

**LAW COMMISSION 14<sup>TH</sup> PROGRAMME OF LAW REFORM**

**CONSULTATION**

**ARTICLE 12 UNCRC**

**QUESTIONS**

**Section 1: About You**

**(1) What are your names?**

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**(4) What is your telephone number?**

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**(5) Are you responding to this consultation in a personal capacity or on behalf of your organisation?**

We are responding on behalf of our organisation.

**Section 2: Your idea for reform**

*Please use this questionnaire to tell us where you think there is a significant problem with the law. We want to know what you think is wrong and what practical problems arise. Please give us as much information as you can, even if you cannot answer all the questions.*

**(6) In general terms, what is the problem that requires reform?**

6.1 We respectfully contend that:

6.1.1 Children and young people are not being listened to sufficiently or given an effective voice before, during or outside family proceedings which causes them suffering;

6.1.2 The rights afforded to children and young people under the United Nations Convention on the Rights of the Child ('UNCRC') 1989 are not sufficiently accessible to children and young people in England and not sufficiently enforceable;

6.1.3 The most effective way to ensure that the spirit and letter of the Convention is upheld before, during and outside family proceedings is to incorporate the Convention directly into English Law.

6.2 The problem is complex. It involves international,<sup>1</sup> constitutional,<sup>2</sup> and domestic law,<sup>3</sup> ethics<sup>4</sup>, policy and practice.<sup>5</sup> It raises issues of respect for human rights, dignity, culture, citizenship and equality.<sup>6</sup> Consideration must be given to children's evolving capacities and competence. Contradictions and ambiguities must be recognised. Difficult conflicts between the rights of adults and parents, and the rights of children and young people need to be addressed explicitly and balanced.

6.3 Potentially, the problem affects all children and young people:

- Outside court proceedings (for example, voluntary reception into local authority care under Section 20 Children Act 1989<sup>7</sup>);
- Prior to the issue of family court proceedings (the 'pre-proceedings stage' in the context of child protection; and alternative dispute resolution stage in the private law context); and
- During family court proceedings, as well in relation to education, juvenile justice, welfare and immigration.

6.4 Especially vulnerable groups, such as children from Black, Asian and minority ethnic backgrounds, children with disabilities, and refugee children, may be affected more severely.

6.5 We respectfully invite the Law Commission to review the issue.

### **(7) Can you give us an example of what happens in practice?**

*The example below is based on empirical research conducted by the University of the West of England into pre-proceedings in the field of Children's Social Care 2013-2014 and 2016-2017.*

#### 7.1 Introduction

Research conducted by the University of the West of England into pre-proceedings in the field of children's social care, suggests that children and young people are 'invisible' and 'do not have a voice' and that more is needed to implement Articles 3 and 12 (in particular) of the United Nations Convention on the Rights of the Child 1989.

#### 7.2 Appendices

Please see Appendices 1, 2 and 3, respectively, for a brief summary, of the following:

- The research pilot study;
- International law; and
- Domestic law.

### 7.3 Overview of the research into pre-proceedings protocols

7.3.1 What struck the researchers is that the role of children in pre-proceedings is conspicuous by its absence. There is no reference to the rights of children in the Revised Public Law Outline either.<sup>8</sup> Although each of the pre-proceedings protocols considered in the course of the research refers to the need to ascertain each child's wishes and feelings, and identify his or her needs and timescales, children are not otherwise mentioned. Some of the professionals who participated in the research acknowledged this lack of visibility of children in the process. What is more, when there was some interaction with children and young people, issues of honesty, trust and confidentiality were revealed, as well as a lack of cultural awareness.

### 7.4 The lack of children's involvement in pre-proceedings cases

#### *7.4.1 Local authority children's services files*

During the course of the research, an examination of 70 confidential children's services' files in four local authorities revealed that it was standard practice to involve parents in the pre-proceedings process in accordance with national and regional practices. There was nothing in the files to suggest that children and young people were, or should be, supplied with any generic information (orally or in writing) about pre-proceedings, invited to meetings, or spoken to or listened to in any way. When asked about this, a local authority manager who participated in the research [LAM1 (2017)] suggested that social workers might discuss these issues with children and young people without necessarily recording their conversations.

#### *7.4.2 Children and young people's concerns*

It was therefore important to talk with individual children and young people in order to understand the nature of any communication and/or interaction they had with professionals while on the edge of care. The focus group of young people that took part in the research comprised five female members of the Family Justice and Young People's Board ('FJYPB'). The youngest participant was 11 years old and was accompanied by her mother. The others were young people in their late teens or early twenties.

When asked about the interactions the children and young people had had with professionals during pre-proceedings and what, if anything, they knew was happening at home, none of the members remembered being given any information. One member said:

'I think it's just like I wasn't really told anything, and it was just like I was in the middle of it, and no-one wanted to tell me anything or why they came to my [home].' [YP1 (2016)]

Another member said:

'Like to them I didn't know what was going on but I just kind of kept eavesdropping on conversations because I realised nobody was telling me anything, so I had to listen for meself.' [YP2 (2016)]

When the young people tried to find out what was happening, they felt that professionals avoided their questions. One member said: 'I was just there to be ignored or asked questions.' [YP3 (2016)] Two of the members related their parents' terror as they were being taken into foster care and how they (the members) had not known what was happening or why it was happening. One member explained the impact of ignorance: 'It's so

much worse for a young kid because they can't understand it and they are trying to piece it together and it's horrible.' [YP3 (2016)]

Each of the members recalled being questioned and having to tell their story again and again. One said: 'I don't like] the way that they interrogate you to really get everything out.' [YP1 (2016)]. Another said:

'I felt alienated because I felt like the normal life I was actually living kind of got invaded and it's like loads of different people coming to me house asking me loads of questions and then I go and visit another family member and then I am getting questions there.' [YP2 (2016)]

The questioning could take place both at home and at school. One member described the negative impact of this on her younger brother psychologically and in relation to his academic performance. Another member said:

'At times, I enjoyed school when I was going to it but then social workers got involved in school and at home. It just made my life like complete hell because I couldn't be anywhere without thinking about it. There was no break from it.' [YP2 (2016)]

#### *7.4.3 Professional concerns*

Several professionals who took part in the research were concerned about the position of children during the pre-proceedings stage.

An independent reviewing officer felt that there was a problem with the visibility of children.

According to a senior local authority manager,

'The child gets lost. This doesn't help their voice'. [LAM (2016)]

A focus group of family law solicitors was concerned. They said that, 'Older children have no voice in the pre-proceedings process. They need a mouth-piece or representative such as a guardian or solicitor.' [FLSFG1 (2016)]

A magistrate said:

'Information at the beginning really helps. This keeps uncertainty to a minimum. Certainty is important for children. Children shouldn't know every detail of what's happening in their family and shouldn't be made to feel responsible for the decisions that are made but they need to know that someone is looking out for them.' [MAG1 (2016)]

When asked how the voice of the child could be captured at the pre-proceedings stage, a senior local authority manager who participated in the research was unsure. She said:

'Children and young people want certainty: yes/ no answers. Pre-proceedings involves a great many uncertainties and 'grey areas'. It would be very difficult for social workers to provide such certainty and/ or require a lot of confidence.' [LASM1 (2016)]

#### 7.4.4 *Honesty, trust and confidentiality*

Honesty, trust and confidentiality were significant issues for the 5 young members of the FJYPB who participated in the research.

All five of them remembered being assured that they could speak to the social worker in confidence. However, two members felt unable to say what they wanted to say. One told us:

'They (the social worker) will be like, "Wouldn't it be better if it was like this and why don't you agree?" It's just annoying like.' [YP1 (2016)]

Three of the members felt that some of the things they said were repeated or reinterpreted and that their situation became more difficult as a result.

One member said, 'My answers to those questions would go to my mum and they'd say different answers to what I said. So, they would just kind of twist what I said to something else.' [YP3 (2016)]

Another member said:

'I would tell her (the social worker) in confidence and then it would go round back to my parents, and I would get in trouble for it because of the way our culture is. I just felt that they made things a lot worse especially when you trusted them. You want to speak freely, and you are in a bad situation, but it's all about having to hold back because you can't trust or tell anyone, and you just feel trapped.' [YP1 (2016)]

A third member said:

'Even though me Mum's passed away, [this family member] still slates me Mum and I'm like, why the hell did the social worker ever actually speak to you? You know if you tell them they are going to tell people anyway. And it's like you can't be bothered with more drama, so obviously just suffer in silence.' [YP2 (2016)]

None of the members liked information about them being shared with other people, such as other family members or teachers. One member said this: 'You want your privacy, yeah you do. You don't want everyone knowing'. [YP3 (2016)]

#### 7.4.5 *Cultural diversity*

One participant felt strongly that social workers needed to be given better training about cultural issues. She cited two examples of why this was important: respecting religious dress, practices and dietary preferences, and not placing a child or young person in danger.

'[Social workers] are so ignorant and so stereotypical. Just because of my sisters', you know, skin colour, they put them into a Hindu home thinking it was Muslim. And there is stuff they would be served to eat and they couldn't eat it and my sisters both received a lot of hate because of, you know, their prayers and the head scarf they wear. It's like they put labels on things like honour-based violence, but they don't really understand what it is. And because of the way that certain members of my family are, I was very scared to be put in the same town, so I just felt like, I just never felt safe, and they didn't understand. They thought I was over-exaggerating.' [YP1 (2016)]

She described her father's violence towards her and how, on one occasion, she had been kept away from school until the bruises on her face had started to fade. She had asked her school friends not to report it because she was afraid of what would happen to her, but they did report it and children's services told her step-mum. She explained:

'So when I got home from school, I was denying it to the best of my ability and she (my step-mum) went and told my dad and I got even more shit for that. It scares the life out of me. If I did open my mouth, what would have happened to me?' [YP1 (2016)]

She felt that social workers did not understand cultural diversity:

'I think that is something they definitely need to [brush] up on. I will speak up for a lot of Asian families. With us, it's whatever happens in the house, stays in the house. That's like an honour thing, like if you have got police cars and all these official people turning up at your door it's like, "What's going on in your house? Your daughter said this and that about you. She is bad mouthing you to other people". It's such a bad thing. But when you are in a bad situation, how can you not tell people, how can you not get some sort of help? You don't want to be in that situation. With my dad, the fact that I didn't like it and I wanted to get some help was what made him more aggressive towards me.'

[[YP1 (2016)]]

## 7.5 Analysis and discussion

### 7.5.1 The legal position in relation to participation by children and young people in pre-proceedings

#### *7.5.1.1 In the field of children's social care, what are pre-proceedings and which cases enter pre-proceedings?*

In England, the welfare of the child should be the paramount consideration whenever decisions are made in public (and private) law family cases.<sup>9</sup>

Local authorities have a duty to safeguard and promote the welfare of children within their area who are in need and, so far as is consistent with that duty, to promote the upbringing of such children by their families.<sup>10</sup>

Local authorities also have a duty to investigate where they have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm.<sup>11</sup> In order to justify making a care or supervision order, a local authority must persuade a court that a two-stage test has been satisfied. In the first stage, the case must cross a threshold. This threshold can only be crossed if the court agrees that things have happened which have already caused significant harm to a child or pose a serious risk that significant harm will be suffered in the future or which show that the child is beyond parental control.<sup>12</sup> In the second stage, even if the threshold is crossed, it must be in the child's best interests to make an order. It is not inevitable that a care order will be made every time a child has suffered significant harm (but it is likely).

The cases which are considered appropriate for the 'pre-proceedings' process are 'chronic', 'slow burn' ones involving neglect. (That said, many neglect cases also involve elements of domestic abuse, drug and/ or alcohol misuse which can sometimes be severe enough to warrant an immediate application to the court.)

The aims of pre-proceedings are two-fold: First, it allows the matters that can be diverted from court to be diverted from court. Secondly, it ensures that the matters that cannot be diverted from court are properly prepared for the court.

Where the 'threshold criteria' for care appear to be met, the following steps are to be undertaken by the relevant local authority in all cases *before the issue of proceedings unless the urgency of the matter demands an immediate application to the court*.

- A Legal Planning Meeting
- A Pre-Proceedings Letter to the parents
- A Pre-Proceedings Meeting with the parents
- Assessments and Reports

Nationally, there is no time-limit/ target period for the completion of these pre-proceedings steps, nor is the court under any obligation to accept the local authority's pre-proceedings work. If proceedings are started, they must be concluded within 26 weeks.<sup>13</sup>

It should be noted that some cases may be 'resolved' during pre-proceedings or as a result of court proceedings but will re-enter the pre-proceedings stage at some point in the future.

#### 7.5.1.2 *Defining terms such as 'involvement' and 'participation'*

Terms commonly used in relation to child-friendly justice and respect for children's rights include 'awareness', 'understanding', 'information', 'consultation', 'involvement' and 'participation'.

According to the Cambridge Dictionary:<sup>14</sup>

- 'Awareness' includes knowledge that something exists, or understanding of a situation or subject at the present time based on information or experience' and/ or 'knowledge and understanding of a particular activity, subject, etc.';
- 'Understanding' includes knowledge about a subject, situation, etc. or about how something works; a positive relationship between two people or groups in which they feel sympathy for each other; and/ or an informal agreement between people. An understanding person who has the ability to know how other people are feeling, and can forgive them if they do something wrong;
- 'Information' means 'facts about a situation, person, event, etc.';
- 'Consultation' includes 'a meeting to discuss something or to get advice' and/ or 'the process of discussing something with someone in order to get their advice or opinion about it';
- 'Involvement' means 'the act or process of taking part in something'; and
- 'Participation' means 'the fact that you take part or become involved in something'.

Is the difference between 'involvement' and 'participation' significant? Thomas (2008)<sup>15</sup> is worthy of study here.

Arguably, the terms identified above are relevant to the question of whether children and young people should be included in (1) adult decisions that affect the lives of individual children and families as well as in relation to (2) the development of policies, strategies and impact assessments that may affect all children and young people. They may also assist in a discussion about societal views about the rights of children and young people.

#### *7.5.1.3 Different levels and depths of communication*

Communication underpins social work and other interactions with children and young people on the edge of care.<sup>16</sup> For a contemporary analysis of communication in the context of social work, see Healy.<sup>17</sup>

Communication operates at different levels and depths. According to Kapur,<sup>18</sup> the different levels include communicating in a polite and respectful manner, asking meaningful questions, imparting factual information and abiding by norms and values. The levels of communication normally have an objective.

Communication includes exchanging thoughts or information via speech, visuals, signals, writing, or behaviour. Communication requires a source, a message, and a recipient, although the recipient may not be present or aware of the source's intent to communicate at the time of communication.

Someone ('the source') must first imagine, create and send a message. This includes deciding what to say; choosing the right order or words to convey the intended meaning; presenting or sending the information to the recipient or audience; and observing the recipient/ audience's reaction in order to perceive how well they received the message, and to clarify or provide further information if necessary. Here, the words used, the way in which they are arranged, use of grammar, headings and punctuation, together with tone of voice, body language, and appearance/ choice of clothing all play a part in conveying the message.

The recipient may hear/ see things differently and not grasp the intended meaning. This might be due to the context and the environment. The recipient may be distracted or frightened. The 'source' must ensure that their body language and/ or writing style is consistent with the message.

Any response by the recipient, whether this is intentional or not, verbal or non-verbal, will provide feedback to the source. The greater the amount of feedback, the greater the accuracy of the communication.

Besides the type or level of communication, communication can vary in terms of depth too. According to the counsellor and coach, Jacqueline Hogan,<sup>19</sup> 'communication may be shallow if a recipient feels rejected, humiliated or embarrassed; if they do not feel they are being heard or listened to; if they feel they are being interrupted, intimidated or controlled; or if they feel the 'source' is being false, judgmental or dismissive. On the other hand, communication may be deep if the discourse is honest and transparent, if the source is respectful, humble, appreciative, compassionate, assertive and/ or decisive.'

#### *7.5.1.4 Different levels of confidentiality*

There are different levels of confidentiality, ranging from unclassified to confidential and strictly confidential. The unauthorised disclosure of strictly confidential information or material could reasonably be expected to cause exceptionally grave damage to or impede the conduct of the work, whereas the unauthorised disclosure of confidential information or material could reasonably be expected to cause damage to the work. The unauthorised



disclosure of unclassified information or material would not reasonably be expected to cause damage.

#### 7.5.1.5 *Different types of confidentiality*

Different types of confidentiality include legal confidentiality and clinical/ counselling confidentiality. In the first, the aim is to encourage the client to speak to his or lawyer frankly so that the lawyer has a complete understanding of the issues and is less likely to be 'ambushed' by the other side. In the latter, the aim is to promote trust. In each instance, the professional must protect the confidential information and not permit an unauthorised breach of their duty of confidentiality.

The 'three traditional requirements of the cause of action for breach of confidence' were identified by Megarry J in the following terms:

'In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'<sup>20</sup>

According to The Code of Ethics for Social Work:<sup>21</sup>

- Social workers should make decisions about sharing information legally and ethically. They should ensure that they protect privacy and confidentiality across agencies and professions but also that they share information professionally where it is necessary and required by law.
- Social workers need to explain the nature of that confidentiality to people with whom they work and any circumstances where confidentiality must be waived should be made explicit. Social workers should identify dilemmas about confidentiality and seek support to address these issues.
- Social workers should recognise that the use of digital technology and social media may impact on ethical practice, including privacy, confidentiality and conflicts of interest. Social workers need to take steps to ensure they have the appropriate knowledge of technology to protect themselves and the people they are working with.

#### 7.5.1.6 *Presentation of information; different levels and depths of communication*

In the context of pre-proceedings in the field of children's social care, social workers are likely to wish to gather information from children and young people to help them to understand what is going on in their family. They will need to analyse and evaluate that information and decide what to do with it, why and how. They may feel it necessary and appropriate to share the information with other professionals and/ or with other members of the family. Arguably, this would involve breaching a duty of confidentiality owed to the child or young person.

The children and young people themselves may wish to be (first) provided with information so that they can understand what is going on. They may have questions they want answered. Arguably, a social worker's response runs the risk of breaching a duty of confidentiality owed to the parents of the child or young person concerned. Should the conversation/ discussion be noted or recorded? If so, how and where, and who should have access to it and in what circumstances? Should the conversation or discussion influence

and perhaps change the social worker's approach or recommendations? How would this be explained to the child or young person, his or her parents, to the court?

In either instance, has there been informed consent to disclosure of confidential information? If not, is disclosure legitimate and proportionate?

#### *7.5.1.7 Written communication? Meetings? Information? Explanations?*

As mentioned above, information may be gathered or shared via face to face or online meetings, or in writing. To what extent, if at all, is either process supported by an explanation in age-appropriate terms? Where is this information recorded and how are those records kept?

#### *7.5.1.8 Consideration of children and young people's views*

As mentioned above, the participation of children and young people in research is vital ethically to understand the impact of the law and procedure on them.

#### *7.5.1.9 Altering course of action/ decisions as a result*

Morally and ethically, research involving children and young people should lead to improved outcomes for children and young people. Thus, arguably, those who make decisions and determine courses of action should be prepared to alter them in light of what children and young people say.

### 7.6 Reality based on the research

#### *7.6.1 Sample and dynamics of focus group*

The five members of the Family Justice and Young People's Board who participated in the research had not met before or discussed the issues before. There were startling similarities between them which strengthens and reinforces their message. They also demonstrated incredible resilience.

#### *7.6.2 Views of children and young people*

The members were asked specifically about pre-proceedings processes and they answered specifically about pre-proceedings processes.

According to the children and young people who participated in the research, information-retrieval was one-way ie by them to social workers. They wanted information to understand what was happening but felt brushed aside. They complained that the information they provided was sometimes twisted, sometimes passed on to members of their family, and sometimes passed on in a way that placed them in danger.

Their answers revealed the complexity of the pre-proceedings 'arena' as well as the participants' ambiguity. There was anger about the lack of awareness of race, religion and culture. There were angry feelings about being 'pumped' for information and about breaches of confidence in relation to that information. There was a desire to know and understand what was going on and to be safe and get some help. At the same time, there was a desire to be afforded privacy. It was apparent that a child or a young person might not want to be questioned and might not want a parent to know their views. This might make it very difficult for them to be in the same pre-proceedings meeting as a parent.

### 7.6.3 Discussion

#### 7.6.3.1 *Who, when, where, why, how should children and young people be involved?*

The challenges and methods of involving children in child protection work or in medical treatment have been considered by a number of academics and practitioners:

According to Hart<sup>22</sup> in 1997, there was a growth in children's rights and an increasing recognition of children's abilities to speak for themselves. He argued that democracy depended on the extent to which the nation's citizens were involved, that it took time to develop as citizens, and that children had to be afforded increasing opportunities to participate in democracy. In his observation, however, the participation of children around the world was often exploitative or frivolous.

In 2004, Hemrica and Heyting<sup>23</sup> examined child-participation in the context of parental divorce and decision-making about arrangements. They considered the child's supposed interests in having a say, supposedly required competences for having a say, and the supposed links between and relative priority of the child welfare perspective and the rights perspective in this issue. They warned against relying of assumptions about what children wanted.

In 2008, Thomas<sup>24</sup> discussed the development of a theoretical framework for understanding what is meant by the term, 'children's participation'. He reviewed some of the criticisms that have been made of participatory practice and, with reference to the work of Young<sup>25</sup> and Bourdieu<sup>26</sup> in particular, he considered some of the concepts involved.

He suggested that the basic flaws identified by Cleaver<sup>27</sup> and Mosse<sup>28</sup> appear to stem from two fundamental problems: the use of participatory methods for external reasons and to suit external agendas; and the submerging of, or collusion with, different interests within the 'community' and were relevant to participatory work with children and young people. He argued that if we read external reasons and external agendas as 'adult reasons' and 'adult agendas', many of the flaws identified in participatory work with children (including the failure to enable children to take decision-making positions (see Tisdall and Davis<sup>29</sup>), the tendency for initiatives to be 'top-down' and adult-led (see Badham<sup>30</sup>), Matthews'<sup>31</sup> 'invisible networks' and Percy-Smith's<sup>32</sup> 'brick wall') fitted well into this category.

Thomas<sup>33</sup> expressed concern that participatory practice tended to include some kinds of children and exclude others, while Tisdall and Davis<sup>34</sup> argued that projects were inappropriately selective and Percy-Smith<sup>35</sup> noted a failure to reach a diversity of voices.

Thomas<sup>36</sup> also reviewed criticisms of more established participatory structures in Europe. Begg<sup>37</sup> quoted critics of children's councils in Norway who stated that they were 'not conducted on children's terms. Instead, children were praised when they behaved like small adults and put in their place when they did not' (p. 131; this may of course be begging the question what counts as 'adult' behaviour). Pavlovic (2001)<sup>38</sup> criticised the Children's Parliaments in Slovenia: they were representative rather than participatory, children tended to produce socially expected responses, adult messages were dominant, and there was a lack of effective feedback mechanisms. Dekleva and Zorga<sup>39</sup> argued that the Children's Parliaments were successful in their symbolic and educational functions, but generally unsuccessful in the functions of decision making and introduction to parliamentary process, precisely because they had no real power. Also, as they put it:

'The process of Children's Parliaments scoops up above all the 'good' children from 'normal' schools and the less school-adaptable children, and children in care, to a large extent remain outside of the process.'<sup>40</sup>

Thomas<sup>41</sup> stated that the most significant objections to much current practice under the banner of children's participation appeared to fall under two heads—first, that it did not give real power to children, and second, that it failed to include certain groups of children, including those who were already disadvantaged.

In 2008, Gallagher<sup>42</sup> considered Foucault's conceptualisation of power and argued that it offered a distinctive and original perspective with the potential to afford insights into the nature of participation, whilst also understanding participation as a profoundly ambiguous phenomenon.

In 2012, Dalrymple and Percy-Smith<sup>43</sup> found that many problems occurred as a result of professionals not listening, learning or responding to children and young people. Percy-Smith<sup>44</sup> described children's participation as an empowering social process.

In 2012, Stoecklin<sup>45</sup> argued that as long as organizations remained unaware of – or unwilling to work on – the hidden frameworks used in intervention, their capacities to develop a more bottom-up line would not improve. He advocated a step towards an interdisciplinary exploration of action to better understand the very nature of children's agency and hence respect and foster their distinctive personality. He also argued that low child empowerment was related to low elaboration of the theories of action.

In 2014, Coyne et al<sup>46</sup> considered shared decision-making in the context of children's clinical care. They found that healthcare professionals and parents controlled the shared decision-making process and that children held a minimal role. They concluded that children appeared content that adults held responsibility for the major treatment decisions but desired and valued receiving information, voicing their preferences and choosing how treatments were administered to them.

Although many of the key messages from UWE's research are broadly in line with those of previous research on pre-proceedings,<sup>47</sup> a comparison should also be attempted with research specifically conducted into children's involvement in care order decision-making.

In 2015, Berrick et al<sup>48</sup> considered 'three dimensions of involving children', namely, ensuring inclusion in the decision-making process, providing information about care order preparations (which could include pre-proceedings work in England), and collecting information regarding care-order related tasks. They found that child protection workers in England were less inclined than their US, Norwegian and Finnish counterparts to attach high importance to eliciting the child's wishes and feelings, or to inquiring about the child's needs, and less likely to note the importance of speaking with an 11 year old about 'what really happened' (perhaps because they already knew the facts or because in an adversarial system, a case that depended on what a child said was likely to be vulnerable). However, they were very likely to rate it as very important to involve the child as a participant, especially if he was as young as five.

How do these findings compare with the ones in UWE's research? The young people who participated in UWE's research revealed a degree of disengagement, frustration or anger with what they described as constant questioning (to establish facts) and being ignored (when they asked questions to try and find out what was happening). They also described social workers repeating things they had said in confidence and sometimes altering the meaning of what they had said or placing them in danger, perhaps because of

cultural differences or ignorance. This seems to go beyond responses noted in relation to the vignettes used in the Berrick<sup>49</sup> study. However, in UWE's research, there did seem to be a divergence between policy and practice, as noted in Berrick,<sup>50</sup> both in terms of what child protection workers said they do<sup>51</sup> and the experiences of the young participants.

In 2016, Cossar J et al,<sup>52</sup> argued that participation by children in child protection remains a complex area of practice. They presented findings from a qualitative study exploring the views of 26 children, aged 6–17 years, about their participation in the child protection system in England. All of the children were subject to a child protection plan and were living at home at the time of interview. The children's understanding of the child protection process was categorized. The majority of children, including the youngest, were found to be at least partially aware of the child protection process but often struggling to make sense of the professional intervention in their families on the basis of partial information. They argued that decisions about children's involvement should take into account not only children's age and understanding, but be seen in the context of wider family dynamics. Participation in formal processes such as child protection conferences was experienced as difficult and emotive. They concluded that the child's relationship with their social worker was central to meaningful participation.

#### *7.6.3.2 What is the purpose of involvement/ participation?*

As mentioned above, the purpose of involvement/ participation in the context of child protection may be to ensure that children and young people have a greater awareness or understanding of what is happening within their family.<sup>53</sup> It may be to give them more power.<sup>54</sup> It may be to avoid making assumptions about what children want.<sup>55</sup> It may be to enable them to develop their capacities as citizens.<sup>56</sup> It may be to ensure that children's rights or voices feature in policy or legislative processes, Child Rights Impact Assessments (CRIA) and training about children's rights.<sup>57</sup>

#### *7.6.3.3 Will it change anything?*

The challenges presented by attempting to fully implement the UNCRC and achieve a culture of children's rights are immense. Yet, UWE's research suggests that, despite integration of some of the principles of the UNCRC into English Law (such as the welfare principle and the requirement to ascertain the child's wishes and feelings), there is a lack of awareness or understanding of children's UNCRC rights, or of the importance of them and a lack of consistency in professional practice and across regions. The research indicated that children and young people are suffering as a result. The long-term impacts can only be imagined.

According to a UNCRC Report in 2012:<sup>58</sup>

- Effective protection of children's rights requires a unifying, comprehensive and rights-based national strategy rooted in the UNCRC;
- Those countries that have adopted a range of approaches have been most successful in implementation of the UNCRC.
- Child participation was widely recognised as an important aspect of implementation.
- Children's rights are better protected in countries that have given legal status to the UNCRC in some form.
- In many countries, incorporation into domestic law provided a platform from which other legal and non-legal measures developed.

Thus, incorporation of the UNCRC into domestic law may be considered the best way to advance children's rights. It is important not to neglect the issue of enforcement, however. Non-legal approaches such as the appointment of Children's Commissioners are vital too.

#### *7.6.3.4 Implications of earlier involvement/ participation*

- Facilities/ resources

How/ where could social workers 'meet' children and young people? Should interactions be conducted digitally by mobile telephone or online (as per Covid-19) rather than face to face in a building/ other physical space? What about obtaining consent? Consent must be informed. (How) can children and young people give informed consent? Might there be circumstances in which consent might not be informed? If so, what happens next? Any data collected should be kept confidential. Do we have a system for recording the confidential information? What then happens to it? Might there be circumstances in which it would be appropriate to breach confidentiality, perhaps in order to be proactive in keeping children safe?

- (How) can children and young people participate in pre-proceedings (and proceedings)?

What is the age profile of children in care proceedings? Age is likely to be crucial to an understanding of participation. (How) can age-appropriate information be provided to children and young people? Will (part of) it be generic or tailored? What information could be shared with them, without breaching their parents' confidentiality?

- Should social workers send a pre-proceedings letter to children and young people at their home?

What if their parents intercept and read the letter or question the child or young person?

- Should children and young people be invited to attend pre-proceedings meetings with, or separately from, their parents?

Adult matters are discussed at pre-proceedings meetings and the parents' shortcomings are likely to be revealed. Meetings like this are not child-friendly and are not meant to be. Not all conversations should take place in front of the children. But there are examples of children and young people attending court and child protection conferences and an expectation that they attend their 'Looked After Child/ren' reviews. So possibly, in some cases, children and young people could attend a pre-proceedings meeting, whether some or all of it.

- Who should help to prepare the child or young person for the meeting and support them during and after?

Should children and young people be afforded separate legal representation from their parents? Would legal aid be available for this? Should the Cafcass Plus<sup>59</sup> model be piloted again? How will the attendance of children and young people affect the style of the meetings? Their tendency to be sharp and hard-hitting is often seen as their value. The attendance of children and young people is likely to make them very different. Would it make such meetings less candid and less effective? Or would parents try harder, while there was still time to alter the course of events? Would children and young people be served better by being more involved? Similar issues arise in relation to court attendances.

- Training

Giving children and young people a 'voice' in pre-proceedings would have an impact on the training of social workers. The role of the latter is already complex. Providing information, consulting, involving children and young people and enabling them to participate in the context of pre-proceedings poses significant and important challenges with regard to informed consent and assent, vulnerability and potential conflicts of interest. Professionals should advocate and promote participation by children and young children, while being attentive to mitigating risks. Can the role of the social worker (continue to) be both therapeutic and investigatory? (How) can social workers work with parents and with children and young people in a way that does not breach duties of confidentiality owed to each? What would be the cost of such training? Should lawyers, family court advisers, magistrates and judges receive comparable training?

- Impact of non-participation

Non-participation raises further difficult questions, such as whether the court can uphold local authority assessments conducted during the pre-proceedings stage if the child has not participated.

#### *7.3.3.5 Challenges of ascertaining and incorporating children's wishes and feelings, taking account of their age and understanding*

Eliciting the wishes and feelings of children, especially younger children, is highly skilled work.<sup>60</sup> Doing so in the context of pre-proceedings is especially difficult. This is partly because of the need to preserve parents' confidentiality and partly because case may or may not be diverted from court, meaning that there may be a great many unknowns.

#### *7.3.3.6 Respecting children and young people's confidentiality*

According to the European Convention on Human Rights,<sup>61</sup> everyone, children included, has a right to respect for private and family life, home and correspondence<sup>62</sup> and the right to a fair trial.<sup>63</sup>

The UNCRC also protects children from 'arbitrary or unlawful interference with his or her privacy, family, home or correspondence'.

Children have a very strong sense of their entitlement to privacy, as demonstrated by recent research regarding transparency of the Family Court and the publication of judgments about children.<sup>64</sup>

#### *7.3.3.7 Respecting parents' confidentiality*

The need to protect children cannot always trump confidentiality. How can children be given (more) information, in a meaningful way, without breaching their parents' confidentiality?

#### *7.3.3.8 Balancing different sorts of rights (rights to be brought up by their birth families, rights to be safe from inhuman and degrading treatment)*

Clearly, there must be limits on the amount of sensitive information that is provided to children and young people. The FRA<sup>65</sup> considered that information about parents could be harmful and should not necessarily be shared with children. Where's the balance?

One of the young people who participated in the research felt:

‘There is only so much the parents or whoever else was involved would let you know. I don’t think they would always tell you the whole story.’ [YP3 (2016)]

The issue of preservation of parental confidentiality is a challenging one. Is it possible to provide children with enough of an indication of the local authority’s concerns, without divulging too much detail about their parents, to enable children to participate in the pre-proceedings process? How might a social worker go on to explain what might happen next (in terms of possible court proceedings)? This might present an even greater challenge.

#### *7.3.4 Policy recommendations and practical implications*

Invariably, professionals need to ask children about their home life in order to build a picture of what is happening within the family. However, there does not appear to be sufficient, formal, recognition of a need to provide children with the information and support that they need during pre-proceedings to understand what is happening and to enable them to participate, to respect their culture and the confidential nature of some of the things they wish to say, or to recognise the impact of professional behaviours on children. Professionals may, of course, decide to avoid children’s questions and not to provide information as to do so may involve breaching parents’ confidentiality. Clearly, the issues of awareness, information, consultation, involvement, participation, confidentiality and cultural diversity can be closely intertwined. However, without information, children are prevented from understanding or from participating in pre-proceedings effectively. Confidentiality and respect for cultural diversity are important to children too. So what is the right approach? Most people would probably accept that children should be involved and/ or participate in pre-court processes as well as court processes. The core messages are simple: Listen to children. Offer them support; don’t overrule them unless you really have to.

The challenge is putting them into practice in such difficult situations (violence, drug abuse, mental ill-health, sexual exploitation etc). It may be very hard for professionals to achieve this engagement although that is not to say that one should not aim for it. Arguably, there should be a clearer requirement that social workers should obtain an account of the child’s views (unless this would endanger the child or is not what the child wants).

The position is likely to be very much more complicated than people might think and represents significant challenges for professionals and policy-makers alike. How and why do we want the system to be better? The answer is likely to involve trust. Trust (or lack of it) affects someone’s entire life. But care must be taken not to cause more harm to a child or young person by exposing their parents’ faults. Information sharing, consultation, involvement, and/ or participation may be impossible; we may have to settle for greater awareness. Even if this is the case, it is important that children and young people are treated consistently, regardless of where they live in England, or how often they have been on the edge of care.

#### *7.4 Potential solutions in relation to pre-proceedings in the context of children’s social care*

What might help children to participate in the pre-proceedings process?

One recommendation is better communication and more emotional support. The young people who participated in the research had very clear ideas about what would and would not help them.



One member said:

'You don't want someone to come into your life acting like, oh yeah, we know what this kid is going to be like. No, you don't. Everyone is different, everyone acts and reacts in a certain way.' [YP3 (2016)]

Another member said:

'I think across the system not just the family, everyone just needs to be on the same page with how they communicate with each other.' [YP4 (2016)]

All five members expressed a desire to be treated as an 'individual' and as an 'equal', not as a 'case', a 'group', in a 'stereotypical way' or as another 'box to be ticked'.

Two members praised the role of their family support and Barnardo's workers. One member said:

'[My Barnardo's worker] was like a best friend as well because she was constantly there for whatever I needed. I always related to [her] because there was only ten years between us.' [YP4 (2016)]

The age of the support worker was felt to be a factor, so that they could, as one of the members put it, 'Relate to our life'. [YP5 (2016)]

Another recommendation is access to free legal advice. None of the members of the focus group of young people had had a solicitor acting for them. When asked whether they would have found it helpful to talk with a solicitor, none of the young people were sure. They felt that it might depend on how old they were.

Although the allowance is tiny, Legal Help is available to parents, theoretically at least, to enable them to seek legal advice both before and during the pre-proceedings meeting. According to the professional stakeholders who participated in the research, local authorities would only proceed with the scheduled meeting when a parent was accompanied by a solicitor and the process could be described as fair.

Although Masson has found that pre-proceedings may result in the successful 'diversion' of cases away from court,<sup>66</sup> many cases will go to court. During proceedings, children are usually entitled to a lawyer and a guardian, and possibly experts too.

The presence or absence of legal representation is one of the key differences between the conduct of pre-proceedings and court proceedings so far as children are concerned. The pre-proceedings stage is critical as more and more work is undertaken before the issue of proceedings in order to ensure that the appropriate assessments have been completed and the 26-week court time-frame can be met. Is it discriminatory to provide parents with legal advice and not children? If a child is not part of the pre-proceedings process, how can the court uphold any of the assessments that are organised by the local authority during the pre-proceedings stage? Can there be any justification for excluding children during the pre-proceedings process and for depriving them of a lawyer?

Another recommendation is amendment of the Revised PLO and regional protocols. Currently, they focus on the steps that should be taken to involve parents in the pre-proceedings process. Could they be amended to include a list a series of measures that could be taken by local authorities, such as meeting with each child, to ensure that children received age-appropriate information and support? If so, it is likely that local authorities

would monitor their interaction with children as well as the other steps that form part of the pre-proceedings process. This would be a major step forward in ensuring the effective participation of children during the pre-proceedings stage. Each of the above recommendations involves resource and training issues. However, these could be set against costs savings brought about by diverting cases from court proceedings.

Could information sharing with, consultation of, or involvement or participation by children and young people be made (more) explicit in the Education Act 1996 (as amended)<sup>67</sup>, Children Act 1989 (as amended),<sup>68</sup> the Adoption and Children Act 2002 (as amended)<sup>69</sup> and other relevant legislation?

Would any of these measures go far enough to address all of the issues identified above, to ensure that children and young people are treated as citizens with rights and that their treatment is consistent, regardless of which area of the law or practice might be involved and regardless of which geographical area they live in? Would not incorporation of the UNCRC into English Law be the most effective way to signal that children and young people have rights, that all public authorities will uphold those rights, and that they will be funded, monitored and supported by complaints mechanisms?

#### *7.5 Conclusions about the research into pre-proceedings in the field of children's social care*

This small but in-depth study in the field of children's social care found that the child's right to information is not mentioned in the Revised PLO,<sup>70</sup> or in any of the four local pre-proceedings protocols studied and is not a feature of the children's services files kept by four local authorities. It also concluded that the pre-proceedings process was mostly clear to professionals but not clear to children and young people.

In the field of children's social care, pre-proceedings are, by their very nature, complex, fluid and uncertain. They are a prime example of State intervention in private family life, the entire thrust of which changes at the point when a local authority's lawyer's advice that the threshold for care is met. Families may be on the edge of care for weeks, months, even years. Matters that may be directed towards court may be 'stepped down' and diverted from court. Alternatively, a matter that has been dealt with by a court may have to go through the pre-proceedings again.

According to one senior judge who took part in the research, the court has a legitimate interest in what happens during the 'pre-court' period. Arguably, the reach of the UNCRC should include the 'pre-court' period as well as any proceedings themselves.

Family fragmentation is a real risk and one that can happen quickly because of the current focus on speed. For children and young people, the stakes could not be higher. They may be separated from their families permanently as a result of care and placement orders leading to lifelong adoption, or made subject to special guardianship orders or long-term foster care. Children and young people are the victims of the failings and shortcomings of others and of society. They deserve to be noticed and included. The system should be visualised as they see and experience it. Procedures should not just be child-friendly; children and young people have rights that should be respected and upheld.

What can and should be done to ensure that information is given in an age-appropriate and culturally respectful way to children and young people, and that children and young people can participate without being embarrassed or endangered in respect of the things they wish to say? How can any of this be achieved without breaching parents' confidentiality?

Arguably, children and young people do not need to know everything, but they should know that someone is looking out for them. The challenges facing the social work profession, local authorities and the State are immense but there can be no excuse for continuing to ignore children's rights. Further research is warranted. There is also a need to act. Formal encouragement and recognition of the need to involve children and young people might make difficult conversations and analysis easier and more likely to occur.

**(8) To which area(s) of the law does the problem relate?**

*We will be looking into the existing law that relates to the problem you have described. Please tell us about any court/tribunal cases, legislation, books or journal articles that relate to this problem. You may be able to tell us the name of the particular Act or case that relates to the problem.*

A selection of journal articles about the voice of the child and effective participation by children and young people may be found in Section 7.6.3.1 above.

Articles 3 and 12 of the United Nations Convention on the Rights of the Child ('UNCRC')<sup>71</sup> specify that children's best interests are the primary consideration in any action that affects them<sup>72</sup> and that the treatment of children in judicial proceedings is an important fundamental rights concern.<sup>73</sup>

The importance of providing children with child-friendly information and adequate support by trained staff has been emphasised by the UN Committee on the Rights of the Child.<sup>74</sup>

Although guidelines on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe,<sup>75</sup> are not binding, information and advice is nevertheless regarded as a part of child-friendly justice before, during and after judicial proceedings. It has been said that child protection workers in countries such as England, that have ratified the UNCRC and whose child welfare laws reference the UNCRC, are expected to emphasise the involvement of children earlier, more consistently, at a younger age, and in a greater variety of child welfare decisions. Children and their parents are meant to be promptly and adequately informed from their first involvement with the judicial system or other competent authorities (such as the police, immigration, educational, social or health-care services) and throughout the process.<sup>76</sup> The right of children involved in judicial procedures to be informed is regarded as crucial to their effective participation and well-being. The right to information applies not only when children are involved in judicial proceedings but also before proceedings commence in order to raise awareness of their right to be heard on matters that affect them.<sup>77</sup>

The position in England and Wales in relation to family and child protection law seems settled too. The Munro Review<sup>78</sup> recommended that the new child protection inspection framework should examine the child's journey, from needing to receiving help, exploring how the rights, wishes, feelings and experiences of children and young people inform and shape the provision of services, and looking at the effectiveness of the help provided to children, young people and their families. The Family Justice Review Final Report<sup>79</sup> set out to ensure that the voices of children and young people were heard in public and private proceedings; that children should understand the decisions that affected them; that decisions should take the wishes of children into account; that children should know what was happening and why; and that children should be given age appropriate information and support as early as possible. It also recommended that older children should be offered a menu of options.<sup>80</sup>

In England, statutory safeguarding guidance for adults working with children and families<sup>81</sup> has abolished<sup>82</sup> or strengthened<sup>83</sup> previous guidance regarding safeguarding practices. Professionals are expected to observe what children have said that they need, including

understanding and action, respect, information and engagement, explanation, support and advocacy. In 2018, the Office of the Children's Commissioner (sponsored by the Department for Education)<sup>84</sup> updated the information that it provides online for children and young people<sup>85</sup> including 'What Should Professionals Who Work With Children Do To Keep You Safe?' This listed a number of 'things the Government says that professionals should do' in light of the Government's guidance<sup>86</sup> such as listening to children; being honest with them; sharing information, concerns and responsibility to keep them safe; making sure children are not taken from their family, friends or school needlessly; checking to make sure that the help that is given is still the right help; and not telling other people what a child has said, unless the child has allowed them to do so or it is necessary to help keep that child or another child safe.

All of these assurances seem to go a long way to meet the recommendations of Professor Eileen Munro<sup>87</sup> and Sir David Norgrove.<sup>88</sup> Yet, recent research based on interviews with professionals and children,<sup>89</sup> suggests that although all EU Member States have committed themselves to ensuring that children's best interests are the primary consideration in any action that affects them, children's right to be heard, to be informed, to be protected and to non-discrimination are not always fulfilled in practice. UWE's research unfortunately undergirds this European trend.

Can we be sure that all professionals who work with children are acting in accordance with the latest statutory and other guidance both before and after the issue of proceedings? Are children and young people accessing this guidance and feeling reassured about what is happening and what they can expect? The guidance for professionals in relation to children has changed little over a number of years but there can be absolutely no room for complacency. As the Revised PLO<sup>90</sup> and local pre-proceedings protocols do not mention children specifically, there remains a real risk that children's rights, or at the very least, child-centred services, are not provided or monitored consistently during the pre-proceedings stage.

To what extent can children and young people access information themselves? Various websites provide information. The NSPCC's website<sup>91</sup> seems to be aimed at adults. Cafcass<sup>92</sup> and Cafcass Cymru<sup>93</sup> focus primarily (as is consistent with their main purpose) on what children and young people may wish to know about court proceedings and who makes the decisions. (They do, however, offer a number of resources that child and young people might find helpful.)<sup>94</sup> Childline<sup>95</sup> and Action for Children<sup>96</sup> describe the support that is available to children and young people but do not seem to mention pre-proceedings explicitly. Thus, whilst information exists, it largely focuses on proceedings rather than pre-proceedings. One notable exception is The National Youth Advocacy Service ('NYAS').<sup>97</sup> This offers 'a variety of services' including not only 'advocacy for children in care' but also advocacy for those in need – including children subject to child protection plans, care leavers, and children and young people with disabilities'.

UWE's research suggests that children suffer when parents and families are not fully engaged in pre-proceedings and court proceedings. The problem is not new. In 2007, Macdonald explained the roles of Section 41 and Section 1(3)(a) respectively of the Children Act 1989<sup>98</sup> in ensuring that the voice of the child be heard during proceedings under Part IV and that what was heard was acted upon. He added, 'The provisions for ensuring the efficacy of this process during the pre-proceedings stage are far more nebulous. Here, the voice of the child is often drowned out. A [pre-proceedings protocol] must provide a clear statement of the child's right to be treated as an individual and require the application of a fully consultative process for ensuring that the child's views are taken into account. It must be noted in this context that the representation of the child's interests independent of both the parents and the State at the pre-proceedings

stage must now be considered urgently if that pre-proceedings stage is to be Art 6 and Art 8 compliant.<sup>99</sup> This does not seem to have achieved.

We respectfully suggest that current primary and secondary legislation and practice affecting the exercise of children's rights, before, during or outside any court proceedings, is reviewed. This could include but not be limited to legal, social work and education practice in relation to:

- S1 Children Act 1989<sup>100</sup> (as amended by the Children and Families Act 2014<sup>101</sup>)
- S1 Adoption and Children Act 2002<sup>102</sup> (as amended by the Children and Families Act 2014<sup>103</sup>)
- S316 Education Act 1996<sup>104</sup> (as amended by Special Educational Needs and Disability Act 2001<sup>105</sup>)

**(9) Can you give us information about how the problem is approached in other legal systems?**

*You might have some information about how overseas legislatures have responded or how the court or tribunals approach the problem.*

A number of countries have incorporated the UNCRC directly into domestic law. Arguably, this helps to effect a shift from 'tokenism' towards 'child-centred justice' and 'respect for children's rights'.

To mark the 21st anniversary of UK ratification of the UN Convention on the Right of the Child on 16 December, the United Nations in 2012 commissioned a team from Queen's University Belfast to examine and identify lessons from the implementation of the UNCRC in other countries.<sup>106</sup> The report looked at the implementation of the UNCRC in countries<sup>107</sup> beyond the UK, compiling evidence on the most effective, practical and impactful ways of embedding children's rights into domestic law and policy development processes.

What follows is an extract from the executive summary of that Report:<sup>108</sup>

*9.1.1 Basis for analysis*

UNICEF UK commissioned Queen's University Belfast to study the legal and non-legal measures of implementing the UN Convention on the Rights of the Child (CRC) in 12 countries other than the UK. The aim is to analyse the most effective, practical and impactful ways of embedding children's rights into UK domestic law.

The research team selected the 12 countries to demonstrate the variety of ways in which countries with common or civil law legal systems have provided for children's rights at national level by taking steps to implement the CRC.

This study provides an international context to compare the current status in the United Kingdom, more specifically England, and the devolved jurisdictions of Northern Ireland, Scotland and Wales.

*9.1.2 Legal and non-legal measures of implementing the CRC*

The UN Committee on the Rights of the Child favours direct and full incorporation as the method of implementation, thus giving full legal effect to the binding commitments made by governments when ratifying the CRC.

Legal measures of CRC incorporation include:

- direct incorporation – the CRC is fully transformed into domestic law at either legislative or constitutional level
- indirect incorporation – other legal mechanisms (such as the duty on Welsh Ministers to have regard to the CRC) are used to give the CRC some effect in the domestic legal order
- sectoral incorporation – transposing relevant provisions of the CRC into relevant sectoral laws, such as those relating to education or family.

Non-legal measures refer to the processes that different countries can use to progress implementation of the CRC and include:

- national strategies and action plans for children
- child impact assessment processes to anticipate the impact of proposed laws, policies or budgetary allocations
- the establishment of children’s commissioners or ombudspersons, either as distinct offices or as part of a national human rights institution
- child budgeting or the identification, allocation and monitoring of resources spent on children and children’s services
- children’s rights training, awareness raising and capacity building for all those working with and on behalf of children
- the development and collection of data on children’s lives.

### *9.1.3 Research findings*

Successful CRC implementation is key to the realisation of children’s rights. However, while all States Parties to the CRC have committed to implementing its principles and provisions in law and practice, there is no single route to be taken. Few of the countries analysed during this research have fully incorporated the CRC into domestic law, but where this has happened, it has had significant effect.

### *9.1.4 The impact of incorporation*

CRC incorporation in and of itself is significant. The very process of incorporation raises awareness of children’s rights and the CRC in government and civil society. In countries where there has been incorporation (Belgium, Norway, Spain), interviewees felt that children were more likely to be perceived as rights holders and that there was a culture of respect for children’s rights. Whilst incorporation provided opportunities for strategic litigation given that the CRC was part of the domestic legal system, its main value was thought to be in the strong message it conveyed about the status of children and children’s rights, and the knock-on effects for implementation of children’s rights principles into domestic law and policy.

### *9.1.5 CRC principles as part of domestic law*

Integration of the CRC principles into domestic law was taking place across the countries analysed and appears to be increasing steadily over time. Article 3 of the CRC (the best interests of the child) was the general principle that was most likely to be represented in domestic law, and most commonly in areas of child protection, alternative care and family law but sometimes in areas such as juvenile justice (Ireland) and immigration (Norway).

Article 12 (the right of the child to have their views taken into account) was the next that was most likely to be included. This had the potential to have a strong impact in practice (Belgium, Norway).

### *9.1.6 The CRC in federated systems*

In many of the countries analysed, the State Party had signed and ratified the CRC, but the onus for ensuring its implementation in law, policy and practice rested with devolved or federated regions, which had significant responsibility for areas like education, health and social care (Australia, Belgium, Germany, Spain).

While all State Parties to the CRC have committed to implementing its principles and provisions in law and practice, there is no single route to be taken.

A recurring theme was the inconsistency of approaches or divergence in the commitment to the CRC across the different internal jurisdictions, with competence varying between regions thus leading to a lack of clear accountability for children's rights.

A recurring theme was the inconsistency of approaches or divergence in the commitment to the CRC across the different internal jurisdictions, with competence varying between regions thus leading to a lack of clear accountability for children's rights. In each country, certain areas were identified as being at the forefront of CRC implementation (such as Victoria in Australia, Catalonia in Spain, Berlin in Germany and, in different respects, the Flemish and French Communities in Belgium). However, there was an apparent risk that the duty on the State Party to ensure implementation was diluted in the transfer of responsibility to the regions, with the central government often limiting its role to monitoring and compiling the State Party's report.

### *9.1.7 Promotion and awareness raising of the CRC*

The need for CRC training and awareness was highlighted at every level from legislation to case law, and policy development to service provision for children, and effective implementation was contingent upon awareness of children's rights. This did not simply involve knowledge of the CRC articles or issues like child protection, but an understanding of children as the subject of rights, who are entitled to be treated with dignity and respect and to exert influence over their own lives.

### *9.1.8 Child rights monitoring bodies*

Most of the countries analysed had a Children's Commissioner or Ombudsperson. Each had varying powers and resources that were often not as extensive as those invested in the four UK children's commissioners. Where an Ombudsperson approach had been adopted (as in Norway, Spain and Ireland), it was considered that the ability for children to make complaints directly to the office for investigation played an important role in the enforcement of the CRC.

The Commissioner or Ombudsperson was also core to monitoring implementation over time, to holding government to account, and to ensuring consistency in the implementation of the CRC at times of political change.

### *9.1.9 National plans for children*

Almost all of the countries had a national plan for children, but not all have been kept current. National plans are most effective when accompanied by concrete action plans and targets. Even where national plans were not explicitly linked to implementation, it is clear that an ambitious national strategy can drive CRC implementation in particular areas (such as participation rights in Ireland).

#### *9.1.10 Comprehensive data on children*

Children's rights implementation is underpinned by comprehensive data, which needs to be collected in a systematic manner that identifies the most vulnerable categories of children, with change tracked over time. Several governments commission and/or publish useful official annual reports on the state of children's rights reports (Spain, Germany). Some have invested in data collection (such as the Growing up in Ireland study and Australia's Child Development Index) thus enabling an evidence base for policy development to be built up over time. However, in most instances, the focus was on key child development and well-being indicators, rather than the full range of children's rights. Attempts to develop and employ child rights indicators remain rare (South Africa is a notable exception).

#### *9.1.11 Children's participation*

Child participation was widely recognised as an important aspect of implementation of the CRC. In Norway and Belgium, the principle has been implemented in domestic law and policy, and there appears to be recognition that participation is required at all levels of decision making. These countries had relatively good examples of children's participation in individual decision making in the areas of child protection and alternative care, and in private family law matters.

Child participation appeared to be less systematic elsewhere, but there were significant examples of effective working in many contexts, including children's involvement in city-planning decisions (Melbourne, Australia), and embedding child participation in local authority decision making (Ireland). Ireland made an explicit commitment to listen to the views of children in national policy, which has clearly been instrumental in supporting a participation agenda across a whole range of governmental decision making.

#### *9.1.12 Child impact assessment*

There are good examples of child impact assessments being introduced in the legislative review process. Sweden, in particular, has had a system of child impact assessment for some years, as part of its wider national child rights strategy. More recently, the Flemish Region in Belgium has introduced an evaluation process, known under the acronym JOKER, which must be conducted for every draft decree that directly impacts the interests of young people under 25 years.

#### *9.1.13 Child budgeting*

There was a large amount of interest in child-specific budgets, but few examples of it in practice. South Africa was the exception. Here, researchers have been collaborating with the National Treasury to produce budgetary analysis of expenditure in relation to the implementation of child welfare legislation.

#### *9.1.14 Vulnerable children*

In all countries analysed, the most vulnerable groups of children (separated children, asylum-seeking children, indigenous children and children in conflict with the law) continued to fare less well in comparison to their peers. In several countries, interviewees suggested that separated children and asylum seekers were not seen as rights holders in the same way as other children. Some of the most effective forms of redress were perceived to lie in constitutional or domestic equality protections.



### 9.1.15 Building a child-rights culture

There were a number of factors linked to establishing a culture of children's rights, including:

- a general culture of respect for rights (Norway, Belgium, Germany)
- a growing respect for rights that had developed in the wake of conflict and reconstruction (Spain, South Africa)
- public opinion, the role of the media and their combined influence on the political system.

Three significant drivers were identified as leading to increased levels of implementation by building a culture of respect for children's rights:

- Strong non governmental organisation/voluntary sector
- Key children's rights advocates or supporters in government or public office
- CRC periodic reporting process.

#### **(10) Within the United Kingdom, does the problem occur in any or all of England, Wales, Scotland or Northern Ireland?**

Although sectoral laws in the UK may be UNCRC compliant, the problem could occur in any or all four devolved countries in the United Kingdom.

Despite the recommendations of the UN Committee on the Rights of the Child (Committee), the UNCRC has not been incorporated into domestic legislation and remains nonjusticiable in UK courts, and the UK has not ratified the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.<sup>109</sup>

It has been said that the UK government does not prioritise children's rights or voices in policy or legislative processes.<sup>110</sup>

That said, two of the four devolved countries in the UK (Wales and Scotland, respectively) have taken steps towards greater regard for the Convention or incorporation. There follows a short analysis of the position in each of the four countries.

#### *10.1 Wales*

Welsh Ministers have, since 2014, had to have regard to the Convention. Under Section 1 of the Rights of Children and Young Persons (Wales) Measure 2011<sup>111</sup>, Welsh Ministers are under a duty to have due regard to the requirements of—

- (a) Part I of the Convention,
- (b) articles 1 to 7 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, except article 6(2), and
- (c) articles 1 to 10 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

From the beginning of May 2012 until the end of April 2014, the Welsh Ministers had, in making any decision which falls within subsection (3), to have due regard to the requirements of Part I of the Convention and the Protocols.

A decision within subsection 3 was one about any of the following—

- (a) provision proposed to be included in an enactment;
- (b) formulation of a new policy;
- (c) a review of or change to an existing policy.

Under Section 5, there is a duty to promote knowledge of the Convention. The Welsh Ministers must take such steps as are appropriate to promote knowledge and understanding amongst the public (including children) of the Convention and the Protocols.

Evaluation:

The Measures are not equivalent to incorporation of the UNCRC into Welsh Law as the Convention is not superior to policy. Ministers have a due regard duty to the UNCRC under the Rights of Children and Young Persons (Wales) Measure 2011 but there is no due regard duty on public bodies.<sup>112</sup> Thus, the measures do not provide children with any new rights under domestic law, nor do they give children the right to seek help in the courts if their individual rights are violated. However, they are an important step forward in giving the Convention statutory force within the devolved nation of Wales.<sup>113</sup>

## 10.2 Scotland

Until recently, the position in Scotland mirrored that in Wales. However, on 16<sup>th</sup> March 2021, Members of the Scottish Parliament unanimously voted to incorporate the UNCRC into domestic law. The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill<sup>114</sup> (which will commence six months from Royal Assent), will require public authorities to comply with children's rights. More specifically, the Bill:

- directly incorporates the UNCRC as far as possible within the powers of the Scottish Parliament;
- makes it unlawful for public authorities and anyone undertaking functions or providing services to children with public money to act incompatibly with the incorporated UNCRC requirements;
- gives power to the Children's Commissioner to take legal action in relation to children's rights;
- requires Ministers to produce a Children's Rights Scheme setting out how they comply with children's rights and to report annually;
- requires listed public authorities to report every three years on how they comply with children's rights;
- gives children, young people and their representatives the right to go to court to enforce their rights, if necessary.

The Scottish Parliament has announced a £2.1 million programme over three years to help public authorities implement the legislation. This will include funding for guidance and training to help public authorities prepare for implementation, and work to empower children to claim their rights.<sup>115</sup>

Evaluation:

The new Bill should mean that the rights of children and young people will be legally protected and a part of everyday life, and that they and their representatives will be able use the courts in Scotland to enforce their rights.

### 10.3 Northern Ireland

In Northern Ireland, no measures have yet been taken to incorporate the UNCRC into domestic law. There is no legal requirement on government ministers to have due regard to the UNCRC, and, despite talk of a new Bill of Rights, no notable movement has been made to introduce the UNCRC into domestic law.

### 10.4 England

England, like Northern Ireland, has taken no measures to incorporate the UNCRC into domestic law. There is thus no legal requirement on government ministers to have due regard to the UNCRC. No notable movement has been made to introduce the UNCRC into domestic law.

### 10.5 Summary

Arguably, there will be a greater culture of children's rights in Wales and Scotland than in England and Northern Ireland, as a result of the measures adopted by the first two devolved countries. Although an evaluation of what they mean in practice would be invaluable to assess the extent to which children are more aware of their rights, are able to take appropriate steps to exercise and enforce them, it is argued that different laws and approaches across the UK is highly undesirable and that practice should be harmonised. It is argued that the most effective way of doing so is by incorporation of the UNCRC into domestic law.

#### **(11) What do you think needs to be done to resolve the problem?**

Given the amount of legislation that affects children and young people, the array of professionals involved in public and private children law matters, and the importance of consistent practice before, during and outside court proceedings, it is argued that this is an area fit for further enquiry by the Law Commission with a view, potentially, to recommending the direct incorporation of the UNCRC into English law. This could lead to a culture of children's rights, legal and political strength including a child impact assessment system and the invocation of the UNCRC in litigation.

#### **(12) What is the scale of the problem?**

As stated above, potentially, the voice of the child affects all children and young people prior to the issue of family court proceedings, during and outside family court proceedings, as well in relation to education, juvenile justice, welfare and immigration. Especially vulnerable groups, such as children from Black, Asian and minority ethnic backgrounds, children with disabilities, and refugee children, may be affected more severely.

#### **(13) What would be the positive impacts of reform? *Benefits derived from law reform can include:***

- (i) modernisation, for example, supporting and facilitating technological and digital development;*
- (ii) economic, for example, reducing costs or generating funds;*
- (iii) fairness, for example, supporting individual and social justice;*

*(iv) improving the efficiency and/or simplicity of the law, for example, ensuring the law is clearly drafted and coherent to those who need to use it;*

*(v) supporting the rule of law, for example, ensuring that the law is transparent;*

*(vi) improving access to justice, for example, ensuring procedures do not unnecessarily add to complexity or cost.*

*By way of example, when considering economic benefit, if the problem is one which must usually be resolved in court, court fees might be payable; this money might be saved if the problem was reformed. If it involves consulting a solicitor or barrister, legal costs might be relevant. Or, if the problem was one which caused significant costs to businesses, you might be able to tell us how much time or money businesses would save.*

*When seeking to address wider societal benefit, we are interested to hear your assessment of non-economic benefits. For example, will individuals have greater access to justice, will the reputation of legal services be enhanced, or will reform offer greater protection to victims of crime?*

The positive impacts of reform include:

- Fairness, for example, supporting individual and social justice –
  - Children and young people have a very strong sense of what is right and wrong, appropriate and inappropriate. They want to understand what is going on. When something is not right, they want and need to be able to confide in someone; they need to know that what they share will not be ‘re-shared’ without consent or justification. Children and young people need to know they have rights; professionals, members of the judiciary and members of the public need to recognise those rights and respect them. Reform of the law could ensure that a single, simple yet powerful message is sent to all. Children’s rights would be accepted as the norm. Children and young people should not look back and feel a sense of grievance about their treatment. Potentially children with disabilities would be consulted about proposals and decisions affecting them.
- Improving the efficiency and/or simplicity of the law, for example, ensuring the law is clearly drafted and coherent to those who need to use it –
  - The ‘welfare of the child’ is the court’s ‘paramount consideration’ under S1(1) Children Act 1989<sup>116</sup> (mirrored by S1(2) of the Adoption and Children Act 2002<sup>117</sup> and applicable to courts and adoption agencies). Both statutes require the court to have regard to the child’s ascertainable wishes and feelings (considered in light of his/ her age and understanding<sup>118</sup>). Nevertheless, the research suggests that in the field of children’s social care and pre-proceedings, there are multiple legal sources (including domestic legislation, rules of court, and pre-proceedings protocols) and considerations (including ethics, competencies and capacities) and that practice varies between practitioners and regions.
  - The Revised Public Law Outline applies nationally but many regions have adopted a local pre-proceedings protocol. One of the aims of pre-proceedings work is to divert cases from court where this is appropriate to do so. A senior judge, who took part in the research, stated that the court had a legitimate interest in what happened during the pre-proceedings stage.
  - Some solicitors who participated in UWE’s research seemed unaware of the existence of a local pre-proceedings protocol. Local authority practice varied between regions. None of the pre-proceeding protocols examined referred to children and young people explicitly. Interviews with Cafcass, lawyers, local authority managers and children and young people revealed differing ideas about

appropriate and acceptable practice. At present, children and young people seemed to be 'drowned out' in pre-proceedings. The law needs to be clear and coherent for all to ensure that the voice of the child is not lost, practice is consistent between professions (lawyers, social workers and Cafcass) and that practice is consistent geographically.

- Supporting the rule of law, for example, ensuring that the law is transparent -
  - The research indicated that children and young people, in particular, were unaware of their rights. They felt that they were 'pumped' for information about their families; what they said was repeated without their consent or was twisted (sometimes placing them in danger); their questions were not answered; they did not understand what was going on; and they had no privacy. They felt betrayed and angry about their treatment. The law needs to be transparent.
- Wider societal benefit –
  - Children and young people make up approximately one fifth of the population in England. Innumerable private and public law decisions are made every day about their education, care and other issues affecting their private lives.
  - As their capacities and competencies evolve, it is desirable and indeed necessary to afford children and young people opportunities to develop as citizens so that they are ready to play a role in society and in their communities in adulthood.<sup>119</sup>
  - Reform would ensure:
    - children and young people were not lost before, during or outside proceedings but were listened to and given an effective voice in matters that affect their entire lives;
    - progress towards a culture of children's rights. Impacts on children and young people would be assessed; and policy and strategy would be child-centred.

**(14) If this area of the law is reformed, can you identify what the costs or other negative impacts of reform might be?**

*The costs of reform might include, for example, increased administrative burden falling on business as a result of new regulatory requirements, or the costs and maintenance of creating a new oversight body. Non-economic costs might include reducing access to justice or unnecessarily increasing the regulatory burden on business.*

Full implementation of the UNCRC in the context of children's social care and pre-proceedings might necessitate focussed and documented discussions between social workers and children and young people; earlier involvement of Cafcass; separate legal representation funded by legal aid; and attendance at formal meetings with the local authority. The fiscal costs could be considerable. However, it is argued that the costs are warranted if a culture of children's rights and the broad aims of the UNCRC – which was, of course, ratified by the UK nearly 30 years ago - are to be achieved in practice, and if practice and procedure are not to cause needless suffering to children and young people.

**(15) Does the problem adversely impact equality, diversity and inclusion by affecting certain groups in society, or particular areas of the country, more than others? If so, what are those groups or areas?**

The problem adversely affects all children, but it is argued that children from Black, Asian and Minority Ethnic backgrounds are affected even more severely. Please see paragraph 7.3.5 above for examples.

The issue of cultural diversity within care proceedings has been the subject of scholarly enquiry and research, not least by Brophy<sup>120</sup> and Brophy and Jhutti-Johal.<sup>121</sup>

What about diversity during the pre-proceedings stage? In 2007, MacDonald<sup>122</sup> noted that many incidents of delay were rooted in a failure to identify and address issues of diversity sufficiently or at all during the pre-proceedings stage. One of the examples he cited included a failure to consider at an early stage the potential placement needs of minority ethnic children. This may be a resource issue as well as a training issue.

Percy-Smith<sup>123</sup> reminds us of the difficulty in collecting diverse views.

**(16) In your view, why is the independent, non-political, Law Commission the appropriate body to undertake this work, as opposed to, for example, a Government department, Parliamentary committee, or a non-Governmental organisation?**

The Law Commission<sup>124</sup> is the appropriate body to undertake this work. It is a statutory independent body which aims:

- to ensure that the law is as fair, modern, simple and as cost-effective as possible;
- to conduct research and consultations in order to make systematic recommendations for consideration by Parliament; and
- to codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes.

Its viewpoint is truly independent. It is not bound by Government policy. It listens and its enquiry is searching and genuine. Its recommendations may not be what is expected.

As explained above, giving children and young people an effective voice raises extremely complex issues. The Law Commission is ideally suited to dealing with such complexity and has already indicated an interest in considering Article 12 UNCRC.

A Government department is not an appropriate body to undertake this work because it will be bound by Government policy. Arguably, there has been a decline in children rights in recent years.<sup>125</sup> There is, for example, no longer a Permanent Secretary of State for Children and Families;<sup>126</sup> Vicky Ford was appointed Parliamentary Under Secretary of State for Children and Families at the Department for Education on 14 February 2020.<sup>127</sup>

General or select Parliamentary committees of either House<sup>128</sup> are not appropriate either. Although the House of Commons appoints General Committees on a routine basis to consider proposed legislation in detail, general committees do not review current law. A further problem is the political nature of parliamentary committees. Legislation committees reflect the political makeup of the House, and the government always has a majority. Thus, unless children's rights are high on the government's agenda and, arguably they are not,<sup>129</sup> they are unlikely to be advanced by a parliamentary committee.

There is a Commons Select Committee<sup>130</sup> for each government department, examining three aspects: spending, policies and administration. Although some Select Committees have a role that crosses departmental boundaries; or may look at any or all of the government departments; or have power to appoint outside specialist advisers paid by the day, it is argued that the array of issues highlighted in this paper would not be well-suited for consideration by a Select Committee.

For similar reason, it is argued that the subject-matter is not ideally suited to a Special Inquiry Committee of the House of Lords.<sup>131</sup> The subject-areas covered by Permanent House of Lords Select Committees do not appear suitable either.<sup>132</sup>

It is argued that non-governmental organisations ('NGO's) are not appropriate either. Although 'Save The Children'<sup>133</sup> is a non-governmental organisation accredited to the conference of states parties<sup>134</sup> and has, under Article 45a,<sup>135</sup> a direct role in overseeing the implementation of the UNCRC, it is not in a position to review English Law. It is doubtful that any other NGO would have the capacity or remit to review English Law either.

**(17) Have you been in touch with any part of the Government (either central or local) about this problem? What did they say?**

We have not been in touch with central Government about this problem.

We shared our findings with the local authorities which participated in the research, and we received an acknowledgement from two of them. We have not, however, discussed Article 12 UNCRC with any of them.

**(18) Is any other organisation such as the Government or a non-Governmental group currently considering this problem? Have they considered it recently?**

*If so, please give us the details of their investigation on this issue, and why you think the Law Commission should also look into the problem.*

In 2012, the Rights of Children UK Coalition ('ROCK'),<sup>136</sup> which is a coalition of voluntary organisations and individuals from across the UK, made the case for incorporation of the UNCRC into UK domestic law in its report entitled 'Why Incorporate? Making rights a reality for every child'.<sup>137</sup>

On 9<sup>th</sup> December 2020, the Children's Rights Alliance for England ('CRAE')<sup>138</sup> which protects children's human rights by lobbying government and others with power, issued a press release referring to a report entitled 'England Civil Society Submission to the United Nations Committee on the Rights of the Child to inform its List of Issues Prior to Reporting (LOIPR) 2020'.<sup>139</sup> The report contains warnings from 90 children's charities in England regarding a deterioration in children's rights since the UN last examined the issues in 2016. The lack of participation by children in decision-making is considered in section 6 of the report.

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<sup>1</sup> See The Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') which was signed by the UK in 1950 and adopted into domestic law via the Human Rights Act 1998; and the United Nations Convention on the Rights of the Child (1989) [online] Available from: <http://www.ohchr.org> which was ratified by the UK in 1991

<sup>2</sup> For an overview, see, for example, the 2015 Summary on The UK Constitution by the Political and Constitutional Reform Committee of the House of Commons

<sup>3</sup> See, for example, S1(1) Children Act 1989 (as amended by the Children and Families Act 2014); S1(4) Adoption and Children Act 2002 (as amended by the Children and Families Act 2014; Education Act 1996, c. 56 (as amended by the Special Educational Needs and Disability Act 2001, c. 10)

<sup>4</sup> See, for example, The Code of Ethics for Social Work © British Association of Social Workers

<sup>5</sup> See Practice Direction 12a - Care, Supervision and Other Part 4 Proceedings: Guide To Case Management ('Revised Public Law Outline')

<sup>6</sup> See The Code of Ethics for Social Work © British Association of Social Workers, and Hart, R. A. 1997, *Children's Participation: From Tokenism to Citizenship*, UNICEF

<sup>7</sup> S20 Children Act 1989 c. 41 (as amended)

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<sup>8</sup>Ibid

<sup>9</sup> S1(1) Children Act 1989 (as amended by the Children and Families Act 2014) and S1(4) Adoption and Children Act 2002 (as amended by the Children and Families Act 2014)

<sup>10</sup> S17 Children Act 1989 c. 41 (as amended)

<sup>11</sup> S47(1)(b) Children Act 1989 c. 41 (as amended)

<sup>12</sup> S31(2) Children Act 1989 c. 41

<sup>13</sup> See Practice Direction 12a - Care, Supervision and Other Part 4 Proceedings: Guide To Case Management ('Revised Public Law Outline')

<sup>14</sup> <https://dictionary.cambridge.org/dictionary/english>

<sup>15</sup> Thomas, N. (2008) *Towards a Theory of Children's Participation* *International Journal of Children's Rights* 15 (2007) 199–218

<sup>16</sup> See The Code of Ethics for Social Work © British Association of Social Workers

<sup>17</sup> Healy, K. *The skilled communicator in social work. The art and science of communication in practice*, London: Palgrave, 2018, 261 pp., £26.99 (pbk), ISBN 978113756484

<sup>18</sup> Kapur, R. *The Levels of Communication*

<sup>19</sup> <https://www.jacquelinehogan.com/your-guide-to-deep-communication/>

<sup>20</sup> *Coco v A N Clark (Engineers) Ltd* (1968)

<sup>21</sup> Clark, C. (2006) *Against Confidentiality? Privacy, Safety and the Public Good in Professional Communications* *Journal of Social Work*, vol. 6, 2: pp. 117-136. ,

<sup>22</sup> Hart, R. A. 1997, *Children's Participation: From Tokenism to Citizenship*, UNICEF

<sup>23</sup> Hemrica, J. and Heyting, F. (2004) *Tacit Notions of Childhood: An analysis of discourse about child participation in decision-making regarding arrangements in case of parental divorce*, SAGE Publications

<sup>24</sup> Thomas, N. (2008) *Towards a Theory of Children's Participation*, *International Journal of Children's Rights* 15 (2007) 199–218

<sup>25</sup> Young, L. M. (2000) *Inclusion and Democracy*, New York, Oxford University Press

<sup>26</sup> Bourdieu, P. (1992) *The Logic of Practice*, Cambridge: Polity

<sup>27</sup> Cleaver, E.(2001) *Institutions, Agency and the Limitations of Participatory Approaches to Development in* Cooke, B. and Kothari, U. (eds) *Participation: The New Tyranny?*, London: Zed Books

<sup>28</sup> Mosse, D. (2001) *People's Knowledge, Participation and Patronage: Operations and Representations in Rural Development* in Cooke, B. and Kothari, U. (eds) *Participation: The New Tyranny?*, London: Zed Books.

<sup>29</sup> Tisdall, K. and Davis, J. (2004) *Making a Difference? Bringing Children's and Young People's Views into Policy-making*, *Children and Society* 18(2), 131–142.

<sup>30</sup> Badham, B. (2004) *Participation—for a Change: Disabled Young People Lead the Way*, *Children and Society* 18(2), 143–154.

<sup>31</sup> Matthews, H. (2003) *Children and Regeneration: Setting an Agenda for Community Participation and Integration*, *Children and Society* 17(4), 264–276

<sup>32</sup> Percy-Smith, B. (2005) *'I've Had My Say, But Nothing's Changed!': Where to now? . . . Critical reflections on children's participation* Paper presented at Emerging issues in the Geographies of Children and Youth Conference, June 23–24, Brunel University, 'From Consultation to Social Learning in Community Participation with Young People', *Children, Youth and Environments* 16(2), 153–179. (Retrieved 25/04/2007 from <http://www.colorado.edu/journals/cye>)

<sup>33</sup> Thomas, N. (2008) *Towards a Theory of Children's Participation*, *International Journal of Children's Rights* 15 (2007) 199–218

<sup>34</sup> Tisdall, K. and Davis, J. (2004) *Making a Difference? Bringing Children's and Young People's Views into Policy-making*, *Children and Society* 18(2), 131–142.

<sup>35</sup> Percy-Smith, B. (2005) *'I've Had My Say, But Nothing's Changed!': Where to now? . . . Critical reflections on children's participation* Paper presented at Emerging issues in the Geographies of Children and Youth Conference, June 23–24, Brunel University, 'From Consultation to Social Learning in Community Participation



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with Young People', *Children, Youth and Environments* 16(2), 153–179. (Retrieved 25/04/2007 from <http://www.colorado.edu/journals/cye>)

<sup>36</sup> Thomas, N. (2008) *Towards a Theory of Children's Participation' International Journal of Children's Rights* 15 (2007) 199–218

<sup>37</sup> Begg, I. (2004) 'Participation Rights in Norway' in Crimmens, D. and West, A. (eds) *Having Their Say: Young People and Participation: European Experiences*, Lyme Regis: Russell House

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<sup>40</sup> Ibid

<sup>41</sup> Thomas, N. (2008) *Towards a Theory of Children's Participation' International Journal of Children's Rights* 15 (2007) 199–218

<sup>42</sup> Gallagher, M. (2008) *Foucault, Power and Participation*, *International Journal of Children's Rights* 16 (2008) 395–406

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<sup>45</sup> Stoecklin D. *Theories of action in the field of child participation: In search of explicit frameworks*. *Childhood*. 2013;20(4):443-457. doi:10.1177/0907568212466901

<sup>46</sup> Coyne, I. et al, *Children's participation in shared decision-making: Children, adolescents, parents and healthcare professionals' perspectives and experiences*, *European Journal of Oncology Nursing* 18 (2014) 273-280

<sup>47</sup> UNCRC (2009) [online] Available from: <http://www.ohchr.org>

<sup>48</sup> See Berrick, J. D., Dickens J., Poso, T., and Skivenes, M. (2015) *Children's Involvement in Care Order Decision-Making: A cross-country analysis*. *Child Abuse & Neglect* 49 pp. 128 – 141. The study was based on the questionnaires submitted by 772 child protection workers from four countries, namely Norway, Finland, England and the US. See also Archard, D. & Skivenes, M. (2010) *Deciding best interests: general principles and the cases of Norway and the UK*. *Journal of Children's Services* 5, 43 – 54. Available from: <http://dx.doi.org/10.5042/jcs.2010.0695>

<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Cossar, J. et al, 'You've got to trust her and she's got to trust you': *Children's views on participation in the child protection system*, *Child and Family Social Work*. Feb 2016,

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<sup>54</sup> Percy-Smith, B. (2014) *Reclaiming children's participation as an empowering social process*. In: Education, Childhood and Anarchism: Talking Colin Ward. Routledge, pp. 209-220.

<sup>55</sup> Hemrica, J. and Heyting, F. (2004) *Tacit Notions of Childhood: An analysis of discourse about child participation in decision-making regarding arrangements in case of parental divorce*, SAGE Publications

<sup>56</sup> Hart, R. A. 1997, *Children's Participation: From Tokenism to Citizenship*, UNICEF

<sup>57</sup> Report from the Children's Commissioners of the United Kingdom of Great Britain and Northern Ireland (UK) to the United Nations Committee on the Rights of the Child's development of the List of Issues Prior to Reporting related to the UK's Combined Sixth and Seventh Periodic Reports under the UN Convention on the Rights of the Child (UNCRC) December 2020

<sup>58</sup> The United Nations Convention on the Rights of the Child: a study of legal implementation in 12 countries by Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, Queens University Belfast, <https://www.unicef.org.uk/publications/child-rights-convention-2012-report>

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- <sup>59</sup> See <https://www.nuffieldfjo.org.uk/wp-content/uploads/2021/05/1D-Cafcass-Plus-A-Kemp.pdf>
- <sup>60</sup> See Handley, G. and Doyle, C (2012) Ascertaining the wishes and feelings of young children: Social workers' perspectives on skills and training, *Child & Family Social Work*
- <sup>61</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') was signed by the UK in 1950 and adopted into domestic law via the Human Rights Act 1998.
- <sup>62</sup> Article 8, ECHR [online] Available from: <http://www.echr.coe.int>
- <sup>63</sup> Article 6, ECHR [online] Available from: <http://www.echr.coe.int>
- <sup>64</sup> See Brophy, J. (2014) *Irreconcilable differences? Young people, safeguarding and the 'next steps' in 'transparency'*. *Family Law Journal* [online] Vol 44 No 12 pp1653-1784 and Brophy, J. (2015) *Children's Privacy*, *Family Law Journal* [online] Vol 45 No 11 pp 1297-1428
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- <sup>67</sup> Education Act 1996, c. 56 as amended by Special Educational Needs and Disability Act 2001, c. 10
- <sup>68</sup> Children Act 1989 (as amended by the Children and Families Act 2014)
- <sup>69</sup> Adoption and Children Act, c. 38 (as amended by the Children and Families Act 2014)
- <sup>70</sup> Child-friendly justice: perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States', Report of FRA European Union Agency for Fundamental Rights, May 2015 [online]. Available from: <http://fra.europa.eu/en>. Also available from the Luxembourg: Publications Office of the European Union.
- <sup>71</sup> The UK ratified the UNCRC in December 1991. The Child's Rights Alliance for England is a good source of further information. See <http://www.crae.org.uk/childrens-rights-the-law/laws-protecting-childrens-rights/un-convention-on-the-rights-of-the-child/>.
- <sup>72</sup> Article 3 UNCRC [online]. Available from: <https://www.unicef.org.uk>
- <sup>73</sup> Article 12(1) and (2) UNCRC [online] Available from: <https://www.unicef.org.uk>
- <sup>74</sup> UNCRC (2009) [online] Available from: <http://www.ohchr.org>
- <sup>75</sup> Council of Europe (2010) *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, Strasbourg, Council of Europe Publishing.
- <sup>76</sup> Council of Europe Guidelines on child-friendly justice, Section IV A 1, *ibid*.
- <sup>77</sup> Child-friendly justice: perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States', Report of FRA European Union Agency for Fundamental Rights, May 2015 [online]. Available from: <http://fra.europa.eu/en>. Also available from the Luxembourg: Publications Office of the European Union.
- <sup>78</sup> *Ibid*.
- <sup>79</sup> *Ibid*.
- <sup>80</sup> See, for instance, paragraphs 5-9 inclusive of the Executive Summary.
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- <sup>83</sup> The 2015 guidance updated 'Working Together to Safeguard Children 2013'.
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- <sup>85</sup> *Ibid*: [https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/GUIDE\\_Young\\_Persons\\_Guide\\_to\\_Keeping\\_Children\\_Safe.pdf](https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/GUIDE_Young_Persons_Guide_to_Keeping_Children_Safe.pdf).

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<sup>86</sup> HM Government (2015) *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* [online]. Available from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/592101/Working\\_Together\\_to\\_Safeguard\\_Children\\_20170213.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592101/Working_Together_to_Safeguard_Children_20170213.pdf).

<sup>87</sup> Child-friendly justice: perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States', Report of FRA European Union Agency for Fundamental Rights, May 2015 [online]. Available from: <http://fra.europa.eu/en>. Also available from the Luxembourg: Publications Office of the European Union.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> NSPCC (2017). Available from: <https://www.nspcc.org.uk/>

<sup>92</sup> Cafcass (2017). Available from: <https://www.cafcass.gov.uk/>

<sup>93</sup> Cafcass Cymru (2017) Available from: <http://cafcass.gov.wales/>

<sup>94</sup> See

<https://www.cafcass.gov.uk/teenagers/other-children-young-peoples-stories/people-are-trying-to-make-sure-im-safe.aspx>

<sup>95</sup> Childline (2017). Available from: <https://www.childline.org.uk/>

<sup>96</sup> Action for Children (2017). Available from: <https://www.actionforchildren.org.uk/>.

<sup>97</sup> NYAS (2017). Available from: <https://www.nyas.net/>

<sup>98</sup> The current version of this section has been in force since 22<sup>nd</sup> April 2014.

<sup>99</sup> Council of Europe (2010) *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, Strasbourg, Council of Europe Publishing.

<sup>100</sup> Children Act 1989, c. 41

<sup>101</sup> Children and Families Act 2014, c. 6

<sup>102</sup> Adoption and Children Act, c. 38

<sup>103</sup> Children and Families Act 2014, c. 6

<sup>104</sup> Education Act 1996, c. 56

<sup>105</sup> Special Educational Needs and Disability Act 2001, c. 10

<sup>106</sup> The United Nations Convention on the Rights of the Child: a study of legal implementation in 12 countries by Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, Queens University Belfast, <https://www.unicef.org.uk/publications/child-rights-convention-2012-report>

<sup>107</sup> The 12 countries were Australia, Belgium, Germany, Ireland, Norway, Spain; Canada, Denmark, Ireland, New Zealand, South Africa and Sweden. Primary data was collected in relation to the first 6 countries; secondary data was collected in relation to the last 6 countries.

<sup>108</sup> The United Nations Convention on the Rights of the Child: a study of legal implementation in 12 countries by Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, Queens University Belfast, <https://www.unicef.org.uk/publications/child-rights-convention-2012-report>

<sup>109</sup> Report of the Children's Commissioners of the United Kingdom of Great Britain and Northern Ireland to the United Nations Committee on the Rights of the Child, December 2020

<sup>110</sup> Ibid

<sup>111</sup> <https://www.legislation.gov.uk/mwa/2011/2/contents>

<sup>112</sup> Report of the Children's Commissioners of the United Kingdom of Great Britain and Northern Ireland to the United Nations Committee on the Rights of the Child, December 2020

<sup>113</sup> See 'Why incorporate? Making rights a reality for every child.' (2012) Rights of the Child UK Coalition ('ROCK')

<sup>114</sup> <https://www.gov.scot/news/landmark-for-childrens-rights/>

<sup>115</sup> <https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>

<sup>116</sup> S1(1) Children Act 1989, c. 41

<sup>117</sup> S1(2) of the Adoption and Children Act 2002, c. 38

<sup>119</sup> Hart, R. A. 1997, *Children's Participation: From Tokenism to Citizenship*, UNICEF

<sup>120</sup> S1(3) Children Act 1989, c. 41; and S1(4) of the Adoption and Children Act 2002, c. 38

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<sup>121</sup> Brophy, J. and Jhutti-Johal, J. (2008) *Care proceedings and minority ethnic families* in Thorpe, L.J. and Singer, S. Integrating Diversity. Bristol: Family Law.

<sup>122</sup> Council of Europe (2010) *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, Strasbourg, Council of Europe Publishing.

<sup>123</sup> Percy-Smith, B. (2005) *'I've Had My Say, But Nothing's Changed!': Where to now? . . . Critical reflections on children's participation* Paper presented at Emerging issues in the Geographies of Children and Youth Conference, June 23–24, Brunel University, 'From Consultation to Social Learning in Community Participation with Young People', Children, Youth and Environments 16(2), 153–179.)

<sup>124</sup> <https://www.lawcom.gov.uk>

<sup>125</sup> See, for example, <http://www.crae.org.uk> and [http://www.crae.org.uk/media/129724/CRAE\\_LOIPR\\_09-DEC-20.pdf](http://www.crae.org.uk/media/129724/CRAE_LOIPR_09-DEC-20.pdf)

<sup>126</sup> <https://www.gov.uk/government/ministers/minister-of-state-children-and-families>

<sup>127</sup> <https://members.parliament.uk/member/4674/contact>

<sup>128</sup> <https://committees.parliament.uk>

<sup>129</sup> [http://www.crae.org.uk/media/129724/CRAE\\_LOIPR\\_09-DEC-20.pdf](http://www.crae.org.uk/media/129724/CRAE_LOIPR_09-DEC-20.pdf)

<sup>130</sup> <https://committees.parliament.uk>

<sup>131</sup> Ibid

<sup>132</sup> Ibid

<sup>133</sup> <https://www.savethechildren.org.uk>

<sup>134</sup> <https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the-convention-on-the-rights-of-persons-with-disabilities-2/list-of-non-governmental-organization-accredited-to-the-conference-of-states-parties.html>

<sup>135</sup> Article 45a United Nations Convention on the Rights of the Child 1989

<sup>136</sup> <http://www.rights-of-the-child.org.uk/about-rock/>

<sup>137</sup> See also: 'Why incorporate? Making rights a reality for every child.' (2012) Rights of the Child UK Coalition ('ROCK')

<sup>138</sup> <http://www.crae.org.uk>

<sup>139</sup> [http://www.crae.org.uk/media/129724/CRAE\\_LOIPR\\_09-DEC-20.pdf](http://www.crae.org.uk/media/129724/CRAE_LOIPR_09-DEC-20.pdf)