Commissioner for Children & Young People

The Joint Select Committee on Australia's Family Law System
Email: familylaw.sen@aph.gov.au

30th January 2020

Joint Select Committee on Australia's Family Law System

As South Australia's Commissioner for Children and Young People, my mandate under the *Children and Young People (Oversight and Advocacy Bodies) Act 2016* is to advocate for the rights, interests and wellbeing of all children and young people in South Australia. My work is underpinned by the rights contained in the Convention on the Rights of the Child (CRC).

Since becoming South Australia's inaugural Commissioner, I have engaged with thousands of children and young people who consistently tell me that they want to have a voice and be listened to when it comes to decisions that affect their lives. This includes children and young people who have touched the family law system who often feel particularly disempowered within this system and lacking a say. Family law decisions can have a very significant impact on the lives and wellbeing of children and young people, with adults making decisions about their lives, including where they will live, which school they go to and other matters.

The Australian Law Reform Commission (ALRC) Review of the Family Law System provided me with the opportunity to carry out focused consultations with children and young people about the family law system. In this submission, I will outline what children told me about this system. This includes the main barriers to participation and support for children and young people as their families navigate the family law system. I will also highlight the need for – and the benefits of – a child-friendly and child-focused system and provide recommendations as to where improvements can be made.

According to the children and young people I talked to, they overwhelmingly wanted to be informed about what was going on in the Family Court process and proceedings, to be allowed the time and space to process their experiences and emotions, and to contribute in the decision-making process. This included having the opportunity to choose the extent to which they participated in Family Court proceedings, even in difficult cases.

Children and young people expressed a desire for their parents and other adults to listen to their point of view throughout the process of separation and beyond. These findings are consistent with a substantial body of family law research in Australia and overseas about the importance of children and young people having an opportunity for their views to be considered in decision-making that affects them.[i] However, the system does not currently allow for this to occur. As the ALRC's 2019 final report highlights, there is "no existing mechanism for children's views to be taken into consideration at a systemic level".[ii] This is reflected in what children and young people reported as their key concerns with and feeling towards the system. As one young person put it:

> "Children are still seen as possessions, even if not legally there is still a social stigma. They have opinions but they are seen as if they are a child that can't have an opinion. They should not be seen that way because they have opinions and emotions which are very real".[iii]

Many reported feelings of confusion and uncertainty about the process, their role and the role of the adults involved. They were concerned about whether they would be able to remain in the same school or home, and did not always feel as though they could talk to a trustworthy adult about these concerns. As a result of a lack of accessible information and of feeling like were not being heard, children and young people felt excluded, isolated and disempowered.

The "best interests of the child": The Family Law Act and the United Nations Convention on the Rights of the Child

It is an inherent right under Article 3 of the Convention on the Rights of the Child that "in all actions concerning children ... the best interests of the child shall be a primary consideration".

Under Section 60CA of *Family Law Act*, the court must regard the "best interests of the child" as the paramount consideration. Further, section 68L of the *Family Law Act*, the court may appoint an Independent Children's Lawyer (ICL) to represent the child's best interests. However, Section 68LA of the *Family Law Act* does not require the ICL to take into consideration the views of the child in forming what is in the

best interest of the child. Rather, the duty of the ICL per Section 68LA(5)(b) is to ensure that any views expressed by the child are "fully put before the court"; how ICLs might obtain the child's views and how this is put before the court is not specified and so this duty may be discharged without the ICL meeting with the child. Recent studies suggest that ICLs themselves often express concerns about their role, particularly in relation to the difficulty of facilitating children's participation.[iv]

Children and young people do not have the opportunity to participate in many parts of the family law process which can effectively result in children's best interests not being acted upon. Children are unable to express their views directly as witnesses in Family Court proceedings. What children and young people think and feel is often diluted through "expert" reports and the determination of what constitutes their "best interests" is predominantly made by the adults in the process. More often than not, the focus on the child can be lost and the needs and demands of parents and other adults take precedence. This is counter to Article 12 of the CRC where all children and young people have the right to express their views "freely in all matters affecting the child" and "in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child either directly or through a representative or an appropriate body".[v] This right to express their views is inherent in understanding what the best interests of the child are and these rights cannot be divided.

Moving beyond the protection-participation dichotomy

Traditionally, it has been argued that children should be protected from being placed "in the middle of" the conflict and from hearing what their parents are saying to each other in Family Court proceedings. According to this argument, promoting greater participation of children (satisfying Article 12 of the CRC) is inconsistent with the objective of safeguarding their best interests (satisfying Article 3 of the CRC). However, the children and young people I talked to told me that more often than not, they know what their parents are saying to the court, even when parents think they don't. Evidence also suggests that allowing children to participate directly in the family law process may in fact lead parents to stop and reflect on what they are saying to each other.

Ultimately, the dichotomy between protection and participation is a false one. As the CRC has clarified, a child's right to be heard (Article 12) is not inconsistent with a

child's right to have their best interest treated as a primary consideration (Article 3). In fact, these rights are complementary:

> "One establishes the objective of achieving the best interest of the child and the other provides the methodology for reaching the goal of hearing either the child or the children ... there can be no correct application of Article 3 if the components of Article 12 are not respected. Likewise, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives."[vi]

Fears about children taking part in family law proceedings partly stem from the inaccurate assumption that children are unreliable witnesses, incapable of articulating their experiences and telling the truth. In a 2012 High Court case, the court demonstrated this view of children when it unanimously rejected the argument made on behalf of the children concerned that they be represented by a legal practitioner. The court made the following observation:

> "Unlike most capable adults, a child is almost invariably under the control of other people who owe the child legal duties. Inevitably, that child is vulnerable to their influence."[vii]

The perception of children as incapable and susceptible to influence can undermine a child's right and ability to be heard and taken seriously and could result in their best interests not being taken into consideration. The children I talked to did not complain about adults trying to 'influence' them or ask them to lie to ICLs, Family Consultants and other court officers.

Interestingly, the Children's Rights Judgment Project chose to re-write this judgment applying a children's rights approach that "revealed particular views of the child that are inconsistent with contemporary views on the capacity and autonomy of the child".[viii]

Since the passing of the *Family Law Act* in 1975 ("the Act"), and in light of developments regarding children's rights and new evidence regarding child development, views about the participation of children and young people have shifted away from a view of children as "passive, dependent, less than adults" towards a view of children as "active social actors in their own lives".[ix] Furthermore, the quality of a child witness' evidence can depend on the skills and expertise of the

interviewer, and the function and complexity of the questions asked, rather than the child's inability to provide accurate information.[x]

Concerns that children and young people will be manipulated by adults during the process – particularly by one parent in order to alienate them from another parent – are often used to oppose children's participation in Family Court proceedings. Parental Alienation Syndrome is commonly used in court despite little evidence to support that it actually occurs. It relies on the inaccurate assumption that most allegations of abuse are false and that children are incapable of recognising abuse. Evidence actually suggests that false allegations of abuse are rare.[xi]

Parental Alienation Syndrome is also biased against women insofar as it also relies on gendered constructions of mothers as manipulative, mentally ill or vindictive. Ultimately, none of the children and young people who I talked to were concerned about being manipulated or told what to say to officers that would report back to the family court. Their fundamental concerns were that they are not being listened to, that they lack information and support and that their parents' stories mute what is in the children's best interests.

Furthermore, it seems to be counter-intuitive that children and young people can be exposed to the child criminal justice system and its consequences, but are restricted from having direct involvement in family law decisions that affect their lives. Children and young people are actively involved in criminal proceedings (as young as ten), in child protection proceedings and tribunals.

Child victims of sexual abuse must be a witness in the criminal proceedings in order for cases where the perpetrator pleads not guilty to go ahead. These children can be very young and below 10. In this setting, changes in procedures, support services and evidence in Australian and overseas jurisdictions have supported child victims and witnesses to give their evidence in a safe and protected space.[xii] As a result convictions of sexual offenders have increased, effectively making the community safer. If this can be done in a criminal setting, similar supports and methods could and should also be available to children in a family law setting.

When provided with the right support, children and young people want to have the opportunity to have a say. It is the system that needs to change in order to better support them to do so. We need to start believing in children and young people as

capable citizens who are able to meaningfully contribute to the decisions that impact their lives. As Patrick Parkinson and Judy Cashmore put it in their book *The Voice of the Child in Family Law Disputes*:

> "The way forward is to abandon the idea that children's best interests can be served by protection from participation, and to find ways of protecting them *in* participation."[xiii]

What needs to be done? Towards a child-focussed family law system

Although most cases do not go to court, those that do make it to court for parenting arrangements predominantly involve families affected by family violence and child safety concerns, evidence of abuse (emotional, financial or physical), mental health issues or substance misuse.[xiv] In the Australian Institute of Family Studies Survey of Separated Parents, nearly 50% of parents who went to court for parenting arrangements reported concerns for safety (their own, their children's or both).[xv] The complex reality of these situations reinforce the urgent need for child-focused systemic change.

In order for child-focused family law decisions to be the norm rather than the exception, there needs to be a whole system approach to child-focused best practices.

What happens when the system is child-focused?

Improving the system to be more child-focused is not impossible. In fact, overseas jurisdictions are increasingly recognising the importance and benefits of child-focused practices. In other jurisdictions, children have the right to make an application to court, are able to communicate directly with the Judge, attend court and be a party in Family Law proceedings. In the UK, Judges have written child-friendly judgements in letters addressed directly to children.

Research suggests that child-focused practices and frameworks lead to better outcomes for all parties. When children and young people are given the opportunity to be heard and included – to be seen as real people rather than the object of other people's disputes – they feel respected and valued. Research from the Australian Human Rights Commission and the Australian Legal Rights Commission suggests that

the increased sense of control felt by children and young people who participate in and understand family law proceedings has a direct correlation with positive physical and psychological health outcomes.[xvi] Furthermore, when children are given the opportunity to understand and be involved in the process directly, they might feel more inclined to comply with the decision compared to a child who feels they have been ignored.

Family law judgments have significant implications for children and young people. At the core of an improved family law system is the inclusion, engagement, participation and empowerment of all children and young people, who are actively heard and supported. Reforming the system to provide children with meaningful opportunities to participate and access support will not only lead to positive outcomes for the rights, interests and wellbeing of children and young people, but it will also improve the integrity of the system and public and professional confidence in the system.

Our recommendations for a child-focused family law system include:

1. Providing mandatory, regular and ongoing training for all family law system professionals – including legal and social work family practitioners, judicial officers and report writers – to engage with and interview children and young people, to complete trauma-informed practice family violence training, cultural awareness training and unconscious bias training. Training and the material for training should have be coordinated at a national level to ensure consistency and that it is built on year-on-year. This would minimise the potential for misunderstandings between children and professionals.

2. Establishing a Children and Young People's Advisory Board to provide advice and information about children's experiences of the system to inform policy and practice. The Board would be made up of children and young people with experience of the family law system or an interest in children's rights or the courts. The organised participation of children and young people through an advisory board has developed in other jurisdictions.

   In 2016, the Family Law Council recommended the creation of such a body to assist in the design of child-focused family law services.[xvii] In my 2018 report,

I suggested that the creation of an advisory board modelled on the Family Justice Young People's Board (FJYPB, established in England and Wales in 2013) could provide a mechanism for facilitating child-focused improvements to the system.[xviii] The 2018 evaluation of South Australia's Young People's Family Law Advisory Group (YPFLAG) similarly recommended such a body be permanently established and expanded to operate on a national basis.[xix]

3. Changing the name of "Parenting Orders" to "Child Arrangements Orders". This language is used in British jurisdictions and reflects the reality that it is children who are most affected by the order.

4. Reforming court processes to support direct communication between children and the Judge.

5. Mandating the use of child rights impact assessments to improve child-centred practices and ensure that the system protects the fundamental rights of the child. Child rights impact assessments systematically map how policies, decisions and laws impact children and their best interests.[xx]

6. Ensuring that children and young people are actively supported to be heard. This could be through a child advocate. Advocates are increasingly being used in different legal processes to provide independent and accessible information about the proceedings and guide and support children throughout the process. Advocates should be as independent as possible, should talk to the children before anyone else and maintain a focus on the children's well-being and their interests throughout all stages of the process. Children and young people should feel as though they can trust the advocate. Advocates should be trained to work with children and young people.

   Independent Children's Lawyers (ICLs) are not advocates; they do not act as a support throughout the entire process and do not necessarily have experience working with children and young people. The role of the child advocate would fit somewhere in between Australia's ICL and the UK's Family Court Adviser. In the UK, the Children and Family Court Advisory Support Service (CAFCASS) appoints a professionally qualified Family Court Adviser to "work with parents, relatives, local authorities and the courts" to

"put the children's needs, wishes and feelings first, making sure that children's voices are heard at the heart of the Family Court setting".[xxi] CAFCASS is an independent, non-departmental body, accountable to the Ministry of Justice. Australia's system could benefit from the establishment of a similar body that is committed to child-focused and child-inclusive practices and outcomes.

7. Ensuring that children are able to provide feedback and access support such as counselling after judgments and initiate their own reviews of decisions made.

8. Recognising the diversity of children and young people and their different individual opinions and needs, including between siblings.

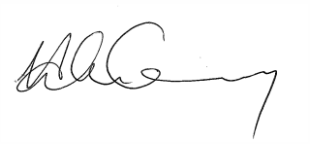
9. Recognising that the notion of family has changed since the *Family Law Act* commenced and the notion of a nuclear family is particularly problematic for Aboriginal and Torres Strait Islander children and young people with different concepts of kin and child-rearing involving extended families and communities.[xxii] Article 30 of the CRC enshrines a child's 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". The UN Committee have emphasised that considering the "collective cultural rights of the child is part of determining the child's best interests."[xxiii] There is a lack of compliance with Aboriginal and Torres Strait Islander Child Placement Principles (ATSICPP) and cultural care plans are inadequately prepared.[xxiv] The system should consider the importance of culture and the implementation of a cultural plan to ensure that the system is more accessible and culturally safe and that nuances that may otherwise be overlooked by the court can be considered.

10. Improving communication between the family law system and state and territory child protection systems and family and domestic violence systems in order to strengthen the capacity of the family law system to effectively identify, assess and respond to family violence and child safety concerns.

Commissioner for Children & Young People

If you have any questions or queries, please do not hesitate to contact me.

Yours sincerely,



Helen Connolly
Commissioner for Children and Young People
Adelaide, South Australia

[i] Australian Institute of Family Studies, "Children and Young People in Separated Families: Family Law System Experiences and Needs" Final Report 2018, 30; Rachel Birnbaum and Michael Saini, "A Scoping Review of Qualitative Studies about Children Experiencing Parental Separation," *Childhood: A Global Journal of Child Research* 20, no. 2 (2013): 260–282; Anja Marschall, "Exploring Children's (and Parents') Perspectives on Post-Divorce Family life," *Children & Society 31*, no. 5 (2017): 342–352.
[ii] Australian Law Reform Commission Report 135, "Family Law for the Future – An Inquiry into the Family Law System, Final Report," March 2019, 386.
[iii] CCYP SA, "What children and young people think should happen when families separate" Report, August 2018, accessed at https://www.ccyp.com.au/wp-content/uploads/2018/08/Family-Law-Report-Final-27-08-18.pdf.
[iv] Rae Kaspiew et al., "Getting the Word Out: The Role of Independent Children's Lawyers in the Family Law System," *Australian Journal of Family Law* 28 (2014): 29-46; Rae Kaspiew et al. "Independent Children's Lawyers Study – Final Report, June 2014."
[v] United Nations Convention on the Rights of the Child, Article 12(1) and (2).
[vi] Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to Be Heard* 51st Session, UN Doc CRC/C/GC/12 (1 July 2009), 74.
[vii] *RCB as litigation guardian of EKV, CEV, CIV and LRV v. The Honourable Justice Colin James Forrest, one of the judges of the Family Court of Australia & Ors* [2012] HCA 471, par. 52.
[viii] The Children's Rights Judgments Project 2015-2017, "Summary of Cases", Available at http://docplayer.net/38330701-The-children-s-rights-judgments-project-summary-of-cases-judgment-writer-listed-first-and-commentator-second.html.
[ix] E. Kay, M. Tisdall, "Subjects with Agency? Children's Participation in Family Law Proceedings," *Journal of Social Welfare and Family Law* 38, no. 4 (2016): 362.
[x] Gail S. Goodman and Bette L. Bottoms, *Child Victims, Child Witnesses: Understanding and Improving Testimony* (New York: Guilford Publications, 1993), 19.
[xi] Jodi Death, Claire Ferguson and Kylie Burgess, "Parental Alienation, Coaching and the Best Interests of the Child: Allegations of Child Sexual Abuse in the Family Court of Australia," *Child Abuse & Neglect* 94 (2019); Kathleen Coulborn Faller, "Coaching children about sexual abuse: A pilot study of professionals' perceptions," *Child Abuse & Neglect* 31 (2007): 947-959.
[xii] Courthouse facility dogs are increasingly used to support child witnesses and complainants, see Ellen Wood and Paul Harpur, "Teaching an Old Dog New Tricks," *Alternative Law Journal* 43, no. 2 (2018): 89-95; Child Witness Service in Victoria; Children's Champion NSW, see victimsservices.justice.nsw.gov.au.
[xiii] Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008), 219.
[xiv] Kaspiew et al. *Evaluation of the 2012 family violence amendments: Synthesis report.* Melbourne: Australian Institute of Family Studies, 2015. Available at http://aifs.gov.au/publications/evaluation-2012-family-violence-amendments.
[xv] Australian Institute of Family Studies, "Experiences of Separated Parents Study: Evaluation of the 2012 Family Violence Amendments," October 2015, available at https://aifs.gov.au/sites/default/files/efva-esps.pdf.
[xvi] ALRC Report 135, "Family Law for the Future Final Report," March 2019. Youth Affairs Council, *Submission 5* and Australian Human Rights Commission, *Submission 217*.
[xvii] Family Law Council, Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems, Final Report, 30 June 2016. See rec 13.1.
[xviii] CCYP SA, What Children and Young People Think Should Happen When Families Separate, Report 2018, 21–2.
[xix] Family Law Pathways Network South Australia, "The Tip of the Iceberg – Report of Young Peoples Family Law Advisory Group: A Pilot Project 2016/17", Report 2018, 32–3.
[xx] Lisa Payne, "Child Rights Impact Assessment as a policy improvement tool," *The International Journal of Human Rights* 23, no. 3 (2019): 408-424.
[xxi] Children and Family Court Advisory Support Service, Child Impact Assessment Framework (CIAF), https://www.cafcass.gov.uk/about-cafcass/.
[xxii] Keryn Ruska and Zoe Rathus, "The place of Culture in Family Law Proceedings: Moving Beyond the Dominant Paradigmm of the Nuclear Family," *Indigenous Law Bulletin* 7, no. 20 (2010): 8-12.
[xxiii] Committee on the Rights of the Child, *General Comment No 11: Indigenous Children and Their Rights under the Convention*, 50th session, UN Doc CRC/C/GC/11 (12 February 2009) 6–7. [30]–[32].
[xxiv] Titterton, Adelaide "Indigenous Access to Family Law in Australia and Caring for Indigenous Children", *UNSW Law* 40, no. 1 (2017).