



# **CHILDREN'S RIGHTS AND DISPUTES OVER PARENTAL DIVORCE AND SEPARATION. CHILDREN'S ACCESS TO JUSTICE**

**REPORT – MAY 2009**

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## The survey and contributing institutions

In preparation for the May 2009 Joint Conference of ENOC-SEE Children's Ombudspersons' Network (CRONSEE), a questionnaire was circulated to all ENOC full and associate member institutions in April. This report is prepared on the basis of the responses received by May 15 from 17 institutions. Comments are welcome and should be sent to: [peter@endcorporalpunishment.org](mailto:peter@endcorporalpunishment.org)

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The following member-institutions had responded to the survey:

- Austria** – the Ombudsman for Children from the Länder of Styria
- Belgium** (Flanders) – Children's Rights Commissioner
- Belgium** (French Community) – Delegate General for Children's Rights
- Croatia** – Ombudsperson for Children
- Cyprus** – Commissioner for Children's Rights Office
- France** – Institution of the Defender of Children
- Georgia** – Children's Rights Centre, Public Defender's Office
- Greece** – Ombudsman, Children's Rights Department
- Ireland** – Ombudsman for Children
- Lithuania** – Children's Rights Ombudsman
- Malta** – Commissioner for Children
- Norway** – Ombudsman for Children
- Portugal** – Provedoria de Justiça
- Russia** (Moscow) – Child Ombudsman
- Serbia** (Vojvodina) – Provincial Obmudsman, Children's Rights Protection Section
- Spain** (Madrid) – Children's Ombudsman
- Sweden** – Children's Ombudsman

For the sake of brevity the full titles of the institutions are not used here: instead the institution's country is given (although some institutions represent cities or provinces, the questionnaire refers to federal law for the country as a whole).



## 1. Work on this issue undertaken by the contributing institutions

### 1.1. Individual complaints

The questionnaire asked whether institutions accepted individual complaints from children, or those working on their behalf. All the institutions whose mandate includes handling complaints had received complaints about this issue – in some cases very large numbers.

- **Norway**, however, said that although many parents and some children contacted them about this issue, their involvement had to be limited because section 3 of the Ombudsman’s Code states: *“The Ombudsman shall reject applications concerning specific, individual conflicts between a child and its guardians, between the guardians mutually concerning the exercise of parental responsibility and similar matters. The Ombudsman shall also reject applications that partly cover such conflicts, unless the Ombudsman, after a concrete assessment, finds that the interests of the child obviously will be neglected through this rejection.”*
- **Greece’s** founding statute prohibits the Ombudsman becoming involved in any cases that are *sub judice*, so limiting their involvement to cases where the court has already adjudicated. A similar position operates in **Ireland**.

The answers to: “roughly how many such cases per year, what percentage of annual caseload?” varied widely between offices:

	No. of complaints per year	Percentage per year	From children	From adults
Austria (Styrian)	250			90 %
Belgium (Flemish)	350	30 %		
Belgium (French)	450-700	25-30 %		
Croatia	405-989		2-3 %	
Cyprus		15 %		
France		almost 50%		
Georgia	4-5			
Greece		15 %	very few	large no
Ireland	35	5 %		
Lithuania	95	13 %		
Malta	120	70 %		
Portugal		24 %		
Russia (Moscow)	7-9			
Serbia (Vojvodina)	Just a few			Mostly
Spain (Madrid)		3 %		



## 1.2. Approaches by parents

All offices confirmed that parents and concerned adults often contacted them about children affected by separation. The questionnaire also asked: “If you are approached by parents about these issues, how do you determine that the response is in the best interests of the child?” All acknowledged the difficulty of determining best interests. **Spain (Madrid)** said they were not empowered to take approaches from parents on this issue.

As regards determining best interests, some offices relied on their professional judgment; others saw this as a matter for the courts.

**Belgium (French Community)** commented, “We can have an opinion and the court another. Which is correct? We prefer therefore to ensure that the judiciary surrounds themselves with sufficient evidence (hearing the child, expertise etc.) to appreciate what is the best interest of the child.”

And **Belgium (Flemish Community)** said: “If the parents contact us, which happens frequently, it is usually only one of the two parents, with only one ‘colored’ side of the story. We try to get in touch with the children when we can, to hear their views, but this is, unfortunately, not always possible. We make it clear to the parent that he/she should contact a mediator or their lawyer because we do not work to protect their rights. We try to make it clear to parents that it is in the child’s best interest to have as little conflict as possible, that it is basically their ‘right’ to keep in touch with both parents, that they are responsible in the first place for their children’s wellbeing.”

A number of offices have formal responsibilities in such cases – for example, **Georgia** and **Russia’s** experts make recommendations on the child’s best interests, **Lithuania** acts as a mediator in cases of conflict (but will not override a court decision) and **Serbia’s** institution has a role in relation to the centre that determines children’s best interests: “Our jurisdiction is to investigate whether the welfare centre based its opinion in a law-abiding way and whether it investigated and considered all relevant facts with the aim of determining the child’s best interests. We require reports on these proceedings and we usually get very detailed replies. This report is the primary base for formulation of an official institutional recommendation to the authority or institution in question.”

## 1.3. Policy development

The questionnaire asked “Has your institution been involved in making proposals for law or policy changes relevant to these issues?”

Of the 17 institutions responding, 11 said that they had made proposals for change and **Greece** said it was planning to make proposals for children to have the right of separate representation in these cases. Five (**Austria, Croatia, France, Russia** and **Sweden**) did not provide details of the changes they had proposed.



The most commonly-made proposals were to ensure that children's views were adequately taken into account in the decision-making process – **Belgium (Flemish and French Communities)**, **Cyprus**, **Ireland** (in relation to reform of the Irish Constitution) and **Malta** are all active on this aspect of children's rights.

In addition, both **Belgium's** institutions are promoting specialist youth lawyers, the right of children not to be denied a voice on grounds of lack of capacity, a mandatory referral of parents in conflict to mediation ("not mandatory mediation as such, which would be contradictory to the concept of mediation") and both institutions oppose a recent law which sets the "preferential custody model" of one week with each parent. **Cyprus** has initiated a "Dialogue with the judiciary" aimed at increasing the judges' awareness of good practice and sensitivity to children.

**Lithuania** submitted proposals for a statutory mediation service and for clearer regulations as to how court orders should be implemented (for example, on change of residence).

**Norway** has recommended amendments on joint custody, including measures to ensure contact with both parents whilst protecting the child from potential abuse.

## 2. Child's best interests the paramount consideration

The survey asked "Does legislation provide that the child's best interests are the paramount consideration in determinations of custody, access etc. following parents' divorce or separation?"

All respondents replied in the affirmative, with some comment and caveats:

- **Austria** said that the discretionary provisions relating to the views of children under ten made it difficult in practice to determine their best interests.
- **Belgium (Flemish Community)** said that the legal presumption of shared custody and giving the right of contact to the parent rather than the child made it over-optimistic to state that best interests were paramount.
- **France** stated that the "preservation and protection of the exercise of parental authority by both parents" was still a key principle of French family law and that "when the interests of a child clashes with the rights or wishes of one or both parents or guardians, the judge decides by balancing the interests and by taking into account the best interests of the child."
- **Ireland's** statute provides that the welfare of the child must be the first and paramount consideration; however the respondent commented that "welfare" was arguably synonymous with "best interests".



- **Norway's** law specifies that, when determining best interests, courts must have regard to ensuring that the child is not subjected to violence or impairment to mental or physical health, and **Russia's** Family Code includes in its definition of best interests, the child's opportunities to develop, the attachment of the child to parents and siblings and the moral and other personal qualities of each parent.

It should also be noted that the questionnaire asked whether best interests were paramount in *all* court determinations, not just those where the parents were in conflict. The answers tended to suggest that where parents are in agreement, the law assumes children's best interests are met. However **Greece's** Civil Procedure states that: "In parental responsibility and contact cases, the court obliges the litigants to try to solve the matter in conciliatory spirit. The compromise sought must be in the best interest of the child; otherwise it is not binding for the court."

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### 3. The views of children

All respondents answered "YES" (some with qualifications) to the question: "Does your national law provide for children to be heard and given due weight, including in court, when matters concerning custody, residence and access to children are being decided following divorce or separation of parents?"

However, seven of the seventeen replied negatively to the question: "In practice are rights respected in such cases?" By and large answers to this question referred only to judicial hearings, and usually only in cases where parents have failed to reach agreement. However some respondents reported laws that recognised the right of children to be heard beyond the courtroom. For example, **Norway** has a law that whenever children are able to form their own point of view on matters that concern them, the parents or carer must take these views into account and provides that: "Parents shall steadily extend the child's right to make his or her own decisions as he or she gets older and until he or she comes of age." **French** law also recognises the right of children to be heard by their parents in all decisions affecting them, and the **Portuguese** law includes listening to children as a part of parental responsibilities.

Additionally, before going to court, it is now common for separating parents to attend mediation, but very few respondents gave information about the duty of mediators to include the child (or their views) in this process.

Closer examination of the replies reveals variations in children's rights in court proceedings:

#### 3.1. Age-based distinctions

Some laws give all children the right to be heard, regardless of their age – though most add provisions in line with Article 12, "*in accordance with age and maturity*" –



but some countries make age-based distinctions.

- **Austria** provides that as regards children under ten, the court expert may be ordered to find out their views, but that children aged 10 to 13 are entitled to be heard in court, and the views of children of 12 and 13 must be given weight. The views of children aged 14 and over are “essential.”
- **Norway’s** legislation provides that children of seven and over are allowed to express a view to the courts on custody and access, and when they reach 12 these views must carry “significant weight.”
- In **Belgium**, although in divorce cases the judge has discretion in this respect (see below), if a disputed access or custody matter goes to the youth protection court, the judge must call for children aged 12 or over to be heard (though they are not obliged to speak) and may do so for children under that age.
- **Georgia’s** laws require the child’s view to be heard and given weight from the age of 10, **Spain’s** laws require this from 12 and **Malta’s** from 14.
- **Lithuania** responded that all children’s views must be given weight unless contrary to their interests, but that the views of children of 14 and above must be formally recorded and signed in the court protocol (below that age, the inclusion of their view is dependent on the initiative of mediator, parent or judge).
- **Russia** also gives children a general right to be heard, but stipulates that the opinions of children of 10 or over are obligatory unless contrary to their best interests.
- **Serbia** gives all children the right to be heard, but also stipulates that children aged 15 and above have the right to determine which parent they live with.

### 3.2. Views heard dependent on child’s capacity

Children can express views from a very early age, but some countries’ laws do not entitle these views to be heard at all unless they are judged to have capacity. For example, in **Belgium** children will only be heard if they acquired “discernment”, which is determined by the judge. **Belgium (Flemish Community)** commented: “Some judges will hear children from a young age, while others only hear adolescents.” **France** also entitles children “with full capacity” to be heard by the judge, with similar provisos.

Only **Serbian** and **Croatian** laws recognised that, in order to express a mature opinion, the child needs to be fully informed. **Serbia’s** laws require children to be given all necessary information and **Croatia** defines this right as including not only



“all the important circumstances of the case” but also a right to “advice” and “to be informed about the consequences which may arise if his or her opinions are respected.”

### 3.3. How does hearing children’s views work in practice?

Ten respondents were satisfied that children’s rights to be heard were adequately respected.

For example **Cyprus**’ law not only requires that the child’s view must be sought before any custody decision is made, but also details that the reporting welfare officer in such cases must not only meet with the children at the homes of both parents to evaluate the family dynamics, but also see children separately from their parents on at least two occasions.

Most respondents, however, were careful to point out that listening to children did not necessarily mean following their wishes, and that these would be overridden if they conflicted with their perceived best interests.

Of those that expressed reservations about how things worked in practice, none said that many children were failing to be heard, just some distressing cases. For example, **Belgium (Flemish Community)** said: “We do get complaints from children who were not invited by the judge even after they asked to be heard because he/she considered them to be too immature to do so. How they can decide that without even speaking to the child is a mystery to us.”

**Norway** said, “It is the Ombudsman’s impression that children are usually some way or another heard in legal proceedings about child custody etc. A decision made by the court without giving the child an opportunity to speak may be invalid. However, research shows that some children do not feel that they are given the opportunity to be heard and taken seriously. Moreover, the way the children are heard might not be child-friendly and suitable.”

**Ireland** expressed dissatisfaction with its current guardian *ad litem* service, designed to represent the child’s personal and legal interests, because these must only be appointed in “special circumstances” and in any event are not regulated in sufficient detail. **Russia** and **Serbia** also expressed concern that there were no effective mechanisms for ensuring that the child’s view was heard by decision-makers.



#### 4. The separate representation of children

The survey asked if “children have the right to have their views separately represented in relevant court proceedings, if their views differ from any expert view of their best interests?” and “If yes, is this right respected in practice?”

While ten respondents answered “YES” to this question, when their detailed comments are examined it appears that in practice very few children in these countries can be sure that their views will be separately and adequately advocated when the experts do not agree with them. A number of respondents said that children were separately represented where their *parents’* views appear to conflict with their best interests, but this was not the question. Others, for example **Greece**, said that the children’s views were separately represented “because they are expressed in a direct private meeting with the judge,” although a private conversation does not necessarily ensure that the child’s view receives effective representation.

Of those that replied negatively, this was because their children’s representatives were specifically mandated to advocate the child’s best interests (e.g. **Spain (Madrid)**), or because research had revealed that children were dissatisfied with how their views had been sought or represented (e.g. **Sweden**).

**Austria** reported that, “in future a children’s guardian (‘Kinderbeistand’) is going to be implemented to support children’s views more effectively. The ‘Kinderbeistand’ is a special person that represents the children’s position and rights in front of the court, and tries to find out the children’s concerns and requests.”

#### 5. Children’s right to apply to court for a change in arrangements

The survey also asked, “Do children have the right to apply to court for a change in custody/access or other arrangements?” and, “If yes, is this right exercised by children?”

Only five institutions answered “yes”: **Austria, Croatia, Georgia, Russia** and **Serbia**. However in **Austria, Georgia** and **Russia** the right is only held by children aged 14 and over, and both **Russia** and **Serbia** reported that, in practice, children did not exercise this right.

Only **Croatia** reported that under their Family Act a child may, “autonomously and independently of his or her legal representative,” initiate a number of different proceedings, including:

- to determine elements of parental care or the exercise of the child's rights, or to change an existing decision,



- in the event of death of the parent with whom the child lived, for a decision about the care of the child,
- to determine visits and access to the child's grandparents, former de facto spouse of his or her parent, step-parents etc,
- for a court order prohibiting unauthorised access or harassment by a grandmother, grandfather or sibling who does not live with the child.

However, **Croatia** said that there was no available data on how these rights were being exercised by children.

## 6. Policy development

Finally, the survey sought the views of the institutions on how courts should determine custody and access decisions. Four possible principles were envisaged, with the respondents invited to give reasons for their answer:

(1) that the court should follow the children's views (unless there are serious concerns about the safety of the child if their views are followed);

(2) that the court should follow the child's views (unless there are serious concerns about safety) if the child is over a certain age (please state age);

(3) that the court should seriously consider the child's views but not necessarily follow them?

(4) that the court should make its own decision, based on an evaluation of the best interests of the child.

The intention was that these four principles would be mutually exclusive, i.e. that the respondents would only tick one of them. However, in the event, most respondents answering this question supported more than one principle:

	(1)	(2)	(3)	(4)
Austria	No	No	Yes	Yes/No
Belgium (Flemish Com)	-	-	Yes	-
Belgium (French Com)	No	No	Yes	Yes
Croatia	-	-	Yes	Yes
Cyprus	Yes	No	Yes	Yes
France	No	No	Yes	Yes
Georgia	Yes	No	Yes	Yes
Greece	-	Yes (13)	Yes	No
Lithuania	Yes	No	Yes	Yes
Malta	Yes	Yes (6-9)	Yes	Yes
Norway	-	-	Yes	Yes
Russia	No	Yes (14)	Yes	Yes
Serbia	-	-	-	Yes
Spain	-	-	Yes	Yes

