and insufficient aspects

~ : Neutral

+: Sufficient

- : Insufficient

n.a. : Not applicable

### Capability of the child to express views

With regards to capability, as discussed above, there are three sub-criteria. As South Africa does not have any child related requirements for the appointment of either the legal representative or curator ad litem, it definitely does not have an age limit and the other criteria are not applicable. The Netherlands does have an age requirement for the separate legal representative in various proceedings, in the other two jurisdictions age requirements are more implicit, as they can be found in their capability

requirements. For example, age is used in the rebuttable presumptions of (in)capability in New South Wales. The second sub-criterion is that decision-makers should employ a presumption of capability and then determine the capability of the child on a case-by-case basis. None of the jurisdictions have an explicit presumption of capability for all children in their law, but they also do not have a presumption of incapability and the child related requirements, if used, are of a personal nature. Thus, all jurisdictions can be qualified as neutral for this matter. Finally, regarding the open requirement employed in three of the jurisdictions for capacity, only the requirement in New South Wales is much less ambiguous than the standard of the Committee. The requirement includes clear criteria as to when the child should be considered capable of giving proper instructions.

### **Capacity of the child**

The fourth main criterion concerns the capacity of the child: in accordance with the child's age and maturity due weight should be given to the views of the child. As discussed above, this is generally an issue for the decision-maker who must weigh the views of the child. However, for the legal representative in South Africa it is also important as the child's capacity determines the legal representative's role. According to the Committee, children's capacity cannot be determined solely on the basis of one the factors. Both age and maturity must be taken into account on a case-by-case basis, and this is also exactly what South African law prescribes.

### **'Freely' an 'opportunity' to express views**

The following main standard, contained both in paragraph 1 and 2 of Article 12 UNCRC, is that the child has the right to be heard and represented, but is not obliged to. In Australia and South Africa this is very much the case. In the France, there is one situation in which representation is obligatory with or without the child's consent, and in the Netherlands there are two. Thus, in both jurisdictions there are good practices, but the mandatory representation is questionable. In these situations, the child must be afforded the option not to express views to meet the standard of Article 12 UNCRC.

### **Through a representative**

The sixth, and probably most important, standard concerns the right of the child to be heard through a representative according to Article 12 paragraph 2 UNCRC. On the basis of the Committee's General Comment, four sub-criteria can be determined. The first is that the child has the choice to be represented. In principle, the fact that each jurisdiction has two or more forms of representation in addition to other means by which they can be heard, provides children with choices. However, these are not limitless choices. The types of proceedings are one potential limit. In the Netherlands there is only one available form of representation per type of proceeding. This means, for example, that the child can only choose for the general guardian ad litem in parental authority proceedings, no other options are available. In France and South Africa, there are more types of proceedings in which a

choice is available between the two forms of representation. In New South Wales, the choice between the representatives is the most far-reaching. However, in all three jurisdictions the child related and conflict related requirements can still limit the remaining choices.

The second sub-criteria concerning representation is that the representative should exclusively represent the child's views and, if required to determine the child's best interests, should do so objectively based on evidence and by including the child's views. In all jurisdictions, the representatives only represent the child. However, as there are many best interests representatives, the issue of objectively presenting the best interests of the child is more difficult. All representatives are required to do so, but whether their final consideration on the best interests is an objective one in practice remains to be seen.

The third and fourth sub-criteria concern the professional background of the representative and that they must have sufficient knowledge, understanding and experience. All jurisdictions and their representatives fulfill both requirements. Albeit that the French are more relaxed concerning the knowledge, understanding and experience required for the administrator ad hoc and children's lawyer.

### **Accessibility**

The seventh main criterion is that representation should be accessible. According to the Committee, potential barriers should be eliminated. The hurdle of legal costs is the lowest for children in New South Wales, Australia and the highest for children (and their parents) in France. There is no legal barrier in any of the jurisdictions that prevents children from being able to request legal representatives, but the final decision is – by and large – left to the courts or other panel of adults (e.g. Legal Aid Board). This limits the autonomy of children in their choice whether or not to be represented in family law disputes.

### **Child's best interests and Article 3**

In light of Article 3 UNCRC, the best interests of the child should be a primary consideration in family law proceedings and the implementation of Article 12 UNCRC. However, it should not function as a protectionist argument to obstruct the child's right to be represented. Which is what may possibly occur in practice with the Australian, Dutch, and South African requirements that the appointment of a representative must be necessary in the best interests of the child.

### **Implementation steps of Article 12**

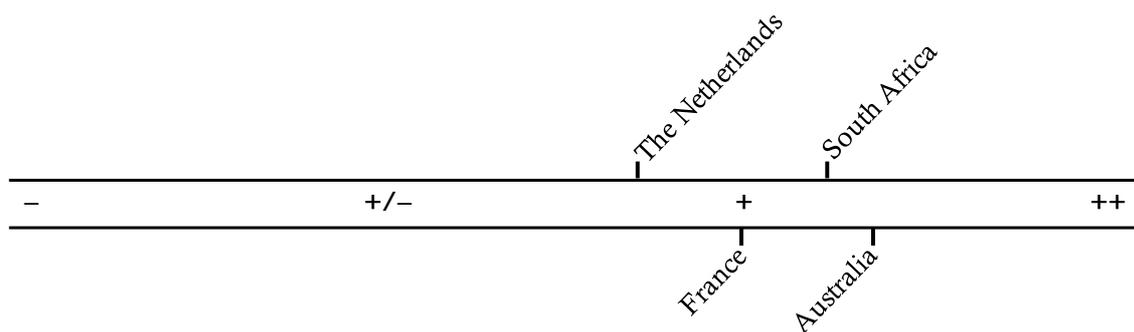
Finally, three of the Committee's five steps for the implementation of Article 12 are relevant in light of the legal framework of representation. All three – the preparation of the child by providing information, the hearing of the child and the giving of feedback to the child – must be undertaken by the representation forms of the jurisdictions. Although the specifics may differ, see section 3.5.2, the overall picture is a positive one.

## 4. Conclusion

In this research the child’s right to be heard and represented in Article 12 UNCRC has been thoroughly examined. The four legal frameworks of child representation in Australia, France, the Netherlands and South Africa were systematically studied and compared. The latter was evaluated using the standards derived from the human rights analysis to tackle the main research question: To what extent is the minimum international human rights standard for child representation provided by Article 12 UNCRC complied with by the legal framework for family law proceedings in four jurisdictions?

The answer to this question is contained in the entire third chapter, specifically in the overview of Table 9 and summary in section 3.6 above. Each of the jurisdictions’ legal representation frameworks have been shown to have advantages and disadvantages in relation to the standard of Article 12 UNCRC. But, for the short answer to the main research question, how do the advantages and disadvantages add up? In Figure 2, the overall compliance of the jurisdictions’ representation frameworks with the UNCRC are shown.<sup>356</sup>

Figure 2: Overall compliance with the UNCRC of representation frameworks in the four jurisdictions



### Compliance with the minimum standards of Article 12 UNCRC

All in all, the four jurisdictions meet most of the minimum standards contained in Article 12 UNCRC to provide children with representation in family law proceedings. Of course, there are differences between the jurisdictions. The legal representation framework of Australia, specifically New South Wales, scores the highest in compliance. With four forms of accessible representation available in all types of family law proceedings, and extensive detailed laws and guidelines containing clear requirements, the framework answers best to the standards of the UNCRC. Australia is closely followed by South Africa, another jurisdiction with detailed provisions and guidelines for the appointment and functioning of the legal representative and with an additional, less regulated,

<sup>356</sup> The total compliance score has been calculated based on the scores in Table 9 of section 3.6. Each sign was given a score: ++ = 2, + = 1, +/- = 0,5, ~ = 0 and - = -1. These were totaled up and then divided by the number of scores given to calculate the mean score. The mean score of each jurisdiction is: Australia 1.3, France 1.0, the Netherlands 0.7, and South Africa 1.2. The jurisdictions were placed along the scale in Figure 4 with the symbols given the same score as used for the calculation.

representative in common law: the curator ad litem. The two civil law jurisdictions, France and the Netherlands have frameworks of representation which conform less with the minimum standards of the UNCRC. Although both remain on the positive side of the scale, several improvements can be made. In both jurisdictions, the limits in the types of cases, the ambiguity of their capability requirements, and the lack of choice for the child are issues. With the Netherlands having the additional drawback of an age limit for the separate legal representative.

However, the criticism should not be reserved solely for the Netherlands or France. There is room for improvement in the legal frameworks of all jurisdictions. For example, concerning the level of dependency the child has on an adult decision-maker for the appointment of a representative or the explicit presumption of capability for all children prior to a case-by-case examination. Aside from the existing issues in these jurisdictions, the question also remains how these legal frameworks function in practice. This has not been examined in this research, but the manner in which these frameworks are implemented may reveal more imperfections.

### **Margins of discretion in Article 12 UNCRC**

Although the Committee on the Rights of the Child provides further clarification on Article 12 UNCRC, through their General Comments and in Concluding Observations, certain margins of discretion remain. With regards to the right to representation two main issues have been left open by the Committee. The first issue is that the Committee remains very ambiguous as to how the child's capability should be determined. The second issue that has been sidetracked by the Committee is which form(s) of representation should be offered to children. The Committee spares no words on which types of representative should be made available or which form would be most effective. As Parkes remarked, it is an area shrouded in confusion.<sup>357</sup>

The comparative research has shown that these margins of discretion afforded by the Committee have been dealt with by the different jurisdictions in a variety of manners. For example, the open capability requirements for representation in France and the Netherlands mirror the ambiguity of the Committee, (potentially) impeding children's right to representation. The Committee could learn something from New South Wales in this regard. The open capability requirement there has been additional given shape with rebuttable presumptions and a variety of further factors that must be considered on a case-by-case basis. Concerning the second main margin, the form(s) of representation, this research has identified two general forms of representation on the basis of their general task in all four jurisdictions: the best interests representative and the separate legal representative. In addition, this research has shown that although two general forms of representation are common to all jurisdictions studied, all eleven forms of representation have their own peculiarities.

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<sup>357</sup> Parkes 2013, p. 255.

Where there is a margin of discretion, differences are to be expected between jurisdictions. In fact, differences may even be applauded as a variety of best practices may develop in each State. Through the use of comparative research, States can then learn from each other and potentially transplant best practices through legal reform in their own systems. However, further guidance by the Committee regarding these margins in Article 12 might also be constructive. Clarification of the minimum standards to be adhered to by States would raise the bar for national jurisdictions. For example, if the requirement of capability would be further specified children would have more certainty as to when they have the right to express their views. Of course, reservations must be expressed. If the Committee stipulates further guidelines, then these should be (empirically) tested best practices which are suitable for implementation in all legal cultures and systems. The Committee should not express which form of representation ought to be provided and thereby exclude other forms, without certainty that it is indeed the best option for all children in all types of situations and legal proceedings. Therefore, it is important that further comparative and empirical research is conducted as to child representation to inform the Committee and States of existing best practices and the variety of options available.

### **Novel aspects of this research**

This comparative research included two novel aspects: a widened geographical scope and a focus on family law proceedings in the broad sense. This research departed from the ‘Anglocentric focus’ found in existing comparative research by including a mixed jurisdiction, a common law jurisdiction, and two civil law jurisdictions. When looking at the historical development of the representation forms in each of the jurisdictions, the legal traditions visibly had an influence. By including four jurisdictions with varying traditions, more divergent approaches have been studied. In general, it can be concluded from Figure 2 that the civil law jurisdictions (France and the Netherlands) could learn from the legal framework in the common law jurisdiction (Australia) and mixed jurisdiction (South Africa). The focus on family law proceedings in the broad sense revealed the inconsistencies between types of proceedings. These inconsistencies include the differences between horizontal and vertical family law disputes and between the tasks of representatives in varying proceedings. By looking at all types of family law proceedings, this research has presented a more complete picture of child representation.

The thorough comparison and evaluation of child representation in four jurisdictions has set out the legal frameworks and their compliance with Article 12 UNCRC. It has revealed good practices, which can be of value for other legislatures and the Committee on the Rights of the Child. It has also exposed shortcomings. Further normative comparative, multi-disciplinary, and empirical research is required to transform the conclusions from this exploratory research into conclusions for practical application.

To conclude, although room for improvement remains for the four jurisdictions as well as for the guidance by the Committee, the jurisdictions have already made significant strides in complying with the minimum standard of the child's right to be represented in family law proceedings. Looking back at the old Victorian proverb, it is time for a new maxim in accordance with Article 12 UNCRC to encourage legislatures and the judiciary to take children seriously in family law proceedings:

*'Children should be seen, and, if they so wish, heard and represented'*

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## 5. Annexes

### 5.1. Australia (New South Wales)

#### 5.1.1. What forms of representation are available for children in family law proceedings in Australia (New South Wales) and how are they regulated?

Four forms of representation are available for children in family law proceedings in Australia, more specifically in the state New South Wales. Federal law provides for the **independent children’s lawyer** in Section 68L of the Family Law Act 1975 (hereafter AFLA 1975). The independent children’s lawyer represents the child’s interests in the legal proceedings.<sup>358</sup> This form of best interests representation is similar to the **independent legal representative** in New South Wales provided for in s. 99A(2) of the Children and Young Persons (Care and Protection) Act 1998 (NSW) (hereafter CCPA (NSW)) and s. 122(2)(b) of the Adoption Act 2000 (NSW).<sup>359</sup> In New South Wales, children can instruct a **direct legal representative** following s. 99A(1) CCPA (NSW) and s. 122(2)(b) of the Adoption Act 2000, who will act on their instructions.<sup>360</sup> Lastly, a **Guardian ad Litem** can be appointed for the child following s. 100 CCPA (NSW) and s. 123 of the Adoption Act 2000. The guardian ad litem is a ‘person appointed by the court to make decisions on behalf of a child in the legal proceedings’.<sup>361</sup>

##### 5.1.1.1. When were the forms of representation introduced or amended?

Most of the forms of representation in Australia are relatively young, direct representation of children since the 1970s and best interests representation in the following decades.<sup>362</sup> Only the **Guardian ad Litem** has historical roots in English common law which was the basis of Australian family law prior to the Family Law Act of 1975.<sup>363</sup>

Fifteen years prior to Australia’s ratification of the UNCRC, s. 65 of the original Family Law Act 1975 established a statutory form of child representation in the line of Article 12 UNCRC.<sup>364</sup> As Part VII of the AFLA 1975 was extremely brief, comprising of only 10 pages, there was no guidance regarding the role of the child’s representative.<sup>365</sup> Following the ratification of the UNCRC the role of this ‘separate representative’ was developed and defined by case law, especially in the 1990s, for example in *In the Matter of P and P* and *Re K*.<sup>366</sup> In the latter case the Family Court also acknowledged the role of the UNCRC in developing the guidelines on the appointment of separate

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<sup>358</sup> Barrie 2013, p. 128.

<sup>359</sup> Representation Principles for Children’s Lawyers 2014, p. 8.

<sup>360</sup> Fernando 2013, p. 395.

<sup>361</sup> Representation Principles for Children’s Lawyers 2014, p. 8.

<sup>362</sup> Ross 2013a, p. 411.

<sup>363</sup> Australian Law Reform Commission 1997, para. 13.10; and Bates 2013, p. 48.

<sup>364</sup> McIntosh, Bryant & Murray 2008, p. 128.

<sup>365</sup> McIntosh, Bryant & Murray 2008, p. 128.

<sup>366</sup> *In the Matter of P and P* [1995] FLC 92-615 and *Re K* [1994] FLC 92-461. See also, Inquiry into the Australian Legal Aid System 1997, para. 5.23; Carson et al. 2014, p. 59; and Kaspiew et al. 2013, p. 4.

representatives.<sup>367</sup> In 2004, the Family Law Council published their ‘Pathways for Children: A Review of Child Representation in Family Law’ report in response to a Federal Government directive.<sup>368</sup> While the report did not recommend any major changes to the role of child representatives as developed by case law,<sup>369</sup> it did recommend the clarification and consolidation of best interests representatives as independent children’s lawyers through further legislative recognition.<sup>370</sup> Essentially, the Family Law Council recommended the codification of the pre-existing practices in case law.<sup>371</sup> These recommendations were to a great extent adopted and implemented into the Family Law Act by the Family Law Amendment (Shared Parental Responsibility) Act 2006.<sup>372</sup> This Amendment Act drastically extended Part VII of the AFLA 1975 to approximately 200 pages, amongst others by introducing the **independent children’s lawyer** with a best interests role and clear statutory guidelines.<sup>373</sup> Part VII was further amended in 2011, when the fulfillment of Australia’s obligations as a signatory to the UNCRC was introduced as an additional object of the Part in s. 60(B)(4).<sup>374</sup> This reaffirms how the introduction of the independent children’s lawyers is an important aspect of Australia fulfilling the obligations under Article 12 UNCRC.<sup>375</sup>

In New South Wales, the representation of children in care proceedings was introduced by the Children (Care and Protection) Act 1987 (NSW), as the previous act, the Child Welfare Act 1939 (NSW) made no mention of represented children. Section 66(2) of the Children (Care and Protection) Act 1987 allowed for the child to be separately represented without offering any further guidance regarding the role of such a representative. It was the Children and Young Persons (Care and Protection) Act 1998 which further expanded and explicitly introduced the **direct legal representative** and the **independent legal representative** in s. 99A. The new act, coming eight years following the ratification of the UNCRC, also incorporates the child’s right to participate as a fundamental principle in s. 10.<sup>376</sup> In doing so, the Act has strengthened children’s participation rights in child care proceedings as well as all other decisions made within the framework of the Act, for example by social workers.<sup>377</sup>

#### 5.1.1.2. In which types of cases can they be represented?

The **independent children’s lawyers** can be appointed in federal family law proceedings under the Family Law Act ‘in which a child’s best interests are, or a child’s welfare is, the paramount, or

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<sup>367</sup> McIntosh, Bryant & Murray 2008, p. 128.

<sup>368</sup> Pathways for Children 2004 and Bell 2015, p. 3.

<sup>369</sup> Pathways for Children 2004 and Bell 2015, p. 3.

<sup>370</sup> Pathways for Children 2004, p. 29 and 43; Bell 2015, p. 3; and Kaspiew et al. 2013, p. 4.

<sup>371</sup> Kaspiew et al. 2013, p. 4.

<sup>372</sup> Bell 2015, p. 3.

<sup>373</sup> Barrie 2013, p. 125-127.

<sup>374</sup> Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011. See also, Carson et al. 2014, p. 58.

<sup>375</sup> Kaspiew et al. 2013, p. xi.

<sup>376</sup> Ross 2013b, p. 334.

<sup>377</sup> Parkinson 2001, p. 260.

relevant, consideration’ per s. 68L AFLA 1975.<sup>378</sup> Originally, the role was limited to ‘proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage’ (s. 65 (old) AFLA 1975). However, later amendments increased the scope of the independent children’s lawyer’s role.<sup>379</sup> Now the types of cases include proceedings on parental authority (s. 61A to 61F), parental plans (s. 63A to 63H), parenting orders (s. 64A to 65ZD), child maintenance orders (s. 66A to 66X), and parentage proceedings (s. 69P to 69ZD). Proceedings concerning an international child abduction are also included, albeit that s. 68L(3) applies further requirements for the appointment of independent children’s lawyer in those cases. The scope is also no longer limited to children of a marriage, but also includes cases concerning children from *de facto* partners, children born as a result of artificial conception procedures or surrogacy agreements, and adopted children (see s. 60EA to 60HB).

In New South Wales, the **direct legal representative, independent legal representative**, and **Guardian ad Litem** can be appointed in child protection proceedings and in adoption proceedings.<sup>380</sup> In child protection proceedings, the participation principle of s. 10 CCPA (NSW) explicitly lists certain decisions which will likely have a significant impact on the child’s life and thus especially require representation. The list names proceedings concerning emergency or ongoing care, the development and review of care plans, the provision of counselling or treatment services and contact with family members.<sup>381</sup> In adoption proceedings, the participation principle of s. 9 Adoption Act 2000 also lists decisions of significant impact, which are proceedings related to the placement for adoption of the child, the development of adoption plans, the application for the adoption order, and related to contact with birth parents of the child.

#### 5.1.1.3. When can children be represented in family law proceedings in Australia (New South Wales)?

##### **Independent children’s lawyers**

Independent children’s lawyers can be, and often are, appointed at an early stage in the family law proceedings.<sup>382</sup> This why they also receive legal aid funding for the first stage of proceedings in most States and Territories until the end of proceedings, if not for post-decision orders.<sup>383</sup> For example, in New South Wales, the independent children’s lawyer is funded for three stages: 1) the procedural hearing to the listing for hearing, 2) the preparation for the final hearing, 3) the final hearing (and potentially post-decision orders).<sup>384</sup> According to the Federal Guidelines for independent children’s lawyers, the representation can end either because the decision has been made or because the

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<sup>378</sup> Kaspiew et al. 2013, p. xi.

<sup>379</sup> See also, Inquiry into the Australian Legal Aid System 1997, para. 5.5.

<sup>380</sup> Bell 2015, p. 2; and Ross 2013b, p. 332.

<sup>381</sup> S. 10(3) CCPA (NSW). See also Parkinson 2001, p. 260.

<sup>382</sup> Kaspiew et al. 2013, p. 18.

<sup>383</sup> Kaspiew et al. 2013, p. 19.

<sup>384</sup> Kaspiew et al. 2013, p. 19.

independent children's lawyer has sought the court to discharge the appointment. The latter can be done because the independent children's lawyer is of the opinion that he or she no longer serves a useful purpose, the relationship with the child has broken down irretrievably, the representation is contrary to the best interests of the child, or because practical circumstances make continuation impossible.<sup>385</sup>

### **Direct legal representative and independent legal representative**

The direct legal representative and independent legal representative will generally be appointed at the start of the child protection or adoption proceedings and will represent the child throughout the course of the proceedings.<sup>386</sup> Direct legal representatives can be dismissed by the children themselves at any time and regardless of who appointed the representative.<sup>387</sup> The court should be informed hereof by the representative. Independent legal representatives cannot be dismissed by the children themselves.<sup>388</sup> Following s. 99(3) CCPA (NSW) both types of legal representatives may be dismissed by the court at any time and for any reason, in adoption proceedings only for the reason that 'the child informs the Court that he or she does not wish to be represented' (s. 122(9) Adoption Act 2000).

### **Guardian ad Litem**

A Guardian ad Litem will most likely also be appointed in the early phases of a proceeding, although it is not exactly clear. It is also not clear when the Guardian ad Litem's standing terminates, however case law has shown that it can continue after the final decision, because the Guardian ad Litem may commence an appeal.<sup>389</sup> What is clear is that the appointment of a Guardian ad Litem should not be done too hastily, because once a Guardian ad Litem is appointed the child can no longer instruct a direct legal representative.<sup>390</sup> That is also why an order for a Guardian ad Litem is rarely made, because as explained by Hamilton J in *Re Oscar*, it is generally sufficient and less intrusive for the interests of the child to be protected by a direct or independent legal representative.<sup>391</sup>

#### 5.1.1.4. What requirements are set for the children, e.g. age, level of maturity?

### **Independent children's lawyer**

In the AFLA 1975 no requirements are set regarding the children for the appointment of an independent children's lawyer. However, the order that the court can make under s. 5 for the independent children's lawyer to find out the child's views on the matter can be set aside by the independent children's lawyer if complying with the order would be inappropriate due to the child's

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<sup>385</sup> Guidelines for Independent Children's Lawyers 2013, para. 6.6.

<sup>386</sup> Care and Protection Practice Standards 2015, principles 2.2.2(1), 2.2.4, 2.3.2(1), and 2.3.4.

<sup>387</sup> Principle J2 of the Representation Principles for Children's Lawyers 2014.

<sup>388</sup> See the explanatory text relating to Principle J2 of the Representation Principles for Children's Lawyers 2014.

<sup>389</sup> Bao-Er 2006, p. 5.

<sup>390</sup> Bao-Er 2006, p. 2.

<sup>391</sup> *Re Oscar* [2002] NSWSC 453 (21 May 2002), para. 7; and Bao-Er 2006, p. 2.

age or maturity (s. 6(a) AFLA 1975). No information is given either in the statute or in the Federal Guidelines when this would be the case.

### **Direct legal representative and independent legal representative**

In New South Wales, requirements are set regarding the child for the appointment of direct and independent legal representatives both in child protection proceedings and adoption proceedings.

In child protection proceedings, the age and/or capability of the child determines what form of representative is appointed, if a child is presumed capable of giving proper instructions a direct legal representative is appointed, if not an independent legal representative.<sup>392</sup> Two rebuttable presumptions apply. According to s. 99B CCPA (NSW), children are not presumed to be capable of giving proper instructions under the age of 12. From the age of 12 and over, children are presumed capable of giving instructions and this presumption is not simply rebutted if the child has a disability (s. 99C CCPA (NSW)).

In adoption proceedings, the age and/or capability of the child plays a similar role with regards to the form of representative appointed.<sup>393</sup> Section 122(4) of the Adoption Act 2000 also includes a rebuttable presumption, but then that a child from the age of 10 and over is capable of giving proper instructions and that it may not be rebutted simply because the child has a disability. More importantly in adoption proceedings, the consent of the child is required if the child is between 12 and 18 years of age according to s. 55 of the Adoption Act 2000. However, this consent may be dispensed by the court, following s. 69, if the child is ‘in such a physical or mental condition as not to be capable of properly considering the question of consent’.

The rebuttable assumptions in both child protection and adoption proceedings raise the question as to how the child’s capability of giving proper instructions should be determined. The NSW Representation Principles for Children’s Lawyers give further guidance. The determination of capability should be based on ‘the child’s willingness to participate and ability to communicate’ not ‘any assessment of the ‘good judgment’ or level of maturity of the child’.<sup>394</sup> It must be determined per child and the representative should consider whether ‘a perceived incapacity could be overcome by developmentally appropriate communication or by adopting a different approach in taking instructions’.<sup>395</sup> More generally the representative should boost the child’s capacity by taking into account the ‘child’s age, level of education, cultural context and degree of language acquisition’ when communicating with the child.<sup>396</sup> However, if the capacity of the child to give proper instructions is in fact limited, but the child can give limited instructions then the representative should directly represent the child only regarding those matters, or if the child has a disability, then the representative

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<sup>392</sup> S. 99A(1)(a) and S. 99A(2)(a) CCPA (NSW). See also Ross 2013b, p. 334.

<sup>393</sup> S. 122(3)(c)(i) Adoption Act 2000 requires an independent legal representative if the child is not capable of giving proper instructions, otherwise a direct legal representative suffices.

<sup>394</sup> Principle C1 of the Representation Principles for Children’s Lawyers 2014.

<sup>395</sup> Explanation following Principle C1 of the Representation Principles for Children’s Lawyers 2014.

<sup>396</sup> Principle C2 of the Representation Principles for Children’s Lawyers 2014.

should ‘seek help from appropriate service providers’ to enhance the child’s capacity to give instructions.<sup>397</sup>

### **Guardian ad Litem**

In regards to the appointment of a Guardian ad Litem in New South Wales one of the main requirements, that there are special circumstances which warrant the appointment, are factors concerning the child. Section 123(2) of the Adoption Act 2000 states that special circumstances may include that the child has special needs because of age, disability or illness. In s. 100(2) CCPA (NSW), the exact same thing is stated with the addition of the special circumstance that the child is not capable of giving proper instructions.

#### 5.1.1.5. What other requirements are applied, e.g. conflict of views between child and parents?

An **independent children’s lawyer** will not be appointed automatically in every case, but instead the court will only do so if it is of the opinion that the child’s interests ‘ought to be independently represented’ in the proceedings, according to s. 68L(2) AFLA 1975.<sup>398</sup> The Australian courts make use of the non-exhaustive criteria provided in *Re K* to assist them in deciding whether or not to use their discretion to appoint an independent children’s lawyer.<sup>399</sup> If the cases are relatively straightforward, courts will generally not appoint an independent children’s lawyer.<sup>400</sup> In *Re K*, a decision from 1994, the Full Court determined thirteen grounds in which a child’s interests will normally require an independent children’s lawyer.<sup>401</sup> The thirteen grounds are, that there is a proceeding involving: 1. Allegations of child abuse, 2. An apparently intractable conflict between the parents, 3. Parental alienation, 4. Issues of cultural or religious differences affecting the child, 5. Issues concerning the sexual preference of the parent(s) which is likely to impinge upon the child’s welfare, 6. Alleged anti-social conduct by the parent(s) which seriously impinges on the child’s welfare, 7. Significant medical, psychiatric or psychological illness or personality disorder in relation to the parent(s) or child, 8. Parents who neither seem suitable custodians, 9. A child of mature years expressing strong views, which involve changing a long standing custodial arrangement or a complete denial of access to one parent, 10. The potential permanent removal of the child from the jurisdiction, 11. A proposal to separate siblings, 12. Custody cases where none of the parties are legally represented, 13. Applications relating to the medical treatment of children. Australian access to justice

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<sup>397</sup> Principle C3 of the Representation Principles for Children’s Lawyers 2014.

<sup>398</sup> Fernando 2014, p. 48.

<sup>399</sup> *Re K* [1994] FLC 92-461; Inquiry into the Australian Legal Aid System 1997, para. 5.16; Carson et al. 2014, p. 59; and Kaspiew et al. 2013, p. xi.

<sup>400</sup> Fernando 2014, p. 48.

<sup>401</sup> *Re K* [1994] FLC 92-461. See also, Inquiry into the Australian Legal Aid System 1997, para. 5.15 for the full and extensive list of grounds.

research shows that independent children's lawyers are especially appointed when the first, third, sixth or seventh ground is involved.<sup>402</sup>

With regards to international child abduction cases, s. 68L(3) AFLA 1975 places an additional requirement on the appointment of an independent children's lawyer. The court may only do so if it considers that there are 'exceptional circumstances that justify doing so'. Although in a previously leading case, *De L* the High Court of Australia found that separate representation should always be afforded to children in international abduction cases,<sup>403</sup> the effect of the decision was reversed in the Family Law Amendment Act 2000 by including para. 3 to s. 68L AFLA 1975. The explanation to do so was that the Hague Convention requires a prompt return without an inquiry into 'the reasons for the abduction' or 'the best interests of the child' and thus no separate representative is required unless in exceptional circumstances.<sup>404</sup> The requirement of 'exceptional circumstances' has been criticized recently, including by the Chief Justice of the Family Court, as it 'may now be too restrictive'.<sup>405</sup>

In New South Wales, the CCPA (NSW) and Adoption Act 2000 apply the same relatively vague requirement for appointing either a **direct legal representative** or **independent legal representative**. Following s. 99(1) CCPA (NSW) and s. 122(2)(b) Adoption Act 2000, the court may appoint a representative 'if it appears to the court that the child needs to be represented in any proceedings before it'. There is no further specification as to when this is the case, but it will probably at least be so when any of the thirteen grounds of *Re K* are involved. With regards to the **Guardian ad Litem**, s. 100(1)(B) CCPA (NSW) and s. 123(1)(B) of the Adoption Act 2000 again apply the same requirement as a separate option to the child-related factor discussed above of 'special circumstances', namely 'if the court is of the opinion that the child will benefit from the appointment'. This is likewise a vague requirement, but as an example, in *Re Oscar* the court was of the opinion that the child would benefit from a Guardian ad Litem because the child was almost 12, so his wishes were a relevant consideration, but he was (likely) suffering serious developmental impairment or psychological harm because of the particularly bitter and complicated history of the matter.<sup>406</sup>

#### 5.1.1.6. Who decides whether the child will be represented?

The decision whether the child will be represented is made by the courts in Australia. An **independent children's lawyer** can be appointed by the court either on its own initiative or on the

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<sup>402</sup> Kaspiew et al. 2013, p. 5.

<sup>403</sup> *De L* [1996] FLC 92-706.

<sup>404</sup> Further Revised Explanatory Memorandum Family Law Amendment Bill 2000, para. 293.

<sup>405</sup> Senate Legal and Constitutional Affairs Committee 2011, p. 42; and Kaspiew et al. 2013, p. 5.

<sup>406</sup> *Re Oscar* [2002] NSWSC 453 (21 May 2002), para. 4 and 7.

application of the child, an organization concerned with the welfare of the child or any other person, following s. 68L(4) AFLA 1975.<sup>407</sup>

In New South Wales, a **direct legal representative** or **independent legal representative** may either be appointed by the court or requires the leave of court if retained directly by the child or the parents or guardians of the child.<sup>408</sup> A **Guardian ad Litem** can only be appointed by the court, see s. 100(1) CCPA (NSW) or s. 123(1) of the Adoption Act 2000. If a representative was first appointed for child, but they determine that the child is unable to instruct the representative, then the representative should inform the court and apply for an appointment of a Guardian ad Litem for the child, whose instructions the representative can then act on.<sup>409</sup>

#### 5.1.1.7. How is the child's representative financed?

Legal aid is a matter left to the Legal Aid commissions in each State or Territory. In principle, the costs of a representative is either borne by the parties equally or by a legal aid grant.<sup>410</sup> Speaking generally, across Australia the Legal Aid Commissions will mostly provide legal aid for independent children's lawyers if appointed by the court.<sup>411</sup> In New South Wales, it depends on the type of family law proceeding whether legal aid is available and which test must be satisfied. Legal aid for the **independent children's lawyer** in proceedings on parenting matters or parenting orders is granted if the court has appointed the lawyer and legal aid is considered reasonable, no means or merits test is applied.<sup>412</sup> In proceedings on child maintenance or international child abductions a means and merits test is applied.<sup>413</sup> With regard to the **direct legal representative** or **independent legal representative**, legal aid is provided in care proceedings without a means or merits test,<sup>414</sup> but is only provided in adoption proceedings in exceptional circumstances in addition to the means or merits test.<sup>415</sup> If legal aid is not provided, independent children's lawyer, direct and independent legal representatives, must be paid for by the parties, the parents, equally, taking into consideration their capacity to pay, their legally aided status and previous contributions.<sup>416</sup>

The **Guardian ad Litem** is appointed in New South Wales from the Guardian ad Litem Panel which falls under the responsibility of the Department of Justice. This means that when a Guardian ad Litem is appointed he or she is paid an allowance in accordance with the scheduled fee through the Guardian ad Litem Panel.<sup>417</sup>

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<sup>407</sup> Barrie 2013, p. 128.

<sup>408</sup> See the explanatory text accompanying Principle A1 and Principle A2 of the Representation Principles for Children's Lawyers 2014.

<sup>409</sup> Principle B2 and the accompanying explanatory text of the Representation Principles for Children's Lawyers 2014.

<sup>410</sup> Parkinson & Cashmore 2008, p. 51.

<sup>411</sup> Kaspiew et al. 2013, p. 17.

<sup>412</sup> Policies Legal Aid New South Wales, 5.3.3 and 5.4.4.

<sup>413</sup> Policies Legal Aid New South Wales, 5.10.3 and 5.12.

<sup>414</sup> Policies Legal Aid New South Wales, 5.16.10.

<sup>415</sup> Policies Legal Aid New South Wales, 5.18.

<sup>416</sup> Guidelines Legal Aid New South Wales, 2.4.

<sup>417</sup> Guardian ad Litem Handbook 2012, para. 35.

### 5.1.2. What is the task of the child's representative in family law proceedings in Australia (New South Wales)?

#### **Independent children's lawyer**

Under the Family Law Act 1975, s. 68LA sets out the task of the independent children's lawyer. Independent children's lawyers represent the child's best interests in the court proceedings. They are not the child's legal representative and thus are not obliged to act on the child's instructions (s. 68LA(4) AFLA 1975).<sup>418</sup> Instead, s. 68LA(2) and (3) require that they 'form an independent view' of what is in the best interests of the child and act and/or make submissions to the court in the proceedings accordingly, including appealing the orders of the court if necessary.<sup>419</sup> To do so, the independent children's lawyer must 'act impartially' by being truly independent of the court and the parties and focusing fully and objectively on the child's best interests.<sup>420</sup> The independent children's lawyer should bring before the court the child's best interest as drawn from and supported by evidence, not from their own opinion of the case.<sup>421</sup> The independent children's lawyer's task also includes ensuring that any views expressed by the child (note, the child is not required to express views – s. 60CE AFLA 1975) are fully put before the court.<sup>422</sup> This does not mean that the independent children's lawyer must meet with the child themselves.<sup>423</sup> If these views do not concur with what the independent children's lawyer has submitted as being in the best interests of the child, that is not a problem as long as it has been made clear to the court.<sup>424</sup> Finally, the independent children's lawyer also has the task of acting as an 'honest broker' on behalf of the child in the facilitation of any agreements and must 'endeavor to minimize the trauma to the child associated with the proceedings'.<sup>425</sup>

#### **Direct legal representative**

The role of the direct legal representative in New South Wales is to act on the instructions of the child, who is their client, as well as ensuring that their views are placed before the court and that all relevant evidence is adduced according to s. 99D(a) CCPA (NSW) and s. 122(3).<sup>426</sup> According to Parkinson, the role of a client-directed legal representative is more important in care proceedings than

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<sup>418</sup> See also, Guidelines for Independent Children's Lawyers 2013, para. 2; and Fernando 2013, p. 396.

<sup>419</sup> Guidelines for Independent Children's Lawyers 2013, para. 6.11.

<sup>420</sup> See, s. 68LA(5)(a) AFLA 1975 and the Guidelines for Independent Children's Lawyers 2013, para. 4 and 6.4.

<sup>421</sup> Guidelines for Independent Children's Lawyers 2013, para. 4.

<sup>422</sup> See, s. 68LA(5)(b) AFLA 1975 and the Guidelines for Independent Children's Lawyers 2013, para. 4.

<sup>423</sup> Fernando 2014, p. 49.

<sup>424</sup> Guidelines for Independent Children's Lawyers 2013, para. 2; and Fernando 2013, p. 395.

<sup>425</sup> See, s. 68LA(5)(d) and (e) AFLA 1975 and the Guidelines for Independent Children's Lawyers 2013, para. 6.4.

<sup>426</sup> See also Principle A1 of the Representation Principles for Children's Lawyers 2014; Parkinson 2001, p. 267; and Ross 2013b, p. 335.

in parental disputes, because the child protection authority will already promote the best interests of the child.<sup>427</sup>

### **Independent legal representative**

The role of the independent legal representative in New South Wales is more akin to that of an independent children's lawyer. Independent legal representatives are best interests representatives as they do not act on a child's instructions and do not have a client,<sup>428</sup> unless a Guardian ad Litem has been appointed, in which case the independent legal representative acts on their instructions (s. 99D(b)(i) CCPA (NSW) and s. 123(4) Adoption Act 2000).<sup>429</sup> Their role is thus to present evidence to the court on what is in the best interests of the child and to make applications, submissions or appeals accordingly, but also to present the child's views (s. 99D(b) CCPA (NSW) and s. 123(7) Adoption Act 2000).

### **Guardian ad Litem**

The role of the Guardian ad Litem in New South Wales is to 'safeguard and represent the interests of the child' and to instruct the legal representative of the child, s. 100(3) CCPA (NSW) and s. 123(3) Adoption Act 2000. This role is relatively vague as no further statutory guidance is provided.<sup>430</sup>

#### 5.1.2.1. What are the function requirements for the child's representative?

**Independent children's lawyers, direct legal representatives, and independent legal representatives** are all legal practitioners who are either 'inhouse', employed directly by the State's Legal Aid Commission, or work privately but are appointed to a panel from which they can be appointed.<sup>431</sup> In either case it is required that the practitioner has a minimum of 5 years experience in family law and, for independent children's lawyers, have completed the independent children's lawyer training program.<sup>432</sup> In New South Wales, once practitioners have been appointed to the panel they must agree and adhere to the practice standards.<sup>433</sup> These practice standards require that the lawyers must be able to communicate effectively with children and must have an understanding of issues facing children in proceedings.<sup>434</sup> New South Wales also has a professional development program available to all independent children's lawyers.<sup>435</sup>

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<sup>427</sup> Parkinson 2001, p. 268.

<sup>428</sup> Principle A2 of the Representation Principles for Children's Lawyers 2014; and Ross 2013, p. 335.

<sup>429</sup> Principle A3 of the Representation Principles for Children's Lawyers 2014.

<sup>430</sup> Bao-Er 2006, p. 1.

<sup>431</sup> Kaspiew et al. 2013, p. 15; and Ross 2013b, p. 335.

<sup>432</sup> Carson et al. 2014, p. 60.

<sup>433</sup> Kaspiew et al. 2013, p. 103.

<sup>434</sup> Care and Protection Practice Standards 2015, para. 1.2.

<sup>435</sup> Kaspiew et al. 2013, p. 107.

**Guardians ad Litem** in New South Wales are generally not lawyers, instead they are persons with qualifications and experience in social, health or behavioural sciences. People can apply to become a member of the Guardian ad Litem panel, if they have ‘mediation, advocacy and decision making skills, the ability to communicate effectively with various professionals and family members, basic knowledge of legal proceedings and the legal process, knowledge of issues affecting children and young people, people with illness, disability or disorder which may affect their decision-making capacity’.<sup>436</sup>

#### 5.1.2.2. How should the child’s representative complete their task?

##### **Independent children’s lawyer**

The Family Court’s Guidelines for Independent Children’s Lawyers provide guidance as to how independent children’s lawyer ought to complete their task.<sup>437</sup> Some of the most important guidelines will be briefly touched upon. Firstly, while the independent children’s lawyer is not required to meet with the child, they are encouraged and expected to, unless exceptional circumstances should prevent them from doing so.<sup>438</sup> Secondly, the independent children’s lawyer should provide and explain certain information to the child concerning their role (including the limitations, e.g of confidentiality), the court processes, if they have made submissions contrary to the child’s views why they have done so, and at the conclusion of the proceedings the orders made by the court and their effect.<sup>439</sup> Thirdly, the independent children’s lawyer should strive for a relationship of trust and respect in which the child is provided the opportunity to express his or her views, which will subsequently be fully put before the court, even if they disagree that the child’s views are in his or her best interests.<sup>440</sup> The independent children’s lawyer should also draw evidence to the court’s attention concerning the child’s best interests, but also if there is a situation of family violence and abuse.<sup>441</sup>

##### **Direct legal representative and independent legal representative**

In New South Wales, the Representation Principles for Children’s Lawyers and the Care and Protection Practice Standards give further guidance as to how direct and independent legal representatives should fulfill their task. A few general guidelines apply. The representative should see the child as soon as possible before going to court, in a place and at a time when it is ‘comfortable and convenient’ for the child, if necessary with the support of a trusted adult, as well as after any hearings or court orders.<sup>442</sup> The representative should use ‘language appropriate to the age, maturity, level of

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<sup>436</sup> Guardian ad Litem Handbook 2012, para. 12.

<sup>437</sup> Carson et al. 2014, p. 60.

<sup>438</sup> Guidelines for Independent Children’s Lawyers 2013, para. 6.2; Carson et al. 2014, p. 60; and Fernando 2014, p. 49.

<sup>439</sup> Guidelines for Independent Children’s Lawyers 2013, para. 5.1, 5.2, 5.4 and 6.10.

<sup>440</sup> Guidelines for Independent Children’s Lawyers 2013, para. 5.1, 5.3, and 5.4.

<sup>441</sup> See s. 68LA(5)(c) and Guidelines for Independent Children’s Lawyers 2013, para. 7.

<sup>442</sup> Principle D1, D4 and D5 of the Representation Principles for Children’s Lawyers 2014; and Care and Protection Practice Standards 2015, para. 2.2.3 and 2.3.3.

education, cultural context and degree of language proficiency of the child' when communicating with the child,<sup>443</sup> if necessary employing an interpreter to do so.<sup>444</sup> The representative should inform and explain to the child what the role of the representative is, the proceedings, and the confidential nature of the relationship and should also prepare the child for the end of the relationship.<sup>445</sup> The representative should in this communication also encourage the child to ask further questions and answer them appropriately.<sup>446</sup>

### **Direct legal representative**

The direct legal representative has to maintain a lawyer-client relationship with the child.<sup>447</sup> This means that the representative should meet with the child and maintain in contact with them throughout the proceedings,<sup>448</sup> should represent the child competently and professionally,<sup>449</sup> and owes the same duty of confidentiality as if the child were an adult.<sup>450</sup> Besides the general information requirements, the direct legal representative should ensure that the child is sufficiently informed of the nature of the proceedings, the available options, possible consequences, the lawyer-client relationship, and all the relevant documents.<sup>451</sup> Besides informing the child, the direct legal representative should also seek the child's instructions on those matters and should ensure that they understand these instructions.<sup>452</sup>

### **Independent legal representative**

The independent legal representative must retain a relationship with the child, to provide the child with information and to 'explore' the child's views and the extent to which the child can participate in the proceedings.<sup>453</sup> In that respect the independent legal representative also has a duty of confidentiality.<sup>454</sup> The independent legal representative's task to represent the child's best interests must be done 'in a competent and professional way'.<sup>455</sup> What does this mean? Firstly, that the best interests must be determined on the basis of 'objective criteria addressing the child's specific needs and preferences' and that the representative should aim at achieving the child's long term best

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<sup>443</sup> Principle D6 of the Representation Principles for Children's Lawyers 2014.

<sup>444</sup> Care and Protection Practice Standards 2015, para. 2.2.3 and 2.3.3.

<sup>445</sup> Principle D3, E1, F2 and J1 of the Representation Principles for Children's Lawyers 2014.

<sup>446</sup> Care and Protection Practice Standards 2015, para. 2.2.3 and 2.3.3.

<sup>447</sup> Principle D2 of the Representation Principles for Children's Lawyers 2014; and Care and Protection Practice Standards 2015, para. 2.2.2.

<sup>448</sup> Care and Protection Practice Standards 2015, para. 2.2.2.

<sup>449</sup> Principle E2 (part 1) of the Representation Principles for Children's Lawyers 2014.

<sup>450</sup> Principle F1 of the Representation Principles for Children's Lawyers 2014.

<sup>451</sup> Principle D2 of the Representation Principles for Children's Lawyers 2014; and Care and Protection Practice Standards 2015, para. 2.2.3.

<sup>452</sup> Principle D2 of the Representation Principles for Children's Lawyers 2014; and Care and Protection Practice Standards 2015, para. 2.2.3.

<sup>453</sup> Care and Protection Practice Standards 2015, para. 2.3.2 and 2.3.3.

<sup>454</sup> Principle F1 of the Representation Principles for Children's Lawyers 2014.

<sup>455</sup> Principle E2 (part 2) of the Representation Principles for Children's Lawyers 2014.

interests through the court's decision.<sup>456</sup> Secondly, representative should do so by participating in all court proceedings, obtaining relevant materials, presenting evidence, and ensuring that the child's views are included in the proceedings.<sup>457</sup>

### **Guardian ad Litem**

There are no clear guidelines as to how a Guardian ad Litem should fulfill their task, however the Guardian ad Litem takes the position of a party and should thus act in that manner.<sup>458</sup> The case of *Re Oscar* has also clarified that the Guardian ad Litem can, amongst other things, review the materials in the proceedings and interview the child.<sup>459</sup> The Guardian ad Litem should also give instructions to the legal representative on behalf of the child.

#### 5.1.2.3. Is the child representative the only option to be heard, are other options available and can they be complementary?

With regard to the previously discussed forms of child representation in Australia, specifically New South Wales, a few comments can be made with regards to complementarity. An **independent children's lawyer** cannot act complementary to a direct or independent legal representative or to a Guardian ad Litem, because the independent children's lawyer is provided for in the Family Law Act 1975 for certain types of family law proceedings which are not provided for in the New South Wales legislation on care or adoption proceedings. In these care or adoption proceedings, a **direct legal representative** and **independent legal representative** can also not act in the same proceedings. The child will have either or, according to Principle B4 a representative cannot act 'simultaneously' as both types of representative, if the need arises for a change of form of representation the court should be informed.<sup>460</sup> However, the forms of legal representative can act together with a **Guardian ad Litem**. In care proceedings, the independent legal representative acts on the instructions of the Guardian ad Litem (s. 99D(b)(i) CCPA (NSW)), in adoption proceedings it is the direct legal representative (s. 122(3)(c)(ii) and s. 123(4) Adoption Act 2000).

Regarding the other options for the child to be heard, it is important to realize that a representative is only one of the three co-existing mechanisms, together with the family report and the judicial interviews, by which the child's views can be heard in family law proceedings under the Family Law Act 1975.<sup>461</sup> Family reports are written by family consultants, who are social workers or

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<sup>456</sup> Principle B3 and the explanatory text accompanying Principle E2 (part 2) of the Representation Principles for Children's Lawyers 2014.

<sup>457</sup> Care and Protection Practice Standards 2015, para. 2.3.4.

<sup>458</sup> Bao-Er 2006, p. 4.

<sup>459</sup> *Re Oscar* [2002] NSWSC 453 (21 May 2002); and Bao-Er 2006, p. 4.

<sup>460</sup> Representation Principles for Children's Lawyers 2014, see also Principle B2 which states that the representative can only proceed if he or she is certain of what type of representative they are.

<sup>461</sup> Kaspiew et al. 2013, p. 4.

psychological counsellors.<sup>462</sup> These consultants will speak to the child to ascertain their views and write a report concerning those views as well as other matters concerning the child's welfare (s. 62G AFLA 1975).<sup>463</sup> The other option for the court is that a judge, or a judicial officer, may interview a child upon their discretion.<sup>464</sup> If child expresses clear views relevant to the case during this interview, the judge may opt to order a family report.<sup>465</sup> A family report, judicial interview and independent children's lawyer can be complementary, if necessary.

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<sup>462</sup> Parkinson & Cashmore 2008, p. 48.

<sup>463</sup> Barrie 2013, p. 129.

<sup>464</sup> Barrie 2013, p. 133.

<sup>465</sup> Barrie 2013, p. 129.

## 5.2. France

### 5.2.1. What forms of representation are available for children in family law proceedings in France and how are they regulated?

In French family law proceedings, children can be represented in two manners. The first form of representation is the institute of the *Administrateur ad hoc* (hereafter: ad hoc administrator). While there is no legal definition of an ad hoc administrator, legal doctrine defines it as ‘a natural or legal person, appointed by a magistrate, who substitutes the parents in exercising the rights of the non-emancipated child, in the child’s name and place within the limited assignment entrusted to him’.<sup>466</sup> The ad hoc administrator can function in criminal, civil and administrative cases, ranging from family law proceedings, criminal proceedings with child victims to the representation of unaccompanied minor refugees.<sup>467</sup> The second form of representation, the *avocat d’enfant* (hereafter: children’s lawyer), grants children the opportunity to be assisted by a lawyer in certain cases.<sup>468</sup> The children’s lawyer is not a separate institution, as such, but special guidelines have been set up for lawyers working for children.<sup>469</sup>

#### 5.2.1.1. When were the forms of representation introduced or amended?

The **ad hoc administrator** was first introduced in 1910 in order to mitigate paternal power over children’s property and was limited to issues of property.<sup>470</sup> In 1964, Article 389-3 French Civil Code (*Code Civil*; hereafter FCC) was introduced for the ad hoc administrator in guardianship matters concerning children’s property.<sup>471</sup> The **children’s lawyer** was first introduced in the context of child protection proceedings in Article 1186 French Code of Civil Procedure (*Code de procédure civile*; hereafter FCCP) in 1981.<sup>472</sup> The role of the ad hoc administrator gradually expanded to other types of cases (e.g. for criminal proceedings involving child abuse in 1989<sup>473</sup>). In 1993 the role was extended to include family law proceedings of a non-patrimonial nature.<sup>474</sup> The law which introduced Article 388-2 FCC, was also crucial in providing children with a general right to be heard by the judge or a third party in family law proceedings in Article 388-1 FCC, with or without the support of a children’s lawyer.<sup>475</sup> This 1993 law was introduced with the aim of the French government to bring

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<sup>466</sup> Favre-Lanfray 2008b, p. 11; and Fédération nationale des administrateurs ad hoc 2009, p. 10.

<sup>467</sup> Favre-Lanfray 2008a, p. 2.

<sup>468</sup> Avenard 2015, p. 34.

<sup>469</sup> See, Charte nationale de la défense des mineurs 2008.

<sup>470</sup> Loi du 6 avril 1910 pour la bonne administration des biens des mineurs. See also, Fédération nationale des administrateurs ad hoc 2009, p. 12; and Grevot 2010, p. 12.

<sup>471</sup> Loi n°64-1230 du 14 décembre 1964 portant modification des dispositions du code civil relatives à la tutelle et à l’émancipation. See also, Fossier 2002.

<sup>472</sup> Décret n°81-500 du 12 mai 1981 instituant les dispositions des Livres III et IV du nouveau Code de procédure civile et modifiant certaines dispositions de ce code.

<sup>473</sup> Loi n° 89-487 du 10 juillet 1989 relative à la prévention des mauvais traitements à l’égard des mineurs et à la protection de l’enfance. See also, Grevot 2010.

<sup>474</sup> Fédération nationale des administrateurs ad hoc 2009, p. 12; and Grevot 2010, p. 12.

<sup>475</sup> Loi n°93-22 du 8 janvier 1993 modifiant le code civil relative à l’état civil, à la famille et aux droits de l’enfant et instituant le juge aux affaires familiales. See also, Demarchi 2010.

the French Civil Code in conformity with the UNCRC, following the ratification of the UNCRC by France in 1990.<sup>476</sup> More amendments occurred in 2007, which introduced the obligation to inform the child on their right to be heard and to be assisted by a children's lawyer,<sup>477</sup> and in 2009, when Articles 338-1 to 338-12 FCCP were introduced clarifying how children should be heard.<sup>478</sup> In 2015, the (old) Article 389-3 FCC was abrogated and the content concerning the appointment of an ad hoc administrator was instead moved to an amended Article 383 FCC by an Ordonnance with the aim of modifying and simplifying family.<sup>479</sup> Most recently, in 2016, Article 388-2 was amended to include a section on the appointment of an ad hoc administrator in child protection proceedings.<sup>480</sup>

#### 5.2.1.2. In which types of cases can they be represented?

Children can be represented by an **ad hoc administrator** in a variety of civil, criminal and administrative law proceedings. In civil cases, the ad hoc administrator can be appointed in a variety of procedures. There are two legal grounds for civil cases, Article 383 and Article 388-2 FCC, but they are complex and to a certain extent incoherent as debate remains regarding in which types of cases an ad hoc administrator can be appointed.<sup>481</sup>

Article 383 FCC is relatively clear as it allows an ad hoc administrator to represent children in proceedings concerning their property, e.g. in a succession, when there is a conflicting interest between the child and their legal representative, for example their parents.<sup>482</sup> It is important to realize that the ad hoc administrator is not the same as a guardian (*tutelle*), the ad hoc administrator has a precise and limited mission as a judicial representative while the guardian has a continual function as the replacement legal representative.<sup>483</sup> An ad hoc administrator can replace the judicial representation of children in conflict with their guardian, however.<sup>484</sup>

Article 388-2 FCC allows for the appointment of an ad hoc administrator in many other family law matters when the interests of the child and their parent(s) conflict. However, it is debated whether the ad hoc administrator can only represent the child who is not a party to proceedings or can only represent the child who is a party to the proceedings. In principle, as emphasized by Gouttenoire, the ad hoc administrator can act in cases in which children are a party but do not have the capacity to represent themselves, thus should be represented by their legal representative, but due to a conflict of interests can or should not be.<sup>485</sup> This would include the proceedings in which the child has the (exclusive) right to establish or contest maternity or paternity (Art. 325 and 327 jo. 328 FCC or Art.

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<sup>476</sup> Attias 2012; Bazin 2014; and Le Mintier 1994, p. 1.

<sup>477</sup> Loi n°2007-308 du 5 mars 2007 portant réforme de la protection juridique des majeurs. See also, Demarchi 2010.

<sup>478</sup> Décret n°2009-572 du 20 mai 2009 relatif à l'audition de l'enfant en justice. See also, Demarchi 2010.

<sup>479</sup> Ordonnance n°2015-1288 du 15 octobre 2015 portant simplification et modernisation du droit de la famille.

<sup>480</sup> Loi n°2016-297 du 14 mars 2016 relative à la protection de l'enfant.

<sup>481</sup> Grevot 2010, p. 13.

<sup>482</sup> Massip 1995.

<sup>483</sup> Fédération nationale des administrateurs ad hoc 2009, p. 10.

<sup>484</sup> Favre-Lanfray 2008b, p. 11.

<sup>485</sup> Gouttenoire 2006, p. 62.

334 FCC),<sup>486</sup> child protection proceedings (Art. 375 FCC),<sup>487</sup> proceedings for the revocation of a simple adoption (Art. 370-1 FCC),<sup>488</sup> and proceedings on the grandparent's right of access and visitation (Art. 371-4 FCC).<sup>489</sup> On the other hand, an ad hoc administrator can also be appointed in types of cases where children are not a party to the proceedings as has been implicitly accepted by the Cour de Cassation and in legal doctrine.<sup>490</sup> While some authors still find it pointless to appoint an ad hoc administrator in cases when the child cannot intervene,<sup>491</sup> it is possible for the appointment of an ad hoc administrator in procedures concerning parental authority, e.g. the litigation of visitation, access, and custody after divorce, etc.<sup>492</sup>

In a variety of family law matters, the **children's lawyer** can represent the child when the child is a party or can assist the child in cases when the child is not a party.<sup>493</sup> In child protection proceedings, to which the child is a party (Art. 375 FCC), the child with discernment has the right to appoint a children's lawyer (Art. 1186 FCCP).<sup>494</sup> The same applies to the revocation of a simple adoption (Art. 370-1 FCC). Even if the child is not a party but has the right to be heard, such as in proceedings within the framework of parental authority or international child abduction, Article 388-1 FCC allows for the child to be assisted by a children's lawyer.<sup>495</sup>

#### 5.2.1.3. When can children be represented in family law proceedings in France?

The **ad hoc administrator** of Article 383 FCC can be appointed prior to the start of a proceeding, while the appointment on the basis of Article 388-2 FCC can only occur in an ongoing procedure.<sup>496</sup> An ad hoc administrator has a precise and limited mission, which means that their functioning is limited to the time necessary to complete the mission.<sup>497</sup> This also highlights one of the differences between the ad hoc administrator and the guardian (*tutelle*), who has a continuing function.<sup>498</sup> There is no specific start or end to the task of the **children's lawyer**. They can assist and/or represent the child prior to, during and after the proceedings. The law places no restrictions, but does require that a children's lawyer appointed by the judge according to Article 1186 FCCP must be designated to the child within eight days of the appointment.

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<sup>486</sup> Favre-Lanfray 2008a, p. 3; and Fédération nationale des administrateurs ad hoc 2009, p. 17-18.

<sup>487</sup> Fédération nationale des administrateurs ad hoc 2009, p. 14.

<sup>488</sup> Favre-Lanfray 2008a, p. 3; and Grevot 2010, p. 12.

<sup>489</sup> Fédération nationale des administrateurs ad hoc 2009, p. 15.

<sup>490</sup> Cour de Cassation 1<sup>ère</sup> Chambre civile, 23 février 1999 (Bull. n°66). See also, Fédération nationale des administrateurs ad hoc 2009, p. 26-27; and Gouttenoire 2006, p. 62.

<sup>491</sup> Fédération nationale des administrateurs ad hoc 2009, p. 15.

<sup>492</sup> Gouttenoire 2006, p. 62; and Grevot 2010, p. 12.

<sup>493</sup> Gouttenoire 2006, p. 63.

<sup>494</sup> Attias 2012; Eglin 2006, p. 36; and Ligue des droits de l'Homme 2012.

<sup>495</sup> Avenard 2015, p. 34; and Ligue des droits de l'Homme 2012.

<sup>496</sup> Fédération nationale des administrateurs ad hoc 2009, p. 26; and Grevot 2010, p. 13.

<sup>497</sup> Fédération nationale des administrateurs ad hoc 2009, p. 10-11; and Lebrun 2001, p. 33.

<sup>498</sup> Fédération nationale des administrateurs ad hoc 2009, p. 11; and Lebrun 2001, p. 33.

#### 5.2.1.4. What requirements are set for the children, e.g. age, level of maturity?

The important requirement for children, both with regards to the **ad hoc administrator** and the **children's lawyer**, is whether the child is *capable de discernement*, so whether the child is capable of forming his or her own views. When this requirement is achieved, the child has the right to be heard (Art. 388-1 FCC and Art. 1182 FCCP) and thus the right to have a children's lawyer.<sup>499</sup> The requirement is relevant for the ad hoc administrator in a negative sense. If the child is not *capable de discernement* in cases where the child can normally act as a party by themselves and there is a conflict of interests with the parent(s) or guardian, then an ad hoc administrator can be appointed.<sup>500</sup> When is a child *capable de discernement*? There is no age attached to the requirement, instead the judge must decide per case.<sup>501</sup> According to Attias, children are generally considered capable of forming their own views in France at the age of 7 years old.<sup>502</sup>

#### 5.2.1.5. What other requirements are applied, e.g. conflict of views between child and parents?

An **ad hoc administrator** is not appointed automatically, the additional requirement of a conflict of interests between the child and the legal representative(s) must be met.<sup>503</sup> Article 383 FCC requires the actual existence of a conflict of interests at the time of the judge's decision to appoint an ad hoc administrator, while Article 388-2 FCC only requires the appearance of a conflict of interests.<sup>504</sup> This means that it could also concern a future conflict of interests, but this conflict must be sufficiently serious, close and threatening.<sup>505</sup> What is meant by a 'conflict of interests' in both of these articles is very subjective and vague, which on the one hand means that a great variety of cases is included, but also means that the appointment of an ad hoc administrator is very dependent on the judge's discretion.<sup>506</sup> However, the conflict of interests is generally understood as only concerning conflicts between the child's interests and the parents' interests, not conflicts between the parents, and as having to be sufficiently contradictory or divergent not simply distinct.<sup>507</sup> According to the *Fédération nationale des administrateurs ad hoc* the judge does not have any discretion when the legal representative of the child requests an ad hoc administrator on the ground of Article 383 FCC and thus the conflict of interests requirement does not apply in this situation.<sup>508</sup>

There are no additional requirements for the **children's lawyer**.

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<sup>499</sup> Fédération nationale des administrateurs ad hoc 2009, p. 15; Gouttenoire 2006, p. 63; Ligue des droits de l'Homme 2012; and Rongé 2008.

<sup>500</sup> Fédération nationale des administrateurs ad hoc 2009, p. 14.

<sup>501</sup> Rongé 2008, p. 45.

<sup>502</sup> Attias 2012.

<sup>503</sup> Fédération nationale des administrateurs ad hoc 2009, p. 22; and Gouttenoire 2006, p. 60.

<sup>504</sup> Favre-Lanfray 2008b, p. 13; and Fédération nationale des administrateurs ad hoc 2009, p. 23.

<sup>505</sup> Fédération nationale des administrateurs ad hoc 2009, p. 24.

<sup>506</sup> Fédération nationale des administrateurs ad hoc 2009, p. 23-24.

<sup>507</sup> Fédération nationale des administrateurs ad hoc 2009, p. 23-24.

<sup>508</sup> Fédération nationale des administrateurs ad hoc 2009, p. 43.

#### 5.2.1.6. Who decides whether the child will be represented?

For the **ad hoc administrator**, the person who decides whether the child will be represented depends on the legal ground for the appointment. On the ground of Article 383 FCC, the *juge des tutelles* (guardianship judge) has the competence to appoint an ad hoc administrator. The judge must do so automatically at the request of the legal representative (parent(s) or guardian) and has the discretion to do so if the legal representative has not requested it at the request of the public prosecutor or the child or *ex officio*.<sup>509</sup> Article 388-2 FCC grants the *juge des tutelles* the competence to appoint an ad hoc administrator under the same conditions as included in Article 383 FCC and also grants the judge of the seized instance the competence to appoint an ad hoc administrator *ex officio*.<sup>510</sup> The latter judge can be any of judges involved in the proceedings, e.g. the family judge.<sup>511</sup> The legal representatives of the child may appeal against the appointment of an ad hoc administrator (Art. 1210-2 FCCP) within 15 days of the appointment. The function of an ad hoc administrator is not obligatory, so the person who the judge has appointed can decide to decline, the judge will then appoint another ad hoc administrator.<sup>512</sup>

With regards to the **children's lawyer** it is up to the child with discernment to decide whether to have a lawyer. The child can freely choose who to have as a lawyer.<sup>513</sup> In child protection proceedings, this is also the case according to Article 1186 FCCP, but the child may also request the *juge des enfants* (children's judge) to have the president of the court appoint a children's lawyer for them.

#### 5.2.1.7. How is the child's representative financed?

The **ad hoc administrator** used to work on a gratuitous basis, however since 1999 the law provides for the compensation of an ad hoc administrator, albeit in the form of a fixed lump sum until 2008.<sup>514</sup> Since 2008, Article 1210-3 FCCP in conjunction with Article R. 93(I)(3) French Code of Criminal Procedure (*Code de procédure pénale*; hereafter FCPC) allows for the reimbursement of the ad hoc administrator's travel costs and the compensation for their work if it is an ad hoc administrator appointed from the list in R. 53 FCPC. The amount of compensation is linked to the work done, but remains a – low – fixed sum (Art. 1210-3 FCCP).<sup>515</sup> Although the State Treasury advances the compensation, the Treasury recovers these costs from the party ordered to pay them by the judge (Art. 1210-3 FCCP).<sup>516</sup>

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<sup>509</sup> Fédération nationale des administrateurs ad hoc 2009, p. 42 and 44; and Massip 1995.

<sup>510</sup> Favre-Lanfray 2008b, p. 13; and Fédération nationale des administrateurs ad hoc 2009, p. 44.

<sup>511</sup> Fédération nationale des administrateurs ad hoc 2009, p. 44.

<sup>512</sup> Massip 1995.

<sup>513</sup> Charte nationale de la défense des mineurs 2008.

<sup>514</sup> Fossier 2006, p. 17; and Grevot 2010, p. 16.

<sup>515</sup> Fédération nationale des administrateurs ad hoc 2009, p. 80; Grevot 2010, p. 17; and Guide Méthodologique Administrateur ad hoc 2014, p. 45.

<sup>516</sup> Fédération nationale des administrateurs ad hoc 2009, p. 83.

The costs for the **children’s lawyer** should, in principle, be borne by their client. This means that the costs should be borne by the child, and will in some cases be borne by their parents.<sup>517</sup> However, when the children’s lawyer functions within the framework of Article 388-1 FCC (the child’s right to be heard), then Article 9-1 of the Legal Aid Act (*Loi n° 91-647 du 10 juillet 1991 relative à l’aide juridique*) automatically provides for the right to legal aid from the State. In other cases, the child can also request legal aid from the State according to the standard requirement of insufficient resources (Art. 2 Legal Aid Act).

### 5.2.2. What is the task of the child’s representative in family law proceedings in France?

The task of the **ad hoc administrator** is not defined by the legislator, but their task is to represent the child, protect the child’s interests and to assist and accompany the child in the legal proceedings according to legal doctrine.<sup>518</sup> The ad hoc administrator substitutes the child’s place, which is normally substituted by the parent, as a party in the proceedings, thereby ensuring the child’s access to justice.<sup>519</sup> The task of an ad hoc administrator is limited to the scope of the mission for which they are appointed by the judge, who cannot give the ad hoc administrator a ‘blank cheque’.<sup>520</sup>

The task of the **children’s lawyer** is dependent on the child’s position in the legal proceedings. In proceedings to which the child is a party, e.g. child protection proceedings, the children’s lawyer represents the child in the court proceedings as a normal lawyer would.<sup>521</sup> In family law matters where the child is not a party to the proceedings, the children’s lawyer does not have a traditional representative function, but instead assists the child in exercising their right to be heard (Art. 388-1 FCC) and in understanding the proceedings and decision.<sup>522</sup>

#### 5.2.2.1. What are the function requirements for the child’s representative?

The function requirements of an **ad hoc administrator** are relatively broad, as diversity exists between who functions as an ad hoc administrator or, to put it more positively, the profile of an ad hoc administrator is ‘multi-faceted’.<sup>523</sup> According to Article 1210-1 FCCP, the judge will generally appoint a family member of or someone close to the child as the ad hoc administrator unless this is not in the interests of the child.<sup>524</sup> In that case, the judge will appoint an ad hoc administrator from the

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<sup>517</sup> Rongé 2008, p. 46.

<sup>518</sup> Favre-Lanfray 2008b, p. 11; Fédération nationale des administrateurs ad hoc 2009, p. 11 and 60; and Grevot 2010, p. 15-16.

<sup>519</sup> Fédération nationale des administrateurs ad hoc 2009, p. 11; and Grevot 2010, p. 15.

<sup>520</sup> Fossier 2006, p. 17; and Massip 1995.

<sup>521</sup> Ligue des droits de l’Homme 2012.

<sup>522</sup> Avenard 2015, p. 34; Demarchi 2010; and Ligue des droits de l’Homme 2012.

<sup>523</sup> Fédération nationale des administrateurs ad hoc 2009, p. 52 and 59. See also, Fossier 2006, p. 18; and Grevot 2010, p. 13.

<sup>524</sup> Fédération nationale des administrateurs ad hoc 2009, p. 53; Fossier 2006, p. 18; and Grevot 2010, p. 13.

list created by the Court of Appeal according to Article R. 53 FCPC.<sup>525</sup> This is a very diverse list consisting both of natural as well as legal persons, including private and public legal persons.<sup>526</sup> Natural persons often do the work independently in combination with their other jobs.<sup>527</sup> To be added to the list, they must: (1) be between the age of 30 to 70 years old, (2) have a proven interest in children and their capabilities, (3) reside in the jurisdiction of the Court of Appeal, (4) never have had a criminal, disciplinary or administrative punishment for acts contrary to good morals, (5) never have been bankrupt.<sup>528</sup> As professionalism has made the ad hoc administrator more into a public office, the list contains many private and public legal persons.<sup>529</sup> To be added to the list the legal persons must fulfill two requirements: (1) the directors of the legal person must fulfill requirements (4) and (5) applicable to natural persons, and (2) all the persons who will act on behalf of the legal person as an ad hoc administrator must fulfill all five of the requirements applicable to natural persons.<sup>530</sup> There are no training requirements for the natural or legal persons on the list.<sup>531</sup>

There are no specific function requirements for the **children's lawyer** as it is not specific institute, in principle any French *avocat* with the general qualifications can act as a children's lawyer.<sup>532</sup> However, a national charter on the role and functioning of the children's lawyer was composed and signed at the Conference of Court Presidents (*Conférence des bâtonniers*) in 2008 which outlines best practices and creates a group of children's lawyers at the level of the regional bar, who on a voluntary basis bind themselves to these best practice guidelines.<sup>533</sup> The child can freely opt for one of these children's lawyers or for another lawyer.<sup>534</sup>

#### 5.2.2.2. How should the child's representative complete their task?

The **ad hoc administrator** represents and is the child in the proceedings. This means that when the child is not a party to the proceedings, the ad hoc administrator cannot function as a party in the proceedings, but when the child is a party, then the ad hoc administrator has all the same procedural powers as the child would have had.<sup>535</sup> If the ad hoc administrator functions as a party to the proceeding on behalf of the child, then they must represent and defend the child's interests.<sup>536</sup> To do

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<sup>525</sup> Fédération nationale des administrateurs ad hoc 2009, p. 53.

<sup>526</sup> Fédération nationale des administrateurs ad hoc 2009, p. 54; and Grevot 2010, p. 14.

<sup>527</sup> Grevot 2010, p. 14.

<sup>528</sup> Art. 2 Décret n° 2003-841 du 2 septembre 2003 relatif aux modalités de désignation et d'indemnisation des administrateurs ad hoc institués par l'article 17 de la loi n° 2002-305 du 4 mars 2002. See also, Fédération nationale des administrateurs ad hoc 2009, p. 54.

<sup>529</sup> Fossier 2010, p. 18.

<sup>530</sup> Art. 3 Décret n° 2003-841 du 2 septembre 2003 relatif aux modalités de désignation et d'indemnisation des administrateurs ad hoc institués par l'article 17 de la loi n° 2002-305 du 4 mars 2002. See also, Fédération nationale des administrateurs ad hoc 2009, p. 55.

<sup>531</sup> Fédération nationale des administrateurs ad hoc 2009, p. 54-55.

<sup>532</sup> Duval 2008, p. 44.

<sup>533</sup> Charte nationale de la défense des mineurs 2008. See also, Attias 2012.

<sup>534</sup> Charte nationale de la défense des mineurs 2008.

<sup>535</sup> Fédération nationale des administrateurs ad hoc 2009, p. 70; and Fossier 2006, p. 18-19.

<sup>536</sup> Fossier 2006, p. 18.

so they will work in collaboration with a lawyer, have contact with all parties involved, including the child, study the dossier and listen to the child and answer all their questions.<sup>537</sup> With regards to what exactly the ad hoc administrator must represent, the child's views or the child's interests, it appears to be accepted in legal doctrine that an ad hoc administrator must act according to what they themselves think is right and thus ought to represent what is in the child's best interests.<sup>538</sup> While the ad hoc administrator ought to transmit the child's views, the ad hoc administrator not only physically substitutes the non-emancipated child in legal proceedings but also substitutes the child's will because the child does not issue their own choice.<sup>539</sup> However, if the ad hoc administrator's view is different from that of the child, then that should be disclosed to the court.<sup>540</sup>

How the **children's lawyer** should complete their task depends in part on the type of procedure, as that defines their task. When the task is the same as that of a regular lawyer, then they should execute their task as they would in normal cases. With regards to the child protection procedure, a few specific rules apply. According to Article 1187 FCCP the children's lawyer receives all the court documents and relevant files, but these may not be shared with the child. The children's lawyer is also obliged to visit the child.<sup>541</sup> When the children's lawyer functions in family matters where the child is not a party but has the right to be heard, then in light of the assisting function, the avocat cannot speak at the hearing.<sup>542</sup> Instead the children's lawyer informs the judge if and when the child wishes to be heard, without informing the judge what the child has disclosed to them due to the confidential nature of the relationship between the avocat and the child.<sup>543</sup>

More generally speaking, the children's lawyer must meet with the child, alone if the child is *capable de discernement* to prevent the risk of a conflict of interests with any third parties (e.g. parents).<sup>544</sup> When meeting the child, the children's lawyer should explain their role, the confidential nature of their relationship, and the proceedings to the child.<sup>545</sup> The children's lawyer can only be the child's lawyer, not the lawyer of (one of) the parents, and must inform the parents hereof.<sup>546</sup> At the conclusion of the procedure, the child who is at least 6 years of age (according to the best practices charter) should be informed of the decision by the children's lawyer.<sup>547</sup>

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<sup>537</sup> Fédération nationale des administrateurs ad hoc 2009, p. 14-15 and 62; and Grevot 2010, p. 15-16.

<sup>538</sup> Fédération nationale des administrateurs ad hoc 2009, p. 60-62; and Fossier 2006, p. 19.

<sup>539</sup> Fédération nationale des administrateurs ad hoc 2009, p. 61; and Fossier 2006, p. 21.

<sup>540</sup> Fédération nationale des administrateurs ad hoc 2009, p. 62.

<sup>541</sup> Ligue des droits de l'Homme 2012.

<sup>542</sup> Ligue des droits de l'Homme 2012.

<sup>543</sup> Charte nationale de la défense des mineurs 2008.

<sup>544</sup> Charte nationale de la défense des mineurs 2008.

<sup>545</sup> Charte nationale de la défense des mineurs 2008.

<sup>546</sup> Avenard 2015, p. 34; Ligue des droits de l'Homme 2012; and Rongé 2008, p. 46.

<sup>547</sup> Attias 2012; and Charte nationale de la défense des mineurs 2008.

5.2.2.3. Is the child representative the only option to be heard, are other options available and can they be complementary?

In principle, the **ad hoc administrator** and **children's lawyer** function in different types of cases and complement each other in the sense that the one functions when the child is *capable de discernement* while the other functions when the child is not, it is possible that the child has double representation *strictu sensu*, because the ad hoc administrator will need a lawyer to act legally in proceedings where the child is a party.<sup>548</sup>

Besides the ad hoc administrator and the children's lawyer, the child also has the more general option to be heard (Art. 388-1 FCC) in all procedures which concern the child.<sup>549</sup> The child is can be assisted by a children's lawyer when making use of this option. The child can either be heard directly by the judge or can be heard indirectly by a third person appointed by the judge.<sup>550</sup> According to Article 338-9 FCCP, this third person must be an expert from the social, psychological or medical-psychological field. The judge has great discretion in choosing who this third person can be, although it is important that it is someone who can decipher the child's views.<sup>551</sup> Important in light of the right to be heard is that Article 388-1 FCC also includes the child's right to be informed about the possibility to be heard, albeit under the limitation of two conditions: (1) that the child is *capable de discernement*, and (2) that the proceeding must concern the child.

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<sup>548</sup> Fossier 2006, p. 20.

<sup>549</sup> Demarchi 2010; and Justen 2014, p. 38.

<sup>550</sup> Demarchi 2010.

<sup>551</sup> Demarchi 2010.

### 5.3. The Netherlands

#### 5.3.1. What forms of representation are available for children in family law proceedings in the Netherlands and how are they regulated?

The Netherlands has three forms of representation available for children in family law proceedings. The first two being the *bijzondere curator* (hereafter: guardian ad litem) in the general form provided by Article 1:250 Dutch Civil Code (*Burgerlijk Wetboek*; hereafter DCC) and in the filiation form of the *lex specialis* of Article 1:212 DCC.<sup>552</sup> The third form of representation is **separate legal representation**. In certain cases, the child either is obliged to, or can choose to, have separate legal representation – a lawyer – to act in the proceedings. Having separate legal representation is the same for children as for adults, in the sense that it is not a separate ‘institute’ as the guardian ad litem is.

##### 5.3.1.1. When were the forms of representation introduced or amended?

On the 5<sup>th</sup> of February 1995, the Netherlands ratified the UNCRC by which the Convention took immediate domestic effect.<sup>553</sup> Although the ratification was an important step in recognizing children’s rights, the UNCRC did not have an immense impact on Dutch legislation, as great reforms were not considered necessary by the government, the Constitution was not amended and no special children’s laws or acts were drawn up.<sup>554</sup>

The guardian ad litem has a longstanding history with regards to matters concerning the property of children and the denial of legitimacy. As discussed with regards to South Africa, the existence of curators to represent minor’s in litigation originates from Roman Law and continued its existence in Old Dutch Law.<sup>555</sup> More specifically, in the codified Dutch civil codes of the 19<sup>th</sup> and 20<sup>th</sup> century, the vague outline of two current forms of guardian ad litem can already be found.

The precursor to the **general guardian ad litem** was the *bijzonderen curator* who could be appointed to represent the child in matters concerning the property of children when the interests of the child conflicted with that of the parent entrusted with the administration of the child’s property.<sup>556</sup> In 1995, a major amendment of the law on custody and access in the civil code introduced the general guardian ad litem as we now know it.<sup>557</sup> The amendment extended the role of the guardian ad litem to include cases of an ‘immaterial’ nature,<sup>558</sup> thus also forming a type of ‘custody curator’.<sup>559</sup> This enhanced role of the guardian ad litem was introduced for two reasons. On the one hand, to formalize

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<sup>552</sup> Pieters 2008; Van Teeffelen 2008; and Vlaardingerbroek 2001.

<sup>553</sup> Limbeek & Bruning 2015, p. 89-90.

<sup>554</sup> Liefwaard & Vonk 2016, p. 314; and Limbeek & Bruning 2015, p. 89.

<sup>555</sup> Helmholz 1978, p. 229-230 and 232.

<sup>556</sup> Asser 1957, p. 597; and Veegens 1923, p. 256.

<sup>557</sup> Wet van 6 april 1995 tot nadere regeling van het gezag over en van de omgang met minderjarige kinderen, *Stb.* 1995, 240.

<sup>558</sup> Van Teeffelen 2008.

<sup>559</sup> Van Wamelen 1995.

the existing practice of courts at that time appointing a guardian ad litem, not as provided for in property matters, but also in matters of an ‘immaterial’ nature’.<sup>560</sup> On the other hand, to compensate for not introducing a formal access to proceedings for children.<sup>561</sup> An amendment in 1997 had little impact on Article 1:250 DCC, only adding the phrase ‘or both guardians’ to comply with the introduction of joint guardianship.<sup>562</sup> The amendment in 2009 was of more importance.<sup>563</sup> The Continued Parenthood and Well-Planned Divorce Act 2009 had the general aim to improve the position of children and the relationship with their parents following divorce and amended Article 1:250 DCC to specifically improve the position of children in the legal proceedings.<sup>564</sup> The amendment facilitates the appointment of the guardian ad litem, by allowing every judge to make the appointment in cases directly concerning a child, instead of solely the subdistrict court judge (*kantonrechter*).<sup>565</sup> The amendment also extended the role of the guardian ad litem, who can now assist the child in the discussions concerning the parenting plan.<sup>566</sup>

The precursor of the **filiation guardian ad litem**, the *bijzonderen voogd*, already in the early 20<sup>th</sup> century recognized as more of a curator than a *voogd* (guardian), had to be appointed as a representative for the child when proceedings were started to deny the child’s legitimacy.<sup>567</sup> The *bijzonderen voogd* had to defend the interests of the child in these procedures.<sup>568</sup> The modern day version of the filiation guardian ad litem was introduced in 1998 with the revised law of descent.<sup>569</sup> The mandatory guardian ad litem was introduced with the aim of protecting the best interests of the child in matters of filiation.<sup>570</sup> Looking to the future, the role of the filiation guardian ad litem might be further extended in light of the recommendations made by the *Staatscommissie Herijking Ouderschap* to involve a guardian ad litem on behalf of the unborn child in multiple parent families when they are making a parenting plan.<sup>571</sup>

It is difficult to determine the introduction of the **separate legal representative**, because it is not a separate institution. Legal representatives as such have existed for centuries in legal proceedings for adults. Looking more specifically at the option for children in the Netherlands to have a separate legal representative in family law proceedings, two important amendments can be mentioned. Compulsory

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<sup>560</sup> *Kamerstukken II 1992/93*, 23012, 3, p. 11.

<sup>561</sup> Vlaardingerbroek 2001, p. 103.

<sup>562</sup> Wet van 30 oktober 1997 tot wijziging van, onder meer, Boek 1 van het Burgerlijk Wetboek in verband met invoering van gezamenlijk gezag voor een ouder en zijn partner en van gezamenlijke voogdij, *Stb.* 1997, 506. See also, Jansen 2016b.

<sup>563</sup> Wet van 27 november 2008 tot wijziging van Boek 1 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met het bevorderen van voortgezet ouderschap na scheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap (Wet bevordering voortgezet ouderschap en zorgvuldige scheiding), *Stb.* 2008, 500.

<sup>564</sup> *Kamerstukken II 2004/05*, 301245, 3, p. 13. See also, Van Teeffelen 2007.

<sup>565</sup> *Kamerstukken II 2004/05*, 301245, 3, p. 7.

<sup>566</sup> *Kamerstukken I 2008/09*, 30145, E, p. 1. See also, Van Teeffelen 2008.

<sup>567</sup> Asser 1957, p. 472-473; and Veegens 1923, p. 223.

<sup>568</sup> Asser 1957, p. 473.

<sup>569</sup> Wet van 24 december 1997 tot herziening van het afstammingsrecht alsmede van de regeling van adoptie, *Stb.* 1997, 772.

<sup>570</sup> Rapport Staatscommissie Herijking ouderschap 2016, p. 180.

<sup>571</sup> Rapport Staatscommissie Herijking ouderschap 2016, p. 432.

legal representation for children in proceedings concerning the authorization for secure youth care was introduced on the 1<sup>st</sup> of January 2008 with the Secure Youth Care Act, to offer extra protection to the child considering the drastic nature of the decision.<sup>572</sup> The compulsory legal representation for children in disputes on the execution of a care and supervision order was introduced with the Implementation Act of the Youth Act 2014.

#### 5.3.1.2. In which types of cases can they be represented?

The **general guardian ad litem** represents children in matters concerning the child's care and upbringing or concerning the child's property. These are proceedings surrounding the separation of parents, e.g. the (change of) custody, principal residence and access, as well as care proceedings, e.g. family supervision and placement in care orders.<sup>573</sup> It also includes matters of education, labor, and other specific cases concerning children and care measures, e.g. conflicts regarding foster care or an injunction to request treatment.<sup>574</sup> Theoretically, the guardian ad litem can also be appointed in international child abduction proceedings, however in practice this has never been done as it might impede the strict 6 week timeframe of Hague Convention proceedings.<sup>575</sup> The general guardian ad litem can represent children in these types of cases under the condition that the conflict must be sufficiently serious.<sup>576</sup> The Dutch Supreme Court has emphasized that the role of the general guardian ad litem is not meant for general parenting issues, but instead for substantial conflicts.<sup>577</sup> The guardian ad litem is meant for concrete problems which require legal proceedings if they cannot be resolved amicably.<sup>578</sup>

The **filiation guardian ad litem** represents children in matters of parentage. These are proceedings concerning the denial of paternity (Art. 1:200 DCC), denial of maternity (Art. 1:202a DCC), substitute consent to recognize parentage by the court (Art. 1:204(3) and (4) DCC), nullification of recognition of parentage (Art. 1:205 and 1:205a DCC), judicial determination of parentage (Art. 1:207 DCC), and proceedings concerning a claim or dispute of civil status (Art. 1:211 DCC).<sup>579</sup> Although not expressly determined in the law, adoption proceedings appear to also qualify as (parentage) proceedings in which the filiation guardian ad litem can be appointed, especially because children aged 12 or older must explicitly consent to the adoption (Art. 1:228(1)(a) DCC).<sup>580</sup>

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<sup>572</sup> *Kamerstukken II* 2005/06, 30644, 3, p. 23. See also, Van Teeffelen 2008.

<sup>573</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 5; *Kamerstukken II* 2004/05, 301245, 3, p. 7; and Ter Haar 2015.

<sup>574</sup> Ter Haar 2016; and Jansen 2016b. See also, Klaas 2009, for proceedings in which a bijzondere curator may perhaps be employed.

<sup>575</sup> Jonker et al. 2015, p. 45.

<sup>576</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 3. See also, Jansen 2016b; and Ter Haar 2016.

<sup>577</sup> Hoge Raad 4 February 2005, ECLI:NL:HR:2005:AR4850, para. 3.4.2.

<sup>578</sup> Hoge Raad 4 February 2005, ECLI:NL:HR:2005:AR4850, para. 3.4.2. See also, Kinderombudsman 2016, p. 11.

<sup>579</sup> Lok & Vonk 2016; and Schrama 2015.

<sup>580</sup> See Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 4 and 6.

Children can have **separate legal representation** in a few specific proceedings concerning care and protection orders. In proceedings concerning the authorization for secure youth care the child is obliged to have a lawyer (Art. 6.1.10(4) Youth Act). If children wish to act in disputes on the execution of a care and supervision order, they are also obliged to do so with a separate legal representative according to Article 1:262b DCC jo. Article 1:265k(1) DCC. In multiple other cases children have a formal right to bring proceedings and can do so with a lawyer, although this is not obligatory. These cases are those concerning the termination of a care and supervision order (Art. 1:261 DCC), the revocation of a written instruction on the supervision order (Art. 1:264 DCC), the request to end or shorten the placement in care (Art. 1:265d DCC), and the adjustment of a decision concerning the care orders due to changed circumstances (Art. 1:265g(2) DCC).

#### 5.3.1.3. When can children be represented in family law proceedings in the Netherlands?

The **general guardian ad litem** can be appointed at any phase of the family law proceedings, including during the preliminary injunction or at the stage of appeal.<sup>581</sup> In theory the guardian ad litem can also be involved prior to the court proceeding, however as a judge must appoint the guardian ad litem, the judge must be aware of the potential conflicts between the parent(s) and the child, thus proceedings must have already been instituted.<sup>582</sup> Once a general guardian ad litem has been appointed they must represent the child at law and otherwise.<sup>583</sup> The duration of the role of the guardian ad litem depends on the assignment description given by the judge, can be a short or a longer term.<sup>584</sup> In any case, the appointment of the guardian ad litem ends when an amicable settlement has been made between the parent(s) or guardian(s) and the child or if the court has made a final judgment.<sup>585</sup>

The **filiation guardian ad litem** will be involved from the very start of the proceedings. Either the court will appoint a guardian ad litem immediately after receiving the application or the guardian ad litem was the initiator of the proceedings by submitting an application on behalf of the child (and need not be re-appointed by the court).<sup>586</sup> The latter is possible, in part because the filiation guardian ad litem also represents the child at law and otherwise.<sup>587</sup>

Children are free to decide when to hire a **separate legal representative**. Generally, it would make sense for children to do so prior to submitting their application. In the case of secure youth care, the child will be assigned a lawyer at the start of the proceeding.

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<sup>581</sup> *Kamerstukken II* 2004/05, 301245, 3, p. 13; Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 5.

<sup>582</sup> Kinderombudsman 2016, p. 11.

<sup>583</sup> *Kamerstukken I* 2008/09, 30145, E, p. 1.

<sup>584</sup> De Graaf & Limbeek 2011.

<sup>585</sup> Jansen 2016b.

<sup>586</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 3.

<sup>587</sup> Pieters 2008.

#### 5.3.1.4. What requirements are set for the children, e.g. age, level of maturity?

The text of both articles concerning the **guardian ad litem** do not mention any requirements with regards to the child's age or maturity,<sup>588</sup> however it is a factor taken into account. The courts have great discretion in deciding whether to appoint a **general guardian ad litem** and the age or maturity of the child is only one of the factors the court will consider.<sup>589</sup>

It is a whole other story for the **filiation guardian ad litem**, who must be appointed once a filiation proceeding is pending, the courts have no discretion.<sup>590</sup> Thus, when the filiation guardian ad litem is appointed following the commencement of proceedings by another party there is no age or maturity requirement for the child. This is different when the guardian ad litem initiates the proceedings on behalf of the child. In those cases, children should be of a certainty maturity, they should be sufficiently able to foresee the consequences of the application.<sup>591</sup> Generally, children from the age of 12 onwards will be considered sufficiently mature as this is also the age limit applied for the child's right to veto a change of their legal status (see e.g. Art. 1:204(1)(d) DCC).<sup>592</sup> Only in exceptional situations will children under the age of 12 years old be able to initiate a proceeding through their guardian ad litem. Considering the existing examples in the case law, it will exceptionally even be possible for very young children to be represented through a guardian ad litem in initiating filiation proceedings if this is in their best interests.<sup>593</sup>

With regards to the **separate legal representative**, there are two situations. In secure youth care proceedings, there is no requirement placed with regards to the age or maturity of the child. In all the cases concerning care and supervision orders and the placement in care, the child is required to have at least reached the age of 12.<sup>594</sup>

#### 5.3.1.5. What other requirements are applied, e.g. conflict of views between child and parents?

As mentioned above, the appointment of a **filiation guardian ad litem** is mandatory in filiation proceedings and therefore no other requirements are applied. Other requirements are applied by the courts in determining whether to appoint a **general guardian ad litem** as the courts have discretion. Article 1:250 DCC grants courts the competence to appoint a guardian ad litem when 'the interests of the parent(s) with parental authority or of the guardian(s) are in conflict with those of the child [...] if the court considers this necessary in the child's best interests, taking into account in particular the

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<sup>588</sup> See also, Schrama 2015.

<sup>589</sup> Jansen 2016b.

<sup>590</sup> De Graaf & Limbeek 2011; and Lok & Vonk 2016.

<sup>591</sup> Schrama 2015.

<sup>592</sup> Schrama 2015.

<sup>593</sup> Schrama 2015; and Van Teeffelen 2008.

<sup>594</sup> See Art. 1:261, 1:262b, 1:264, 1:265d and 1:265g DCC.

nature of this conflict of interests'.<sup>595</sup> Two main criteria are applied, the conflict of interests and the necessity in the interests of the child. The first should be understood broadly according to the guidelines of the *Landelijk Overleg Vakinhoud Familie- en Jeugdrecht* (the National Consultations on Family and Child Law matters, hereafter: LOVF).<sup>596</sup> It need not be a direct conflict between the child and (one of) the parents, but there can already be a conflict of interests if there is a conflict between the two parents or guardians.<sup>597</sup> This is so, because if the parents' views are diametrically opposite each other in the conflict, they are both not capable of representing the child's views as they normally should.<sup>598</sup> The best interests of the child, as included in the second criterion of necessity, should form a primary consideration of the court.<sup>599</sup>

Although some guidance is provided, the criteria remain rather vague which, in combination with the discretion afforded to courts, leads to uncertainty in practice.<sup>600</sup>

There are no additional requirements applied with regards to **separate legal representation**. In most situations, it is for the child to decide whether to take a lawyer, with regards to secure youth care the judge will always *ex officio* assign a lawyer to the child (Art. 6.1.10(4) Youth Care Act).

#### 5.3.1.6. Who decides whether the child will be represented?

The **general guardian ad litem** is appointed by the judge of the court in which the proceeding is pending, according to Article 1:250 DCC this can be the subdistrict court judge, the judge at the court first instance, at the court of appeal or at the Supreme Court.<sup>601</sup> The judge can decide to appoint a guardian ad litem at the request of an interested party (*belanghebbende*) or *ex officio*.<sup>602</sup> Who is an interested party? The term '*belanghebbende*' refers to Article 798 Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvorming*; hereafter DCCP), interested parties are those whose rights and duties are directly affected by the case. This includes the child, the parent(s) or guardian(s), persons who have 'family life' with the child, but also the guardianship agency or the association which operates a shelter.<sup>603</sup> In deciding whether to appoint a general guardian ad litem, the judge can opt to hear the child about the request or the intention to appoint *ex officio*.<sup>604</sup> If the judge decides to appoint, then it appears that a letter of intent is required from the appointed guardian ad litem.<sup>605</sup>

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<sup>595</sup> Original text: 'de belangen van de met het gezag belaste ouders of een van hen dan wel van de voogd of de beide voogden in strijd zijn met die van de minderjarige [...] indien hij dit in het belang van de minderjarige noodzakelijk acht, daarbij in het bijzonder de aard van deze belangenstrijd in aanmerking genomen'.

<sup>596</sup> Werkproces benoeming bijzondere curator o.g.v. Art. 1:250 BW 2014. See also, Jansen 2016a, p. 2179; and Ter Haar 2015.

<sup>597</sup> Werkproces benoeming bijzondere curator o.g.v. Art. 1:250 BW 2014, p. 3.

<sup>598</sup> Ter Haar 2015.

<sup>599</sup> Ter Haar 2016.

<sup>600</sup> Limbeek & Bruning 2015, p. 92; and Strutz & Verhagen 2015, p. 308.

<sup>601</sup> *Kamerstukken I* 2008/09, 30145, E, p. 1.

<sup>602</sup> *Kamerstukken I* 2008/09, 30145, E, p. 1. See also Kinderombudsman 2016, p. 11; and Jansen 2016a, p. 2179.

<sup>603</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 3; and Ter Haar 2015.

<sup>604</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 4.

<sup>605</sup> Pieters 2008.

The **filiation guardian ad litem** is appointed by the court before which the procedure is pending according to the article.<sup>606</sup> If there is no procedure pending, the appointment of a guardian ad litem to initiate proceedings on behalf of the child can be requested by the legal representative of the child (e.g. parent(s) or guardian(s) following Art. 1:245(4) DCC), the legal parent without parental authority as well as the child's natural father who has 'family life' with the child (as an interested party following Art. 798(1) DCCP).<sup>607</sup> If the guardian ad litem is to initiate proceedings at the child's request, it will probably occur directly without prior appointment by the court.

In proceedings concerning the authorization of secure youth care, the court orders *ex officio* the Legal Aid Board to assign a **separate legal representative** to the child (Art. 6.1.10(4) Youth Care Act). In all other proceedings where a child can act with or without a separate legal representative it is for children themselves to hire a lawyer. The courts cannot appoint a separate legal representative for the child.

#### 5.3.1.7. How is the child's representative financed?

There is no special legal aid regime applicable to both types of **guardian ad litem** in the Netherlands or to the **separate legal representative**. The general Legal Aid Act (*Wet op de rechtsbijstand*) is applicable.<sup>608</sup> The costs of the guardian ad litem or the representative can be reimbursed through state-subsidized legal aid if the guardian ad litem or representative is registered at the Legal Aid Board (*Raad voor Rechtsbijstand*).<sup>609</sup> The guardian ad litem will be reimbursed with a fixed amount calculated at the hand of the specific tasks and the type of case for which the guardian ad litem has been appointed.<sup>610</sup> While legal aid is normally awarded following a means test, according to Article 8© of the Legal Aid (Personal Contributions) Decree (*Besluit eigenbijdrage rechtsbijstand*) the means of the child and the parents are disregarded when the child requests legal aid in a conflict with their parent(s).<sup>611</sup> Furthermore, Article 6(1)(d) of the Decree determines that the child is not obliged to pay a personal contribution when a **general guardian ad litem** has been appointed on their behalf.<sup>612</sup> The **filiation guardian ad litem** is not named in that article. Case law of the Dutch Supreme Court has shown that the filiation guardian ad litem can be ordered to pay the costs of the proceedings, which must be borne by the child, if the guardian ad litem is found to be in the wrong and has litigated

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<sup>606</sup> See also, Vlaardingerbroek 2001.

<sup>607</sup> Lok & Vonk 2016.

<sup>608</sup> *Kamerstukken I* 2008/09, 30145, E, p. 2; Pieters 2012; and Ter Haar 2016.

<sup>609</sup> *Kamerstukken I* 2008/09, 30145, E, p. 2; Pieters 2012; Strutz & Verhagen 2015, p. 310; and Ter Haar 2016.

<sup>610</sup> *Kamerstukken I* 2008/09, 30145, E, p. 2; Strutz & Verhagen 2015, p. 311.

<sup>611</sup> *Kamerstukken I* 2008/09, 30145, E, p. 2; Jansen 2016b.

<sup>612</sup> *Kamerstukken I* 2008/09, 30145, E, p. 2; Pieters 2012; and Ter Haar 2016.

unnecessarily.<sup>613</sup> The **separate legal representative** in cases of secure youth care is appointed through the Legal Aid Board and thus financed through the State (Art. 6.1.10(4) Youth Care Act).

### 5.3.2. What is the task of the child's representative in family law proceedings in the Netherlands?

The task of the **general guardian ad litem** is to represent the best interests of the child in a concrete conflict.<sup>614</sup> The primary role, according to the guidelines of the LOVF, is to present the child's views to the parents in order to mediate an amicable settlement.<sup>615</sup> However, if an amicable settlement is not possible, then the guardian ad litem must represent the child's views and especially the child's objective interests in court.<sup>616</sup> In a written report to the court, the guardian ad litem must include a description of the actions taken, their findings, and an advice in light of the child's interests on the conflict.<sup>617</sup> The guardian ad litem also is expected to – but not legally obliged to – inform and explain the course and potential outcome of the proceedings, as well as the final decision, in an age-appropriate manner to the child.<sup>618</sup>

The task of the **filiation guardian ad litem** is to exclusively represent the best interests of the child in the filiation proceedings.<sup>619</sup> The guardian ad litem is the representative, but also legal counsel of the child.<sup>620</sup> However, the guardian ad litem is not simply a 'mouthpiece' for the child,<sup>621</sup> their task is to independently and objectively determine what is in the short and long term interests of the child, through speaking to the involved parties and aiming to determine the factual and legal truth.<sup>622</sup> It does not matter whether the person who requested the representation of the child disagrees with the guardian ad litem's point of view, as the guardian ad litem ought only to represent the child's best interests.<sup>623</sup>

The task of the **separate legal representative** of the child is the same as that of a legal representative on behalf of adults: to represent the child in the legal proceedings. This means that the legal representative ought to act on the directions of the child, as the child is their client.

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<sup>613</sup> Hoge Raad 6 October 2006, ECLI:NL:HR:2006:AV9444. See also, Schrama 2015.

<sup>614</sup> Pieters 2008.

<sup>615</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 11; Kentie & Hendriks 2013; Kinderombudsman 2016, p. 10; and Strutz & Verhagen 2015, p. 311.

<sup>616</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 11; De Gaaf & Limbeek 2011; and Strutz & Verhagen 2015, p. 311.

<sup>617</sup> De Gaaf & Limbeek 2011; and Strutz & Verhagen 2015, p. 313.

<sup>618</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 12; and Strutz & Verhagen 2015, p. 311 and 313.

<sup>619</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 6; Schrama 2015; and Vlaardingerbroek 2001, p. 104.

<sup>620</sup> Vlaardingerbroek 2001, p. 107.

<sup>621</sup> Lok & Vonk 2016.

<sup>622</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 6; Schrama 2015; and Vlaardingerbroek 2001, p. 105.

<sup>623</sup> Lok & Vonk 2016.

### 5.3.2.1. What are the function requirements for the child's representative?

In theory, the **general guardian ad litem** can be anyone, Dutch law does not impose any requirements, it is up to the judge to decide.<sup>624</sup> However, the guidelines of the LOVF and the legal aid rules, do include some requirements. The list of general guardians ad litem at the Legal Aid Board are lawyers and mediators (some with other professional backgrounds, e.g. psychologists and orthopedagogues) who have registered with the Board and can therefore represent children at State expense.<sup>625</sup> These neutral professional guardians ad litem are most often appointed, as they are considered to have mediation skills, child communication skills, and experience with parental conflicts.<sup>626</sup> A parent or guardian of the child should not be appointed as guardian ad litem,<sup>627</sup> and in principle, neither should someone who has previously been in contact with the child, unless this is specifically opted for as they are well-informed of the existing conflict.<sup>628</sup> Generally, someone from the Child Care and Protection Board is also not suited, as it will impede the Child Care and Protection Board from conducting their own neutral research if requested.<sup>629</sup> When deciding who to appoint as the guardian ad litem, the judge should consider the nature of the conflict, the professional background of the guardian ad litem and the place of residence of the child and other involved parties.<sup>630</sup> In exceptional cases, it is possible for the judge to appoint two guardians ad litem.<sup>631</sup>

The courts have composed a limited list of potential **filiation guardians ad litem**, which is now provided for by the Legal Aid Board.<sup>632</sup> The guardians ad litem on this list are lawyers who have 'demonstrable and recent experience' in filiation proceedings, have followed courses or training programs in that area, and preferably have mediation skills according to the LOVF guidelines.<sup>633</sup> If the guardians ad litem on the list prove to be unsatisfactory, they can be removed from the list.<sup>634</sup>

The **separate legal representative** of the child can only be a lawyer who is a member of the Netherlands Bar Association (*NovA*) and a member of the District Bar Association. The representative must comply with all the standard requirements for lawyers as provided for by the NovA. With regards to the representative in secure youth care proceedings, the lawyer must comply with the

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<sup>624</sup> *Kamerstukken I* 2008/09, 30145, E, p. 1; and Strutz & Verhagen 2015, p. 310.

<sup>625</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 6; and Van Leuven et al. 2015.

<sup>626</sup> Kentie & Hendriks 2013.

<sup>627</sup> Pieters 2008.

<sup>628</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 6.

<sup>629</sup> Jansen 2016b.

<sup>630</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 6.

<sup>631</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 6.

<sup>632</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 3.

<sup>633</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 2.

<sup>634</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 3.

requirements of the specialization for youth cases, the representative in the other cases must comply with the specialization for family law provided for by the Legal Aid Board.<sup>635</sup>

#### 5.3.2.2. How should the child's representative complete their task?

There are no special guidelines as to how a **separate legal representative** should fulfill their task when representing a child in family law disputes. The standard guidelines for lawyers as provided for by NovA should be followed. For both types of **guardian ad litem** the LOVF guidelines explain how their tasks should be completed.

A **general guardian ad litem** is appointed through an interlocutory order in which the court formulates a concrete task description.<sup>636</sup> For example, the court may require the guardian ad litem to speak to certain third parties (although a guardian ad litem can also do this at their own initiative).<sup>637</sup> The guardian ad litem then gets four weeks time to provide the court with a written report which includes the guardian ad litem's position on the conflict.<sup>638</sup> During these four weeks the guardian ad litem should personally speak to the child, if the child has reached the age of 12 years old or is younger, but can be considered sufficiently capable of a reasonable appreciation of their interests to be spoken to.<sup>639</sup> If a psychologist or other behavioural expert has been appointed as guardian ad litem, then the guidelines also advise contact with much younger children.<sup>640</sup> The guardian ad litem should not only speak to children to determine what will be in their best interests and to present the child's views to the court, but also to explain the proceedings and the outcome to the child.<sup>641</sup>

The **filiation guardian ad litem** also gets a task description and instructions from the court once appointed. If appointed to represent the child when another party initiated the filiation proceedings, the guardian ad litem must submit what is in the best interests of the child in a written report after 4 weeks (unless an extension is requested).<sup>642</sup> If appointed by the court or approached as the potential applicant on behalf of the child, then the guardian ad litem must determine whether initiating proceedings is in the best interests of the child.<sup>643</sup> It remains unclear what happens when the guardian ad litem decides not to initiate proceedings. Schrama is of the opinion that a guardian ad litem appointed with the task to initiate proceedings on behalf of the child must do so, albeit with a supplementary report stating that in their view it is contrary to the interests of the child to grant the

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<sup>635</sup> Inschrijvingsvoorwaarden advocatuur 2016.

<sup>636</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 7; Kentie & Hendriks 2013; and Ter Haar 2015.

<sup>637</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 7.

<sup>638</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 8.

<sup>639</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 10.

<sup>640</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 10.

<sup>641</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 14.

<sup>642</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 5; and Pieters 2008.

<sup>643</sup> Broekhuijsen-Molenaar 2016.

application, in order to allow the court to consider the case.<sup>644</sup> Both Pieters and Lok and Vonk are of the opinion that the guardian ad litem can opt not to submit an application on behalf of the child, although Lok and Vonk doubt whether the guardian ad litem must then still submit a written report to the court.<sup>645</sup>

In any case, the filiation guardian ad litem may do various things to determine the best interests of the child. The LOVF guideline clearly expects the guardian ad litem to personally speak to the child who has reached the age of 12 and those who are younger but considered sufficiently mature, even if the court itself also hears the child.<sup>646</sup> The guardian ad litem should also speak separately to the other involved parties, e.g. the child's mother, legal father, the acknowledger, the man who wants to acknowledge the child, or any of their heirs.<sup>647</sup> In addition, the parties should be informed that a DNA test may be required and the child should be explained what the proceedings are about.<sup>648</sup> Determining what is in the best interests of the child in filiation proceedings cannot be done through a checklist, but various factors have been drafted by Schrama: whether the parents are in agreement, the child's interests in having two legal parents, the child's interests in having legal, social and biological parentage match-up, and potentially the child's own views.<sup>649</sup>

### 5.3.2.3. Is the child representative the only option to be heard, are other options available and can they be complementary?

There are other options for the child's views to be taken into account in Dutch family law proceedings. The first being the judicial meetings in which the child is heard in person by the judge(s). According to Article 809 DCCP, the judge may only decide in family-law matters concerning children who are 12 years or older (or 16 years or older in child maintenance cases) after having given the child the opportunity to share their views in person or in writing.<sup>650</sup> The judge may also give children under the age of 12 (or 16) the opportunity to share their views on the matter. The second option, reports from the Child Care and Protection Board, is less direct than the judicial meetings and does not have hearing the child as its core aim. The judge in family-law matters (except in child maintenance cases) can request such an advice report (Art. 810 DCCP), and must do so in certain care proceedings according to Article 810(4) DCCP. The Child Care and Protection Board will often speak to the child, but need not inform the court of the child's views.

Can the forms of representation and the other options function complementarily? The **general guardian ad litem** and the **filiation guardian ad litem**, can generally not function complementarily

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<sup>644</sup> Schrama 2015.

<sup>645</sup> Lok & Vonk 2016; and Pieters 2008.

<sup>646</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 4; and Lok & Vonk 2016.

<sup>647</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 4.

<sup>648</sup> Richtlijn benoeming bijzondere curator o.g.v. Art. 1:212 BW 2014, p. 4; and Lok & Vonk 2016.

<sup>649</sup> Schrama 2015.

<sup>650</sup> See also, Van Triest 2004.

as the types of cases in which they can be appointed differ. However, as mentioned previously, it is possible, in exceptional cases, to have two general guardians ad litem.<sup>651</sup> A **separate legal representative** cannot function at the same time as a filiation guardian ad litem, as they function in different types of cases. It is possible to have a separate legal representative at the same time as a general guardian ad litem, although it is exceptional.<sup>652</sup>

The guardians ad litem and separate legal representatives can also be complementary to the other options for the child to be heard. Even though a guardian ad litem has been appointed, or the child is represented by a lawyer, it is expected that the judge will hear the child in person.<sup>653</sup> It is also possible for the judge to request an advice from the Child Care and Protection Board in addition to the appointment of a guardian ad litem or when the child has a separate legal representative.<sup>654</sup>

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<sup>651</sup> Werkproces benoeming bijzondere curator o.g.v. art. 1:250 BW 2014, p. 6.

<sup>652</sup> Klaas 2009.

<sup>653</sup> Lok & Vonk 2016.

<sup>654</sup> See e.g., Vlaardingerbroek 2001.

## 5.4. South Africa

### 5.4.1. What forms of representation are available for children in family law proceedings in South Africa and how are they regulated?

Two forms of representation are available in South Africa for children in family law proceedings: the **legal representative** and the **curator ad litem**. The legal representative is provided for in the Bill of Rights, Section 28(1)(h) of the Constitution of the Republic of South Africa, 1996. This section grants children ‘the right to have a legal practitioner assigned to him or her, by the state at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result’. The curator ad litem has a common law origin<sup>655</sup> and is a person who ‘conduct[s] litigation in the name and in the interests of the minor’.<sup>656</sup>

#### 5.4.1.1. When were the forms of representation introduced or amended?

The right to separate legal representation for children in civil proceedings was introduced in 1996 with the Constitution of the Republic of South Africa. The interim Constitution of 1993 and its section on the fundamental rights of the child (s. 30), was much barer and did not include any right to be heard or to be represented.<sup>657</sup> This changed following the ratification of the UNCRC. The UNCRC was the first international human rights treaty to be ratified by South Africa’s first universally elected democratic government on the 16<sup>th</sup> of June 1995.<sup>658</sup> Through the swift ratification of the UNCRC, children’s rights were placed on a pedestal and, according to Sloth-Nielsen, given a ‘prominent role in the reconstruction of South African society’.<sup>659</sup> The main rights afforded by the UNCRC were imbedded into the Constitution of 1996 by the extensive section 28.<sup>660</sup> According to the South African Constitutional Court, ‘section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child’.<sup>661</sup> Amongst others, the child’s right to representation of Article 12(2) of the UNCRC has been incorporated into s. 28(1)(h) of the South African Constitution.<sup>662</sup>

While an incidental form of representation was already provided for in the Divorce Act of 1979,<sup>663</sup> the new Constitutional protection of children’s rights drove the government to take further measures to revise legislation, policy and practice regarding children and lead to ‘substantial and measurable gains’.<sup>664</sup> One of the revisions was the new Section 8A inserted into the Child Care Act of

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<sup>655</sup> Boezaart 2013b, p. 708.

<sup>656</sup> *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 12.

<sup>657</sup> Kassan 2003, p. 167; Sloth-Nielsen 1996, p. 323.

<sup>658</sup> Sloth-Nielsen 1996, p. 323.

<sup>659</sup> Boezaart 2013a, p. 357; Sloth-Nielsen 1996, p. 324.

<sup>660</sup> UNCRC Initial Periodic Report of South Africa 1998, para. 1; and Sloth-Nielsen 2002, p. 139.

<sup>661</sup> *S v M (Centre for Child Law as Amicus Curiae)* (CCT 53/06) [2007] ZACC 18 (26 September 2007), para. 16. Referred to in: Liefwaard & Doek 2015.

<sup>662</sup> Zaal & Skelton 1998, p. 540.

<sup>663</sup> See S. 6(4) which provides for the appointment of a legal practitioner to represent a child in divorce proceedings at the cost of the parties.

<sup>664</sup> Boezaart 2013a, p. 357; Kassan 2003, p. 167; and Sloth-Nielsen 1996, p. 324.

1983 through the Child Care Amendment Act 96 of 1996, to bring the Child Care Act in line with s. 28(1)(h) of the Constitution.<sup>665</sup> Section 8A provided for the appointment of a legal representative at state expense to represent a child in a hearing of the children's court where this is in the child's best interest,<sup>666</sup> but was repealed by the Children's Act 38 of 2005.<sup>667</sup> The adoption of the latter Act was even more important for the child's right to participation and representation in South Africa.<sup>668</sup> The aim of the Children's Act includes giving effect to the constitutional rights of the child (s. 2(b)). According to Boezaart and de Bruin, the Act 'pioneered a new era in child participation in legal proceedings',<sup>669</sup> as it offers consistency that was previously lacking with regard to the child's right to be heard.<sup>670</sup>

While some authors are of the opinion that s. 28(1)(h) of the Constitution also includes the right of the child to a curator ad litem,<sup>671</sup> the curator ad litem has a much more extensive history originating from Roman law. In Roman law, the distinction was made between the *tutor* and the *curator*, the latter having the duty to assist the minor in litigation, next to protecting the minor's property.<sup>672</sup> The child's right to participation in litigation as provided for in Roman law remained similar in the Roman-Dutch law of the 17<sup>th</sup> and 18<sup>th</sup> Centuries: children were represented by their fathers or their guardians.<sup>673</sup> This included representation by a curator ad litem in certain cases.<sup>674</sup> Through the transplant of Roman-Dutch law to South Africa, the curator ad litem was introduced and remained in the common law of South Africa.<sup>675</sup>

#### 5.4.1.2. In which types of cases can they be represented?

##### **Legal representative**

Children can be represented by a legal representative in a wide variety of cases as laid down in the Children's Act of 2005 (hereafter SACA 2005) and the Divorce Act of 1979.

In the Children's Act of 2005 there are several specific types of cases for which a legal representative is provided, further elaborating the general principle of participation in s. 10 SACA 2005.<sup>676</sup> In court proceedings concerning parental responsibilities and rights agreements (s. 22(4)(b)),<sup>677</sup> the assignment of contact and care to an interested person (s. 23), the assignment of

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<sup>665</sup> Zaal & Skelton 1998, p. 541.

<sup>666</sup> Zaal & Skelton 1998, p. 552.

<sup>667</sup> S. 313 of the Children's Act 38 of 2005.

<sup>668</sup> Heaton 2012, p. 403.

<sup>669</sup> Boezaart & de Bruin 2011, p. 417.

<sup>670</sup> Cleophas & Assim 2015, p. 294.

<sup>671</sup> Boezaart 2013b, p. 712.

<sup>672</sup> Helmholz 1978, p. 229-230 and 232.

<sup>673</sup> De Bruin 2010, p. 65.

<sup>674</sup> Bisschop 1904, p. 43; and De Bruin 2010, p. 507.

<sup>675</sup> De Bruin 2010, p. 50 and 371. Roman-Dutch law is the common law of South Africa, see also Heaton 2012, p. 398.

<sup>676</sup> Skelton et al. 2010, p. 264.

<sup>677</sup> Before registering a parental responsibilities and rights agreement the court must be satisfied that the agreement is in the best interests of the child, therefore the court can appoint a legal practitioner (see s. 22(5) SACA 2005).

guardianship (s. 24), the confirmation of paternity (s. 26(b)), or the termination, extension, suspension or restriction of parental responsibilities and rights (s. 28), section 29(6)(a) SACA 2005 provides that the court may appoint a legal practitioner to represent the child. With regards to international child abduction cases there is also a specific right for the child to have legal representation. According to s. 279 SACA 2005 the child must have a legal representative in all applications regarding the Hague Convention on International Child Abduction. This is to ensure that the child is afforded a serious opportunity to object to being returned, s. 278(3).<sup>678</sup>

More generally, s. 55 SACA 2005 provides for the legal representation of children who are not yet being represented but are involved in any matter before the children's court. Looking at s. 45, this concerns a wide range of matters besides those already discussed above, including: the protection and well-being of a child, the support of a child, the provision of development or intervention services, civil proceedings concerning maltreatment, neglect and abuse, the temporary safe care or alternative care of a child, and the adoption of a child. This means that in child protection cases, as further discussed in sections 150 to 160 SACA 2005, the child also has a right to legal representation. Also in adoption cases the child has the right to legal representation. Children over the age of 10 and children under the age of 10 who are of an age, maturity and stage of development to understand the implications have to consent to their adoption (s. 233(1)(c) SACA 2005). As the child cannot be exempted from giving this consent, it is important the children are sufficiently counseled and assisted.<sup>679</sup>

Section 6(4) of the Divorce Act of 1979 provides specifically for the appointment of a legal representative for a child in divorce proceedings for the purposes of safeguarding the child's interests in orders regarding maintenance, custody, guardianship, or access to the child.<sup>680</sup>

### **Curator ad litem**

There is no clear list of types of proceedings in which children can or cannot be represented by a curator ad litem. In part, because the curator ad litem is grounded in common law. Rule 57 of the Uniform Rules of Court, which applies to the High Courts, does not delineate in which types of cases a curator ad litem can or cannot be appointed. The same applies to s. 33 of the Magistrates' Court Act of 1944, which simply provides for the curator ad litem at the level of proceedings in magistrates' courts in 'any case in which such a curator is required or allowed by law'. It has been alleged by some that s. 6 of the Divorce Act of 1979 not only provides for the representation by a legal representative but also by a curator ad litem. However, Boezaart argues that this is clearly not correct, s. 6(4) explicitly refers only to a legal practitioner for divorce proceedings.<sup>681</sup> Potentially the same can be said about s. 29(6)(a) SACA 2005, which refers to a 'legal practitioner', while s. 55 SACA 2005

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<sup>678</sup> Boezaart 2013a, p. 365.

<sup>679</sup> Ferreira 2013, p. 379.

<sup>680</sup> See s. 6(3) Divorce Act.

<sup>681</sup> Boezaart 2013b, p. 711.

refers more broadly to a ‘legal representative’. According to the Supreme Court of Appeal the court has a wide discretion to appoint a curator ad litem.<sup>682</sup> In previous case law, curators ad litem have been appointed in a wide variety of types of proceedings, amongst others, in (inter-country) adoption proceedings<sup>683</sup> and parental responsibilities and rights disputes.<sup>684</sup>

#### 5.4.1.3. When can children be represented in family law proceedings in South Africa?

It is not clear from what moment in, or leading up to, the proceedings that children can be represented. Based on a textual interpretation of the various sections in the Constitution, Children’s Act, and Divorce Act it appears that the **legal representative** is mostly appointed from the moment that proceedings have been instituted, e.g. ‘in’ or ‘at’ proceedings. However, it is likely that both the **legal representative** and the **curator ad litem** can be appointed at an earlier stage as their role can be to assist the child in getting access to the court, s. 14 SACA 2005.

#### 5.4.1.4. What requirements are set for the children, e.g. age, level of maturity?

The above sections show that there are various sections and rules applicable to the forms of representation for children in South Africa. This section will briefly consider whether there are any requirements set as to when children can make use of the forms of representation. Firstly, s. 10 SACA 2005 which contains the general principle of the child’s right to participate in any matter concerning them, does limit the child’s right to participate to ‘every child that is of such an age, maturity and stage of development as to be able to participate’. Thus, this section provides for an open norm as to when children should participate. It does not provide for a norm regarding when children have access to representation. Section 14 SACA 2005 which provides for the child’s right to bring, and to be assisted in bringing, a matter to the court does not contain any requirements regarding the child’s age or maturity. Although Heaton has argued that the child’s access to court, e.g. with assistance of a curator ad litem, in this section is limited to children over the age of 7,<sup>685</sup> there is no distinction made and thus one can conclude no age limit is imposed.<sup>686</sup>

### **Legal representative**

More specifically, s. 29(6)(a), s. 55 and s. 279 SACA 2005 and s. 6(4) of the Divorce Act all do not impose an age limit or a requirement of maturity for the child to be represented by a legal representative. Although the consent for adoption is required based on either the age limit or the level

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<sup>682</sup> *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 12.

<sup>683</sup> *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* (CCT 40/01) [2002] ZACC 20 (10 September 2002); *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* [2007] ZACC 27 (7 December 2007); *Ex parte Centre for Child Law in re: six minor children* [2012] Unreported case no. 11762/2012. See also: Boezaart 2013b, p. 717-719.

<sup>684</sup> *S v J* (695/10) [2010] ZASCA 139 (19 November 2010).

<sup>685</sup> The age limit of 7 years and older comes from the distinction in Roman-Dutch law between an *infans* (≤7 years old) and *minor* (> 7 years old) with regards to the legal capacity of the child, see also Boezaart 2013 2013b, p. 708.

<sup>686</sup> Boezaart & de Bruin 2011, p. 420.

of maturity and stage of development, there are no requirements imposed with regards to the legal representative.

### **Curator ad litem**

With regards to the curator ad litem, both rule 57 of the Uniform Rules of Court and s. 33 of the Magistrates' Court Act do not impose any requirements with regards to the child's age, maturity or stage of development.

#### 5.4.1.5. What other requirements are applied, e.g. conflict of views between child and parents?

The constitutional right to legal representation for children provided in s. 28(1)(h) seems to be dependent on the requirement 'if substantial injustice would otherwise result'.<sup>687</sup> This would mean that the legal representation for children in South Africa would always be dependent on the ambiguous 'substantial injustice' test.<sup>688</sup> However, a different interpretation is also possible. Namely, that the 'substantial injustice' test refers solely to the child's right to have legal representation assigned by the state at state expense.<sup>689</sup> This also appears to be how the Legal Aid Board of South Africa understands the 'substantial injustice' test.<sup>690</sup> In that regard the Legal Aid Guide of 2014 distinguishes six criteria to decide if the child passes the test: 1. seriousness of the issue for the child, 2. complexity of the law and procedure, 3. ability of the child to represent him or herself effectively without a lawyer, 4. financial situation of child, their parents or guardians, 5. child's chances of success in the proceeding (but this criteria only applies if the child brings the proceedings), and 6. whether the child has a substantial disadvantage compared to the other parties.<sup>691</sup> According to Cleophas and Assim, in various cases the South African courts also consider the 'substantial injustice' test to determine whether to appoint a legal representative for the child.<sup>692</sup>

### **Legal representative**

With regards to the appointment of a legal practitioner for children in family law proceedings, two situations must be considered. Section 6(4) of the Divorce Act poses no further requirements for the appointment of a legal practitioner. It is however located in the section 'safeguarding of interests of dependent and minor children' and the appointment is possible 'for the purposes of this section', so one could argue that the appointment is dependent on it being in the interests of the child. For all other appointments of legal practitioners in family law proceedings through the Children's Act, s. 55 makes

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<sup>687</sup> Zaal & Skelton 1998, p. 541.

<sup>688</sup> Kassan 2003, p. 168.

<sup>689</sup> Cleophas & Assim 2015, p. 298.

<sup>690</sup> Legal Aid Guide 2014, para. 4.18.1, p. 65.

<sup>691</sup> Legal Aid Guide 2014, para. 4.18.1, p. 65.

<sup>692</sup> Cleophas & Assim 2015, p. 298.

the appointment of a legal representative (if the child is not yet represented) conditional upon ‘if the court is of the opinion that it would be in the best interests of the child to have legal representation’.<sup>693</sup>

### **Curator ad litem**

There are four instances when a curator ad litem can be appointed by a court: 1. when the child has no parent or guardian; 2. where the interests of the child clash with those of the parent or guardian or if a possibility of such a clash exists; 3. where the parent or guardian of the child cannot be found; 4. where the child’s parent or guardian unreasonably refuses to assist the minor in legal proceedings.<sup>694</sup>

For the appointment of a curator ad litem in family law proceedings, the second instance is the most common. As clarified by the Supreme Court of Appeal, the discretion exercised by the court in determining whether to appoint a curator ad litem for the child in one of these four instances is solely guided by the best interests of the child.<sup>695</sup>

#### 5.4.1.6. Who decides whether the child will be represented?

### **Legal representative**

It is generally the court that ‘may appoint’ a legal representative, e.g. in s. 6(4) of the Divorce Act and s. 29(6)(a) SACA 2005. However, it is unclear who makes the final decision in cases concerning the Children’s Act. Section 55 states that the court ‘must refer the matter to the Legal Aid Board’, who must then deal with the matter ‘in accordance with section 3B’ of the Legal Aid Act. This seemingly places the decision regarding legal representation at the Legal Aid Board, not the court.<sup>696</sup> However, s. 3B of the Legal Aid Act of 1969 requires the Legal Aid Board to evaluate and report to the court whether the child should be provided with legal representation at State expense. Once the court has received the report, then the court makes the final decision and can order the Legal Aid Board to provide a legal representative at State expense for the child.<sup>697</sup>

The child can also apply for the appointment of a legal representative directly to the Legal Aid Board. In *Legal Aid Board v R and another* it was confirmed that this can be done on grounds of s. 28(1)(h) of the Constitution without a prior order from the courts.<sup>698</sup> This decision also clarified that when appointing a legal representative on the application of a child, the Legal Aid Board also does not need to obtain the consent from the child’s parent or guardian.<sup>699</sup> According to the Legal Aid Guide of 2014, if the child requests a legal representative to be able to intervene in divorce, care or maintenance proceedings, then the Regional Operations Executive (the head of the regional office)

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<sup>693</sup> This also applies for legal representation in international child abduction cases, which according to s. 279 SACA 2005 is subject to s. 55, as well as to representation ex. s. 29(6) which is also subject to s. 55 SACA 2005.

<sup>694</sup> Boezaart 2013b, p. 709-710; and Boezaart & de Bruin 2011, p. 422-423.

<sup>695</sup> *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 13.

<sup>696</sup> Sloth-Nielsen 2008, p. 499.

<sup>697</sup> Legal Aid Guide 2014, para. 4.18.5, p. 67.

<sup>698</sup> *Legal Aid Board v R and another* [2009] (2) SA 262 (D).

<sup>699</sup> Boezaart & de Bruin 2011, p. 432; and Skelton et al. 2010, p. 265.

must give prior written consent.<sup>700</sup> The consent will be given if a legal representative is needed to protect the best interests of the child and if substantial injustice would otherwise result.<sup>701</sup>

### **Curator ad litem**

A curator ad litem is usually appointed by the court based on an *ex parte* application by either the child, the relative of a child or some other person with a reasonable interest in the child.<sup>702</sup> This application can be made to the High Court following the requirements of rule 57 Uniform Rules of Court or to the Magistrate's Court (s. 33 Magistrates' Court Act). The courts have a wide discretion in appointing curators ad litem and thus can also do so *ex officio*.<sup>703</sup> In fact, if the court is of the opinion that it is to the benefit of the child and in his best interests to appoint a curator ad litem, then this can even be done against the child's will or without his knowledge.<sup>704</sup>

#### 5.4.1.7. How is the child's representative financed?

### **Legal representative**

The costs of the child's legal representative can be financed in two different ways. On the one hand, the parties to the proceedings (e.g. the parents), or either one of them, can be ordered by the court to pay the costs of the legal representative. This is the case in s. 29(6)(b) SACA 2005 as well as in s. 6(4) of the Divorce Act. In the latter, the court is only empowered to order the appointment of a legal representative for the child on the costs of the parties, not at State expense. Thus, in divorce proceedings a legal representative through a court order is only reserved for children of wealthy parents.<sup>705</sup> However, as mentioned above children themselves can request a legal representative through the Legal Aid Board at State expense.<sup>706</sup> In contrast, s. 29(6)(b) SACA 2005 provides for the court to order the state to pay the costs of the legal representative instead of ordering the parents, if a substantial injustice would otherwise occur.

In all other matters of the Children's Act, s. 55 provides for the opportunity of representation at State expense. Following the Constitutional right afforded to children under s. 28(1)(h) the Legal Aid Board applies the 'substantial injustice' test previously discussed. If the criteria of the 'substantial injustice' test are met the child has the right to legal aid.<sup>707</sup> The application for legal aid can be made either by the child, an adult acting on behalf of the child, or if there is a court order for legal representation at State expense there need not be an application.<sup>708</sup> In most cases, the Legal Aid Board

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<sup>700</sup> Legal Aid Guide 2014, para. 4.18.7, p. 70.

<sup>701</sup> Legal Aid Guide 2014, para. 4.18.7, p. 71.

<sup>702</sup> Boezaart 2013b, p. 713; *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 12.

<sup>703</sup> Boezaart & de Bruin 2011, p. 422; *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 12.

<sup>704</sup> *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 12. See also, Boezaart 2013b, p. 717.

<sup>705</sup> Heaton 2012, p. 402.

<sup>706</sup> Legal Aid Guide 2014, para. 4.18.7, p. 70.

<sup>707</sup> Legal Aid Guide 2014, para. 4.18.1, p. 65.

<sup>708</sup> Legal Aid Guide 2014, para. 4.18.2, p. 65.

still applies the ‘normal’ means test either to the child’s means or the means of the parents if they are assisting the child.<sup>709</sup> If the parents have sufficient means but fail, refuse or neglect to pay the legal representative, then the Legal Aid Board will still provide the child with legal aid if ‘substantial injustice’ would otherwise occur and can then claim these costs through proceedings against the parents.<sup>710</sup>

### **Curator ad litem**

The curator ad litem of the child could either be paid for by the parties involved, so either through the means of the child or the parents, but it is also possible to request legal aid. If legal aid is required and if the curator ad litem is an employee of Legal Aid South Africa, then the court must refer the case to the Regional Operations Executive who will make a decision in that regard. If legal aid is required but the curator ad litem will not be an employee of Legal Aid South Africa, then the curator must complete and sign a form which must be submitted to the Legal Aid Board.<sup>711</sup>

#### 5.4.2. What is the task of the child’s representative in family law proceedings in South Africa?

The main difference between the legal representative and the curator ad litem in South Africa lies in their respective tasks. In principle, the legal representative is a client-directed advocate who represents the child’s views while the curator ad litem is a best-interests advocate who advances the best interests of the child.<sup>712</sup> However, there are some nuances.

### **Legal representative**

The role of the legal representative is to be an advocate of the child’s views in the proceedings. The legal representative has the same status in the proceedings as the other parties and can therefore make sure that the child’s views are represented in court.<sup>713</sup> However, as emphasized in *Soller NO v G* the legal representative is ‘not a mere mouthpiece’.<sup>714</sup> Depending on the age, maturity and level of development of the child, the nature of the proceedings, as well as the extent to which the child wishes to participate the role of the legal representative can differ.<sup>715</sup> The legal representative should clarify what his or her role will be at the outset of the proceedings by making a determination on all these factors, with the capacity and wishes of the child as the primary factor.<sup>716</sup> If the child is sufficiently mature, developed and wishes to participate directly, then the legal representative should

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<sup>709</sup> Legal Aid Guide 2014, para. 4.18.3, p. 66.

<sup>710</sup> Legal Aid Guide 2014, para. 4.18.3, p. 66.

<sup>711</sup> Legal Aid Guide 2014, para. 4.18.8(b), p. 72.

<sup>712</sup> Boezaart 2013b, p. 716.

<sup>713</sup> Cleophas & Assim 2015, p. 300.

<sup>714</sup> *Soller NO v G* [2003] (5) SA 430 (W). See also Sloth-Nielsen 2008, p. 504.

<sup>715</sup> Boezaart 2013a, p. 369; and Cleophas & Assim 2015, p. 300.

<sup>716</sup> Cleophas & Assim 2015, p. 301.

take instructions from the child and follow them.<sup>717</sup> If the child is very young and unable to give instructions, then the role of the legal representative should be more like that of the curator ad litem: a best-interests advocate.<sup>718</sup> This has also been acknowledged by the court in *B v G*, where a legal representative was appointed in a role ‘akin to that of a curator ad litem’ for a four year old boy.<sup>719</sup>

### **Curator ad litem**

The curator ad litem is an advocate who conducts legal proceedings on behalf of the child with the child’s best interests at heart.<sup>720</sup> Therefore, the task of the curator ad litem is to advance all the arguments in favor of the child’s objective interests in the specific case. The curator ad litem’s own opinion with regards to the child’s situation is, in principle, irrelevant.<sup>721</sup>

#### 5.4.2.1. What are the function requirements for the child’s representative?

### **Legal representative**

All the sections which determine that a legal representative should be or can be provided for the child refer to a ‘legal’ representative or practitioner, even s. 28(1)(h) of the Constitution. Thus, the legal representative ought to be a lawyer. This was also reaffirmed in *Soller NO v G*, where the court found that a social worker, psychologist or counsellor cannot be appointed as a legal representative, it must be a lawyer due to the particular skills and expertise required.<sup>722</sup> More specifically the lawyer appointed should be ‘an individual with knowledge of and experience with the law but also the ability to ascertain the views of a client, present them with logical eloquence and argue the standpoint of the client in the face of doubt or opposition from an opposing party or a court’.<sup>723</sup>

### **Curator ad litem**

Generally, a curator ad litem is an advocate.<sup>724</sup> In proceedings at the High Court, the court usually directs the Bar Council to appoint a suitable advocate of the High Court with no interests in the matter as a curator ad litem.<sup>725</sup> If this is not possible or feasible, an attorney can also be appointed, see rule 57(5) of the Uniform Rules of Court. A Family Advocate (to be discussed below) cannot be appointed as a curator ad litem, because the Family Advocate has a neutral and very distinct role compared to a curator ad litem.<sup>726</sup>

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<sup>717</sup> Boezaart 2013a, p. 369; and Cleophas & Assim 2015, p. 300.

<sup>718</sup> Cleophas & Assim 2015, p. 301.

<sup>719</sup> *B v G* [2012] 2 SA 329 (SGJ HC). See also Boezaart 2013a, p. 370.

<sup>720</sup> *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 12. See also, Boezaart & de Bruin 2011, p. 423; and Cleophas & Assim 2015, p. 301.

<sup>721</sup> Boezaart 2013b, p. 716.

<sup>722</sup> *Soller NO v G* [2003] (5) SA 430 (W). See also Sloth-Nielsen 2008, p. 503.

<sup>723</sup> *Soller NO v G* [2003] (5) SA 430 (W). See also Sloth-Nielsen 2008, p. 503.

<sup>724</sup> *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 12.

<sup>725</sup> Boezaart 2013b, p. 713-714.

<sup>726</sup> Boezaart 2013b, p. 714-715.

#### 5.4.2.2. How should the child's representative complete their task?

##### **Legal representative**

The child's legal representative should first determine which role he or she should take. If the child is sufficiently mature and developed and wants to direct the legal representative, then the legal representative should establish the views of the child and convey them to court.<sup>727</sup> In doing so, the legal representative should apply his or her legal knowledge and expertise to translate the child's views to the court when appearing on behalf of the child.<sup>728</sup> The legal representative may also apply for the child to be joined as a party in the proceedings.<sup>729</sup>

##### **Curator ad litem**

According to the long-standing common law, the curator ad litem must represent the minor in the pending proceedings and should 'watch and protect his interest in the case as a good and prudent father would have done'.<sup>730</sup> In more modern terms, the curator ad litem must investigate the child's circumstances by informing and interviewing the child and by making any other necessary enquiries.<sup>731</sup> On the basis thereof, the curator ad litem reports recommendations to the court.<sup>732</sup> Furthermore, if necessary the curator ad litem can also apply for the appointment of a legal representative for the child.<sup>733</sup>

#### 5.4.2.3. Is the child representative the only option to be heard, are other options available and can they be complementary?

The representation of the child by a **curator ad litem** and a **legal representative** can be complementary. This derives in part from the fact that the curator ad litem can apply for the appointment of a legal representative for the child (see above).

The other option for the child to be heard in family law proceedings in South Africa is the office of the Family Advocate. A Family Advocate is a neutral advocate who makes enquiries to collect information and report to the court about the child's welfare in divorce cases.<sup>734</sup> The enquiry is done together with qualified family counsellors or social workers following a divorce application at

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<sup>727</sup> Boezaart 2013a, p. 369.

<sup>728</sup> Sloth-Nielsen 2008, p. 504.

<sup>729</sup> Boezaart 2013a, p. 369.

<sup>730</sup> *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 12.

<sup>731</sup> Rule 57(5) Uniform Rules of Court and *Centre for Child Law and Another v Minister of Home Affairs and Others* [2005] (6) SA 50 (T) (13 September 2004), para. 6. See also, Boezaart 2013b, p. 716; Boezaart & de Bruin 2011, p. 436; and Cleophas & Assim 2015, p. 301.

<sup>732</sup> Rule 57(5) Uniform Rules of Court and *Centre for Child Law and Another v Minister of Home Affairs and Others* [2005] (6) SA 50 (T) (13 September 2004), para. 6. See also, Boezaart 2013b, p. 716; and Boezaart & de Bruin 2011, p. 436.

<sup>733</sup> Boezaart & de Bruin 2011, p. 436; and Cleophas & Assim 2015, p. 301. See for an example: *Centre for Child Law and Another v Minister of Home Affairs and Others* [2005] (6) SA 50 (T) (13 September 2004).

<sup>734</sup> S. 4 of the Mediation in Certain Divorce Matters Act of 1987. See also, Boezaart 2013b, p. 715; and Cleophas & Assim 2015, p. 302.

the request of the parties or the court.<sup>735</sup> The Family Advocate will generally interview the parents and can talk to the child. However, the Family Advocate is not obliged to hear the child or include his or her views in the report.<sup>736</sup> Thus, it is not specifically an opportunity for the child to be heard. The Family Advocate can function simultaneously with either a curator ad litem and/or a legal representative of the child, because all three have very different roles.<sup>737</sup> While the latter two, as advocates of the child, do not remain neutral, that is the function of the Family Advocate.<sup>738</sup>

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<sup>735</sup> Cleophas & Assim 2015, p. 302.

<sup>736</sup> Cleophas & Assim 2015, p. 303.

<sup>737</sup> Boezaart 2013b, p. 715; Sloth-Nielsen 2008, p. 503; and Skelton et al. 2010, p. 265.

<sup>738</sup> *Soller NO v G* [2003] (5) SA 430 (W) and *Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 39 (29 March 2011), para. 21. See also, Boezaart 2013b, p. 715.