

**UNIVERSITY OF KWAZULU-NATAL**

**CHILD PARTICIPATION IN FAMILY GROUP CONFERENCES IN CARE  
AND PROTECTION CASES: A COMPARATIVE ANALYSIS OF SOUTH  
AFRICA, NEW ZEALAND AND AUSTRALIA**

By

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**February 2019**

## TO MY SON RUBEN

## **DECLARATION**

I, **Maria Elizabeth Kitching** (211555939), declare that:

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## **ABBREVIATIONS AND ACRONYMS**

African Charter on the Rights and Welfare of the Child 1990	ACRWC
Alternative Dispute Resolution	ADR
American Humane Association and Family Group Decision Making Guidelines	AHA
Australian Capital Territory	ACT
Centre for Advanced Studies in Child-Welfare	CASCW
Children and Young People Act 2008	CYPA
Children, Young Persons and their Families Act 24 of 1989	CYPFA
Department of Justice and Constitutional Development	DJCD
Family Group Conference	FGC
South African Law Reform Commission	SALRC
South African National Department of Social Development	SA NDSD
United Nations Convention on the Rights of the Child 1989	CRC

## **ABSTRACT**

The United Nations Convention on the Rights of the Child 1989 awarded children the right to be heard and to express their views in all matters that affect them. This includes the right of the child to participate in decision-making processes that affect their lives and shape their futures. Although progress has been made in many countries by changing their legislation, policy and practice to include children in decision-making, it remains the case that the right to be heard is unrealised for many children across the world.

Many children, exposed to abuse and neglect, do not have access to welfare and justice services and it is often the view in certain cultures that children should be “seen and not heard”. These children are then excluded from expressing their views and feelings and do not have the opportunity to participate in decision-making processes. Even if children are provided with the opportunity to express their views, it is imperative that these views are taken seriously and are considered when decisions are made about their lives, especially in instances where children are in need of care and protection.

One of the ways in which children’s voices can be heard in care and protection matters is by using alternative dispute resolution methods. One of these alternative dispute resolution methods, family group conferences, was initiated in New Zealand and was adopted in countries across the world, including Australia. This has been found to be cheaper than statutory court processes and also less intimidating to children and their families.

In South Africa the Children’s Act 38 of 2005 was adopted to strengthen the statutory child protection system to give effect to the right of the child to be heard in care and protection matters, and to participate in decisions that affect their lives.

The overall aim of this study is to critically examine the current South African, New Zealand and Australian legislation which governs the implementation of FGC and the factors that influence the child’s right to be heard and to participate in decisions that affect his/her life. This study is exploratory and has two primary aims. First, to explore child participation in FGC, pertaining to care and protection matters as contained in South Africa’s legislation as well as in other countries ie New Zealand and Australia. Secondly, to formulate recommendations based on the relevant international materials and experiences of New Zealand and Australia for improvement of the South African law and practice. The dissertation further aims to demonstrate that the shortcomings

in the South African legislation can be overcome by means of appropriate solutions such as legislative amendments, supplementary provisions or guidelines.

The research identified gaps that exist in the current South African legislation, and sections were identified where improvements could be made and instances where guidelines need to be developed to improve the legislation and guide the implementation of FGC in care and protection cases in South Africa.

There is a lack of clarity and direction in respect of child participation in FGC in child care and protection matters in South Africa and the researcher is therefore of the opinion that this study and the application of the recommendations could make a valuable contribution to South Africa's implementation of FGC and the child's participation in this decision-making process.



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# **CHAPTER 1**

## **BACKGROUND AND CONTEXT OF THE STUDY**

### **1.1. RESEARCH BACKGROUND AND MOTIVATION**

Historically, society's view of children was that of passive individuals whose wishes and views were not considered. There are still many who believe that children do not have the capacity to make knowledgeable contributions to decisions about matters that considerably affect them and that their participation will place them at risk and will have an undesirable effect on their lives (Lansdown, 2011). According to Lee (2014), children were viewed as illogical, immature and incapable individuals, which resulted in parents, or adults in general, believing that children belong to them and it is their duty to make all decisions regarding them. The expectation has been to "see and not hear" children (Lansdown, 2011). The voices of children have been customarily ignored in a society that is adult-centred (Ibid).

Moses (2008:331) asserts that "[t]he way in which childhood is conceptualised has an impact on the way in which power functions in adult-child interactions and therefore on the spaces that are opened up for children to participate, . . . whether that be through having the opportunity to articulate their opinions, have their input and opinions taken seriously or actually being enabled to make decisions".

Listening to children, as outlined in article 12 of the United Nations Convention on the Rights of the Child 1989 (CRC), "was a new concept in international law, and posed a challenge to most countries throughout the world, where a culture of listening to children was not widespread or even acceptable" (Lansdown, 2011:1). It was not easy to accept that children could be actively involved and contribute to decisions within their own lives (Ibid). The African Charter on the Rights and Welfare of the Child (ACRWC) is the first regional mandatory instrument which identifies the child as a holder of certain rights (Moses, 2002) and supplemented the CRC in extending the boundaries of children's rights and focusing on the African context (Sloth-Nielsen and Mezmur, 2007). The right of the child to participate and to express views is contained in article 4(2) of the ACRWC which deals with the best interest of the child and reads as follows:

In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

The traditional approach was, however, challenged through the implementation of the CRC, which recognises that children are entitled to rights. The application of article 12 “involves a profound and radical reconsideration of the status of children in most societies and the nature of adult/child relationships” (Lansdown, 2001:1). Lansdown adds that this article requires that adults “begin to listen to what children say . . . take them seriously . . . [and] recognise the value of their own experience, views and concerns”.

Article 12 of the CRC affords children the right to be heard in all matters affecting them, giving recognition to their human dignity and enabling them to participate in decisions that affect their lives (Krappmann, 2010; Lansdown, 2011). This right furthermore empowers children to enforce other rights that they have, such as speaking out against rights’ violation and abuse (Lansdown, 2011).

The right extends to all aspects of the child’s life, including participation in decisions that are made in care and protection matters that affect them. Lansdown (2011:5) states that the participation of children in decisions ensures better outcomes as “adults do not always have sufficient insight into children’s lives” that would allow them to make well-informed and effective decisions. Children had a distinctive knowledge “about their own lives, needs and concerns,” as well as “ideas and views” that stem directly from their own experiences (Lansdown, 2011:5). Children thus need to inform the decision-making processes that affect their lives.

Child participation in child care and protection matters is promoted by article 12(1) of the CRC and article 7 of the ACRWC. In terms of these articles, children should be heard in all matters that have an impact on their lives and they should be allowed to express their views and feelings freely. According to Olson (2009:53), a range of “consensus-based, non-adversarial dispute resolution and decision-making processes” needs to be implemented. The family group conference (FGC) is an alternative dispute resolution (ADR) processes through which children can express their views and participate in decision-making processes that affect their lives.

According to the Child Welfare Information Gateway website, “[f]amily group decision-making refers to a collection of family intervention approaches in which family members come together to make decisions about caring for their children and to develop a plan for services”. The literature accords different names to describe these interventions or meetings, such as family team meetings, family team conferencing, family group conferencing, family group decision-making, family unity meetings, and team decision-making (Chandler and Giovannucci, 2004; Huntsman, 2006; Knoke, 2009; (Olson, 2009); Connolly and Masson, 2014). Although these methods differ in some aspects, they all include the participation of families and decisions that influence the safety stability, and well-being of children. In this study it is referred to as FGC.

The participation of children in decision-making processes, such as family group conferences (FGCs), is also affected by socio-economic conditions and cultural diversity of societies in a country, especially in emerging countries like South Africa, where social welfare and justice amenities are not within reach of children from marginalised communities; and even if they are, the country does not have sufficient budgetary resources or skilled and trained personnel to effectively implement the legislation as intended. As a result, children are not presented with the opportunity to take part in these processes to express their views and feelings and contribute to decisions about their own lives.

Qvortrup, in Moses (2008:330), affirms that “[c]hildhood and the living conditions of children are fundamentally influenced by the economic, social and political conditions that constitute the context in which they live”. Moses (2008:331) adds that “[t]he impacts of these conditions on the nature of children’s lives calls for theorisations of children’s participation to grapple with the way in which socio-economic conditions shape and constrain how, in what, and to what effect, children are able to participate”.

Moses (2008:331) further states that

[C]hildren may be unable to take opportunities to participate in processes that affect them because other basic rights are not met. Furthermore, tensions exist in a developing country context such as South Africa between budgeting for participation (which can be costly) versus addressing basic needs and the lack of essential services.



When considering the above it is clear that child care and protection matters need to be addressed; however one can assume that addressing these issues will place a burden on resources, and that to implement legislation effectively to address these issues will entail cost implications that will need careful and extensive planning and budgeting.

After the ratification of the CRC, South Africa adopted the new Children's Act 38 of 2005 (the Act), to strengthen the statutory child protection system (South African National Department of Social Development (SANDSD), 2017) to give effect to the right of the child to be heard in care and protection matters and to participate in decisions that affect their lives (CRC, 1989).

According to Zaal (2010:354) the Act extends the “previously limited functions of the children's courts” and one of the new competencies will be a “discretionary power” to initiate and use the results of alternative dispute resolution (ADR) before deciding on the best solutions for children. The use of ADR will advance the resolution of cases and is used as an aid in matters where children are involved in court proceedings. This has extended to welfare-initiated child care and protection matters. According to Matthias (2014) these ADR processes have many features that are positive and increasingly used internationally.

Zaal (2010:354) states that the provisioning of ADR methods has resulted in a movement away from a strictly adversarial system, and gives effect to the need for children's voices to be heard. Participation in ADR processes is important as it affects communities, families and individuals when dealing with child care and protection matters for whom the use of ADR options appears to be less expensive and intimidating. It is also a more accessible resolution mechanism than the courts previously used to deal with child care and protection matters. It has also proved to be beneficial when seeking “culturally-appropriate solutions” and to assist “dysfunctional families and vulnerable children” to participate more meaningfully than in a confrontational court setting (Zaal, 2010:354).

In South Africa the Children's Act (the Act) and its regulations have extended the functions of the children's courts in which child care and protection matters are heard (Zaal (2010:354). One of these functions is the discretion given to children's courts to initiate and order a variety of forms of ADR before decisions are made in matters that affect children's lives (sections 46(h)(iii), 49, 69, 70 and 71). The modes mentioned in the Act consist of mediation, pre-hearing conferences, FGC and lay forums (Matthias, 2014). One of the methods that appear to be most commonly used and

successfully implemented in ADR during care and protection matters is FGC (Chandler and Giovannucci, 2004; Mayer, 2009; Olson, 2009).

Countries such as New Zealand and Australia have developed models, guidelines and child care and protection legislation and processes to include child participation in decision-making processes to ensure that the voices of children are heard and given consideration through FGC (Moses, 2008; Petrie and Kruger, 2011; Connolly and Masson, 2014).

This study draws a comparative analysis of South Africa, New Zealand and Australia and will focus on and explore child participation in FGC as the ADR method used in care and protection matters.

## **1.2 STATEMENT OF THE RESEARCH PROBLEM**

Much progress has been made in many countries through changing legislation, policy and practice, to include children in decision-making; however the right to be heard is unrealised for too many children across the world (Lansdown, 2011).

Cultural diversity within South Africa contributes to a situation where adults hold a variety of views on the place of childhood and suitable roles for children within the home, community and beyond. One commonality across social and cultural settings however, is a marked disparity in power and status between children and adults (Clacherty and Donald, 2007).

This affects child participation in decision-making processes and more specifically FGC.

Furthermore, although there has been development and progress in the care and protection of children, it has not aligned opportunities for all children. There are a high number of vulnerable children who do not escape from poverty and the situations where they are exposed to “violence, abuse, neglect and exploitation” (SANDSD, 2017:19) which is indicative of children not receiving the necessary welfare and justice services that would protect them from harm and afford them the opportunity to participate in decision-making processes that have an impact on their lives.

Although South African legislation (the Act) was changed to include children in decision-making processes through ADR methods such as FGC, it appears from the literature that the lack of resources, guidelines and well-defined regulations has prevented the realisation of this right.

According to Zaal (2010) the regulations of the Act do not appear to offer enough guidance on specific forms of ADR, such as FGC (the focus of this study) and there are shortcomings in the legislation that apply to all forms of ADR.

Other authors who have focused on shortcomings in the legislation and recommendations in respect of the methods used in ADR in South Africa are De Jong, (2009); Zaal, (2010) and Matthias, (2014). Researchers have also noted that there is a need for research on the current practice of child participation in the South African context (Bray, 2002; Berry & Guthrie, 2003; Moses, 2008). The literature which specifically focuses on child participation in FGC in South Africa appears to be insufficient and limited.

The use of ADR in child protection cases in South Africa is a new concept that needs to be explored. According to the literature, there are gaps in the South African legislation (the Act) and a lack of clarity and direction in respect of child participation in FGC, in child care and protection matters. The researcher is therefore of the opinion that this research could contribute to South Africa's implementation of FGC and children's participation in this decision-making process.

The overall aim of this study is to critically examine the current South African legislation which governs the implementation of FGC and the factors that influence child participation, to assess whether this approach is compatible with the right of the child to be heard and to participate in decisions that impact his or her life. Section 70 of the Act is the main provision regulating FGC in care and protection matters.

The research will furthermore explore the legislation and implementation of FGC in New Zealand and Australia in a quest to identify best practices and considerations for South Africa.

### **1.3 AIMS AND OBJECTIVES OF THE STUDY**

This study is exploratory and has two primary aims. First, to explore child participation in FGC, pertaining to care and protection matters, as contained both in South Africa's legislation and in New Zealand and Australia. Secondly, to formulate recommendations based on the relevant international materials and experiences of New Zealand and Australia for improvement of the South African law and practice. The dissertation further aims to demonstrate that the shortcomings in the South African legislation can be overcome by means of appropriate solutions such as legislative amendments, supplementary provisions and guidelines.

### **1.3.1 Research Objectives**

The objectives of this study are as follows:

- To examine how children's voices are heard in FGC, in care and protection matters.
- To examine which factors, facilitate or impede child participation in FGC.
- To determine what FGC child participation guidelines need to be developed in South Africa.

### **1.3.2 Research Questions**

The research questions that will be answered through the research study are:

- How are children's voices heard in FGC, in care and protection matters in South Africa, New Zealand and Australia?
- What are the factors that facilitate or impede participation in FGC?
- What child participation guidelines are needed for FGC in South Africa?

## **1.4 CONCEPTUAL FRAMEWORK**

Flekkoy and Kaufman (1997:32) indicate that "article 12 is "the heart of the participatory provisions" of the CRC. This research is underpinned by article 12 of the CRC which provides children with the procedural right to be heard, to participate in decisions that affect them and to express their feelings and views. The significance of article 12, for the purpose of this study lies in that article 12 considers the child as a "subject of protection" instead of an "object of protection"; where children are regarded as "autonomous beings" who can participate in processes such as FGC, where they are allowed to express their own ideas and preferences (Barratt, 2003:149). "Article 12 may best be understood as a right of participation" and it is therefore important that "procedural opportunities" (Barratt, 2003:152) will be created and available to children, in the form of FGC, so that they can express their feelings and views and participate in decision-making that affects their lives. This research will explore the participation of children in FGC in care and protection cases, as implemented by the Act in South Africa and as implemented in New Zealand and Australia.

## **1.5 RESEARCH METHODOLOGY**

This study is based on a desktop literature review. International countries that have been researched include New Zealand and Australia. The literature review suggests that these countries have developed successful models to involve children in the participation of FGC (Kruger, 2005; Huntsman, 2006; Harris, 2007; Lubin, 2009; Petrie and Kruger, 2011; Barrie, 2013; Connolly and Masson, 2014).

Contextual information has been gathered from international and national sources. Primary sources such as international conventions, international and national legislation, policy documents, reports and concluding observations from relevant international committees and bodies have been studied. Secondary sources such as international and local journal articles, academic writings, newspaper articles, non-governmental organisation publications and internet sources will also be used.

## **1.6 LIMITATIONS**

The study is limited to literature review and no interviews were conducted to assess the implementation of the Act and regulations in respect child participation in FGC.

## **1.7 DEFINITION OF KEY CONCEPTS**

### **1.7.1 Child Participation**

The Cambridge Advanced Learner's Dictionary (2008:1035) defines participation as “an individual taking part in or becoming involved in something”. According to Lansdown (2005:12) participation is “the process of sharing decisions which affect one's life and the life of the community in which one lives”.

The Act defines child participation in section 10 as:

[E]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

### **1.7.2 Family Group Conference**

According to Child Welfare Information Gateway website, “[f]amily group decision-making refers to a collection of family intervention approaches in which family members come together to make decisions about caring for their children and to develop a plan for services”. Literature ascribes different names to describe these interventions or meetings, such as family team meetings, family team conferencing, family group conferencing, family group decision-making, family unity meetings, and team decision-making (Chandler and Giovannucci, 2004; Huntsman, 2006; Knoke, 2009; (Olson, 2009); Connolly and Masson, 2014). Although these methods differ in some aspects, they all include the participation of families and decisions that influence the safety, stability, and well-being of children. In this study it is referred to as FGC.

FGC “establishes a process for families in the child protective system to develop a care and safety plan for the children while empowering the family and its extended family system to make their own decisions and utilise often untapped resources and community supports to assist the child” (Chandler & Giovannucci, 2004:220). Furthermore, “the traditional child welfare system often disempowers and disenfranchises families, [and] the approaches used in FGC are designed to strengthen and sustain the family” (Chandler & Giovannucci, 2004:220). Connolly and Masson (2014:404) affirm that the “FGC model, brings the family, including the extended family, together in a solution-focused, family-led process of decision-making”.

Olson (2009:53) agrees with the aforementioned authors and states that “FGC refers to family-focused, strengths-oriented, and community-based processes where parents, older children, extended family members, social service professionals, and others gather and act collectively to work on problems and make decisions for and with families”. It is a consensus-based, non-adversarial dispute resolution and decision-making process (Olsen, 53).

According to Petrie and Kruger (2011:3), the “core” of FGC is based on “ideas of restorative justice and community development”. The FGC model that was used in the child welfare system worked so well in New Zealand and Australia, that it was also applied and successfully used as an ADR method in cases that included criminal, juvenile justice and victim/offender negotiations, to enhance the voice of the child and keeping the child and family out of the court system (Connolly, 2004; Lubin, 2009; Connolly and Masson, 2014). This study will only focus on FGC within the context of the child welfare system.

During the FGC, the facilitator uses the language of the child and family, “not the bureaucracy; information is shared among family members and professionals at the same time, and meetings are facilitated to ensure the maximum amount of participation among the family members” (Chandler and Giovannucci, 2004:220). FGC is a process that is guided by a “neutral facilitator” (Giovannucci, 221). Connolly and Masson (2014:405) add that an important element that contributes to the success of the FGC is “[a] high level of skill is required for the coordinator to both manage pre-conference dynamics, and deal with the tensions and difficulties that emerge during the meeting itself”.

It is thus evident that FGC is a method that is used to try to resolve child care and protection challenges present within families. Connolly & Masson (2014:403) add that FGC empowers families by giving them a greater decision-making voice that promotes the voice of children, when they “work through complex issues of child protection, something that is rarely available to them during formal court processes”. Morris & Connolly (2012:49) assert that FGC provides the “means through which people can exercise their right to participation and to take responsibility for children when it is appropriate and safe to do so”.

It is worth mentioning that although section 70 of the South African Act refers to FGC as a method of ADR, in there is no definition of FGC in section 1 of the Act. In Australia, section 75 of the Children and Young People Act, 2008, provides a detailed definition of FGC. Section 2 of the New

Zealand Children, Young Persons, and Their Families Act 1989, refers in, to the FGC. As far as a definition is concerned, Burford and Pennell (2004) state that “[t]he FGC aims at addressing . . . their care and protection concerns, and strengthening their families so that they can provide them with long-term safety and well-being”.

### **1.7.3 Care and Protection Matters**

The Australian New South Wales Children’s Court Government website (2017), states that “[w]hen concerns have been raised about the care and protection of a child or young person under the age of 18 years, the Children’s Court has jurisdiction to make court orders to ensure their safety, welfare and well-being”.

In South Africa, the Act defines a “child in need of care and protection”, referring to chapter 9, section 150 of this Act and states:

150. (1) A child is in need of care and protection if, the child-
- a. has been abandoned or orphaned and is without any visible means of support;
  - b. displays behaviour which cannot be controlled by the parent or care-giver;
  - c. lives or works on the streets or begs for a living;
  - d. is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
  - e. has been exploited or lives in circumstances that expose the child to exploitation;
  - f. lives in or is exposed to circumstances which may seriously harm that child’s physical, mental or social well-being;
  - g. may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
  - h. is in a state of physical or mental neglect; or
  - i. is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.



(2) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker:

- (a) a child who is a victim of child labour; and
- (b) a child in a child-headed household.”

The importance of child participation and the correct interpretation of children’s’ words in care and protection cases is highlighted by Sinclair (2004:113), who states that during a study conducted, children had a different interpretation of the word “protection” and the phrase “being safe”. For children, the word “protection” meant “over-protection and restrictions by adults and was seen negatively, whereas “being-safe” related to the generation of positive environments for children” (Sinclair,113).

It is asserted that listening to children and young people can “improve decision-making: Participation leads to more accurate, relevant decisions, which are better informed and hence more likely to be implemented” (Sinclair,108).

## **1.8 STRUCTURE OF THE DISSERTATION**

This dissertation consists of six chapters.

**Chapter 1:** Background and context of the study.

**Chapter 2:** Contextual overview and foundation of FGC.

**Chapter 3:** International and national law pertaining to the child’s right to be heard and participation in decision-making processes.

**Chapter 4:** Child participation in FGC in care and protection cases: law, procedure and practice in South Africa.

**Chapter 5:** An analysis of child participation in FGC in care and protection cases: law, procedure and practice in New Zealand and Australia.

**Chapter 6:** Conclusions and recommendations.

## **CHAPTER 2**

### **CONTEXTUAL OVERVIEW AND FOUNDATION OF FAMILY GROUP CONFERENCE**

#### **2.1 INTRODUCTION**

Before consideration is given to child participation in FGC in South Africa, New Zealand and Australia and comparisons are drawn, it is important to clearly understand the FGC model as an ADR method in care and protection cases as well as the value of this method and its process, which provides the opportunity for children to participate in decision-making processes that affect their lives. It is furthermore important to understand the principles that underpin the FGC and which cases could be considered for this process, as these are all aspects that have an influence on FGC and the participation of the child.

This chapter provides a general overview of child participation in FGC in care and protection matters and places these central components of the study in context. The chapter will commence by providing a brief history of FGC where the principles that underpin child participation in FGC will be outlined and the stages of the FGC process will be described. The situations and cases suitable for referral and inclusion in the FGC approach will be explored and discussed as well as the factors that contribute to or hamper the participation of children in the FGC.

#### **2.2 HISTORY OF THE FAMILY GROUP CONFERENCE MODEL**

The FGC originated in New Zealand through the implementation of the New Zealand Children, Young Persons and their Families Act in 1989 (CYPFA). The main principles of this Act are that the welfare of children is of utmost importance and that the family should take part in any decision-making process, and family members should be assisted to care for their children (Olson, 2009). The use of FGC was incorporated in this New Zealand child protection legislation and included all children who were in need of care and/or protection (Connolly & Masson, 2014; Olson, 2009).

In New Zealand, the earlier methods of dealing with needy and disadvantaged children were to remove them and alienate them from unpleasant or dangerous family environments and placing them in residential institutions (Olson, 2009).

FGC was implemented in Australia, Canada, the United States and United Kingdom and in numerous European countries. The New Zealand model was adjusted in some countries and was

referred to as Family Group Decision Making (Huntsman, 2006; Knoke, 2009; Connolly & Masson, 2014).

Governmental, cost and ethical considerations are thought to have delivered the motivation for the implementation of the FGC model. The principles that guide child participation in FGC are mentioned below where the types of child protection cases which are suitable for referral to the FGC, are deliberated. This chapter furthermore outlines factors that impact the FGC process, as well as other factors that influence child participation in FGC.

### **2.3 PRINCIPLES OF THE FAMILY GROUP CONFERENCE PROCESS**

When the use of FGC is considered, it is important that the guiding principles promote children's participation in the FGC process and that the interests of children are the most important consideration.

From the literature, it is evident that authors agree about the core principles that underpin the implementation and delivery of FGC (Connolly & McKenzie 1999; Hanson, 2004; Connolly, 2006; Olson, 2009; Sliwka, 2011 and Boxall, Morgan & Terer, 2012; British Columbia Family Group Conference Reference Guide (2005). These principles are:

- Collaboration between families and community support;
- FGC must be a voluntary process;
- The child's has a right to express views and feelings and that these views, feelings and proposed solutions are as valid as those of the adult participants;
- Safety of the child is of paramount importance;
- Consideration for the child and family's community and culture;
- Impartiality and neutrality of the coordinator;
- Children and families should be provided with sufficient and necessary information to make informed decisions;
- Empowerment of families to address child protection concerns; and
- State responsibility and mobilisation of increased support to families as they provide for their children.

Authors appear to be in agreement that the principles mentioned above are essential and apply to any country where FGC is implemented. It is important that South African legislation (the Act) reflects these principles and provides the impetus for using FGC in practice to provide the opportunity for children to participate in decision-making processes and have a say in the decisions that determine their future. Chapters 3 and 4 will examine and compare legislation that is relevant to this research study.

## **2.4 THE PARTICIPANTS**

The family and the FGC coordinator should decide who will attend and be included in the FGC, to participate and provide information (Connolly & Masson 2014). From the literature there is consistency that the participants of an FGC consist of:

- The family, which includes close and extended family;
- The child who is the topic of the FGC;
- Professionals such as the coordinator, social workers, health and/or educational professionals or legal representatives, who are involved in the case and provide resources, information or specific advice at the FGC, (this includes interpreters wherever required); and
- Support persons who could be immediate or extended family members and friends (Huntsman, 2006; Lubin, 2009; Petrie & Kruger, 2014).

## **2.5 THE FAMILY GROUP CONFERENCE PROCESS**

The FGC processes changed traditional child welfare practices in that families no longer relied on professional evaluation but identified their own strengths and challenges to create their own solutions with the assistance of the professionals' knowledge and experience (Doolan, 2004). The FGC model "brings the family, including the extended family, together in a solution focused, family-led process of decision-making" (Connolly & Masson, 2014:404). In practice, the main elements of this method of decision-making are: a neutral coordinator who contacts family members and convenes the FGC; the social worker's limited role is to explain the issues about the child to the FGC attendees; private family must be given time to agree on a plan in the absence of professionals; and a "special status" for the plan that was developed at the FGC (Ibid).

Some countries use a three-phase process while others describe four distinct stages of the FGC process. Authors, such as Petrie & Kruger (2011), Ashley (2007), Harris (2007), Knoke (2009) and Connolly & Masson (2014) all agree that the FGC is generally characterised by three phases: preparation, the conference and follow-up and monitoring. Chandler and Giovannucci (2004) identify four distinct stages in the FGC in which, the referral and preparation phases are separated. In the three-phase approach, the first two stages are incorporated into one phase.

The FGC model that is currently used by child welfare agencies in Australia and New Zealand is a three-phase process (Huntsman, 2006; Olson, 2009). The South African legislation (the Act) does not make provision for outlining the FGC model or processes. The South African practice of FGC is explored in chapter 4.

### **Phase 1: Preparation**

During this phase, a convener is appointed to arrange and prepare for the FGC. Before the FGC process is facilitated, it is essential that the convener completes important preliminary functions such as identifying and locating key persons (family, extended family, and professionals) and family support systems all of whom have valuable information about resources and services. He/she then invites and encourages these members to attend the conference and to participate and prepares family members and professionals for the process and explains the purpose of the meeting. The conveners need to be independent in all the different phases of FGC and require specialised training and skills (Chandler & Giovannucci, 2004; Huntsman, 2006; Sliwka, 2011; Matthias, 2014). It is important that all persons who are involved in the FGC, start participating as early as possible to ensure that the length of time that children spend in temporary placement is minimised. It is thus important, early in the preparation stage, to establish whether people are willing to participate in the FGC and not to spend too much time convincing people to participate.

### **Phase 2: The Conference**

During the conference phase, there are three stages to the meeting (Huntsman, 2006; Olson, 2009; Sliwka, 2011). The literature refers in general to the child attending the FGC, but does not specifically mention the child's participation in stage one or two. One is left to assume that the child will attend stage one, where information is shared and that the coordinator will determine whether the child should move in and out of the conference or only attend at a specific time. (This

is discussed later in this chapter). The question would then be what happens to the child during stage two, when the family devises a plan in the absence of the professionals? Does the child stay or leave the FGC?

### **Stage 1: Information Sharing**

The convener presents minimum requirements, professionals and family members provide and share information, share the assessments with the family and give the family the opportunity to give their perspectives, describe the resources and services that the family could access, allow the family to describe their concerns for the child and enable family members to ask questions and identify their strengths and weaknesses. The child needs to express views during this stage. If the safety of the child is a concern or the power relations within the family members may affect the child's participation, the child's views need to be expressed and shared with the group. The information shared is presented in the family's language of choice.

### **Stage 2: Private Family Time**

The convener and professionals leave the meeting whereafter the family members are left on their own to discuss challenges and to create their own solutions, based on their own knowledge and the information they have received. The family members utilise their own history, culture and problem-solving approach to devise an acceptable plan of action.

### **Stage 3: Presenting Family Plans**

The convener and professionals return to the meeting whereafter the family presents their plan. The plan is discussed by the group, resources are negotiated, final decisions are made, and the plan is agreed to by all parties, including the child, and then ratified and documented. The social worker needs to agree and support the plan on grounds that it is safe, legal and meets the needs of the child (Centre for Advanced Studies in Child Welfare, 2002). The plan needs to be detailed with specific suggestions on how to address the concerns that were raised during the FGC (Olson, 2009). It is further important that the plan should be specific so that family members, child protection agencies and the court personnel understand what is required (Ibid). A summary of decisions and a copy of the plan are given to all participants. The convener gives the plan to the child protection social worker and the court.

### **Phase 3: Follow-up and Monitoring**

The timing of and responsibility for the follow-up measures and monitoring of the plan is determined and specified. The role of caseworkers is to provide support to the parents and child, focusing on their strengths (Olson, 2009). The literature does not specify the specific roles and functions of professionals as far as monitoring and evaluation are concerned, but, as mentioned above, the plan should be specific, so that professionals understand their role. Huntsman (2006) states that procedures are set out for review of case plans, but does not elaborate on this.

The child needs to be involved in the monitoring and reviewing of the plan that was devised, and must be actively engaged in follow-up assessments, since the child is in the best position to provide feedback on whether the plan is working (Nixon, 2007).

## **2.6 REFERRAL CRITERIA**

It is evident from the literature that some children may not have the opportunity to participate in FGC and contribute to decision-making processes that influence their lives. According to the literature, there are certain issues, circumstances and cases that are viewed as inappropriate and careful consideration is required before a family is referred to participate in FGC. In instances of family violence or where the child has been abused and the child's safety is of concern, these child protection cases could be viewed as inappropriate to include in FGC. (Discussed in more detail, later on in this chapter). For example regulations in the Northern Territory in Australia must include clear guidelines to assist and guide practitioners, agencies and courts as to what factors to consider and when it is not appropriate to refer and include children and their families in FGC (Petrie & Kruger, 2011). This is an important consideration to be included in South African ADR regulations that deals with FGC. Below are some important guidelines for consideration before referring a family to FGC.

### **2.6.1 The Need for a Referral to be made**

In instances where simpler solutions were offered to families and they did not resolve the problem, professionals need to consider whether the existing circumstances suggest that the child appears to be in need of care of protection, and there is a need for decisions to be taken about the needs or welfare of a child and it warrants the child's participation in the FGC (Ashley, 2007).

### **2.6.2 Safety of the Child**

In instances where the immediate safety of the child is of concern, or where there has not been sufficient investigation to confirm whether the safety of the child is a concern, referral is not appropriate (Olson, 2009). The child should participate in the FGC where possible, and the child's safety should be a key concern when preparing for the FGC (Hanson, 2004; Boxall, Morgan & Terer, 2012). In South Africa, the Children's Act (the Act) provides that a children's court must consider "all relevant factors" which includes "the vulnerability of the child, the child's ability to participate in the proceedings, power relations within the family and any allegations made by the parties" before a matter is referred to ADR, including FGC (Matthias, 2014:289). The consideration of these factors would ensure that the child's safety is not at risk and that the above-mentioned factors do not impede the successful outcome of the FGC.

### **2.6.3 Vulnerable Children, Special Needs and Disability**

The negative perceptions that exist in respect of disability, or adults' and professionals' lack of ability to engage and work effectively with disabled children, results in these children often being considered as not able to participate or are not regarded as *bona fide* participants (Nixon, 2007:25). Black and minority ethnic families with disabled children or a disabled parent can be socially disadvantaged and the children often face fewer opportunities than in other families (Ashley, 2007). The insufficient coordination of services and exclusion from child care are common experiences for these families (Ibid). According to the Children's Legal Centre (2011), research shows that children with disabilities are often excluded from FGC and do not have the opportunity to communicate their views. It is therefore important that vulnerable children should also be afforded the opportunity to participate in decisions-making processes that affect their lives.

Professionals need to identify whether a child or parent is disabled or lacking understanding so as to require assistance with communication, to allow them to be included in the FGC process and fully participate (Beckett, 2007). FGC can be successful in including children with disability in the same way as non-disabled children by working with the wider family and reinforcing support within it (Ashley, 2007).



#### **2.6.4 Family Attendance**

Referral to FGC is not appropriate when there is no support system available to the parents. This support system can consist of family members, friends, or community members who are capable of assisting the parents (Olson, 2009:59). There needs to be at least one, and preferably a number of family members or persons outside the immediate household who could be approached to attend the FGC.

#### **2.6.5 Coordinator Neutrality**

In South Africa, in terms of section 70 of the Act, the court must “appoint a suitably qualified person or organisation to facilitate” the FGC (Matthias, 2014:291). In terms of regulation 13 of the Department of Justice and Constitutional Development, “a suitably qualified person includes but is not limited to a family advocate, social worker, social service professional or traditional leader” (Ibid). What has arisen in other countries “is the need for specialised training on the principles, values and the legal framework of the child protection system, as well as training on the methodology of FGC (Ibid; Chandler and Giovannucci, 2004).

The objectivity and neutrality of the facilitator is an important element that contributes to the family feeling independent and empowered (Hanson, 2004). It is imperative that the coordinator stays impartial during the FGC process and that the family members experience the coordinator as being neutral (Ibid). Neutrality is difficult in cases where the coordinator has previously been therapeutically involved with the family or member of the family (Ibid).

#### **2.6.6 Clear and Appropriate Information**

It is important that families and children receive information on the resources and support services that are available to assist them to resolve their difficulties (British Columbia Family Group Conference Reference Guide, 2005; NetCare Consultancy & Training website). Families must receive clear information about what a FGC is and why they have been offered a FGC (NetCare Consultancy & Training website).

Children’s age range, gender and abilities should be considered when transparent information is presented (Lansdown, 2006). The children to be heard should receive “full, accessible, diversity-sensitive and age appropriate information” about their right to express views freely, the weight given to their views and the matter in which they are expected to make informed decisions

(Lansdown, 2011:152; Krappmann, 2010). Children should furthermore be informed about how the participation process will unfold and the consequences of their views.

Certain circumstances have an influence on child participation in FGC, and the important issues for consideration are discussed below.

## **2.7 CIRCUMSTANCES THAT INFLUENCE CHILD PARTICIPATION IN FAMILY GROUP CONFERENCE**

Ashley (2007:174) believes the question that should be raised is not whether families can we use the FGC approach but “*when* or under what circumstances should we use FGCs?” These instances are explored below (author’s emphasis).

### **2.7.1. Lack of Social Power of Children**

There is a “relative powerlessness of children to protect and serve their own interests in comparison with adults and this can compromise their right to participation” (Ackerman, Feeny, Hart, and Newman, 2003:8-9). Children are in many instances disregarded by adults as they are usually not considered as “persons with power” (Ackerman, Feeny, Hart, and Newman, 8-9). This view of children results in them “being disadvantaged and discriminated against” because of their age and leads to adults controlling their lives and futures by making decisions for them (Ibid).

### **2.7.2 Power Imbalances**

According to Ashley (2007:164) “families may experience their participation as being ‘managed’, often to the requirements of the organisation rather than to their own wishes”. To enhance families’ participation does not “necessarily mean that professionals lose their *power*, which they retain through the courts and through the control of information and resources” (Ashley, 2007:165) (author’s emphasis). FGC does, however, provide greater opportunities for sharing power (Ibid). These marginalised families and children have unequal access to services in society (Ibid). Ashley (2007:165) goes on to say that “[i]f we really want to enhance the participation, safety, citizenship and dignity of all children and their families, then wider social, political and economic changes are required that go far beyond social work services”. Ashley’s argument is relevant to South Africa, New Zealand and Australia as these countries have similar demographics, which include large numbers of marginalised families and children.

Nixon (2007) agrees with Ashley and states that there is a connection between poverty and disparity of access that has an overwhelming impact on families and especially children. “The impact of inequality, racism, patriarchy and poverty all have extreme and life-changing or life-threatening effects on children” (Nixon, 2007:22). These conditions have a direct impact on achieving the child’s right to participate in decision-making that affects his/her life (Nixon, 2007). Ashley and Nixon agree that not all children have an equal opportunity to be exposed to processes such as FGC, where the opportunity is provided for the expression of views and wishes and participation in decision-making about their lives.

It is important that the state takes responsibility for the development of policies and practices that eradicate social exclusion and focus on community participation, stakeholder consultation and social inclusion to promote the empowerment of individuals and communities. When opportunities for participation in FGC are created, the family and children are placed at the centre of decision-making.

In South Africa, the development of a family policy was initiated in 2004 after research was conducted on the structure and the needs of families. This research resulted in the development of the White Paper on Families, envisioning “well-functioning families which were loving, peaceful, safe, stable, and economically self-sustaining, and that also provide care and physical, emotional, psychological, financial, spiritual, and intellectual support for their members” (White Paper on Families, 2013).

### **2.7.3 Stakeholder Buy-In and Resources**

According to Olson (2009:59) an instance when referral is not a good option is where there are “no or very limited services or resources available to meet the needs of the family”. The participation and the commitment of stakeholders should be encouraged from the start of the FGC and should continue through the entire process (Boxall, Morgan & Terer, 2012). Olson (2009) states that there must be adequate resources and time allocated to FGC meetings with the need to make provision for services and resources that are necessary to implement the plans created by the family and agreed to.

#### **2.7.4 Practice and Agency Control**

According to Nixon (2007:26), a factor that influences children's participation in FGC is traditional practice. Children often remain "invisible" during the FGC, or they are viewed as bystanders, while adults conduct business over their heads, not allowing them to participate during the conference. Professionals also often do not interpret children's views correctly and distort their views.

Nixon (2007) recorded that an internet study showed that the involvement of children in FGC is usually dependent on the organisation or practitioner rather than the child, and this control may limit the participation of children in FGC. Without a formalised mandate that gives effect to FGC, a family's access to the FGC mainly depends on the commitment of the organisation and professional preference (Connolly & Masson, 2014). It is suggested that the referral process needs to be reviewed to include referral options that are not dependent only on organisations or practitioners. Children and their families should also be allowed to gain access to the FGC through a process that is not limited and controlled.

#### **2.7.5 Physical Space**

When reaching out to children it should be in an environment that is familiar to them rather than representatives being invited to a central point (Lansdown, 2011). Child-friendly environments and meeting places that are non-discriminatory and inclusive should be used where children feel comfortable and relaxed and where they can access the facilities that meet their needs. The venues should also be accessible to children with disabilities (Lansdown, 2011). The FGC could be facilitated in centres within the community, such as schools, churches and homes rather than offices. The setting is an important aspect that creates an informal and relaxed atmosphere to increase child participation (Huntsman, 2006).

#### **2.7.6 Culture, Ethnicity and Language**

The issue of sensitivity to culture is widely discussed in the literature and cited authors agree that cultural sensitivity should prevail throughout the FGC process, and the coordinator should speak the same language as the family and, where possible, have the same cultural background. Furthermore, the coordinator needs to acknowledge and respect the culture and traditions of the

family throughout the FGC process (Ashley, 2007; Boxall, Morgan & Terer, 2012; Connolly & Masson, 2014).

The coordinator is normally selected from the community that is close to the family's background (Centre for Advanced Studies in Child-Welfare (CASCW), 2002). The coordinator "proceeds from an acknowledgement of the role of race, ethnicity, economic class, spirituality and culture in a family's life" (FGC Coordinator Manual for Ontario, 2011:30) and when the coordinator does not understand the family's culture, "s/he works to learn about the family's culture, such as by finding individuals in the community who can serve as cultural guides" (FGC Coordinator Manual for Ontario, 2011:30).

Provision needs to be made to accommodate the needs of children, and the coordinator has to identify, understand and address issues of race, gender, religious beliefs, culture and other lifestyle issues of the family (Ashley, 2007). Some cultural practices that can be included in FGC are to provide choices of food and of venues that are culturally fitting for the FGC (George Hull Centre, 2011).

Cultural values and practices can have a significant influence on the participation of the child and the FGC process and it is therefore important that it should be conducted in a manner that is culturally correct (Boxall, Morgan & Terer, 2012). When the coordinator acknowledges and responds to a family's culture, it improves the relationship with the family and this allows the conference to be relevant to the family and the child and makes them feel more comfortable with the FGC process which could stimulate child participation (Rohm & Bruce, 2008).

It is evident from the literature that authors affirm that the recognition of the child's cultural circumstances and addressing the child in his/her language may encourage child participation. In a multilingual context such as South Africa, it is important to determine the language of the child, before the FGC is convened and to ensure that a language interpreter is appointed to assist. In the absence of an interpreter, alternatives can be considered such as the assistance of an adequately trained community member or volunteer who is skilled to address the child in his/her language and ensure that the child's view is correctly translated during the FGC. When the coordinator shows a sincere interest and understanding of the family's culture, this creates a safe, accessible and appropriate environment for children in which children can feel respected and able to express their views freely. This will further encourage child participation in the FGC.

## **2.8 TYPES OF CASES THAT INFLUENCE FAMILY GROUP CONFERENCES**

There are some situations that may lead the child protection coordinator to conclude that continuing with the referral of the family to participate in the FGC will not be appropriate (Olson, 2009). Furthermore “FGC may not be suitable for all types of families, given the wide diversity of family types and members” (Sliwka, 2011:3). Factors that should be taken into consideration when deciding which families are more suitable for FGC, include their culture and the types of family conflict (Ibid).

FGC is not feasible under conditions of acute mental illness where parents do not understand their participation in the FGC and in instances of domestic violence and substance abuse where children are at risk of being harmed and their safety is a concern (CASCW, 2002). Before an FGC is convened in child care and protection matters, it is important to assess the suitability of the case for FGC and whether the case compromises the safety of the child (Ashley 2007). These circumstances are described below.

### **2.8.1 Safety of the Child and Emotional Harm**

It was mentioned earlier that the safety of the child is paramount. The referral is not appropriate when the type of case raises questions about the immediate safety of the child.

According to Nixon (2007) research suggests that another reason for the exclusion of children from FGC was concerns about children’s safety and adults’ fear of what children may hear or the wish to protect them from emotional harm. Children were thus not included in FGC as it was believed that they were at risk in this process.

Child participation can occur on a continuum from the child attending the entire conference and sharing their views, right through to not attending and having someone else share their views, as long as they are physically and emotionally safe in doing so (Rogers, 2010).

### **2.8.2 Alcohol Abuse, Sexual Abuse and Domestic Violence**

FGC is not a suitable method in all cases; where the child’s safety is of concern FGC may not be a suitable method. There appear to be contradictory views regarding this. Some studies suggest that cases involving substance abuse, domestic violence and sexual abuse will indeed benefit from FGC (Huntsman, 2006; Sliwka, 2011). The benefits of including substance abuse cases in FGC, is

seen in “the active involvement of the extended family” which often takes care of the children, while parents are receiving treatment (Slikwa, 2011:3). The extended family members also often encourage parents to complete treatment (Ibid). In some instances where there is domestic violence or sexual abuse and the child’s safety is of concern, FGC may not be a suitable method.

However, FGC has increasingly been used in cases of domestic violence (Pennell, 2004; Child Welfare League of America, 2005). In cases where domestic violence is present, the coordinator should carefully consider whether to proceed with the FGC and who should be included (British Columbia FGC Reference Guide, 2005). The safety of family members is a priority, and in instances where there is domestic violence and sexual abuse families can be excluded from the FGC (Sliwka, 2011; Petrie & Kruger, 2014).

In instances when sexual or physical abuse have been present over several generations, these cases may not be suitable for referral to a FGC (Olson 2009:59). Certain matters have been identified as less suitable to be dealt with by FGC, especially cases where parents have serious mental health problems, where families are highly transitory, or family networks are very small (Huntsman, 2006; Petrie & Kruger, 2014).

Researchers however suggest that these matters may be dealt with more successfully through FGC than through traditional child protection methods. Jones and Finnegan (2003) concur that FGC is beneficial in these circumstances and encourage the use of FGC with such families. Crampton (2000) however states that all cases should be included in FGC and no cases should be excluded.

### **2.8.3 Family Structure**

Cases that appear to be least suitable for inclusion in FGC are in instances where families appear to be dysfunctional. These instances include parents that have serious mental health disturbances, where the family networks are small or where the families are highly transitory (Sliwka, 2011). Some researchers are however of the opinion that there are no types of abuse that are particularly unsuitable for FGC and there are not any specific types of cases that should be excluded from FGC. Each case’s individual characteristics should be considered (Crampton, 2000).

Those who believe that FGC can be successfully applied to all cases emphasise that the structure of the conference increases communication and family participation and ought to be beneficial to every case in the child welfare system (Chandler and Giovannucci, 2004).

The level of participation of the child in FGC is in the discretion of the coordinator (CASCW, 2002). Variable elements that intensify the voice of the child are discussed in the section below.

## **2.9 FACTORS THAT STRENGTHEN THE VOICE OF THE CHILD AND CHILD PARTICIPATION**

### **2.9.1 Age and Level of Maturity**

The most common factors that influence child participation in FGC are the “child’s age and understanding” (Nixon, 2007:27). Before a child attends the FGC, the child protection coordinator must assess the age and maturity of the child (Lubin, 2009). From the literature it appears that the age and maturity of the child will have an influence on how the child expresses wishes and feelings (verbally or non-verbally) and how his voice will be heard (directly or indirectly).

There are various views regarding the age and maturity of the child and the influence of these factors on the participation in FGC. According to Lansdown (2011:23) the weight that is given to a child’s views is dependent on the age and maturity of the child and thus what the “child’s level of understanding” is evaluated by the ability to understand the consequences of a situation. The age of a child is not necessarily an indication of what the level is, of a child’s understanding, as there are several young children who can demonstrate high levels of maturity (Lansdown (2011:23). The child should not be excluded from participation only because of age. Ashley (2006:137) states that “a child of any age can be present at their FGC and indeed it is usual practice to have babies and children of all ages attend their own FGC”.

The CRC “does not impose a lower age limit on the right to participate, and . . . discourages the introduction of age limits, . . . that restrict the child’s right to participation in decision-making (Lansdown, 2011:22). The decision, whether the child should attend a FGC, must be made between the therapist of the child, the social worker, parents and the coordinator (Nixon, 2007).

### **2.9.2 Assessment of Competence**

“The child’s wishes, if articulated, are likely to be a significant factor in the adults’ decision”, but should only be encouraged in “an environment in which the child’s competence and personality can be assessed” (Eekelaar, 1994:54). The assessment is done by a professional and should include an interpretation of the wishes that are expressed by the child (Eekelaar, 1994). Competence is



based on “sufficient understanding and intelligence” that will allow the child to completely understand what is suggested (Eekelaar, 1994:55).

Lansdown (1995) suggests that decision-making that involves the child’s needs must be linked to an assessment of the child’s competence, relating to a specific decision (Lansdown, 1995). In instances where the child does not have the competence to understand the consequences of a decision, the parent must override the child’s wishes in order to protect the child or to promote the best interest of the child (Lansdown, 1995).

Whenever a child is able to form a view and wants to act on it, he or she should be allowed to express views (Lansdown, 2011). As pointed out earlier, the CRC emphasises that children who are very young are able of forming a views on matters that affect them. “If the court is making a decision affecting a child, it is always important to make sure that it is as fully informed of the child’s perspectives as possible, including the views of very young children” (Lansdown, 2011:56). For example, in cases where a young child has been abused, he or she will have memories and views about what happened, and their views, feelings and wishes will be vital in the decision-making processes. Therefore, every effort should be made to ensure that the child has the opportunity to express his or her view in all cases (Lansdown, 2011).

Finally, when the child displays competence to understand the consequences of his or her views, this should be seen as an important aspect when making decisions regarding the child (Ibid). It is not the duty of the child to provide proof of his or her capacity, but rather the adults that should develop sensitivity to how children communicate (Krappmann, 2010).

### **2.9.3 Verbal and Non-Verbal Participation**

Young children should be allowed to participate in FGC, either through verbal or non-verbal communication, to express their wishes and feelings in different ways. “Children from the youngest ages are able to form views, even when they are not able to express them verbally” (Lansdown, 2011:20). From the beginning of a child’s existence, the child expresses views in ways such as “crying, gestures, bodily reactions which are meaningful means of communication” (Krappmann, 2010:507).

Different methods are used at the FGC and practitioners need to think innovatively about the choices that they offer to children to express themselves (Nixon, 2007). Depending on the unique

situation or case of each child, the child or an appropriate authority, should determine the methods used to convey the views of the child correctly (CRC Committee, 2009). When children cannot express their views verbally, or if they don't want to be present at the FGC, recognition should be given to methods that children can use to promote their voice through non-verbal expression such as play, videos, audiotapes, drawings, painting, facial expressions and body language (CRC Committee, 2009; Lansdown, 2011). A conference call can also be used to exchange points of view (CASCW, 2002). Through non-verbal forms of communication, "very young children make choices, express preferences and demonstrate understanding of their environment" (Lansdown, 2011:12).

#### **2.9.4 Direct and Indirect Participation: Using Support People or Advocates**

Through the CRC, children have the right to express their wishes in person and, although exceptions exist, FGC, best practice supports that children of all ages are present during the FGC (American Humane Association and FGCM Guidelines Committee (AHA Guidelines), 2010; FGC Coordinator Manual for Ontario, 2011). The underlying principle of participation is that the voice of the child should be present at the FGC and this is done by attending the FGC in person (AHA, 2010).

Nixon (2007) agrees that children should be heard in person, unless their age or potential emotional harm would prevent their attendance of the FGC. When the child is unable to attend in person, the child's views and wishes must still be taken into consideration at the FGC (Boxall, Morgan & Terer, 2012).

Children should be provided with the option to participate in only a part of the FGC or to leave the conference if they do not feel comfortable (Hanson, 2004). Alternatively, the coordinator can plan a specific time for the child to visit the FGC and express his or her views (CASCW, 2002). Nixon (2007) agrees that for children who are vulnerable the FGC may be intimidating and suggests that coordinators could use a venue with two rooms where the child can move in and out of the FGC when needed.

Nixon (2007) further asserts that instead of considering whether children should be involved in the FGC, one should rather contemplate how their participation can be achieved. Resistance from family members and professionals or from the children themselves to participate in the FGC can

pose a practice challenge for coordinators. According to Hanson (2004), when child is uneasy about attending the FGC, the coordinator needs to determine the child's level of participation that he or she desires. Hanson (2004) suggests three options that should be discussed with the child, to determine the child's level of participation at the FGC.

First, children may decide not to attend the FGC and choose to write a letter to their family to express their views. This is mostly suitable in cases where a child is really too young or immature to fully participate and where therapists and others are of the opinion that the attendance of the child, in the FGC might lead to emotional harm (Hanson,2004). In these instances, the coordinator can work with the child's lawyer, if one is appointed, and with those closest to the child to ensure that the voice of the child is brought to the meeting. This could be done through the inclusion of photos, pictures or telling or reading stories about the child; using an empty chair that is decorated with a favourite picture or toy or to have a nominated representative for the child (George Hull Centre, FGC Coordinator Manual for Ontario (Ontario Manual), 2011).

With regards to the minimum age for child participation, Nixon (2007) refers to reports that only children over the age of 12 years would be asked to attend the FGC. He further states that there is "no definitive research to support or accepted best practice to assume that children under 12 could not participate" in the FGC (Nixon, 2007:27). Furthermore, the most common factor that influenced child participation in FGC was the "child's age and understanding" (Nixon, 2007). In New Zealand, the FGC model encourages the attendance of children over the age of 10 years (Holland and O'Neil, 2006; Olson, 2009) and in Wales and Australia children as young as six years are included in FGC (Holland and O'Neil, 2006).

Secondly, a support person can be used to attend the FGC with the child, to ensure that the child is feeling safe and proficient. The role of the support person is to assist the child to emotionally cope with the FGC by empowering the child to speak for him or herself and to speak for the child where relevant American Humane Association (AHA), 2008). This also allowed the child to manage his/her feelings and opinions in a manner that was safe and respectful and to provide encouragement (AHA, 2008).

The use of a support person needs careful thought and consideration, and the coordinator should assist children to identify a support person from within their own social support network (Nixon, 2007). Ashley (2007) affirms that any child who is attending the FGC should be assisted to identify

a support person, or an advocate, if possible, from the child's own support network. This support person may have a formal or informal role, but must be an adult who is chosen and trusted by the child (Ibid). Nixon (2007:28) warns that the "use of external or professional advocates" in FGC is an extremely controversial method that could challenge the family decision-making philosophy of FGC. Furthermore, coordinators should however ensure that advocates or family do not take over or speak for children when they can speak for themselves (Ibid).

### **2.9.5 The FGC Coordinator**

Surveys have repeatedly found that it was imperative that facilitators need to be experienced, well-trained, skilled, empathic and culturally sensitive (Kathol, 2009).

#### **2.9.5.1 *Qualities***

It is important to be honest and open when communicating with children as this will be indicative of respect and a willingness to involve children in the FGC (Nixon, 2007). An established factor that encourages child participation in child protection FGC is the quality of the relationship between the child and the professional (Schofield & Thoburn, 1996; Bell 2002; Rees et al. 2010). A review of the literature indicates that the qualities that children seek in persons who support them include empathy, good listening skills, warmth, honesty and an informal but professional approach, being respectful, interested, committed, reliable and willing to act (Mainey, et al, 2009).

#### **2.9.5.2 *Skills***

FGC coordinators require specific skills that will empower children to contribute to decisions about their lives and to protect vulnerable children when the content of FGC discussions is highly emotional (Nixon, 1998). For the FGC to be effective and empowering it is important for the family to be well prepared for participation in the FGC, and skill is necessary to manage the "potentially disruptive dynamics" that may occur during the FGC (Connolly and Masson, 2014:408).

Nixon (2007:28) further states that it is important to use "flexible methods of communication, excellent listening skills, and imaginative ways of involving children in the process". To get children to participate in FGC requires effort and skill. He asserts that communication is active,

and that language and listening is of utmost importance. It is important not to raise “unrealistic or false expectations” of the FGC (Nixon, 2007:28).

It is further imperative that the coordinator must be independent and impartial; if they share a prior working or personal relationship, this involvement could influence coordinator independence or compromise the outcome of the decisions during the FGC (American Humane Association (AHA), 2010). The AHA (2010:33-34) comments on the employment and accountability of coordinators and states that:

[A]ny coordinator, no matter how employed or funded . . . must have a dedicated and distinct role, separate from the child protection role and from the child welfare team of a child welfare agency and:

- Cannot have access to client files or the child welfare agency database;
- Must not read any child welfare recordings or court reports, either from the child welfare agency or from family members;
- Is not to be part of the child welfare team;
- Has the mandate to ensure model fidelity and integrity;
- Has checks and balances built into the system in order to maintain his/her independence;
- Has his/her agency/funder’s commitment to coordinator independence;
- Is advised to be involved in some type of supervision/consultation either through an agency, individual or peer/colleague, or networking with other coordinators”.

### ***2.9.5.3 Knowledge***

Coordinators need to be knowledgeable on additional factors that are viewed as critical and include a substantial knowledge of children’s rights and development, the child care and protection system, family dynamics, the legislation that provides for child protection intervention and matters connected to child abuse and neglect intervention (Schofield & Thoburn, 1996; Boxall, Morgan & Terer, 2012). Furthermore, coordinators should be from “cultural and linguistic diverse backgrounds” (Connolly and Masson, 2014:408).

#### ***2.9.5.4 Training and Qualification***

Morgan et al. (2012) state that FGC coordinators should be supported by ongoing, adequate and intensive training and always remain neutral and independent (Boxall, Morgan & Terer, 2012). The FGC Coordinator Manual for Ontario (2011) asserts that coordinators should “[h]ave post-secondary educational qualifications in human services, or equivalent”.

### **2.10 SUMMARY**

FGC is a decision-making process that should be used when there is a need for decisions to be taken about the care and protection of a child. There are certain issues to consider before referral of a child and family to FGC. There are also factors and circumstances that influence child participation in FGC that need consideration. Not all cases are suitable for inclusion in FGC and cases need to be selected carefully to ensure optimal participation of the child in the FGC and decision-making process.

With these principles, the FGC process and factors that influence child participation in FGC in mind, the next chapter will explore whether the legislation in South Africa, and then New Zealand and Australia in the following chapter, reflects these principles and processes and promotes the participation of the child in FGC.

# **CHAPTER 3**

## **INTERNATIONAL AND NATIONAL LAW PERTAINING TO THE CHILD'S RIGHT TO EXPRESS VIEWS AND FEELINGS AND TO PARTICIPATE IN DECISION-MAKING PROCESSES**

### **3.1 INTRODUCTION**

The child's right to be heard, to express views freely with due consideration to the views of the child in all matters affecting his or her life have been incorporated into both the international and regional children's rights instruments, namely, the CRC and ACRWC. Although neither of these instruments makes specific reference to child participation, this is addressed more extensively in the CRC Committee on the Rights of the Child – General Comment No. 12 (Committee on the Rights of the Child, 2009). Although the term “participation” is not found in the text of article 12, it is an extensive practice that has developed in recent years, and “has evolved and is currently used to describe ongoing processes which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes” (Committee on the Rights of the Child, 2009:5). This chapter will explore the international and national legislation which pertains to the right of the child to be heard and to participate in decision-making processes such as FGC.

### **3.2 THE INTERNATIONAL AND REGIONAL LAW CONTEXT**

The international legislation that will be considered includes the CRC and the ACRWC. The CRC deals exclusively with the rights of children and provides specific provisions to ensure the protection of children and the realisation of their rights. The CRC's pursuit for extended boundaries of children's rights is supplemented by the ACRWC (Sloth-Nielsen and Mezmur, 2007) “to give CRC specific application within the African context that the African Children's Charter – the first regional treaty on the human rights of the child – was adopted” (Sloth-Nielsen and Mezmur 331). While supporting all the universal standards that are outlined in the CRC, the ACRWC addresses the specific difficulties that confront African children (Ibid). Both these treaties have had a great impact on Africa by creating an awareness of the rights of children and

more particularly have impacted on how children are currently viewed in South African law (Heaton, 2012).

### **3.2.1 United Nations Convention on the Rights of the Child (1989) (CRC)**

The rights set out in the CRC define universal principles and norms for the status of children (Kubayi, 2005). After ratification, member states committed themselves to protect children's rights and have agreed to hold themselves responsible for honouring this commitment before the international community (Ibid).

The CRC, was ratified by South Africa on 16 June 1995 (South Africa's Periodic Country Report, 2013), committing itself to placing a foundation on the four pillars of rights on which the convention is built, namely, the best interest of the child, the right of the child to life, survival and development, the right of the child to be heard and the right non-discrimination against the child (Kassan, 2004; Committee on the Rights of the Child, 2009). Article 12 predominantly establishes one of the key pillars, of the convention, which is to ensure children's participation by allowing them to express their views and affording them the right to be heard (Ibid).

Article 12 stipulates that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12(1) gives the child the right to express his or her views freely and have "the opportunity to be heard" when he or she wishes to participate and ensures that these views receive due consideration in all matters that affect the child "in any judicial and administrative proceedings" that affect the child (Kassan, 2003:165). Therefore, article 12 has two aspects: the "more general provision contained in article 12(1) and the more specific application of the right to be heard contained in article 12(2)" (See Gallinetti in Kassan, 2003:165). Thus, when adults are making decisions that affect the lives of children, these children have the right to participate in the decision-



making process and state what they think should be the outcome and have their opinions taken into consideration (Lansdown, 2011).

Article 12 (2) focuses on specific instances by affording children the opportunity to be heard in “any judicial and administrative proceedings affecting the child either directly, or through a representative or any appropriate body” (Kassan, 2003:166). This piece of legislation thus provides the opportunity for children to be heard in different settings and situations. The term “administrative proceedings” has a wide application and includes the protection of the child and care proceedings which creates the foundation for giving the child the opportunity to be heard (Ibid). These care and protection proceedings may involve ADR mechanisms such as mediation through the FGC (Committee on the Rights of the Child, 2009). The child has the opportunity to participate in FGC and express views. The Committee on the Rights of the Child (2009) expands on the child’s right to participate.

### **3.2.2 General Comment No. 12 on the Convention on the Rights of the Child**

The General Comment 12 (Committee on the Rights of the Child, 2009) gives a legal and literal analysis of article 12 of the CRC and explains the requirements and provides certain guidelines necessary to fully realise and implement the rights of the child as embodied in article 12. The requirements that are relevant to child participation in decision-making processes, such as FGC are explored below.

#### ***3.2.2.1 Age and Maturity of the Child***

The age and maturity of children are relevant as there are differences in opinion in respect of when children’s views or feelings should be considered. Every child who is “capable of forming his or her own views” should be provided with the opportunity to express these views. Article 12 does not impose any age limit as this would restrict the child’s right to be heard. According to Lansdown (2005:1), all children are capable of expressing a view and he states that there is “no lower age limit imposed on the exercise of the right to participate” and that children are capable of forming views from the youngest age and even when they are unable to express views verbally; article 12 recognises the expression of non-verbal forms of communication.

As mentioned in chapter two, children should therefore be assessed to determine whether they are capable of expressing their views and feelings. Children do not need comprehensive knowledge

of the aspects that affect them – ‘a mere “sufficient understanding” of same suffices. They must be “capable of appropriately forming” own views on matters that affect their lives (Committee on the Rights of the Child, 2009:9). This encompasses children of all ages and the expression of views verbally or non-verbally. The issue of age and maturity is discussed in more detail in following chapters.

### ***3.2.2.2 Expression of Views***

After children have been assessed as capable of expressing their views, it must be decided how they will be heard. This could be directly or indirectly using “a representative or appropriate body” (Committee on the Rights of the Child, 2009:12). Depending on the unique situation or case of each child, the child (or an appropriate authority) should determine the methods used to convey their views correctly. When children are not able to express their views verbally, recognition must be given to non-verbal expression of views such as play, drawings, painting, facial expressions and body language. Play therapy is a psychotherapeutic approach that is mostly used to help children aged 3 to 12 years explore their lives and spontaneously express their thoughts and emotions through play (Association of Play Therapy, 2016; Bratton, Ray, Rhine and Jones, 2005). The therapeutic play usually takes place in a safe and comfortable playroom, where very few rules or limits are imposed on the child to encourage free expression and allowing the therapist to observe the child’s choices, decisions, and play style (Ibid). This method is appropriate for children who are undergoing stressful events in their lives, such as domestic violence, abuse, sexual abuse, trauma and family crisis (Ibid). This issue is also discussed in further detail in following chapters.

### ***3.2.2.3 Express views “Freely”***

It is important that children are not pressured or manipulated but be allowed to “freely” express themselves (Committee on the Rights of the Child, 2009:10). Children should be able to choose whether they want to express their views without being influenced or pressured. This includes providing a safe environment that is “accessible and child-appropriate” and where children feel secure and respected when expressing their views.

Furthermore, children need to receive the necessary information about the “matters, options and possible decisions to be taken and their consequences” as well the conditions under which they will express their views (Committee on the Rights of the Child, 2009:10). Birnbaum (2009:1)

states that “[f]inding ways to include children’s participation in those decisions is often referred to as promoting ‘the voice of the child’”. It is important that children participate in decision-making processes where their well-being is discussed and that they have the opportunity to express their views in an environment where they feel safe and where their voices will be heard and considered.

#### ***3.2.2.4 The Best Interest of the Child***

Article 3, paragraph 1, of the Convention on the Rights of the Child gives the child “the right to have his or her best interest assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere” (Committee on the Rights of the Child, 2013). The best interest of the child, in all matters that affect them, can only be determined when the child has the opportunity to participate in the decision-making process. Adults and parents alone cannot always determine the best interest of the child without knowing how the child thinks or feels. Cases, involving very young children or children who are victims of sexual abuse, violence or other forms of ill-treatment should be handled with care, as the safety and protection of these children are “paramount” to ensure their best interest (Lee, 2014). As indicated in chapter 2, there are various opinions regarding the inclusion of cases in FGC where alcohol abuse, sexual abuse and violence are present. Some authors encourage the inclusion of these cases while others are against inclusion. In South Africa, the Act allows for the inclusion of these abuse matters in FGC (see chapter 4) although there are no protocols developed for instances of domestic violence and abuse cases (Matthias, 2014).

#### ***3.2.2.5 Procedural Right to Participate***

Contrary to the belief that parents have the authority and duty to make all decisions on behalf of children, Lee (2014) argues that it is in the best interest of society, in the long run, if children are allowed to participate actively in their own lives. When they are given the opportunity to participate in decisions that affect them, they benefit and become well-informed citizens and “competent and mature” adults (Lee, 2014). The Committee on the Rights of the child (2009) emphasises that the “right to be heard” and the right to participate must be provided in “any judicial and administrative proceedings” that affect children, irrespective of whether the proceedings are initiated by the child or by others.

### ***3.2.2.6 Knowledge and Training***

Representatives of children should have enough knowledge and an understanding of the different aspects of the decision-making processes that are used. These representatives should also have the necessary experience in dealing with children and they need to represent the needs of children and not any other parties or institutions. The development of a code of conduct is essential.

### ***3.2.2.7 Obligations of the CRC***

An important part of state parties' obligations includes the review or amendment of legislation that will enable the introduction of mechanisms that will provide children with "access to appropriate information, adequate support, [and] if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress". Children's participation and input is essential in the "review process", "follow-up and monitoring process" and the "reporting process" (Lee, 2014). In South Africa, neither the Act nor the regulations, make provision for the child's participation or input as far as the relevant processes are concerned. This is a gap in the legislation that needs to be addressed.

The research will now explore the African regional children's rights instrument, the ACRWC which incorporates the child's "right to be heard" and to express views.

### ***3.2.3 African Charter on the Rights and Welfare of the Child (1990)***

South Africa ratified this charter during January 2000 (Kassan, 2003). The ACRWC reaffirms the obligations of African States in terms of international human rights standards and, in contrast to the CRC, addresses issues that are unique to Africa and implement children's rights within an African milieu (Kassan, 2003; Kubayi, 2005). The focus of this Charter is more collective than individualistic and deals with unique issues, critically "cultural and traditional barriers to progress" (Kubayi, 2005:31). As mentioned in chapter two, cultural views and perceptions have an impact on child participation in the decision-making processes.

The provisions on child participation provided for in the ACRWC are fairly similar to those of the CRC (Viviers, 2010). Article 4(2) of this charter also establishes the right of the child to be heard stating that:

2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate laws."

Article 4(2) should be read in conjunction with article 7, which provides that every child who can communicate his or her views has the right to express these ideas freely in all matters and to distribute those opinions subject to the limitations of domestic law (Boezaart, 2013). The ACRWC specifies how the child will be heard, "directly or through an impartial representative as a party to the proceedings" and is more detailed than the CRC (Boezaart, 2013:16). Article 7 states that:

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

This article deals with the child's right to "freedom of expression". In essence, this article is very liberal as it states that the child can express views on all matters and not just on matters that affect him or her and that the child also have the right to share these views extensively.

It should be noted that this right is limited to a "child capable of communicating his or her views" and that this ability may relate to the age of the child, the education level and expressiveness of the child (Kassan, 2003:166).

### **3.3 THE NATIONAL LEGAL FRAMEWORK**

According to the CRC, state parties must assure that children's rights are heard and taken seriously. South Africa has taken several steps to build a child care and protection system that is legally compliant (SANDSD, 2017). The national legal framework that will be explored below, includes the Constitution of the Republic of South Africa, 1996, and the Children's Act 38 of 2005 (the Act).

### **3.3.1 The Constitution of the Republic of South Africa 1996**

Following the ratification of the CRC in 1995, the South African government sought to bring legislation, policies and practices in line with the demands of the CRC (Kassan, 2003). The South African Constitution (1996 Constitution) recognises and guarantees the rights of all children (Moses, 2008; SANDSD, 2017).

The 1996 Constitution affords children a variety of unique rights; however it does not specifically refer to the right of the child to participate in matters and decisions that affect his or her life (Moses, 2008). The rights that the 1996 Constitution prioritise “for children are more protection-oriented rights”, which regard children as vulnerable rather than citizens of agency” (Moses 329). The 1996 Constitution states that a child’s best interests are of utmost importance in all matters regarding the child. One can then assume that providing the child with the opportunity to participate in decision-making processes (such as FGC) and by listening to and considering the child’s views in care and protection matters that greatly affect the child’s life, implies that, the best interest of the child has been considered.

### **3.3.2 The Children’s Act 38 of 2005 (the Act)**

The Act was passed to give effect to the provisions in section 28 of the Constitution and as mentioned earlier in this chapter both the CRC and the ACRWC have significantly influenced the drafting of the Act. It is a comprehensive law that embraces a “holistic and developmental approach to the care and protection of children and seeks to give effect to South Africa’s responsibilities to children under the CRC and the ACRWC” (SANDSD, 2017:49).

The Act provides the legislative structure for a comprehensive child protection strategy which includes requirements relating to the child’s opportunity to participate in FGC and express views on the decisions made in care and protection matters that affect the child’s life and future. In keeping with the CRC obligation, South Africa enacted section 10 of the Act as a general principle to provide children with the right to participate in all matters that affect them. This section recognises that:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

Furthermore, section 6 (1)(b) affords the right to participate in “all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general”.

These sections in the Act clearly provides for comprehensive participation of children. Schafer (2011:163) states that the inclusion of section 10 of the Act “goes substantially further than what was proposed and closely resembles the participatory rights in article 12”(of the CRC and article 7 of the ACRWC). Section 10 in relation to section 70, which pertains to the FGC, will be explored in more detail in the next chapter.

According to Moses (2008:330) the Act and its Children’s Amendment Act 41 of 2007 (RSA, 2007) contain some participation provisions although in most cases, these provisions are limited to older children and adolescents and that there are not many provisions “which create spaces” for children before their teenage years to participate in decisions that affect them. The Act and regulation 13 of Department of Justice and Constitutional Development provide no detail on FGC processes, with no clarity on attendees and also no direction regarding child participation in FGC (Matthias, 2014). There is furthermore no guidance in the Act on how to select FGC, or other forms of ADR, for specific cases (Zaal, 2010).

Moses (2008:330) adds that despite the achievements of “policy changes, their impact on children’s actual and meaningful participation . . . is limited at the level of implementation”. The perceptions of children’s “(in)competence”, concerns about the protection of children from being burdened with too much responsibility as well as a lack of adult skills for engaging children are some of the issues that continue to limit children’s meaningful participation in court proceedings (Moses, 2008).

### **3.4 CONCLUSION**

The ratified international instruments, namely the CRC and the ACRWC as well as the national constitutional and statutory instruments, embrace the best interest of the child and recognise the right of all children to develop to their full potential and ensure that children are heard and participate in all decisions that affect them.

The CRC, ACRWC and the Constitution do not make direct reference to participation of children in decision-making processes; however they make provision for the child to be heard and express views and for the child’s feelings to be considered. This opportunity afforded to the child to express

feelings and views is essentially participation and recognition that the child does have a say in what happens in his or her life. The Committee on the Rights of the Child (2009), addresses the concept of child participation and provides guidance on the meaningful implementation of article 12.

South Africa has developed legislation (the Act) to honour its obligations in respect of treaties ratified and to incorporate child participation in decision-making processes and, more specifically, FGC. The question however remains whether the existing legislation is clear in its application and provides sufficient guidelines to professionals on all the factors and issues that need consideration to ensure the successful outcome of this provision and the meaningful participation of the child, as intended by the legislation.

This question and an analysis of the relevant sections in the Act, pertaining to the participation of the child in FGC, will be explored in more detail in the next chapter.



**CHAPTER 4**  
**CHILD PARTICIPATION IN FAMILY GROUP CONFERENCES**  
**IN CARE AND PROTECTION MATTERS:**  
**LAW, PROCEDURE & PRACTICE IN SOUTH AFRICA**

**4.1 INTRODUCTION**

South Africa is one of many countries that has been influenced by the CRC, to the extent that it has incorporated the rights of the child, as set forth in article 12, into its national law and more specifically the Children's Act 38 of 2005 (Act). In the Post-1994 era, this Act is the result of the work of the South African Law Reform Commission (SALRC), 2002) which was mandated to investigate the legal position of children in South Africa.

Numerous provisions, of the previous legislation that applied to children, were considered in the drafting of the provisions of section 28 of the Constitution 1996, which articulates the rights of children. Furthermore, the previous legislation did not comply with international legal requirements, which involved the right of children to be heard (article 12 of the CRC) enabling them to participate in decisions that affect their lives. The Act, as amended, provides the legal framework for a child protection strategy that is holistic and includes the consideration of children's views in matters that affect them (Paleker, 2008). Although this Act appears to be a step in the right direction, gaps have been identified (De Jong, 2009; Zaal, 2010; Matthias, 2014). As mentioned earlier there is a lack of resources in South Africa as "the government does not have the financial capacity to offer large-scale and countrywide" implementation of ADR processes as intended by the Act (Paleker, 2008:6). It is important that financial and human resources are identified and allocated to the implementation of FGC. In order to ensure that everyone understands the FGC processes and their various roles, clear guidelines and well-defined regulations need to be developed to outline the model and processes of FGC as well as who must attend the FGC and which families and cases can be referred for FGC, to ensure the suitable intended outcome.

As alluded to in the first chapter FGC, as a method of ADR, can be used in the context of juvenile justice, child care and protection matters and custody and access matters. ADR sets out to resolve

conflict and all persons involved reach an agreement on how the conflict will be resolved. In terms of the juvenile justice context, the Child Justice Act 75 of 2008 includes a restorative justice perspective once an offender admits to the offence and harm done and is prepared to accept responsibility. In contrast to the above, retributive justice is the punishment of offenders, in terms of the criminal justice system.

The focus of this study is on child care and protection matters, originating from the child welfare system, and in view of the above, this chapter will examine to what extent the voice of the child is heard in FGC and how the child is participating in this ADR process within the South African framework, as provided in the Act. It will further explore the relevant sections of the Act that deal with participation in FGC in child protection matters to determine the effectiveness of the legislation and whether any improvements can be made. The research will go on to analyse the relevant sections of the Act to determine whether the right of the child to participate has been implemented effectively.

## **4.2 THE CHILDREN'S ACT 38 OF 2005**

In cases concerning children, the Act is ground breaking, as it is the first South African law that makes provision for court initiation and referral to all the ADR methods, including FGC (Zaal, 2010). The use of FGC in child care and protection matters, initiated through the Act is very appropriate as “the retention of family ties is generally in the best interests of the child” (Bosman-Sadie & Corrie, 2013:112). At the FGC, the persons who are affected by the conflict are brought together in an attempt to resolve conflict during a facilitated meeting and to come up with suitable solutions to avoid future challenges (Ibid). However, deficiencies have been identified; although the Act was changed to include children in decision-making processes, such as FGC, it appears that the lack of resources, guidelines and well-defined regulations have left gaps in the legislation which hinder the realisation of the child's right to meaningful participation in decision making processes and to express views. De Jong, (2009); Zaal, (2010) and Matthias, (2014).

### **4.2.1 General Principles**

In keeping with the requirements of article 12 of the CRC, the child participation process was incorporated into the drafting of the Act (SALRC, 2002). Sections 6 to 17 of Chapter 2 of the Act, outline the general principles that deal with “children's rights and responsibilities” in line with the

1996 Constitution and the international legal instruments (Davel, 2007) discussed in chapter 3. Davel (2007) asserts that an alternative approach, to the settlement of child-centred disputes, is essential and includes care and protection matters, section 6(4)(a) provides that:

In any matter concerning a child-

An approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided;

This section can be viewed as meeting the obligation for the child's voluntary participation in decision-making processes as outlined in the CRC and referred to in the Committee on the Rights of the Child (2009), which states that the child has the right not to express views as this is a choice and not an obligation.

Furthermore, the SALRC identified children's right to participate in decisions that affect their lives as a necessary underlying principle to be included into the Act. In view of this, section 10 was incorporated into the Act as a general principle which provides children with the right to participate in all matters that affect them. The section reads as follows:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

#### ***4.2.1.1 Age and Maturity of the Child***

According to Moyo (2017:173) "[t]he phrase 'age, maturity and stage of development' formally imports the concept of the evolving capacities of the child into the South African legal system. This phrase justifies autonomous decision-making by the child provided the child is competent to make the decision in question".

Section 10 of the Act states that children who are of "such an age, maturity and stage of development" and are able to participate in decision-making, should be allowed to express their views, which should receive special consideration. Bosman-Sadie & Corrie (2013) state that children are holders of human rights and that they have their own views and feelings. They argue that there are no age limits or boundaries set in the Act, as it makes reference to "any matter". It is noted that this meets the expectation of article 12 of the CRC that no age limit be imposed on the

right of the child to express views. There is thus no restriction on the child's right to be heard in any matter that affects the child.

Moyo (2017:175) concurs with Bosman-Sadie and Corrie (2013) and states that “[t]he absence of a competence-predicting age is an acknowledgement of the fact that children form views at very early stages in the life course” and that all children who are able to express themselves, irrespective of their age, should receive the opportunity to express their views through verbal and non-verbal communication. Moyo (2017) further asserts that the specification of a specific age would have presumed that children below this age are incompetent to express their views. These children would then be excluded from participation in decision-making processes (the FGC), limiting their ability to influence decisions in matters that affect them. This would also apply to the outcome of care and protection matters that have a major impact on the lives of children.

The Committee on the Rights of the Child (2009:11) stresses that to “give due weight” to children's views, in accordance to their age and maturity age alone cannot determine the importance of the child's views. Children's level of understanding is not linked to their “biological age”. Maturity of the child refers to the capacity to understand and evaluate the consequences of a specific issue and must be taken into account when the “individual capacity” of the child is considered (Ibid). What should be determined, however, is whether the child has the maturity and competence to participate.

#### ***4.2.1.2 Opportunities to Participate and Express Views***

According to Bosman-Sadie & Corrie (2013:30) “courts and other bodies” will have to “adapt in such a way that it becomes possible for children to participate”. The competence of the child to form and express views may depend on the “procedural opportunities” that are provided, such as whether the child is provided with a “supportive, empowering environment” in which to talk about and deliberate on the options that are available to make an informed decision (Barratt, 2003:153). “[T]oo often children's capacities are underestimated because of an adult failure to create an environment in which children can articulate their views appropriately” (Lansdown, 2005:5).

The processes that are adopted may enhance or restrict the child's ability to make decisions and express feelings and views. Sections 10 and 70 of the Act provides for “procedural opportunities” for children to participate, as one of the principal goals of the Act is to provide a “voice” to children

and a forum, such as FGC, in which to use this voice to express their views and feelings (Bosman-Sadie & Corrie, 2013:112).

Children must be interviewed by professionals, who are trained, to ensure that the child is provided with a proper opportunity to be heard (Barratt, 2003). Barratt (2003) further asserts that the value that is ultimately afforded to the child's views, may be determined by the interviewer's interpretation of these views. According to Lansdown (2005:4) "it is necessary to create sufficient time to listen properly, to check back with children to avoid making assumptions on their behalf".

#### ***4.2.1.3 Suitably Trained Person***

It is therefore important that the interviewer needs to understand what the child is saying within the context of the child's development and the social, economic and cultural environment to be in a position to "assess the child's competence and personality and interpret the child's expressed wishes (if any), their stability and their consistency with the process of self-realisation occurring within the child" (Barratt, 2003:153). It is also important that interviewers receive specialised training to provide them with the necessary skills to ensure effective participation of the child and to enable the child, family and community to engage in the FGC process to share information and make a decision that is in the best interest of the child. According to Kathol (in Mayer 2009:17), surveys have indicated that the interviewer needs to have "substantive knowledge of family dynamics, the child protection system, the legal framework for child protection intervention, and issues related to intervention in child abuse and neglect (eg family violence, substance abuse, child development, and attachment)".

There is no guidance or minimum criteria in the Act on the skill or knowledge that a person should have that would qualify him/her to conduct an assessment. It is recommended that direction is given on these issues by developing criteria that will be made available in the form of guidelines.

#### ***4.2.1.4 Competence and Stage of Development***

Schäfer (2011) also asserts that neither section 10 of the Act, nor article 12 of the CRC refers to an exact age or particular stage of development when defining the child's capacity to express views. He concurs with the Committee on the Rights of the Child (2009) that it is required that each child undergoes an assessment to establish age and maturity, as well as the developmental

stage of the child. According to Moyo (2017:175) the phrase that refers to children who are “of such an age, maturity and stage of development formally imports the concept of the evolving capacities of the child into the South African legal system”. This phrase validates the “autonomous decision-making” of children, provided that they are competent to make the decision in question. Moyo goes on to say that “[t]he absence of a competence-predicting age is an acknowledgement of the fact that children form views at very early stages in the life course” (Ibid). Regardless of the child’s age, all children who are capable of “self-expression” should be provided with the opportunity and a platform to express their views verbally or non-verbally (Ibid). Adults have the responsibility to listen to these views and consider the child’s views “in light of the nature of the problem and the child’s developing maturity” (Moyo 176).

In accordance with the expectations of article 12, it is important that state parties, including South Africa, put measures in place to promote and support the participation of children in FGC. Children who are competent to express their views, should be allowed to do so and adults should consider the views of the child, as this will empower children to influence decisions in matters that affect their lives.

#### ***4.2.1.5 Assessment of the Child***

A limitation of the Act is that neither section 10 nor any regulation to the Act provide guidance on how to assess a child to determine whether the child is competent to form views and how to decide the weight to be assigned to the views and wishes expressed by the child. The child’s views were not considered in the past and it is important to decide to what extent the child’s wishes will now be considered. The Act further does not stipulate who should conduct the assessment to determine the child’s competence to express views and feelings. Furthermore, Schäfer (2011) recommends that an explanation be provided to explain how the child’s wishes have been deliberated as part of the assessment of what is in the best interest of the child. Schäfer (2011) also argues that the Committee on the Rights of the Child (2009) contains useful guidance on how a decision-maker might evaluate whether a child has the ability to participate. The suggested approach is to begin with the assumption that the child has this capacity. One should consider that children can express their views in more than one way, including non-verbal forms of communication such as letters, videos, audiotapes and drawings through which the child’s voice could be determined.

In Bosman-Sadie & Corrie (2013:31) comprehensive guiding criteria are identified that should be considered within the South African context when establishing the child's capacity to participate and his/her level of development when participating in decision-making processes. These criteria should be included in guidelines to assist practitioners when deciding which children to include in FGC. The criteria include the following:

- capacity to understand questions and provide appropriate answers; ability to understand the consequences of decisions;
- ability to write, read and comprehend;
- the biological and mental age of the child;
- attention span;
- behaviour;
- circumstances of the family;
- level of maturity;
- cognitive ability;
- emotional stability;
- health;
- milestone threshold;
- motivation to tell the truth;
- motor skills;
- participation in other areas, eg the school, family, church or extra mural activities;
- school grade;
- social competence and stress factors.

In Australia, the following factors are considered when determining the attendance of the child at the FGC: age, maturity, emotional state, ability to understand the FGC process, ability to communicate views and wishes, the desire to participate and purpose of their participation (Giovannucci and Largent, 2009). In New Zealand, the decision whether a child should attend FGC is dependent on the age of the child and the topics that are discussed. Participation of the child is based on what is in the best interest of the child (Olson, 2009).

#### ***4.2.1.6 Language and Culture***

The Committee on the Rights of the Child (2009) also emphasises that state parties must make efforts to recognise the child's right to express views when the child does not speak the common language. Bosman-Sadie & Corrie (2013) also argue that despite the child acquiring a certain level of intelligence, vocabulary and conversational skill, it is also essential that the listener must understand the language spoken by the child in order to prevent misunderstandings. Social workers

and legal practitioners must understand “language development in children to be able to communicate effectively” (Bosman-Sadie & Corrie 113). Within the multilingual context of South Africa, it is suggested that provisioning is made for the use of interpreters or intermediaries, to ensure that the child understands “the content and meaning” of questions and discussions (Ibid).

Other relevant factors that may impair the capacity of the child and have an effect on the participation of the child, (as discussed in chapter 2) include culture and physical and mental disability (Schafer, 2011). In South Africa, respect and submission to adults is very much a part of family culture, child participation is not encouraged and the opinions of children are “seldom if ever asked” (Moses, 2008:332). “[P]reviously legitimised notions of racial hierarchy continue to play a role . . . and [t]hese perceptions determine . . . who gets to participate and who does not, but also fuel paternalistic approaches to welfare interventions that generally do not allow space for more consultative or empowering approaches” (Moses 333). One should be cautious, to ensure that these cultural practices and attitudes do not hamper the participation of the child in the FGC process.

According to Moyo (2017:178) the Act specifies that the child should ‘participate in an appropriate way’. This phrase does not have a direct equivalent in international law and suggests that the state has two responsibilities (Ibid). First, “it binds the state to ensure that the manner in which children participate, whether directly or through an intermediary or an appropriate body, is consistent with the age and developing competences of the child”. Secondly, it enforces an obligation on the state to make sure that the court and other decision-making platforms are “child-friendly” (Ibid). To achieve this, the state should get rid of language and cultural barriers between children and court staff (Zaal, 2003). In view of South Africa’s multi-diverse context and 11 official languages, it may be expensive to ensure that court staff are trained in all 11 languages and available to allow children to participate and express their views in their choice of language.

#### **4.2.1.7 Various Forms of Participation**

Participation of the child may take various forms at different times and may involve informing the child of what is happening and providing information on any action or decision taken that may affect the child (SALRC, 2015). To be listened to, is another form of participation (Ibid). Schäfer (2011) states that when a child can participate and is given the opportunity to do so, participation may take a variety of forms. Although the CRC recommended that the child should be heard



directly when possible, Schäfer (2011) argues that the use of an intermediary, including a lawyer, social worker or parent is acceptable. It is thus important that children receive information that will allow them to make informed decisions or choices when they participate in FGC. When the child participates in the dispute resolution process, the wishes and views of the child should be heard and weighed up before a decision is made that affects the child.

The relevant sections of the Act that specifically deal with FGC are explored and analysed below and the focus will be on how effective these sections and regulations are in making provision for child participation and whether any mechanisms should be adopted by South Africa to improve implementation of this right.

#### ***4.2.2 Alternative Dispute Resolution Provisions in the Act***

Care and protection ADRs are endorsed in the Act (Matthias, 2014). As referred to in Chapter 1, there are instances when the children's court decides that mediation is compulsory (De Jong in Boezaart, 2009). Section 49 of the Act provides presiding officers with the authority to refer care and protection matters involving children to be settled out of court so that formal court procedures are avoided (Zaal, 2010; Schäfer, 2011; Bosman-Sadie and Corrie, 2013; Matthias, 2014), for example where the child has been abandoned or where the child is an orphan or in instances where the child displays uncontrollable behaviour. The ADR methods that can be considered by the children's court, include lay-forum hearings, as envisaged by sections 49 (mediation), 70 (FGC) and 71 (other lay-forums) and pre-hearing conferences, in terms of section 69 of the Act. The relevant lay-forum hearings which will be explored fall within the FGC as stated in section 49(1)(b) and contemplated in section 70 of the Act.

##### ***4.2.2.1 Section 49 – Lay Forum Hearings***

With regard to ADR generally, section 49(1)(a)-(c) of the Act is introductory and is entitled "Lay-forum hearings" (Zaal, 2010) and reads:

- (1) A children's court *may*, before it decides a matter or an issue in a matter, *order* a lay-forum hearing in an attempt to settle the matter or issue out of court, *which may /include* –
  - (a) mediation by a family advocate, social worker, social service professional or other suitably qualified person;
  - (b) a family group conference contemplated in section 70; or

(c) mediation contemplated in section 71. (Author's emphasis)

The term “lay-forum hearings” in terms of section 49 refers broadly to all ADR methods including ADR facilitated by untrained, non-professionals as well as qualified persons (Zaal, 2010:356).

Zaal (2010:356) argues that the use of the word “may” in the opening phrase of section 49(1) allows children's courts to use their discretion in deciding whether to utilise ADR. The parties do not have a right to insist on it. Furthermore, according to Zaal (2010:357), the phrase “order a lay-forum hearing” as stated in section 49(1) of the Act is of concern as this allows children's courts to make an order “instructing a parent or care-giver of a child . . . to participate in mediation, a family group conference, or other appropriate problem-solving forum”. It has however been generally accepted internationally that ADR should be voluntary and not forced on unwilling participants. Referrals to ADR processes should therefore only be made after careful consideration whether this would be in the best interest of the child. “Expressing views is a choice for the child, not an obligation” (Committee on the Rights of the Child, 2009:8).

The representative, “family advocate, social worker, social service professional or other suitably qualified person” (section 49(1)(a)) who is listening to the child, must be able to transmit the views of the child correctly to the decision maker (Committee on the Rights of the Child, 2009). This representative must have a good understanding, sufficient knowledge of the different aspects of the decision-making process and have experience in working with children. Furthermore, codes of conduct need to be developed for persons who are appointed as representatives to pass on the views and feelings of the child (Committee on the Rights of the Child, 2009).

The term “suitably qualified person” in section 49(1) refers to qualifications as well as experience and section 49(1)(a) could include the words “as prescribed” at the end of the section (SALRC, 2015:27). It is thus important to develop criteria that will provide guidance in respect of the FGC facilitator's qualifications, skill, experience and training as well as those of the representative who provides feedback to the decision makers (if it is someone other than the facilitator). This information should be included in the form of regulations or guidelines to assist presiding officers, facilitators and representatives appointed to conduct FGC and represent the interests of the child.

Originally when lay-forum hearings were considered, the SALRC (2001) believed these hearings could serve a purpose similar to courts but avoid the need for a trained legal officer to make decisions (Davel and Skelton, 2007). The benefits of “avoiding formal court proceedings include

the consideration that in a less adversarial context, children and parties might feel less intimidated”, contributing to a more positive approach (SALRC, 2001:1157; Gallinetti, 2007; Zaal, 2010; Matthias, 2014). These lay-forums could also provide access to services that are not expensive (Davel and Skelton, 2007). The SALRC (2001:1158) pointed out that case studies have shown that while these informal proceedings are helpful to some children, others “feel completely vulnerable and unprotected from abusing adults in an informal situation”. This would be in instances where domestic violence is present or where children have been abused or sexually abused. According to the SALRC (2015:156) “[t]he field of ADR, therefore, covers a broad range of mechanisms and processes designed to assist parties in resolving disputes creatively and effectively. In so far as this may involve the selection or design of mechanisms and processes other than formal litigation, these mechanisms and processes are not intended to supplant court adjudication, but rather to supplement it”.

Where the resulting decision is to be given legally binding status, concerns may be raised as to how the decision was reached (Ibid; Gallinetti, 2007:16) and section 49(2) therefore requires that the children’s court considers the best interest of the child and give specific regard to various factors before ordering a lay-forum hearing and referring a matter for ADR (Gallinetti, 2007). Schäfer (2011:323) and Matthias (2014:289) concur with Gallinetti (2007) that in South Africa, before a case is referred to ADR, the children’s court must consider “all relevant factors” which include the “vulnerability of the child, the child’s ability to participate in the proceedings, power relations within the family and any allegations made by the parties” (section 49(2)). Matthias (2014) further indicates that these factors are well documented in the literature as barriers to successful ADR outcomes. In the instance of the “vulnerability of the child” it may be that a child that has been exposed to abuse, sexual abuse and domestic violence and may be too vulnerable to attend; and the safety of the child is a further consideration. The child may be too “traumatized or psychologically vulnerable to take part” (Zaal 2010:358). The “child’s ability to participate in the proceedings” refers to the capacity of the child to participate. Relevant here, would be the age and maturity of the child and child’s ability to understand the issues to be discussed in the FGC. A child who is mentally disabled may also not have the ability to participate in FGC. As far as “power relations” and “allegations made by parties” are concerned, the safety of the child is a priority. In instances where certain family members would overpower the opinions and participation of other

family members or obvious conflict exists between participants, their participation in FGC needs to be considered carefully.

The factors referred to above that the children's courts must consider, before ordering a lay-forum hearing, are found in section 49(2):

Before ordering a lay-forum hearing, the court must take into account all relevant factors, including—

- (a) the vulnerability of the child;
- (b) the ability of the child to participate in the proceedings;
- (c) the power relationships within the family; and
- (d) the nature of any allegations made by parties in the matter.

Zaal (2010) states that section 49(2) provides the children's court with four criteria to utilise when considering the initiation of ADR. There is however no direction on how to select a specific form of ADR for each case. He suggests that supplementary regulation is needed that should direct that welfare agencies and other parties must provide recommendations based on these aspects in the pre-hearing documentation.

It is also important that cases of abuse and sexual abuse may not be referred to a lay-forum, which might include a "traditional authority", or a pre-hearing conference in terms of section 69(2). There is a possible irregularity in the legislation as the referral of these abuse matters, to a FGC, is allowed in the Act (Zaal 2010; Matthias, 2014). Schäfer (2011:327) states that there is no "apparent limit" on the cases that can be referred to a FGC, adding that "[b]y contrast, the Children's Act 2005 explicitly precludes other lay forums from being convened where the child is alleged to have been abused or sexually abused. This omission from section 70 is "troubling, given the reality that families are often reluctant to acknowledge child sexual abuse and sometimes provide the setting in which child sexual abuse takes place". However, according to Matthias (2014:289) and as cited by some authors (see Chapter 2), FGC as an ADR method has, with "appropriate safeguards", been utilised in abuse cases in various countries.

The Act does not provide any procedures or guidelines on how to deal with instances of domestic violence in respect of ADR and FGC specifically. It also does not provide any requirements in respect of the qualification, experience and training of facilitators dealing with these sensitive

matters, that may place a child at risk if not dealt with in the correct manner (Zaal, 2010; Matthias, 2014).

According to the Committee on the Rights of the Child (2009:5), the child has the right to be heard in “any judicial and administrative proceedings” that affect the child, without limitation, which include cases of physical, psychological and sexual violence and abuse against the child. It further states that state parties should introduce legislative procedures which require decision-makers to explain how much consideration was given to the child’s views and the consequences for the child.

#### ***4.2.2.2 Section 70 – Family Group Conferences***

Although “South Africa does have some experience, especially in civil society and in probation services to carry out family group conferences in criminal matters, the experience of using this method in care and protection proceedings is limited” (Skelton and Batley, 2006:72; Matthias, 2014).

Section 70 of the Act is entitled “Family group conferences” and provides some detailed requirements on their use (Zaal, 2010). The Act and DJCD regulation 13 make provision for the children’s court to order a FGC. According to De Jong (in Boezaart, 2009), section 70 foresees that the children’s court will allocate a person or an organisation who is suitably qualified, to facilitate at a FGC with the family members of the child and other relevant parties involved to discover suitable solutions to resolve any problems which involve the child and will avoid future challenges. The children’s court will appoint a facilitator to guide the family in the decision-making process.

Section 70 of the Act provides that:

(1) The children’s court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children’s court, including any other family members of the child, in order to find solutions for any problem involving the child.

(2) The children’s court must-

(a) appoint a suitably qualified person or organisation to facilitate at the family group conference;

(b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and

(c) consider the report on the conference when the matter is heard.

Section 70(1), as with section 49(1), also contains the word “may” which suggests that the children’s court has the option to set up a FGC. The CRC however leaves no flexibility for discretion and states that “[s]tate parties are under strict obligation to undertake appropriate measures to fully implement” the right of the child to participation (Committee on the Rights of the Child, 2009:8). The SALRC (2015:171) also comments on the wording of this section and points out that section 70(2)(a) “refers to “facilitation” and not “mediation”. As no definition has been provided, it is unclear what method of ADR is intended.

In New Zealand, the legislation defines the “family group” in relation to care and protection proceedings and thus states what ADR method is intended, which is omitted in the South African Act. Furthermore, the calling of a FGC is mandatory when it is believed that a child is in need of care or protection and a FGC needs to be requested as not much decision-making can take place without the convening of an FGC creating the opportunity to find a solution (Kruger, 2005). In Australia, the Australian Capital Territory (ACT) appears to have comprehensive legislation, with a broad focus on child participation in FGC, as the ADR method for care and protection matters. Australian legislations differs from that of New Zealand in that it does not force child protection workers to arrange a FGC in any situation (Harris, 2008). The use of FGC is “largely dependent on the ability of facilitators to convince workers and managers of the benefits of” FGC (Ibid at 14). The specific sections of New Zealand and Australia legislation, relevant to this discussion are discussed in more detail in the next chapter.

The Act is, however, not clear on the qualification, training and skill necessary to successfully conduct the FGC and ensure that the outcome ensures effective participation of the child. There are also no regulations to provide guidance to the presiding officer when choosing an “other suitably qualified person” to facilitate the FGC. It is important that the coordinator has the necessary training and skill to effectively engage with the child and the other participants. The facilitator must further be able to ascertain which parties need to be included in the FGC that will not negatively affect the child. The facilitator must also understand the cultural issues, family

dynamics and language inherent to the child and family as this can create an atmosphere of understanding where the child feels safe to express views and feelings and could encourage the participation of the child in the FGC.

There is no definition, in section 70(2)(a) or in regulation 13(2), of the facilitator who is referred to as “any suitably qualified person” but it includes “a family advocate, a social worker, a social service professional; or a traditional leader”, who are also referred to, in section 49(1)(a) of the Act. Gallinetti (2007:34) places emphasis on the competence of the FGC facilitator and states that FGCs “require a thorough preparation process and specialized skills by the facilitator”. She argues that it is essential that skilled service providers should be appointed, to carry out FGC as the incorrect use of FGCs can result in failure to protect abused children.

The regulations should thus include more practical applications such as the skill, training, experience and qualifications of the facilitator or agency who would facilitate the FGC. It is important that a set of requirements be developed for the facilitator who deals with complicated matters. It is imperative that the facilitator must be competent and has certain skills and expertise to ensure that the child is safe during participation. Direction should be given in respect of the FGC process and the “family private time”, which is an essential part of the FGC and distinguishes FGC from other ADR processes.

Zaal (2008:97) points out that FGCs do have weaknesses that hamper their usefulness. One such challenge is that FGC does not necessarily encourage extensive family participation in the process, as “it has been found that it is often easy for more powerful family members to take control and silence the dissent and alternative views that weaker members (including children) might like to express”. Zaal (2008) continues to assert that family members sometimes conspire to silence the voices of children. In instances where the voice of the child in the FGC may be incriminating to certain family members, they may not want the truth to be revealed and may agree with one another, before the FGC, to disregard the voice of the child. Connolly and Masson (2014:406) concurs with Zaal pointing out that during private family time the professionals are not present to shape the contents of the plan, exposing the risk that “dominant voices within the family may override the best interests of others” present at the FGC.

This could have an effect opposite to what was intended by article 12 of the CRC – that the FGC is intended to create an opportunity for child participation and should encourage the hearing of children’s views and feelings.

A further criticism pointed out by Zaal (2008) is that after the FGC has been held, children are at times subjected to further harm or neglect because extended families fail to get involved. Monitoring and review of the care plan and decisions taken during the FGC are extremely important to ensure the best interest of the child and the implementation of the FGC outcomes. It was found that in instances where families took more responsibility it resulted in less monitoring of children by social workers. This might be to the detriment of children with serious psychological problems when they are placed with relatives who do not know how to deal with this. Zaal (2008:98) argues that “FGC facilitators, social workers and judges struggled to balance the conflicting demands of respect for extended families and their culture on the one hand, and the best interest of vulnerable children on the other”.

The procedure for a FGC is described extensively in Department of Justice and Constitutional Development (DJCD) regulation 13. This regulation however also makes no reference to the child’s right to participate in the FGC. There is also no guidance as to which cases are suitable for FGC. The Act allows for the referral of abuse and sexual abuse matters and there is no guidance for facilitators in respect of these sensitive matters that can cause harm to the child if not dealt with in the correct manner. One would also have expected to see some direction in the regulation on who should be included in the FGC and when the attendance of certain family or other members could place the child’s safety at risk or cause emotional harm.

Zaal (2010:361) raises the criticism of that section 70(1) “inappropriately designates those who may attend FGC as ‘parties involved in a matter . . .including any other family members of the child’”. The purpose of FGC is that the extended family, including persons who may *not* be parties in the legal sense, might be needed to attend the FGC. This aspect should have been made completely clear in terms of the regulations. (Writer’s emphasis)

Another concern of Zaal (2013) is that the wording of DJCD regulation 13(7) states that the facilitator should consult with the parties to get “an agreement or settlement” in respect of the matter. This is the only guidance provided on how the FGC facilitators should function. It therefore fails to bring out the main distinctive feature of FGC, which is the fundamental role of the



facilitator to work supportively in the background to empower the family to find a solution on their own. In view of the important role of the facilitator, it is important that guidelines be developed to describe the role and function of the facilitator in FGC.

Gallinetti (2007) agrees with Skelton and Batley (2006) mentioned earlier that in South Africa, the experience of using the FGC method in care and protection proceedings is limited. It is evident from the above that the success of the FGC relies on the participation of the child, the involvement of the family and the facilitation by a suitable professional. As such, to ensure that the FGC is implemented in such a manner to ensure the outcome as envisaged by the legislation, appropriate officially published criteria, practice rules and regulations are essential, which in turn will direct and guide the children's court and decision-makers. Such guiding documents in support of the existing legislation will lead to the effective implementation of FGC, which will facilitate child participation.

The SALRC (2015:160) argues that "the different forms of ADR as a concept and as a method of retributive justice is, however, merely mentioned in the Act. The Act does not define these concepts, nor does it discuss or evaluate any of the ADR mechanisms". Matthias (2014:287) elaborates that these methods of ADR "provide insufficient detail and procedural direction to enable successful implementation".

Section 75(1)(d)-(f) is also relevant to this research as it enables the development of regulations on sections 69-71 as follows:

- (d) the holding of pre-hearing conferences in terms of section 69, procedures regulating such conferences and information that must be submitted to a children's court;
- (e) the holding and monitoring of family group conferences or other lay-forums in terms of sections 70 and 71, procedures regulating such conferences and other lay-forums and information that must be submitted to a children's court;
- (f) the qualifications and experience of persons facilitating family group conferences, including special requirements that apply to persons facilitating in matters involving the alleged abuse of children;"

Zaal (2010) indicates some general shortcomings that apply to all forms of ADR as envisaged in sections 49, 69-72 and 75(1) of the Act. He states that guidance in respect of which form of ADR

to choose for each case, is essential, as presiding officials are mainly trained in law and not necessarily ADR. Zaal (2010) then suggests that a list of positive and negative indicators should be developed for specific types of ADR to provide direction that is vital to ensure the effective implementation of the Act.

In closing, Jordan (2009:719) asserts that children provide critical information through their participation that needs to be considered before decisions are made. Participation also empowers children as it “involves restoring the children’s sense of their own value, strength, and capacity to handle life problems”.

#### ***4.2.3 Conclusion***

The implementation of the Act in South Africa is not only aimed at meeting the basic human rights of the child but has also introduced new ways to deal with disputes that involving children. The Children’s Act has been implemented to deal with care and protection of children within the social welfare context. The Child Justice Act 75 of 2008 is also new legislation to deal with child justice issues. Both pieces of legislation include the use of ADR methods as a way of solving disputes, outside the formal court justice system. These laws also meet the obligations of article 12 of the CRC to make provision for child participation and creates the opportunity for children to express their views and feelings during decision-making processes, such as FGC, which affects their lives. The implementation of the Act must be actively pursued and reviewed and regulations and guidelines should be developed to support and guide the successful implementation of the Act and to ensure that South Africa keeps up with international trends.

The provision of ADR in the new legislation has also been ground-breaking as it gives effect to the child’s voice being heard in decisions that greatly affect the child as well as the future of the child. The Act has moved away from a strictly adversarial system and encourages child participation in decision-making processes that is more meaningful and generates culturally appropriate decisions through the participation of children and families in the FGC to find solutions in child care and protection matters, which are “culturally appropriate” (Zaal, 2010:354). This has proved to be more meaningful in helping dysfunctional families and vulnerable children in South Africa. This is significant as the use of ADR methods such as FGC appears to be less expensive and intimidating and is also more accessible than courts previously used to deal with child care and protection matters.

FGC, as one of the methods of ADR, which could expedite the resolution of disagreements involving children is in line with international trends. It is important that suitable and comprehensive services are available to everyone, and applicable to the South African context and representing all age groups, all religions, ethnic and cultural groups, and all socio-economic levels. The New Zealand and Australian context is discussed in the next chapter.

It is also vital that facilitators and presiding officers undergo the necessary training, including ongoing training, to ensure that they will choose the appropriate form of ADR that will meet the needs of children and their families best and also ensure a positive outcome of child-centered disputes in child care and protection matters, as intended by the legislation. It is further important that uniform and comprehensive principles are developed to give specific direction to the implementation of FGC. Ongoing monitoring and review are also important to ensure quality assurance.

In this chapter, the challenges associated with implementing the child's right to participate in FGC were also identified. In the next chapter, child participation in FGC in child care and protection in New Zealand and Australia will be explored and implementation lessons learned from the experience of these countries that could be useful for consideration from a South African perspective are considered.

## **CHAPTER 5**

### **AN ANALYSIS OF CHILD PARTICIPATION IN FAMILY GROUP CONFERENCES IN CARE AND PROTECTION MATTERS: LAW PROCEDURE AND PRACTICE IN NEW ZEALAND AND AUSTRALIA**

#### **5.1 INTRODUCTION**

Countries that incorporate international law such as article 12 of the CRC into their domestic law do so in different ways; and some countries manage to implement the rights of children more effectively than others. Therefore, an analysis of child participation in FGC in care and protection cases as implemented in New Zealand and Australia is explored and can render useful insights and examples. This part of the study focuses on a comparative examination of important provisions pertaining to FGC as implemented in New Zealand, Australia and South Africa.

New Zealand and Australia were selected for this study because of their similarities in legal systems, culture and their general approach to alternative dispute resolution strategies that involve children. These countries hold the best interest of the child as paramount and require that the court take the views of children into account (Fernando, 2014). In addition to these similarities, both New Zealand and Australia have large indigenous populations (like South Africa), which have led to a need to refocus child welfare in the direction of shared responsibilities and rights (Cameron, Coady & Adams, 2007; Wharf, 2002; Shlonsky et al, 2009). “The history of relations between indigenous and non-indigenous Australians bear similarities to the Maori/Pakeha history of dispossession and forced assimilation” (Huntsman, 2006:6). It would therefore be suitable to use FGC with indigenous families in Australia and New Zealand. “South Africa and New Zealand have similar socio-economic circumstances” and their societies are characterised by “cultural diversity” (Robinson, 1996; Kruger, 2005:246).

Another similarity is that the FGC process, as implemented in New Zealand and Australia, consists of three phases (see chapter 2). Since South Africa, New Zealand and Australia share similarities in legal systems, culture and their general approach to alternative dispute resolution strategies that involve children, the FGC processes already used in New Zealand and Australia, may also be suited for implementation in South Africa.

The lessons learned from the implementation and practice of FGC, in New Zealand and Australia, could be explored to improve the implementation of FGC in care and protection matters in South Africa. This will ensure that children participate in decision-making processes and that their voices are heard and are considered when decisions are made in matters that affect their lives, as intended by the Act. The emphasis will be on legislation, best practices, initiatives and guidelines developed by these countries that make provision for and guide the participation of children in FGC.

## **5.2 NEW ZEALAND**

Literature reveals that New Zealand has greatly influenced the development of child care and protection systems through the introduction of FGC “as an important instrument for the protection of children in New Zealand” (Kruger, 2005:246).

The Children, Young Persons and Their Families Act 24 of 1989 (CYPFA) came into operation on 1 November 1989 and provides “a culturally sensitive approach to the protection of children, young persons and their families and family groups in legal proceedings”, and “[i]ts uniqueness lies in its recognition of the diversity of family forms to be found in New Zealand (particularly among the Maori), in including promotion of this diversity among its objectives, and in laying down procedures which give *whanau*, . . . a place in decisions affecting Maori individuals and nuclear families” (Kruger, 2005:248). This Act applies to all children who are referred to the Department of Social Development in cases where there are concerns regarding the care and protection of children (Kruger, 2005). This Act was reviewed and amended as at 1 April 2017.

As the CYPFA makes provision for FGC in care and protection matters in New Zealand, the focus will be on this Act. The relevant sections in the CYPFA that provide for the implementation of FGC is explored to determine whether any mechanisms can be adopted by South Africa to improve its implementation of FGC and increase child participation in this decision-making process.

### **5.2.1 Children, Young Persons and Their Families Act 24 of 1989**

In New Zealand, there are two statutes that deal with the care of children and promote the participation of children in decision-making processes that affect their lives. The Care of Children Act 2004 (CCA) deals with the guardianship and care of children, while the CYPFA specifically provides for the care and protection of children as well as juvenile justice. The CYPFA emphasises the participation of family in decisions that affect children who are in need of care and protection

(Kruger, 2005). The CYPFA also “fulfils New Zealand’s obligation as a signatory to the CRC to provide the opportunity for children and families to participate in decisions that affect them” (Levine, 2000).

#### ***5.2.1.1 Definitions and Interpretations in the CYPFA***

Important definitions and interpretations are included in the CYPFA. The CYPFA refers to two age groups of children. Section 2(1) states:

‘[C]hild means a boy or girl under the age of 14 years’ whereas ‘young person means a boy or girl of or over the age of 14 years but under 17 years; but does not include any person who is or has been married or in a civil union’.

In South Africa, the Act defines the child as “a person under the age of 18 years”. In the CYPFA and the Care of Children Act provision is made for all children, which is in line with the expectations of the CRC. Another interesting point is that in terms of the CYPFA, “parent” includes a step-parent. Section 1 of the Act includes the adoptive parent of the child but makes no mention of a step-parent and reads as follows:

Parent, in relation to a child, includes the adoptive parent of a child, but excludes-

- (a) the biological father of a child conceived through the rape of or incest with the child’s mother;
- (b) any person who is biologically related to a child by reason only of being a 20 gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated;

In section 2(1) in the CYPFA, the “family group” is also defined, which is omitted in the Act, and reads as:

Family group, in relation to a child or young person, means a family group, including an extended family,—

- (a) in which there is at least 1 adult member—
  - (i) with whom the child or young person has a biological or legal relationship; or

- (ii) to whom the child or young person has a significant psychological attachment; or
- (b) that is the child's or young person's whanau or other culturally recognised family group"

*Whanau*, as stated in (b) above, refers to the basic family structure of Maori customary law in which *whanau* is the basic family unit.

According to Kruger (2005:249) the emphasis is on "the connection with the child, namely biological, legal or psychological, or by *whanau* or other culturally recognised family group, and the means of connection are wide and varied".

Neither the Act, nor the Department of Justice and Constitutional Development (DOJCD) regulations, of the Act provide a description or a definition of FGC. The Act states:

70. Family group conferences,-

- (1) The children's court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children's court, including any other family members of the child, in order to find solutions for any problem involving the child."

Regulation 13 of the Act merely defines FGC as follows:

Family group conference" means a family group conference as provided for in section 70 of the Act and regulation 13 of these Regulations;"

Whereas the CYPFA (section 2(1)) defines FGC in relation to care and protection proceedings as:

Family group conference,—

- (a) in relation to Part 2, means a meeting convened or reconvened by a care and protection co-ordinator in accordance with section 20:

According to Kruger (2005), the calling of a FGC is mandatory when a social worker or police officer believes that a child is in need of care or protection. The social worker or police member needs to report this matter to a care and protection coordinator, who must request a FGC. The mandatory nature of the FGC is in respect of the co-ordinator's duty to call for a FGC and not in respect of the attendance of the family members (Ibid).

The findings of the FGC are important, as far as the CYPFA is concerned, and not a lot of decision-making can take place without the convention of a FGC and the opportunity to find a solution. There are three exceptions to this principle, found in section 70(2)(c) of this Act:

- In instances where an emergency exists and the child needs to be removed in terms of a warrant, or without a warrant;
- Where a restraining or a custody order is necessary as a matter of urgency; and
- Where a child was abandoned by his or her parents.

The calling of a FGC is not mandatory according to the Act. The Act provides that the “children’s court may cause (sic) a family group conference” when a matter is referred to the children’s court. It thus appears that the CYPFA provides more protection for children by making the call for a FGC mandatory in some instances.

#### ***5.2.1.2 General Principles of the CYPFA***

The CYPFA includes a number of general principles that apply in this Act and incorporates the right of the child to participate in section 5(d), stating:

The principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person.

What is important to note is that the general principle does not refer to the child controlling the decision-making process, but merely requires “consideration” to be given to the child’s “wishes”. This is not to say that the expression of the child’s wishes will override other inputs; it means that the consideration, of what the child wants, may have an influence on the final decision made in respect of the child. According to Schofield & Thoburn (1996) a distinction must be drawn between the right of the child to participate in the decision-making process and the child being in control of the decisions that are made.

A further important point to note is that according to section 5(d) of the CYPFA the child’s wishes should be “considered” when these wishes can be “ascertained” while in section 10 of the Act, the child is given the right to “participate in an appropriate way”. With regard to the consideration



given to the child's wishes, it is assumed that the child's wishes expressed in some or other form to be considered. This expression of wishes then only refers to the child communicating his or her views. However, the term participation involves expressing views and having these views taken seriously.

Participation involves expression, information sharing and that the views of the child be considered. Weight needs to be attributed to the views of the child, taking into consideration, the age and maturity of the child (Lansdown, 2011). However, although the CYPFA does not use the term "participation", the requirement, to give consideration to the child's age and maturity, ensures proper participation of the child.

The other distinct difference between section 5(d) of the CYPFA and section 10 of the Act is that the Act provides that "due consideration" must be given to the views of the child, whilst the CYPFA states that their views must be given "weight as is appropriate in the circumstances, having regard to the age, maturity, and culture" of the child. Under the CYPFA the child's circumstances, age, maturity, culture and language preference affect how much weight will be given to the child's views, whilst in the Act the child's participation is dependent on the age and maturity as well as the stage of development of the child.

The CYPFA states that consideration must be given to the "culture" of the child. South Africa is a country that consists of diverse cultures and the Act would improve its implementation of the right of the child to be heard by including cultural consideration in its legislation.

#### ***5.2.1.3 Welfare and Interests of the Child***

To establish a link between the well-being of children and the well-being of their families is an important objective of the CYPFA (Kruger, 2005 by which the court and the state should play a limited role to promote emphasis on assistance to the family to make decisions (O'Brien in Robinson, 1996; Kruger, 2005).

Against this background, it needs to be established how much the court or the state is permitted to meddle in the "family authority". Section 6 provides the answer by asserting that "the welfare and interests of the child or young person shall be the deciding factor when a conflict of principles and interests arises" (Robinson, 1996:318).

## **6 Welfare and interests of child or young person paramount**

In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the welfare and interests of the child or young person shall be the first and paramount consideration, having regard to the principles set out in sections 5 and 13.

### ***5.2.1.4 Referral of Care and Protection Cases***

The participation of the child in FGC is found under the provision dealing with care and protection matters in Part 2 of the CYPFA. Section 19(2) makes provision for the referral of care or protection cases and reads as follows:

#### **19 Referral of care or protection cases to care and protection co-ordinator by other person or by court**

(2) Every care and protection co-ordinator to whom a case is referred pursuant to subsection (1) shall, where it appears to that care and protection co-ordinator to be necessary to do so,—

convene a family group conference in accordance with section 20;

Sections 20-38 of the CYPFA detail the arrangements for and attendance at the FGC; the advice to families; procedures and the consequences thereof. Although FGC is a voluntary process (Levine, 2000), the CYPFA requires that a FGC is convened and used when decisions might be made in child protection cases (section 20). When adequate grounds exist for intervention, the coordinator refers the case to the FGC and consults (section 21) with the family and the youth about who will attend the conference (Levine, 2000).

### ***5.2.1.5 Persons Entitled to Attend Family Group Conference***

Connolly & Masson (2014) state that “[w]ithin the New Zealand legislative framework the child is an entitled member of the FGC, and therefore has participatory rights”. This is set out in section 22(1):

## **22 Persons entitled to attend family group conference**

(1) Subject to subsection (2), the following persons are *entitled* to attend a family group conference convened under this Part:

(a) the child or young person in respect of whom the conference is held, unless the care and protection co-ordinator convening the conference is of the opinion that—

(i) the attendance of that child or young person would not be in the interests of that child or young person, or would, for any other reason, be undesirable; or

(ii) the child or young person would be *unable*, by reason of its *age* or *level of maturity*, to *understand* the proceedings:

(b) every person who is—

(i) a parent or guardian of, or a person having the care of, that child or young person; or

(ii) a member of the family, whanau, or family group of the child or young person,—

unless the care and protection co-ordinator convening the conference is of the opinion that that person's attendance would not be in the interests of the child or young person, or would be undesirable for any other reason:

(c) the care and protection co-ordinator who is convening the conference, or any care and protection co-ordinator who is acting for that person.

Section 22 of the CYPFA refers to who is allowed to attend the FGC. Section 22(1)(a) refers to the attendance of the child. The choice of wording, in section 22(1) opens up the opportunity for participation to the child, as the attendance of the FGC is viewed as an entitlement and not an obligation. The children may be permitted to attend the FGC, but the child's competence is an issue for consideration prior to the child's participation in the FGC (see chapter 2).

Section 22(1)(a)(i) of the CYPFA alludes to the child not being able to attend the FGC in person as it may not be in the child's best interest or it would be "undesirable" for the child to do so. This section of the CYPFA focuses on instances when it appears that the child's attendance of the FGC is not in the best interest of the child and the child should be excluded from attending the FGC.

Research suggests that one of the reasons for the exclusion of a child from the FGC is the fear of what the child may hear and that there may be a risk of emotional harm to the child (Nixon, 2007). Due to their nature, most abuse cases, especially sexual abuse, have been considered as unsuitable for children's inclusion in FGC (Lubin, 2009). When these sensitive matters are included in the FGC, the aim of the FGC will not necessarily be to reunify the child with the family but to bring the parents and other family members together to team them up with the social worker, who might assist with the provisioning of available resources to the family (Lubin, 2009). (See chapter 2 for a discussion on suitable cases, for inclusion in FGC).

Another instance where the child's attendance and participation in FGC is viewed as "undesirable" is in the case of a child with a disability. The negative assumptions about disability, or adults' and professionals' inability to engage and work effectively with children with disabilities, have contributed to these children often being considered as not capable to participate (Nixon, 2007). Equal rights should be afforded to children with disabilities, to express their views, and additional measures, such as "age- and disability-appropriate assistance" should be provided, to ensure that these children are not excluded (Lansdown, 2011:19).

Section 22(1)(a)(ii) of the CYPFA states that the age or level of maturity of a child are factors that concern the participation of the child and may result in the child not participating in the FGC. The most common factors that influenced children's participation in FGC were the "child's age and understanding" (Nixon, 2007:27). Before a child attends the FGC, the child protection co-ordinator must assess the child's age and maturity as well as the issue involved in the case (Lubin, 2009). (See chapter 2 for a discussion on age and maturity of the child and the assessment of competence).

The literature suggests that the child's age and maturity will have an impact on how the child expresses wishes and feelings, either verbally or non-verbally, and how this voice will be heard, directly or indirectly (See chapter 2). In New Zealand, children receive information and explanations about proceedings and decisions that might affect them and they are encouraged and assisted to participate, depending on their age and maturity (Kruger, 2005). In instances where a child is unable to understand or it is not in the best interest of the child to receive information, the information will be withheld from the child (Ibid). A study in New-Zealand, to evaluate FGC practice and outcomes found that in instances where children did not attend the FGC, they were

represented with a display of their photos, names and drawings to focus FGC participants (Carswell, o-Hinerangi, Gray, and Taylor, 2013).

The CRC does not prescribe an age limit on the rights of children to participate and actively discourages the use of age limits in legislation or procedure, which might limit the right of children to participate in decision-making (Lansdown, 2011).

Section 22(1)(b) refers to persons, other than the child, who are allowed to attend the FGC and states that their attendance must be in the interest of the child and that the coordinator should exclude any persons when their attendance is “undesirable” (see chapter 2).

Section 22(1)(c) of the CYPFA does not stipulate the specific profession or background required for a coordinator. The Director-General of Social Welfare appoints coordinators who must be suitably qualified in respect of “personality, training or experience”, in accordance with section 423 of the CYPFA (Robinson, 1996:324). In the case of the Act, regulation 13(2) makes reference to specific persons who may be suitable to facilitate the FGC but is also open to the inclusion of “any suitably qualified person”. Persons who can be considered include “a family advocate, a social worker, a social service professional or traditional leader”.

Robinson (1996:324) further states that at the time when the Act came into operation, it was anticipated that the coordinator would not only be the cornerstone of the FGC but would also be observed, as “a servant of the FGC, rather than a servant of the Department of Social Welfare”. Whilst this practice appears flawed, in that employees of the Department, who are obliged to exhibit loyalty towards the Department, are obligated to act autonomously and neutrally in the interests of the FGC participants (Ibid), the researcher is of the opinion that when cases are referred to the FGC coordinators should not continue to be involved in cases or with families that are known to them. This will ensure independence and impartiality in the interests of the FGC participants. It is also important that the role of the coordinator in FGC processes is clearly set out to ensure that the Department as well as FGC participants understand this role and do not feel that there is divided loyalty on the part of the coordinator.

Section 22(d) to 22(i) cites several people also entitled to attend the FGC, and makes reference to “a social worker or a constable”, representatives of “anybody or organisation”, “a representative of the person who has the care of that child or young person pursuant to an agreement”, “any person appointed as agent for the court”, “any barrister or solicitor or lay advocate” who represents

the child. These persons could include a doctor, lawyer, teacher, member of the “*hapu* or *iwi*” or any other support persons (Robinson, 1996:324). The attendance of the people mentioned above could have an effect on the participation of the child at the FGC and the outcome of the decisions made during the FGC. The Act (section 70(1)) is not as detailed as to who may attend the FGC and only states that the FGC needs “to be set up with the parties involved in a matter . . . including any other family members of the child”.

Robinson (1996:324) however adds that the members of the FGC are allowed to privately discuss issues, during the FGC. Family members can exclude specific non-family members (including the co-ordinator) “during any discussions or deliberations held among the members of the family, *whanau* or family group” even though these members are, in terms of section 22(1), entitled to attend the FGC. These family deliberations and the possible exclusion of the coordinator is a unique feature in the FGC process, referred to as “private time” (see chapter 2).

#### ***5.2.1.6 Ascertaining Views of Persons Unable to Attend the Family Group Conference***

In instances where the child is unable to attend, when it is not desired for the child to attend or when the child attends only parts of the conference, section 24 of the CYPFA provides for the views of the child to be ascertained and heard. The co-ordinator is responsible for ascertaining the feelings and views of the child and to make sure that those views are made known at the FGC. Section 24 reads as follows:

(1) Every care and protection co-ordinator who convenes a family group conference under this Part shall take all reasonable steps to ascertain the views of the following persons in relation to the matters to be considered at the conference:

(a) any person who is excluded from attendance at the conference pursuant to paragraph (a)(i) or paragraph (b) of section 22(1):

(b) any person who is entitled to attend the conference but who has notified the care and protection co-ordinator that he or she or it is unable, for any reason, to do so.

(2) Where, in respect of any family group conference, a care and protection co-ordinator ascertains the views of any person pursuant to subsection (1), that co-ordinator shall ensure that those views are made known at that conference.

As discussed in chapter 2, according the CRC, the child has the right to express wishes in person, and while there may be some exceptions , the preference is that the child, irrespective of age, is actually present during the FGC (American Humane Association and FGCM Guidelines Committee (AHA Guidelines), 2010). Section 24 of the CYPFA provides for the views and wishes of the child to be made known at the FGC in order for them to be considered, ensuring the participation of the child, whether through direct or indirect participation.

According to Robinson (1996:322) “[t]he overall emphasis throughout the Act is on family participation, decision making and empowering, culminating in the Family Group Conference”. In New Zealand, a FGC must be convened when decision-making needs to take place in instances where it is believed that a child is in need of care and protection. According to Doolan (2011:21) FGC has “strengthened the involvement of children and their families in matters that impinge on them and their right to direct their own affairs”. In New Zealand, the early legislation relating to child welfare was developed for the children of the European population and immigrants whose main value was their contribution to family economics, and who did not have separate civil law protections to those that existed for adults (Doolan and Connolly, 2012). The methods used that formed the basis of government social services for children involved the removing of children from “what were considered unsavoury or dangerous family environments”, placement at residential institutions and later on the “boarding out” at Industrial Schools (Ibid at 1). “Cultural issues have been at the heart of practice changes in New Zealand in response to the negative effects of statutory practices by which children were placed outside their family networks, leaving families with a feeling of “cultural loss” (Ibid). The implementation of the CYPFA transformed the ways in which children and families were treated in New Zealand:

... [T]he Children, Young Persons and Their Families Act reflected its commitment to greater family involvement, its principles clearly articulating the primary role of the family in caring for children and the need to support family, whanau, hapu, and iwi, and the family group to undertake this role” (Connolly, 2004:2).

This statement affirms Doolan’s view that the CYPFA emphasises family participation in FGC and decision-making processes that affect the lives of children in need of care and protection..

According to Kanyi (2013), research on New Zealand care and protection FGC is minimal and outdated. The available research has mainly centred on the process of the conference and reported

that most FGCs reached agreement and that most professionals were satisfied with the plans made by the family (Ibid). “These studies are outdated; the FGC has continued to evolve and hence new studies need to inform current practice” (Kanyi, 2013:37).



### **5.3. AUSTRALIA**

Since the introduction of FGC in New Zealand through the implementation of the CYPFA in 1989, FGC has been widely applied in several countries. In Australia, all territories and states (except the Northern Territory) have adopted the FGC process or have conducted FGC trials (Sliwka, 2011). In line with article 12 of the CRC's "recognition of the importance of children's views, . . . legislation in all Australian jurisdictions endorses the importance of involving children and young people in decision-making (to the extent that their age and maturity enables) and to consult and seek the views of children on issues affecting their lives" (Bromfield & Holzer, 2008:20). It is noted that the legislation, in all eight Australian jurisdictions dealing with care and protection of children makes provision for child participation in decision-making, which is included in legislation as "best interest principles".

Compared with the other jurisdictions in Australia, the Australian Capital Territory (ACT) appears to have comprehensive legislation, with a broad focus on the child's wishes and views in care and protection matters and child participation in FGC. It is for this reason that the focus will fall on ACT child protection legislation.

#### **5.3.1 Children and Young People Act 2008**

The ACT statutory child protection system is regulated by the Children and Young People Act 2008 (CYPA). FGC was initially included in ACT legislation in 1999 and provides that FGCs may be arranged when it is believed that a child is in need of care and protection, by which a child can be diverted from court proceedings, or where the arrangements that were made at a previous conference need to be revisited (Harris, 2007).

Unlike New Zealand legislation, the CYPA does not force child protection workers to arrange a FGC in any situation (Harris, 2008). The use of FGC is thus "largely dependent on the ability of facilitators to convince workers and managers of the benefits of" FGC (Ibid at 14). The ACT FGC model focuses on diversion from court, but orders are generally not required for families that have attended a FGC where an agreement was reached (Harris, 2008). In the ACT the FGC process closely follows the New Zealand three-stage model. According to Harris (2008) amendments that are planned for ACT legislature will also allow for FGC in instances where children are not

considered to be in need of care and protection. This is a provision that is not present in New Zealand or South African legislation.

#### ***5.3.1.1 The Best Interest of the Child***

In chapter 10, Part 10.3 of the CYPA, section 349(1)(b), (f) and section 351(1)(c) and (2) contain the important principles and considerations in care and protection of children and young persons when decision-makers consider the best interest of the child in such matters. These are extensive provisions that particularly apply to care and protection of children. This is a unique feature of the Australian legislation and reads as follows:

- (1) For the care and protection chapters, in deciding what is in the best interests of a child or young person, a decision-maker must consider each of the following matters that are relevant to the child or young person:
  - (b) any views or wishes expressed by the child or young person;
  - (f) the capacity of the child's or young person's parents, or anyone else, to provide for the child's or young person's needs including emotional and intellectual needs;

#### ***5.3.1.2 Care and Protection Procedures***

Section 351 refers to the requirement to assist of families to understand care and protection procedures and states that:

- (1) A decision-maker making a decision under the care and protection chapters in relation to a child or young person must endeavour to ensure that the relevant people for the decision—
  - (c) know that the child or young person, and people with parental responsibility for the child or young person, may take part in the decision-making process and have their views and wishes heard; and
- (2) The decision-maker must give the relevant people for the decision sufficient information about the decision-making process, in language and a way that they can understand, to allow the child or young person, and people with parental responsibility for the child or young person *to take part fully* in the decision-making process. (Authors emphasis)

This section refers to the child and persons with parental responsibility and adds that it is important to provide information to all parties involved in a language and a manner that they can understand, as that this may influence the participation of the child in the decision-making process. This legislation ensures the child understands the decision to be made about his/her life and receives enough information to fully participate in the decision-making process and express views and wishes.

### ***5.3.1.3 Views and Wishes of Children***

Section 352 in the CYPA, refers to the opportunity provided to the child to participate, the consideration given to the views and wishes of the child and how the child's view is heard. This section states:

- (1) A decision-maker making a decision in relation to a child or young person under the care and protection chapters *must* give the child or young person a reasonable opportunity to express his or her views and wishes *personally* to the decision-maker, unless the decision-maker is satisfied that the child or young person does not have sufficient developmental capacity to express his or her views or wishes.
- (2) A decision-maker *may* find out the views and wishes of a child or young person—
  - (a) by having regard to—
    - (i) anything said personally by the child or young person to the decision-maker; or
    - (ii) anything said by a representative of the child or young person about the child's or young person's views or wishes; or
    - (iii) anything about the child's or young person's views or wishes contained in a report given to the decision-maker; or
  - (b) in any other way the decision-maker considers appropriate. (Author's emphasis)

In section 352(1) of the CYPA, it is specified that the child “must” be provided with the opportunity to “personally” express wishes and views. This places the duty on the state to include the child in the decision-making process.

Section 352(2)(i)-(iii) of the CYPA states that the “decision-maker may find out the views and wishes” of the child through various means, in the discretion of the decision-maker. This section

may also make provision for direct and indirect inclusion of the views of children of different ages as it also allows for the representative to provide information or a report on the wishes and views of the child, in instances when the child does not express views and wishes personally.

Section 352(3) refers to mandatory expression of views and states that “[a] decision-maker must not require a child or young person to express the child’s or young person’s views or wishes about anything”.

Section 352(3) of the CYPA appears not to make the expression of views and wishes of the child compulsory, suggesting that participation should be voluntary. It specifically states that a decision-maker cannot compel a child to express wishes, suggesting absence of measures to implement the right of the child to be heard and specific provision the views and wishes of the child to be considered, as prescribed by the CRC.

#### ***5.3.1.4 Family Group Conferences – Definitions***

Chapter 3. Part 3.1 in the CYPA, extensively deals with FGCs and section 73 provides definitions for a family group conference, FGC agreement, FGC facilitator as well as the following:

*Participant*, for a family group conference, means a person who attends the conference at the invitation of the family group conference facilitator.

*Parties*, for a family group conference agreement, means the participants who enter (or propose to enter) a family group conference agreement under section 85.

*Relevant conference participant*, for a family group conference about a child or young person, means a participant who has parental responsibility for the child or young person.

The CYPA went further than the CYPFA in providing definitions for “participant” and “parties”. The CYPFA, however, provides a broader definition of “parent”, while the CYPA refers to a “relevant conference participant” as a person “who has parental responsibilities for the child”.

#### ***5.3.1.5 Family Group Conferences - Objects***

Section 74 of the CYPA, encourages the child to participate in decisions made during the FGC. This creates the opportunity for the child to participate in decisions that affect the child’s life. The legislation ensures that the views of the child should be ascertained and states:

The objects of a family group conference about a child or young person are to—

- (a) *encourage the child or young person* and his or her family members, to *take part* in decisions affecting the child or young person; (author's emphasis).

#### **5.3.1.6 The Meaning of Family Group Conference**

The section 75 definition of a FGC centres on the opportunity to reach and enter into an agreement and reads as follows:

In this Act:

*Family group conference* means a conference about a child or young person to give the participants an opportunity to—

- (a) reach an agreement about a matter relating to the wellbeing of the child or young person; and
- (b) enter into a family group conference agreement detailing the agreed arrangements for the wellbeing of the child or young person; and
- (c) if a family group conference agreement is already in force for the child or young person—review the agreement. (sic)

#### **5.3.1.7 Family Group Conference Facilitators**

Chapter 3, Part 3.2 deals with the appointment and functions of FGC facilitators. Section 78(2) states:

(2) However, the director-general may appoint a person to be a family group conference facilitator only if satisfied—

- (a) that the person has suitable qualifications and experience to exercise the functions of a family group conference facilitator; and
- (b) if the person is not a public employee—that the person is a suitable entity to be a family group conference facilitator."

“*Note* Suitable entities to provide services are dealt with in pt 2.4.”

### ***5.3.1.8 Application and Suitability of Family Group Conference Facilitators***

Important to note is the CYPA’s strict guidelines for the application and suitability of the FGC facilitators as set out in sections 62 and 65, which provide information on who are viewed as “suitable entities” as referred to in the “*Note*” above. Section 62 states:

- (1) An entity may apply, in writing, to the director-general for approval as a suitable entity for a stated purpose.
- (2) The director-general may make guidelines about applications (the *suitability approval application guidelines*).
- (3) A suitability approval application guideline is a disallowable instrument.”

Section 65 provides for suitability information and reads as follows:

1) In this Act:

*Suitability information*, about an entity, means information about the following:

- (a) any conviction of, or finding of guilt against, the entity for—
  - (i) an offence relating to the provision of services for children or young people; or
  - (ii) an offence against a child or young person; or
  - (iii) an offence involving a child or young person; or
  - (iv) an offence involving violence; or
  - (v) a sex offence; or
  - (vi) an offence involving dishonesty or fraud; or
  - (vii) an offence involving possession of, or trafficking in, a drug of dependence or controlled drug; or
  - (viii) an offence against an animal;
  - (ix) any proven noncompliance by the entity with a legal obligation in relation to providing services for children or young people;

**Example**

The entity is a licensed proprietor of a childcare service and the licence is suspended for safety reasons under s 763 or under a law of another jurisdiction that substantially corresponds to s 763

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (b) any refusal of an application for a licence or other authority (however described) in relation to providing services for children or young people;
- (c) the soundness of the entity's financial reputation and the stability of the entity's financial background;
- (e) the entity's reputation for honesty and integrity;
- (f) whether the entity has proven experience or demonstrated capacity in providing services for children and young people;
- (g) whether a child concern report about the entity has been received by the director-general and any action that has been taken in response to the report by the director-general or a court or tribunal;
- (h) for an entity in relation to suitability for the purpose of foster care—information in paragraphs (a) to (g) for each other adult member of the entity's household;
- (i) any other consideration relevant to the entity's ability to provide high quality services for children or young people.

These extensive guidelines on the suitability of FGC facilitators is unique to the CYPA. Another unique feature is that it provides examples in its explanation of certain issues. These guidelines provide valuable information that could be incorporated in the South African context to provide direction in the implementation of the Act.

#### ***5.3.1.9 Family Group Conferences - Criteria***

Under section 80 of the CYPA, a FGC can be arranged when it is appears that the child is at risk or in need of care and protection. Importantly the legislation focuses on the importance of the views and participation of the child in the FGC.

#### ***5.3.1.10 Who Must be Invited to Family Group Conferences***

This section sets out who must be invited to attend the FGC:

- (1) A family group conference facilitator for a family group conference must take all reasonable steps to *invite* the following people to the conference:
  - (a) the director-general;

- (b) if the family group conference facilitator is satisfied that the child or young person can *understand* and take part in the conference—the child or young person;
  - (c) each parent of the child or young person, unless the family group conference facilitator considers that it would not be in the best interests of the child or young person for the parent to attend;
  - (d) each other person (if any) who has parental responsibility for the child or young person, unless the family group conference facilitator considers that it would not be in the best interests of the child or young person for the person to attend;
  - (e) any person with an interest in, or knowledge of, the care, wellbeing or development of the child or young person who the family group conference facilitator considers should attend the conference.
- (2) If a child or young person invited to a family group conference does not take part in the conference, the family group conference facilitator must take all reasonable steps—
- (a) to find out the *views and wishes* of the child or young person; and
  - (b) to make the views and wishes of the child or young person *known* to each other person taking part in the conference; and
  - (c) to ensure that the views and wishes of the child or young person are *considered* in reaching any agreement at the conference.
- (3) Subsection (2) does not create any *requirement* for a child or young person to express a view or wish about any matter.
- (4) A participant may not be represented at a family group conference by a lawyer.
- (5) However, for a participant mentioned in subsection (1) (b), (c), (d) or (e), a *support person* chosen by the participant may attend the family group conference to *assist* the participant if the family group conference facilitator considers the support person appropriate and capable of giving the participant *assistance*. (Author’s emphasis)

As expected from article 12 of the CRC, the child and parties are invited to the FGC and have a choice to participate without any obligation to do so. Section 83(1)(b) of the law also provides for the facilitator to establish the child’s capacity and developmental ability to understand the process. Section 83(2) of the CYPA ensures that even if the child does not participate, the facilitator finds out his/her views and wishes, conveys them to the other participants and considers them. The importance and weight of the child’s views are demonstrated in this legislation.



Section 83(3) of the CYPA makes provision for a suitable support person to assist the child to express his/her views during participation in the FGC. A support person may also be employed where it is not in the best interest of the child to participate in the FGC in cases where the child is a victim of a sexual abuse or a criminal offence, violence or does not take part as a result of a disability (see chapter 2). The use of a support person might be seen as a mechanism built into the legislation to solicit the views or wishes of the child.

#### ***5.3.1.11 Family Group Conference Agreements***

Section 85 refers to the agreements reached between parties at the FGC and states:

(1) This section applies if the family group conference facilitator for a family group conference about a child or young person is satisfied that the director-general and all relevant conference participants (the *parties*) have reached agreement about an issue relating to the wellbeing of the child or young person.

*Note. . . Relevant conference participant* means a participant who has parental responsibility for the child or young person (see s 73).

(2) The facilitator may propose that the parties enter into a *family group conference agreement* detailing the agreed arrangements for the wellbeing of the child or young person.

(3) Before the parties enter into a family group conference agreement—

(a) the facilitator must—

(i) give the relevant conference participants an opportunity to get legal advice about the meaning and effect of the proposed family group conference agreement; and

(ii) if the facilitator is satisfied that the *child* or young person has *sufficient maturity* and *developmental capacity* to *understand* the proposed family group conference agreement—

(A) find out and *consider the child's or young person's views and wishes* about the *proposed* family group conference agreement; and

(B) if the proposed family group conference agreement is about a young person who is *15 years old* or older—give the young person an opportunity to get legal advice about the meaning and effect of the proposed family group conference agreement; (Author's emphasis).

This section provides that weight is given to the age and maturity of the child, ensuring that the child understands the agreement that is reached during the FGC. Before parties enter into any agreement, the further protects the child by requiring the facilitator to provide the child, “who is 15 years old or older”, with the opportunity to obtain legal advice. This will ensure that the child understands the meaning and the effect that the agreement on him/her. In line with the CRC, this section provides for the “decision-maker” to provide the child with information on the outcome of the FGC process, and the weight and consideration that was assigned to the child’s views and wishes in arriving at the proposed agreement. The child must then consent to the agreement before it is accepted.

#### ***5.3.1.12 Approval of the Family Group Conference Agreement***

Sections 86 and 87 require the child’s participation in decision-making even after the FGC by insisting on the child’s approval to the proposed FGC agreement in the child’s best interest. Section 86 states:

- (1) This section applies if a family group conference agreement proposed under section 85
- (2) is about a young person who is 15 years old or older.
- (2) The parties may enter the proposed family group conference agreement only if the facilitator for the family group conference is satisfied that the young person either—
  - (a) agrees to the proposed family group conference agreement; or
  - (b) does not have sufficient maturity or developmental capacity to understand and agree to the proposed family group conference agreement.”

Section 87 states:

- 1) This section applies if the family group conference facilitator for a family group conference about a child or young person—
  - (a) has, under section 85—
    - (i) proposed that the parties enter into a family group conference agreement; and
    - (ii) given the relevant conference participants an opportunity to get legal advice; and
    - (iii) if required, found out and considered the child’s or young person’s views and wishes; and

(b) for a young person who is 15 years old or older—is satisfied under section 86 that the young person either—

(i) agrees to the proposed family group conference agreement; or

(ii) does not have sufficient maturity or developmental capacity to understand and agree to the proposed family group conference agreement.

(3) If the child or young person (not being a young person mentioned in subsection (1) (b)) agrees to the proposed family group conference agreement, the child or young person may also *sign the agreement*. (Author’s emphasis)

Section 87(3) of the CYPA requires that the child must agree to and sign the FGC recommendation. In this instance, the CYPA, however, refers to a child “who is 15 years old or older”.

The CYPA realises the right of the child to be heard in matters that affect him/her and complies with the “[s]teps for the implementation of the child’s right to be heard” as found in the Committee on the Rights of the Child (2009:12). Another requirement of the Committee on the Rights of the Child is that the child must express views in an encouraging and enabling context. The child must also be assured that the adult who is responsible for hearing his or her views is willing to listen and give appropriate consideration. The format of the hearing should not be one-sided but more like a conversation.

## 5.4 CONCLUSION

The use of FGC, in care and protection cases, is an established practice in New Zealand and Australia. FGC was developed in New Zealand and the model was adopted and adapted by Australia to meet the obligations of article 12 of the CRC ie to give participatory rights to children in need of care, and empower them to take part in the decision-making processes that affect their lives.

New Zealand and Australia’s legislation indicates that authorities of both countries consider children’s views when making decisions. The concept of the child having a “voice” is however given more prominence in New Zealand. From the mentioned jurisdictions, New Zealand is the only country to have specifically implemented the right of the child to have the opportunity to regularly express views directly in family legislation. This choice given to children to be heard directly conforms to the requirements of article 12 of the CRC. The FGC legislation, as contained

in the ACT's (Australia's) CYPA, is however far more comprehensive than New Zealand's CYPFA.

International legislation on FGC is supplemented by various guidelines, implementation manuals and reference guides that describe and recommend best practice to ensure effective implementation of the FGC approach. These give appropriate guidance and direction to ensure efficient implementation of the FGC, to ensure that children are protected from harm and that meaningful participation of children takes place. These documents contain valuable information that could provide guidance to South African legislators in drafting suitable regulations or documents for the practice of FGC.

## **CHAPTER 6**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **6.1 INTRODUCTION**

The main aim of the research was to explore child participation in FGC in South Africa, New Zealand and Australia, to compare their implementation and practice of FGC and to identify best practice to improve FGC legislation and its implementation as a conflict resolution and child-inclusive decision-making process in South Africa.

As alluded to in chapter one, before the adoption of the CRC and with specific reference to its article 12, the voices of children were not heard and received little recognition. Children seldom were afforded the opportunity to participate in decision-making processes, which affected their lives and shaped their futures.

Article 12 of the CRC only attains significance if suitable procedures are in place to ensure that children are afforded the opportunity to participate. This essentially means that children must be included in decision-making processes on the ground that they have the right to be heard and to participate in the decisions that affect their lives; legislation therefore needs to make provision for children to be included in decision-making processes and more specifically FGC, as one of these processes.

The goal of this study was to explore current child protection legislation, practices and procedures in South Africa, New Zealand and Australia and to determine best practice for strengthening and improving the implementation of the child protection system relating to FGC in South Africa. This would ensure that the needs of children in South Africa are met; and that child participation in FGC in care and protection matters is guaranteed for their protection and safety.

The following research questions, guided the achievement of this goal:

- 6.1.1 How are children's voices heard in FGC, in care and protection matters in South Africa, New Zealand and Australia?**
- 6.1.2 What are the factors that facilitate or impede participation in FGC?**
- 6.1.3 What child participation guidelines are needed for FGC in South Africa?**

The research method used in this study was literature review and analysis of the available resource material. This chapter presents a summary of preceding chapters and illustrates how the research questions have been addressed and answered. This chapter then closes with recommendations that stemmed from the findings of this study.

## **6.2 SUMMARY OF THE CHAPTERS**

In chapter one and two a foundation for the research was laid; the topic was placed in context and background information was provided as to the extent of the voice of the child being heard, and particularly the participation of the child in decision-making processes such as FGC. In chapter one, the research problem provided information and background on the South African context and the right of the child to be heard and participate in decisions. South Africa is characterised by cultural diversity and a distinct disparity in the power and status between adults and children, affecting child participation in decision-making processes such as FGC. Many children remain trapped in poverty and environments where they are exposed to abuse, violence, neglect and mistreatment without the necessary welfare and justice services to protect them from harm and provide the opportunity to participate in decision-making processes that have an impact on their lives.

Chapter two provided a contextual overview of FGC by focusing on the history and principles of FGC as well as the key elements of the FGC as three-phased process. Important issues for consideration were which cases to refer for inclusion in FGC, who should attend the FGC, the character and status of the FGC coordinator and the preparation of the FGC participants, including the child, to ensure their meaningful participation in the decision-making process.

Before the FGC commences, clear information needs to be provided in a manner that is applicable to the child's age to ensure that the child understands the reason for and the possible outcome of the FGC. The child must be empowered to express views and feelings and contribute to the decisions that are made about his/her life, during the FGC. It is further important to ascertain whether the referral of the child to the FGC would be in the best interest of the child or whether the referral might be harmful to the child or compromise his/her safety and protection. It is therefore important to consider which types of case are suitable for inclusion in FGC and when and under what circumstances the child should be included in the FGC.

Chapter two provided an answer to research question two and explored the factors that have an impact on the voice of the child and influence the level of child participation in FGC. The research found that the child can participate in FGC through various means and methods of communication ie verbal or non-verbal participation, depending on the age, maturity and competence of the child; and direct or indirect participation in instances where the child is unable to attend the conference or parts of the conference. This chapter also explored certain societal circumstances that influence the inclusion of the child in FGC and participation in decisions.

Chapter two lastly focused on the importance of a suitable FGC coordinator – an issue on which all authors agree. The FGC coordinator should be neutral, competent, qualified, knowledgeable, experienced and culturally appropriate to facilitate the FGC. A suitable coordinator creates an atmosphere and environment that is conducive for child participation. When the coordinator understands the language and culture of the child, the child is likely to feel that he/she is accepted and understood, which contributes to the child feeling confident and safe to share views and feelings, ensuring optimum participation in the FGC.

Chapter three explored the international and national law pertaining to the child's right to be heard and to participate in decisions that affect his/her life. The analysis of the international law was limited to the provisions of the CRC and the ACRWC. The CRC deals exclusively with the rights of children and makes provision to ensure the protection of children and the realisation of their rights. The focus was on article 12 of the CRC that provides children with the right to be heard in all matters that affect them.

The interpretive instrument of the CRC, the Committee on the Rights of the Child (2009), extensively refers to the right of the child to participate in decisions and decision-making processes that affect his or her life, and the participation of the child in FGC falls within this ambit. Key obligations relevant to child participation in decision-making processes, were identified and explored, namely the age and maturity of the child, free expression of views, the best interest of the child, procedural right to participate. Knowledge and training of participants were also required by the CRC. The CRC is supplemented by the ACRWC that speaks to the specific difficulties that confront African children whilst also providing for child participation similar to the requirements of the CRC, underlining the child's right to be heard and express views freely.

The national law referred to, in this chapter, was South Africa's Constitution and the legislation that formed the focus of this research was the Children's Act (the Act).

Chapter four explored the South African child protection legislation and regulations and answered the first part of research question number one. This chapter explored sections 6 and 10 of the Act which provide for the inclusion and participation of children and also analyzed section 70 of the Act which makes provision for the child to participate in decision-making processes and specifically addresses the child's participation in FGC. The research found that the implementation of the Act had been a step in the right direction to meet the obligations set out in article 12 of the CRC; however there appears to be a disconnection between what is intended by the legislation and its actual implementation and outcomes as far as child participation in FGC is concerned.

The legislation should create the opportunity for the child to participate in the decision-making process and must make provision for the child to be referred to and included in the FGC. The research identified gaps that exist in the South African legislation, and sections were identified in which improvements could be made guidelines needed to be developed, to improve the legislation and guide the implementation of FGC in care and protection cases in South Africa.

Lastly, chapter five explored New Zealand and Australia's child protection legislation and provided a comparative analysis of various sections which make provision for child participation in FGC. Chapter five thus addressed the second part of research question one, by exploring how children's voices are heard in FGC in care and protection cases in New Zealand and Australia. Literature reveals that New Zealand has made an exceptional contribution to the development of child care and protection systems through the introduction of FGC

The state in Australia that was chosen for this study was the Australian Capital Territory (ACT) whose CYPFA (Children, Young Persons and their Families Act) was explored as its legislation is comprehensive with a broad focus on the wishes and views of the child in care and protection matters and child participation in FGC.

The research found that New Zealand and Australia's legislation is more extensive and inclusive of child participation in FGC than South Africa's, and that there were lessons to be learnt for South Africa to improve its legislation and practice. The research also found that although Australia initially adopted the New Zealand FGC model, the Australian child protection legislation for FGC was in some instances more comprehensive than the New Zealand legislation.



## **6.3 RECOMMENDATIONS**

Based on a literature review that was conducted, the research makes the following recommendations:

### **6.3.1 Resources**

Although the legislation makes provision for children to be included in decision-making processes such as FGC, the provision of these services carries a cost. It is recommended that the government and organizations conduct careful and extensive planning and budgeting to ensure adequate financial provisioning of resources and staff to effectively implement FGC. It is also important that adequately qualified and emotionally suitable staff are appointed to implement FGC effectively.

Consideration should also be given to the possibility that children and families from marginalised areas may need some form of financial assistance or travel allowances to ensure that they participate throughout the FGC process and that the child is given the opportunity to participate in the decisions made. Furthermore, the multilingual context and cultural issues in South Africa need consideration, especially with regards to black African children, to ensure that all children have access to FGC and decision-making processes.

It is recommended that resources be made available for services to continue after the completion of the FGC process, to support the plans that were formulated by the families and ensure that the implementation of the FGC plan is monitored to guarantee the safety and protection of the child after the completion of the FGC; and ongoing evaluation of the implementation is needed to ensure that the plan remains relevant to the child's circumstances.

### **6.3.2 Advocacy and Programmes**

As indicated in the research, not enough children, especially in marginalised areas, are reached in terms of the provisioning of welfare and justice services. It is recommended that advocacy campaigns and programmes are developed to reach marginalised communities to inform families and children of the welfare and justice services that are available and to provide them with the necessary information on the resources that are available to afford care and protection to children and to include them in decision-making through the implementation of the FGC.

### **6.3.3 Training and Skills**

It is recommended that the Department of Justice and Constitutional Development and the Department of Social Development take responsibility to provide all judicial officers with basic training and information about the FGC process and the intended outcomes to ensure that they have the skills to identify when and in which instances or circumstances children and families should be referred to attend FGC. The training should also provide the opportunity to learn about their restrictions as judicial decision-makers in matters that affect children.

Police, welfare organisations and other support services should also receive training to ensure that they understand FGC as an ADR method to ensure buy-in and involvement. It is also recommended that social workers or other suitably qualified persons who are appointed to facilitate the FGC receive training or guidelines on when to use FGC and how to coordinate and facilitate this decision-making method.

It is further recommended that a code of conduct is developed for court staff and coordinators who facilitate FGC. The Department of Social Development in partnership with the Department of Justice and Constitutional Development should also assume responsibility for the accreditation of FGC service providers and quality assurance processes through which FGC service providers could be monitored.

### **6.3.4 Guidelines**

It is recommended that criteria should be developed to provide guidance in respect of the FGC facilitator's qualifications, skill, experience and training as well as those of the representative who provides feedback to the decision-makers (if it is someone other than the facilitator). The guidelines should also include information on cultural consideration, sensitivity and language to prevent barriers to the implementation of FGC.

Guidelines should also contain information about the FGC process and outcomes that will guide the implementation of FGC. Definitions for certain terms and concepts should also be included.

Information in the form of guidelines or regulations should be developed to assist presiding officers, facilitators and representatives who are appointed to implement and conduct FGC.

### **6.3.5 Legislation and Regulations**

It is recommended that the shortcomings in the South African legislation, (as discussed in chapter 4) which apply to all forms of ADR, be addressed and that the regulations to the Act are well defined to provide sufficient guidance on specific forms of ADR.

### **6.3.6 Standards for Child Assessment**

It is recommended that standards, criteria and best practices developed in New Zealand and Australia could be considered for the South African context as these countries have similarities in socio-economic conditions and cultural diversity. Lansdown (2011:56) identified four standards for assessing capacity of the child to establish whether it would be in the best interest of the child to participate, and it is recommended that South African regulations or guidelines include these standards when assessing the child's capacity.

#### ***6.3.6.1 Capability to Understand and Communicate Appropriate Information***

The child needs to have the ability to understand the alternatives that are available, to express a preference, communicate anxieties and ask questions that are important.

#### ***6.3.6.2 Capability to Reason and Make Choices***

The child needs to have the capacity to make choices and to think through issues without being coerced or manipulated.

#### ***6.3.6.3 Capability to Consider Importance, Danger and Detriment***

The child should have the ability to understand the consequences of various options of action, how it will influence him or her, the risks that are involved and the short- and long-term consequences thereof.

#### ***6.3.6.4 Achievement of a reasonably established set of values***

The child needs to have some foundation of values from which decisions are made.

### **6.3.7 Research & Statistical Data**

It is recommended that research be conducted on child participation in FGC in South Africa and that statistical information recorded. There is a lack of research on the current practice of child participation in FGC in South Africa and there is insufficient and limited available literature.

Statistical data is in fact unavailable, and it is evident from the remarks of practitioners that little ADR, and specifically FGC, in care and protection matters, has taken place since the inception of the Act.

There is a lack of clarity and direction in respect of child participation in FGC in child care and protection matters in South Africa and the researcher is therefore of the opinion that this study and the application of the recommendations could make a valuable contribution to South Africa's implementation of FGC and the child's participation in this decision-making process.

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