Many jurisdictions adopt, as their touchstone in resolving parenting disputes, the ‘best interests of the child’ principle. The difficulties in applying this concept are well known. In many instances its application is shaped by mandatory considerations, one common consideration being the child’s wishes and views. Incorporating the views of children in the family law process is not contentious; however there has been much discussion as to how to obtain, and interpret, those views and wishes. In particular, there are diverse opinions on whether children should talk directly to judges. This is the case, even though there is mounting evidence that children’s interests are advanced by more direct participation.

In Australia judges can, and sometimes do, meet with children outside of the courtroom. However, children can only give evidence or even be present in court with the consent of the judge, which is rarely given. The reticence of the Australian judiciary to embrace direct participation of children has recently been highlighted by the work of Fernando, whose survey of judges confirmed what was generally understood; namely, that very few Australian judges interview children and many are strongly opposed to the practice. In place of direct communication between children and judges, the common way of bringing the voice of the child into court is the use of reports by social scientists (what is known in Australia as a Family Report). However, there continues to be concern expressed as to whether this is the optimal way of including children’s voices.

Not all Australian family court judges are, however, opposed to the practice. In adding to the growing literature on the benefits of direct communication with children, and in assessing any adverse consequences of the practice, it is instructive to reflect on the experiences of judicial activists in this area. In Australia, the most vocal member of the judiciary in favour of this practice has been The Honourable Alastair Nicholson AO, RFD, QC, former Chief Justice of the Family Court of Australia. Nicholson was one of few judges to support and adopt this practice.

In this article we will focus on the experiences of one of Australia’s leading family law judges to shed further light on the difficult, and unresolved, question of children’s participation in parenting disputes. We apply a common

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*** The Hon Alastair Nicholson AO RFD QC is the former Chief Justice of the Family Court of Australia.
1 We are not discussing here the possibility of children being heard formally in court, but rather being interviewed by the judge as part of the decision making process.
4 Children’s wishes and views may also be provided through an ‘independent children’s lawyer’ if one is appointed, see M Fernando, note 2 above, pp 50-51.
5 M Fernando, note 2 above.
method in the social sciences called Key Informant Technique. It is a qualitative ethnographic research method with the advantage of generating high quality data in a limited period of time from an expert source of information. Several criteria have been suggested for such a source such as: role in community, knowledge, willingness, communicability and impartiality. The core of the article therefore reflects an interview with our selected key informant, Justice Nicholson, who can be construed as an ideal such informant for this topic. The article does not purport to provide any empirical or measurable data on the topic. Rather, it focuses on His Honour's personal reflections on this issue, drawn from a lifetime career in Australia’s family law courts. Moreover, given that participation of children is relevant to all parenting cases, the discussion sets the issue within the broader context of the difficulty of making parenting decisions under the best interests model.

Nicholson has stood out amongst his peers as a judge open to the idea of interviewing children, and even more rarely, prepared to do it. The current Chief Justice, Diana Bryant, does not share Nicholson’s enthusiasm for the practice, although she is currently considering studies to examine whether there are better ways of conveying to children that the views that they expressed were in fact taken into account. Given the degree of judicial discomfort with this practice evidenced in Fernando’s survey, it is timely to reflect on the experiences of a strong advocate for children’s rights. His insights provide further support to weight, ‘such as the child’s maturity or level of understanding’. However, since 2006 this consideration (like most others) has moved from being one in a general list, to one in a list of ‘additional’ matters. ‘Primary considerations’ are now promoting meaningful parental/child relationships and protecting children from abuse. There have been judicial statements to the effect that, in certain cases, additional considerations may outweigh primary considerations; nonetheless, as a matter of pure statutory interpretation, the fact that children’s wishes are an additional, and not primary, consideration arguably must have some impact on the exercise of discretion.

Australian case law has long established that a child’s wishes cannot be discounted simply on the basis of age alone, and that, where a child’s wishes are not followed, explicit judicial reasoning must be provided. There has not been any research on the extent to which children’s wishes have impacted on outcomes; debate in Australia has focussed rather on the relative merits of introducing the wishes of children through third parties as opposed to judges talking directly with children.

There are three main ways the wishes of children can be introduced in Australian family courts. All matters going to trial will have a Family Consultant appointed, and that court based social scientist will very often be charged with incorporating into their report to the court any wishes of the child and their recommendations as to those wishes. In some, but not all, cases, an Independent Children’s...
Lawyer will be appointed, and they must advise the court of any wishes of the child, and can make recommendations in that regard. Finally, the FLA contemplates the possibility of children talking directly with judges, a practice known as ‘judicial conferencing’. As Fernando has confirmed with her recent empirical work, this is very uncommon, and the specific provision dealing with it has in fact recently been removed from the Family Court Rules. Nonetheless, it is open to decision makers, subject to meeting the requirements of procedural fairness, to speak directly with children.

In terms of the Australian experience, Fernando points to the following arguments in favour of judicial conferencing as a complement to Family Reports:

- Clarification of evidence
- Introduction of current and important information that might not otherwise come before the court
- Ensuring decisions are made on the best available evidence
- Improved probative value of children’s evidence by avoidance of a ‘filtering’ process
- Direct contact with a child may enhance judicial focus on the particular child’s needs and best interests and the judge can discuss with them possible parenting options
- Reducing delay in urgent matters
- Meeting the (documented) desires of children to meet with decision makers, which has been shown to benefit children
- Recognition of children’s rights as set out in international law

On the other hand, there is concern, including amongst family court judges themselves, that judges lack the expertise to take and interpret the evidence of children. Further, judges are hesitant about children being further enmeshed in parental conflicts and being subjected to increased parental manipulation. There are also the obvious concerns about ensuring procedural fairness when information that may be heavily relied upon by a judge is not taken in the more typical, formal way.

While Fernando’s survey of Australian judges found a degree of openness to the practice of judicial conferencing, this was more theoretical than real (given its rarity) and 30% of respondents were implacably opposed to the practice. It is only with a change in judicial attitude that there is likely to be a change in practice in Australia. Indeed, if one looks across to Australia’s near neighbour, New Zealand, a very similar legislative regime has seen much greater use of direct participation of children, arguably because of greater judicial support for this concept.

Given the crucial role that the attitude of judges plays in Australia in this regard, in the remainder of this paper we will focus on Justice Nicholson’s experiences and views.

A judge’s experience

Alastair Nicholson was Chief Justice of the Family Court of Australia for 16 years, retiring in 2004. His Honour is recognised as a leading international campaigner for children’s rights and was founding patron of Children’s Rights International; he is now Chair of the Board of that organisation. Both during his time as Chief Justice and since his retirement, Nicholson has spoken out publicly in support of concrete action being taken both in Australia and overseas to advance children’s rights. Unlike many others on the bench, Nicholson was known to support judicial conferencing, both in theory and in practice.

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17 Under FLA s 68L a lawyer for the child can be appointed by the court; this lawyer does not act for the child, but rather advocates for the child’s best interests; see N Ross, ‘Legal Representation of Children’ in G Monahan and L Young (eds), Children and the Law in Australia, LexisNexis, Sydney, 2008, pp 551-3.
20 M Fernando, note 3 above, p 66.
21 ibid, pp 68-71.
22 ibid, pp 67.
23 In a study conducted of cases heard between 2001 and 2005, 41.5% of cases included a judicial interview with a child: P Tapp, ‘Judges are Human Too: Conversation Between the Judge and a Child as a Means of Giving Effect to Section 6 of the Care of Children Act 2004’ (2006) NZLR 35.
24 M Fernando, note 3 above, pp 53-54. See also the discussion in M Fernando, note 2 above.
practice. In this sense, therefore, he is something of a rarity, and can provide insights into the practical benefits of the process and reflect on the perceived dangers. The following discussion reflects the comments of Nicholson in an interview that raised broad questions about judicial conferencing within the Australian legislative context for resolving parenting disputes more generally.

The inherent difficulties in applying the best interests principle

Incorporating the views of children is part of the general process of determining the best interests of a child. Nicholson stressed the difficulties in applying this notoriously nebulous concept; in practice, he says, one is often faced with determining what is the ‘least worst’ alternative for the child²⁵. While Australian family law legislation provides a checklist of circumstances to be taken into account, such a list can only ever assist to a degree, given the very different circumstances of each case. At best it can give some rough guidance as to the types of things that the parliament thought a decision maker²⁶ ought to take into account in parenting disputes.

However, as Nicholson points out, to a decision maker it may sometimes seem easier to determine whether something is not in the child’s best interest, rather than whether something is. There are some things that a decision maker may feel instinctively or otherwise know are not good for the child. A current parenting regime may not, on any test, appear to a decision maker to be the best arrangement for a child; however, in working out what is best, an Australian family court decision maker must usually²⁷ give significant consideration to shared parenting, which was superimposed onto the question of what arrangement is in a child’s best interests by the 2006 reforms. In reconciling the statutory considerations, a true inquiry into the child’s best interests may be lost, suggests Nicholson.

The inherent difficulty in applying the best interests of the child test stems both from its cultural relativity and from the possibility of natural ‘bias’ on the part of any decision maker. All decision makers, and particularly those exercising a discretion, as is usually the situation in family law cases, are inevitably affected by their own background and experience. Nicholson notes there is a clear risk that a decision maker will be influenced by their personal notion of what is good for children, whether or not they understand this forms a part of their decision making process. Nicholson considers that there is a real need for judicial education in this area to enable judges to recognise and have regard to this problem. Considerable work on this issue was done by the Western Judicial Education Centre in Canada and in the late 1990s a number of Australian judges, including Nicholson, participated in courses conducted by that Centre, both in Canada and Australia, which addressed this problem.

An obvious situation where such a bias might arise is in a case where the contest for parenting rights is between an indigenous and non-indigenous parent. Decision makers will invariably be white and middle aged; the potential for that decision maker to exhibit a preference for a non-indigenous caregiver is evident. Indeed, this is precisely why Nicholson was instrumental in persuading a previous Attorney-General that the best interests checklist should include very specific direction about the consideration of issues particular to indigenous culture²⁸. There are however many other cases where this situation applies.

Nicholson’s comments on the inherent difficulties of applying the best interests test highlight the need for decision makers to have the best, most current, information on which to base their decisions; judicial interviews with children are recognised as providing a potential benefit in this regard²⁹. On the one hand, Nicholson reminds us of the need for exercising caution in relying on the unfettered exercise of judicial discretion to ensure that the best possible decisions are made. The statutory guidelines are complex and bias (in a general sense) is a natural part of all decision making. Indeed, a preconceived notion by a judge as to what might be best

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²⁵ The notion of choosing the least worst outcome was raised in the seminal work of J Goldstein, A Freud and A Solnit, Beyond the Best Interests of the Child, 1973, Free Press, New York.

²⁶ Parenting decisions in Australia may be made by a range of judicial officers.

²⁷ Shared parenting must be actively considered by every decision maker where they have decided to order that the parents have ‘equal shared parental responsibility’ (ESPR): FLA, s 65DAA. ESPR is the equivalent to what was once called ‘guardianship’ in Australian law; it is the responsibility for major long-term issues affecting the child e.g. education, name, major medical decisions etc. Prior to 2006 guardianship was routinely joint, and since 2006 there has been a rebuttable presumption in favour of ordering ESPR: s 61DA. Thus, in many cases, ESPR will be ordered, and so shared parenting must be considered.

²⁸ FLA, ss 60CC(3)(h) and 60CC(6).

²⁹ Fernando highlights this as one of the advantages of judicial conferencing: M Fernando, note 2 above, p 53.
for a child, might best be reality checked by talking directly to a child about what they see as the best outcome. Nicholson’s comments also highlight that the legislative provisions should be focussed on the process of gathering relevant evidence, rather than on prescribing consideration of particular parenting regimes regardless of the circumstances. This latter point is particularly forceful given the growing body of evidence challenging the benefit to children of the inclusion of legislative provisions that require mandatory consideration of particular models of shared parenting.

The judge’s ultimate dilemma

Nicholson identifies two circumstances that stand out as presenting particular difficulties when making a parenting decision. These sets of circumstances appear as diametric opposites. The first is where both parents present as decent people and where each of them on their own would make an excellent parent for the child. The one flaw the parents exhibit is their inability to agree on a reasonable parenting arrangement. Such a scenario, says Nicholson, has the danger of leading to what might be described as the easy way out – ‘sharing’ the child. Such an outcome is intuitively attractive and difficult to avoid under the current Australian legislative regime, which prioritises shared parenting; moreover, not reaching such a conclusion could lead to the child being unnecessarily deprived of the real value that might be derived from the child spending more time with one or other parent.

Nicholson is alluding to the fact, however, that sharing the child may not truly be a decision as to the best interests of the child, which may be better advanced by some other parenting arrangement were it possible for these parents to facilitate such an arrangement. For example, Nicholson points out that there are cases where such ‘good’ parents have diametrically opposed parenting styles to the point where a shared parenting arrangement leads to confusion and uncertainty on the part of the child when he or she is transported from one household to the other. It is often said that hard cases make bad law; in family law, finely balanced cases have the potential to lead to less good decisions for children than in cases where the outcome is more obvious. At least in this scenario, however, the dangers to the child of a less than perfect outcome are less concerning than one might imagine in Nicholson’s alternate scenario.

At the other extreme, and a case where an imperfect outcome due to the difficulty of the case presents much greater risks to children, is the situation where there has been an allegation of sexual abuse against one of the parents. As Nicholson stresses, these are the kinds of hard cases where often a ‘least worst’ outcome has to be chosen by the decision maker. Very often a decision maker will be left with a situation where abuse is not proved, but there is a disconcerting possibility that abuse has occurred. As many commentators have noted, the dangers of excluding a child from contact with a parent in circumstances where no abuse has occurred have to be weighed against the risk of permitting contact where abuse has occurred. A corollary of this problem is the risk that the allegation of abuse has been falsely made by the other parent. If this is the case (and this can be very difficult to establish) it will tell strongly against such a parent having care and control of the child. The stark reality is that, either way, the wrong decision could have disastrous implications for the child.

Nicholson’s scenarios highlight the limitations of a process that seeks to predict - at one point in time - best outcomes for children based on often imperfect past evidence. That is a very tall order, at least if one expects best possible outcomes for children. And it will invariably be the hardest of all cases that end up being resolved in court; when the evidence falls such that a Solomon’s choice has to be made, one wonders whether an outsider might look at the process and consider it to be something of a lottery.

Given this, it might also seem strange to an outsider that the person most directly affected by such ‘line-ball’ decisions is not directly heard in court. Both cases present scenarios where it might be argued that the proper and timely inclusion of direct input from children might increase the chance of the decision maker coming down on the best side for the child.

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32 As to the likelihood of false allegations, and the actual difficulty of disproving them, see L Young, Child sexual abuse allegations in the Family Court of Western Australia: An Old Light on an old problem, (1998) 3 Sister in Law 98.
The adversarial system – part of the problem?

Justice Nicholson noted that, in his experience, one worrying aspect of the adversarial approach to child proceedings was that it often led to undue focus on trivial or irrelevant disputes about past events; the best interests of the children could be subsumed as the parents engaged in a cathartic exercise in which each sought to show the other one up. The nature of the adversarial system was such that it was very difficult for the judge to interfere. In addition, an overly adversarial approach had the disadvantages of increasing costs for parties and exacerbating the levels of aggression between them. Evidential objections would be raised based on very technical grounds. All of this had the potential to distract the court from the real issue, which was what was best for the children in the future.

The 2006 reforms to the FLA included amendments designed to reduce the adversarial nature of parenting disputes (known as the ‘less adversarial trial’ (LAT)). The LAT was introduced after a project run by Justice Nicholson and was inspired by a model from Germany. The German model, which departs considerably from models in jurisdictions with an historical preference for adversarial style litigation, provides the opportunity – from the very outset of the matter - for the judge to have contact with the child. Moreover, special consideration is given to this occurring in a physical space (including outside the court) that is less confronting for the child in question.

The Australian program lacks these particular child oriented features and this is arguably one of its weaknesses. However, the more child oriented approach that it does involve has allowed for the parties to be brought together with their lawyers, and a judge/magistrate, right at the start of the process, and only after dispute resolution has been unsuccessful. The ultimate decision maker is then able to define the issues more directly involvement of the parties – this helps to avoid a purely legal defensive response. By allowing much greater judicial control over proceedings, from the very start the decision maker can identify the relevant evidence required and the relaxation of the rules of evidence afforded under a LAT provides greater judicial flexibility.

Justice Nicholson’s early experience with the LAT process was that there was a startling increase in the appreciation of the parties of the true nature of child proceedings and a feeling that the essential issues were really being faced. At the same time, however, Nicholson notes that from the outset, some of the more ‘traditional’ judges – and also some lawyers – struggled with the breadth of the changes and were keen to find ways to move back into their comfort zone – namely a more adversarial hearing.

The LAT provides a very real opportunity for more direct participation of children in parenting disputes. Decision makers are involved at the outset, have more control over the process and evidence and can assess when and what input might assist from a child. While there has been no research to date specifically focusing on the impact of the LAT as distinct from the trial models of a LAT that preceded it, there are still significant obstacles as Fernando’s research suggests, to its extension in a manner that more directly follows the German model.

One major defect of the LAT as incorporated into the FLA was that its use is optional at the direction of the trial judge or magistrate. Nicholson reports that judges have told him that the LAT places a much higher degree of responsibility upon the trial judge and requires a much higher degree of involvement by the judge in the process of the trial than is the case in an adversarial trial. While many judges relish this opportunity, there has been a natural tendency for some judges who are set in their ways or who are less energetic to revert to the adversarial system, often encouraged by lawyers appearing before them who lose most of their control over the litigation under the LAT.

Some judges and former judges have resented the suggestion that they see as implicit in the LAT, that family court trials have been unsatisfactory in the past, and which minimises their contribution to the development of family law. This is an unfortunate response as what lies behind the LAT is not a criticism of those who made the best of the previous system but rather an attempt to improve that system by changes in the law that take the best from other systems and incorporate them into Australian family law.

The judge talking to a child: one judge’s experience

As indicated above, talking directly to a child in chambers in family law cases is permissible in Australia,
however remains uncommon. Justice Nicholson confirms that it has been a deliberate practice in Australia over the years not to involve children directly in the proceedings, relying rather on reports from counsellors; judges have an historical track record of being very wary about talking to children. However Nicholson considers that judicial interviews with children should be an essential concomitant of the LAT.

Two main concerns, as indicated above, about judicial conferencing are procedural fairness and lack of judicial skill in interviewing children. In relation to procedural fairness, Justice Nicholson confirmed that prior to the 2006 reforms, judicial wariness about interviewing children was motivated, at least in part, by concerns that decisions should not be made on material that was not put to the parties. Justice Nicholson pointed out, however, that there were always ways of dealing with this issue. It was open to the judge to see and talk to a child, then to go back into court, report what the child had told the judge and provide the parties with an opportunity to respond. Another approach, which he has used, has been to ask the children if they would be prepared to talk to a family counsellor (it would now be a Family Consultant) and convey to them what they have told the judge. If the children agree, a further report from the Family Consultant would be ordered which would permit the information to be introduced to the court in a legally admissible form.

Nicholson acknowledges the difficulties with interviewing children and in particular the need to disclose what they have said to the parents. He noted this was not always what children wanted and this could leave a judge in a problematic situation where he/she could not be specific about the information that led to their ultimate decision. Justice Nicholson also highlighted the importance, in deciding whether to interview a child, of assessing whether the parents would be able to accept what has been divulged so as to avoid negative consequences for the children.

Nicholson accepts that the reaction of parents to what children reveal to a judge will of course depend much on their character. However, he reported that some parents were quite pleased that the children had had the opportunity to participate in the process. Indeed, in his experience, there seemed rarely to be any real hostility by parents to a judicial conference with the child. Indeed, his Honour went on to say that parents may, in fact, be suspicious of what the Family Report says; however, if it is confirmed by what the child says to the judge, this can improve the situation somewhat for the parents. This in turn may make it easier for parents to reach an agreement.

Of course, on some occasions what a child reports to a judge can be very confronting and disappointing for some parents. Nicholson points out that judges are cognisant of the possibility of children being punished or reprimanded for the views expressed by them, however, this can arise whether they have spoken to a judge or a Family Consultant. As the court has no contact with the family after the decision is made there is little opportunity to know if this has occurred and this is obviously something that is very difficult for judges to reconcile.

In this respect, Justice Nicholson points out that a decision can be based on what the children say to a judge they want, without disclosure of precisely what has been said. However, as Justice Nicholson points out, if the child has expressed his or her wishes clearly, whether to a Family Consultant, a judge or an ICl, the judge must still explain their reasoning in their decision and why the wishes of the child are not being followed, where this is the case. In Nicholson’s view, the older the child the more extended the explanation should be. Thus, there will always have to be disclosure to some degree.

As has been noted, research is supporting the conclusion that there are benefits for children in being permitted an interview. Nicholson’s experience confirms this; he found children appreciated being able to talk to the actual decision maker. They appreciated being consulted in something that fundamentally affected them, even if their view did not prevail. The fact that the judge was prepared to have a conversation with them and to explore their views and took those into account made for a very positive experience for them.

In relation to the issue of lack of judicial skill, Nicholson accepts that the way an interview is carried out is crucial. Children need to feel at ease and so, while they can be seen in rooms inside the court, it may be appropriate to see them in another more neutral environment. However he notes that the lack of judicial conferencing contributes to a judge’s lack of experience. Judges may then be left to rely on their own personal experiences of parenting. It will, of course, often be difficult to determine what a child actually wants. In addition to listening to what children tell a judge directly, they will need to take account of evidence as to what children have told neutral witnesses or Family Consultants. The interpretation of a child’s wishes can be extremely difficult; while age is a factor, children may also want to protect parents, keep them both happy or even present a view to support a particular parent.
Justice Nicholson also emphasised the importance of reports from Family Consultants; in that sense, judicial conferencing is complementary to Family Reports. In addition to disclosing information that might not be brought forward by, or even be known by, the parties' lawyers, reports are very likely to address matters that will be of great importance to the judge's final decision. Indeed, Justice Nicholson emphasised that, even when a child is interviewed by a judge, the Family Consultant's report will often be used to the same extent as where there is no interview, as very often there is conformity between what is in the report and what the child discloses to the judge. However, the additional information obtained from an interview with a child provides an opportunity to test the report; if the report differs from what the children report as their wishes in a judicial conference, the judge can use this to qualify the report. This additional information will provide a better backdrop against which to assess the weight that should be attached to the recommendations in the report. In Nicholson's experience, on occasions there can be quite significant differences between what the report says about the children and what the judge discovers from a face to face interview with the child. In addition, Nicholson notes that some children feel pressured, when interviewed by a Family Consultant, to provide a particular view and this is a further reason to read the report with caution when it conflicts with what the judge has been told by the child. The judge is then left with the task of forming an assessment as to what the child actually wants, however, with better evidence than would be provided by the report alone.

Nicholson says that the most difficult situation he has encountered when interviewing a child is where the child is mute and clearly does not wish to engage. Such situations can arise and raise the question of how the matter proceeded to the point of an interview without this being known. Under the FLA children are not required to express their views and it should only ever occur after a child has been asked if they wish to participate in this way. However in every instance where this occurred, the child or children were asked if they wished to see the judge and had agreed to do so. Normally they were seen in the presence of the family counsellor and the ICL. Where a child is then reticent, it may be that they have felt overcome by the circumstances or have been discouraged by a parent or parents from saying anything.

Nicholson considers that if there was a regular practice of judges seeing children, particular attention should be paid to where such interviews take place and who should be present. In this regard, he feels there is much to be said for the more informal German system.

Another difficult situation according to Nicholson is where the child is adamant about what he or she wants, but it may be that this is due to the child appreciating that one of their parents has a particular need for support from the child, for example because of alcoholism or other illness. In such a case, Nicholson suggests a judge may take account of the child's view, but would not give it determinative weight.

In regard to specific training for judges, Nicholson acknowledges that judges in Australia have usually been skilful and successful legal practitioners prior to their appointment. However, the role of judge is very different from legal practice, and he suggests a judicial tendency can be detected where some judges assume they have 'done it all' and really do not need a lot more training. Nicholson supports the notion that a judge's practical legal experience needs to be coupled with better judicial education in many areas. In his view, the issue of how to interpret and deal with children should be the subject of quite significant judicial education because only a few judges would have had significant prior experience in this field.

Nicholson noted that a judicial educational experience regarding gender issues was conducted some years ago. It was very much directed at the danger of judges their using own experience in the interpretation of evidence; in his view this challenged many of the participants, but the majority found it to be extremely helpful. This lesson can also be transferred to other areas and no doubt greater training in relation to interviewing children would aid in avoiding the reliance of judges on personal experience.

Nicholson does not suggest that judges should be educated on these issues to the point of becoming experts in their own right but they should develop a significant understanding of the issues and be able to communicate with children to the point of putting them at their ease.

As noted by Nicholson, one of the greatest difficulties faced by judges is not having sufficient material before them to decide a matter. With the LAT judges now have the opportunity of identifying where there is insufficient evidence and what evidence they would like. This would be the case where there is conflicting evidence; so if a

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35 See also M Fernando, note 2 above, pp 51-52.
Family Consultant’s report conflicted with what the child said in a judicial conference, this could be explored further with the consultant in court. In the case of children’s wishes, the judge has to take account of the child’s age and there are situations where the information can be obtained without the need for direct recourse to a child. However, Nicholson thinks that when assessing an important matter, for example, the relationship between a parent and a child, one must be cautious about relying on third party evidence. In other words, as Nicholson identifies, there are significant benefits to judicial conferencing. Overall, and notwithstanding the difficulties involved, Nicholson reports no instances in which he regretted interviewing a child (which was normally in unusual circumstances in any event) and noted that were he hearing cases now, his preference would be to interview children much more frequently.

In this regard it is of interest to note a recent article by Justice Robert Benjamin of the Family Court of Australia in which he supports the desirability of judges interviewing children in appropriate cases and discusses his own experiences of doing so\textsuperscript{36}. It is apparent that his experiences accord with those of Nicholson and in the cases to which he refers, the judicial conference was a vital component in arriving at a satisfactory conclusion in the cases in question.

Benjamin makes an interesting comparison with the different approach of New Zealand judges to this issue\textsuperscript{37}. While to some extent he puts this down to subtle but important legislative differences, he also highlights judicial critique in that country of the use of an adversarial system in resolving parenting disputes\textsuperscript{38}. Notwithstanding this, it is apparent from Benjamin’s article that he does not feel that an Australian judge is unduly constrained from conducting a judicial conference and he has obviously done so with success.

### Conclusion

The difficult application of the ‘the best interests of the child’ concept poses problems in deciding some very practical, and fundamental, aspects of a child’s life, most usually with which parent the child is to live and when. Maximising the right of children to express their wishes and views should be of great assistance in deciding these matters. This, however, does not seem to be sufficiently appreciated.

Almost invariably in Australia, the process is for a third party to talk to the child and then convey the child’s views and wishes to the court. The advantages of such a system are obvious; the most important one being that the child is affected as little as possible by the sometimes highly adversarial situation between the parents. The disadvantage on the other hand is that the wishes and views of the child are filtered through a third person, who is inevitably interpreting what the child is actually saying – and in doing so that person is very often interpreting that evidence in light of what that person thinks are that child’s best interests. That is a decision for the judge. This is precisely why hearsay evidence was not generally permitted in the past. However, simply because hearsay evidence is admissible for children, this does not mean we should throw the baby out with the bathwater. The judge will want to hear the views of the Family Consultant or ICL as to the child’s best interests, but that is no reason for not hearing the views of the child directly, just as the parents have the opportunity to put their case directly. Moreover, even if a different decision does not result, there are benefits for some children in simply being permitted to participate in a decision-making process that fundamentally concerns them.

There will of course be many cases where a child’s views will not be crucial to a decision; however this does not mean that interviewing children should be disregarded in cases where the judge feels unsure of the true feelings of the child (for example where the child may not have understood the significance of their comments to a decision) or that further input from the child may assist in their decision making.

Providing advanced training for judges to be able to handle and interpret such interviews appropriately is a small price to pay for the advantages for the child (both emotionally and in terms of the decision) if the judge speaks with the child directly. Doing this in a formal way in a courtroom could, of course, be a very frightening situation for the child. However, in Australia, the judge can adopt any method they choose, including meeting out of the court. The judge can ensure the child understands the significance of the meeting, and the child can be protected from the more severe setting of the courtroom.

In reflecting on the best processes to advance children’s interests in family law, it cannot be ignored that there is mounting evidence that children’s interests are advanced by more direct participation. Nicholson’s experiences support this conclusion and give reason to expect that


\textsuperscript{37} See also the discussion in M Fernando, note 2 above and the research referred to therein in relation to New Zealand.

\textsuperscript{38} See the discussion in M Harrison, note 33 above, pp 36-38.
more positive outcomes can be achieved for both children and parents. Nicholson sees the greater inclusion of children in the process as a way of minimising the effect of natural bias in decision making, assisting in what are the most difficult cases to decide, improving the likelihood of the better parenting outcome being chosen and affirming children’s rights to be heard fully when a matter concerns them. This would also reduce the possibility of the process seeming arbitrary in the sense that all relevant information is not properly considered.

As a by-product, Nicholson notes that there is an increased possibility of parental satisfaction (and indeed agreement) through the use of interviews. Nicholson’s experiences do not suggest that parents are hostile to the judicious use of interviews and, providing judges are sensitive to adverse consequences for children of disclosure of information, there is every reason to suspect that parents will benefit from greater use of interviews.

As we have seen, Nicholson’s experiences support the view that children benefit personally from being included in the process, beyond the question of what ultimate decision is taken. Indeed, one might question why, if a child particularly wishes to, they would be denied the opportunity of talking to a judge; it seems obvious to suggest this could be more detrimental to children than the risks associated with interviews.

Against this backdrop, it is difficult to see why judges in Australia remain so reluctant to talk directly to children; even when they express interest in the practice they rarely do so. Nicholson’s experiences – and he was the senior judge in the court for many years – do not illuminate the true reason for this judicial reluctance. Nicholson indicated that judges espoused procedural fairness and lack of judicial skill in interviewing children as their driving motivation. However, as we have seen, these are not insurmountable barriers to the practice. Procedural fairness can already be addressed, and further rules could be adopted. Appropriate interviewing skills are a matter relevant both for third parties interviewing children and judges and there is no reason why similar training for both could not be provided on a regular basis. While the judge does not have a social science background, nor do police officers, for example, who have to interview children. Parenting disputes are core business for the family court; what could be more important than education for judges in this area? Judges will come to the job with the legal skills to act for a party but in making a decision about a child’s life it is entirely appropriate that, as Nicholson suggests, considerable effort should be devoted to up-skilling judges in this way.

So far as the future of the less adversarial trial is concerned, for the reasons already discussed, we think that its future is inextricably bound with judicial conferencing. It may be that the Australian judicial reluctance to interview children reflects a continuing tie to the traditional adversarial model. It is interesting to note that in the family and the broader children’s jurisdictions at least there is evidence of the beginning of a more general acceptance of moving away from this traditional approach. We have mentioned the situation in New Zealand where both less adversarial style trials and judicial conferencing are becoming increasingly more accepted.

The Australian and New Zealand trial models have similarly been adopted in Singapore, which has worked closely with the Family Court of Australia over many years. Very recently in the State of Victoria, Australia, a public inquiry into the State’s child justice system found: [The VLRC (Victorian Law Reform Commission) found] that the conduct of matters under Division 12A of the Family Law Act is an excellent model. The Inquiry agrees and considers that the model should be adapted for inclusion in the Act. The Inquiry endorses the VLRC report’s recommendations regarding the LAT model of the Family Court (VLRC 2010, pp. 314-317)...

The Inquiry recommends that the Children’s Court be empowered, through legislative amendment, to conduct matters in a manner similar to the way in which the Family Court of Australia conducts matters under Division 12A of the Family Law Act.

It is to be hoped that in the future this child friendly model of family litigation will gain increasing acceptance and that it will increasingly be coupled with judicial conferencing as an integral aspect of its operation.

³⁹ M Fernando, note 3 above, p 76.