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Children's Representation in Family Law Proceedings

A Comparative Evaluation in Light of Article 12 of the United Nations Convention on the Rights of the Child

Charlotte Mol
Utrecht Centre for European Research into Family Law, Utrecht University, the Netherlands
c.r.mol@uu.nl

Abstract

In the debate on child participation in family law proceedings, a pertinent question is whether or not to provide children with representation and if so, how to provide it. Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) provides minimum standards for the child's right to express views and to do so, in judicial proceedings, through a representative. This article takes these minimum standards as a yardstick to evaluate the legal frameworks of child representation in the family law proceedings of four jurisdictions: Australia (New South Wales), France, the Netherlands and South Africa. On the basis of a systematic legal comparison and evaluation, this article presents a "compliance report card" and concludes with new insights and questions regarding children's representation and Article 12, UNCRC.

Keywords

UN Convention on the Rights of the Child – Article 12, UNCRC – Right to Representation – Family Law Proceedings – Australia, France, the Netherlands, South Africa

1 Introduction

In the last decades, Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) has served as a catalyst for children's right to participate.

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, the child's right to be heard is safeguarded, whether directly or through a representative, in any judicial and administrative proceedings affecting the child. Of the judicial proceedings affecting the child, family law proceedings are very common. These types of proceedings have a profound impact on a child's life. As emphasised by Baroness Hale (2006), President 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, therefore it is crucial to take into account his or her views.

While children's right to be heard has become widely accepted, the question remains: how can or should children participate in family law proceedings? The UNCRC leaves a great deal of discretion as to how participation should be provided nationally. Guidance has been given by the Committee on the Rights of the Child in their General Comment No. 12 of 2009. 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. 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, the 'how' with regards to the forms of participation is a relevant discussion (Sutherland, 2012).

In general, participation in family law proceedings can roughly be separated into five forms: expert reports, children's litigation on their own behalf, direct hearing of children by judges, best-interests representation, and separate legal representation (e.g. Fernando, 2013). This article focuses on the latter two representation forms of participation, legal or lay, because consensus on the topic is much needed. Whether or not to have children's representatives and if so, what the form, function, tasks and other specifics should be, is a hot topic in the Netherlands (e.g. Pieters, 2012; Kentie and Hendriks, 2013), but is also the subject of lively debate in many other jurisdictions (e.g. Tisdall *et al.*, 2004; Elrod, 2007; Bala *et al.*, 2013). Existing research in social sciences has shown the beneficial effects of providing children with a representative (e.g. Tisdall *et al.*, 2004; Birnbaum and Bala, 2009; Tisdall and Morrison, 2012; Ballard *et al.*, 2014). How these representatives should be given form remains a question to be answered.

This article departs from the premise that the child's right to be heard, according to Article 12, UNCRC also through a representative, has led to national family and procedural laws providing children with representation in family

law proceedings (Nicola, 2010). The UNCRC promotes and imposes common human rights standards and has stimulated the creation and implementation of formal mechanisms for children's representation in many jurisdictions (Bilson and White, 2005; Sutherland, 2012). It is also understood that Article 12, UNCRC leaves some leeway as to how State Parties implement the international human rights standard. The content of the rights contained in the UNCRC are *minimum* human rights standards. This raises the interesting question as to how jurisdictions comply with the UNCRC minimum standards and at the same time make use of the discretion afforded to them. This article tackles this question by taking a comparative approach, examining four jurisdictions: Australia, France, the Netherlands and South Africa.

The full text of Article 12 UNCRC reads:

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.

Child representation frameworks have many facets. The frameworks of the four jurisdictions cannot be analysed in light of Article 12, UNCRC in its entirety within the length of a journal article. Therefore, to answer the question posed conscientiously this article focuses on three aspects of Article 12, UNCRC which are relevant for child representation in family law proceedings. These aspects are: (1) the right to be heard 'through a representative', (2) the right to be heard in 'all matters' and 'proceedings affecting the child', and (3) the role of the child being 'capable of forming his or her own views' in exercising this right. By addressing these three aspects (1) the representation forms available in the four jurisdictions, (2) the types of proceedings in which they may act and (3) the applicable capability requirements will be discussed and compared.

The article will commence with a short note on methodology. Subsequently, each of the three aspects will be dealt with consecutively through the comparison and evaluation of the four jurisdiction's legal frameworks. At the end of the article, a "compliance report card" will be presented in the concluding remarks.

2 Methodological Considerations

In this research the comparative legal method, specifically the functional-institutional approach, was employed. The functional-institutional approach, introduced by Örücü, answers the question, 'Which institution in system B performs an equivalent function to the one under survey in system A?' (2006: 33). Thus, legal institutions with similar functions form the *tertium comparationis* and are the starting point of the comparison (Oderkerk, 2015). In this research, the *tertium comparationis* is the legal institution which functions as a form of child representation in family law proceedings.

As there is a clear 'Anglocentric focus in much of the international literature' (Bilson and White, 2005: 223), more varied jurisdictions were selected. The choice for Australia, France, the Netherlands and South Africa was based on three selection guidelines. First, the functional-institutional approach requires the jurisdictions selected to have at least one form of child representative in family law proceedings. This was the case for each of the four jurisdictions. The second selection guideline was to include jurisdictions from different legal-technical traditions (De Boer, 1992): one common law jurisdiction, two civil law jurisdictions and one jurisdiction with a mixed legal system. In doing so, the aim was to complement the existing "Anglocentric" literature on child participation in common law jurisdictions with a comparison including civil and mixed jurisdictions. Finally, the selection was made to include jurisdictions not previously compared. As Australia is a federation, with a division of power between the federal legislature and the state and territory legislatures, a specific state was chosen. Family law is federal law, so for a large part the conclusions concern all the states and territories. However, each state and territory has its own child protection and adoption legislation. Therefore, the state jurisdiction of New South Wales, the most populous state, was taken as the example.

This research is exploratory and limited to the law in the books to be able to describe how child representation is regulated. No conclusions can be drawn with regards to which regulation works best. The child representation framework may look very promising on paper, but not function at all in practice. Further empirical and interdisciplinary research is required to identify good practices, this research provides the legal groundwork to do so.

3 Right to be Heard 'Through a Representative'

The first aspect to be examined is the right of the child to be heard 'through a representative'. After the minimum standard of Article 12, UNCRC is introduced,

the forms of representation available in the four jurisdictions and their general tasks will be compared, followed by an evaluation in light of Article 12, UNCRC.

3.1 *Article 12, UNCRC*

The text of Article 12(2) UNCRC states that the child's opportunity to be heard should be provided *'either directly, or through a representative or an appropriate body'*. According to Parkes (2013), the paragraph implies that having a representative must be available as an option to children in proceedings. Hodgkin and Newell (2007) interpret it differently, stating that States have the discretion to determine how the child's views should be heard. Although neither the Article itself, nor the Committee, put an obligation on States to provide for a form of child representation in legal proceedings, it appears that States cannot simply decide to provide children with only one manner in which to be heard. Hodgkin and Newell's remark would mean that the child does not have a choice in how to be heard, while the Committee specifically states that the child 'will have to decide how to be heard' (General Comment No. 12, para. 35). This phrase can be understood to provide children with a choice: once a child has opted to be heard in a proceeding, he or she should be provided the opportunity to decide how to be heard (Lansdown, 2011; Sutherland, 2013; Daly, 2018).

The Committee's General Comment No. 12 provides additional information on who 'a representative' should be. The Committee notes that various persons can be a representative: parents, lawyers or other persons (para. 36). However, one must be cautious with having parents as a representative, as there is often the risk in family law proceedings that there is a conflict between the child and the parents, or between the two parents who ought to represent the child's interests jointly. In such situations a legal or other lay representative is required. In any case, the representative should ensure that the views of the child are 'transmitted correctly to the decision maker' (para. 36) and thus should also exclusively represent the interests of the child and not those of other persons. With regards to the latter, it is important that representatives do not confuse their role with the obligation contained in Article 3, UNCRC that the child's best interests be a primary consideration (Lansdown, 2011). 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.

3.2 *Comparison*

Is the opportunity to be heard through a representative provided? In all four jurisdictions studied, Australia, France, the Netherlands and South Africa, at least two forms of child representation in family law proceedings are available as discussed below. It is important to note that in this section the representatives

are introduced generally, without reference to the specific types of family law proceedings in which they may represent children. That information is presented in the next section of this article.

3.2.1 Australia (New South Wales)

In total, four forms of representation are available for children in family law proceedings in New South Wales, Australia. One form of representation in family law cases at the federal level, three forms in proceedings at state level.

In Australian federal law, the Family Law Act 1975 (hereafter AFLA 1975), Section 68L provides for the independent children's lawyer. The independent children's lawyer is a legal practitioner who represents the child's interests in legal proceedings (Barrie, 2013). This federal form of child representation was established in statutory form in the original AFLA 1975, further developed and refined by case law in the 1990s, notably *Re K* ([1994] FLC 92–461) and *In the Matter of P and P* ([1995] FLC 92–615). Subsequently, the Family Law Amendment (Shared Parental Responsibility) Act 2006 introduced the current independent children's lawyer with clear statutory guidelines, which are complemented by the Family Court's Guidelines for Independent Children's Lawyers (2013).

In New South Wales, three forms of representation are provided for in the Children and Young Persons (Care and Protection) Act 1998 (NSW) (hereafter CCPA (NSW)) and the Adoption Act 2000 (NSW). These are the independent legal representative, the direct legal representative and the guardian ad litem. The latter is appointed by the court to make decisions on behalf of a child in the legal proceedings and is generally a person with qualifications and experience in social, health or behavioural sciences. The guardian ad litem has its historical roots in English common law. The independent legal representative and the direct legal representative have different tasks and are legal practitioners. The independent legal representative represents the child's interests, while the direct legal representative acts on the instructions of the child. In 1998, the CCPA (NSW) emphasised the child's right to participate as a fundamental principle (S. 10) and in light thereof, explicitly introduced both forms of legal representatives. The New South Wales' Representation Principles for Children's Lawyers (2014) and the Care and Protection Practice Standards (2015) further clarify the requirements, tasks and role of these representatives.

3.2.2 France

In French family law proceedings, children can be represented in two manners. The first form of representation is the *administrateur ad hoc* (hereafter ad hoc administrator). Although included in the French Civil Code (*Code Civil*;

hereafter FCC) since 1910, no legal definition or extensive guidance is provided. Instead, legal doctrinal writing is informative, defining the ad hoc administrator 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' (Fédération nationale des administrateurs ad hoc 2009: 10). Secondly, children may be assisted by the *avocat d'enfant* (hereafter children's lawyer) in certain cases (Avenard, 2015). Special guidelines have been set up for these children's lawyers (e.g. Commission «droit des mineurs» de la Conference des bâtonniers, 2008).

3.2.3 The Netherlands

The Netherlands has three forms of representation available to children in family law proceedings. The first two are separate forms of the *bijzondere curator* (hereafter guardian ad litem). The first is the general guardian ad litem provided by Article 1:250, Dutch Civil Code (*Burgerlijk Wetboek*; hereafter DCC). The second is the *lex specialis* form for matters of filiation in Article 1:212, DCC, the filiation guardian ad litem. Both guardians ad litem have the similar task of protecting the best interests of the child in proceedings, although they differ in their function and other procedural specifics. General guardians ad litem are lawyers or mediators, sometimes with non-legal professional backgrounds, e.g. psychologists (Werkproces Art. 1:250 BW), filiation guardian ad litems are always lawyers (Richtlijn Art. 1:212 BW). Both guardians ad litem were introduced to the Civil Code in the 1990s, to improve the position of the child in legal proceedings and to compensate for the lack of providing formal access or party status to children (Vlaardingerbroek, 2001). The third form of representation is separate legal representation. In certain types of proceedings, a child is either obliged to, or can choose to, have separate legal representation – a lawyer – to act in the proceedings. This separate legal representative is similar to legal representation for adults.

3.2.4 South Africa

In the final jurisdiction, South Africa, two forms of representation are available: the legal representative and the curator ad litem. Following the ratification of the UNCRC, the first international human rights treaty to be ratified by South Africa's first universally elected democratic government in 1995, the main rights afforded by the UNCRC were embedded into the Constitution of the Republic of South Africa of 1996 (Sloth-Nielsen, 1996). Section 28(1)(h) of this Constitution provides for the child's right to a legal representative assigned by the state, and at state expense, in civil proceedings affecting the

child, if substantial injustice would otherwise result. The text of the Constitution is generally interpreted as limiting the right to state-funded legal representation (e.g. Sloth-Nielsen and Mezmur, 2008). However, Skelton (2008) and others have argued that the right to legal representation should be 'de-linked' from the assignment of representation by the state and at state expense, so as to recognise the right to representation as a separate right (*Brossy v. Brossy* (602/11) [2012] ZASCA 151 (28 September 2012) – Submissions by the Amicus Curiae: 24; Cleophas and Assim, 2015). The second form, the curator ad litem, has a more extensive history. The curator ad litem originated from Roman law and was introduced to South African common law through the transplant of Roman-Dutch law (De Bruin, 2010). As clarified by the Supreme Court of Appeal in *Legal Aid Board: In re Four Children* ((512/10) [2011] ZASCA 39 (29 March 2011): 12), a curator ad litem is a person who 'conduct[s] litigation in the name and in the interests of the minor'. An advocate of the High Court is appointed as curator ad litem; if this is not possible or feasible, an attorney may also be appointed (Boezaart, 2013a).

3.2.5 Comparison

The successive description above has introduced us to child representation in the four respective legal frameworks. It has also described the general task of these representatives. In comparing the forms of representation these tasks are interesting to consider. There are two types of general tasks distinguished in academic literature (Fernando, 2013; Parkes, 2013; Daly, 2016): best interests representatives, representing and advancing the child's best interests, and separate legal representatives, representing the child's views by acting on their instructions. In Table 1, below, an overview of all the forms of representation per jurisdiction is presented with an indication of their general task.

As can be seen in the table, the legal frameworks of all four jurisdictions provide for best interests representatives and separate legal representatives. In Australia, the federal independent children's lawyer, the independent legal representative and the guardian ad litem in New South Wales are relatively similar in their task of representing the child's best interests in family law proceedings. 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 ad hoc administrator and the general and filiation guardians ad litem, and a separate legal representative acting on the instructions of the child, respectively the 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 in exceptional circumstances if the child is very young and cannot

TABLE 1 *The forms of representation and their general task per jurisdiction*

			General task	
	Forms of representation		Best interests representative	Separate legal representative
Australia	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	
France	Ad hoc administrator (AHA)		X	
	Children's lawyer (CL)			X
The Netherlands	General guardian ad litem (GGAL)		X	
	Filiation guardian ad litem (FGAL)		X	
	Separate legal representative (SLR)			X
South Africa	Legal representative (LR)		X*	X
	Curator ad litem (CAL)		X	

** Only in exceptional circumstances.*

give instructions, but generally the legal representative is a client-directed advocate representing the child's views.

3.3 *Evaluation in Light of Article 12 UNCRC*

The comparison above has revealed two main conclusions. That each jurisdiction has at least two forms of child representation and that these representatives are either best interests or separate legal representatives.

That each jurisdiction has forms of representation available to children in family law proceedings 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. As discussed above, neither the Article nor the Committee explicitly require representation forms to be available to children. However, multiple authors have argued that it is required for the child to have a choice between various mechanisms of being heard. Having forms of representation available is the first step to achieving this. The availability of other

options and forms of participation, for example the direct hearing of children by judges in the Netherlands provided by Art. 809, Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvorming*), is also relevant for determining whether children have a choice. In any event, various factors may limit the choice between mechanisms of participation. Two of these factors will be discussed: the types of proceedings, and child-related requirements. Whether children have a choice between the forms of representation in each type of proceeding will be discussed in the next section and whether child-related requirements potentially restrict this choice will be discussed in the section thereafter.

The second outcome of the comparison is that all jurisdictions have representatives with the general task of representing the child's best interests in family law proceedings and representatives with the task of representing the child directly in proceedings. How does this relate to the minimum standard of Article 12, UNCRC? Remembering that the child's representative should not confuse their task with the obligation of Article 3, UNCRC, there may be cause for worry regarding the best interests representatives. At first glance, it may appear that best interests representatives cause tension between the obligations in Article 12 and Article 3, UNCRC. The child's representative should ensure the correct transmission of the child's views to the decision maker. Therefore, the views of the child should not be shrouded by what the representative considers to be in the child's best interests. However, the representatives characterised as having the general task of best interests representative, need not do so. This will depend on the more specific functions and the exercise of their tasks. That is an issue outside the scope of this article. In any event it is important to remain critical of these best interests representatives and their role in communicating the views of the child. As stressed by the Committee in General Comment No. 14 (2013), the child may need (legal) representation to ensure the correct implementation of their right to have their best interests taken as a primary consideration.

4 In All Matters and Proceedings Affecting the Child

With the forms of representation introduced, it is now time to move onto the question of when these representatives may act for the child. This section will commence with a brief look at what Article 12, UNCRC requires regarding the types of proceedings in which children may be represented. Then the legal frameworks of the four jurisdictions in that regard will be discussed and compared, providing the basis for an evaluation.

4.1 *Article 12, UNCRC*

In both paragraphs of Article 12 UNCRC it is specified that the right is granted to the child in all matters and proceedings affecting the child. Paragraph 1 states that the child has the right to express their views in *'all matters affecting the child'*. This phrase signifies the very broad application of Article 12, UNCRC. In the second paragraph, the opportunity to be heard is to be provided for *'in any judicial and administrative proceedings affecting the child'*. The Committee in General Comment No. 12 explicitly emphasises that this means 'all relevant judicial proceedings affecting the child, without limitation' (para. 32), referring as an example to, amongst others, family law proceedings such as the separation of parents, custody, care and adoption, but also to other areas of law.

4.2 *Comparison*

In order to determine whether these standards have been upheld in the four jurisdictions it is important to compare in which types of proceedings representation is provided for. Previously all the forms of representation were introduced which function in family law proceedings, but in which types of proceedings may they represent the child?

4.2.1 Australia (New South Wales)

In Australia, the independent children's lawyer can be appointed in federal family law proceedings under the Family Law Act, 'in which the child's best interests are, or a child's welfare is, the paramount, or relevant, consideration' as per S. 68L, AFLA 1975. This includes proceedings on parental authority; parental plans, parenting orders and child maintenance orders following separation or divorce; and parentage proceedings. Proceedings concerning international child abduction are also included, albeit that S. 68L(3) applies further requirements in those cases.

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. 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. This includes 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. In adoption proceedings, the participation principle of S. 9, Adoption Act 2000 also lists decisions of significant impact. These 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 the child's birth parents.

4.2.2 France

In France, children can be represented by an ad hoc administrator in a variety of civil, criminal and administrative proceedings. In this research, the civil proceedings are relevant. There are two legal grounds for the representation by an ad hoc administrator in civil cases, Article 383 and Article 388–2, FCC. The interpretation of these two articles remains open to some debate in France (see Gouttenoire, 2006; Grevot, 2010). Article 383 FCC is relatively clear as it allows for the representation of children in the judicial proceedings concerning their property, when there is a conflicting interest between the child and their legal representative, e.g. their parents (Massip, 1995).

Article 388–2 FCC allows for the appointment of an ad hoc administrator in a wide range of 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 only the child who is a party to proceedings. In principle, as emphasised by Gouttenoire (2006), 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 cannot be. This would include 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. 334, FCC), child protection proceedings (Art. 375, FCC), proceedings for the revocation of a simple adoption (Art. 370–1, FCC), and proceedings on the grandparent's right of access and visitation (Art. 371–4, FCC). On the other hand, an ad hoc administrator can also be appointed in cases where children are not a party to the proceedings, as has been implicitly accepted by the Cour de Cassation (1ère Chambre civile, 23 février 1999 (Bull. n°66)) and in legal doctrine (Gouttenoire, 2006; Fédération nationale des administrateurs ad hoc, 2009). This means that it is possible for the appointment of an ad hoc administrator in proceedings concerning parental authority and in divorce or separation proceedings, e.g. on custody, visitation or access (Gouttenoire, 2006; Grevot, 2010).

The children's lawyer can represent the child in a variety of family law matters whether the child is a party or not. 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 following Art. 1186, French Code of Civil Procedure (*Code de procedure civile*; hereafter FCCP). The same applies to the revocation of a simple adoption (Art. 370–1, FCC). Even if the child is not a

party to the proceedings, but does have the right to be heard, Art. 388–1, FCC allows for the child to be assisted by a children's lawyer. This includes proceedings within the framework of parental authority, divorce, or international child abductions.

4.2.3 The Netherlands

In the Netherlands, the three forms of representation can represent the child in a range of proceedings. To start off, the general guardian ad litem can represent children in matters concerning the child's care and upbringing or concerning the child's property (Art. 1:250, DCC). These are proceedings surrounding the separation of the parents, e.g. custody, principal residence and access, as well as care proceedings, e.g. family supervision and placement in care orders (Werkproces Art. 1:250 BW) and conflicts regarding foster care or an injunction to request treatment (Ter Haar, 2015; Jansen, 2016). Theoretically, the general guardian ad litem can also be appointed in international child abduction proceedings (Jonker *et al.*, 2015). In all these types of proceedings, the general guardian ad litem may represent the child under the condition that the conflict must be sufficiently serious. The Dutch Supreme Court (HR 4 February 2005, ECLI:NL:HR:2005:AR4850) has emphasised that the general guardian ad litem is not meant for general parenting issues, but for substantial conflicts with concrete problems which require legal proceedings when they cannot be resolved amicably.

The filiation guardian ad litem represents children in matters of parentage (Art. 1:212, DCC). These are proceedings concerning denial of paternity or maternity (Art. 1:200 and Art. 1:202a, DCC), substitute consent to recognise 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 claims or disputes of civil status (Art. 1:211, DCC). Although not expressly determined in law, adoption proceedings appear to qualify as (parentage) proceedings in which the filiation guardian ad litem can be appointed (Richtlijn Art. 1:212 BW).

Children are afforded separate legal representation in a few specific proceedings concerning care and protection orders. In proceedings concerning authorisation 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 (Art. 1:262b jo. Art. 1:265k(1), DCC). In multiple other situations, children have a formal right to bring proceedings and can do so with a representative, although this is not obligatory (Van Teeffelen, 2013). These are proceedings on the replacement of the supervisory authority (Art. 1:259, DCC), 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 on care orders following changed circumstances (Art. 1:265g(2), DCC).

4.2.4 South Africa

The South African legal representative may represent children in a wide variety of family law matters. Section 6(4) of the Divorce Act of 1979 provides for the appointment of a legal representative in divorce proceedings for the purposes of safeguarding the child's interests in orders regarding maintenance, custody, guardianship or access to the child. The general provisions of children's participation in S. 10 of the Children's Act 2005 (hereafter SACA 2005) and of children's access to court in S. 14, SACA 2005 are elaborated further in a multitude of provisions. Section 29(6)(a), SACA 2005 provides that the court may appoint a legal practitioner to represent the child in various court proceedings. Namely, those concerning parental responsibilities and rights agreements, the assignment of contact and care to an interested person, the assignment of guardianship, the confirmation of paternity, and the termination, extension, suspension or restriction of parental responsibilities and rights. Moreover, S. 55, SACA 2005 provides that if a child is not yet represented but is involved in any matter before the children's court, the court must, if it is of the opinion that it is in the best interests of the child to have representation, refer the matter to the Legal Aid Board. The Legal Aid Board must deal with the matter and can appoint a legal representative for the child at state expense (Du Toit, 2009). This Section applies to a wide range of matters besides those already discussed above, including proceedings on: 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, temporary safe care or alternative care of a child and adoption of a child (S. 45 SACA, 2005). In addition, according to S. 279, SACA 2005, children must have a legal representative in all applications regarding the Hague Convention on International Child Abduction 1980.

Due to the common law nature of the curator ad litem (De Bruin, 2010) there is no fixed or explicit list of proceedings in which a curator ad litem may be appointed. However, the Supreme Court of Appeal has clarified that courts have a wide discretion in appointing curators ad litem (*Legal Aid Board in re Four Children* (512/10) [2011] ZASCA 29 (29 March 2011)). Case law has shown that children can be represented by curators ad litem in proceedings including, amongst others (inter-country) adoption proceedings (*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)) and parental responsibilities and parental rights disputes (*S v. J* (695/10) [2010] ZASCA 139 (19 November 2010)). It has been alleged that the curator ad litem may also represent the child in divorce proceedings; however, Boezaart argues that this is clearly not correct as the Divorce Act of 1979 explicitly only refers to a legal representative for children (2013a: 711).

4.2.5 Comparison

The above shows the broad range of family law proceedings in which children may be represented. These types of family proceedings can be divided into five categories: parental authority, divorce and separation, parentage, child protection, international child abduction and (national and international) adoption proceedings.

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 this is the independent children's lawyer, in the Netherlands the general guardian ad litem. In France and South Africa both types of representatives, respectively the ad hoc administrator and children's lawyer, and the legal representative and curator ad litem.

The second category of proceedings are those following the divorce or separation of parents. The available forms of representation are similar to those mentioned in the first category. With the independent children's lawyer in Australia, the general guardian ad litem in the Netherlands and the French ad hoc administrator and children's lawyer. However, in South Africa only the legal representative is provided for in these types of proceedings.

The third category is proceedings concerning parentage of the child. In Australia the independent children's lawyer and in the Netherlands the filiation guardian ad litem can function in all forms of parentage proceedings. In France and South Africa the role of representatives is more limited in this category. The French ad hoc administrator representing children in establishing or contesting maternity or paternity, and the South African legal representative only representing children in confirmation of paternity proceedings.

The fourth 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, the Netherlands and South Africa the available forms of representation are involved in a wide range of these proceedings. In

Australia and France the different sorts of representatives may be appointed in the same type of proceedings, while in the Netherlands and South Africa each type of proceeding has its own available sort of representative.

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. Child representation in adoption proceedings is less uniform in the four jurisdictions. In New South Wales, Australia and South Africa all forms of representation may be appointed. In contrast, in the Netherlands only the filiation guardian ad litem may be appointed and in France representation can only occur in one specific national adoption procedure, namely the revocation of a simply adoption; however, this can be done by both types of representatives.

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 2.

4.3 *Evaluation in Light of Article 12, UNCRC*

Three evaluative conclusions can be drawn from the table and discussion above in light of Article 12, UNCRC.

First, that in all six categories of proceedings each jurisdiction has at least one form of representation for children. At first sight, the jurisdictions appear to comply with the requirement of all matters and proceedings in Article 12, UNCRC. There should be no limitation to the types of proceedings in which children can be heard. With regards to representation in the family law proceedings studied in this research, only one jurisdiction fulfills this requirement with regards to representation. 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 is only available in select types of child protection proceedings. As other forms of participation may be provided for children, no firm conclusions can be made regarding the requirement of providing the right to be heard in all matters and proceedings.

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, divorce, separation and parentage proceedings, and the

TABLE 2 *Forms of representation available in different categories of proceedings in each jurisdiction per type of representation*

		General type of representation	
Categories of proceedings	**Jurisdictions**	**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)
Divorce or Separation	Australia	X (ICL)	
	France	X (AHA)	X (CL)
	The Netherlands	X (GGAL)	
	South Africa		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

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? One could argue that in vertical proceedings the child may require more procedural protection from state interference in their private family matters because the effects of the decision may be 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 (Daly, 2016). It is interesting to note that in the category of international child abduction proceedings, only South Africa provides for a strong mandatory right to representation. 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.

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 a clear division between the types of cases, while in other jurisdictions there is a separation of tasks but no separation 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 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. 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, 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 applied.

5. Capability of the Child

The third and final aspect to be compared in this article is whether the jurisdictions place a capability requirement for the child to have a representative. The phrase on capability in Article 12, UNCRC will be examined, followed by a comparison and evaluation.

5.1 *Article 12, UNCRC*

Article 12 provides the child 'capable of forming his or her own views' with the right to express views. This capability criterion applies to the access of children to participation forms. It should be distinguished from the capacity criterion – 'in accordance with the age and maturity of the child' – applicable to the weighing of the views expressed (Daly, 2018). With regard to representation, the capability criterion is relevant as it may determine which children have access to a representative. Therefore, it will now be discussed.

What is meant by the capability condition? According to the Committee this should not be seen as a limitation (General Comment No. 12, para. 20). 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 (para. 21). Governments, courts and others should always start with the presumption that the child is capable of forming his or her own views, instead of assuming that the child is incapable (Lansdown, 2011). 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 to prove his or her own capability (Krappmann, 2010). As the UNCRC aims to remove the long-standing binary view of capability, that children do not have the capability 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' (Day of General Discussion, 2006: 51). An age limit to determine capability would also contradict the findings developmental psychologists have made about the gradual development of children's capacities over time (e.g. Parkinson and Cashmore, 2008). The Committee also refers to developmental findings, emphasising 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 (General Comment No. 12, para. 21).

So, when is a child capable of forming their own views? According to the Committee in its General Comment No. 12, it is 'not necessary that the child has comprehensive knowledge of all aspects of the matter affecting him or her' (para. 21). This means that children do not need to be able to understand all aspects of the matter or be able to foresee the consequences of their views. Instead it is sufficient if children have 'sufficient understanding' to form their own views, which also includes their own feelings, insights and concerns (Lansdown, 2011). Furthermore, States should not use the protectionist argument of withholding children the opportunity to express their views because it is contrary to the child's best interest (Hodgkin and Newell, 2007).

The mainly negative explanation of the 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 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' (2009: 10).

5.2 *Comparison*

If the Committee has difficulty defining a standard for determining capability, how have the four jurisdictions tackled the issue in regards to representation? Let us consider each of the legal frameworks.

5.2.1 Australia (New South Wales)

In Australia, the appointment of an independent children's lawyer is not subject to specific capability requirements, but the non-exhaustive criteria from the *Re K* decision ([1994] FLC 92–461) by which judges determine whether to use their discretion, do contain two child-related factors. The appointment of the independent children's lawyer can be set aside if it is considered

inappropriate due to the child's age or maturity (S. 68L(6)(a), AFLA 1975) or may be required because the child is of mature years and has strong views.

In New South Wales, capability requirements are set for the appointment of direct and independent legal representatives in child protection and adoption proceedings. In both these types of proceedings, the capability of the child determines what form of representative is appointed. If a child is presumed capable of given proper instructions, a direct legal representative is appointed, if not, an independent legal representative (S. 99A, CCPA (NSW) and S. 122(3)(c), Adoption Act 2000). The requirement of being capable of giving proper instruction is supplemented by rebuttable presumptions in these sections. 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. The rebuttable presumptions may not be rebutted simply because the child has a disability. The Representation Principles for Children's Lawyers provide further guidance. 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 (Principles C1 and C2, Representation Principles for Children's Lawyers 2014).

Lastly, in New South Wales, a guardian ad litem can be appointed if there are special circumstances which warrant the appointment. These 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 (S. 123(2), Adoption Act 2000 and s. 100(2), CCPA (NSW)).

5.2.2 France

The French ad hoc administrator and children's lawyer are both bound by a capability requirement. This requirement is not applied in the specific situation of the ad hoc administrator who must be appointed if requested by the child's parent(s) within the framework of Article 383, FCC (Massip, 1995; Fédération nationale des administrateurs ad hoc, 2009). In all other situations both representatives are bound by the requirement whether the child is '*capable de discernement*'. This requirement is taken directly from the French version of Article 12 of the UNCRC, translating into whether the child is capable of forming his or her own views. If the child is '*capable de discernement*', the child has the right to be heard and thus the right to a children's lawyer (Art. 388–1, FCC and Art. 1182, FCCP). If the child is not '*capable de discernement*' in cases where the child can normally act as a party and there is a conflict of interests with the parent(s) or guardian, then an ad hoc administrator can be appointed

(Fédération nationale des administrateurs ad hoc, 2009). When is the child '*capable de discernement*'? There is no specific age; instead the judge must determine the child's capability individually in each separate case (Rongé, 2008). Generally, however, children are considered capable from the age of seven onwards (Attias, 2012).

5.2.3 The Netherlands

In the Netherlands, requirements of capability play different roles for each form of representation. The text of both articles concerning the guardians ad litem do not mention any requirements regarding the child's age or maturity. The general guardian ad litem is appointed at the discretion of the court. The child's age or level of maturity can be a factor taken into account in addition to other relevant factors, but is not a hard requirement (Jansen, 2016). The filiation guardian ad litem must be appointed once a filiation proceeding is pending; courts have no discretion in that regard. However, this is different when the filiation guardian ad litem initiates proceedings on behalf of the child. In these cases, Dutch courts have discretion. According to legislative history, children should be of a certain maturity in that they should be sufficiently able to foresee the consequences of the application (Van Teeffelen, 2008; Schrama, 2016). However, the Dutch Supreme Court has clarified that this is not a prerequisite (HR 31 October 2003, ECLI:NL:HR:2003:AJ3261). It may be in the best interests of the child in light of exceptional circumstances to provide for a filiation guardian at litem at a (very) young age.

With regards to the separate legal representative, the discretion of the courts is curtailed. On the one hand, the appointment of a separate legal representative is mandatory in authorisation of secure youth care proceedings (Art. 6.1.10(4), Youth Care Act). On the other hand, a bright line test applies in all cases concerning care and supervision orders and the placement in care. A child must be 12 years or older to have a separate legal representative.

5.2.4 South Africa

In South Africa, the capability of the child is not critical for the appointment of a representative. The curator ad litem is not restricted by any child-related factors. The legal representative is also appointed regardless of the age or maturity of the child. Although the general right to participate is limited to 'every child that is of such an age, maturity and stage of development as to be able to participate' (S. 10, SACA 2005), the specific sections (S. 29(6)(a), S. 55 and S. 279, SACA 2005 and S. 6(4), Divorce Act) do not impose any capability requirements. However, the role of the legal representative is dependent on child-related factors (Boezaart, 2013b; Cleophas and Assim, 2015). 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.

5.2.5 Comparison

Capability requirements in these four jurisdictions take on all shapes and sizes. In three situations spread over the Netherlands and France child representation is mandatory. In these circumstances, the capability of the child plays no role. Aside from these three situations, further requirements are applied for all other types of proceedings and forms of 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 capability requirement, although child-related factors, such as the age of the child, may still influence the appointment or general task of the representative. This is the case for the Australian independent children's lawyer and the Dutch general guardian ad litem, both of which may be appointed taking the child's capability into account. The South African curator ad litem and legal representative are also appointed regardless of the child's capability, although the role of the legal representative is dependent on child-related factors, as discussed above.

Secondly, there 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 of this, is that children must be 12 years or older to have a separate legal representative in Dutch care and supervision order proceedings. Other 'positive' requirements include that in New South Wales the direct legal representative is appointed if the child is presumed capable of giving proper instructions and that in France if children are '*capable de discernement*' a children's lawyer can represent them. With regards to the Dutch filiation guardian ad litem, courts have discretion but generally take into account the "positive" (soft) requirement that the child should be sufficiently able to foresee the consequences of the application. As this may be set aside in light of the child's best interests, this is a borderline case between no requirement and a "positive" requirement (as shown in Table 3 below).

The last option is that jurisdictions use 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 who are both appointed when the requirements for, respectively, the direct legal representative or

TABLE 3 *The role of capability requirements for the representation forms in the different jurisdictions**

	Australia	France	The Netherlands	South Africa
No (explicit) requirement	ICL	-	GGAL	LR
			FGAL	CAL
'Positive' requirement	DLR	CL	SLR	-
+ ↕ -	*Capable of giving proper instructions*	*Capable de discernement*	-	-
'Negative' requirement	ILR	AHA	-	-
	GAL			

** 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
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

children's lawyer are not met. The guardian ad litem in New South Wales is also appointed when special circumstances apply, for example when a child is not capable of giving proper instructions.

In Table 3 below, the three ways in which capability 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.

Three of the capability 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 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'. As discussed above per jurisdiction, these requirements are interpreted in different ways.

In New South Wales, the requirement is supplemented by rebuttable presumptions in the legislation and guidelines in the Representation Principles for Children's Lawyers. The French requirement of being '*capable de discernement*' should be determined per child and per case, although in practice one can conclude that the requirement is often met by children once they reach the age of 7. In the Netherlands, the requirement of being sufficiently able to foresee the consequences of an application is generally interpreted by courts as applying to children aged 12 or older, although in exceptional cases the requirement is circumvented to allow for the appointment of a guardian ad litem for (very) young children.

5.3 *Evaluation in Light of Article 12, UNCRC*

Article 12, UNCRC grants the right to be heard to the child 'capable of forming his or her own views'. How do the requirements in the four jurisdictions relate to the capability requirements contained in the UNCRC?

First, it is crucial that there should be no age limit in law or in practice. Age should not be an automatic barrier. Of the representation forms discussed, only one has a simple age limit 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. 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 advisable to make the necessity of such a mindset more explicit.

A main issue regarding capability, is how it should be understood. As discussed above, 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. 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 criticised 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 (Concluding Observations France, 2004). 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 from the perspective of Article 12, UNCRC. 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.

A final note should be made regarding the Dutch and French proceedings in which representation is mandatory. By making representation mandatory in these proceedings, the legislatures must have considered these situations extraordinary, for example in the Netherlands when the child is placed in secure treatment. Although it is commendable that representation is not limited to any specific requirements in these situations, it may conflict with the fact that Article 12, UNCRC comprises a right for the child to participate in proceedings, not an obligation. A child should have the option not to express his or her views. Therefore, mandatory representation may be problematic. However, it does not have to mean that children are obliged to express their views. If children are represented in proceedings, for which adults in similar situations would also have mandatory representation, and they are not forced to directly express their views, mandatory representation does not have to threaten the standard of Article 12 UNCRC.

6 Concluding Remarks

This article has carefully compared three aspects of four jurisdictions' legal frameworks for child representation in family law proceedings. It is now time to tally up the results of the comparison and evaluation of these three aspects of Article 12, UNCRC. Do the legal frameworks of the four jurisdictions comply

TABLE 4 *Compliance of the legal representation frameworks in four jurisdictions with Article 12 UNCRC*

	AU (NSW)	FR	NL	SA
Through a representative:				
– Representation forms available	++	++	++	++
– Choice for child	+	+/–	–	+/–
– Represent child's views, not own views	+	+	+	+
In all matters and proceedings affecting child:				
– No limits regarding types of proceedings	++	+/–	+/–	+/–
– No distinction between types	+	+	+	+
Capability of the child:				
– No age limit	+	+	–	++
– Presumption of capability case-by-case	~	~	~	~
– Less ambiguous than the Committee	++	–	–	n.a.

++: Very good *+/– : Both sufficient and insufficient aspects* *~ : Neutral*
+: Sufficient *– : Insufficient* *n.a. : Not applicable*

with the minimum standards of Article 12, UNCRC? The evaluative conclusions drawn have been combined to form a "compliance report card" in Table 4 below.

The first aspect, that children may be heard 'through a representative', can be split into three criteria. Each jurisdiction has different forms of representation available to children, therefore complying with the first criteria that representation forms be available to children. That the child should have a choice in representation forms the second criteria. The availability of multiple forms of representation in the jurisdictions does not immediately lead to a positive conclusion. Various other aspects of child representation, such as procedural requirements, may limit the choice. Two of these aspects have been studied. The types of proceedings in which children may be represented can form a (potential) limit. This is the case, for example, in the Netherlands where only one form of representation is available per type of proceeding. New South Wales, Australia, provides a good example in this regard, as multiple forms of representation are available in similar proceedings. Capability requirements may also limit a child's choice. Finally, it is important to reiterate that a child's representative should represent the child's views and should, if tasked with determining the child's best interests, not confuse this task with transmitting

the child's views to the court. The distinction between these tasks is an issue which requires further consideration in all four jurisdictions.

The second standard – that the right to be heard ought to be provided in all matters and proceedings affecting the child – requires there to be no limits on the types of proceedings or any distinction between types of proceedings. Regarding family law proceedings, it is only Australia with no limits on the types of proceedings with regard to representation. This is commendable. In France, the Netherlands and South Africa there are representatives in all categories of proceedings, but there are limitations. The distinctions between the types of proceedings do exist to a certain extent in each of the jurisdictions. There is a clear preference for providing separate legal representation forms in vertical family law disputes and more best interests representation forms in horizontal family law disputes.

The final aspect examined was the applicable requirements concerning the capability of the child. 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 case-by-case. However, the Committee remains vague on how capability ought to be determined. With regards to age limits, South Africa has no capability requirements for the appointment of either representation forms, the Netherlands has explicit age limits for the separate legal representative in various proceedings, and Australia and France have implicit age requirements. Looking at the second criteria, none of the jurisdictions have an explicit presumption of capability for *all* children, but they also do not have a complete presumption of incapability. As the capability requirements are of a personal nature and ought to be complied case-by-case in each jurisdictions, each jurisdiction has been awarded a "neutral" in the report card. Finally, considering the open requirements employed in three of the jurisdictions for capability, only the requirement in New South Wales is much less ambiguous than the standard of the Committee. It includes clear criteria as to when the child should be considered capable of giving proper instructions. This may serve as an example for other jurisdictions (re)considering their capability requirements.

All things considered, this article has provided a meticulous overview of four legal child representation frameworks. The similarities between the legal frameworks and the increasing development of child representation corroborate the premise stipulated at the start of this article that Article 12, UNCRC has, to a certain extent, stimulated states to provide for child participation mechanisms in their national family and procedural laws. However, the differences between jurisdictions in doing so shows that the minimum standards of UNCRC provide room for variation. These differences cannot clearly be traced

back to the legal-technical traditions of the studied jurisdictions. However, one must be cautious in drawing firm conclusions on the basis of a limited sample of four jurisdictions.

To conclude, this article has provided new comparative insights, but also raises questions for further debate. How should children be provided representation in (all types of) family law proceedings pursuant to Article 12, UNCRC? How can representatives with best interests tasks ensure the correct transmission of children's views? How ought children's capability be determined in such proceedings? And finally, how should these questions be answered in light of the scarcity of money and time. There is still much to say about this topic. This article provides, yet another, stepping stone.

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