THE *BEST INTEREST OF THE CHILD* PRINCIPLE: A COMPARATIVE STUDY OF LEGISLATIVE AND JUDICIAL RECOGNITION IN CHILD PROTECTION AND FAMILY LAWS IN AUSTRALIA AND MALAYSIA

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Abstract

The best interest of the child principle has played a significant role in achieving children's rights around the world since the adoption of the United Nations Convention on the Rights of the Child, 1989 ("CRC"). For example, Australia has a clear legislative as well as judicial assertion of the best interest of the child principle. However, there are no general provisions that incorporate the best interest of the child principle within Malaysia's main child protection laws, despite the country being a treaty state of the CRC. Research has been conducted to explore the incorporation of the best interest of the child principle within the Sharia perspective in the Malaysian context; however, there is limited research on the incorporation and adoption of the principle within the general children and non-Muslim family law legislations in Malaysia. The lack of universal incorporation of the principle within federal legislation in Malaysia and the absence of supporting legislative guidelines to determine the principle has been a source of limitation for the state and other actors. Employing doctrinal legal research methods and comparative law methodology, this research examines and analyses the legal framework concerning the incorporation and application of the best interest of the child principle, both in Malaysia and Australia. The findings of this research indicate that in comparison to Australia, Malaysia lacks specific provisions for the best interest of the child principle, pursuant to Article 3 of the CRC. Furthermore, there is no clear and comprehensive legitimate guidelines on the application of the principle in key child protection and non-Muslim family law legislations. This research, therefore, proposes reforms to key federal legislation on the protection of children and non- Muslim family law, specifically the Child Act 2001, the Law Reform (Marriage and Divorce) Act 1976, and the Guardianship of Infants Act 1961, and suggests including provisions that require consideration of the best interest of the child as the primary consideration, supported by legitimate guidelines.

Keywords: Best interest of the child principle, Family Law, Welfare of the Child, United Nations Convention on the Rights of the Child, Child Protection Law

I INTRODUCTION

The *best interest of the child* principle is a foundational concept and key guiding standard in international and domestic child laws. The principle ensures all actions and decisions concerning children primarily consider their well-being and overall development, has historical roots dating back to the late 19th and early 20th centuries. The principle became a distinct legal concept upon the adoption as one of the four general principles of the United Nations Convention on the Rights of the Child, 1989 ("CRC").[1] The *best interest of the child* principle functions not only in providing a framework for laws and policies in terms of implementing rights and obligations of children, but is also utilised to resolve judicial issues involving children. The inclusion of the *best interest of the child* principle within legal frameworks procedurally guarantees the assessment and determination of the principle by the state and other actors.[2] Today, the *best interest of the child* principle is utilised and assessed in unlimited circumstances where children are vulnerable and require protection, including in determining custody and guardianship, protection against abuse, violence and neglect, right to health, right to education, and right to privacy.[3]

Malaysia ratified the CRC in 1995 and, in compliance with its international obligations, subsequently enacted the Child Act 2001("Child Act").[4] The Child Act is the key child protection legislation in Malaysia. There are, however, no general provisions for the *best interest of the child* principle within the Child Act. Rather, the *best interest of the child* principle is

Received: December 13, 2024, **Revised:** October 31, 2025, **Accepted:** November 19, 2025.
Published online: December 05, 2025.

DOI: https://doi.org/10.22452/jmcl.vol51no2.4

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1 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC'*).

2 Committee on the Rights of the Children, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) ('*CRC/C'*).

3 John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 80.

4 *Child Act 2001* (Malaysia) Act 611('*Child Act*'); UNICEF Malaysia 'UNICEF Malaysia: 70 years of prioritizing children - A look through our journey for children in Malaysia 70 years in the making' <https://www.unicef.org/malaysia/unicef-malaysia-70-years-prioritizing-children>.

mentioned to be applied in specific circumstances.[5] Traditionally, the *best interest of the child* principle has been utilised in family law matters for the physical and psychological protection of children.[6] However, there is also no provision for *best interest of the child* principle within key non- Muslim family law federal legislations, such as the ("LRA")[7] nor the Guardianship of Infants Act 1961 ("GIA"), to determine custody and guardianship of children.[8] Rather, the narrow and antiquated *welfare of the child* principle is utilised. Further, there is a lack of structured guidelines in applying the principle to determine custody and guardianship. The lack of universal incorporation of the *best interest of the child* principle within the Child Act, LRA and GIA or domestication of the principle has resulted in a failure to protect children.

Malaysia has a complex and plural legal system. As a former British colony, Malaysia has adopted a federal civil legal system, based on common law and statutes. Islam is the official religion in Malaysia, and as such, Malaysia has a *Sharia* legal system that falls under the jurisdiction of the 13 separate states. The *Syaria* legal system applies to personal and family matters of Muslims, in particular the distribution of estates, marriage, divorce, and custody of children. In addition, there is a customary legal system that refers to 'Adat', Malay Customary laws, as well as customary laws of indigenous communities both in Peninsular Malaysia as well as in Sabah and Sarawak. The customary legal system governs matters involving land rights, inheritance, and communal practices.[9] All three systems are anchored under the Federal Constitution of Malaysia.[10] These different legal systems, whilst outwardly cohesive, create potential conflicts and challenges in applying the *best interest of the child* principle uniformly.[11] There is currently a gap in the literature regarding the legitimacy of incorporating the *best interest of the child principle*, both judicially and legislatively.

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5 'Child Act' (n 3) ss 18(a), 30(5), 30(6)(a), (13)(aa), 35(3), 37(5), 40(5), (12)(aa), 42(7)(a)−(b), 80, 84(3), 89, 90(13)(a).

6 Joseph Goldstein, Anna Freud and Albert J Solnit, *Before the Best Interests of the Child* (The Free Press, 1979); Thomas Hammarberg, *The Principle of The Best Interest of the Child – What it Means and What it Demands from Adults* (Commissioner for Human Rights Council of Europe, CommDH/Speech (2008)10, 2008) 2.

7 *Law Reform (Marriage & Divorce) Act 1976* (Malaysia) Act 164 (*'LRA'*).

8 *Guardianship of Infants Act 1961* (Malaysia) Act 351.

9 Shad Saleem Faruqi, 'Legal Pluralism in Malaysia: Navigating the Civil and Sharia Systems', *FULCRUM Analysis of Southeast Asia* (Web Page, 5 May 2025) <https://fulcrum.sg/legal-pluralism-in-malaysia-navigating-the-civil-and-shariah-systems/>.

10 *Federal Constitution* (Malaysia) art 160(2) ('*Federal Constitution'*).

11 Mohd Amir Abdullah, 'Analyzing the Dynamics Between Sharia Law and Civil Law in Governing Divorce Proceedings Among Muslims in Malaysia and . Legal Outcomes' (2024) 3(4) *Law and Economy* 29, 31.

While some researchers have already examined the issue from a *Sharia* perspective, there is a lack of research that explores it in the context of general children and non-Muslim family law legislations in Malaysia, highlighting the need for a further doctrinal exploration.[12] The scope of this research is therefore limited, adopting a doctrinal and comparative approach that allows for a focused and meaningful analysis of Malaysia's general child-related laws. For clarity and consistency, the *Sharia* perspective is not included within the scope of the research.

This research has used doctrinal legal research methods to analyse relevant documents, both primary, e.g. key federal legislations, case laws, and judgments on child protection and non- Muslim family law, and secondary sources, such as journal articles, and other written commentaries on case laws and legislations, textbooks, periodicals, published and unpublished conference papers, newspaper and magazine articles, international online databases such as JSTOR, HeinOnline and thesis on the analysis on the *best interest of the child* principle. An analytical approach was undertaken in analysing the relevant sources. The most common keywords that were utilised were terms and phrases that include "best interest of the child", "family law", "child protection", and "welfare of the child". A combination of two or more terms was referred to as part of the analysis.

This research has also used comparative legal research methodology to provide a critical insight into the foundation and mechanics of a foreign legal system.[13] This provides solutions to issues arising within the national legal systems. The jurisdiction compared is Australia. Australia has a long legislative and judicial history of incorporating the *best interest of the child* principle within key legislations on child protection and family law. Key Australian child protection and family legislations, including the Family Law Act 1975 (Cth),[14] state child protection legislations as well related case laws and grounds of judgements on the adoption and incorporation of *best interest of the child* principle were evaluated and analysed. This was then compared against key federal child protection and non- Muslim family law legislations as well as case laws and grounds of judgement on the incorporation and adoption of the *best interest of the child* principle in Malaysia. The same was then utilised to

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12 Roslina Che Soh and Nora Abdul Hak, 'Application of Maslahah (interest) in Deciding the Right of Hadanah (Custody) of a Child: The Practice in the Syariah Court of Malaysia' (2011) 7(13) *Journal of Applied Sciences Research* 2182, 2187; Akbar Kamarudin and Abdul Shukor, 'Shari'ah Court's Decision and Respondent's View on Child Custody After Divorce in Kuala Lumpur and Selangor' (2022) 7(2) *Journal of Contemporary Islamic Law* 54, 55.

13 Edward J Eberle, 'The Methodology of Comparative Law' (2011) 16(1) *Roger Williams University Law Review* 51, 51.

14 *Family Law Act 1975* (Cth) (*'Family Law Act'*).

provide recommendations for suitable changes within the child protection and non-Muslim family law legal framework.

Australia domesticated the *best interest of the child* principle soon after ratifying the CRC. The principle can be found in both state and federal legislations on child protection and family law.[15] A structured and systematic legitimate guideline has been incorporated to determine the *best interest of the child* principle under the Family Law Act. Recent reforms in 2024 have also shifted the Family Law Act to a child-centered legal framework with emphasis on the safety of the child as well consideration for the cultural identities of children. Malaysia in line with its international obligations under the CRC should domesticate the *best interest of the child* principle and modernise the Child Act as well non- Muslim family law legislations, LRA and GIA. Considering the experiences and lessons learnt from application of the principle from Australia, the modernisation process in Malaysia should be further supported by structured guidelines to determine custody and guardianship in line with the *best interest of the* child principle. These changes will uphold the rights of children and better protect them.

This article is divided into eleven sections including the introduction and conclusion. It starts introducing the *best interest of the child* principle. The article then explores the incorporation of the principle, legislatively and judicially in Australia as well as in Malaysia. The article concludes with a comparative of both jurisdictions and offers recommendations on incorporating the principle within the child protection and non-Muslim family law legal framework in Malaysia.

II *BEST INTEREST OF THE CHILD* PRINCIPLE

The *best interest of the child* principle is the main legal consideration in determining the scope of protection for children. This principle has been likened to an umbrella provision, covering any issues involving children.[16] The *best interest of the child* principle gained popularity as one of the four key general principles that protects and promotes children's rights under the

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15 *Family Law Act* (n 14) s 60CC; *Children's Services Act 1986* (ACT) s 5; *Children (Care and Protection) Act 1987* (NSW) s 55(a); *Community Welfare Act 1983* (NT) s 9; *Children's Services Act 1965* (Qld) s 52(2); *Child Protection Act 1999* (Qld) s 5A; *Children's Protection Act 1993* (SA) s 4; *Community Services Act 1970* (Vic) s 41; Children*, Youth and Families Act 2015* (Vic) s 10(1).

16 Asgeir Falch-Eriksen and Elisabeth Backe-Hansen, *Human Rights in Child Protection Implications for Professional Practice and Policy* (Palgrave Macmillan, 2018) 61.

CRC.[17] The principle can be traced from the Welfare System from the 20th century.[18] The principle was expressly incorporated in the Geneva Declaration on the Rights of the Child 1924 ("Geneva Declaration").[19] The principle was subsequently affirmed under the Declaration of the Rights of Child 1959.[20] Since then, the *best interest of the child* principle has been solidified as a primary consideration for all actions involving children pursuant to the incorporation under Article 3 (1) of the CRC.[21]

The CRC is the most ratified international treaty.[22] Treaty states adopting the CRC must incorporate the CRC into domestic statutes, including the *best interest of the child* principle. Aside from the CRC, the *best interest of the child* principle has appeared in other significant international treaties in reference to children. International communities have recognised the protection of children's rights through the adoption of the *best interest of the child* principle.[23] Today, the *best interest of the child* principle is a key legal principle worldwide to determine the rights and protection of children.

III THE *BEST INTEREST OF THE CHILD* AS A LEGAL CONCEPT

The *best interest of the child* principle functions in providing a framework in terms of implementing rights and obligations that children are entitled to. The

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17 *CRC* (n 1) art 3. The other general principles of the CRC include Principle of Non-Discrimination (CRC art 2(1)), The right to survival and development (CRC art 6(2)) and right to participation and to be heard (CRC art 12 (1)).

18 Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *The International Journal of Children's Rights* 483, 496.

19 *Geneva Declaration of the Right of the Child* adopted 26 September 1924, Preamble:
By the present Declaration of the Rights of the Child, commonly known as 'Declaration of Geneva,' men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed.

20 *Declaration of the Rights of the Child,* GA Res 1386, UN Doc A/RES/1386(XIV) (20 November 1959) principle 2:
'The best interest of child shall be the paramount consideration' in the enactment of laws of children, as well as 'the guiding principle of those responsible for (the child's) education and guidance'.

21 *CRC* (n 1) art 3(1).

22 Ann Quennerstedt, Carol Robinson and John I' Anson, 'The UNCRC: the Voice of Global Consensus on Children's Rights?' (2018) 36(1) *Nordic Journal of Human Rights* 38, 40.

23 *Convention on the Rights of Persons with Disabilities,* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 23(2); *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* signed 29 May 1993 art 4; *Convention on the Elimination of All Forms of Discrimination Against Women* opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 5(b), 16(1)(d).

principle is also utilised to resolve matters involving children.[24] The principle is subjective in nature. Different factors and conditions must be considered to determine what will serve the child best.[25] The flexibility of the *best interest of the child* principle allows for a wide range of interpretations that most effectively serves a child's best interest.[26] Ultimately, this addresses the potential violation of children's rights and provides for the most appropriate remedies.

The best approach to maneuver around the subjective nature of the *best interest of the child* principle is to take into consideration the directions and limitations imposed under CRC. Taking into account the framework of the *best interest of the child* principle within the framework of the CRC, includes considering substantive rights, as well as providing a barricade against possible subjective arbitrariness.[27] The United Nations Committee on the Rights of the Child has laid down seven elements that should be considered in determining a child's best interest (*CRC Seven Elements*) to provide structure in determining the principle.[28] These seven elements cover all aspects of a child's life. The application and weightage of each element will vary according to the outcome of the application of these elements. The Committee has further elaborated that the *best interest of the child* includes considering the full scope of children's rights, balanced against a variety of individual circumstances of a child.[29]

The key in applying the *best interest of the child* principle is that it shall be the *primary consideration* for all decisions or lack of decisions involving children.[30] In *ZH (Tanzania) v Secretary of State for the Home Department,*[31] Her Ladyship, Baroness Hale explains that *primary consideration* means that

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24 Zermatten (n 18) 485.

25 Dina Iman Supaat, 'Establishing the Best Interest of the Child Rule as an International Custom,' (2014) 5(1) *International Journal of Business, Economic and Law* 110; Thomas Hammarberg, *The Principle of The Best Interest of the Child – What it Means and What it Demands from Adults* (The Council of Europe Commissioner for Human Rights, 30 May 2008) 7.

26 *CRC/C* (n 2) [30]; Marit Skivenes M and Line Marie Sørsdal, 'The Child's Best Interest Principle across Child Protection Jurisdictions,' *Human Rights in Child Protection* (Springer International Publishing, 2018).

27 Jason Pobjoy, 'The Best Interest of the Child Principle as an Independent Source of International Protection', (2015) 64(2) The *International and Comparative Law Quarterly* 327, 350.

28 See *CRC/C* (n 2):
a) the child's view; b) the child's identify; c) preservation of the family environment and maintaining relations; d) care, protection and safety of the child; e) situation of vulnerability; f) the child's right to health, and g) the child's right to education.

29 Pobjoy (n 27) 327.

30 *CRC/C* (n 2) [18].

31 *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 All ER 778 [25(f)].

the child's *best interest* is considered first, above all other considerations. Applying the *best interest of the child* principle as *primary consideration* means that a larger weightage is attached to what serves a child best.[32] However, it must be noted that while the *best interest of the child* has to be **a** *primary consideration*, it is not ***the*** primary consideration.[33] As such, other than the child's best interest, other factors would still have to be considered in matters involving children.[34]

The *best interest of the child* principle is rooted in providing children with the widest available chance to grow into well-adjusted adults without the intrusiveness of adult authority. State agencies, in adopting the principle in policies and regulations involving children, act proportionally and appropriately when considering the *best interest of the child.*[35] The application of the principle provides the best outcome for children. The adoption and application of the principle is meant to allow children to be protected without any limitation. Today, the *best interest of the child* principle is utilised and assessed in unlimited circumstances where children are vulnerable and require protection, including (but not limited to) in determining custody and guardianship, protection against abuse, violence, and neglect, right to health, right to education, and right to privacy.[36]

IV CRITICISM OF THE *BEST INTEREST OF THE CHILD* PRINCIPLE

The *best interest of the child* principle has drawn its fair share of criticism. Despite being a highly distinctive principle, it can be difficult to classify and even more challenging to apply.[37] There is no clear definition of the *best interest of the child* principle. This has resulted in a principle that is shrouded in abstruseness and uncertainty. Fotin describes the principle as "social ideas, rather than individual rights, as a result of the lack of determinable content".[38]

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32 Committee on the Rights of the Child, *General comment no. 13 (2011), The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) [39] ('*CRC/C*').

33 Zermatten (n 18) 489.

34 Mary George and Noor Aziah Mohd Awal, 'The Best Interest Principle within Article 3(1) of the United Nations Convention on the Rights of the Child' (2019) 19(4) *International Journal of Business, Economics and Law,* 30, 30.

35 Zermatten (n 18) 488.

36 Tobin (n 3) 80.

37 Carl Funderburk, 'Best Interest of the Child Should Not Be an Ambiguous Term' (2013) 33(2) *Child Legal Rights Journal* 229.

38 See Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009) 18. Here, Fortin is describing economic, social and cultural rights in the context of children's rights, but the descriptor is also fitting for the best interests of the child.

The indeterminacy of the *best interest of the child* principle could be traced to the lack of structure and guidelines for the principle. This makes applying the principle difficult. The lack of objectivity of the principle also provides decision-makers with too extensive power in determining the scope of application of the principle. This has led to allegations of biasness by decision makers.[39] Decision-makers have also been criticised for applying what is "*best*" for the child rather than what is in the "*best interest*" of the child.[40] This has resulted, as Parker explained, in a "convenient cloak for bias, paternalism and capricious decision-making."[41]

The scope of the application of the *best interest of the child* principle can be inexhaustive. The "*best interest*" is not the same for all children. The scope of the principle can be varied according to the different age groups of children, different periods of development of children, as well as available resources and cultures of different countries. This can result in a complex prediction about the consequences of choices and future outcomes. This also results in a diverse interpretation based on the realities in different national and international settings in applying the *best interest of the child* principle.

It is assumed that the *best interest of the child* principle is meant to cover a broad spectrum of children's rights. However, the principle has been narrowly applied by the judiciary and legislature, mainly to protect the continuance of parental influence over children.[42] As a result, the scope of utilisation of the *best interest of the child* principle, whilst meant to be applied to all aspects of children's rights, still continues to remain in areas involving custody, adoption, neglect, and maltreatment.[43]

V THE *BEST INTEREST OF THE CHILD* PRINCIPLE IN AUSTRALIA: LEGISLATIVE RECOGNITION

Constitutionally mandated, child protection laws and family laws in Australia are separate areas of law. The Federal parliament legislates on family law[44] whereas child protection falls within the legislative powers of parliament of the

39 Funderburk (n 37) 229.

40 Ibid.

41 Stephen Parker, 'The Best Interests of the Child – Principles and Problems' (1994) 8(1) *International Journal of Law and the Family* 26.

42 Anne C Dailey and Laura A Rosenbury, 'The New Law of the Child' [2018] 127 *The Yale Law Journal* 1448.

43 Josimar Antônio de Alcântara Mendes and Thomas Ormerod 'The Best Interests of the Child: An Integrative Review of English and Portuguese Literatures' [2019] 24 *Psicologia em Estudo* 4.

44 *Australian Constitution* ss 51(xxi).

Australian states and territories.[45] Further family law is considered an area of private law, where the state should not intervene and child protection law is considered an area of public law.[46]

Early state legislations used the term *welfare of the child*" as the "paramount principle" around custody, guardianship and access of children.[47] One of the earliest legislations, the Infants Custody and Settlement Act 1899 (NSW), referred to the *welfare of the children* as the "first and paramount consideration". The earliest legislative recording of the term "*best interest*" principle could be seen in the state of Victoria's child welfare legislation in Social Welfare Act 1960.[48] Silverstein explains the early adoption of the *best interest of the child* principle was possibly influenced by the Declaration on the Rights of the Child 1959.[49]

The Matrimonial Causes Act 1959 (Cth) was enacted to move from an amalgamation of state family law legislations to a coordinated, unified federal legislation.[50] The legislative enactment of Matrimonial Causes Act resulted in an early federal legal recognition of the *best interest of the child* principle in Australia. Under the Matrimonial Causes Act, regulating custody arrangement after the dissolution of marriage, the judiciary has to regard the interest of the children as the paramount consideration.[51] Selby, J emphasise that the provisions of the Matrimonial Causes Act, obligated the judiciary to safeguard the welfare of children.[52]

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45 Ibid s 107; *Children and Young People Act 2008* (ACT); *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Care and Protection of Children Act 2007* (NT); *Child Protection Act 1999* (Qld); *Children's Protection Act 1993* (SA); *Children, Young Persons and Their Families Act 1997* (Tas); *Children, Youth and Families Act 2005* (Vic); *Children and Community Services Act 2004* (WA).

46 Kyllie Cripps, 'Indigenous Children's "Best Interests" at the Crossroads: Citizenship Rights, Indigenous Mothers and Child Protection Authorities' (2012) 5(2) *International Journal of Critical Indigenous Studies* 25.

47 Australian state legislations included *Judicature Act 1876* (Qld) s 5(10); *Supreme Court Act 1928* (Vic) s 62; *Supreme Court Civil Procedure Act 1932* (Tas) s 11(8); *Supreme Court Act 1935* (WA) s 25(11).

48 Jordana Silvestein '"Best Interest of the Child", Australian Refugee Policy, and the (Im)possibilities of International Solidarity' (2021) 22(4) *Human Rights Review* 389.

49 Ibid.

50 *Matrimonial Causes Act 1959* (Cth) ('*Matrimonial Causes Act');* Margaret Harrison, 'To Have but Not To Hold: A History of Attitudes to Marriage and Divorce in Australia 1858–1975 by Henry Finlay (The Federation Press, 2005)'(2006) 30(2) *Melbourne University Law Review* 600.

51 *Matrimonial Causes Act*, (n 50) s 12(b)(i), s 71, s 85(1)(a).

52 David Mayer Selby, 'The Development of Divorce Law in Australia'(1966) 29(5) *The Modern Law Review* 491.

In 1975, the Matrimonial Causes Act was replaced with the Family Law Act 1975(Cth).[53] The Family Law Act started with custody proceedings relating to "children of a marriage". Over the years, the Family Law Act has been expanded and amended to protect children in Australia from violence and abuse.[54] At the inception of the Family Law Act, the term "*welfare*" was utilised in lieu of the *best interest of the child*.[55] The Family Law Act today is the main federal legislation with regards to the care and welfare of children in Australia.

Australia was one of the earliest states to ratify the CRC in December of 1990.[56] Whilst, there is no specific commonwealth legislation incorporating the CRC, all Australian child protection legislations is meant to be underpinned by the treaty.[57] Since the ratification of the CRC, the *best interest of the child* principle has been incorporated into Australian State and Territories (child protection) legislations.[58] Additionally, the Australian Human Rights and Equal Opportunity Commission Act 1986 provides guidelines on upholding the principles of the CRC as a declared instrument.[59] As a declared instrument, the CRC soon became a source "to resolve ambiguities in domestic primary and subordinate legislation but also to fill up lacunae in common law, particularly in playing a significant role of the Family Law Act 1975".[60]

In 1995, through the Family Law Amendment Act 1995 ("1995 Reforms"), the "welfare principle" was replaced with the "*best interest*" principle.[61] The incorporation of the *best interest of the child* principle into a key child protection legislation aligned Australia with its obligation under the CRC.[62] Not only were terminology but also rights as per the CRC were

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53 *Family Law Act* (n 14).

54 Eithne Mills and Marlene Ebejer, *'Focus Family Law'*(Lexis Nexis Butterworth, 7th ed, 2017) ('Mills').

55 *Family Law Act* (n 14) s 60D, s 64(1)(a).

56 Mills (n 54) 146.

57 Australian Institute of Family Studies, 'Australian Child Protection Legislation' *Australian Government* (Web Page) <https://aifs.gov.au/resources/resource-sheets/australian-child-protection-legislation>.

58 *Children's Services Act 1986* (ACT) s 5; *Children (Care and Protection) Act 1987* (NSW) s 55(a); *Children's Services Act 1965* (Qld) s 52(2); *Child Protection Act 1999* (Qld) s 5A; *Children's Protection Act 1993* (SA) s 4; *Community Welfare Act 1983* (NT) s 9; *Children, Youth and Families Act 2015* (Vic) s 10(1); *Community Services Act 1970* (Vic) s 41.

59 *Australian Human Rights Commission Act 1986* (Cth) pt III sch 3.

60 *Murray v Director Family Services Act* (1993) FLC 92–41, 80, 256 (Nicholson CJ and Fogarty J).

61 *Family Law Act* (n 14) s 65E.

62 Lisa Young, 'B and B- Family Law Reform Act 1995 (Cth) – Relocating the Rights Debate' (1997) 21(2) *Melbourne University Law Review* 722.

incorporated into the Family Law Act.[63] The incorporation of the *best interest of the child* principle was to be utilised to determine "parenting order" (i.e. the allocation of parenting responsibility for a child) under the Family Law Act.[64] For the judiciary to determine the "parenting order", the *best interest of the child* is the paramount consideration for the court.[65] Prior to the 1995 Reforms, there were no list of criteria for the judiciary to refer to determine the *best interest of the child*. Through the 1995 Reforms, a long list of criteria was included, providing the judiciary with legitimate guidelines in determining the *best interest of the child*.[66]

In 2006, the most significant change to family law in Australia occurred through the Family Law Amendment (Shared Parental Responsibility) Act 2006 ("2006 Reforms"). The 2006 Reforms under the Family Law Act brought clarification to the term "*best interest*" principle by providing a hierarchy factors that the judiciary had to consider.[67] The inclusion of hierarchy factors stemmed from the difficulties of relying on value system of the judiciary to determine factors considered in determining "*best interest*" test.[68] Under the 2006 Reforms, there were attempts to provide better guidance to the judiciary by establishing "primary" and "additional" considerations ("legitimate guidelines") to be utilised to interpret the *best interest of the child* principle.[69] The "primary" considerations, include children's benefit from a meaningful relationship with their parents as well as the need to protect children from abuse.[70] Through the inclusion of "additional" considerations, the judiciary, in determining the *best interest of the child*, referred to factors that included the view of the child, family violence, encouraging cooperation between parents and ensuring efficient proceeding.[71] The 2006 Reforms further elevated the "paramount status" of the *best interest of the child*, resulting in a "superior level of protection for children" in Australia.[72]

63 Mills (n 54) 151.
64 *Family Law Act* (n 14) s 64 B(2), s 65D.
65 Ibid s 60CA.
66 Ibid s 68F(2).
67 Renata Alexander, *Australian Master Family Law Guide* (CCH Australia, 10th ed, 2019).
68 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case*) (1992) FLC 92
69 Alexander (n 67).
70 *Family Law Act* (n 14) s 60 CC (2).
71 *Family Law Act* (n 14) s 60 CC (3), 248.
72 Mills (n 54) 157; *Family Law Act* (n 14) ss 60CA, 63BE.

In May 2024, the Family Law Act was further amended through the Family Law Amendment Act 2023 ("2023 Reform").[73] These changes provided prescriptive and mandatory considerations with the aim of providing a simpler list for the judiciary when considering the *best interest of the child*. These reforms came about to provide safer, clearer, and more child-centered outcomes.[74] The "primary" and "additional" considerations have been replaced with "general" considerations. The process to determine the *best interest of the child* was streamlined by the reduction of considerations from the previous twenty-one possible considerations to six-considerations. Today, family courts are required to only keep in mind these six -consideration test, in determining the *best interest of the child*; the safety of the child from family violence, the child's view and need, parental capacity, benefit of the child to have 'meaningful' relationship with both parents and for Aboriginal or Torres Strait Islander children, a standalone provision for parenting arrangement to ensure continued connection with Aboriginal and Torres Strait Islander cultures ("legitimate guidelines").[75] To support the judiciary consideration to determine *best interest of the child,* the judiciary can rely on family reports prepared court child experts.[76] The simplification of considerations not only provided clarity and flexibility to Family Court but ultimately puts children's welfare and best interest in the front and centre.

VI RECOGNITION OF THE *BEST INTEREST OF THE CHILD* PRINCIPLE IN AUSTRALIA – JUDICIAL RECOGNITION

In the 19th century, Australian fathers retained custody of the children automatically after marital breakdown.[77] Fathers had the power to remove children from their mothers and place them in the care of female relative or staff. This then led to the emergence of the "tender years" doctrine. Under the doctrine of "tender years", it was considered in the *best interest* of younger children to remain with their mothers. The doctrine of "tender years" made its way into Australia, and the concept was used to determine cases involving

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73 Attorney-General's Department, 'Children and family law: The Family Law Act 1975 focuses on the rights of children and the responsibilities that each parent has towards their children' *Australian Government* (Web Page) <https://www.ag.gov.au/families-and-marriage/families/children-and-family-law>.

74 Mark Dreyfus 'Landmark Family Law Act reforms come into effect' (Media Release, 6 May 2024) <https://markdreyfus.com/media/media-releases/landmark-family-law-act-reforms-come-into-effect-mark-dreyfus-kc-mp/>.

75 *Family Law Act* (n 14) s 60CC(2).

76 See ibid s 62G. Court child experts can include Panel Family Consultants within Court Children Services, social scientist, psychologist and psychiatrist.

77 Nell Musgrove and Shurlee Swain, 'The 'best interests of the child' Historical perspectives' (2010) 35(2) *Children Australia* 36.

children inheriting estates. In the mid-19th century, the doctrine of "tender years" was used in custody cases involving illegitimate children. The *welfare of the child* was considered, usurping the father's right.[78] The *welfare of the child* however had limited persuasion in cases involving infidelity and adultery.[79] Rather, the judiciary felt that it wasn't in the *best interest of the child* to be placed with adulterous mothers.[80] By the 1950s, the doctrine of "tender years" had a resurgence. Under the doctrine, it was considered that the *welfare* of children, particularly that of young girls, was best served in the care of their mother. [81]

The inception of the Matrimonial Causes Act brought not only statutory recognition of the welfare principle but brought a push forward of a recognition of the *best interest of the children*. In *Oliver v Oliver,* it was determined that the judiciary in its duty in deciding the custody of children had to regard the *interest* of the child as paramount consideration.[82] As such, the judiciary is only to consider the welfare of the children. In *Barnett v Barnett,* in deciding contested custody order, it was determined for the judiciary to reach a conclusion, the overriding consideration would be in the *best interest* of the children.[83] It was further emphasised that the *welfare* of the children in custody arrangement had to prevail over other considerations, including parental rights.[84]

The emergence of the Family Law Act in the 1970s, the judiciary was forced to determine the appropriate testing to determine the *welfare of the child*.[85] At the inception of the Family Law Act, in the case of *Marriage of Horman*, Fogarty J held that the test of the child's *welfare* is determined by "having regard to contemporary social standards and not from the point of view of the standards of the individual parent".[86] In applying the *welfare* principle, the judiciary affirmed that the *welfare of the child* was of the paramount consideration, overriding the notion of justice of other parties including that of the child's parents.[87] Whilst not the sole consideration, the judiciary considered

78 Alfred Abhulimhen-Iyoha, 'Reflections on Custody of a Child in Nigeria and Australia (2021) 2(2) *Law and Social Justice Review* 23.
79 Ibid.
80 Ibid.
81 Ibid.
82 *Oliver v Oliver* (1969) FLR 397, 405; Michael Errington, 'Conduct, Fault and Family Law' by Norman A Katter (Law Book Company, 1987)'(1989) 12(1) *Sydney Law Review* 296.
83 *Barnett v Barnett* (1973) 2 ALR 19.
84 Ibid.
85 *Family Law Act* (n 14) s 60D.
86 *Marriage of Horman* (1976) 5 Fam LR 796.
87 *Marriage of Schenck* (1981) 7 Fam LR 170.

the *welfare of the child* an overriding consideration.[88] As such, in the interpretation of the *welfare* principle, the judiciary had to determine that children's interest will prevail over competing interest over any other person, including parents.[89] The scope of consideration of *welfare of the child* was wide and encompassing, where the judiciary considered factors such as child's happiness to the health and development of the child as well as the long term and as well as in some cases the short term impact on children.[90]

Prior to the 1995 Reforms, there were no clear guidelines that judiciary could refer to in determining the *best interest of the child* principle. The absences of guidelines "created an unexaminable discretion" at the hands of the judiciary.[91] The 1995 Reforms provided the judiciary with "legitimate guidelines" to determine the *best interest of the child* principle. The Full Court of the Family Court in *B and B: Family Law Reform Act 1995* ("*B and B"*) provided clarification of the 1995 reforms. *B and B*, separated parents, who were originally based in Cairns, had first obtained a consent order, where the mother had sole custody.[92] The mother, B, subsequently wanted to move to Bendigo, northwest Melbourne, with the children. The issue before the court was whether to grant the mother, B, the application to vary the existing access order to permit her to relocate from Cairns to Bendigo. In view of the significance of the decision, which was to come after the 1995 Reforms, the Human Rights and Equal Opportunity Commission intervened. The Full Court in *B and B* reaffirmed that the *best interest of the child* was the overriding consideration in parenting dispute cases when the judiciary enforces children's right.[93] Here, the Full Court affirmed that the *best interest of the child* was the "essential premise" of the Family Law Act and "remains the final determinant".[94] To determine the *best interest of the child*, the judiciary are guided by criteria set out under the Family Law Act.[95] The weight of each factor then would have to be determined by the particular facts of each case, in order to serve what was ultimately the best for the child. [96]

The Full Court in *B and B*, in its decision explained that the changes to

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88 *Marriage of Kress* (1976) 2 Fam LR 11.

89 Richard Chisholm, 'The Paramount Consideration' (Conference Paper, National Family Law Conference, March 2002) 7.

90 Ibid; Long term impact: *Brown v Brown* (1979) 6 Fam LR 352; Short term impact: *Marriage of Raby* (1976) 27 Fam LR 412.

91 *Secretary, Department of Health and Community Services v JWB and SMB* [1992] 175 CLR 218 ('*Marion's Case*').

92 *B and B: Family Law Reform Act 1995 (1997) 21 Fam LR 676* ('*B v B'*).

93 Young (n 62) 727.

94 *B v B* (n 92) 733–4; Eithne Mills and Marlene Ebejer, *Focus Family Law,* (Lexis Nexis Butterworth, 7th ed, 2017).

95 *Family Law Act* (n 14) s 60B(2), s 68F(2).

96 *B v B* (n 92) 730; *Marriage of R* (1998) 23 FLR 456.

the Family Law Act to introduce the concept of parental responsibility were aligned with the CRC.[97] The Full Court in *B and B* also reiterated that while the CRC has not been incorporated into domestic law in Australia, the CRC was of assistance in the interpretation of the Family Law Act. The judiciary had to be mindful of the Australia's obligation under the CRC and as such had to take the CRC into account in the development of common law and giving effect to the treaty. The Full Court referred to Australia's continuous inclusion of earlier children's rights treaties to affirm the incorporation of the CRC to protect Australian children.[98] This affirmed the earlier decision of *Minister of State for Immigration and Ethnic Affairs v Teoh,* which affirmed that Australia's ratification of the CRC created a legitimate expectation that Australia would make the decisions wherein the *best interest of the child* was the primary consideration.[99]

The decision of *Goode v Goode* was the first comprehensive decision after the 2006 Reforms.[100] After separation, the father sought an order for equal shared care arrangement where else the mother had sought an order that their children should be with her most of the time. In *Goode v Goode,* the Full Court of the Family Court in addressing the changes of the 2006 Reforms, affirmed that "the child's best ascertained by a consideration of objects and principles in s 60B and the primary and additional consideration in s 60CC."[101] The 2006 Reforms also brought the rebuttal presumption that it was in the *best interest of children* for parents to have "equal shared responsibility" for them.[102] The Full Court in *Goode v Goode*, affirmed the necessity of complying with the requirement of equal shared parental responsibility presumption, displacing the earlier decision of *Cowling v Cowling*, where the *best interest of children* were served by maintaining existing parenting arrangements.[103] The Full Court in *Goode v Goode*, however did explained that "even if the presumption did not apply, the Court in determining what is in the *best interest of the child*, the arrangement that will promote the child's best interest."[104] This rebuttal presumption applies unless there is reasonable grounds to believe a parent is abusing the child or there is family violence.[105] Rather as Watt J in *Pavli v*

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97 *Family Law Act* (n 14) s 61C:
'Parental responsibility', both parents are joint holders of this 'responsibility for the child's care, welfare and development' until such time a parenting order is to the contrary is made'.

98 See *B v B*, where the court (Nicholson CJ, Fogarty J and Lindenmayer JJ) stated in relation to the UN Convention [741]–[742].

99 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, 373.

100 *Family Law Act* (n 14) s 61DA.

101 *Goode v Goode* [2006] FamCA 1346 (*'Goode'*).

102 *Family Law Act* (n 14) s 61DA.

103 *Cowling v Cowling* (1998) FLC 92,108.

104 *Goode* (n 101).

105 *Champness v Hanson* [2009] FamCAFC 96.

Beffa explained, that the phrased "equal shared parental responsibility" referred to the joint responsibility for all major long term issues.[106] The Full Court of the Family Court subsequently in *Dundas & Blake* have affirmed that unless there is evidence to satisfy the court that it is not in the *best interest of the child* for the presumption to apply, there must be explicit and cogent reasons why the presumption should be rebutted.[107]

The factors that the judiciary had to determine *best interest of the child* principle were under two categories- (1) Primary Consideration';[108] (2) 'Additional Consideration',[109] which provided a prescriptive process. However, there is no hierarchy in interpreting the factors to determine the *best interest of the child*. In *Aldridge & Keaton*, the Family Court determined that there is no priority in any of the considerations.[110] Further, the Family Court in *Slater & Light* decided that the judiciary does not have to take into consideration factors under any order.[111] Despite the long list of considerations, the priority of judiciary is in ensuring that children are protected from harm. Ultimately, the judiciary in Australia must regard the *best interest of the child* as paramount consideration in issues involving children.[112]

VII THE *BEST INTEREST OF CHILD PRINCIPLE* IN MALAYSIA – LEGISLATIVE RECOGNITION

In Malaysia, both child protection and key family law legislations are legislated by the Federal Parliament. The main child protection legislation, Child Act was enacted pursuant to Malaysia's ratification of the CRC on the 17th of February 1995.[113] The enactment of the Child Act is meant to fulfill Malaysia's obligation under the CRC. Today, the Child Act is the main source of reference for the protection of children. There are multiple parts to the Child Act, each part is to be read separately and disjunctively. The general provisions for the application of *best interest of the child* principle, however, are not provided within any of the 135 sections of the Child Act. In fact, none of the four cornerstones of the CRC are specifically categorised under the Child Act. Rather the *best interest of the child* principle is mentioned to be applied in very

106 *Pavli v Beffa* [2013] FamCA 144 [25].
107 *Dundas v Blake* [2013] FamCAFC 133.
108 *Family Law Act* (n 14) s 60CC(2):
'(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'.
109 *Family Law Act* (n 14) s 60CC(3).
110 *Aldridge v Keaton* [2009] FamCAFC 229.
111 *Slater v Light* [2011]FamCAFC.
112 *Banks v Banks* [2015] FamCAFC 36 [23].
113 UNICEF Malaysia (n 4).

specific circumstances.[114] The lack of specific recognition of the application of the *best interest of the child* principle to be considered by the State and other actors, has meant there is no universal application of the principle.[115] This has resulted in a lack of mandate on the executive, legislative as well as the judiciary to consider the *best interest of the child* principle in any matter involving children.

The provisions under the Child Act also do not provide that all decisions in reference to the protection of children by public or private bodies must be made pursuant to the *best interest of the child* as provided under the CRC. Instead as mentioned earlier, the *best interest of the child* principle is applied as mentioned above in very specific circumstances, particularly that involving the roles of the Court of Children or court assigned "Protector" as well Director General of Social Welfare.[116] The Court of Children in particular is required to consider the *best interest of the child* as paramount consideration, if a child brought to the court needs care, protection, particularly to be rehabilitated and reintegrated into society.[117] If a child is arrested and brought before the Court of Children, the court is required to consider the *best interest of the child* to protect the child from associating with undesirable persons.[118] Another key distinguishing factor, the *best interest of the child* principle must be the *paramount consideration* unlike under the requirement under the CRC wherein the *best interest of the child* shall be the *primary consideration*.[119]

Traditionally, the *best interest of the child* principle has been utilised in family law matters, ensuring the physical and psychological protection of children.[120] Malaysia is a dualist state in terms of family law (i.e. custody and children's right to maintenance after divorce). There is a separate legal framework for Muslim and non-Muslim children. For Muslim children, the Islamic Family Law (Federal Territories) Act 1984 ("IFL") and equivalent state enactments govern family law. The *best interest of the child* principle is recognised under *Sharia* law.[121] Salahudin Hidayat Shariff in his research has

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114 *Child* Act (n 4) ss 13(aa), 18(a), 30(5), (6)(a), 35(3), 37(5), 40(5), (12)(aa), 42(7)(a)(b), 80, 84(3), 89, 90(13)(a).

115 Salahudin Dato' Hidayat Shariff, 'The Best Interest of the Child Principle in England and Malaysia' [2021] (January) *Journal of the Malaysian Judiciary* 178.

116 *Child Act* (n 4) ss 18(a), 30(5), 35(3), 37 (5), 40(12)(aa), 80, 84(3), 89, 90(13)(a).

117 Ibid s 90 (13)(a), 30 (5); *Pendakwa Raya v Chong Waijun* (Unreported, Magistrates' Court of Ipoh, Anis Hanini Abdullah M, 12 February 2025) [9].

118 *Child Act* (n 4) s 84 (3)(b); *Muhammad Ibrahim Md Yusof dan lain-lain lwn Pendakwa Raya* (Unreported, Suriyati Hasimah Mohd Hashim PK, 1 December 2024).

119 *Child Act* (n 4) s 30(5).

120 Goldstein (n 6); Hammarberg (n 25).

121 Akbar Kamarudin @ Abdul Shukor, 'Shari'ah Court's Decision and Respondent's View on Child Custody After Divorce in Kuala Lumpur and Selangor' (2022) 7(2) *Journal of Contemporary Islamic Law* 54, 55.

indicated that *Sharia* Law and the *best interest of the child* principle as per the CRC are compatible.[122] However, the term *welfare of the child* principle is utilised under the IFL to determine the custody placement of child.[123] In determining the welfare of the child, the *Sharia* Court has to consider among others the wishes of the parent of the child, the wishes of an age appropriate child, the rebuttable presumption that it is for the good of a child during infancy to be with the mother as well as to consider the welfare of each siblings independently.[124]

For non-Muslim children, the LRA and GIA are the key federal legislations overseeing family law. Additionally, for Sabah and Sarawak, the Guardianship of Infants Ordinance of Sabah ("GIO Sabah")[125] and the Guardianship of Infants Ordinance of Sarawak ("GIO Sarawak")[126] apply to non- Muslim children in Sabah and Sarawak respectively. The LRA was drafted pursuant to the suggestion by the Royal Commission on Non- Muslim Marriages and Divorce Laws 1971 for a unilateral law for non-Muslims in Malaysia.[127] The LRA replaced the multiple Acts governing customary laws and civil marriages for non- Muslims including the Civil Marriages Ordinance 1952, the Christian Marriage Ordinance 1956 and the Sarawak Chinese Marriage Ordinance 1948.[128] The GIA was initially enacted in 1961 as an Ordinance (No. 13/1961). Both the GIA and the GIO Sabah were modelled after the English Guardianship of Infants Act 1886, while the GIO Sarawak were modelled after the more recent English Guardianship of Infants Act 1925.[129]

Similar to the IFL, none of the non- Muslim family law federal legislations and state ordinance have incorporated the *best interest of the child* principle. Likewise, the term *welfare of the child (infant)* is also utilised. Under

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122 Salahudin Hidayat Shariff, 'The Application of the Best Interests of the Child Principle as a Criterion for Fulfilling Malaysia's Convention on the Rights of the Child Obligations: A Comparative Study Between Malaysia's Child Act 2001 and the English Children's Act 1989 Including the Common Law and Shari'ah Law Applications in the Respective Jurisdictions'(PhD Thesis, University of Kent, 2018) 219.

123 I*slamic Family Law (Federal Territories) Act 1984* (Malaysia) s 86(2) ('*IFL'*).

124 Ibid s 86(2)–(4).

125 *Guardianship of Infant Ordinance (Sabah Cap 54)* (Malaysia) ('*GIO Sabah'*).

126 *Guardianship of Infant Ordinance (Sarawak Cap 93)* (Malaysia) (*'GIO Sarawak'*).

127 Sridevi Thambapillay, 'The 2017 Amendments to the Law Reform (Marriage and Divorce) Act 1976: A Milestone or a Stone's Throw in the Development of Malaysia Family Law?' (2020) 28(2) *IIUM Law Journal*, 449, 452.

128 Siti Marshita Mahyut, 'The Rationality of Law Reform (Marriage and Divorce) Act 1976 to the Sensitivity of the Multi-Religious Community in Malaysia', (2016) 2(2) *Journal of Asian and African Social Science and Humanities* 123,124.

129 Yong Chiu Mei, 'The Aftermath of Susie Teoh – Are Parental Rights Supreme?'[1991] *Jurnal Undang- Undang* 130.

the LRA and GIA, GIO Sabah and GIO Sarawak, the *welfare of the child* is a paramount consideration in deciding the custody and care of children.[130] In determining the *welfare of the child*, the courts shall take into consideration the wishes of the parents,[131] the wishes of the child, if the child is of an age to express an independent opinion,[132] and the rebuttable presumption that a child under the age of seven should be placed with the mother.[133] If there is a dispute between the joint guardians, the court will determine custody and rights of access to parents based on the *welfare of the child*.[134] Additionally, the courts will refer to the *welfare of the child* to determine the power and authority of guardians over the property of children.[135] If it is reasonable and relevant, the judiciary shall consider the report of the Welfare Officer or persons who are trained or experienced with child welfare.[136] At the forefront in deciding custody of the child, the courts are mandated to consider the *welfare of the child.*[137]

As former British colonies, the utilisation of the *welfare of the child* under the LRA, GIA, GIO (Sabah) and GIO (Sarawak) is similar to the incorporation of the term under the Matrimonial Causes Act and the initial enactment of the Family Law Act. However, unlike the amendments made under the Family Law Act in keeping with Australia's obligation under the CRC, Malaysia has yet to amend the IFL, LRA or GIA to incorporate the *best interest of the child* principle pursuant to its obligations under the CRC. Further, there is no clear legitimate guidelines to determine the *welfare of the child* principle under the LRA nor GIA. As such, there is no guidance on the interpretation of the *welfare of the child* principle and seen later in the article, the judiciary is forced to determine the "relevant factors" to be considered to determine the *welfare of the child*. The lack of universal incorporation of the *best interest of the child* principle within the Child Act, LRA, GIA, GIO Sabah and GIO Sarawak as well the domestication of this treaty principle has potentially restricted the Malaysian judiciary in applying the principle.

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130 *LRA* (n 7) s 88(2); *Guardianship of Infants Act 1961* (Malaysia) s 11(2) (*'GIA'*); *GIO Sabah* (n 125) *s* 7(3)(a).

131 *LRA* (n 7) s 88(2)(a).

132 *LRA* (n 7) s 88(2)(b).

133 *LRA* (n 7) s 88(3).

134 *GIA* (n 130) s 19A(2)(a); *GIO Sabah* (n 125) s 19A(1)–(2)(a).

135 *GIA* (n 130) s 9; *GIO Sabah* (n 125)) s 9.

136 See *LRA* (n 7) s 100: Persons trained and experience in child welfare include psychiatrist, psychologist, family therapist, social welfare officers and child counsellors.

137 *Nah v Nah* [2024] 11 MLJ 1 [31] (*'Nah'*).

VIII THE *BEST INTEREST OF THE CHILD* PRINCIPLE IN MALAYSIA- JUDICIAL RECOGNITION

Prior to the inception of the Child Act or Malaysia's ratification of the CRC, the *best interest of the child* principle, while limited, has been utilised by the judiciary, mainly involving family law disputes. In early family law cases, like Australia, the term *welfare of the child* or *welfare* principle was commonly utilised. This was in line with provisions of the GIA. Most cases were guided by the English case of *In Re McGrath (Infants)*, where his Lordships Lindly LJ, emphasised that the main factor for the court to consider was the welfare of the child. The *welfare of the child* had to be considered in the widest sense, to include to not only monetary or physical comfort but also moral, religious as physical well-being.[138] One of the earliest cases involved the controversial custody dispute in *In Re Maria Huberdina Hertogh; Adrianus Petrus Hertogh and Anor v Amina Binte Mohamed and Ors.*[139] The court determine custody of a child based on *welfare of the infant* in line with s 11 of the than Guardianship of Infants Ordinance. In the later decision of *Kok Su- Win v Foo Lum Choon,* the judiciary determined custody on "the paramount consideration as to the *welfare of the children's"*. [140] Here, *welfare* referred to not only their "comfort and health but also their moral, intellectual and spiritual welfare."[141]

The Federal Court decision of *Mahabir Prasad v Mahabir Prasad,*[142] determined that in custody disputes, that the *welfare of the child* is the first and paramount consideration and other considerations must be subordinate. It was explained that as per Lord MacDermott in *J & Anor v C & Ors* [1970] AC 668 710-711, the "first consideration because of first importance and the paramount consideration because it rules upon or determines the course to be followed."[143] Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was), explained that the phrase "first and paramount" does not mean that the court should view children's *welfare* as first on the list of factors to be considered but rather it must be the overriding consideration. Determining the *welfare of the child* is a process. Here, the judiciary had to not only consider the wishes but also the conduct of the parents, the age and wishes of the child as well as reports from the welfare officers. The general well-being of the child supersedes the desire of the parent to have custody of the child. Ultimately, in determining and promoting the welfare of the child, the judiciary must consider what will be in

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138 *In Re McGrath (Infants)* (1893) 1 Ch 143, 148 (Lindley LJ).

139 *In Re Maria Huberdina Hertogh; Adrianus Petrus Hertogh and Anor v Amina Binte Mohamed and Ors* [1951] 1 MLJ 12.

140 *Kok Su-Mun v Foo Lum Choon* [1958] 4 MC 27.

141 Ibid.

142 *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189 ('*Mahabir Prasad'*).

143 Ibid.

the *best interest of the child*.[144]

The Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors,*[145] had provided an expansive view of the principle of the *welfare of the child*. The Federal Court adopted Chan Sek Keong JC (as his Lordship then was) explanation in the Singapore case of *Tan Siew Kee v. Chua Ah Boey* [1988] 3 MLJ 20 that the *welfare* is to be interpreted in its widest sense. As such, *welfare of the child* means the general well-being of the child and all aspects of his upbringing – religious, moral as well as physical. The child's well-being includes happiness, comfort and security. Further, His Lordship, James Foong FCJ, (as his Lordship then was) was of the opinion that the principle of the *welfare of the child* is determined based on a set of factors. Guided by the English Children Act 1989, His Lordship explained that these factors include the wishes and feelings of the child, the child's age, gender background as well as the capabilities of the parents.[146]The judiciary has to not only consider these set of factors but also determine the priorities in affirming custody of a child.[147] The courts are tasked with methodically examining the principle of the *welfare of the child* in the widest context but also have to reflect and weigh up all relevant factors.[148] The *welfare of the child* as a principle serves as her Ladyship, Evrol Moriette Peters J (as her Ladyship then was) explained as the "golden thread" that is interwoven through all proceedings, influencing the interest of the child. [149]

In a more recent superior court decision, the Federal Court in *Viran a/l Nagapan v. Deepa a/p Subramaniam and other appeals,* accord the *welfare of a child* under the LRA as of paramount importance, it was necessary to take into account such matters as the conduct of the parties, their financial and social status, the sex and age of the child, his/her wishes as far as they could be ascertained depending on the age of the child, the confidential reports of a social welfare officer and whether in the long run, it would be in the greater interest, welfare and happiness of the child to be with one parent rather than the other.[150] Today, the scope of welfare of the child is wide. In addition to the factors as determined in the Federal Court decisions of *Sean O'Casey Patterson and Viran a/l Nagapan,* other factors to be considered under the *welfare of the child* by the judiciary include religion and customs of the

144 *Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326

145 *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137.

146 Ibid [53].

147 Ibid.

148 *Nah* (n 137).

149 *MIL v MON* (Unreported, High Court of Kuala Lumpur, Evrol Mariette Peters J, 28 February 2024) [35].

150 *Viran a/l Nagapan v Deepa a/p Subramaniam* [2016] 3 CLJ 505 [33], [35], [37].

parents,[151] the racial and cultural background of the families involved, the conduct of the parties in seeking custody,[152] the medical and health condition of the child[153] as well as maintaining the status quo of the child.[154]

The lack of legal recognition of the *best interest of the child* principle within LRA and GIA didn't deter the judiciary from considering the principle. There were decisions where the judiciary equated *welfare of the child* to what was in the child's *interest* or *best interest.*[155] In *Yong May Inn v Sia Kuan Seng,* the term *welfare* required the judiciary to take into consideration "circumstances a wise parent acted in the true interest of the child".[156] In many cases, the term was used interchangeably, particularly in older cases.[157] Here, the judiciary will start by considering the *welfare of the child* but will come to the conclusion that the custody is in the *best interest of the child*.[158] At a later stage, the judiciary determined custody based on both the *welfare* and *best interest of the child* should be the paramount consideration.[159] This was a term that was utilised in the Singapore case of *Tan Siew Kee*, which was referred to by the Federal Court in *Sean O'Casey Patterson* as well as the Court of Appeal decision in *Low Swee Siong v Tan Siew Siew & Other Appeals.*[160]

There was also the hybrid term "*best interest of the welfare of the child*" determined in the High Court case of *Khoo Cheng Nee v Lubin Chiew Pau Sing,*[161] by His Lordship, Abdul Wahab Patail JC (as his Lordship then was). Despite the lack of legal recognition for the *best interest of the child* principle within the LRA, His Lordship provided an extensive list of factors to determine the best interest of the child. This term '*best interest of the welfare of the child'* as well factors considered has been utilised in many subsequent

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151 *Dorothy Yee Yeng Nam v Lee Fah Kooi* [1956] MLJ 25 (Thomson J); *Re Satpal Singh (An Infant*) [1958] MLJ 283 (Buttrose J); *Re KO (An Infant)* [1990] 1 MLJ 494.

152 *Arumugam s/o Seenivasagam v Sinnamah* [1959] MLJ 130.

153 *Thanaletchimy a/p Batamallai v Vijaya Kumar a/l Kassinathan* [2018] 4 MLJ 557.

154 *MIL v MON* [2024] 12 MLJ 843, [47].

155 *Marina Nahulandran v Appiah Nahulandran* [1976] 1 MLJ 137; *Kok Yoong Heong v Choong Thean Sang* [1976] 1 MLJ 292; *Ngang Nguk Moi v Chen Ai Choo* (Unreported, Malaysian Court of Appeal, Suriyadi Halim Omar JCA, Heliliah Mohd Yusof JCA and Wan Adnan Muhamad JCA, 12 June 2008).

156 *Yong May Inn v Sia Kuan Seng* [1971] 1 MLJ 280 (*'Yong May Inn'*).

157 *Kok Su-Mun v Foo Lum Choon* [1958] 4 MC 27.

158 *Yong May Inn* (n 156); *Re Vasandah (An Infant)* [1958] 3 MC 231.

159 *Low Swee Siong v Tan Siew Siew* (Unreported, Malaysian High Court, Yeoh Wee Siam JC, 1 October 2010); *Ong Kean Leong v Tan Siew Hwa and Lim Toh Seng* (Unreported, Malaysian High Court, Yeoh Wee Siam JC, 15 October 2010); *Por Boon Lan v Hong Sie Kit* [2010] (Unreported, Malaysian High Court, Yeoh Wee Siam JC, 27 October 2010); *Ling Sui Ching v Chen Kui* Siang (Unreported, Malaysian High Court, Aliza Sulaiman JC, 23 August 2018).

160 *Low Swee Siong V Tan Siew Siew* [2013] 5 CLJ 461.

161 *Khoo Cheng Nee v Lubin Chiew Pau Sing* [1996] 4 MLJ 171.

family law decisions.[162] In a more recent decision, the High Court in *Ng Li Mian v Chong Hou Choong,* considered the *welfare of the child* and *child's best interest* disjunctively, separate factors in determining custody of a child.[163] However, while the court started out by separating both principles, the final outcome of the High Court was determining custody of the child was based on the *best interest of the child.*[164]

The lack of adoption of the *best interest of the child* principle as per CRC under the Child Act, didn't dissuade the early application of the principle by the judiciary in cases involving the protection of children. However, the early reference of *best interest of the child* principle were mainly considered in non- Muslim family law matters, where there was an issue of paternity and custody of children. This could be seen in the Court of Appeal decision of *Sean O' Casey Paterson v Chan Hoong & Ors*, where the *best interest of the child* principle was applied to determine the custody of the child in the matter.[165]

The lack of general provision of the principle within any federal legislation, forced the judiciary to refer to the CRC directly. One of the earliest cases, the High Court decision of *Lai Meng v Toh Chew Lian* ,where the presiding judge was of the view that Articles 3 (1) (as well as Article 9) of the CRC which Malaysia had ratified which refers to the *best interest of a child* was applicable in determining the access to illegitimate children.[166] Her Ladyship, Datin Yeoh Wee Siam J (as her Ladyship then was) stated that the *best interest of the child* principle as per the CRC should be considered as this was consistent with the *welfare of the child* principle. In *Lai Meng*, the presiding judge was of the view, considering the circumstances of the case that it wasn't in the *best interest of the child* to be accessed by the father.[167] Persuaded by the judicial pronouncement in *Lai Meng*, the High Court in *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik*, took a similar approach in deciding that it was in the *best interest of the child* pursuant to Article 3 (1) CRC, that the child's biological father could be compelled to undergo a DNA test to determine the paternity of the child.[168] In the subsequent High Court case of *Heng Choon Lee & Anor v*

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162 *Daniel Paul Guerrard v Lori Ann-Marie Guerrard* [2025] (Unreported, Malaysian High Court, Azizan Md Arshad, 23 June 2025).

163 *Ng Li Mian v Chong Hou Choong* (Unreported, Malaysian High Court, Awg Armadajaya Awg Mahmud JC, 24 March 2022) [36] ('*Ng Li Mian'*).

164 Ibid [50].

165 *Sean O ' Casey Patterson v Chan Hoong Poh* [2010] 3 MLJ 733, [21].

166 *Lai Meng v Toh Chew Lian* [2012] 8 MLJ 180.

167 Ibid [90].

168 *Lee Lai Ching (as the next friend of Lim Chee Zheng and on behalf of herself) v Lim Hooi Teik* [2013] 4 MLJ 272, [34].

Wong Choon Ho,[169] the High Court wasn't easily persuaded by the High Court decision in *Lee Lai Ching* that it would be in the *best interest of the child* to determine the paternity of the child. His Lordship, Mohd Radzi JC (as his Lordship then was) was of the view that the tender age of the child, the child would not comprehend purpose and consequence of determining the paternity, ultimately not serving the *best interest of the child*.[170]

The principle as per the CRC was brought to the attention of the superior courts at the Court of Appeal hearing of *Low Swee Siong v Tan Siew Siew and other appeals* by the counsel for Human Rights Commission of Malaysia ("SUHAKAM") who was invited to address the court.[171] The Human Rights Commission counsel brought to the attention of the Court of Appeal, the importance of adhering to Article 3 (1) (as well as Article 12) of the CRC, which postulates that principle of *best interest of the child* in custody cases, in particular where it has been established that due weight must be given in accordance with the age and maturity as a child is capable of forming their own views [172] Whilst, the Court of Appeal didn't adopt the *best interest of the child* principle as per Article 3(1) of the CRC in its judgement, the Court of Appeal did refer to the *best interest of the child* principle in determining outcome of the case.[173] Since then, there has been a move by the judiciary to refer to *best interest of the child* rather than *welfare of the child* in determining custody of children.[174] In the High Court case of *Chan Eng Lim v Camille Yap & Other cases,*[175] the judiciary affirmed that the principles within the LRA could be utilised to determine the *best interest of the child*. In *Gong v Hong*, Her Ladyship, Evrol Mariette Peters J (as her Ladyship then was), averred that the role of the family court was to make decisions that serve the *best interest of the child*.[176] This shift isn't necessarily an adoption of *best interest of the child* principle but rather shift in terminology. This as the judiciary continues to utilise the same set of factors in terms of determining the custody and guardianship of the child. Further, the term *welfare of the child* has not been

169 *Heng Choon Lee v Wong Choon Ho* [2020] 7 MLJ 387.

170 Ibid [38].

171 *Low Swee Siong v Tan Siew Siew* [2013] 3 MLJ 247.

172 *Hoong Wai Kit (L) v The Toong Joo (P)* (Unreported, Malaysian High Court, Hayatul Akmal Abdul Aziz J, 16 December 2019) [13].

173 *Low Swee Siong* (n 171) [63]–[67].

174 *Ooi Mei Chein @ Wei Mei Chein v Micheal Tan Cheng Hai* [2014] 9 MLJ 449; *Loh Poh Yee (P) v Ang Hua Keong* (Unreported, Malaysian High Court, Choo Kah Sing J, 10 October 2018); *Joy v Gia* (Unreported, Malaysian High Court, Evrol Mariette Peters J, 16 March 2025); *Boo v Yoo* (Unreported, Malaysian High Court, Evrol Mariette Peters J, 31 January 2025).

175 *Chan Eng Lim v. Camille Yap* [2013] 1 LNS 861.

176 *Gong v Hong* (Unreported, Malaysian High Court, Evrol Mariette Peters J, 24 November 2024) [98].

amended from either the LRA or GIA.

The Malaysian superior courts had an opportunity to affirm the adoption of the *best interest of the child* principle as per the CRC into Malaysian common law in the decision of *CAS v MPPL & Anor ("CAS 1").*[177] The Court of Appeal acknowledged that international treaties and convention were not directly applicable to domestic laws until and unless incorporated into domestic law. However, the Court of Appeal was persuaded by the decision in *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors,* and chose to apply the principles of the CRC. In *Noorfadilla*, their Lordships believed when common law is ambiguous, the judiciary could favour the construction which accords with Malaysia's obligation under international treaty or international convention. [178] In *CAS 1,* both Article 3 (1) (as well as Article 7) of the CRC were pleaded as grounds that it was in the *best interest of the child* to have a right to know who were their biological parent.[179] The Court of Appeal choose to err in the side of caution and only apply Article 3 (1) of the CRC, respecting Malaysian government's reservation of Article 7. As such, it was cited that it was in the *best interest of the child* pursuant to Article 3 (1) CRC to know their biological parent and that policy reasoning of s112 of Evidence Act 1950 in not wanting to out illegitimate children could no longer be the sole judicial philosophy.[180] It has to be noted that in 2024, the Federal Court in *MPPL & Anor v CAS* held that it was not in the *best interest of the child* for the court to order a DNA test to determine paternity.[181] The Court of Appeal decision of *CAS 1* did however influence the High Court decision of *JKL v ABC & Anor*.[182] The High Court was of the view that the *best interest of the child* was the cornerstone in determining DNA testing in paternity cases.[183] The *best interest of the child* principle under the CRC provided for a test that is child-centric and responses to the needs of children.[184]

Aside from paternity cases, the *best interest of the child* principle under Article 3(1) of the CRC, have also been pleaded in cases involving the registration of name of a child. In the High Court case of *Mohd Shafiee Bin Arshad & Anor v District Officer Sibu,* the applicant sought to removal of 'Bin

177 *CAS v MPPL & Anor* [2019] 4 MLJ 243.

178 See *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun* [2012] 1 MLJ 832, [29] citing Mason CJ of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, 363 (*'Noorfadilla'*).

179 See *CRC* (n 1) art (7): Refers to provision for nationality and identity of a child.

180 *Noorfadilla* (n 178) [36]–[38].

181 *MPPL v CAS* [2024] 4 MLJ 524.

182 *JKL v ABC* [2023] 11 MLJ 793.

183 Ibid [40].

184 Ibid.

Abdullah' from his child's birth certificate.[185] His Lordship, Christopher Chin Soo Yin JC, reaffirmed the universal application of *best interest of the child* principle. His Lordship, was of the view that as per the *best interest of the child* as under Article 3(1) of the CRC , it was the intention as expressed by the child's parents as they have both the legal and moral responsibility of the child as well as his welfare, emotions, health, education and general upbringing.[186] Further, his Lordship was of the view that all factors considering, the most serious consideration should be the wishes of the parent of the child.[187] In similar circumstances, His Lordship, David Wong CJ, in his dissenting judgment, in *Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, Intervener*), was clear that despite the *partial ratification* of Article 3(1) CRC under the Child Act 2001, the *best interest of the child* applies in the specific context of the right of the child to bear name.[188] His Lordship reiterated that the *best interest of the child* must be the primary concern in all laws, policies and decisions effecting children and any laws that lay serious and unjust repercussions on child's wellbeing and future, does not have the best interest of the child.[189]

Despite the lack of adoption of the *best interest of the child* principle as per Article 3(1) of the CRC by the judiciary in earlier superior court's decision, the superior courts did eventually adopt the application of principle of *best interest of the child* as per Article 3(1) of the CRC in the Federal Court decision of *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara Malaysia & Anor.*[190] Her Ladyship Mary Lim FCJ, reaffirmed that it was in *best interest and welfare of the child,* consonant with the principle of the CRC that Malaysia has acceded and ratified to reflect the accurate information in public records of the child's biological father.[191] This view has since been repeated in the High Court decision of *Halley Francis Dayah v Registrar-General of Births and Deaths, National Registration Department & Anor*.[192] His Lordship, Christopher Chin Soo Yin JC, (as his Lordship then was) bound by the Federal Court decision of *Leow Fook Keong,* affirmed that it was in the *best interest of the child* to correct the public records of birth of the child but also determine the custody of the child.[193] In the later decision of *Ow Man Yaw &*

185 *Mohd Shafiee bin Arshad v District Officer Sibu* (Unreported, Malaysian High Court, Christopher Chin Soo Yin JC, 6 April 2021).

186 Ibid [57].

187 Ibid [65].

188 *Negara v A Child (Majlis Agama Islam, Negeri Johor, Interverner)* [2020] 2 MLJ 277, [201] (*'Negara'*).

189 Ibid [204].

190 *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara Malaysia* [2022] 1 MLJ 398.

191 Ibid [68].

192 *Halley Francis Dayah v Registrar-General of Births and Deaths, National Registration Department* [2023] MLJ 1042 ('*Halley Francis'*).

193 *Halley Francis* (n 192) [13].

Ors v Kementerian Dalam Negeri, in determining the citizenship application of an abandon child, the High Court took the opportunity to evaluate the concept of the *best interest of the child*.[194] Here, Her Ladyship, Nurulhuda Nur'Aini Mohamad Nor J, explained that applying the *best interest of the child* principle as per CRC means acknowledging that the protection of the child which includes safeguarding the interest of the child even before birth.[195] These decisions reaffirmed that despite the obstacle of the lack of domestication of the *best interest of the child* principle, the judiciary was determined that the protection of children takes precedence and navigated around these obstacles.

IX THE *BEST INTEREST OF THE CHILD* PRINCIPLE IN AUSTRALIA AND MALAYSIA: A COMPARISON

Australia has a long history of incorporating the *best interest of the child* in determining children's rights. As one of the earliest treaty states to ratify the CRC, Australia didn't waste any time domesticating the *best interest of the child* principle. The *best interest of the child* principle can be found in both state and federal legislation on child protection and family law.[196] Additionally, the CRC is a declared instrument. The principles under the CRC, including the *best interest of the child* principle, can be utilised to resolve ambiguities and fill lacunas in the laws. [197]

Since domesticating the principle, Australia has continuously improved on the application and interpretation of the *best interest of the child* principle. One key aspect has been the adoption of a structured and systematic legitimate guideline to determine the *best interest of the child* principle under the Family Law Act. The legitimate guidelines have been continuously reformed, reflecting the response to multiple inquiries, reviews, and recommendations.[198] Key to the reform has been a shift towards a child-centered legal framework with emphasis on the safety of children. These recent reforms include taking into consideration the cultural connections to Aboriginal and Torres Strait Islander children. Here,

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194 *Ow Man Yaw & Ors v Kementerian Dalam Negeri* (Unreported, Malaysia High Court, Nurulhuda Nur'aini Mohamad Nor J, 14 September).

195 Ibid [8]–[9].

196 *Children's Services Act 1986* (ACT) s 5; *Children (Care and Protection) Act 1987* (NSW) s 55(a); *Children's Services Act 1965 (Qld)* s 52(2); *Child Protection Act 1999 (Qld)* s 5A; *Children's Protection Act 1993 (SA)* s4; *Community Welfare Act 1983* (NT) s 9; *Children, Youth and Families Act 2015* (Vic) s 10(1); *Community Services Act 1970* (Vic) s 41, *Family Law* Act (n 14) s 60CC.

197 *Murray v Director Family Services Act* (1993) FLC 92, 256 (Nicholson CJ and Fogarty J).

198 Mathew Doran, 'Family law overhaul promised, as government drafts new system more inclusive of children and kinship carers' *ABC News* (online, 30 January 2023) <https://www.abc.net.au/news/2023-01-30/family-law-reform-overhaul-proposed/101905666>.

the judiciary considers, among others the lifestyles, culture, traditions as well child- bearing practices of these communities in determining custody of Aboriginal and Torres Strait Islander children.[199] Indigenous cultures emphasises collective caregiving and a deep connection to indigenous land.[200] Malaysia has large indigenous communities, both in Peninsular Malaysia as well as in Sabah and Sarawak. However, neither the LRA nor the GIA, have provisions for the judiciary to consider the cultural connections of these communities in determining custody and guardianship.

Despite ratifying the CRC, the LRA and GIA have not been updated to provide for the *best interest of the child* in determining custody and guardianship. Rather, the judiciary is obligated to consider the *welfare of the child.* As there are no clear legitimate guidelines, there is reliance on the value system of the judiciary to determine the factors in the *welfare of the child*. These different factors complicate judicial decision-making. Similarly, it is confusing for families that come before the family court to determine custody and guardianship. To further complicate matters, the judiciary refers to different terms from 'interest', 'best interest', 'best interest of the welfare of the child', and even the non-adopted *best interest of the child* principle in determining custody and guardianship of children. The ultimate factor in determining custody and guardianship should be the safety of the child in an already challenging and contentious family environment. A structured and concise set of factors, anchored by the *best interest of the child* principle, protects children.

The Australian decision of *Teoh* highlights a state's obligation upon ratifying the CRC. There is a legitimate expectation that decisions pertaining to protecting children would be made where the *best interest of the child,* is the primary consideration. However, despite ratifying the CRC in 1995, there is no universal incorporation of the *best interest of the child* principle in Malaysia within the Child Act. The lack of domestication of the principle has meant that there is no legal obligation on the executive or the judiciary to consider *the best interest of the child.* This has been a sourced of limitation impacting the protection of Malaysian children. There have also been continuous challenges to the judicial adoption of the principle. The judiciary is forced to refer to the CRC directly in adopting and utilising the principle. Even in circumstances where the *best interest of the child* principle has been judiciously adopted, there are continuous challenges in determining the scope and application of the principle.

The application of the *best interest of the child* principle in Australia and Malaysia, in a comparative setting, is projected in the Table below-

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199 'Aboriginal and Torres Strait Islander families and the Court' *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fcfcoa.gov.au/fl/pubs/atsi-families-court>.

200 Kathleen Bennett, 'Cultural Permanence for Indigenous Children and Youth "Reflection from a Delegated Aboriginal Agency in British Columbia' (2015) 10(1) *First Peoples Child & Family Review* 99, 103.

FEATURES	AUSTRALIA	MALAYSIA
Ratification of the CRC	**Yes** December 1990	**Yes** February 1995
Adoption of *Best Interest of the Child* Principle	**Yes** **Child Protection Laws** **General provisions (Incorporated)** Children's Services Act 1986 (ACT), s 5; Children (Care and Protection) Act 1987 (NSW), s 55(a); Children's Services Act 1965 (Qld), s 52(2); Child Protection Act 1999 (Qld), s 5A; Children's Protection Act 1993 (SA), s4; Community Welfare Act 1983 (NT), s9; Children, Youth and Families Act 2015 (Vic) s10(1); Community Services Act 1970 (Vic) s 41. **Yes** **Family Law** Family Law Act 1975, s 60CA	**Yes** **Child Protection Law** **Specific provisions** Child Act 2001 - , s 18 (a), s 30 (5), s 35 (3), s 30(6)(a) & (13)(aa) and s 37 (5) in Part V , s 40(5), s 40 (12)(aa), s42(7) (a) & (b) in Part VI ; s 80 in Part XI; and s 84 (3), s 89 and s 90 (13) (a) in Part X **No** **Family Law** **The term "welfare of the child" utilised.** Islamic Family Law (Federal Territories) Act 1984 (Act 303), s 86 (2); Law Reform (Marriages and Divorce) Act 1976, s 88(2), Guardianship of Infants Act 1961, s 11 (2), Guardianship of Infants Act 1961. Guardianship of Infant Ordinance (Sabah Cap 54), s 7(3)(a)
Legislative Guidelines/ Statutory Factors	**Yes** Family Law 1975, s 60CC(2) i. the safety of the child from family violence; ii. the child's view and need; iii. parental capacity; iv. benefit of the child to have 'meaningful' relationship with both parents; and v. Aboriginal or Torres Strait Islander children - parenting arrangement to ensure continued connection with Aboriginal and Torres Strait Islander cultures.	**Yes** Islamic Family Law (Federal Territories) Act 1984, s 86 (2) - (4); Law Reforms (Marriage & Divorce) Act 1976, s 88 (2) (a). (b) & (3) i. wishes of the parent of the child; ii. the wishes of an age appropriate child; iii. the rebuttable presumption that it is for the good of a child during infancy (under the age of 7 (Non- Muslim) to be the mother;

		iv. welfare of siblings considered independently.
Judicial Recognition of the Best Interest of the Child Principle	**Yes** *B and B: Family Law Reform Act 1995* (1997) 22 Family Law Report 676	**Yes** *Leow Fook Keong (L) v Pendaftar Besar Bagi Kelahiran dan Kematian, Jabatan Pendaftaran Negara Malaysia & Anor*[2022] 1 MLJ 398
Statutory Incorporation of Cultural/ Religious/ Other Specific Needs	**Yes** i. Cultural consideration for Aboriginal and Torres Strait Islander children; ii. Protection against violence.	**No**

X RECOMMENDATION

The domestication of the *best interest of the child* principle within the LRA and GIA imposes an obligation on the judiciary to consider the *best interest of the child* principle in custody and guardianship. Further, the domestication within these legislations shifts the focus from parental right towards the responsibility of parents towards the children.[201] Replacing the *welfare of the child* principle with the *best interest of the child* principle within the LRA and GIA not only meets Malaysia's international obligation under the CRC but also shifts emphasis from a narrow and paternalist approach to a wide, modern and child-centric approach in determining custody and guardianship.

A key criticism of the *best interest of the child* principle, is that the principle is difficult to classify and challenging to apply.[202] This can lead to a principle that is uncertain, inexhaustive, and indeterminate. To avoid these issues in Malaysia, there needs to be a legitimate guideline that is structured and concise to determine the *best interest of the child* principle within the LRA and GIA. A structured and concise guideline removes the reliance on a subjective, convoluted, and inexhaustible set of factors determined by the judiciary. Two key factors that should be included is consideration for the safety of the child and the cultural connection to indigenous communities. By considering the safety of the child, the judiciary is mandated to protect children from harm as versus to maintain parental relationships. As a country with indigenous communities, consideration for cultural connection to indigenous communities aligns with Malaysia's obligation under the CRC where

201 Clare Decena, 'The History of the Family Law Act & its Amendments', *Family Law Express* (Web Page, 16 May 2014) <http://www.familylawexpress.com.au/family-law-brief/family-law-reform/family-courts-violence-review/the-history-of-the-family-law-act-its-amendments/2431/>.

202 Funderburk (n 37) 229.

indigenous children have the right to be raised within their cultural group and identity.[203]

The Child Act, the main child protection legislation, should be amended to include a general provision that the judiciary and executive should consider the *best interest of the child* principle. The inclusion of the *best interest of the child* principle provides for a child-centered framework for decision-making. This will ensure that children's rights, their well-being and developmental needs are prioritised in all actions and policies as obligated under the CRC. Ultimately, this would lead to a comprehensive child protection system that would react efficiently to the neglect and exploitation of vulnerable children in Malaysia.[204] The embedding of the principle into the Child Act will procedurally guarantee the assessment and determination of the *best interest of the child* principle by the state and other actors.[205] This allows for consistency and uniformity in the application of the principle by the judiciary. Further, this would also guarantee that principle would have to be incorporated into specific legislations and policies protecting children across different domains and legal systems in Malaysia. Ultimately, the Child Act will become a modernised child-centered legal framework. This fulfills Malaysia's international obligation to the CRC but also ensures that the protection of children is non-negotiable.

XI CONCLUSION

As a treaty state of the CRC, Malaysia has an obligation to incorporate the *best interest of the child* principle within key child protection and family law legislations. This, however, has not been followed through as the general provision for the *best interest of the child* principle is missing within the Child Act, LRA, and GIA. The lack of incorporation of the *best interest of the child* principle places a great difficulty and limitation on the state and other actors in determining what is "best" for children in Malaysia. Australia, on the other hand, has taken its responsibility as a signatory to the CRC by incorporating the *best interest of the child* principle, with clear, legitimate guidelines. These steps taken by Australia, particularly in terms of the incorporation of the *best interest of the child*, reflect Australia's understanding that, in view of their

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203 See *CRC* (n 7) art 30:
'In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language'.

204 United Nations High Commissioners for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child* (Guidelines, 2008) 17.

205 *CRC/C* (n 2).

vulnerability, children have the right to special protection. Moving forward, Malaysia must make the necessary changes to incorporate the *best interest of the child* principle in the Child Act, LRA, and GIA, otherwise, as a state, it fails in protecting and upholding the rights of its most vulnerable.

This research has provided insights into the steps that Malaysia can adopt from Australia in effectively incorporating the *best interest of the child* principle in child protection and non-Muslim family law. However, due to time constraints, this research could not include empirical research to determine the judicial, legislative, and executive impact of the *best interest of the child* principle, both here in Malaysia and Australia. Several questions remained unanswered regarding the long-term outcomes of custody and guardianship orders on children made based on the *best interest of the child* principle. There are gaps in the research regarding children's participation in custody and guardianship hearings, the continued safety and stability of children, particularly in ensuring equitable participation in the legal system, especially for children from indigenous backgrounds. There are also gaps in the research on the application of the principle by state officers pursuant to the Child Act.

Malaysia operates under a plural legal system, and there are gaps in the research concerning the adoption of the principle within the *Sharia* and customary legal systems. Addressing these gaps would enhance the understanding and application of the *best interest of the child* principle. Future empirical research should be conducted to determine the impact of the judicial, legislative, and executive incorporation of the *best interest of the child* principle in Malaysia.