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Hearing Children's Objections in Hague Child Abduction Proceedings in England and Wales, Australia, and the USA

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Abstract: In this article we compare how children's objections to being returned to their country of origin are treated in Hague child abduction matters in three different international jurisdictions: England and Wales, Australia, and the United States. We examine the relevance of children's views for the purposes of the 'gateway' stage of the relevant exception to mandatory return, and how children's objections have been approached in legislation, case law, and scholarly commentary. We critique each jurisdiction's approach against the objectives of the Hague Convention and the Convention on the Rights of the Child. We discuss how aspects such as the methods by which children are heard can make a difference to experiences for children and make recommendations to promote greater certainty and consistency in how children's objections are heard and considered across jurisdictions.

Keywords: child abduction; Hague Convention; children's rights; children's participation; children's objections; comparative law



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1. Introduction

The Hague Convention on the Civil Aspects of International Child Abduction ('Convention') aims to ensure that children who are wrongfully removed to or retained in a Contracting State are returned promptly and that parental rights of custody and access in a Contracting State are respected in other Contracting States (Article 1). The Convention is designed to protect children from the harmful effects of unilateral removal or retention (Schuz 2013), and it is generally presumed that it is in children's best interests to be returned to their country of habitual residence, where issues of care and parenting can be decided (Fernando and Ross 2018).

If an application is made to a court in a Contracting State within one year of a child's removal to or retention in that country, and the child is under the age of 16, and the court is satisfied that the removal or retention was wrongful, then the court must generally make an order that the child be returned 'forthwith' to their country of habitual residence (Articles 4, 3, and 12, respectively).

Nevertheless, there are limited exceptions to the requirement to return children which appear in Article 13 of the Convention. These are, firstly, if the person who would otherwise have care of the child was not actually exercising custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced to the removal or retention. Secondly, if there is a grave risk that returning the child would expose them to physical or psychological harm or otherwise place them in an intolerable situation. Thirdly, if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views¹. If one of the exceptions is made out, the court has discretion to not return the child.

¹ A further exception appears in Article 20 which allows a court to refuse to return a child if it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. This exception is rarely invoked (Schuz 2013).

The exceptions are ‘important qualifications to the general rule for returning a child to the place of its habitual residence’. (DP v Commonwealth Central Authority 2001, para. [36]; RCB v The Honourable Justice Forrest and Ors (RCB 2012, para. [19])). In practice, they represent a ‘compromise’ between the general principle that children should be returned to their home country forthwith without considering the merits of any custody dispute, and recognition that, in certain circumstances, a departure from this principle may be justified (De L. v Director-General, NSW Department of Community Services 1996 (‘De L.’)). Where one of the exceptions is established, the general concept that a prompt return is in the best interests of the child can be rebutted, as per the Hague Guide to Good Practice on Part VI Article 13(1)(b) (‘Guide to Good Practice’) ([Hague Conference on Private International Law 2020](#), p. 24).

In the Convention’s Explanatory Report, Pérez-Vera stated that the exceptions are to be interpreted restrictively if the Convention is to not become a ‘dead letter’, and cautioned against a systematic invocation of the exceptions ([Pérez-Vera 1982](#), p. 34). However, she also identified that the exceptions form an important element in understanding the extent of a court’s duty to return a child ([Pérez-Vera 1982](#), p. 27). The Convention does not contemplate an automatic return mechanism, and where one of the exceptions is raised, it should be investigated properly, within the limited scope of return proceedings ([Hague Conference on Private International Law 2020](#), p. 27).

The exceptions play an important role in the effective operation of the Convention, and their existence and application do not automatically detract from the Convention’s objectives ([Fernando 2022](#)). This is because the underlying objective of the Convention is to protect the interests of children, including to protect them from the harmful effects of abduction (Preamble). While returning children is a method of achieving the objective of protecting children, it is not an objective in its own right ([Schuz 2013](#)). The exceptions provide appropriate recognition that there may be situations where returning children to their country of habitual residence will not protect a child from harm and may even cause greater harm ([Schuz 2013](#)). The ‘children’s objection’ exception provides express recognition in that regard in relation to mature children who object to being returned. The Convention gives these children the possibility of interpreting their own interests ([Pérez-Vera 1982](#)). The exception envisages that a mature child ‘will be permitted to dictate the return question because of his or her views on the merits’ ([Elrod 2011](#), p. 677). Despite the usually summary nature of Convention proceedings, if a court is satisfied that a child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views, the court then has a discretion to allow the child to remain, or to return them in spite of the mature child’s objections ([Elrod 2011](#)).

This article focuses on the approach taken to ascertaining, considering, and incorporating children’s views for the purposes of applying the ‘children’s objection’ exception in three international jurisdictions: England and Wales, Australia, and the United States. In particular, we examine the extent to which the approach taken in each jurisdiction promotes the voices of children and enables the child’s objection to be properly taken into account in accordance with the Convention. In confining the discussion to the treatment of children’s objections, this paper does not examine in detail how courts assess the ‘age and degree of maturity’ of objecting children, nor how courts exercise their discretion to return or not return children, should the court be satisfied that the child objects and is of sufficient age and maturity. As a result, our discussion does not concern the outcomes of Convention proceedings, but, instead, the way in which courts consider and hear children’s objections, which could influence that outcome.

We have focused on these three Contracting States for particular reasons. Firstly, these jurisdictions are English-speaking, which facilitates ready access to case reports and literature. Secondly, despite the jurisdictional similarities of these three States, existing literature indicates that there are key differences in how the ‘children’s objection’ exception is approached. On one hand, this literature indicates substantive statutory differences in Australia, and England and Wales, with the former requiring additional provisions as part

of its incorporation of the Convention into domestic law. On the other hand, the literature indicates only limited engagement with the objection exception itself in the United States. By focusing on these three States, our analysis will provide a comparative insight into the range of approaches that are employed by participating jurisdictions and the extent to which common barriers and problems may be mitigated.

Comprehensive empirical research involving international reviews of case law and literature, surveys, interviews, and specialist workshops with legal professionals and family members has already revealed a divergence of practices and attitudes in relation to the ‘children’s objection’ exception (Taylor and Freeman 2018). In this paper, we build upon that knowledge by extending the global understanding of the approaches taken by different Contracting States to ascertaining and considering children’s views, which, in turn, deepens understandings of how the ‘children’s objection’ exception is treated and applied in different jurisdictions. This knowledge is necessary to promote certainty and consistency in international law in an issue on which the Hague Conference on Private International Law is yet to publish a Guide to Good Practice. This paper will, therefore, contribute important insight into how effectively and consistently children’s objections are presently used to inform applications of the objection exception across Contracting States, with a view to setting an agenda for improved practices in the future.

2. The Relevance of Children’s Objections

In order to reject or apply the ‘children’s objection’ exception when it is raised, it is necessary for the court to consider any objection that the child has expressed to being returned. The ‘children’s objection’ exception states:

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. (Article 13)

Courts across these three jurisdictions have generally divided this inquiry into two stages. First, the court will determine whether the requirements for the exception exist; that is, whether the child objects to being returned and has attained the required age and maturity. If it determines these matters in the positive, the inquiry will move to the second stage, where the court will determine whether to nevertheless exercise its discretion to return the child. At this second stage, the court will ordinarily consider the nature, basis, and strength of the objections expressed, as well as a much wider range of considerations, including aspects relating to the child’s welfare and the objectives of the Convention (Re. R. (Child Abduction: Acquiescence) 1995; Commonwealth Central Authority v Sangster 2018; De L. 1996). Therefore, even when the ‘children objection’ exception has been made out, the court retains discretion to order that the child be returned, but this second stage only comes into play in the event that objections are acknowledged in the first stage. In England and Wales, the two stages of inquiry have been conceptualised as the ‘gateway stage’ and the ‘discretion stage’, respectively (per L.J. Black in Re. M. (Republic of Ireland) (Child’s Objections) (Joinder of Children to Appeal) 2015 (‘Re. M.’)), and that terminology has often been adopted in other jurisdictions, including Australia. For clarity, we will adopt the same terminology throughout this paper.

It is in determining the first part of the gateway stage that children’s objections to being returned are substantively relevant. Of course, children’s views may also be relevant to a number of other aspects in Convention proceedings (Schuz 2013), such as whether there is a grave risk that returning the child would expose them to harm or place the child in an intolerable situation (Article 13(b)), or whether the child is settled in their new environment, which gives a court discretion to not return a child if proceedings are commenced after one year (Article 12). A court may also consider children’s views in deciding whether to exercise its discretion to return a child, should the child’s views have been relevant to the circumstances giving rise to the discretion. Nevertheless, for the purposes of drawing comparative insights, the specific focus of this article is on the treatment of children’s

objections to being returned for the purpose of the gateway stage of the ‘children’s objection’ exception in Article 13.

The United Nations Convention the Rights of the Child (‘UNCRC’) gives children a right to express their views freely in all matters affecting them, the views of the child to be given due weight in accordance with their age and maturity (Article 12). It states that children must be given an ‘opportunity to be heard’ in any judicial or administrative proceedings affecting them. There is an apparent tension between Article 12 of the UNCRC, which gives children a right to express their views and have those views be given weight in *all proceedings* affecting them, and the ‘children’s objection’ exception which only requires a court to consider children’s views if they constitute an ‘objection’ in the relevant sense, and the child has attained an age and degree of maturity at which it is appropriate to take their views into account (Schuz 2013; Fernando and Ross 2018). A strong argument can be made that, because of the UNCRC, *all* abducted children must be given an opportunity to be heard even where the ‘children’s objection’ exception has not been raised (see, e.g., Baroness Hale in *Re. D. (A Child) (Abduction: Rights of Custody) 2007* (‘Re. D.’); Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions 2011). However, at the very least, Article 12 of the UNCRC requires that, where there is evidence that a child objects to being returned, the child is given an opportunity to express that objection freely and have it considered, subject to their age and maturity, in the gateway stage of the relevant exception (*Office of the Children’s Lawyer v Balev 2018*).

2.1. What Constitutes an ‘Objection’?

An ‘objection’ is, by its nature, different from a mere view, wish, or preference (*Re. M. 2015*, per L.J. Black; *De L. 1996*, per J. Kirby). An objection ‘should be a feeling beyond ordinary wishes, where the child displays a strong sense of disagreement to the return’ (Fenton-Glynn 2014, p. 134). ‘It must, at the least, involve the expression of a negative view not to return to the [country of habitual residence]’ (Nygh 1997, p. 3). A mere wish to remain with the abducting parent, for example, will not be enough to constitute an objection (Beaumont and McEleavy 1999).

It is generally accepted that a child’s objection must be to being returned to their country of habitual residence, and not to being returned to the left-behind parent (*Re. M. (A Minor) (Child Abduction) 1994*; *Department of Community Services v Crowe 1996*). However, ‘there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated’ (*Re. T. (Abduction: Child’s Objections to Return) 2000*, p. 203 (L.J. Ward); *Re. R. (Child Abduction: Acquiescence) 1995*). In *De Lewinski v Director-General, New South Wales Department of Community Services (1997)*, the Full Court of the Family Court of Australia said (at 83, 939):

We would not suggest that children must articulate that they object to being returned to the country of their habitual residence for the purpose of enabling the courts of that country to resolve the merits of any dispute as to where and with whom they should live in order to come within the provisions of (Article 13). That is not the language of children and the Court should not expect them to formulate and articulate their objection. . . in that manner. The Court must have regard to the whole of the evidence and determine, no matter how the children articulate their views, whether the children object in the relevant sense.

As such, there is a seeming lack of clarity in current jurisprudence as to what may constitute an objection for the purposes of the exception, with several influencing factors for judges to consider and weigh when identifying and responding to prospective objections.

2.2. How Objections Are Raised

The phrasing in Article 13 that ‘(t)he judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned . . .’ suggests that the court is obliged to investigate whether the child objects even if the abductor does not raise this defence. However, ‘the orthodox view is that the burden of proof is

on the person opposing return as with the other exceptions' (Schuz 2013, p. 317). This is problematic because research suggests that children involved in Convention proceedings are largely unaware of their entitlement to raise an objection to returning to their country of origin (Taylor and Freeman 2018, p. 11) and, even if they are aware, have no practical way of raising the exception themselves within proceedings. Objections are invariably brought to the attention of the court by the abducting parent. This presents challenges to the extent to which the court will recognise such objections at the gateway stage, due to the unavoidable risk that judges will perceive such objections as conflated with the viewpoint of the parent (McEleavy 2008). The fact that children are dependent on parents to raise a potential objection may mean that the exception is not raised, or is raised but is treated with scepticism if viewed as a means to bolster the strength of the abducting parent's case, even before the court begins to scrutinise the substance of the objection and the question of whether the child has reached a requisite age and degree of maturity in order for the objection to be taken into account.

The pragmatic difficulty for children's ability to raise objections is further complicated by the methods applied by the various courts to ascertain and hear evidence of children's views, should an objection be raised. There are a variety of mechanisms available, and a divergence in those regularly employed by the courts in different legal systems. These mechanisms range from reports provided by child welfare experts, judicial meetings with children, independent representation for children, accounts of the child's objections from the abducting parent, and, in some instances, the child being joined as a party to the proceedings. The last of these is very rare in each of the jurisdictions we examined. The method that is employed by the court is likely to significantly influence the way in which children are able to express their objections and the way that evidence is presented to the court, and, as such, the methods employed will be explored further throughout the analysis of each jurisdiction below.

2.3. The Importance of Accounting for Children's Objections

It is very important that the views of children who object to being returned to their country of habitual residence are listened to and taken seriously, within the requirements of the 'children's objection' exception. This is because it is important for children to be heard, and to feel that they have been heard, and also because of the documented negative impacts on children who have been abducted and subject to Convention proceedings (Freeman 2014).

As discussed above, Article 12 of the UNCRC grants children a right to express their views, and enshrines the notion that children must be given an opportunity to be heard in proceedings that affect them. Potentially-objecting abducted children must be given an opportunity to express their objections to the court and have a right to have their views be given due weight in accordance with Article 12 of UNCRC and the requirements of Article 13 of the Hague Convention.

There are those who argue that the time necessary to properly ascertain the child's views and assess the quality of their objections and their maturity is inconsistent with the summary nature of Convention proceedings. For reasons related to children's welfare and the Convention's objectives, decisions under the Hague Convention should be made without undue delay. In jurisdictions that do not routinely embed consultations with children into their court processes, the notion of pausing proceedings in order to do so may be considered an unjustifiable delay. However, as Schuz (2013) argues, Article 13 clearly envisages that the child's maturity will be assessed, and it is difficult to see how the quality of a child's objections could be determined without someone having spoken with the child. While it is important that Convention proceedings are conducted in the most efficient manner, this must not be at the expense of a proper inquiry into the nature and quality of the child's objection and consideration of their views and maturity.

There is a wealth of research explaining the value to children in being afforded an opportunity to be heard and to have their views be taken into account in decisions that

affect them (see, e.g., [Carson et al. 2018](#); [Birnbaum 2017](#); [Smith et al. 2003](#)). Children who feel that they have been listened to are more likely to accept the court's decision, even if the decision does not accord with their views ([Cashmore 2003](#)). In contrast, excluding children from proceedings is likely to exacerbate the pain, confusion and other negative effects experienced as a result of the family circumstances ([Taylor 2006](#)).

Further, research conducted with children who have been abducted describes the tremendous impact abduction has on children and their future lives and relationships, with children describing Convention proceedings as a 'defining moment in a child's life' ([Taylor and Freeman 2018](#), p. 11). [Freeman \(2006\)](#) interviewed 10 children who had been abducted, who reported that they did not feel that they had been taken seriously in terms of decisions taken about them, or that their views had much weight. Freeman found that children need to be involved in the process and kept informed, and to not be treated as passive bystanders. Given the lasting effects experienced by children who are the subject of Convention proceedings ([Freeman 2014](#); [Schuz 2013](#)), it is imperative that their rights and interests are properly identified and accounted for.

We will now explore how children's views have been treated for the purposes of the 'children's objection' exception in each of the three nominated jurisdictions.

3. The Treatment of Children's Objections in England and Wales

The Convention is incorporated into domestic law in England and Wales via the Child Abduction and Custody Act (1985). Until 31 January 2020, England and Wales were also bound by European legislation, including 'Brussels II *bis*'²—a regulation that provides a framework for how member states were to navigate jurisdictional issues arising from disputes involving children, including international child abduction. Article 11(2) of Brussels II *bis* provided an explicit obligation for member states to make provisions for children's views to be heard in Convention proceedings, unless doing so would be inappropriate, having regard to their age or degree of maturity. As such, the importance of listening to children and providing them with opportunities to express their views has been strongly emphasised in jurisprudence emerging from England and Wales. Most notably, in the case of *Re. D.* 2007, Baroness Hale articulated a landmark judgment which had the effect of further reinforcing the Article 11 obligation, by establishing a common law presumption that all children should be heard in Convention proceedings, as long as the requisite levels of age and maturity are deemed to be satisfied.

Although the Article 11 obligation had existed since 2005, prior to *Re. D.*, it had been restrictively interpreted in relation to Convention proceedings involving objections. Commentary indicates that only mature adolescents expressing forceful objections tended to be acknowledged in the gateway stage, and, even then, such consideration was reportedly limited to circumstances involving pragmatic barriers to return, rather than as a means of recognising and respecting the views of children expressing such views ([Fenton-Glynn 2014](#); [Vigers 2011](#)). Since *Re. D.*, however, there have been positive examples of judges recognising the objections of much younger children at the gateway stage, even where the decision is ultimately taken to return them when it comes to the discretion stage (*Re. W.* 2010). Moreover, given the subsequent departure of the United Kingdom from the European Union, the authority of *Re. D.* can now be understood as even more significant, as it effectively preserved the presumption in domestic law, despite the fact that Brussels II *bis* (now Brussels II *ter*) is no longer applicable to England and Wales.

There has, however, been significant debate over the past couple of decades as to what kinds of views expressed by children will amount to an objection for the purposes of Article 13(b). Early authorities, such as *Re. T.* (2000) have been criticised (*Re. M.* 2015, para. [61–64]) for over-complicating the gateway stage, for instance, by calling for an examination of factors such as: a child's perspective of what is in their short- and long-term interests;

² This provision has been recast several times, most recently with effect from 1 August 2022, and is presently known as 'Brussels II *ter*'.

whether their objection is rooted in reality; whether their views have been coloured by pressure from the abducting parent; and the extent to which their objections would be mollified on return to their country of origin.

More recent authorities have affirmed that such a detailed investigation is, in practice, a conflation of the gateway and discretionary stages. The modern approach in England and Wales, therefore, is that the question of whether a child objects to returning to their country of origin is a simple one for the purposes of the gateway stage. In essence, the notion of an ‘objection’ is to be interpreted in ordinary terms, and the gateway stage is to be confined to a straightforward and relatively robust examination of whether the child objects and has reached an age and degree of maturity at which it would be appropriate to take account of their views, as a question of fact. As Lady Justice Black articulated in *Re. M.* (2015, para. [76–77]):

The starting point is the wording of Article 13 which requires, as the authorities which I would choose to follow confirm, a determination of whether the child objects, whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and what order should be made in all the circumstances. . . I hope that it is abundantly clear. . . that I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process.

Accordingly, the capacity of courts in England and Wales to recognise views at the gateway stage is considered a ‘fairly low threshold’ because ‘it does not follow that the court should take account of a child’s objections only if they are so solidly based that they are likely to be determinative of the discretionary exercise that is to follow’ (*L.J. Black, Re. M.* 2015). In theory, therefore, current jurisprudence from England and Wales appears keenly focused on maximising the extent to which children’s objections are recognised at the gateway stage, regardless of the outcome that may ultimately be reached at the discretion stage. This is reinforced by studies that have identified a relatively liberal judicial attitude towards hearing the views of children across a range of ages and abilities in cross-border abduction cases heard in England and Wales ([Hollingsworth and Stalford 2018](#)).

In practice, however, there are pragmatic limitations on the extent to which objections can be raised for the purposes of triggering the gateway stage. If an objection is brought to the court’s attention, the primary—and, practically, universal—method by which the court will ascertain the substance of that objection in Convention cases is similar to that used in domestic parenting disputes: a report prepared by a professional from the Child and Family Court Advisory and Support Service (CAFCASS). In Convention cases, reports are prepared by a specialist team of CAFCASS officers who focus on assisting the High Court (Family Division), and, in certain cases, these officers can also be appointed as Guardians to children. As part of their assessment of a family’s circumstances, CAFCASS officers will typically meet with children and determine if there are any ascertainable views that can be included in their report, including the existence of any preferences or objections to particular arrangements for their future. Given the strong institutional standing of this CAFCASS team within the wider family justice system in England and Wales, these reports are perceived as particularly influential by judges in Convention proceedings.

Research studies have, nevertheless, exposed the limitations of the approach of relying on CAFCASS reports as a mechanism for identifying children’s objections in Convention cases. Studies such as *Hollingsworth and Stalford’s* analysis of cross-border child abduction cases have identified that meetings between CAFCASS officers are both short in duration and limited to one or two instances, with officers unable to gather sufficient context due to time constraints or language barriers impeding accessibility of the child’s paperwork ([Hollingsworth and Stalford 2018](#)). Further concern has been expressed about the weight that is typically given to CAFCASS reports, given that social welfare services in the UK are contending with the simultaneous pressures of increasing demand and diminishing resources, meaning that CAFCASS officers are likely to be even more constrained in their ability to effectively and accurately ascertain any objections that children may have

(Munby 2016). Despite this, studies show that CAFCASS officers frequently draw explicit distinctions between whether, in their view, the child has expressed a preference or an objection to returning to their habitual country. Such a distinction is likely to be subtle and nuanced, and scholars are hesitant that CAFCASS officers have the specialist training to be able to draw such definitive distinctions, particularly in light of their limited time and resources. As such, CAFCASS reports carry the risk of ‘filtering out’ objections, if they are not expressed forcefully enough or are not perceived as genuine by the CAFCASS officer concerned (Hollingsworth and Stalford 2018; Schuz 2013; Taylor and Freeman 2018).

In *Re. D.*, Baroness Hale acknowledged that CAFCASS reports would likely be the most common method for ascertaining children’s views within proceedings, but there are circumstances in which it may be more appropriate to ascertain children’s views through other means, such as separate representation in proceedings by a solicitor (or CAFCASS officer) acting as a Children’s Guardian, or by judges meeting with children personally. However, these options are only employed to a limited extent in England and Wales, and, even then, are often only considered when recommended by a CAFCASS officer after their initial assessment of a child. For instance, case law confirms that separate representation of children is only recommended in complex cases, and that the ordinary method for ascertaining children’s views should be through a CAFCASS officer (*Re LC* 2014). In contrast, while judicial meetings with children are far from routine, there appears to be slightly greater scope for children to express their objections through such meetings in this jurisdiction. In 2010, the Family Justice Council and the President of the Family Division (Family Justice Council 2010, p. 1) produced a set of guidelines to encourage judges to hold meetings with children, where appropriate, in order to help children feel ‘more involved and connected’ with proceedings that concern their futures. As stated in the guidelines, judicial meetings with children can be valuable for helping children to feel involved in proceedings, but the task of gathering evidence is categorically one to be undertaken by CAFCASS. In other words, while judicial meetings with children are encouraged, the expectation is that they will have no evidence-gathering function, and that the primary mechanism by which objections may be identified is through a CAFCASS report.

Taken together, the basis of the approach taken to recognising children’s objections for the purposes of the gateway stage in England and Wales appears to be relatively liberal, despite the fact that statutory safeguards concerning the importance of hearing children in Convention proceedings have been somewhat weakened by the UK’s withdrawal from the European Union. Nevertheless, this liberal approach is potentially limited by pragmatic constraints, including the central reliance on CAFCASS reports as the primary method of ascertaining children’s views and identifying objections.

4. The Treatment of Children’s Objections in Australia

In Australia, the Convention is not incorporated into domestic law, however, it is given effect through the provisions of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) (‘regulations’). The regulations reflect, but are not identical to, the articles of the Convention. The subtle but important differences between the regulations and the articles of the Convention can be seen in the articulation of the ‘children’s objection’ exception which appears at reg 16(3)(c):

A court may refuse to make (a return order) if a person opposing return establishes that each of the following applies:

- i. the child objects to being returned;
- ii. the child’s objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;
- iii. the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.

The requirements of reg 16(3)(c) are clearly different from, and more stringent than, the requirements of the ‘children’s objection’ exception as it appears in the Convention,

due to the fact that the regulation adds a requirement that the child's objection 'shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes'.

One may think that this 'strength of feeling' requirement simply reflects the globally accepted position; that an objection is different from, and stronger than, a mere preference or view. However, many judges in Australia have interpreted the regulation to require an additional test beyond that found in the Convention. This effectively transforms the 'gateway stage' from a two-part to a three-part inquiry (Fernando 2022). This approach was explained by the plurality of the High Court in RCB (2012) which said (at para. [19]):

The court may also refuse to make a return order if a person opposing return establishes that the child objects to being returned, that the objection shows a strength of feeling beyond a mere expression of a preference or of ordinary wishes and that the child has attained an age and a degree of maturity at which it is appropriate to take account of his or her views.

The 'strength of feeling' requirement was created through legislative amendment in 2000. It was created to counteract the effect of the High Court's judgment in *De L.* (Nygh 2002; Kirby 2010). In *De L.*, the plurality held that, when determining whether a child objects to being returned, a literal interpretation of the word 'objects' should be taken and no 'additional gloss' is to be supplied. This reflects the prevalent position currently taken in England and Wales, where an 'overly intellectualised' approach is strictly discouraged, as detailed by Lady Justice Black in *Re. M.* (2015, para. [77]) above. In amending the Australian law and regulations to include the 'strength of feeling' requirement, an 'additional gloss' was statutorily enshrined (Fernando 2022), thus formalising Australia's departure from the position in England and Wales.

The 'strength of feeling' requirement, if strictly applied, has created an additional hurdle which children must meet before their objections can be taken into account. For example, in the primary judgment which led to RCB (*Department of Communities v Garning* 2011 ('Garning')), J. Forrest accepted that four Italian sisters wrongfully retained in Australia by their mother objected to being returned. However, his Honour was not satisfied 'that the girls' objection to being returned to Italy shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes, as is the requirement in order to give rise to the defence' (Garning 2011, para. [116]). This additional hurdle has led to situations where the objections of children who express themselves in equivocal or less forceful terms are discounted on the basis that the objection lacks the requisite 'strength of feeling'. Further, there is a lack of clarity as to precisely what threshold is required, and as to the difference between an objection that does not meet the requirement and one that does (Fernando 2022). There is no 'clear standard with a readily identifiable border between ordinary wishes and wishes that are not ordinary, or when something moves beyond a mere preference' (*Department of Communities and Justice v Sarapo* (no. 2) 2019, para. [18]).

Fernando (2022) observed that Australian courts were more likely to be satisfied that children's objections met the required 'strength of feeling' where they were 'demonstrative of extreme or emotionally dysregulated behaviour' (*Secretary, Department of Communities and Justice v Paredes* 2021, para. [253]). In that study, Fernando analysed three separate cases where, at first instance, the court accepted that the children 'objected' to being returned. Their views were, however, dismissed on the basis that the objections did not meet the 'strength of feeling' requirement. When the respective children's views became extreme, with aspects such as threats of self-harm or actual or threatened refusal to board a plane, a later court found that the objections met the required test. Fernando also observed that, paradoxically, objections expressed in extreme terms or with high emotion can alternatively be viewed as evidence of immaturity or parental manipulation.

This approach to the 'children's objection' exception runs contrary to the Convention, which only requires that a child objects to being returned, and has attained an age and degree of maturity at which it is appropriate to take account of their views, before their views can be taken into account. The 'strength of feeling' requirement invites an assessment

of the strength of views at this first part of the ‘gateway’ stage, rather than accepting that a child objects to being returned and leaving the assessment of the strength, basis, and weight to be given to those objections to the ‘discretion’ stage. Judges will strictly analyse the child’s language and demeanour. If their objection is not considered to conform to the requisite ‘strength of feeling’, it will not be taken into account at all.

Moreover, this approach also runs in direct contrast with similar jurisdictions with which there are frequent reciprocal cases, including England and Wales. With many Convention cases involving abduction between Australia and the United Kingdom, it seems incongruous that the objections of children who have one British and one Australian parent and have spent part of their lives living in each country (which is a very common phenomenon) may be treated differently based solely on which country they have been unlawfully removed to or retained in.

Some Australian judges prefer the simplified approach advocated in England and Wales, evidenced by the fact that they interpret the ‘strength of feeling’ requirement as an ordinary corollary of the investigation into whether the child ‘objects’, rather than as an extra hurdle which must be met before the objection can be taken into account (Fernando 2022). As discussed above, an objection is, by definition, different and stronger than a mere preference or ordinary wishes. On this interpretation, the ‘strength of feeling’ requirement simply reinforces this position, rather than adding another limb to the ‘gateway’ stage. Issues such as the strength of the objection will be left to deliberation under the ‘discretion’ stage. For example, in *Commonwealth Central Authority v Sangster* 2018, J. Bennett said (at para. [54]):

I do not draw a distinction between the principles and points articulated in by L.J. Black in *Re. M. (Republic of Ireland) (Child’s Objections) (Joinder of Children to Appeal)* and by L.J. Ward in *Re. T. (Abduction: Child’s Objections to Return)* and the current state of the Australian law and regulations under [reg] 16(3)(c). These are the principles which I will apply in this case.

Similarly, J. Gill in *Department of Communities and Justice v Sarapo* (no. 2) 2019 adopted an ordinary meaning of the word ‘objects’ and held that the ‘strength of feeling’ requirement means establishing, factually, that the strength of feeling in respect of an objection is beyond the mere expression of a preference or of ordinary wishes. J. Gill said (at para. [27]):

[E]ven in the context of the Hague Regulations. . . , there is no high threshold before a child’s view is to be at least taken into account. If it is to be taken into account, the assessment of weight is a matter for the discretion. The establishing of the exception requires merely that it be appropriate to take the view into account, not that it also be capable of bearing ultimate or even significant weight in the discretionary assessment.

An approach which allows a court to take children’s objections into account and weigh the strength of those objections alongside other matters in the ‘discretion’ stage aligns with the principles and objectives of the Convention. It demonstrates consistency with the approach taken in England and Wales and many other jurisdictions where no particular threshold is required before children’s objections can be considered. It is in keeping with Article 12 of the UNCRC and is ‘undoubtedly to be preferred’ (Beaumont and McEleavey 1999, p. 188).

When the ‘strength of feeling’ requirement is applied strictly, children must meet a very high standard before their views can be taken into account. This is problematic because children are not given any information or advice about the level of objection that is required. As discussed below, in Australia, an independent lawyer for the child, who may be able to explain the process, can only be appointed in ‘exceptional circumstances’. The fact that there needs to be an inquiry as to whether the views expressed by the child meet the ‘strength of feeling’ requirement means that the methods by which children’s voices are heard are very important.

As in England and Wales, the most common mechanism employed by Australian courts to hear children's objections is through a report from a court-appointed child welfare expert who interviews the child and provides a report on matters including the child's objections to being returned, and the report writer's expert opinion as to the validity and strength of those views, and the child's maturity and ability to understand the consequences of their choices. As noted above in relation to the reports of CAFCASS officers in England and Wales, expert reports are very highly regarded, but there is a danger in relying on them as the sole source of information about the child's objections. Unlike general parenting matters, where the child's views are one matter amongst many for the court to consider in an assessment of the child's 'best interests', in Convention matters the existence and strength of the child's objection, and an assessment as to the child's maturity, will determine whether the court has discretion to refuse to make what would otherwise be a mandatory return order (Fernando and Ross 2018). Fernando and Ross (2018) observed that it seems risky to rely on only one source of evidence to assess the 'children's objection' exception when the stakes are so high. It is widely known that report writers differ in skill and ability, but the way a report writer approaches their task may greatly influence the court's decision. For example, the primary judge in *RCB* agreed with the report writer that, although the children objected to returning to Italy, their ability for abstract thought and future forecasting was not fully formed and the children lacked the ability to truly predict what impact their choices would have for their future relationship with their father (the left-behind parent). In his re-written judgment of *RCB* for the Children's Judgments Project, Simpson (2017) observed (at 510):

[w]ith the greatest respect to the family consultant I find considerable difficulty with the concept of 'future forecasting'. To the extent it implies being able to see into the future, I doubt that that is an attribute that many adults possess (if any). Nor am I convinced that a fully formed ability for abstract thought is something that all mature adults possess let alone children.

In both Australia and in England and Wales, expert reports have limited utility in providing children with a 'voice' in proceedings. Children have reported that they are dissatisfied with a process that requires them to express their views to a person who then includes them, amongst other matters, in a report to the court (Parkinson and Cashmore 2008). In particular, children have commented that they are not happy about the techniques used by report writers, the lack of confidentiality, the feeling that their views have not been properly understood or taken seriously, and the filtering and reinterpretation by the report writer of what the children have said (Parkinson and Cashmore 2008). Children have no say in how their views are presented and have no opportunity to respond if they feel that they have been misrepresented (Fernando and Ross 2018).

In Australia, a court may appoint an independent children's lawyer (ICL), usually in addition to an expert report. An ICL may lead evidence and advocate in favour of the child's views. However, the ICL has a limited role in promoting the views of a child or ensuring that the child's objections are taken into account. This is because the ICL is a 'best interests' advocate. They are not the child's legal representative and are not obliged to act in accordance with a child's instructions (Family Law Act 1975 (Cth) ('FLA') s 68LA(4)). Further, in Convention cases in particular, a court can only make an order appointing an ICL 'if the court considers that there are exceptional circumstances that justify doing so' (FLA s 68LA(2A))³. The fact that there is evidence that a child objects to being returned is not enough, on its own, to constitute 'exceptional circumstances' (see, e.g., *RCB* 2012). This means that there are many cases where children object to being returned but no ICL is appointed to represent their interests.

Judicial meetings with children are very rare in Australia (Fernando 2012) and no steps have been taken to encourage the practice, such as through the promulgation of guidelines.

³ Note that the Family Law Amendment Bill 2023 (Cth) proposes to repeal that provision.

This, again, sits in contrast with other jurisdictions, including England and Wales, where, although judicial meetings are not designed to be evidence-gathering strategies, the existence of guidelines provides at least some scope for children to feel more involved in the decision-making processes that occur in Convention proceedings.

5. The Treatment of Children's Objections in the USA

The Convention is incorporated into domestic law in the United States via the International Child Abduction Remedies Act (1988), which permits Hague Convention cases to be heard in either State or Federal courts. Despite several advancements in respect of other areas of the Convention⁴, the application of the child's objection exception in the United States is somewhat misaligned with the UK and Australia

Historically, many courts in this jurisdiction have been accused of paying little—if any—attention to children's views in cases that raise the objection exception (Schuz 2013). Commentators have described the US approach to such cases as one in which judges are, generally, reluctant to consider children's views, and take a very limited view of their ability to express legitimate objections (Greene 2005, p. 134). In fact, some scholars have gone as far as to regard the application of the 'children's objection' exception in the US as 'fairly straightforward—for the most part, it does not exist' (Kenworthy 2002, p. 351). The traditional resistance to considering children's objections that has inspired this degree of criticism is clear in early case law. In the case of *Tahen v Duquette* (1992), a New Jersey court refused to engage with the objections raised by a nine-year-old child by stating that the exception was simply incapable of applying to a child of this age. Importantly, the court saw no potential benefit or purpose to interviewing the child to further examine their views and no further explanation or analysis was provided to justify why the child was not capable of objecting. Similarly, in the slightly later case of *England v England* (2000), a Texas court determined that a 13-year-old's views could not be interpreted as an objection for the purposes of the exception because there was not sufficient evidence to show that she *was* mature enough to express reasonable objections. In a unique dissenting judgment in this case, Circuit Judge Duhe reflected upon the logical dissonance of the approach taken by the majority, arguing that if the child's objection exception is 'to have any meaning at all, it must be available for a child who is less than 16 years old' (*England v England* 2000, para. [274]). In practice, US courts have traditionally justified this non-engagement with children's objections in two different ways. Firstly, there is a strong judicial belief that it is not appropriate for US judges to engage in the detail of custody disputes that are best dealt with by courts in the country of origin (Kenworthy 2002, p. 348). Secondly, there is judicial concern about the wide scope of discretion that the Convention permits individual judges in each jurisdiction when identifying and weighing up children's objections. From this perspective, the lack of a specified age limit in the Convention opens the door to "potential subjective and arbitrary decision making" and arguably risks situations where "... the child and not the judge would, in effect, be making a return decision" (Greene 2005, p. 134).

While these examples illustrate a degree of judicial contempt towards the 'children's objection' exception that was apparent in the 1990s and 2000s, recent case law indicates that this is gradually changing, albeit very slowly. In *Wan v Debolt* (2021), an Illinois District Court held that, in cases concerning objections from children, it is necessary for a court to engage in a fact-intensive inquiry into the maturity of the child on a case-by-case basis. In the event that a child is mature enough to express such views, their objections must be more than generalised preferences if a court is to give them due weight. In practice, this requires an assessment of maturity at the gateway stage, rather than the discretion stage. In respect of the gateway stage, US judges are perceived as 'divided' on the issue of how old a child should be before they are deemed sufficiently mature (Pritchard 2015, p. 271). Nevertheless, there is evidence that such inquiries have indeed been undertaken,

⁴ Recent judicial decisions have clarified and strengthened the position in the US with regard to habitual residence (*Monasky v Taglieri*, 140 S. Ct. 719 (2020) (habitual residence test and appeal standard of review for habitual residence)), and undertakings (*Golan v Saada*, 142 S. Ct. 1880 (2022)).

with examples such as *Avendano v Balza* (2021) indicating that courts can and do recognise children as sufficiently mature to express objections and overcome the gateway stage, even if these are ultimately outweighed at the discretion stage. However, the need for objections to be particularised is clear: in *Dubikovskyy v Goun* (2022), a District Court for the Western District of Missouri reversed a decision to prevent the return of a child who expressed a general but otherwise clear and justified preference to remain in the US.

The emphasis on particularised objections remains restrictive, but, nevertheless, these cases indicate that there is now some tentative willingness to consider children's views, at least, in principle. In *Bhattacharjee v Craig* (2021), a District Court for the Eastern District of Missouri took a similar view, but strongly emphasised that such factual inquiries should be approached restrictively. Here, the District Court asserted that only in extraordinary cases should children be deemed mature enough to express objections. Interestingly, this case also indicated that this standard should be interpreted even more strictly when the 'children's objection' exception is the only defence raised in the case. In this respect, this suggests there has been little progress in the US. Nearly 20 years ago, [Greene \(2005, pp. 116–17, 121\)](#) argued that it is rare for US courts to recognise the children's objections exception in its own right, and instead a tendency to consider expressed objections merely as a component of evidence that may be put forward in support of the grave risk of harm exception.

On the basis of this, it appears that the US is no longer as firmly opposed to the objection exception as it once was, but that this jurisdiction, nevertheless, continues to take a staunchly restrictive approach to interpreting this exception. Despite the aforementioned developments in other areas of the Convention, [Cullen and Powers \(2023, p. 199\)](#) recently summarised the US position on children's objections as one that, unfortunately, 'remains out of step with the rest of the world'.

A further concern is that the US appears to have little consensus on how children's views should be ascertained and evaluated for the purposes of the objection exception. When US courts have sought children's views in support of other aspects of the Convention, such as the grave risk of harm exception, there have been a range of strategies: some judges are willing to instruct psychologists or social workers to assess the maturity of children; others request that parents engage their own experts to evaluate children and testify in court proceedings; and others may meet privately with children via video link or in chambers ([Cullen and Powers 2023, p. 199](#)). Therefore, the extent to which children's views are heard in the US is limited not only by the current restrictiveness of US courts' application of the objection exception, but also by the lack of clear mechanism by which such objections might be identified.

In sum, while recent case law indicates a tentative shift in the right direction, consideration of children's views is extremely limited in the US context. The judicial hesitancy to engage in the objections exception can be largely attributed to the fact that the US is one of only two countries that has not ratified the UNCRC, which specifically supports the notion that children's voices should be heard in any matters that affect them. The situation of US courts is rather unique in that it is not a signatory to the Convention that enshrines the importance of children's views, yet it is required to navigate the 'children's objection' exception as part of its obligations under the Hague Convention. This gives rise to a situation where Hague Convention cases are routinely heard within a legal context that does not recognise the importance of hearing children's views, let alone engage with children's objections, meaning that this aspect of the Convention is largely ignored ([Elrod 2011, p. 663](#)).

6. Discussion and Recommendations

Our analysis of the ways children's views are ascertained and treated for the purpose of the 'children's objection' exception in the three jurisdictions identified reveals a concerning lack of consistency and clarity between and within the jurisdictions. Our analysis suggests a distinct possibility that the views of abducted children will be treated differently based on the country which they have been unlawfully retained in or removed to. This result

is contrary to principles of international law which aim to achieve consistency between Contracting States.

Of the three jurisdictions examined, England and Wales demonstrates an approach which is most aligned with the Convention. The family court in England and Wales generally takes a simplified approach to the treatment of children's views, taking into account any objections expressed by a sufficiently old and mature child in the gateway stage, and leaving assessment as to the nature, strength, or weight to be given to those views to the discretion stage. However, even in England and Wales there remain problems in relation to clarity in how the 'children's objection' exception is to be approached in practice, and there are limitations in the methods by which children's views are heard.

The Australian approach to the 'children's objection' exception is problematic, because children's objections are only taken into account if they are held to show a particular 'strength of feeling', which is not a requirement of the Convention itself. When judges interpret this requirement strictly, children's objections are likely to be discounted unless they are expressed with a sufficient degree of 'strength', in circumstances where there is no clarity as to the threshold required. The Australian approach presents a danger that children's objections will be rejected in the gateway stage in situations where proper application of the Convention would require that those views be taken into account and considered, along with other factors, in the discretion stage.

The approach in the US is the most misaligned with the Convention, and is largely inconsistent with the other two jurisdictions examined in this paper. While recent case law demonstrates greater willingness to engage with the 'children's objection' exception, it appears that courts favour a restrictive approach, where children may be considered not 'mature' enough to have any objections they may express taken into account. This is compounded by a reluctance to consider the 'children's objection' exception unless it is one of a number of exceptions raised in a case. Children's objections are only typically engaged insofar as they may provide evidence to substantiate other exceptions under the Hague Convention, namely, that returning the child would result in a grave risk of harm. Even then, the methods by which these objections are ascertained are limited in their scope and do not enable children to have an effective voice. In short, by failing to properly engage with the 'children's objection' exception, and prioritising return of children, the US approach neglects the true scope of its obligations under the Convention. As discussed earlier in this article, the primary objective of the Convention is not to return children at all costs. It is to protect children from harm, including from the harmful effects of abduction. Through the exceptions, the Convention recognises that there are situations where a refusal to return a child may be justified to protect a child from harm. Where one of the exceptions is raised, it must be investigated properly and, if it is found to be supported, a court must carefully consider whether to exercise its discretion to, nevertheless, return a child.

In all three jurisdictions, it could be argued that children are not given a right to express their views or be given opportunities to be heard, as is required by Article 12 of the UNCRC. The reliance on expert reports as the primary, and often only, means of ascertaining and communicating the child's objections to the court is inherently limited in that regard. Expert reports necessitate a third-party filtering and contextualising children's views, and have other limitations which we have discussed earlier. Other strategies which could allow more direct involvement by children, such as separate representation or judicial meetings with children, are used to a minimal extent, or in a restricted way, which also curtails the extent to which children's voices can be effectively heard.

On the basis of the research set out in this article, we recommend that the Hague Conference on Private International Law (HCCH) issues a Guide to Good Practice to provide clarity in how the 'children's objection' exception is to be interpreted and applied, to promote consistency in how Contracting States approach the exception, and to ensure that children are given a voice in a way that promotes children's rights under the UNCRC but also complies with the objectives of the Hague Convention.

In addition to its Conventions and accompanying Explanatory Memoranda, the HCCH publishes post-Convention documents from time to time, including Guides to Good Practice, which are designed to assist those in charge of implementing and applying Conventions, as well as academics, legal practitioners, and the general public, to support their sound implementation and effective operation ([Hague Conference on Private International Law 2022](#)). Guides to Good Practice are not binding on Contracting States, and are intended to provide guidance and advice on interpreting and applying the Convention. The HCCH has published six Guides to Good Practice on various aspects of the Hague Child Abduction Convention ([HCCH 2020, 2012, 2010, 2005, 2003a, 2003b](#)). The most recent was published in 2020 on the ‘grave risk of harm’ exception and was the first Guide to Good Practice offering guidance on the interpretation and application of one of the exceptions to mandatory return.

The objective of the ‘grave risk of harm’ Guide to Good Practice is expressed to be ‘to promote, at the global level, the proper and consistent application of the grave risk exception in accordance with the terms and purpose of the 1980 Convention. . .’ ([Hague Conference on Private International Law 2020](#), p. 3). To achieve that objective, the Guide offers information and guidance on proper interpretation and application of the ‘grave risk of harm’ exception, drawing from interpretive aids such as the Convention’s Explanatory Report and Conclusions and Recommendations of the Special Commission, and documents good practice from diverse jurisdictions. Given the problems with consistency and clarity in interpreting and applying the ‘children’s objection’ exception that we have identified, we advocate for the publication of a Guide to Good Practice on this exception also as an appropriate and necessary step.

As with the Guide to Good Practice on the ‘grave risk of harm’ exception, a Guide to Good Practice on the ‘children’s objection’ exception should provide a thorough overview of the legal framework and relevance of the relevant exception in relation to the Hague Convention, including the assistance for Central Authorities in managing cases and providing helpful resources. Our recommendations below relate to how a Guide to Good Practice can promote the correct interpretation and application of the first part of the ‘gateway’ stage of the ‘children’s objection’ exception, and ensure that children’s views are ascertained and considered in a way that accords with both the objectives of the Hague Convention and Article 12 of the UNCRC. In particular, we consider that a Guide to Good Practice on the ‘children’s objection’ exception should include, inter alia:

1. Clarification of what constitutes an ‘objection’ for the purposes of the exception;
2. Clarification of what considerations are relevant to satisfy the ‘gateway’ and ‘discretion’ stages, including when and how the ‘strength’ of an objection is to be considered;
3. A recommendation that all children with capacity to express their views be given an opportunity to be heard;
4. A recommendation that in all cases where a child objects to being returned, the child is afforded independent legal representation;
5. A recommendation that in all cases where a child objects to being returned, a judge considers whether to meet with the child;
6. A recommendation that the court ensure that the child is kept informed of the proceedings and possible consequences in a timely and appropriate way.

We will briefly discuss each of these in turn.

6.1. Clarification of What Constitutes an ‘Objection’ for the Purposes of the Exception

The Guide to Good Practice should include an explanation of the words which appear in the ‘children’s objection’ exception. This would include an explanation of what constitutes an ‘objection’ and clarification as to what a child must be objecting to.

It is expected that an ‘objection’ would be described as being an expression of a negative view to being returned to the child’s country of habitual residence, and explain that there is a difference between an objection and a mere wish or preference. The explanation would make clear that a child’s objection must be able to be interpreted as an objection

to returning to their country of habitual residence and not merely an objection to being returned to the left-behind parent. However, in accordance with the case law on this issue earlier discussed, the child does not need to explain their objection in those terms.

It would be useful for the explanation to clarify that an objection does not need to be an objection to returning in any circumstances. This would guard against situations where a child's objections may be rejected because the child has expressed that they will return if certain circumstances are present, such as being able to return with, and remain living with, the abducting parent. Just as a child's objection should not be accepted if it is merely an objection to being returned to a left-behind parent, a child's objection should not be rejected merely because a child is willing to return if they remain with an abducting parent.

6.2. Clarification of What Considerations Are Relevant to Satisfy the 'Gateway' and 'Discretion' Stages, Including When and How the 'Strength' of an Objection Is to Be Considered

The question of whether a child objects and whether a child's objections should be given weight are frequently conflated. This amounts to an unacceptably inconsistent application of the gateway and discretion stages identified at the beginning of this article. This is evident, for instance, by comparing the US, where children's objections are discounted for a range of circumstantial reasons (and, sometimes, for no reason at all), and Australia, where children's objections are discounted if they are not expressed with sufficient strength of feeling.

The Guide to Good Practice should clearly articulate the relevant criteria and considerations that factor into the gateway stage—namely, whether the child objects, and whether they have attained an age and degree of maturity at which it is appropriate to take account of those objections. The Guide should explicitly direct judges to avoid assessing the nature or strength of such objections at the gateway stage, with these factors more appropriately considered at the discretion stage. The position in England and Wales offers a practical example of how this distinction can work effectively. As noted earlier in this article, Lady Justice Black's articulation of the gateway stage shows that it is not 'an over-prescriptive or over-intellectualised approach' (Re. M. 2015, para. [77]), but, rather, a simple question of whether the child objects, and has attained a sufficient age and degree of maturity at which it is appropriate to take account of their views.

By approving, firstly, this approach to the gateway stage, and, secondly, the distinction between the two stages, the Guide to Good Practice will ensure that all countries are well equipped to approach the 'children's objection' exception in a way that is consistent with the intentions of the Convention. In other words, it will assist all signatory jurisdictions to strike an appropriate balance between the objectives of the Convention—that is, returning children where appropriate whilst also protecting children in situations where a refusal to return may be justified. In terms of the latter, it is essential that any objections are carefully investigated through this designated process, rather than prematurely dismissed.

The Guide to Good Practice should also provide guidance as to how to approach the question of the age and maturity of the child in the gateway stage, and the specific considerations that should be taken into account at the discretion stage, both of which fall beyond the scope of this article but are likely to require further clarification and scrutiny in order to ensure consistency.

6.3. A Recommendation That All Children with Capacity to Express Their Views Be Given an Opportunity to Be Heard

The Special Commission on the Practical Operation of the Hague Conventions welcomed the 'overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether (a 'children's objection' exception) has been raised' ([Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions 2011](#), p. recommendation 50). This reflects the common law presumption espoused by Baroness Hale in Re. D. (2007) and is consistent with, and gives effect, to Article 12 of the UNCRC,

which gives children a right to express their views and be given opportunities to be heard in any proceedings affecting them.

Some jurisdictions have already enshrined this right within domestic law. Section 278(3) of the South African Children's Act 38 of 2005 states that the court must afford the child 'the opportunity to raise an objection to being returned to their home country' and 'must give due weight to that objection', taking into account the child's age and maturity. Further, the Brussels II *ter* Regulation discussed earlier which is applicable for member states of the European Union clarifies that children must be given an opportunity to be heard in the proceedings unless this appears inappropriate having regard to the child's age or maturity (Article 11(2)).⁵

Ensuring that children have an opportunity to be heard also gives them an opportunity to express an objection to being returned, thus invoking the 'children's objection' exception if it has not already been raised by the taking parent. A court must ensure that there is an independent means of conveying the child's views to the court, which could be via an expert report, separate representation, or a meeting between the judge and the child.

6.4. A Recommendation That, in All Cases Where a Child Objects to Being Returned, the Child Is Afforded Independent Legal Representation

Subject to the rules and procedures in each Contracting State, a court should ensure that children who object to being returned to their country of habitual residence are independently represented within Hague Convention proceedings. This will ensure that the child's views and interests, which are integral to the court's determination of whether the 'children's objection' exception is made out, and whether the child should be returned, are properly represented. It also ensures that children are given an opportunity to be heard, as part of a lawyer's role will be to ascertain the views of the child, preferably by communicating with them directly.

Elrod (2011) opined that a lawyer for a child is particularly important in Hague Convention cases because the child's interests are at stake and the parents' interests may not be the same as the child's. She argued that, in a high-conflict case, independent representation offers the best chance of ensuring that the child's views are presented to the court.

Independent representation for children can assist courts to make the best decisions for children in situations where judges are otherwise dependent on information presented by the parties (Schuz 2013). As well as allowing children to be heard, it also ensures that children's perspectives and interests are put to the court in a professional and persuasive manner, and ensures that the court has all the essential information to determine whether the exception is made out (Schuz 2013). The role of a child's lawyer is different from the role of the court-appointed child welfare expert, who ascertains the child's views and contextualises them in a report, but has no obligation to advocate on behalf of the child or their best interests. Appointing a lawyer for a child conforms with article 12(2) of the UNCRC which provides that a child be provided the opportunity to be heard, either directly, or through a representative or an appropriate body.

In 2011 the Hague Special Commission noted that an increasing number of States provide for the possibility of separate legal representation in abduction cases, and cases and commentators have argued that children who object to being returned should, generally, be represented (e.g., Schuz 2013; Elrod 2011; De L. 1996).

There are various models for independent representation, ranging from a strictly 'best interests' representative—as seen in Australia—to direct representation in a traditional advocate/client model—as found in some states of the USA. However, whichever model is adopted in the Contracting State, independent representation for children can provide an important role in the presentation of necessary information for a court to determine the

⁵ As of 1 January 2021, this provision no longer applies to the jurisdiction of England and Wales due to its departure from the European Union, but, as noted earlier, the essence was nevertheless preserved by Re. D.

‘children’s objection’ exception, and in giving children a voice which accords with their right under the UNCRC and their interests under the Hague Convention.

6.5. A Recommendation That, in All Cases Where a Child Objects to Being Returned, a Judge Considers Whether to Meet with the Child

In each of the jurisdictions examined in this article, and in many jurisdictions around the world, judges have discretion to meet with a child who is the subject of proceedings. Meeting with a judge gives a child an opportunity to directly express their views to the decision maker, satisfying the child that their views have been heard. International research shows that when children are given the opportunity to meet with a judge, many choose to do so (Morag et al. 2012; Taylor et al. 2012).

Despite the judicial hesitancy to meet with children in some jurisdictions, this mechanism allows judges to hear children’s objections first-hand, to clarify or supplement information already contained in an expert report. It allows judges to fill any gaps in the report, to ensure that the court has all information on which to adequately assess the ‘children’s objection’ exception (Fernando and Ross 2018).

We acknowledge the barriers to judges embracing this practice in some jurisdictions, including Australia, due to judges feeling uncomfortable about speaking with children, or having concerns about how the evidence gleaned will be reported back to the parties (Fernando 2012; Parkinson and Cashmore 2008). Nevertheless, we consider that there is value in judges considering whether to meet with children in Hague cases, and whether, in the circumstances, these barriers can be overcome. The Hague [Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions](#) (2011, recommendation 50) emphasised the importance of ensuring that any person who speaks with a child for the purpose of ascertaining the child’s views has appropriate training for this task where possible. It is, therefore, important that judges are offered training in how to appropriately speak with children and interpret their views.

Meeting with a child is an important acknowledgement of the child’s right to express their views in proceedings as required by Article 12 of UNCRC, and of the significance of the child’s voice in determining the ‘children’s objection’ exception.

6.6. A Requirement That the Court Ensure That the Child Is Kept Informed of the Proceedings and Possible Consequences in a Timely and Appropriate Way

In 2011, the Hague [Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions](#) (2011, p. recommendation 50) recognised ‘the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child’s age and maturity’. Similarly, the [United Nations Committee on the Rights of the Child](#) (2006) recognised the right to receive and impart information as an important component to children’s participation. The requirement to keep children informed also appears in the ‘grave risk of harm’ Guide to Good Practice (HCCH 2020, p. 88) where it is stated that a court should, where appropriate under the relevant laws and procedures:

inform and encourage the parties, the separate representative for the child or an appointed expert to inform the child of the ongoing process and possible consequences in a timely and appropriate way considering the child’s age and maturity.

Giving a child information about court processes and keeping them informed about the proceedings is a necessary corollary of the child’s right to be heard in proceedings (Freeman et al. 2019). To facilitate this, a court could also ensure that a child is given a child-friendly version of the Convention which would give them information about the Convention’s objectives, what a court may take into account, and the extent to which children’s views may be relevant to the court’s decision. Recently, a website has been launched for the specific purpose of informing children and young people about international parental child abduction. The ‘*FindingHome.world*’ website explains the main aspects of the Convention

and includes stories providing examples of the different situations and circumstances that can occur in abduction cases. It explains the processes that will occur after a child has been abducted and informs children of their right to be heard and for their views to be considered in the proceedings. The website also provides answers to common questions that children have about abduction and the law, and links to organisations which can provide support and further assistance. Judges can refer children to resources such as this to ensure that children have information about court processes and how they can be heard.

As envisioned in the ‘grave risk of harm’ Guide to Good Practice (HCCH 2020), a court can ensure that children are kept informed of the proceedings and possible consequences by instructing or encouraging the parties, the separate representative for the child, or the appointed expert to undertake this task. Alternatively, a judge may choose to meet with a child directly for this purpose.

7. Conclusions

As Schuz (2013, p. 353) explains:

If courts remember that (the ‘children’s objection’ exception) creates a child’s defence rather than a defence for the abducting parent, they will understand that giving appropriate weight to the objections of sufficiently mature children is not contrary to the policy of the Convention and that a child-centric approach has to be taken in determining whether the defence is established.

Children have a right to be heard and have their views taken into account in all proceedings that affect them, and, particularly, in circumstances where the ‘children’s objection’ exception may be relevant. This is because if a child objects to being returned, and has attained an age and degree of maturity at which the court determines it is appropriate to take account of their views, a court is not obliged to return the child to their country of habitual residence.

Our examination of how children’s views are heard and considered for the purposes of the ‘children’s objection’ exception has demonstrated considerable differences in the three jurisdictions examined. While we have observed that the approach to the treatment of children’s objections in England and Wales is superior to that taken in Australia and the USA, there are still limitations, in all three jurisdictions, in how children’s objections are brought before the court. In an area of international law which relies on consistency and comity, it is concerning that different jurisdictions are taking divergent approaches to children’s objections. As articulated in this article, guidance is needed to promote clarity and consistency on the ‘children’s objection’ exception, and to ensure that children’s voices are heard to an extent that upholds their rights and complies with the objectives of the Convention.

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