

Children's best interests between theory & practice

Recommendations or discussion topics based on international best interests practices and policy strategies since 2004



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This advice is provided on behalf of the Division for Youth of the Flemish Government as part of the preparations for the European conference on the 'best interests of the child', which is organized on 9 and 10 December 2014 by the Flemish Community (Division for Youth), the French Community and the Belgian federal government (Justice Department) in light of the 25th anniversary of the United Nations Convention on the Rights of the Child.

INTRODUCTION

In light of the Belgian presidency of the Council of Europe the Flemish Community (Division for Youth), the French Community and the Belgian federal government (Justice Department) join together to organize a political 'best interests of the child conference' to celebrate the 25th anniversary of the United Nations Convention on the Rights of the Child. The goal of this conference is to come to a dialogue between theory and practice regarding the best interests principle. Therefore, common tensions in this dialogue were explored and possible solutions to address them identified, based on an inventory and content analysis of existing international best interests practices and policy initiatives since 2004. This analysis brings up a number of recommendations which are provided below. As these recommendations stem from a narrow analytic strategy (for more information: see 'methodology' in Op de Beeck et al., 2014), they are not lapidary. Rather, these recommendations are formulated to serve as inspirational topics that may feed the discussions at the best interests conference.

The recommendations are based on a broad report in which the methodology of the inventory and content analysis as well as the results are thoroughly outlined and illustrated. In the current advice, the topics are only succinctly described, but the paragraphs in the report in which the topic is more extensively discussed, are referred to. As well, it is more generally advised to read the recommendations/discussion topics together with the report, as the report provides valuable background information on how the topics arose and in which existing initiatives they have already been applied.

RECOMMENDATIONS OR DISCUSSION TOPICS

1. Workability of a generalist concept (§ IV.1 in the report)

1.1 If a substantive interpretation of the best interests principle is pursued:

- a. base it on an in-depth scientific methodology (*cf.* Kalverboer & Zijlstra, 2006);
- b. explicate the framework that is used as a starting point and the different steps taken to come to the interpretation;
- c. be conscious about the fact that every substantive interpretation is inevitably culturally dependent and limited in scope.

1.2 Foresee sound procedural safeguards to come to a qualitative best interests assessment.

- a. Address a best interests assessment as a dynamic learning trajectory, not as the unambiguous outcome of a concrete instrument.

- i. Mediation mechanisms can be used as an inspiration to arrive at this learning goal, as such practices eminently stem from the goal to learn more about, and empathize with, other parties' perspectives.
- b. Recognize the importance of the individual who performs or leads the assessment. The background and knowledge of this person may be more decisive than the assessment tool. Therefore, it is recommended to:
 - i. invest in adequate child specific training programs for professionals whose decisions affect children;
 - ii. invest in monitoring, feedback and ex-post evaluations to build hands-on knowledge based on one's own practices and decisions.
- c. Develop a clear decision-making structure to use as a general procedural guideline in all best interests assessments.
 - i. Foresee a separate structure for (1) the assessment of the child's evolving capacities, in order to adequately weigh the child's opinion and (2) the best interests assessment itself.
 - ii. Inspiration can be found in academic decision-making literature (see § IV.1.4 in the report).

1.3 *Do not avoid issues regarding the workability of the best interests concept by focusing on protective elements or negative definitions (i.e. defining what is definitely not in the child's best interests). Such approaches depreciate the richness of the best interests concept. Instead, when maintaining clear procedural safeguards, the 'vagueness' of this concept can be considered as one of its strengths, as it challenges involved stakeholders to continuously reflect on and further develop this principle.*

2. Conflict of interests (§ IV.2 in the report)

2.1 *Avoid the use of the child's best interests principle as a general pretense to defend other parties' interests.*

- a. Clearly separate children's interests from their parents' or other parties' interests.
- b. Create transparency by developing a distinct definition of other parties' interests and develop adequate methodologies to safeguard them.

3. Hearing children's voices: ensuring a just and equal participation (§ IV.3 in the report)

3.1 Realize a meaningful participation of children to the best interests assessment *by providing them with adequate and adapted information.*

3.2 Realize a meaningful participation of children to the best interests assessment *by avoiding the following side effects:*

- a. apparent or tokenistic participation, not properly prepared and/or merely performed to fulfil a consultative duty;

- b. negative participation, or participation as a way to transfer responsibility for realizing children's best interests to children themselves;
- c. overquerying of children: participation is a right, not a duty.

3.3 Realise qualitative participation at the individual level by hearing the child's voice in decisions that affect him, *based on the child's evolving capacities*.

- a. Do not use age or other general demarcations as criteria for maturity, but judge the child's evolving capacities on a case-by-case basis:
 - i. evaluate the way children express their opinion, their reasoning and their appreciation of different decision alternatives (*cf.* Archard & Skiveness, 2009);
 - ii. ignorance, a poor understanding of the issues, a lack of decisive independence, over-dependency on the judgements of others and/or inconsistencies in judgment may indicate a lack of maturity (*cf.* Archard & Skiveness, 2009).
- b. Realise qualitative participation of children at the group level by hearing (a representation of) the voices of *all* children who may be affected by the decision. Pay specific attention to the inclusion of socially vulnerable children. To do so, the following methods can be used:
 - i. cooperate with specific target group organizations to reach socially vulnerable children (examples under § IV.3.2 in the report);
 - ii. use customized methodologies to include socially vulnerable children (examples under § IV.3.2 in the report);
 - iii. use representative sampling techniques (examples under § IV.3.2 in the report).
- c. Carefully estimate whether direct or indirect participation (through representation of a close family member or trained professional for individuals, and through representative organisations for groups) is more appropriate. Although direct participation is generally more desirable, indirect participation can be recommended:
 - i. in case the child is not considered mature enough for direct participation;
 - ii. in decisions at the meso level, for which representation by organisations who are specialized in communicating the views of children and youth (such as the Youth Council) may at times be more appropriate (see § IV.3.4 in the report).

4. Child rights impact assessments (CRIA) at the policy level

4.1. *Use insights regarding CRIA as an inspiration* to invigorate best interests assessments and/or to address possible shortcomings in best interests assessments.

4.2. Comparison with an extensive evaluation of the Flemish CRIA brought up *the following recommendations*:

- a. Centralize knowledge and expertise regarding best interests assessments and make it accessible through online modalities and through the support of a network of focal points;
- b. Facilitate control of, and appeal to, decisions that directly and indirectly affect children;

- c. Take into account the social context of the child: especially in decisions that only indirectly affect children, balancing the different interests involved may be a precarious exercise (*cf.* recommendation nr. 2.1b);
- d. Underline the process character in determining children's best interests. Not the eventual outcome, but the underlying reflections are capital in the best interests assessment (*cf.* recommendation nr. 1.2a).