TIFFANY BUCKLEY

IMPLEMENTATION OF ARTICLE 12 OF THE CRC IN THE YOUTH COURT COMPARED TO THE FAMILY COURT

Faculty of Law

Victoria University of Wellington

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Abstract:

All children have the right to effectively participate in judicial proceedings under art 12 of the United Nations Convention on the Rights of the Child (CRC). However, children who are involved in the Youth Court are having this right fulfilled far more than children who appear in the Family Court. I will make evident this disparity by applying Laura Lundy's model of participation to the Youth Court and the Family Court, as well as highlighting how art 12 could be better upheld in both courts. I will argue that this disparity is causing procedural unfairness because some children are having their voices heard in judicial proceedings better than others. The most obvious cause of this disparity is the different legislative requirements across both jurisdictions. However, I will question whether there might be other underlying reasons for this disparity, and how they might be addressed.

Fortunately, there is the opportunity for this disparity between the Youth Court and the Family Court to be remedied with the Family Court (Supporting Children in Court) Legislation Bill which was introduced into Parliament in August 2020. I will consider how effective this Bill is likely to be in ensuring art 12 is upheld and suggest where it could be improved.

Keywords; children, participation, CRC, criminal proceedings, guardianship disputes.

I Introduction

Children who are involved in court proceedings enter a world of anachronisms and institutional language that few adults would understand, let alone children.[1] The two courts that a child is most likely to be involved in are the Youth Court or the Family Court. Whilst children will often appear in the Youth Court, their physical presence in the Family Court is much rarer.[2] Nonetheless, children remain at the heart of many Family Court proceedings.[3] Children who are involved in these courts have the right under art 12 of the United Nations Convention on the Rights of the Child (CRC) to express their views, be heard and take part in judicial proceedings.

However, there is a significant disparity in the way art 12 is upheld, and how meaningful and effective children's participation is in the Youth Court compared to the Family Court. I will explore why there is such a disparity and how this might be limiting access to justice and procedural fairness for the children who appear in the Family Court but not the Youth Court. Are children in the Youth Court getting a better deal when it comes to their right to participate? To explore this disparity, I will apply Laura Lundy's model of participation to analyse the practical ways each court is or is not fostering effective participation of children.

The organisation of this paper is as follows. Firstly, I will outline the background to the right to participate in international and domestic law. Secondly, I will explain Laura Lundy's model of participation and what is required to fulfil each element. Then the analysis splits into the Youth Court and the Family Court. I will apply Lundy's model to both courts, analysing where art 12 is upheld well and where it is not, and I will provide recommendations for how art 12 could be better upheld. Finally, I will discuss the implications of the disparity in the way art 12 is upheld, and discuss reasons for this disparity.

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[1] Nadine Metzger, Koleta Savaii, Alayne McKee and Sally Kedge *Listening to Young People's Experiences of Communication Within the Youth Justice Sector in New Zealand* (Point Research and Talking Trouble Aotearoa, July 2018) at 10.

[2] Ministry of Justice "What to Expect at Family Court" (25 September 2020) <www.justice.govt.nz>

[3] Nicola Taylor, Pauline Tapp and Mark Henaghan "Respecting Children's Participation in Family Law Proceedings" (2007) 15 Brill 61 at 80.

As a preliminary note, the Oranga Tamariki Act 1989 (OTA) defines a child as a person under the age of 14 years and a young person as someone over the age of 14 but under the age of 18.[4] Under the Care of Children Act 2004 (COCA), a child is a person under 18 years old.[5] I will use the definition of child as per the COCA.

Firstly, I will discuss the piece of international law which governs this right to participation, as children, both in the Youth and Family Court are guaranteed rights under this treaty.[6]

II United Nations Convention on the Rights of the Child

The CRC is a comprehensive treaty that articulates specific children's rights which state parties must uphold.[7] It was adopted by the United Nations in 1989 and ratified by New Zealand in 1993.[8] Whilst New Zealand has not incorporated the CRC, s 5 of the OTA states that the courts should be guided by the principles in the CRC. This is an indication that judges should be considering the CRC when making decisions and conducting their court.[9] The important article for this paper is art 12, which states:[10]

> State Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight per the age and maturity of the child.
>
> 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.

The Committee on the Rights of the Child (The Committee) consists of 18 independent experts that monitor the implementation of the CRC by its state parties.[11] The Committee publishes its

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4 Section 2.
5 Section 8.
6 United Nations Convention on the Rights of the Child GA Res 44/25 (1989), art 12.
7 Above n 6.
8 United Nations Human Rights Office of the High Commissioner "Ratification of 18 International Human Rights Treaties" (2014) < www.indicators.ohchr.org>
9 Dr Nessa Lynch *Youth Justice in New Zealand* (3rd Ed, Thomson Reuters, 2019) at 40.
10 Above n 6, art 12.
11 United Nations Human Rights Office of the High Commissioner "Committee on the Rights of the Child" (2020) <https://www.ohchr.org>

interpretation of CRC provisions in the form of general comments.[12] In its General Comment Number 12, the Committee discussed what it meant to meaningfully give effect to art 12.[13] The Committee urged state parties to avoid being tokenistic when applying art 12 and to ensure that children's views are given due weight.[14]

This right to participate is so important because it is fundamental to natural justice, which every person in New Zealand has the right to under the Bill of Rights Act 1990.[15] A fundamental principle of natural justice is that everybody has the right to be heard and have their views taken into account.[16]

Surprisingly, the term "participation" does not actually appear in art 12 of the CRC.[17] However, the term has been used broadly to describe an ongoing process which includes information sharing between children and adults, and opportunities for involvement of the child wherever appropriate.[18]

There is now a broad consensus on the basic requirements which have to be reached for effective, ethical, and meaningful implementation of art 12.[19] The Committee in 2009 said that all processes in which a child or children are heard and participate in must be: "transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable."[20] The Committee noted that since the adoption of the CRC, considerable progress had been made across the world to create legislation and policies which promotes the implementation of art 12.[21]

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12 United Nations Human Rights Office of the High Commissioner (2020) "Human Rights Treaty Bodies – General Comments" United Nations Human Rights Office of the High Commissioner <https://www.ohchr.org>

13 Committee on the Rights of the Child *General Comment No. 12 (2009)* CRC/C/GC/12 (1 July 2009) at [88].

14 At [132].

15 Section 27.

16 New Zealand Bill of Rights Act 1990, s 27.

17 Above n 6, art 12.

18 Deborah Inder "Children's Participation in the Context of Private Law Disputes in the New Zealand Family Justice System" (Doctor of Philosophy (Thesis)), University of Otago, Faculty of Law, 2019) at 65.

19 Above n 13, at [133].

20 At [134].

21 At [3].

However, there are many barriers to full acceptance of this right, such as the assumption that children lack the competence to participate meaningfully, that participation is burdensome for children, and undermines parental authority.[22]

Most of the other rights guaranteed to children under the CRC, such as the best interest principle in art 3, are based on the idea of protection of the child.[23] In contrast, the fundamental principle behind art 12 is that children are rights holders themselves and are entitled to have their voice heard and be a part of proceedings involving them.[24] This principle of autonomy differentiates the right under art 12 to the other rights children are entitled to under the CRC.

A The CRC in New Zealand Case Law

Below I will discuss the different legislative instruments which have referred to the CRC. However, the New Zealand courts have also recognised the significance of this treaty. In 2009, the Supreme Court in *Ye v Minister of Immigration* said the following: [25]

> …his approach is supported by the principle that the Act should be interpreted in a way that is consistent with New Zealand's obligation to observe the requirements of applicable international instruments and, in particular, in present circumstances, those of the United Nations Convention on the Rights of the Child (CRC).

Whilst New Zealand has not domestically incorporated the CRC, recognition from the Supreme Court of New Zealand's obligations under the CRC sends a strong message to the courts that they must observe these obligations.[26] The Court of Appeal has also affirmed its international obligations under the CRC in 2020.[27]

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[22] Deborah Inder, above n 18, at 1.
[23] Ursula Kilkelly and Ton Liefaard *International Human Rights of Children* (Springer, Singapore, 2018) at 4.
[24] Dale Clarkson and Hugh Clarkson "The rights of children under the Care of Children Act 2004, with particular reference to cases of parental alienation or intractable contact disputes (2005) 5 NZFLJ 91 at 91.
[25] *Ye v Minister of Immigration* [2009] NZSC 76 at [24].
[26] The applicability of the CRC was later affirmed by the Supreme Court again in *Wood – Luxford v Wood* [2013] NZSC 153 at [78].
[27] *Minister of Immigration v Q* [2020] NZCA 288 at [9].

It is clear then, both through international obligations and case law that New Zealand courts should uphold art 12. I will now outline Lundy's model of participation, which if followed, would lead to the fulfilment of art 12 of the CRC.[28]

III Lundy's Model of Participation

Laura Lundy is a Professor of International Children's Rights at the Queen's University of Belfast.[29] Children's rights are her area of expertise and she has focussed her research in particular on the implementation of the CRC.[30] Lundy's paper "Voice is not Enough" articulated a model of children's participation, which is based on four key interrelated concepts: space, voice, audience, and influence.[31] The Lundy model of child participation has been used extensively in scholarship and practice.[32] It has also been adopted by international organisations such as the European Commission and global NGOs such as World Vision.[33] Lundy's model of participation is based on art 12, and so the fulfilment of Lundy's four elements should lead to the fulfilment of art 12 of the convention.[34]

A Space

According to Lundy, a prerequisite of art 12 is the creation of a space where children are encouraged to be involved and express their views.[35] An important first step in ensuring this happens is to ask children which matters they consider important, and how they would like to be involved in influencing the outcome of these decisions.[36] Further, it is equally important that children are asked whether or not they would even like to participate in decision making

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28 Danielle Kennan, Bernadine Brady & Cormac Forkan "Space, Voice, Audience and Influence" (2017) Social Work in Action 205 at 205.

29 Laura Lundy "Research Statement" (2020) Queens University Belfast <pure.qub.ac.uk/en/persons/laura-lundy>

30 Above n 29.

31 Laura Lundy "Voice is Not Enough: Conceptualising Art 12 of the United Nations Convention on the Rights of the Child" (2007) 33 BERA 927 at 932.

32 Above n 29.

33 Above n 29.

34 Whilst Lundy's model has received international accreditation, it has also received some critique. See: Deborah Inder above n 18.

35 Above n 31, at 932.

36 Elizabeth Welty and Laura Lundy "A children's rights-based approach to involving children in decision making" (2013) 12 JCOM 1 at 2.

in the first place.[37] Finally, the space in which children are encouraged to participate in must be inclusive.[38]

B Voice

The voice element of Lundy's model seeks to counter the common misconception that the right to express a view depends upon the child's capacity.[39] Children's capacity only relates to the weight to be given to their view, not whether they should have their view heard or not.[40] Each child's needs must be considered individually as to what is the most appropriate way for their views to be expressed.[41] For example, children could present themselves, or have the assistance of someone such as a Communication Assistant or Lay A dvocate.[42] They might be involved in the whole proceeding, just some of it, or none at all.[43]

C Audience

Article 12 requires that children's views be given due weight.[44] This audience element of Lundy's requires therefore that children's views are communicated to someone with the responsibility to listen.[45] In Youth Court and Family Court proceedings, this audience will be the judge. This element requires that there are appropriate formal channels of communication to ensure the relevant person or body hears the child's views.[46] There is also a growing recognition that children express their views in many different ways, including through non-verbal communication such as body language.[47] Therefore, effective listening may also include effective looking.[48]

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37 Elizabeth Welty and Laura Lundy, above n 36, at 2.
38 At 2.
39 Laura Lundy, above n 31, at 935.
40 At 935.
41 At 935.
42 At 935.
43 At 935.
44 United Nations Convention on the Rights of the Child, above n 6.
45 Laura Lundy, above n 31, at 937.
46 At 937.
47 Glenda MacNaughton, Patrick Hughes and Kylie Smith "Young Children's Rights and Public Policy: Practices and Possibilities for Citizenship in the Early Years" (2007) 21 Young Children's Rights and Public Policy 458 at 463.
48 Laura Lundy, above n 31, at 937.

D Influence

The use of the term "influence" in the Lundy model encapsulates the concept of "due weight" as expressed in art 12.[49] Influence requires that children's views are taken seriously and acted upon, where appropriate.[50] The Committee has warned that appearing to listen to children is not challenging, giving due weight to the child's views is what requires real change.[51]

One final point to note about Lundy's model is that while there are four distinct elements, there will be some overlap between them. For example, when analysing both audience and influence, the actions of the decision maker must be considered, which in this paper will be the judge. Further, inevitably, Lundy's model will not have a consistent application across both courts. Therefore, there might be more analysis under one element than another. I will point this out during the application.

I will now set out the relevant background to proceedings in the Youth Court, which is helpful to keep in mind when applying Lundy's model because this background shapes the application of the model.

IV Youth Court

The Youth Court deals with criminal offending by children that is too serious to be dealt with by the police in the community.[52] The majority of children and young people who appear in the Youth Court have characteristics which make them particularly vulnerable, such as mental illness, one or more neurodisabilites, trauma, intellectual disability, exposure to family violence and sexual abuse.[53] The high prevalence of neurodisabilities in children appearing in the Youth Court has been evident for a while.[54] These vulnerabilities and communication difficulties make it very hard for children and young people to understand what is going on in court and express their personal views on their case. Recent research in New Zealand

[49] Danielle Kennan, Bernadine Brady and Cormac Forkan "Space, Voice, Audience and Influence: The Lundy Model of Participation (2007) in Child Welfare Practice" (2018) 31 Child Welfare Practice 2015 at 214.
[50] Laura Lundy, above n 31, at 937.
[51] At 937.
[52] Ministry of Justice "About Youth Court" (2019) <www.youthcourt.govt.nz>
[53] Judge John Walker, Principal Youth Court Judge "Running Interference" (Blue Light International Conference, Queenstown, New Zealand, 18 October 2019).
[54] Above n 53.

established that 64% of the young people assessed in a youth justice residence had a significant language impairment compared with only 10% of control peers.[55] The problem is evident, the children appearing in the Youth Court are likely to have significant communication difficulties which hinder their right to effectively participate in proceedings. Yet their right to participate and communicate their views is a fundamental right they are entitled to.[56] This issue is especially concerning given that most youth justice procedures rely heavily on oral language skills.[57]

A Oranga Tamariki Act 1989

The OTA promotes the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups.[58] It is also the Act which sets out the procedural requirements of the Youth Court. There are three key provisions of the Act worth noting for this paper as they all refer to the right to participate.

1 Section 5

In 2019 the principles of the Act were strengthened.[59] One fundamental principle under s 5 is that a child must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account.[60] Significantly, s 5(1)(a) does not differentiate as to the weight and maturity of the child or young person.[61] Youth Court judges are now consistently referring to their obligations under s 5 of the OTA.[62]

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55 Nadine Metzger, Koleta Savaii, Alayne McKee & Sally Kedge, above n 1, at 7.
56 United Nations Convention on the Rights of the Child, above n 6, art 12.
57 *New Zealand Police v FG* [2020] NZYC 328 at [136].
58 Oranga Tamariki Act 1989, s 4.
59 Stephen O'Driscoll *Purposes and Principles of Oranga Tamariki Act 1989* (Online ed, Lexis Nexis) at [5].
60 Oranga Tamariki Act 1989.
61 Above n 60.
62 See for example New Zealand *Police v FG* [2002] NZYC 328, *Police v EL* [2020] NZYC 45 at [17] and *Police v RT* [2020] NZYC 7 at [22].

2 Section 10

Section 10 requires that the court, in any proceedings under the Act involving the child or young person, explain the nature of the proceedings in a manner and language that can be understood by the child or young person.[63] The court also needs to be satisfied that the child or young person understands the proceedings.[64]

This section provides that whoever is representing the child or young person must explain the legal implications of the allegations.[65] It has been suggested that the following might be included in the explanations: the reason for any arrest, how the case will progress, the roles played by each person in the court, the fact that the proceedings in the court are adversarial and what that means, to name a few.[66] To date, there is no case law on the application of s 10.[67]

3 Section 11

Section 11 states that the child or young person must be encouraged to participate in the proceedings or process to the degree appropriate for their age and level of maturity.[68] The exception to this is if the court is satisfied that participation is not appropriate, having regard to the matters to be heard or considered.[69] This determination will be at the discretion of the judge through the application of the s 4A primary considerations, particularly the interests of the victim and the public interest.[70] Particularly important is s 11(2)(d) – (f) that "any written decision must set out the child's or young person's views and, if those views were not followed, include the reasons for not doing so; and the decision, the reasons for it, and how it will affect them must be explained to the child or young person."[71]

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63 Oranga Tamariki Act 1989, s 10.
64 Above n 63.
65 Above n 63.
66 *Adams on Criminal Law – 10 Duty of Court and Counsel to Explain Proceedings* (online ed, Thomson Reuters Westlaw) at [CY 10.101].
67 Last search undertaken in August 2020
68 Oranga Tamariki 1989, s 11.
69 *Adams on Criminal Law – Child's or Young Person's Participation and Views* (online ed, Thomson Reuters Westlaw) at [CY 11.01].
70 Oranga Tamariki Act 1989.
71 *Adams on Criminal Law,* above n 69 at [CY 11.01].

There has only been one case which has considered s 11 since its enactment. This is *MC v Chief Executive, Oranga Tamariki*.[72] In this case, the complainant argued that the Judge did not take account of her evidence as to the child's wishes.[73] However, the Judge stated that parents are not included in the s 11(3) list of persons who may express the views of the child.[74] Things said by children to their parents can be affected by factors such as coercion, parental expectation or a desire to please their parents.[75] On the other hand though, the child's parent could be the person the child feels most comfortable speaking to and being honest with.

In summary, since 2019 there has been a very strong legislative focus under the OTA on the right of the child to participate in judicial proceedings as per art 12 of the CRC. I will now apply Lundy's model of participation to the Youth Court to see if art 12 is also being uphold on the ground in the Youth Court.

V Application of Lundy's Model to the New Zealand Youth Court

A Space

1 Privacy of Proceedings

One aspect of the Youth Court which indicates fulfilment of Lundy's space element is that all proceedings are closed to the public, meaning the details of the child and their case remains confidential.[76] This element of privacy in Youth Court proceedings recognises that children are less culpable than adults and promotes the young person's reintegration into the community.[77] Further, a private court is likely to make the child feel more at ease.

To protect the confidentiality of the child, the victim and their families, leave of the Youth Court judge must be sought before a media report is made concerning the case.[78] Further, the publication of any identifying details such as the young person's name, their school, or the

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72 *MC v Chief Executive, Oranga Tamariki* [2020] NZHC 50.
73 At [97].
74 At [101].
75 At [101].
76 Dr Nessa Lynch, above n 9, at 206.
77 At 206.
78 Oranga Tamarki Act 1989, s 438(1).

name of their parents is forbidden.[79] The confidentiality of proceedings is the same in the magistrates' courts in England and Wales, where the public are not permitted to enter the court.[80] However, the situation differs in jurisdictions such as Canada. Youth Justice Courts in Canada are open to the public and members of the media.[81] However, children have strict privacy rights and there are only limited circumstances where their name or any other information that might identify them can be published.[82] There is an argument that this approach might be better as it balances the right to open and transparent courts more. There is a genuine public interest in seeing justice served, and private courts are inconsistent with the principle of open and transparent justice.[83] Nonetheless, having private Youth Court hearings does provide a safe space for children as they can state their views free of reprisal from the public.

However, just because the Youth Court is closed to the public does not mean that children get complete privacy in their case. A Ministry of Justice study in 2010 found that children and their families experienced significant wait times in the court foyer with other children.[84] This leads to offender association and created issues with privacy for young people and families.[85] Professionals have also stated that the lack of private interview rooms in the Youth Court meant private conversations have to take place in the foyer in front of other people.[86] However, children did not consider this to be a concern.[87] This is likely to be because lots of children enjoy seeing their friends in the foyer, and would see it as an opportunity to catch up or make new friends. This is another issue which is out of the scope of this paper but is worthy of looking into. Whilst offender association is an issue, the fact that children can have a private space to share their views is an indication of Lundy's space element.

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79 Oranga Tamarki Act 1989, s 438(3).
80 Magistrates Association "Youth Court" (2019) <www.magistrates-association.org.uk>
81 Department of Justice, Government of Canada "Overview of the Youth Justice Criminal Act" (3rd May 2015) < https://www.justice.gc.ca>
82 Youth Criminal Justice Act S C 2002 c.1, s 110.
83 Halls Sentencing *Court Proceedings Generally Open to Public [s 196]* (online ed, Lexis Nexis) at [CPA196.1].
84 Research Team Justice Sector Strategy *Youth Court Research: Experience and Views of Young People, Their Families, and Professionals* (Ministry of Justice, Research Report, 2011) at 12.
85 At 12.
86 At 12.
87 At 12.

2 Layout of Court

The Youth Court tends to have a different layout than the ordinary District Court. Some professionals in the Ministry of Justice study referred to above, said that the Youth Court U-shaped seating was better than the usual court room because it was more informal and allowed the child to see the other people in the room.[88] Professionals also said that the judge should sit in a different seat as having the judge elevated on the bench dehumanised the child.[89] It was stated that children might feel more comfortable if the judge was on the same level as them.[90] On the other hand, others suggested that the elevation of the judge was suitable as it gave a greater impression of formality.[91] However, I believe that children's views should be at the heart of any discussion, and the children in this study did not report significant issues with the layout of the court. The concerns that they did have were that they did not like standing up for long periods and that they did not like the small space.[92] These concerns do not indicate that children do not feel as though they are in a safe space which they can express their views.

3 Specialist Courts

Lundy's space element also requires that the space be inclusive.[93] A judicial innovation in the Youth Court is the development of the Rangatahi and Pasifika Courts. Rangatahi Courts operate in the same way as the Youth Court, but are held on marae and follow Māori cultural processes.[94] Similarly, the Pasifika Courts also operate in the same way as the Youth Court, but are held in Pasifika churches or community centres and follow Pasifika cultural processes.[95] The courts work within the Youth Court legal framework, the same laws apply, but instead of being monitored through the usual Youth Court, children attend these different courts.[96] The Rangatahi Courts and the Pasifika Courts are a judicial innovation which aim to connect children who admit their offending to a better sense of why they offended and how

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88 Research Team Justice Sector, above n 84, at 38.
89 At 38.
90 At 38.
91 At 38.
92 At 38.
93 Laura Lundy, above n 31, at 937.
94 Ministry of Justice "About Youth Court" (2019) Youth Court <www.youthcourt.govt.nz>
95 Lagi Tuimavae "The Pasifika Youth Court: A Discussion of the Features and Whether they Can Be Transferred" (LLB Hons, Victoria University of Wellington, 2017) at 16.
96 Kaipuke Consultants *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (Ministry of Justice. Final Report, December 2012) at 8.

they can change their behaviour in the future.[97] These courts are a key way the Youth Court provides an inclusive space for children whose cultural background is not reflected in the traditional court system.[98]

A question is whether the Rangatahi and Pasifika Courts, and other specialist courts should be mainstreamed. Given that Māori and Pasifika children are disproportionately represented in Youth Court statistics,[99] should these specialist courts not be the default? Currently, a child still has to appear in the ordinary Youth Court before they can be monitored in the Rangatahi or Pasifika courts.[100] The fact that these courts are still considered to be specialist might be inconsistent with Lundy's space element if not all children are guaranteed an inclusive place to express their views. However, I would argue that mainstreaming these courts has the potential to take control away from the communities who help run them. Trying to mould these practices into the traditional western system has the potential to make participants still feel the disconnect they experience going through the ordinary court. I argue that having these specialist jurisdictions as an option for children is upholding Lundy's element of space, without requiring them to be mainstreamed.

4 Physical Presence of the Child

Finally, Lundy's model requires that children are asked whether they would even like to participate in proceedings at all.[101] Children are generally encouraged to attend Youth Court proceedings.[102] However, children in the Youth Court are also being asked whether they would like to physically be in court. For example in *F v HJ* the judge acknowledged that the child was too distressed and did not want to participate in the hearing at all.[103]

In summary, Lundy's element of space seems to be upheld in the Youth Court. The factors that lead strongly towards this conclusion is the privacy of proceedings and the fact that the Rangatahi and Pasifika courts are ensuring Māori and Pasifika children, who are significantly

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97 Greg Kikaha "Rangatahi and Pasifika Courts" (2014) The District Courts of New Zealand <www.districtcourts.govt.nz>

98 Kaipuke Consultants, above n 96, at 11.

99 Ministry of Justice "Children and Young People in Court: Data notes and trends for 2019/2020" (28 September 2020) <www.justice.govt.nz>

100 Kaipuke Consultants, above n 96, at 5.

101 Laura Lundy, above n 31, at 937.

102 Research Team Justice Sector Strategy, above n 84, at 31.

103 *R v HJ* [2019] NZYC 612 at [1].

overrepresented in the Youth Justice system, feel that they are in a space where their voice can be meaningful.

B Voice

1 Youth Advocate

In the Youth Court, every child is automatically entitled to be represented by a Youth Advocate (lawyer).[104] In addition to the usual tasks of a lawyer, Youth Advocates undertake several other key tasks that facilitate the child's voice in Youth Court proceedings.[105] Youth Advocates will give information to the Youth Court, to ensure that the child's circumstances are appreciated.[106] This might include providing the court with information that the child does not feel comfortable providing themselves. In the Ministry of Justice study, children frequently reported that it was good to have their Youth Advocate talking for them in court and explaining what was going on.[107] However, a few children and family members were unhappy with their advocates.[108] This was usually because they felt they had not had enough contact with their advocate, or because the advocate was not able to talk using language that was easy to understand.[109] For example, one child said that it would be better if his youth advocate used terms which a sixteen-year-old could understand.[110]

Whilst Youth Advocates are a key way for children's voices to be heard, they will not be contributing to Lundy's voice element if they are worsening communication barriers in the Youth Court. This does not seem to be the case, as only a few children asked were unhappy with their youth advocate. Nonetheless, it emphasises the importance of Lundy's requirement that each child's needs are assessed on an individual basis.

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104 Dr Nessa Lynch, above n 9, at 237.
105 Alison Cleland *Youth Advocates in Aotearoa/New Zealand's Youth Justice System* (The Law Foundation, 2011) at 2.
106 At 2.
107 At 43.
108 Research Team Justice Sector Strategy, above n 84, at 44.
109 At 44.
110 At 44.

2 Communication Assistants

Communication Assistants are court-appointed specialists who advise and assist people in court who have communication difficulties so that they can participate effectively.[111] One way a communication assistant helps to fulfil the element of voice is by determining how the information should be presented to the child. To determine what may be an appropriate format for the child, a Communication Assistant will provide a pre-trial report which will discuss the child's communication needs.[112] They will make recommendations on phrasing options, how often a child might need a break and will discuss how a child's responses could be inaccurately interpreted for example.[113] All of this information will be provided to the judge and others within the court to ensure that the child has their communication needs fully met during the trial.[114]

Police v FG is a 2020 Youth Court decision which is a good example of how a Communication Assistant can help fulfil Lundy's voice element in the pre-trial stage. A speech language therapy report was provided which identified language and communication strategies needed to facilitate FG's participation in an FGC.[115] The following findings were made:[116]

> FG had limited understanding of legal terminology. He did not know a variety of legal words such as victim, remorse, guilty, remand, and not denied. For example, when asked what is a victim, he said a suspect….He had difficulties formulating a cohesive narrative which impacted on his ability to effectively communicate novel information.

Detailed recommendations were made to help those communicating with FG do so in a way that would enable their meaningful participation.[117] Avoidance of jargon, metaphors, abstract vocabulary and legal terminology was necessary.[118] It was also found that drawing events being described and the use of resources such as Post It notes would help FG.[119] This is all information which a judge otherwise would not have known.

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111 Benchmark *Communication Assistance* (online ed, Benchmark) at [2.1].
112 At [11.1].
113 At [10.4].
114 At [4.6].
115 *New Zealand Police v FG,* above n 57, at [75].
116 At [75a].
117 At [77].
118 At [77].
119 At [77].

It has been argued that the majority of children will be able to participate effectively in court without a Communication Assistant, provided that the judge and others in court change their approach to accommodate for the child's communication difficulties.[120] However, there will still be some children who require a communication assistant to be with them in court during the proceedings.[121]

For the children who are appearing in court, one way Lundy's element of voice could be fulfilled is if children are given a range of ways to express their opinion.[122] One technique which Communication Assistants use is showing the child the various elements of the actus reus and mens rea through cartoon diagrams so that the child knows what they are admitting to.[123] A Communication Assistant was also used during the trial in *Police v FG.* Below are some of the innovative measures the communication assistant used to ensure that FG could participate in the trial:[124]

> Both Ms Winterstein and Ms Kedge monitored [FG]'s concentration levels and suggested a break when that was needed. Ms Kedge also enabled [FG] to follow the evidence being given by witnesses, and what was happening in the hearing, by use of a computer on her desk from which she could send to a screen set up in front of [FG], words and images that converted the language into an intelligible format for him.

In theory, Communication Assistants seem as though they fulfil Lundy's voice element well. However, we must always consider whatever evidence is available as to how things are working in practice. There are a lot of issues surrounding the use of Communication Assistants. Firstly, Communication Assistants are not available to every child who appears in the Youth Court.[125] This means that some children's cases might be more procedurally fair than others. There is also not a streamlined process to determine who should have a Communication Assistant available to them and who should not.[126] This means that two children could have

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120 *New Zealand Police v FG,* above n 57, at [9]
121 At [9]
122 Laura Lundy, above n 31, at 935.
123 Dr Nessa Lynch, above n 9, at 203.
124 *New Zealand Police v FG,* above n 57, at [84].
125 Kelly Howard, Clare McCann and Margaret Dudley "I was flying blind a wee bit': Professionals' perspectives on challenges facing communication assistance in the New Zealand youth justice system" (2020) 24 Evidence and Proof 104 at 109.
126 At 109.

the same communication difficulty, whilst one would have access to a Communication Assistant and the other would not. There are also significant disparities around courts in New Zealand in the use of Communication Assistants.[127] Is the fact that some people can get this assistance whilst others cannot worsening an injustice?

It is also important to note that Communication Assistants do not entirely solve this voice issue. In some cases, even with the benefit of a Communication Assistant, a child might still not understand what is going on. The following case shows this: [128]

> Even with the benefit of education on various aspects regarding his case in the course of the health assessors assessment, and ongoing assistance from a communication assistant, HJ has struggled to follow what has been happening and what is to come.

Communication Assistants are a relatively new, but growing profession. They provide a real opportunity for the child to be able to participate effectively in proceedings, and the way they facilitate the child's understanding is a key aspect of Lundy's voice element. However, the issues with Communication Assistants indicate that the court should be wary of relying on them solely to uphold their obligations under art 12.

3 Lay Advocates

An important aspect of voice is facilitating the expression of children's views.[129] One way children can be supported to do this in the Youth Court is through a Lay Advocate. As per s 326, a Lay Advocate is "to be so far as practicable, a person who has, because of personality, cultural background, knowledge, and experience, sufficient standing in the culture of the child in respect of whom the appointment is made to enable that person to carry out his or her duties under the Act."[130]

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127 Kelly Howard, Clare McCann and Margaret Dudley, above n 125, at 111.
128 *R v HJ,* above n 103*,* at [16].
129 Laura Lundy, above n 31, at 933.
130 Oranga Tamariki Act 1989.

A key part of the Lay Advocates role is to provide the court with cultural information that is relevant to proceedings.[131] The scope of this information can be as wide or as narrow as the particular circumstances of the child requires.[132] For example, a child from a migrant community will have different and specific cultural circumstances and needs that will be relevant to decision making.[133] Providing the court with this information puts the child's views into the context of their background.

The Judge in *Police v KO* stated that the role of a Lay Advocate is an important one in the Youth Court.[134] To date, the Lay Advocate role has been significantly under-utilised.[135] It was not until the introduction of Rangatahi Courts in 2008 that Lay Advocates were used in a much more meaningful and systematic way.[136]

Like space, Lundy's voice element is also upheld well in the Youth Court. The Youth Court takes a multifaceted approach when it comes to involving professionals in the process which can help facilitate understanding and expression of the child's views. I will now apply Lundy's audience element to the Youth Court.

C Audience

1 Training and Qualifications of a Judge

The judge is central to the child's experience of the Youth Court.[137] According to many children and professionals, children's main involvement in the court appearance is interacting with the judge and responding to their questions.[138] Children are generally aware of who the judge is and that the judge makes the final decisions.[139]

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131 Andrew Becroft, Former Principal Youth Court Judge "The Rise and Lay of Lay Advocates in Aotearoa New Zealand" (National Youth Advocates/Lay Advocates Conference, 13-14 July 2015) at 1.
132 At 3.
133 At 3.
134 *Adams on Criminal Law – Criminal Procedure* (online ed, Thomson Reuters Westlaw) at [326.01] [2014] NZYC 845.
135 Andrew Becroft, above n 131, at 3.
136 At 3.
137 Research Team Justice Sector Strategy, above n 84, at 12.
138 At 40.
139 At 40.

A Youth Court judge is a District Court Judge with a Youth Court warrant.[140] If a judge gets a Youth Court warrant it means they are recognised as an appropriate judge to sit in that jurisdiction.[141] They might get a Youth Court warrant at the same time as their appointment to the District Court. For example, if they have been a Youth Advocate during their time as a lawyer. Alternatively, a judge could get a Youth Court warrant further throughout their judicial career.[142]

A Youth Court judge will not sit in the Youth Court full time, as the caseload is not high enough for that to happen.[143] Instead, they will sit in the Youth Court perhaps one day a week, and the rest of the week will be spent in the District Court or in other courts they might have a warrant in, such as the Family Court.[144] Once a judge gets a Youth Court warrant, they undertake specialised Youth Court training as part of their professional development requirements.[145] Youth Court judges will also attend biannual Youth Court Updates, which educate judges on current issues and themes that are prevalent in the Youth Court at that time.[146] Therefore whilst judges are not "child experts" they are carefully selected to be a Youth Court judge based on their capabilities to judge in the Youth Court environment.

Lundy's audience element could be fulfilled better if there were more opportunities for Youth Court judges to engage in training specific to the Youth Court jurisdiction. There is no specialised training into becoming a judge.[147] This is because New Zealand has a recognition judiciary, as opposed to the career judiciary model in continental European jurisdictions for example.[148] Youth Court judges have a considerable demand for them to be "child experts." For example, an aspect of Lundy's audience element is that the audience member can be an effective looker as well as an effective listener. This requires the judges to be familiar with how a child communicates through body language which people spend years training in. Without the training that other professionals in this area such as Communication Assistants

140 Courts of New Zealand "The Judges of the District Court" <www.courtsofnz.govt.nz>
141 Above n 140.
142 Oranga Tamariki Act, s 435(1).
143 Dr Nessa Lynch, above n 9, at 195.
144 At 195.
145 Courts of New Zealand "Judicial Committees" (2020) < www.courtsofnz.govt.nz>
146 "Institute of Judicial Studies Prospectus 2020" (August 2019) Institute of Judicial Studies <www.ijs.govt.nz>
147 Jessica Kerr "Turning Lawyers into Judges is a Public Responsibility" (26 August 2020) Australian Public Law <www.auspublaw.org>
148 Nicholas L. Georgakopoulos "Discretion in the Career and Recognition Judiciary" (2000) 7 The University of Chicago Law School Roundtable 205 at 205.

have, it seems unrealistic to expect judges to be child experts. However, the below aspects illustrate that judges can still fulfil the audience element of Lundy's model without formal training.

2 Informal Nature of the Youth Court

The Youth Court is more informal than the District Court. Judges aim to communicate directly with the child rather than through the legal representative which is what happens in the District Court.[149] By doing this, the judge is establishing a relationship with the child which is vital to gain their trust and to be honest with the judge about when they do and do not understand. This direct communication with the child is one factor that might fulfil Lundy's audience element, as this informal communication is likely to make the child feel more at ease, and like the proceedings involves them.

Children have said that they generally prefer the judge referring to them directly, but that this relationship between the judge and the child is crucial.[150] Children have reported that judges generally encourage them to participate in court.[151] One way judges do this is by asking children to introduce their family and ask questions about progress with their FGC plan, particularly when there are issues with compliance with the plan.[152] Asking children to introduce their family is thought to make children feel more comfortable in the court and more involved in the process.[153]

The judge altering their persona in the Youth Court to be more informal with the child is a strong indicator of the fulfilment of Lundy's audience element. This is also something they can do without specific training, as people are likely to talk to children differently than they do adults on an everyday basis.

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149 Dr Nessa Lynch, above n 9, at 200.
150 Research Team Justice Sector Strategy, above n 84, at 37.
151 At 12.
152 At 12.
153 At 41.

3 Child Friendly Judgments

The term "Child-Friendly Judgments" relates to recent literature which has shown that the best way to involve children in judicial proceedings is for the judgment to be written in child-friendly language.[154] Studies have asked children why this is important to them, and their answers have included: it takes children and their situation seriously and it frames hearings as conversations between two persons of equal value.[155] In terms of oral judgments in particular, children appreciated when judges would adjust their approach and language to the children's age, rather than treating them like adults, when the judge spoke enough that children can hear them properly, and when the judge listened carefully.[156]

One way of presenting a child-friendly judgment is to separate the judgment into legal language and child-friendly language. An example of this is below:[157]

> In legal language, I make these findings: When the proceedings began, the children had suffered and were at risk of suffering significant physical, emotional, educational and developmental harm caused by a combination of…

Applying this technique means the legal requirements can still be ticked off, but the child can "tune in" to the judgment when less technical terms are being used.

There is evidence of some excellent practice in New Zealand in employing child-friendly language in written judgments. For example, the below extract from Judge Eivers in *Police v FW* shows the judge both addressing the child directly and clarifying what certain words mean:[158]

> What is important now, [FW], is that you are supported by your whānau and that you are supported by Oranga Tamariki, because Oranga Tamariki is in charge of your overall care, together with your mum and dad and your whānau, and so that is what we

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154 Helen Stalford, Kathryn Hollingsworth "This case is about you and your future: towards judgments for children" (2020) 83 MLR 1030 at 1031.

155 Michael O'Flaherty *Child – Friendly Justice: Perspectives and Experiences of Children Involved in Judicial Proceedings as Victims, Witnesses or Parties in Nine EU Member States* (FRA European Union Agency for Fundamental Rights, 2017) at 24.

156 At 24.

157 *Lancashire County Council v M and others* [2016] EWFC 9 at [28].

158 *Police v [FW]* [2018] NZYC 393 at [12].

> talk about when we say words like "interventions" and "custody", where all we are meaning is that the Chief Executive or the boss of Oranga Tamariki is the person that is ultimately responsible for your care.

Judge Eivers is not only addressing the child directly but is explaining what she means by certain words. For example, a child is unlikely to know who a Chief Executive is, and is likely to be much more familiar with the word "boss." Explaining what legal terms mean can have significant implications for the child. Principal Youth Court Judge John Walker gave the illustration that if a child does not understand what curfew means then they are unlikely to be able to abide by their curfew instructions.[159] Similarly, if they cannot read their bail form they will probably breach their bail conditions.[160]

Another example of a good child-friendly judgment from a Youth Court judge is *Police/Oranga Tamariki v LV*. Judge Fitzgerald does not refer to LV directly, but he does employ multiple techniques consistent with child - friendly judgments.[161] For example, he tells the child at the beginning of the judgment his final decision, which was a s 282 discharge.[162] Telling the child at the beginning of the judgment the outcome is likely to be a child - friendly technique as the child is much more likely to be at ease and listening to the rest of the judgment. Judge Otene also does this in *Police v QF*.[163]

Judge Malosi in *Police v GK* engages in several child-friendly judgment techniques. Significantly, she explains what her role is as a judge and what the law is that she is applying:[164]

> The other thing that Judges look at are cases which are kind of the same, that have already been decided by a Court. Ms Norrie has given me some to look at which go both ways. Some young people were convicted and transferred to the District Court for sentencing, while others were allowed to stay in the Youth Court and were sentenced here.

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159 Interview with John Walker, Principal Youth Court Judge (Kathryn Ryan, Radio New Zealand, 21 September 2020).
160 Above n 159.
161 *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117.
162 Oranga Tamariki Act 1989.
163 *Police v QF* [2019] NZYC 675.
164 *Police v GK* [2016] NZYC 369 at [11].

It is very unlikely children would understand what it means to analogise and distinguish case law. Here Judge Malosi is explaining the process of judges looking at different decisions in a way the child will understand.[165] This is important because as the key audience of the child's views, the judge needs to relay the reasoning for their decision.

Some fantastic child-friendly judgments are being written by Youth Court judges, and as the literature continues to grow I would expect this technique to be employed more. However, it would be incorrect to say that all Youth Court judges are doing this. For example, out of the 20 most recent Youth Court decisions, I would only consider four to be child-friendly judgments in the sense that they comply with one or more of Kathryn Hollingsworth's standards. These standards include addressing the child directly, using plain simple language or explaining legal terms.[166] A select few judges employing these techniques is not enough to fulfil Lundy's audience element by itself.

D Influence

1 Sentencing Remarks

The challenge in fulfilling this element of influence is to find ways of ensuring that judges not only listen to children but that they take children's views seriously.[167] While this cannot be guaranteed, one safeguard is to ensure that children are told how their views were taken into account.[168] Further, children should have explained what decision was made.[169] This section will analyse Youth Court judgments to determine how much weight is being given to the child's views and whether explanations are given for not incorporating the child's views.

In *Police v LV*, the Judge demonstrated how the child's views can be integrated into a written judgment, rather than substituting them for their thoughts:[170]

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165 *Police v GK,* above n 164, at [11].
166 Helen Stalford, Kathryn Hollingsworth, above n 154, at 1043.
167 Danielle Kennan, Bernadine Brady & Cormac Forkan "Space, Voice, Audience and Influence" (2017) Social Work in Action 205 at 214.
168 Laura Lundy, above n 31, at 938.
169 At 939.
170 *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117 at [25e].

> [L] has a lot to be angry about and her anger appears directed at her traumatising life experiences, invalidating, disempowering and possibly dehumanising with an absence of purpose and identity. She summed it up in her own words when she said she had been "passed around so much" and "I have been hurt all my life".

It is clear from this judgment that L's views were a large part of Judge Fitzgerald's decision to grant a s 282 discharge. He consistently refers back to her views as a means of deciding that she should not have a formal record of her offending.[171] There were other considerations that the judge took into account and that is normal – the judge would never solely base their decision on what the child wants or thinks, just like with anyone in court.[172] However, the child's views are important and should be a basis for the judge's decision.

Some cases also evidence that while the child may not have expressed their views directly to the judge, the judge can show the influence they are giving to a child's views which might have been expressed to someone else, such as a social worker or a lawyer. A good illustration of directly speaking to the child, whilst referencing views the child expressed to another person is *NZ Police v QF*:[173]

> QF the social worker tells me that you express strong feelings of regret for carrying out the robbery, that you know it is wrong. That is suggested to me by the letters that I have read but also you have taken responsibility because you have not denied these charges.

QF's remorse and want to change is a consideration that went into the mix when Judge Otene decided to give QF a supervision with residence order rather than transferring him to the District Court to be sentenced.[174] Similarly, *Police v XR* shows the Judge recognising the child's willingness to attend the Odyssey House programme:[175]

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171 *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117 at [9].
172 Interview with Deborah Inder (Kathryn Ryan, Radio New Zealand, 21 September 2020).
173 *New Zealand Police v QF,* above n 165, at [19].
174 At [25].
175 *New Zealand Police v XR* [2020] NZYC 67 at [15].

> For those reasons, I refused to approve the YJ FGC plan but did strongly encourage XR to go and have a look at the Odyssey House Residential Programme which she is interested in doing.

Involving the child in the decision-making process is a way to ensure that their views are incorporated into the process, and the child is less likely to feel as though the decision was made for them, not with them.[176]

Further, when deciding whether to grant a s 282 or s 283 discharge, one consideration the judge must have is to the attitude of the child.[177] This is a key avenue for the child's views to be given influence. For example, in *Police v LS* a the child received a s 282 discharge. The judge acknowledged the child's understanding of how serious their offending was, and how that must contribute to a s 282 discharge.[178]

Whilst not all Youth Court judges are giving the child's views influence in their written judgments, there is a strong indication that Youth Court judges are beginning to align their decision with what they have heard from the child which is an indication of Lundy's influence element.

VI How Lundy's Model could be Strengthened in the Youth Court

A Out of Court Time

In a 2018 study "Youth Voices about Youth Justice" children involved stated that rapport and trust with the person they are working with in the justice system is vital.[179] Interestingly, the children referred to "rapport shortcuts." This means that if an adult took them out for food, or spent time going for a drive with them, or doing a physical activity, it made it easier to nurture a positive relationship.[180] Therefore, perhaps to fulfil Lundy's model better there needs to be greater relationship building between the judge and the child. The interaction between the judge and the child will be much more limited than for example their relationship with a counsellor.

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176 Laura Lundy, above n 31, at 938.
177 Oranga Tamariki Act 1989.
178 *Police v LS* [2015] NZYC 600 at [1], [18]
179 Nadine Metzger, Koleta Savaii, Alayne McKee and Sally Kedge *Youth Voices about Youth Justice* (Talking Trouble, Report, 14th August 2018) at 4.
180 At 20.

This is because the relationship can only be established within the court. However, perhaps the judge should meet with the child before the hearing to better fulfil Lundy's model. The concept of a judicial interview, where the judge does meet with the child separately will be discussed in the Family Court section.

B Involvement of Professionals

It is clear from my analysis that judges cannot uphold Lundy's model in the Youth Court without the help of other professionals as well. This is because talking and communicating with children and understanding them does require special skill. However, I pointed out the issues with inconsistencies in the use of Communication Assistants for example. Judges need to be encouraged to make the most of the available professionals, and recognise that a multifaceted approach is required.

The judge as an officer of the court should ensure procedural fairness is upheld in all proceedings.[181] However, is the judge obligated to take on recoomendations such as the above to fulfil procedural fairness? Some would argue that the procedure is still fair without it. However, Principal Youth Court Judge John Walker states that when the challenges that children face in court proceedings are not properly accommodated, then the process is procedurally unfair.[182] He argues that if a proceeding is procedurally unfair then it is unlikely to work as an effective intervention.[183] Therefore, even if judges do not feel a personal obligation to fulfil art 12, perhaps they still need to endeavour to fulfil Lundy's model more as a means of upholding procedural fairness.

VII Youth Court Conclusion

New Zealand's Youth Court has received international recognition for its welfarist approach, and innovative measures to ensure the process is centred around the child.[184] I also

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[181] Jean Landis and Lynn Goodstein "When is Justice Fair? An Integrated Approach to the Outcome versus Procedure Debate (1986) 11 ABRF 675 at 675.

[182] John Walker *Am I part of this? Is this really anything to do with me? Fostering engagement and procedural fairness in the youth justice system* (Ministry of Justice, Paper Delivered for Children's Court of Victoria Conference, October 2018) at 5.

[183] At 5.

[184] J Wundersitz "Juvenile Justice in Australia: Towards the New Millennium" in D Chappell and J Wilson (eds) Crime and the Criminal Justice System in Australia: 2000 and Beyond (Butterworths, Sydney, 2000) at 110.

acknowledge that innovation, and would conclude that the New Zealand Youth Court is fulfilling Lundy's model of participation. Lundy's elements of space, voice, audience, and influence are provided for in several different ways in the Youth Court. Although, some areas are providing better fulfilment of Lundy's elements than others. For example, Lundy's voice element is quite strongly upheld by Communication Assistants, Youth Advocates and Lay Advocates. However, expressing children's views in child - friendly judgments and sentencing decisions under the elements of audience and influence is an area that is still developing. Whilst the New Zealand Youth Court is currently doing well under Lundy's model, it can and should continue to do more to fulfil their obligations under art 12.

I will now look at guardianship disputes in the Family Court to analyse whether there is a difference in the application of art 12.

VIII Family Court

Children are at the heart of a lot of the decisions in the Family Court.[185] As mentioned at the beginning of this paper, the reason for applying Lundy's model of participation to the Family Court as well as the Youth Court is that the Family Court is the other main court which a child will be involved in. It is also an interesting point of comparison because the characteristics of children involved in the Family Court can be significantly different from the children in the Youth Court. I will expand on this more below.

This paper will focus specifically on children subject to guardianship disputes under s 6(1)(a) of COCA. A characteristic of many of the children in the Youth Justice system is a lack of a stable home environment, a violent upbringing and high prevalence of neurodisabilities, to name a few.[186] However, children could be involved in guardianship disputes if they have no involvement in the Youth Justice system as guardianship disputes can arise in any family. That is not to say that there is not a crossover between children who appear in the Youth Court and children who appear in the Family Court.[187] There is such an overlap in fact, that a "crossover"

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[185] Mark Henaghan "Art 12 of the UN Convention on the Rights of Children: Where are we Now and Where to From here?" (2017) 25 BRILL 538.

[186] Judge John Walker, Principal Youth Court Judge "Running Interference" (Blue Light International Conference, Queenstown, New Zealand, 18 October 2019).

[187] Susan Baidawi and Rosemary Sheehan 'Crossover kids': Offending by child protection-involved youth (2019) 13 Australian Institute of Criminology 1 at 1.

list has been developed specifically for these children.[188] However, for this paper, I will be discussing children who appear in the different courts.

The situation regarding the right to participation in Family Court guardianship decisions is quite different from that in the Youth Court. There is much less of a focus on the child's right to have a view and participate in decisions. This has been an area of contention particularly since some 2014 legislative amendments which moved a lot of these guardianship decisions into out of court processes.[189] This part of the paper will analyse the application of Lundy's model in Family Court guardianship disputes and explain why reform of COCA is necessary, which is currently underway in the Family Court (Supporting Children in Court) Legislation Bill.

A Care of Children Act 2004

The purpose of the COCA is to promote children's welfare and best interests, facilitate their development, and recognise certain rights of children.[190] Section 6(2) states that a child must be given reasonable opportunities to express views on matters affecting the child, and any views the child expresses (either directly or through a representative) must be taken into account.[191] This section applies to guardianship disputes, administration of property and the application of income property.[192]

Section 6(2) was drafted in light of art 12 of the CRC.[193] There is, however, no obligation to give weight to a child's views under this Act.[194] This was confirmed in *C v S* where Randerson J said, "the obligation to take any such views into account is mandatory but the section is silent as to the weight to be given to the views expressed."[195] This is arguably inconsistent with art 12 of the CRC which requires that the views of the child "be given due weight per the age and maturity of the child."

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188 See for example *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117. In this case, L was on the crossover list.
189 Secretariat to the Independent Panel *Background Paper: Overview of the 2014 Family Justice Reforms* (Ministry of Justice, Background Paper, 2019) at [28].
190 Care of Children Act 2004, s 3.
191 Care of Children Act 2004.
192 Above n 191.
193 *Child Law – Child's Views* (Online Ed, Thompson Reuters) at [CC6.02].
194 *C v S* [2006] 3 NZLR 420 at [31(h)].
195 At [31(h)].

Participation of children in the Family Court is important because the published literature has evidenced that the majority of children want to take part in decision-making when their parents separate.[196] In an Australian study, children were interviewed concerning their views of participation in family law decision-making.[197] All children thought opportunities to participate in decision making should be provided to them following parental separation.[198] The finding of majority support for participation by children is replicated in multiple studies from several jurisdictions.[199] It is also widely acknowledged that because parental separation is a period of complicated communication and distress, children's thoughts and feelings are sometimes lost within the emotion.[200] Therefore, it is even more important that adults actively seek children's views in the decision-making process.

On the other hand, a research study in Switzerland established that specific aspects of participation in legal proceedings can cause distress to children.[201] Those aspects are: "testifying, repeatedly being interviewed, the adversarial nature of legal proceedings, lack of understanding of court processes, delays and experiencing unfavourable outcomes."[202] Whilst this should always be kept in mind when considering greater child participation, children rarely physically attend in person in Family Court proceedings in New Zealand which is likely to counter most of the above causes for distress.

It is evident from the case law that COCA made clear that the views of children were more influential than earlier legislation. For example, the views of children aged 4 and 6 years old who had long expressed a wish to spend more time with their father were factored into the Court's decision in *F v H*.[203]

1 Amendments to the Care of Children Act

196 Deborah Inder, above n 18, at 185.
197 Anne Graham and Robyn Fitzgerald "Exploring the Promises and Possibilities for Children's Participation in Family Relationship Centres" (2010) 84 Family Matters 53 at 54.
198 At 55.
199 Deborah Inder, above n 18, at 185.
200 Family Works Resolution Service "Child Consultation" (2020) <www.resolution.org.nz>
201 Helen M Milojevich, Jodi A Quas and Jason Z Yano "Children's participation in legal proceedings: Stress, coping and consequences" (2016) 1 Advances in Psychology and Law at 1.
202 At 207.
203 *F v H* FC Feilding FAM-2005-015-000041, 5 April 2007 at [19].

COCA was amended in 2014 and has since been criticised as drawing back from full recognition of the child's right to participate in decision-making.[204] These amendments moved Family Court disputes into an out of court system whereby mediation of private law disputes is mandatory before issuing legal proceedings.[205] These amendments were said to be a cost-cutting exercise.[206]

These drawbacks came in the Family Court Amendment Rules 2014. Specific amendments included the move from a mandatory appointment of a lawyer for child in s 7, to such appointments being permitted only if the court has concerns for the safety or well-being of the child, and if it considers the appointment of a lawyer for the child is necessary.[207] Further, under the new law, there is no requirement that mediators give children opportunities to express their views as part of the mediation process.[208] As one lawyer put it, "children in New Zealand have experienced world leading participation opportunities at times, but there has also been a weakening of those opportunities at times due to fiscal constraints."[209] Even before applying Lundy's model, from a purely legislative basis, it appears as though the Family Court is drawing back from full recognition of art 12. Whereas the Youth Court's legislative framework is very strongly focussed on the child's right to participation and giving them a platform to meaningfully participate.

IX Application of Lundy's Model to the New Zealand Family Court

A Space

1 Out of Court Spaces

Family Dispute Resolution (FDR) processes, which are now compulsory before a guardianship dispute can go to court, do not occur within the court.[210] Instead, they occur at the offices of a

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204 Mark Henaghan Article 12 of the UN Convention on the Rights of Children (2017) 25 International Journal of Children's Rights 537 at 546.
205 Secretariat to the Independent Panel, above n 189, at [37].
206 At [26].
207 Care of Children Act 2004.
208 *Child Law - Child's Views,* above n 193, at [CC6.05].
209 Deborah Inder, above n 18, at 12.
210 Community Law "Family Dispute Resolution: Mediation through the Family Court" (2020) <www.communitylaw.org.nz>

Family Dispute Resolution Provider or at another neutral setting.[211] FDR providers in New Zealand include the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), the Resolution Institute (formerly LEADR) and the New Zealand Law Society (NZLS), and FairWay Resolution Limited.[212] As mentioned in the Youth Court section, there can be a lot of intimidating aspects of a courtroom. Therefore, there might be an advantage in terms of providing a safe space for children if they can have their voices heard outside of a court environment. Often those involved in the mediation process with the task of ascertaining the child's views, such as the Lawyer for Child, will choose to meet with the child somewhere neutral.[213] One case study from FairWay Resolution Limited spoke about a lawyer meeting a fifteen year old girl at her school.[214] The girl shared what was good and bad about her current arrangements.[215] Because she felt comfortable she was able to come prepared with notes about her life and relationship with her mother and father.[216] She had ideas about what could change with her living arrangements, what would be helpful and what was important to her.[217]

However, whilst it is positive that the child can give their views in a neutral setting in FDR such as their school, this ability to give their views at all is not guaranteed. Only if a Lawyer for Child is appointed, or if a Child Consultation Practice is used will the child's thoughts and feelings be brought into the process.[218] It is evident that using a Child Consultation Practice is rare and done on an ad hoc basis.[219] It also only occurs when both parties request it[220] and the parties undertaking Family Mediation must first give written informed consent for the referral.[221] This is not in line with Lundy's element of space, as under this element all children should be provided with a safe space to voice their opinions, not just some. I argue that out of court processes are not providing a safe space for children to give their views particularly well. This is mainly because whilst the FDR facility might provide a safe and neutral space for children, this is not guaranteed for all children because only in limited circumstances is a

211 Community Law, above n 210.
212 Ministry of Justice "Family Mediation and Parenting Course Providers" (11 September 2020) <www.justice.govt.nz>
213 Fairway Resolution "Case Studies" (2020) < https://www.fairwayresolution.com>
214 Above n 213.
215 Above n 213.
216 Above n 213.
217 Above n 213.
218 Above n 213.
219 Ministry of Justice *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice, May 2019) at 34.
220 Family Works Resolution Service "Child Consultation" (2020) <www.resolution.org.nz>
221 Above n 220.

lawyer for child or child inclusive practice involved. Whilst children might not want to be physically present at these FDR processes, a requirement of Lundy's is that they at least are given the option of being there.[222] This can be contrasted with children in the Youth Court having the option of going through the Rangatahi or Pasifika courts. Whilst not every child will be monitored in those courts, the option is much more widely available.

2 Privacy of Proceedings

Like the Youth Court proceedings, Family Court proceedings are not open to the public.[223] There is a stronger argument in favour of Family Court proceedings remaining private as there is less of a public interest in finding out the outcome of these proceedings. Where a child has offended, there is a public interest in seeing justice be served, like there is with all criminal proceedings.[224] However, guardianship disputes are inherently personal family issues. There is arguably no real need for public involvement in them.

B Voice

1 Child Inclusive FDR Practices

As mentioned above, parents must now attend FDR before having access to the Family Court.[225] There is no requirement to ascertain or consider children's views and no independent mechanism for children's views to be presented during FDR.[226] A review of FDR carried out by the Ministry of Justice found that the failure to consider children's views in the process was a major defect.[227] However, since 2015, one of the FDR providers (FDR Centre) has been offering child inclusive FDR Mediation.[228] This is where children have the opportunity to share their views with a Child Inclusion Specialist, who attends the mediation in the children's

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222 Laura Lundy, above n 31, at 934.
223 Ministry of Justice "About Family Court" (4 September 2020) <www.justice.govt.nz>
224 Craig Barretto, Sarah Miers and Ian Lambie "The Views of the Public on Youth Offenders and the New Zealand Criminal Justice System" (2018) 62 International Journal of Offender Therapy and Comparative Criminology 129 at 129.
225 Community Law "Family Dispute Resolution: Mediation through the Family Court" (2020) <www.communitylaw.org.nz>
226 Mark Henaghan, above n 185, at 268.
227 Ministry of Justice, above n 219, at 24.
228 Catherine Green "Giving Children a Voice in FDR Mediation" (2 April 2019) Family Dispute Resolution Centre <www.fdrc.co.nz>

shoes.[229] This process was developed to allow children to talk about what is happening in their family and to hear their perspectives.[230]

However, a recent review of the 2014 Family Court reforms found that child inclusive practices in Family Dispute Resolution are variable and there are different views on the extent to which children should be involved.[231] This evidences that child inclusive FDR is inconsistent with Lundy's voice element because all children are not being provided with an appropriate means to express their views. There is a lot of overlap between this element of voice, and the space element discussed above as both centre around the child inclusive practice in mediation.

2 Lawyer for Child

As alluded to earlier, s 7 of COCA regarding the right of the child to a lawyer also sits uneasily with Lundy's voice element. Formerly, under s 7 of COCA a lawyer for the child had to be appointed in all cases 'likely to proceed to a hearing' unless the court was 'satisfied the appointment would serve no useful purpose.'[232] However, since 31 March 2014, a lawyer for the child will only be appointed under s 7 of the Act where the court 'has concerns for the safety or well-being of the child' and where they consider 'an appointment necessary'.[233] This is an indication from Parliament that lawyers for children are no longer to be appointed automatically. This is problematic given that through a lawyer is one of the key ways a child's voice is often heard.[234]

In court, the lawyer for child represents both the child's views and best interests. However, even in the rare occasions that a lawyer is appointed, it has been found that there is a lot of variation in how the Lawyer for Child approach this task.[235] The Independent Panel heard that many children would like to participate more than they are currently able to.[236] They would

[229] Family Dispute Resolution Centre "Voice of the Child" (2018) <www.fdrc.co.nz/>
[230] Above n 229.
[231] Ministry of Justice, above n 219, at 24.
[232] Care of Children Act 2004 (as at 25 September 2013).
[233] Care of Children Act, s 7.
[234] *Child Law – Child's Views,* above n 193*,* at [CCC6.11].
[235] Ministry of Justice, above n 219, at 24.
[236] At 24.

also like some means of being sure that their voices have been heard and taken into account, whether or not the decision is consistent with what they wanted.[237]

The 2014 reforms were intended to be more responsive to the needs and interests of children caught up in disputes over their care or contact.[238] However, there were no specific proposals about children's participation in decision making. The reforms seem to have had the opposite effect, by limiting how children can have a voice in these proceedings, particularly taking away the automatic right to a lawyer for child – which is inconsistent with Lundy's voice element.

C Audience

1 Judicial Interview

The key audience in guardianship disputes in the Family Court is also the judge. Whilst the parents are also an important audience, this paper will focus on the role of the judge as they are the final decision maker in these proceedings. Further, there are issues with parental influence on a child's views which can make them a biased audience member for the purposes of Lundy's model.

Children rarely attend Family Court hearings.[239] A judge may permit a child to attend a particular part of a court hearing, but it would be very unusual for a child to be allowed to go to the whole hearing, as this has been determined to not be in their best interests.[240] This is in comparison to the Youth Court where the child's physical presence at court is encouraged.[241]

Instead, one of the ways the judge may be a good audience of a child's views under s 6 of COCA is by judicially interviewing the child.[242] The benefits of judicially interviewing the child are that the judge gets to know personally the child whose future they are deciding.[243] One of the earliest New Zealand cases recording details of a judicial interview of a child was

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237 Ministry of Justice, above n 219, at 24.
238 At 14.
239 Community Law "About the Family Court" (2020) <www.communitylaw.org.nz/>
240 Above n 239.
241 Research Team Justice Sector Strategy, above n 84, at 31.
242 John Caldwell "Judicial Interviews of Children: Some Legal Background" (2007) 5 NZFLJ 215 at 218.
243 At 219.

Re Gilberd (An Infant) (1913).[244] Judge Chapman, refusing custody of a 12-year-old girl to her father, stated: [245]

> I questioned the girl in private and can quite understand her statement that until recently she neither remembered nor knew any other home than her uncle's house.

Since the passing of COCA, Family Court judges are now more likely to speak to children privately.[246] Family Court judges in New Zealand feel more confident about speaking to children, particularly when it is part of a team approach and not the sole source of the child's views.[247] This is consistent with the multifaceted approach to ascertaining the child's views in the Youth Court. The question becomes, is a judicial interview an appropriate way for children to get their views across to the judge? There are some risks in children talking to the judge first hand. These include: judges may not have the required capability to interview children, talking to the child in private damages the perception of procedural fairness, and it is difficult for the judge to know when the child is being coached.[248]

Psychologists have commented that children often go into these interviews with "rehearsed answers" after being coached by their parents in what to say.[249] It has been suggested that the indirect method used by a psychologist is better than a direct judicial interview because they are trained in looking out for coached answers.[250] Nonetheless, judges in the Family Court are attempting to hear children directly through judicial interviews and these interviews are consistent with Lundy's element of audience. Whilst there are issues with judicial interviews, children have stated that they like to form a relationship with the person they are speaking with, and speaking with the judge one on one may help them do this. As long as the interview is not the sole source of the child's views, I believe that judicial interviews are an important way of fulfilling Lundy's audience element.

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244 *Re Gilberd (An Infant)* (1913) 15 GLR 631 at 633.
245 At 633.
246 Ian Mill "Conversations with children: a judges perspective on meeting the patient before operating on the family" (2008) 6 NZFLJ 72 at 72.
247 At 72.
248 At 73.
249 Mark Henaghan *Principles Under the Care of Children Act 2004* (Online ed, Lexis Nexis) at [6.105B.01(a)]
250 At [6.105B.01(b)]

2 Child Friendly Judgments

Under the Youth Court section, I discussed the concept of "Child-Friendly Judgments." Family Court judges in other jurisdictions such as England and Wales are also starting to employ this technique.[251] Professor Kathryn Hollingsworth and Professor Helen Staford argue that judges have a duty, through the art of judgment writing, to acknowledge and engage children.[252] One example of a Family Court decision expressed in a child-friendly judgment, which is discussed quite often in this literature is "Re: A Letter to a Young Person." The judgment began as follows: [253]

> Dear Sam, This case is about you and your future, so I am writing this letter as a way of giving my decision to you and your parents.

This case has become well known for being an exemplary way those in the legal system should communicate with children.[254] This is because it engages the child, and centres the judgment around them and their understanding. After all, the child should be the main concern in these proceedings.

Child-Friendly judgments in the Family Court would be very valuable because the decisions made about the child's guardianship will have a huge impact on their lives. They have the right to understand the decision that was made and how it was made. Further, the judgment can be a means of the child finding out the outcome from an unbiased person. If the child only hears of the judgment and reasons through the parents, there could be an element of bias and "storytelling."

However, New Zealand Family Court judges do not appear to be engaging in Child-Friendly Judgment writing as much as the Youth Court judges are. However, this is not necessarily a criticism of the Family Court. Written judgments are very close to a re-write of oral judgments, and oral judgments in the Family Court are usually given when the child is not there.[255] So in that sense, the judgments in the Family Court are less aimed at the children and that would be

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[251] Helen Stalford, Kathryn Hollingsworth, above n 154, at 1030.
[252] At 1032.
[253] *Re A: Letter to a Young Person* [2017] EWFC 48 at [1].
[254] Above n 154, at 1031.
[255] Community Law "About the Family Court" (2020) <www.communitylaw.org.nz/>

a good reason why we do not see child-friendly judgments in the New Zealand Family Court yet.

D Influence

1 Written Judgments

Like in Youth Court proceedings, the influence given to the child's views will depend on the consideration given to those views by the presiding judge. Therefore, similarly to the Youth Court section, this section will analyse Family Court written judgments to see how much weight is given to the child's views.

An analysis of Family Court judgments under s 6 of COCA from 2018 – 2020 shows that Family Court judges do acknowledge s 6 of COCA. This is usually noted in a standalone paragraph where the judge also explains how the child's views have been sought in any particular case. An example from *Reese v Reese* is below:[256]

> Section 6 of the Act requires the Court to have regard to the views that may be expressed by the children, to the extent that they may be prepared to give them.
>
> …
>
> The report from the s 133 report writer, Mr Garner, notes that the children do not have a strong attachment to their grandmother and it goes on to note that their primary attachment is, in fact, with their mother.

The Judge in this case made the final order that the child was to be in the day to day care of the mother.[257] Multiple factors went into the judge's decision, such as how putting the children in the mother's care would help her get a benefit which would help with housing.[258] However, the fact that the children's primary attachment was with their mother influenced the judge's decision.[259] Though this is positive that children's views are influencing the final decision of their guardianship dispute, an issue that became evident when analysing the Family Court

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256 *Reese v Reese* [2020] NZFC 1238 at [34].
257 At [73b].
258 At [72].
259 At [34].

judgments, is that judges still tend to be giving a lot of weight to the age of the child. This is not a requirement under the CRC. For example, see the below extract from *Reese v Reese*:[260]

> …, [Earl] is too young to express a view, but I expect his primary attachment would be with his mother. Whilst Mr Garner did not go so far as to say that, I believe he intended that when he referred to the fact that the attachment had been disrupted by the children being placed with their grandmother...

The problem here is that the judge did not even consider that a young child could have a view of their own. Lundy makes clear that the age and capability of the child go to the weight to be given to their views, not whether they should be able to have a view or not.[261]

A similar position was expressed in Brown v Bryne:[262]

> …with respect to Hudson, it was considered by Ms Bryne he was too young to have a clear view as to what his views were…

However, the judge in this case still endeavoured to get the child's views through the Oranga Tamariki social worker.[263] Also in *Reynolds v Reynolds,* the Judge doubted the reliability of a child's views who was under four. Nonetheless, the judge acknowledged that the child's view was evidenced by non-verbal communication:[264]

> This is a child who is not too young to express views but certainly any views expressed by a [child under four] are likely to be somewhat haphazard and of dubious worth. The child's lawyer suggested such, but what I do have is the evidence of a strong bond and relationship between Grandmother and child.

The judge also acknowledges the child's views which have been ascertained through other means in *Mazar v Holloway:*[265]

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260 *Reese v Reese,* above n 256, at [69].
261 Laura Lundy, above n 31, at 935.
262 *Brown v Bryne* [2019] NZFC 8312 at [39].
263 At [59].
264 *Reynolds v Reynolds* [2018] NZFC 7018 at [59].
265 *Mazar v Holloway* [2019] NZFC 9520 at [105].

> Given the extensive evidence of [Asher] being burdened by his parents' issues and keeping in mind that he is only just five years of age with no memory of life in [the EAC], he is not in a situation of being able to cognitively evaluate the relocation and care issues that the court has to decide. On the other hand, he is expressing a desire to see his father despite all of the current adult dynamics that work against this.

Here, the judge is not referring to anything explicit which the child has said, but rather the child's behaviour in general which would have been drawn from a range of different observations. Therefore, it seems that even though Family Court Judges are giving weight to the age of the child when determining whether they should have a view, they are still acknowledging that the child's view can be ascertained through other means. Further, many judges are giving explicit reference to the child's views, with their final decision being consistent with what the child said that they wanted. For example, in *Henderson v Henderson* the judge said:[266]

> … Harper, in an interview with me, said she could not choose between her parents care, however she wanted to live with [Anne] [Jane] and [Jessica]. The reality of her sister's care arrangements means to favour her sisters requires she live in the day to day care of her mother….

This case shows a judge recalling what was said in a judicial interview to them and using this as a grounds for their decision, clearly giving the child's voice due weight. However, there does appear to be an issue of Family Court judges dismissing the views of the child altogether. In *Mangan v Rossborough*, the judge had to decide what school the children were going to go to, which is considered a guardianship dispute.[267] The judge articulated the child's views very clearly. They were showing a strong preference to go to School One and even said that they would be very upset were they to go to School Two.[268] Nonetheless, the Judge ordered that the children should go to School Two so as not to cause a rift in the children's relationship with their father.[269] The Judge in this case had a good basis for his decision, but the fact that he dismissed the children's very strong views altogether is inconsistent with Lundy's model.

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266 *Henderson v Henderson* [2019] NZFC 9936.
267 *Mangan v Rossborough* [2019] NZFC 157 at [15].
268 At [47].
269 At [68].

According to Lundy, if a child's views are dismissed then at the least they should get an explanation as to why this was the case.[270]

While there are exceptions, it appears as though judges in the Family Court generally are using the child's views of their parenting arrangements to influence their final decision. They are also acknowledging the requirement under s 6 to do so.[271] An issue that arises under influence is some judges are still dismissing some children as being too young to be able to express a view at all. Although, whilst this is the case for some judges, the majority are still actively seeking the child's views in other ways such as through social workers, and are giving due weight to them. This is in line with the influence element of Lundy's model.

X How Lundy's Model could be Strengthened in the Family Court

My recommendations for improvement in the Family Court largely correspond with the recommendations that the Independent Panel has made and has resulted in the Family Court (Supporting Children in Court) Legislation Bill. This Bill will amend the COCA and the Family Dispute Resolution Act 2013 and was introduced into Parliament on 6 August 2020.[272]

A Legislative Amendments

The Independent Panel recommended that COCA should be amended to be more consistent with the principles of the OTA.[273] The Independent Panel said that this would include amending COCA and the Family Dispute Resolution Act 2013 to include children's participation as a guiding principle, modelled on the new s 5(1)(a) of the OTA.[274] The Family Court (Supporting Children in Court) Legislation Bill came in as a result of these recommendations, and as a response to the concerns raised that the 2014 reforms negatively impacted on children, parents, whānau and exacerbated existing issues.[275]

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270 Laura Lundy, above n 31, at 938.
271 Care of Children Act 2004.
272 New Zealand Parliament "Family Court (Supporting Children in Court) Legislation Bill" (2020) <www.parliament.nz>
273 Ministry of Justice, above n 219, at 7.
274 At 7.
275 Family Court (Supporting Children in Court) Legislation Bill (explanatory note).

Quite significantly, s 6 of this Bill amends s 6 of COCA to add a section which states "the purpose of this section is to implement in New Zealand Article 12 of the United Nations Convention on the Rights of the Child."[276] Even the OTA which is described as very focussed on New Zealand's international obligations does not say that it will expressly implement the CRC. I would argue that this is an express implementation of the CRC. The implication of this is that there could be much more serious consequences for a breach of s 6. However, what I will get to later is that there is no explanation in this Bill of how to implement art 12. This could lead to issues of application inconsistent with Lundy's model and not strong enough implementation of art 12.

Along with the explicit reference to the CRC, this Bill would make it a requirement that when a lawyer is appointed to represent a child, the court must appoint a person who is because of their personality, cultural background, training and experience suitably qualified to represent the child.[277] The next section will consider the lawyer for child amendments in more detail.

Section 11 of the Bill also requires that FDR providers facilitate the participation in those discussions of the children involved in the dispute, to the extent (if any) that the FDR provider considers appropriate.[278]

1 Children Scotland Bill

In determining how effective the Family Court (Supporting Children in Court) Legislation Bill could be, it can be helpful to see how it compares to other jurisdictions. The Children (Scotland) Bill introduced in 2019 aims to amend the law relating to children to among other things, ensure the views of the child are heard in contact and residence cases in Scotland.[279] This Bill comes after concern that children's views were not always heard in contact disputes, and that there is inconsistent practice across Scotland.[280] The important provision of this Bill for this paper is s 11ZB which states:[281]

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276 Family Court (Supporting Children in Court) Legislation Bill.
277 Above n 276, s 7.
278 Above n 276, s 11.
279 Children (Scotland Bill) 2020 (explanatory note) at [5].
280 Fiona Morrison, Kay Tisdall "Scotland's Children Bill: why the law needs to protect the rights of the child when parents separate" *The Conversation* (Scotland, 23rd May 2020).
281 Children (Scotland) Bill 2020.

(1) In deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must—

(a) give the child concerned an opportunity to express the child's views in—

(i) the manner that the child prefers, or

(ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference, and

(b) have regard to any views expressed by the child, taking into account the child's age and maturity.

(2) But the court is not required to comply with subsection (1) if satisfied that—

(a) the child is not capable of forming a view, or

(b) the location of the child is not known.

(2A) The child is to be presumed to be capable of forming a view unless the contrary is shown.

(3) Nothing in this section requires a child to be legally represented in any proceeding.

There are a few elements of this Bill which I believe go further to ensure children's participation rights than the New Zealand Bill. The presumption in s (2A) would counter the issue appearing often in Family Law cases in particular, where young children are presumed not to be capable of forming a view.[282] This provision flips the presumption and would ensure that all children will have the opportunity to have a view. Further, under s 1(a)(i) the child can choose how they would like to have their views heard.[283] This is consistent with both Lundy's space and voice element, which requires that children make the decisions as to how they would like to participate.[284]

One aspect of the Children (Scotland) Bill that I do not agree with is that no child is entitled to legal representation.[285] This is something I would change in the New Zealand Bill.

2 Amendments to the Family Court (Supporting Children in Court) Legislation Bill

The Family Court (Supporting Children in Court) Legislation Bill will be a significant improvement to the current COCA in terms of increasing children's participation in

[282] Children (Scotland) Bill 2020.
[283] Above n 282.
[284] Laura Lundy, above n 31, at 935.
[285] Section 3.

proceedings. However, it could be strengthened to ensure that it adequately explains to those in court proceedings involving children what is required of them. As it stands there is a lot of room for misinterpretation. I propose that clear requirements that the court has to adhere to will make it easier for art 12 to be fulfilled.

I would retain s 1AAA and instead, drawing from Lundy's model, add some subsections with guidance as to how to implement art 12. This would be similar to what is currently in the OTA under ss 10 and 11. I propose the below draft provisions:

Section 6 – Child's Views

(2) In proceedings or a process to which this section applies:

a) The child must be given the opportunity to express their views in an environment that is neutral and comfortable to the child. This means that where possible the child will get to choose where they state their views, and whether they want to state their views at all.

b) Appropriate professionals must be utilised wherever possible to help ascertain the views of the child. These professionals include but are not limited to a Communication Assistant, Lawyer for Child, or a child psychologist.

c) The Judge in all proceedings concerning the child will commit to developing the suitable expertise and qualifications to hear the child's views.

d) All children are presumed to be capable of having a view. However, due weight is to be given to the child's views in accordance with their age and maturity.

Section 7 – Lawyer for Child

(1) In all proceedings involving children, a lawyer for child will be appointed.

This Lawyer for Child provision will be particularly important in the Family Court because a lawyer has been recognised as one of the main ways a child's views can be ascertained in family law proceedings.[286] The Family Court (Supporting Children in Court) Legislation Bill does not go as far as to do that. This is likely to be due to costs, as the lawyer for the child

[286] *Child Law – Child's Views,* above n 193, at [CCC6.11].

provision was amended for cost-cutting purposes.[287] As aforementioned, in the Youth Court, a lawyer for the child must be appointed by the Court if the child who is the subject of the proceedings is not already represented by a lawyer.[288]

XI Family Court Conclusion

Currently, Lundy's model of participation is not upheld in the Family Court. However, I am of the view that the Family Court (Supporting Children in Court) Legislation Bill will go a long way in remedying the disparity between the Youth Court and the Family Court. This Bill would place a much stronger focus on the principles of CRC and in particular the right to participation. However, this Bill would not go the full way towards fulfilling the requirements of Lundy's model. The proposed amendments I have provided would ensure that there were specific requirements which people in the court engaging with children have to adhere to. This would be much more in line with the OTA. I recommend this Bill (with the suggested amendments) is implemented so that the children who offend, and the children who are subject to guardianship disputes are getting equal access to justice and procedural fairness in cases involving them.

XII Disparity between the Two Jurisdictions

The previous sections of this paper have evidenced that there is a significant disparity between the Youth Court and the Family Court in terms of the effective implementation of art 12 of the CRC. In this section, I will give my views on why there might be such a disparity between the two courts, and how this is having implications for children's access to justice.

A COCA Amendments

The most obvious cause for the disparity is the cost-cutting amendments undergone in the Family Court. The legislative drawbacks in the amended COCA from full implementation of art 12 places it significantly behind the Youth Court. Amending COCA would be a good start to remedying this disparity. However, the differing implementation in the two jurisdictions does raise some issues which I believe go further than just the legislative difference. This is

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[287] Megan Gollop, Nicola Taylor and Mark Henaghan *Evaluation of the 2014 Family Law Reforms: Phase One* (The New Zealand Law Foundation, February 2015) at 21.

[288] Oranga Tamariki Act 1989, s 159.

because many of the Youth Court innovations do not come from explicit statutory direction.[289] There is an argument then that the Family Court could be upholding this right better even without a stronger legislative focus on participation under the COCA.

B Characteristics of the Children

At the beginning of each section, I referred to the different characteristics of children who are involved in criminal proceedings compared to guardianship disputes. Could the fact that children who offend tend to be from significantly more disadvantaged backgrounds be the reason people involved in the Youth Court are taking more significant steps to hear their voice? The fact that Māori and Pasifika children are overrepresented in the Youth Justice system, for example, was the reason for the creation of the Rangatahi and Pasifika courts.[290] It is this innovation which goes such a long way to fulfilling Lundy's space element.

With children in guardianship disputes, there is less of a need to factor in certain disadvantages. Perhaps this is a reason why less has been done to hear their views. However, I would argue that even if not directed at the overrepresentation of Māori and Pasifika in the Family Court, having initiatives such as the Rangatahi and Pasifika courts in the Family Court is necessary. The principles taken from these specialist courts, such as the bringing together of whānau would be a great innovation in the Family Court.

I would also argue that the best interest of the child principle has more of a focus in the Family Court than in the Youth Court.[291] Whilst best interests is a principle considered in Youth Justice proceedings, there are a lot of other principles referred to in this paper which have to be balanced against.[292] Perhaps parent's views are being substituted for what is in the child's "best interests" in Family Court proceedings. This was seen for example in *Mangan v Rossborough* where the judge decided not tethering the children's relationship with their father further was in their best interests, despite the children being very clear they wanted to go to the school their father opposed.[293] Alternatively in the Youth Court, parents are encouraged to be

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289 Dr Nessa Lynch, above n 9, at 25.
290 Nessa Lynch "Protective measure for children accused or convicted of serious crimes" in *Violence Against Children in the Criminal Justice System* (Routledge, New Zealand, 2020) 56 at 65.
291 Care of Children Act 2004, s 3.
292 Oranga Tamariki Act 1989, s 4A.
293 *Mangan v Rossborough,* above n 267, at [30].

a part of the process but there is less of a risk of the parents views being substituted for the childs.

C Public versus Private Concern

The child's voice is heard more in the Youth Court, where their views in terms of criminal offending have the potential to be more offensive and there might be more of a valid reason to restrict their views. However, in the Family Court, this would be much less of a concern as the child's views are unlikely to be broader than which parent or guardian they want to live with. Why should the child's voice in these guardianship disputes be restricted then? Going back to the barriers to children's participation that I mentioned at the start of this paper, arguably because Family Court disputes are a private matter traditionally considered to be between adults, perhaps the voice of the child is seen to undermine parental authority. Whereas this is not an issue in the Youth Court because the proceedings do not involve the family/parents/whānau as a party and are more of public concern.[294]

I would argue that it is equally important for the court to ensure child's views are heard in Family Court proceedings to counter the misconception that hearing a child's views undermines parental authority and to uphold procedural fairness across both jurisdictions.

D Crossover between Youth and Family Court Judges

It is also noteworthy that there is such a disparity in the implementation of art 12 across the two jurisdictions because a lot of the District Court judges with a Youth Court warrant will also have a Family Court warrant.[295] This means that the same judges will often sit in the Youth Court and the Family Court. There are 81 District Court Judges with a Family Court warrant, of those 81 Family Court Judges, 35 of them are also Youth Court Judges.[296] Given that just under half of the Family Court judges are also Youth Court judges, I would argue that the same techniques should be able to be applied by these judges across both jurisdictions.

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[294] Craig Barretto, Sarah Miers and Ian Lambie "The Views of the Public on Youth Offenders and the New Zealand Criminal Justice System" (2018) 62 International Journal of Offender Therapy and Comparative Criminology 129 at 130.

[295] "The Judges" (1 August 2020) The District Court of New Zealand < https://www.districtcourts.govt.nz>

[296] Above n 295.

I would also argue that Family Court Judges should all be Youth Court Judges as there is such a crossover between the two courts, and that way there would be more of a consistent approach to dealing with children in court in general. Although, the problem with this is that the Youth Court is currently not busy enough to require full time Youth Court judges.[297] There is not a need for many more Youth Court Judges.

It is interesting though that across both jurisdictions, the audience and influence elements – both which relate to the individual role of the judge, were not very strongly upheld. This raises the question, are we expecting too much of judges to be able to fulfil these requirements? I alluded to this problem earlier in the paper when discussing the training and qualifications of Youth Court judges. Judges in general already have a significant workload. For them to properly fulfil Lundy's audience and influence elements we need them to be child experts. This might just be unrealistic, and some elements of Lundy's might have to give way to things such as the efficiency of the court process.

XIV Overall Conclusion

This paper has used Laura Lundy's model of participation to analyse the extent children's voices are heard in criminal proceedings in the Youth Court compared to guardianship disputes in the Family Court. I began by discussing the New Zealand Youth Court, which has received international recognition for its innovativeness.[298] The Youth Court is taking strides to ensure that all children regardless of their cultural background have a safe space to voice their opinions in court. Proceedings in Youth Court take place in private.[299] Further, the increasing use of the Rangatahi and Pasifika courts are an innovative way to ensure children of different cultural backgrounds have a safe space to have their views heard.[300] Similarly, the use of Youth Advocates, Lay Advocates and Communication Assistants assure not only that children can have their voice heard but that there are appropriate ways to express that voice, whether that be verbally or non-verbally. However, the audience and influence element, which is where the individual role of the judge comes in is much more inconsistent with Lundy's model. Ultimately how well either of these elements is upheld in a particular Youth Court will depend

297 Dr Nessa Lynch, above n 9, at 195.
298 Andrew Becroft "Never too Early Never too Late" (Paper presented at the New Zealand Youth Justice Conference, 17 – 19 May 2004).
299 Dr Nessa Lynch, above n 9, at 206.
300 Kaipuke Consultants, above n 96, at 42.

on the particular judge. Judges are human and all different. This means that the weight they give to children's views is going to differ depending on their interpretation of ss 10 and 11 of the OTA. Although, it is arguable that ss 10 and 11 in particular places quite stringent duties on the Court to hear and place weight on the child's views so differing interpretations are unlikely to be a justified reason for not hearing the child's views.

On the other hand, there is a marked difference in how art 12 is fulfilled in guardianship disputes in the Family Court. The Family Court is not taking as significant strides to uphold the space element. There is no version of the Rangatahi or Pasifika courts in the Family Court meaning children of different nationalities might find it much more difficult to express a view in the Family Court. The 2014 reforms restricted the child's voice quite significantly, in particular by taking away the automatic right to a Lawyer for Child.[301] The conclusion regarding the audience and influence element, however, is similar to the Youth Court in that how well this element is upheld does come down to how well the individual judge personally listens to and gives weight to the child's voice. However, this paper also considered other reasons why children's voice has less of a focus in the Family Court compared to the Youth Court.

I argue that there should not be such a disparity between the Youth Court and Family Court in terms of how well the child's voice is heard and how much they understand. However, New Zealand has the opportunity to create an equal platform across both jurisdictions with the Family Court (Supporting Children in Court) Legislation Bill. I strongly favour the passing of this Bill which would amend COCA to make it much more consistent with the New Zealand Youth Court. However, I have also redrafted the provision, in light of Lundy's test, which would ensure that the courts are not just told that they have to implement art 12, but explained how they should do so. Until there is this change, children in the Youth Court will be having much greater access to justice and procedural fairness than children in the Family Court.

XV Word Count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 14894 words.

[301] Ministry of Justice, above n 219, at 14.

XVI Bibliography

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