



Australian
Human Rights
Commission

Review of the Family Law System

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE
AUSTRALIAN LAW REFORM COMMISSION**

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Australian Law Reform Commission (ALRC) in its Review of the Family Law System (this Review).
2. The Commission commends the Australian Government and the Australian Law Reform Commission for this Review. In particular, the Commission welcomes its comprehensive nature, noting that the ALRC will ‘consider the redevelopment of the family law system as a whole, in an integrated and holistic, rather than piecemeal, way’. The Review is a unique opportunity to assess and evaluate whether the system as a whole is functioning at its best in meeting the needs of individuals and family members, including children.
3. As the ALRC points out in its Issues Paper, this Review builds on a number of earlier reviews that examined aspects of the family law system. There are also several Bills before Parliament proposing amendments to the *Family Law Act 1975* (Cth) (the Family Law Act), which the Commission has made submissions to in relation to children’s rights.
4. This submission does not seek to address every question outlined in the Issues Paper. It concentrates on particular human rights issues raised with us by organisations and individuals, including children, or issues examined by the Commission in its previous work. This includes those relating to the human rights of: children; Aboriginal and Torres Strait Islander peoples; people with disability; lesbian, gay, bisexual, transgender and intersex (LGBTI) people; people from culturally and linguistically diverse communities; and people experiencing family and domestic violence. These issues have been dealt with in this submission by reference to headings provided in the Issues Paper.

2 Summary

5. As Australia’s family law system becomes ever more complex and needs to respond to a greater diversity of clients, it is timely to review how it protects the human rights of individuals and their families, in particular the most vulnerable in our communities, including children and victims of family and domestic violence.
6. The Commission considers that it is important that changes to the Family Law Act reflect the principles set out in international human rights treaties which Australia has agreed to. Respect for the family, equality before the law and non-discrimination are important human rights principles relevant to the family law system. Protecting the rights of those vulnerable in the system, in particular children’s rights, should also be central principles guiding the administration of the Act.
7. An accessible legal system is essential to meet the fundamental principles of equality before the law and non-discrimination. Certain groups face barriers in accessing the family law system, in particular Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse communities, people with disability and LGBTI people. Culturally sensitive legal assistance

and inclusive and supportive court processes are some key features of improving accessibility.

8. The Family Law Act currently reflects important legal principles in relation to parenting: the best interests of the child, Aboriginal and Torres Strait Islander children's right to culture and ensuring the safety of victims of family and domestic violence. How these principles are set out in the Act, and how they are understood and applied by decision-makers, can be improved to better protect the rights of children and victims of domestic and family violence.
9. Safety must be a pre-eminent concern of the family law system. Despite previous amendments to the Family Law Act to better ensure the safety of victims of violence and abuse, the Commission is concerned at reports that many separated parents still continue to share parenting responsibility for their children despite allegations of family and domestic violence or child abuse.
10. The welfare jurisdiction gives the family courts a broad power to make orders relating to the welfare of children, which has included decisions relating to the sterilisation of young people with disability, medical procedures for intersex children, and medical procedures for children with gender dysphoria. The Commission continues to be concerned about the sterilisation of young people with disability, and also has some concerns about the way in which some cases dealing with intersex children have been decided and whether the Family Court is providing appropriate oversight of procedures involving such children.
11. There also needs to be certainty for children from a greater diversity of families. On surrogacy arrangements, if Australia is to take a regulatory approach, a number of issues need to be addressed at a federal level in order to protect the human rights of all parties involved, and to ensure legal clarity about the parent-child relationships that result from the arrangement. At present, there is uncertainty about whether the Family Court can or should make a declaration of parentage in such circumstances.
12. Further, a lack of clarity with regard to the definition of 'parent' under the Family Law Act puts children of same-sex couples at risk of experiencing discrimination.
13. Dispute resolution and adjudication processes can be inappropriate and inaccessible for victims of family and domestic violence. Direct cross-examination by unrepresented parties in family law proceedings, in matters involving allegations of family and domestic violence, risks re-traumatising victims of family and domestic violence, who are disproportionately women. There is an ever-growing number of women who are family violence victims and who are falling through the cracks of the legal aid system. There needs to be greater access to legal aid for parties accessing the family courts, and holistic and ongoing support services, for women experiencing family and domestic violence.
14. Children's rights and interests in particular need to be safeguarded in the family law system. The complexity of cases involving children and family and domestic violence necessitates a response by a multidisciplinary team of

professionals who fully understand the impacts of this type of violence on children and their development, such as is currently provided by the Family Court's Magellan Program.

15. One of the primary means of protecting children's rights and interests is to ensure that children are able to express their views and have these taken into account by decision-makers, as guaranteed by the *Convention on the Rights of the Child* (CRC). Children are often directly affected by the separation of their parents, and can be the victims of abuse and violence. Children and young people consistently say that they would like to have more of a say in, and be informed about, legal decisions that affect them. The National Children's Commissioner has heard directly from children about this. However, there are numerous barriers that are inhibiting child participation in the family law system. This includes a lack of understanding and concerns about children's participation and how to facilitate it. While a child should not be compelled to express a view in a family law matter, the Commission considers that children should be provided with the opportunity to do so in a manner appropriate to their age and maturity. This includes children whose parents are involved in alternative dispute resolution processes.
16. Qualified professionals are an essential safeguard to guarantee the implementation of human rights in the family law system. Given the complexity of many matters before the family courts, judicial officers and family law professionals will need ongoing training and resources on specific areas relevant to human rights:
 - the impacts of family and domestic violence and child abuse on children and child development
 - effective communication with children and young people
 - disability awareness training
 - the differences between, and issues faced by, people with intersex variations and people who are lesbian, gay, bisexual, transgender, gender diverse or queer
 - cultural competency skills, in particular in relation to Aboriginal and Torres Strait Islander peoples
 - content and meaning of the provisions of the CRC and the *United Nations Declaration on the Rights of Indigenous Peoples*
 - trauma-informed practices, in particular in relation to the impact of inter-generational trauma on Aboriginal and Torres Strait Islander peoples.
17. The Commission makes the following recommendations:
18. Recommendation 1: Protection of children's rights is included in the overarching principles of the Family Law Act by direct references to the four Guiding Principles and other provisions of the *Convention on the Rights of the Child*.
19. Recommendation 2: In conducting this review and fulfilling its obligations under s 24(1) of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC consider in particular the human rights principles contained in the

following international human rights treaties and instruments when evaluating proposed reforms for the Family Law Act:

- *Convention on the Rights of the Child*
 - *Convention on the Elimination of All Forms of Discrimination Against Women*
 - *Convention on the Rights of Persons with Disabilities*
 - *Declaration on the Rights of Indigenous Peoples*
 - *International Convention on the Elimination of All Forms of Racial Discrimination.*
20. Recommendation 3: Aboriginal and Torres Strait Islander Legal Services are funded to ensure the availability of culturally sensitive legal assistance in family law matters, irrespective of geographic location.
 21. Recommendation 4: The environment, procedures and processes of the family law system are reviewed to ensure appropriate accessibility by people with a disability as required under the *Disability Discrimination Act 1992* (Cth).
 22. Recommendation 5: A person with disability is supported to participate in the court process and to make their own decisions in family law proceedings.
 23. Recommendation 6: The Family Law Act is amended to clarify that the disability of parents not give rise to a presumption that orders should not be made in their favour in relation to residence, contact and parental responsibility.
 24. Recommendation 7: The Family Court makes appropriate accommodations for persons with disabilities in the court processes.
 25. Recommendation 8: Consideration of the views of the child is included as a third primary consideration in section 60CC of the Family Law Act.
 26. Recommendation 9: Section 4 of the Family Law Act is amended to include an explanatory note to the definition of 'family and domestic violence' to explain the nature, features and dynamics, including the gendered nature, of family and domestic violence.
 27. Recommendation 10: The ALRC review the operation of the presumption of equal shared parental responsibility to ensure it is achieving its intended objectives, having particular regard to the findings of the House of Representatives Standing Committee on Social Policy and Legal Affairs' inquiry, *A better family law system to support and protect those affected by family violence: recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence.*
 28. Recommendation 11: In the development of any regulatory regime dealing with surrogacy, the following guiding principles are followed:
 - a. the best interests of the child are protected (including the child's safety and wellbeing and the child's right to know about his or her origins)

- b. the surrogate mother is able to make a free and informed decision about whether to act as a surrogate
 - c. sufficient regulatory protections are in place to protect the surrogate mother from exploitation
 - d. there is legal clarity about the parent-child relationships that result from the arrangement.
29. Recommendation 12: If the Australian Government decides to permit some form of international surrogacy arrangements, then the following amendments are made to Commonwealth law to clarify parent-child relationships that result from those arrangements:
 - a. a clearer definition of 'parent' be inserted into the Family Law Act
 - b. a federal Status of Children Act be introduced that:
 - i. includes the power to make orders about the status of children and legal parentage for the purpose of all Commonwealth laws; and
 - ii. specifically deals with applications for transfer of parentage in surrogacy cases where State and Territory Acts do not apply
 - c. section 60H of the Family Law Act be redrafted to make it clear that it does not apply to surrogacy arrangements.
30. Recommendation 13: The Family Law Act is amended to include a general definition of parent that is consistent with contemporary understandings of parent-child relationships including de facto partners and non-biological parents.
31. Recommendation 14: The Family Law Act is amended to prevent direct cross-examination by unrepresented parties in family law proceedings, in matters involving family and domestic violence, having regard to the following matters:
 - the protection of vulnerable witnesses and their capacity to give effective evidence balanced against the right of another party to test evidence adduced by all relevant witnesses
 - the need to take into account the views of the women and children, and the importance of the role of independent children's lawyers
 - procedural fairness and potential limitations on the unrepresented party's ability to effectively examine the witness
 - the particular requirements and role of the court-appointed person.
32. Recommendation 15: Consideration is given to increasing legal aid funding to promote greater access to legal aid for women who are victims of family and domestic violence, in particular Aboriginal and Torres Strait Islander women, as well as providing funding for specialist family and domestic violence legal and non-legal services to be embedded in the family courts, to better support the needs of parties experiencing family violence.
33. Recommendation 16: Any alternative dispute resolution processes for parenting matters provide children with the opportunity to express their views, in compliance with article 12 of the *Convention on the Rights of the Child*.

34. Recommendation 17: The Attorney-General resource and support the Family Court of Australia to extend the Magellan program to all parenting matters where there are allegations of family and domestic violence.
35. Recommendation 18: The Family Law Act is amended to require a judge to provide children with an opportunity to express their views in matters that affect their rights or interests. A child should not be compelled to express a view, but should be provided with the opportunity to do so in a manner appropriate to their age and maturity.
36. Recommendation 19: The requirement in section 68P of the Family Law Act to explain to a child court orders or injunctions that are inconsistent with an existing family violence order is retained.
37. Recommendation 20: Children are informed of their rights in family law proceedings that affect them, including their right to be heard, in a manner appropriate to their age and maturity.
38. Recommendation 21: Children are informed of decisions made in relation to parenting arrangements that affect them, in a manner appropriate to their age and maturity.
39. Recommendation 22: Judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with ongoing training and resources on family law matters relating to children including the impacts of family and domestic violence and child abuse on children, child development and applying the best interests of the child principle in parenting matters.
40. Recommendation 23: Consistent with article 13 of the *Convention on the Rights of Persons with Disabilities*, judicial officers and other family law professionals are provided with disability awareness training, including on not making assumptions about a person with disability's parenting capacity.
41. Recommendation 24: Judicial officers are provided with training and resources on the differences between, and issues faced by, intersex people and people who are lesbian, gay, bisexual, transgender, gender diverse or queer.
42. Recommendation 25: Judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with training and resources to assist them to engage and communicate effectively with children about family law matters that concern them.
43. Recommendation 26: Judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with training and resources to assist them to have and maintain cultural competency skills, in particular in relation to Aboriginal and Torres Strait Islander peoples.
44. Recommendation 27: Judicial officers receive appropriate training on the content and meaning of the provisions of the *United Nations Declaration on*

the Rights of Indigenous Peoples and the Convention on the Rights of the Child and its Optional Protocols.

45. Recommendation 28: Judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with training and resources on trauma-informed practices, in particular in relation to the impact of inter-generational trauma on Aboriginal and Torres Strait Islander peoples.

3 Objectives and principles

3.1 Human rights principles to inform amendments to the Family Law Act

46. In conducting the current inquiry, the ALRC must aim at ensuring that the laws, proposals and recommendations it reviews, considers or makes are, as far as practicable, consistent with Australia's international obligations that are relevant to the inquiry.¹
47. The Commission considers that Australia's international human rights obligations are particularly relevant to this inquiry and should be used as a benchmark for assessing reform proposals.
48. There are a number of human rights which are particularly relevant to the objectives and principles of Australia's family law system.
49. As a starting point, States Parties must ensure respect for the family unit. Article 23 of the *International Covenant on Civil and Political Rights* (ICCPR) states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.² Similarly, the preamble to the *Convention on the Rights of the Child* (CRC) recognises the family as 'as the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities in the community'.³
50. International human rights law sets out the obligations of States Parties to ensure equality before the law (article 26, ICCPR) and protection from discrimination (articles 2 and 26, ICCPR) for all family members. On equality and family law specifically, article 23 of the ICCPR obliges States Parties to take 'appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'. Article 23 also specifies that provision is to be made for the necessary protection of children on the dissolution of any marriage.
51. In addition to these general rights for everyone, international human rights law recognises the need for protecting the most vulnerable in our family law system. This includes the rights of:
 - children (CRC)

- victims of family and domestic violence (articles 1 and 2, *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW); article 19, CRC)
- people with disability (*Convention on the Rights of Persons with Disabilities* (CRPD))
- Aboriginal and Torres Strait Islander peoples (*United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP))
- LGBTI people (*Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*).

(a) *Children's rights*

52. The importance of protecting the rights of children affected by family law has been acknowledged for decades, in particular through the principle that, in all actions concerning children, the 'best interests of the child' be a primary consideration. The principle is one of Australia's fundamental international human rights obligations, and one of the four Guiding Principles in the CRC.⁴ In domestic law, the principle is reflected in Part VII of the Family Law Act, dealing with children.
53. The principle is expressed even more strongly in the Family Law Act in relation to parenting orders. In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.⁵
54. In June 2012, the Family Law Act was amended to include specific reference to the CRC more generally. Section 60B(4) of the Family Law Act now provides that an additional object of Part VII is to give effect to the CRC. This is not limited to the 'best interests' principle in article 3 of the CRC.
55. The Commission welcomed this inclusion.⁶ It also considers that the principles in the CRC should be applied to other parts of the Family Law Act that affect the rights and interests of children.
56. The Commission considers that the rights contained in the CRC, in particular the four Guiding Principles, should guide the administration of the Family Law Act in all areas where the rights and interests of children are affected.
57. These four Guiding Principles are core requirements for all of the rights contained in the CRC. They are:
- the right of all children to enjoy all the rights of the CRC without discrimination of any kind (article 2)
 - respect for the best interests of the child as a primary consideration (article 3)
 - the right to survival and development (article 6)
 - the right of all children to express their views freely on all matters affecting them (article 12)

58. The Commission notes that areas other than Part VII of the Family Law Act cover matters that concern children. For example, Part III deals with family consultants who may meet with children and report their views to the Court. Part VIII focuses on property, spousal maintenance and maintenance agreements also may cover decisions which have a direct impact on children.
59. Further, Professor Patrick Parkinson has suggested that listing the CRC as an ‘additional object’ in Part VII could lead to an interpretation that it is a secondary consideration only.⁷ To avoid the potential for such an interpretation, it would be better not to make a distinction between objects and ‘additional objects’.
60. As outlined in the Issues Paper, currently section 43 of the Family Law Act provides principles to be applied by the courts in the exercise of their jurisdiction under the Act, and several of these principles refer to the protection of children. Section 43(c) specifically includes the ‘need to protect the rights of children and to promote their welfare’. However, it does not refer to the CRC. By including specific reference to the CRC in overarching objectives or principles, rather than as an ‘additional object’ in Part VII only, Australia is more comprehensively giving effect to its obligations to protect the rights of children and providing guidance on how this is to be achieved.
61. **Recommendation 1: Protection of children’s rights is included in the overarching principles of the Family Law Act by direct references to the four Guiding Principles and other provisions of the *Convention on the Rights of the Child*.**
- (b) *Discrimination against women*
62. The Commission submits that the rights set out in the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) should also be considered when assessing proposals for reform of the Family Law Act.
63. Women often experience economic disadvantage throughout their lives due to a number of factors, including the gender pay gap,⁸ women’s underrepresentation in the workforce,⁹ and the greater amount of time spent on unpaid domestic and care work as compared to men.¹⁰ They are also more likely to be victims of family and domestic violence.¹¹
64. The safety of the child is also inextricably linked to the safety and protection of the primary care-giver of the child.¹² Women are generally the primary care-givers of children. At the same time, women are far more likely to be victims of domestic and family violence.¹³ Violence against women seriously affects the capacity and ability of a woman to care for a child, contrary to the best interests of the child. In particular, the Commission draws the ALRC’s attention to research conducted by Australia’s National Research Organisation for Women’s Safety (ANROWS), which examines the impact of family and domestic violence on parenting. The research provides a clear indication of the links between family and domestic violence, poorer parental wellbeing and poorer outcomes for children.¹⁴

65. Gender-based violence is a form of discrimination prohibited under CEDAW: Article 1 of CEDAW defines ‘discrimination against women’ as ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women’, of human rights and fundamental freedoms.¹⁵ Article 2 requires States Parties to agree to pursue by all appropriate means and, without delay, a policy of eliminating discrimination against women.

66. The CEDAW Committee, in General Recommendation 19, specifically recognises that family violence impairs the ability of women to participate in family life on a basis of equality and recommends that States Parties ensure that laws against family violence and abuse give adequate protection to all women.¹⁶

(c) *The rights of people with disability*

67. Article 7(1) of the CRPD obliges States Parties to take all necessary measures to ensure children with disabilities enjoy their human rights and fundamental freedoms on an equal basis with other children. Further, parents with disabilities should be supported to ensure their children also enjoy their human rights and fundamental freedoms on an equal basis with other children.

68. Article 16(1) of the CRPD obliges States Parties to take all appropriate legislative and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse, including their gender-based aspects.

69. Article 23 of the CRPD refers specifically to the obligations of States Parties to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships:

- Article 23(2) provides that States Parties render ‘appropriate assistance to persons with disabilities in performance of their child-rearing responsibilities’.
- Article 23(3) provides that ‘to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families’.
- Article 23(4) states that ‘In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents’.¹⁷

70. Given the greater risks experienced by people with disability to violence and abuse,¹⁸ the Commission recommends that these principles in the CRPD also be considered when assessing proposals for reform of the Family Law Act.

(d) *Aboriginal and Torres Strait Islander peoples*

71. UNDRIP sets out the minimum standards for the survival, dignity, wellbeing and rights of the world’s Indigenous peoples.¹⁹ UNDRIP articulates how substantive rights and principles in international human rights law apply to the

specific circumstances of Indigenous peoples. A number of these rights and principles are engaged by the family law system, including: the right to culture; the rights of the child; and the right to be free from discrimination in legal and judicial proceedings. Although UNDRIP is not itself a formally binding treaty, it contains rights and freedoms that are set out in other binding international human rights treaty law, some of which may be considered customary international law.²⁰

72. Article 27 of the ICCPR recognises that ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language.²¹ The UN Human Rights Committee has recognised that members of Indigenous communities are capable of constituting minorities protected by article 27 and that that the right to self-determination is relevant when interpreting article 27.²²
 73. The Committee on the Elimination of Racial Discrimination has consistently affirmed that discrimination against Indigenous peoples falls within the scope of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), and that all appropriate means must be taken to combat and eliminate such discrimination.²³ In particular, article 5 of ICERD contains the obligation of States Parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination.²⁴ This includes the right to equal treatment before tribunals and all other organs administering justice, which is to be enjoyed by all persons living in a given State.²⁵
- (e) *Lesbian, gay, bisexual, transgender and intersex people*
74. While there is no dedicated international treaty that deals with the human rights concerns of LGBTI people, all human rights in existing treaties apply equally to LGBTI people. The human rights principle of equality before the law is especially relevant for LGBTI people.
 75. Further, the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* sets out the principles that apply existing international human rights law in the contexts of sexual orientation, gender identity, gender expression and sex characteristics.²⁶ These Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse. The *Yogyakarta Principles plus 10* supplement the Principles.²⁷
 76. LGBTI people continue to experience discrimination in Australia today, including in the context of family issues,²⁸ although there have been some key societal advances. In particular, the Commission has welcomed the recent passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) which has meant that LGBTI people who are married will be treated the same way as heterosexual people who are married for the purposes of the Family Law Act.²⁹

77. However, LGBTI people are affected by other issues, outside of marriage, which are covered by the Family Law Act. These include:
- the risk of unnecessary medical interventions for intersex people, particularly children and those without legal capacity to consent.
 - until recently, the requirement for Family Court authorisation for children seeking medical interventions relating to gender dysphoria
 - a lack of clarity with regard to the definition of parent in the Family Law Act for same-sex couples and their children.
78. These are discussed further in this submission.
79. **Recommendation 2: In conducting this review and fulfilling its obligations under s 24(1) of the *Australian Law Reform Commission Act 1996 (Cth)*, the ALRC consider in particular the human rights principles contained in the following international human rights treaties and instruments when evaluating proposed reforms for the Family Law Act:**
- ***Convention on the Rights of the Child***
 - ***Convention on the Elimination of All Forms of Discrimination Against Women***
 - ***Convention on the Rights of Persons with Disabilities***
 - ***Declaration on the Rights of Indigenous Peoples***
 - ***International Convention on the Elimination of All Forms of Racial Discrimination.***

4 Access and engagement

80. Equality before the law and non-discrimination are basic tenets of human rights law. An accessible legal system is essential to realise these rights.

4.1 Accessibility for Aboriginal and Torres Strait Islander people

81. The principles of non-discrimination and equality are central to UNDRIP, which sets out the minimum standards for the survival, dignity and wellbeing of the world's Indigenous peoples, and is recognised as reflecting a global consensus on Indigenous peoples' rights.
82. UNDRIP states that Indigenous peoples 'have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their Indigenous origin or identity'.³⁰ The principles of non-discrimination and equality also extend to interactions between Aboriginal and Torres Strait Islander peoples and legal and judicial proceedings. For example, article 13(2) requires measures be taken to ensure that Indigenous peoples can understand and be understood in political, legal and administrative proceedings and that interpretation facilities be provided where necessary.
83. As stated in the Issues Paper, Aboriginal and Torres Strait Islander peoples encounter a range of barriers that affect their access to the family law system, including issues of cost, language, cultural safety, literacy and geographic

accessibility. Aboriginal and Torres Strait Islander people who live in rural, regional and remote areas face additional barriers due to poorer socio-economic, health and education outcomes. These barriers must be addressed in order for the family law system to be consistent with the principles of equality and non-discrimination under international human rights law.

84. It is also critical that any measures to improve accessibility apply an integrated approach, as the legal needs of Aboriginal and Torres Strait Islander peoples are complex, and many of the barriers that they face within the Australian legal system are interrelated. In particular, it is important that measures acknowledge that Aboriginal and Torres Strait Islander peoples access the family law system within a context of entrenched disadvantage, discrimination and inter-generational trauma, and that these factors constitute significant barriers to Aboriginal and Torres Strait Islander peoples participating in the family law system in an effective way.
85. Creating an environment of cultural safety is essential to improving accessibility of the family law system for Aboriginal and Torres Strait Islander peoples. As stated by Mick Gooda, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, 'for Aboriginal and Torres Strait Islander peoples a culturally safe environment is one where we feel safe and secure in our identity, culture and community'.³¹ Cultural safety requires the creation of cultural competency by those who engage with Aboriginal and Torres Strait Islander communities. Improving the cultural competency of family law professionals is explored further in the section on Professional skills below.
86. The Commission welcomes the inclusion in the Issues Paper of the need to improve the availability and quality of interpretation services for Aboriginal and Torres Strait Islander peoples who speak English as a second or other language, in particular in regional and remote locations.³² It is important that interpreters are culturally competent and have experience working with Aboriginal and Torres Strait Islander clients in order to ensure that further communication breakdowns do not occur. As stated above, this approach is consistent with article 13(2) of the Declaration. The UN Committee on the Rights of the Child has also stated that, in the case of Indigenous children:
- States parties should adopt measures to ensure that an interpreter is provided free of charge if required and that the child is guaranteed legal assistance, in a culturally sensitive manner.³³
87. The availability of culturally-sensitive legal assistance, for both children and adults, is a critical component of creating a culturally safe environment and improving the accessibility of the family law system for Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander Legal Services and the network of the Aboriginal Family Violence Prevention Legal Services are experts in delivering culturally competent legal assistance services, and they are the preferred providers for Aboriginal and Torres Strait Islander peoples. Access to these services is particularly important, given that the formality and cost of the family law system is often a barrier for Aboriginal and Torres Strait Islander peoples accessing the system.³⁴

88. Legal advice is expensive, and Aboriginal and Torres Strait Islander peoples have, on average, a much lower income than non-Indigenous Australians.³⁵ Literacy levels amongst Aboriginal and Torres Strait Islander peoples are also often lower than non-Indigenous Australian, which presents procedural issues for Indigenous peoples such as filling out forms. Adequate and sustainable funding and resourcing for Aboriginal and Torres Strait Islander community controlled legal services is therefore essential to ensuring the availability of culturally sensitive legal assistance, irrespective of geographic location.
89. In November 2017, the UN Human Rights Committee noted its concern that access to culturally appropriate legal assistance services in Australia, including interpretation and translation services for Aboriginal and Torres Strait Islander peoples, remains insufficient.³⁶ The Committee recommended that Australia ‘ensure adequate, culturally-appropriate, and accessible legal services for Aboriginal and Torres Strait Islander people’.³⁷
90. It is also important that the family law system continues to emphasise respect for Aboriginal and Torres Strait Islander kinship systems and child-rearing practices, in particular in the context of parenting orders. The Commission welcomes the acknowledgement of these systems and practices in the Issues Paper. In Indigenous communities, extended family members often play a central role in childrearing and often have significant responsibilities and obligations for the care, welfare and development of children. These arrangements often stand in contrast to Anglo-European understandings of family organisation, which emphasise the nuclear familiar paradigm.³⁸ It is therefore important for the family law system to be aware of this distinction in order to avoid bias towards the nuclear family structure, which comes at the expense of Aboriginal and Torres Strait Islander peoples’ understandings of childrearing, kinship systems and social and family organisations.
91. **Recommendation 3: Aboriginal and Torres Strait Islander Legal Services are funded to ensure the availability of culturally sensitive legal assistance in family law matters, irrespective of geographic location.**

4.2 *Accessibility for people from culturally and linguistically diverse communities*

92. Australia has a significant culturally and linguistically diverse (CALD) population. The Issues Paper notes that, according to the 2016 Census, more than one quarter of Australians were born overseas, and almost half had at least one parent born overseas. Further, more than one-fifth spoke a language other than English at home.³⁹
93. Culturally and linguistically diverse Australians face particular challenges as they relate to the accessibility of family law. These challenges may be more acutely felt by recently arrived migrants and refugees, noting, for instance, that the resettlement process may ‘pose serious challenges to the stability of family relationships’.⁴⁰ The Family Law Council’s substantial 2012 report on improving the family law system for clients from CALD backgrounds identifies barriers including: a lack of knowledge of the relevant law; language and

literacy barriers; and a lack of culturally safe and responsive services.⁴¹ It made numerous recommendations with respect to improving accessibility.

94. The Commission notes new initiatives aimed at addressing some of the identified issues, including the introduction in 2017 of pilots of legally-assisted and culturally-appropriate dispute resolution through 'Family Relationship Centres'. The objective is to 'deliver a service model ... to better support separating or separated families experiencing family violence who are from Indigenous or [CALD] backgrounds. This early intervention and client-centred initiative will provide frontline services to victims of family violence, by giving them a safe and empowering way to resolve family law disputes without resorting to court.'⁴²
95. Pilots commenced in June 2017, and will be evaluated by the ANU's National Centre for Indigenous Studies in 2019 (the pilots also relate to Indigenous families).⁴³ Pilots should be closely monitored then, if deemed successful, expanded. As noted above, Australia has a significant culturally and linguistically diverse population that may benefit from culturally-appropriate services.

4.3 Accessibility for people with disability

(a) Participation in court

96. Consultations undertaken by the Commission as part of its *Equal Before the Law* report, found that people with disability often face barriers to participating in court.⁴⁴ The Commission found that a key difficulty is being able to access the necessary supports or appropriate adjustments to participate effectively in proceedings and give instructions to legal representatives. This could include access to communication supports or devices, the timely appointment of a guardian or volunteer court support.
97. As noted in the Issues Paper, the level of understanding of disability held by judicial officers, legal practitioners and other professionals working in the family law system may also act as a barrier to access to justice.
98. The CRPD commits State Parties to provide people with disabilities with the necessary modifications and adjustments in order to obtain effective access to justice and to exercise their legal capacity.⁴⁵ This is often referred to as 'reasonable accommodation'. This may include, but is not limited to: physical access to court buildings; provision of accessible information; adjustments in court proceedings; and the use of language which can be understood by a person with disability.

(b) Improving the inclusiveness of the family law system

99. The Commission suggests a human rights approach to improve the accessibility of the family law system for people with disability, where people with disabilities are viewed as rights-holders in court and afforded dignity. This approach includes:

- Reviewing the court environment, procedures and processes to ensure appropriate accessibility by people with a disability as required under the *Disability Discrimination Act 1992* (Cth).
- Incorporating supported decision-making in family law processes, where a person with disability is supported to participate in the court process and to make their own decisions in family law proceedings. Supported decision-making is consistent with article 12 of the CRPD: 'people with disability enjoy legal capacity on an equal basis with others and should be provided with access to the support they require to exercise their legal capacity'.⁴⁶
- Conducting disability awareness training for judicial officers, legal practitioners and other professionals working in the family law system. This would be consistent with article 13 of the CRPD: 'in order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice'.⁴⁷

100. **Recommendation 4: The environment, procedures and processes of the family law system are reviewed to ensure appropriate accessibility by people with a disability as required under the *Disability Discrimination Act 1992* (Cth).**

101. **Recommendation 5: A person with disability is supported to participate in the court process and to make their own decisions in family law proceedings.**

102. A recommendation on disability awareness training for judicial officers and other professionals is included in the section below on Professional skills.

(c) *Discrimination against parents with disability*

103. The Commission is concerned about reports of discrimination against parents with disability in the family court system.⁴⁸ Common themes include: not knowing their rights: not having support: and being afraid to ask for help for fear of being judged and negative assumptions about their ability to parent.

104. Assumptions about a person with disability's parenting capacity or capacity to manage the stresses of litigation creates the potential for parents with disability to be disadvantaged in achieving orders for the care of children in family law proceedings, and may see a parent lose their care role, or be persuaded to consent to limited contact arrangements.

105. Article 23 of the CRPD states that States Parties shall:

take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others

and that States Parties shall:

render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

106. It further states that, ‘in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents’.⁴⁹
107. **Recommendation 6: The Family Law Act is amended to clarify that the disability of parents not give rise to a presumption that orders should not be made in their favour in relation to residence, contact and parental responsibility.**
108. **Recommendation 7: The Family Court makes appropriate accommodations for persons with disabilities in the court processes.**

5 Legal principles in relation to parenting and property

5.1 Parenting

(a) Best interests of the child in parenting matters

109. The UN Committee on the Rights of the Child has stated that it is useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included by any decision-maker to determine the ‘best interests’ of the child. These must be taken into consideration and balanced in light of each situation.⁵⁰
110. Section 60CC of the Family Law Act sets out a range of considerations appropriate to determining what is in the child’s ‘best interests.’ In particular, the Commission supports the inclusion of a requirement for the court to consider ‘any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give the child’s views’.⁵¹
111. The Commission notes that, following amendments to the Family Law Act in 2006, this section draws a distinction between ‘primary considerations’ and ‘additional considerations’, which appear to prioritise certain considerations over others. The primary considerations are:
- the benefit to the child of having a meaningful relationship with both the child’s parents; and
 - the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
112. In applying these primary considerations, the court is directed to give greater weight to the second of them.⁵² The Commission considers this is appropriate, given the prevalence and serious effects of family violence and abuse on children.⁵³
113. The Commission notes that, in contrast to the importance attached to the views of the child under the CRC, children’s views under section 60CC are not given the status of a primary consideration.
114. Article 12 of the CRC sets out the child’s right to participate in judicial and administrative proceedings. One of the four Guiding Principles of the CRC,

article 12 requires that a child capable of forming their own views has the right to express those views freely in all matters affecting the child and that they be given due weight in accordance with the child's age and maturity. Further, it requires that the child be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child—this being either directly or through a representative or appropriate body.

115. The UN Committee pointed out that 'simply listening to the child is insufficient; the views of the child have to be *seriously* considered when the child is capable of forming her or his own views' (emphasis added). Article 12 makes it clear that the views of the child need to be assessed on a case by case basis.
116. In a submission to the Senate Legal and Constitutional Committee's Inquiry in the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, the Commission expressed its disappointment that the views of the child were given only secondary weight.⁵⁴
117. The Commission recommended at that time that: either the list of matters to be considered in deciding on the best interests of the child all be given equal weight; or that the views of the child be included as a third primary consideration of the child's best interest.
118. **Recommendation 8: Consideration of the views of the child is included as a third primary consideration in section 60CC of the Family Law Act.**

(b) *Indigenous child's right to enjoy their culture*

119. Article 30 of the CRC explicitly recognises the right of Indigenous children to culture, language and religion, and states that:

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.

120. Under section 60CC(3)(h) of the Family Law Act, the court, when determining an Aboriginal or Torres Strait Islander child's best interests, must consider the child's right to enjoy their Aboriginal or Torres Strait Islander culture. Section 60CC(3)(h) falls under Part VII of the Family Law Act which, amongst other things, vests power in the relevant courts to make 'parenting orders' about the care of children.
121. For Aboriginal and Torres Strait Islander children, a fundamental link exists between the ability to enjoy their own culture and growing up with continuity to their Indigenous culture. The importance of this link is the foundation of the Aboriginal and Torres Strait Islander Child Placement Principle, which 'was developed in recognition of the devastating effects of forced separation of Indigenous children from families, communities and culture'.⁵⁵ When determining what is in the Indigenous child's best interests, regard should therefore be given to preventing the loss of cultural identity by ensuring that

the child maintains connection with his or her Indigenous cultural identity.⁵⁶ As stated by June Oscar, the Aboriginal and Torres Strait Islander Social Justice Commissioner:

Our sense of a strong and respected Aboriginal and Torres Strait Islander identity is fundamental to supporting our cultural life which in turn is vital to our health and wellbeing. The freedom to express who we are and practice our culture in all parts of our life is evidenced to alleviate health issues, to keeping children at home, in their communities and in school, it promotes resilience, it protects against ill health and psychological damage, and it is a predicate for post-school qualifications and for entering the workforce.⁵⁷

122. When assessing the best interests of an Indigenous child, the CRC has underlined that the child's best interests need to be conceived both as an individual and collective right. As a result, consideration needs to be given to the cultural rights of the Indigenous child and their need to exercise such rights collectively with members of their group.⁵⁸ It has stated that:

States should always ensure that the principle of the best interests of the child is the paramount consideration in any alternative care placement of indigenous children and in accordance with article 20(3) of the Convention pay due regard to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background. In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity.⁵⁹

123. The Commission considers that the five core elements of the Aboriginal and Torres Strait Islander Child Placement Principle could provide the court with some guidance when considering the matters set out in section 60CC(3)(h):
1. Prevention: Protecting children's rights to grow up in family, community and culture by redressing the causes of child protection intervention
 2. Partnership: Ensuring the participation of community representatives in service design, delivery and individual case decisions
 3. Connection: Maintaining and supporting connections to family, community, culture and country for children in out-of-home care
 4. Participation: Ensuring the participation of children, parents and family members in decisions regarding the care and protection of their children
 5. Placement: Placing children in out-of-home care in accordance with the established ATSICPP placement hierarchy.⁶⁰
124. The Secretariat of National Aboriginal and Islander Child Care has provided a detailed description of each of these five elements, which draws on research and the guidance of Aboriginal and Torres Strait Islander leaders in the child and family services sector.⁶¹
125. The child's right to enjoy his or her culture under section 60CC(3)(h) of the Family Law Act should also be interpreted in a manner consistent with international human rights standards, in particular the CRC. This is consistent with section 60B(4) of the Family Law Act.

(c) *Family and domestic violence and parenting orders*

(i) Definitions of family and domestic violence

126. In the *Children's Rights Report 2015*, the National Children's Commissioner pointed out that there are no consistent definitions, legal frameworks or common methods used to identify family and domestic violence.⁶² Combined with this, different terms are used to describe the wide range of behaviours associated with it. The use of varied terms, different definitions and the disparate means of identifying family and domestic violence is particularly challenging in terms of establishing prevalence data and difficult for those working in the field.

127. The Australian Bureau of Statistics (ABS) uses the term 'family and domestic violence' because it:

reflect[s] the mixed use of the terms 'Family Violence' and 'Domestic Violence' and is a combination of the various contextual elements implicit in these individual terms, including relationships, location of offences, and/or domestic arrangements.⁶³

128. Consistent with the ABS, in the 2015 Report the National Children's Commissioner used the term 'family and domestic violence' as an overarching term, while acknowledging that in Aboriginal and Torres Strait Islander communities the term 'family violence' is more commonly used. The term 'family and domestic violence' was used to describe: physical violence, sexual abuse, emotional abuse, verbal abuse and intimidation, economic and social deprivation, damage of personal property, and abuse of power which can occur within spouse and de-facto relationships, ex-spouse and ex-de-facto relationships, cultural and kinship relationships, parent-child relationships, sibling relationships, and foster and guardian relationships.⁶⁴

129. The Commission supports a consistent use of terminology for family and domestic violence in line with the ABS definition.

(ii) Explaining the nature of family and domestic violence

130. The Commission supports the ALRC's Report: *Family Violence—A National Legal Response* (2010) (ALRC Report) Recommendations 7–2 and 7–3, which state that the Family Law Act should contain 'a provision that explains the nature, features and dynamics of family violence'.⁶⁵

131. Further, consistent with ALRC Report Recommendations 7–2 and 7–3, the Commission considers that an explanation will prompt judges to consider the particular impacts of family and domestic violence on persons from minority groups in Australia.

132. The Commission acknowledges that family and domestic violence in Australia remains endemic and continues to disproportionately affect women. The Australian Bureau of Statistics 2016 Personal Safety Survey reported that 17% of women and 6% of men had experienced violence by a partner since

the age of 15.⁶⁶ Further, the intersection of gender with other forms of inequality results in women with disability, Aboriginal and Torres Strait Islander women, LGBTI women and women from culturally and linguistically diverse backgrounds experiencing higher rates of family and domestic violence and additional barriers to seeking help and support, including access to the family law system.

133. The Commission recommends that an explanatory provision in the Family Law Act be worded to the effect that:

While anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men against women and their children, it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. Family violence has a particular impact on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.⁶⁷

134. This explanation should be included as a note to the definition of ‘family violence’ in section 4 of the Family Law Act. The note should act as an interpretive aid to identifying cases of family and domestic violence, supporting a precautionary approach.

135. **Recommendation 9: Section 4 of the Family Law Act is amended to include an explanatory note to the definition of ‘family and domestic violence’ to explain the nature, features and dynamics, including the gendered nature, of family and domestic violence.**

- (iii) Equal shared parental responsibility

136. The Commission draws the ALRC’s attention to the discussion concerning equal shared parental responsibility in the Report of the House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) Inquiry into *A better family law system to support and protect those affected by family violence: recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence (A better family law system Inquiry)*.⁶⁸

137. In particular, the Committee noted that it received considerable evidence that the presumption in the Family Law Act of equal shared parental responsibility is leading to unjust outcomes and compromising the safety of children, particularly where there is evidence of family violence.⁶⁹ It also heard concerns about misinterpretations of the presumption for equal shared parental responsibility as a presumption for equal shared time.⁷⁰

138. The Committee also noted that the presumption of equal shared parental responsibility, which was first introduced in amendments to the Family Law Act in 2006, was evaluated by the Australian Institute of Family Studies (AIFS) in 2009, and again in 2015, when it reviewed reforms introduced in 2012. In both cases the AIFS found that the provisions were not achieving their intended outcomes.⁷¹ It found that many separated parents still continue to share

parenting responsibility for their children despite allegations of family and domestic violence or child abuse.⁷²

139. The Committee recommended that the ALRC in this Review consider removing the presumption of equal shared parental responsibility.⁷³
140. The Commission also notes that the UN Committee on the Rights of the Child considers that while shared parenting is generally in a child's best interests, it should not be automatically applied:

The Committee is of the view that shared parental responsibilities are generally in the child's best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. In assessing the child's best interests, the judge must take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case.⁷⁴

141. The Commission is concerned that the presumption of equal shared parenting responsibilities in the Family Law Act may lead judicial officers to automatically apply shared parenting at the expense of child safety or other important considerations such as the views of the child.
142. **Recommendation 10: The ALRC review the operation of the presumption of equal shared parental responsibility to ensure it is achieving its intended objectives, having particular regard to the findings of the House of Representatives Standing Committee on Social Policy and Legal Affairs' inquiry, *A better family law system to support and protect those affected by family violence: recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence.***

5.2 The welfare jurisdiction

(a) Forced sterilisation of people with disability

143. As noted in the Issues Paper, children with disability may be involved in the family law system, either as the subject of disputes in relation to their care, or in the exercise of the Family Court's welfare jurisdiction. The Issues Paper asks what changes might be made to the legislative provisions governing decisions about children's care arrangements and the court's welfare jurisdiction.⁷⁵
144. The Commission continues to have concerns about the application of the Family Law Act's welfare jurisdiction in certain kinds of cases. The welfare jurisdiction gives the family courts a broad power to make orders relating to the welfare of children. This includes deciding cases about whether or not to authorise the sterilisation of a young person, including intersex children, as discussed in this submission further below.

145. Involuntary or forced sterilisation is a serious violation of human rights. In 2013, the UN Committee on the Rights of Persons with Disabilities released its concluding observations on Australia's compliance with the CRPD. The Committee raise serious concerns about the involuntary sterilisation of people with disabilities and urged Australia to adopt uniform national legislation prohibiting the sterilisation of people with disabilities in the absence of their prior, fully informed and free consent.⁷⁶ In 2017, the UN Human Rights Committee released its concluding observations from its review of Australia's compliance with the ICCPR. In 2017, the UN Human Rights Committee released its concluding observations from its review of Australia's compliance with the ICCPR. It also raised concerns about the involuntary sterilisation of women/girls with intellectual/cognitive disabilities and recommended that Australia eliminate this practice.⁷⁷

Concluding observations on the sixth periodic report of Australia: Non-therapeutic sterilisation of persons with disabilities

23. While noting that the Senate Standing Committee on Community Affairs recommended limiting the practice of sterilisation of persons for psychosocial reasons and strengthening the safeguards against abuse in its inquiry report of July 2013, the Committee remains concerned about the compatibility of the practice of involuntary non-therapeutic sterilisation of women and girls with intellectual disability and/or cognitive impairment with the Covenant, in particular the prohibition against cruel, inhuman and degrading treatment, the right to privacy and equality before the law (arts. 2, 7, 17, 24 and 26).

24. The State party should abolish the practice of involuntary non-therapeutic sterilisation of women and girls with intellectual disability and/or cognitive impairment.

146. The Commission draws the ALRC's attention to the recommendations made in the Commission's Submission to the Senate Community Affairs References Committee on the involuntary or coerced sterilisation of people with disabilities in Australia (2012).⁷⁸ This includes:

- National legislation be enacted to criminalise involuntary or forced sterilisation—except when there are serious threats to life or health.
- Criminalising removing a child or adult with disability from Australia with the intent of having them sterilised overseas.
- Establishing a national system to monitor the number of applications and orders made for sterilisation.
- Improving education regarding the sexual and reproductive rights of people with disability in Australia and the rights enshrined in the CRPD.⁷⁹

(b) *Intersex children*

147. Intersex people face particular issues within the Family Court system that raise concerns for the protection of their human rights.
148. 'Intersex' is a term that describes people born with variations in sex characteristics. The term intersex describes an individual's body (in other

words, their anatomy) and does not speak specifically to their gender identity. Up to 1.7% of the population is born with intersex variations.⁸⁰ The following definition from the United Nations Free & Equal campaign is informative:

Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies. Intersex is an umbrella term used to describe a wide range of natural bodily variations. In some cases, intersex traits are visible at birth while in others, they are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all.⁸¹

149. Recognising the difference between intersex and other populations is important, particularly in this context given the distinct legal and medical oversight of these populations.
150. Intersex people, particularly children and those without legal capacity to consent, are at risk of unnecessary medical interventions. Intersex children can be engaged in the family law system when family and medical professionals seek authorisation from the court for surgical interventions to physically change their bodies. The Family Court currently has a role of oversight of these procedures through its welfare jurisdiction. The Commission is concerned that applications for court authorisation can be made where there is no medical need for intervention.
151. The legal regulation over the medical treatment provided for intersex children is inherently different from regulation over transgender or gender diverse children. As a general rule, transgender and gender diverse children who want to physically transition have been concerned that court processes can inappropriately delay or constrain their choices regarding access to medical intervention, in a way that offers no medical or other benefit. By contrast, intersex children face concerns over medical treatments forced upon them without their informed consent. As discussed below, following *Re Kelvin*⁸² and *Re Matthew*,⁸³ children diagnosed with gender dysphoria no longer need Family Court approval, where the parents or guardians and clinicians agree, to access some forms of medical treatment. This is another reason why it is important to distinguish between gender identity and intersex status because a trend towards less oversight of 'special medical procedures' may not be beneficial for intersex children.

(i) Human rights of intersex children

152. The CRC and ICCPR outline human rights that are particularly relevant to the treatment of intersex children in this context. Intersex children are at risk of violation of the right to physical and mental integrity, the right to the highest attainable standard of health, the right of the child to express views freely in all matters concerning them and freedom from torture, cruel, inhuman or degrading treatment, including freedom from medical experimentation.⁸⁴ The best interests of the child shall also be a primary consideration in all actions concerning children.⁸⁵
153. The Yogyakarta Principles plus 10 recognise the risks facing intersex people in outlining the right to bodily and mental integrity:

No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.⁸⁶

154. The Yogyakarta Principles plus 10 also state that States shall '[e]nsure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity'.⁸⁷

155. The Family Court has a responsibility to protect these rights of the child.

(ii) Current jurisdiction of the Family Court—special medical procedures

156. Generally, a child under the age of 18 may consent to a medical procedure if the child has sufficient maturity and understanding to give valid consent to the procedure (has 'Gillick competency').⁸⁸ If the child is not *Gillick* competent, section 61C of the Family Law Act currently provides that decision-making responsibility about medical treatment typically vests in the parents or guardians.⁸⁹

157. However, in a case about the sterilisation of a girl with intellectual disabilities, the High Court held that parents do not have the authority to consent to certain kinds of medical procedures.⁹⁰ These cases are known as 'special medical procedures' and are decided in the Family Court as part of its welfare jurisdiction.

158. Some hospitals and parents of intersex children have applied to the Family Court to seek court authorisation for a particular intervention or series of interventions.⁹¹ In providing court authorisation, the Family Court is to consider whether the medical procedure is in the 'best interests' of the child.⁹²

159. The Commission has some concern over the way in which some cases dealing with intersex children have been decided and whether the Family Court is providing appropriate oversight of these procedures. The judgments regarding special medical procedures for intersex children reflect disparate approaches.⁹³

160. In addition, few intersex cases have come to court. The cases that have been filed with the Family Court have been restricted to sterilisation cases and one case regarding an application for hormone replacement therapy.⁹⁴ There do not appear to have been any cases about genital 'normalising' procedures. On one view, these cases fall within the terms of the High Court's decision in *Marion's case*, because they are non-therapeutic interventions and there is a risk that decisions are being made that would not be made by the child themselves if they were in a position to have their views heard and considered.

161. Problems with the current system of oversight include:

- a lack of clarity around which cases should go to the Family Court

- the small number of applications that have been made to the court have tended to be restricted to sterilisation cases and not other kinds of genital ‘normalisation’ procedures
- some of the judgments reveal gender stereotyping and misunderstandings about intersex status⁹⁵
- the parties and interveners in special medical procedure cases regarding intersex children have not included human rights bodies or intersex organisations.

162. In 2013, the Australian Senate Community Affairs References Committee published a report on the involuntary or coerced sterilisation of intersex people in Australia (Senate inquiry). The report provided a number of recommendations on the medical treatment of children. In relation to the role of the Family Court, the inquiry made the following recommendations:⁹⁶

Recommendation 5: In light of the complex and contentious nature of the medical treatment of intersex people who are unable to make decisions for their own treatment, the committee recommends that oversight of these decisions is required.

Recommendation 6: The committee recommends that all proposed intersex medical interventions for children and adults without the capacity to consent require authorisation from a civil and administrative tribunal or the Family Court.

(iii) Current Australian Human Rights Commission project

163. The Commission is currently undertaking a project on how best to protect the human rights of people born with variations in sex characteristics – also known as intersex people. The project will involve a consultation process seeking input from people with variations in sex characteristics, parents and carers, medical professionals, service providers, and legal and government representatives. The project is assessing current relevant law, clinical practices and community education in this area to determine how effectively they protect the human rights of people born with variations in sex characteristics in this medical context. The Commission aims to make recommendations for how to improve such law, clinical practices and education, by applying a human rights approach.
164. As the current inquiry is only at its initial stages, the Commission cannot now make specific recommendations to this Review relating to proposed changes to the role of the Family Court in relation to oversight of procedures on intersex children.
165. However, the Commission notes the recommendations of the Senate inquiry and in principle supports legal oversight of medical interventions undertaken on intersex children.
166. The Commission notes that to date the current system has failed to provide adequate protections to intersex children and therefore supports the consideration of different oversight mechanisms. Any oversight should be human rights-based and consideration ought to be given to bringing in human

rights experts, intersex-led organisations and clinicians into consideration of these cases.

(c) *Children with gender dysphoria*

167. The Issues Paper notes:

Transgender and intersex children may be engaged in the family law system in the exercise of the Family Court's welfare jurisdiction relating to approval for medical interventions related to their gender identity ... [C]oncerns exist about the opportunity for children to participate in this process.⁹⁷

168. The Commission notes that the Issues Paper refers to the recent decision in *Re Kelvin*.⁹⁸ This decision is important, because it has profound implications for children and their interaction with the Family Court in the context of medical interventions.⁹⁹ The key issues raised in those proceedings were: (a) whether court authorisation is required for Stage 2 hormone treatment for gender dysphoria, and (b) whether it is necessary for the court to determine the *Gillick* competence of a child seeking Stage 2 treatment.

169. In a landmark decision, the Full Court in *Re Kelvin* held that court authorisation is no longer required for Stage 2 treatment, where it has been appropriately diagnosed, where there is no dispute about treatment, and where treatment is to be administered in accordance with best practice guidelines. As a result, the Court held that it is not required to determine the question of *Gillick* competence in the context of Stage 2 treatment cases.

170. The Commission intervened in *Re Kelvin* to assist the Court with its deliberations. In the Commission's media release, the National Children's Commissioner, Megan Mitchell, welcomed the decision:

The decision recognises our obligations to protect and promote children's rights to health, non-discrimination, the preservation of their identity and to participate in decisions that affect them. The process of seeking court authorisation can cause distress for young people and their families due to financial costs and delays in treatment. Today's decision will have a significant, positive impact on the health and wellbeing of trans young people.¹⁰⁰

171. As Human Rights Commissioner, Edward Santow, noted in the same media release, the decision in *Re Kelvin* brings Australia into conformity with recommendations made by the UN Human Rights Committee, which had previously suggested Australia 'consider ways to expedite access to stage two hormonal treatment for gender dysphoria, including by removing the need for court authorisation'.¹⁰¹

172. The *Re Kelvin* ruling does not extend to children under the care of a State Government Department.¹⁰² Children who fall into this category are still required to obtain court authorisation to commence treatment. Similarly, if there is a genuine dispute or question as to whether treatment should be given to a child, then the Family Court still has jurisdiction to hear and determine that dispute.¹⁰³ This may include situations where, for example, one parent consents to the procedure but the other parent is opposed.

173. The Commission also draws the ALRC's attention to the recent decision in *Re Matthew*¹⁰⁴ involving a 16 year old child, 'Matthew', who was born genetically female but identified as male. Matthew's parents applied to the Court for a finding that he was *Gillick* competent to consent to Stage 3 treatment (in this case, a surgical double mastectomy). The Family Court held no application to the Court is required in respect to obtaining Stage 3 treatments if:
- a child is diagnosed as suffering from gender dysphoria;
 - the treating practitioner assesses the child to be *Gillick* competent;
 - there is no controversy surrounding the application for treatment; and
 - the treatment is therapeutic in nature.
- (d) *Arrangements for children and family diversity*
- (i) *Surrogacy*
174. In 2016, the Commission made a comprehensive submission¹⁰⁵ to the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements (Inquiry into Surrogacy).
175. In that submission, the Commission made a number of recommendations for action by federal, state and territory governments to better ensure the human rights of children, men and women involved in surrogacy arrangements, both domestic and international.
176. Surrogacy arrangements raise difficult issues of public policy. For some people, a surrogacy arrangement provides the only opportunity for them to have a child that they are biologically related to. Studies in the United Kingdom suggest that children born as a result of local altruistic surrogacy arrangements generally grow up in loving families and are well adjusted.¹⁰⁶
177. By contrast, in many cases international commercial surrogacy arrangements present a range of serious human rights concerns. In many countries, surrogacy is unregulated or poorly regulated.
178. International surrogacy arrangements can have a significant impact on the rights of children born as a result. Unregulated arrangements raise real concerns about trafficking of children. Even where there is some regulation, differences in legal regimes between countries can mean that some parent-child relationships are not recognised, which can have a significant impact on children's other rights such as rights to citizenship, passports, medical treatment, inheritance, and child support. In extreme cases, there are risks of children becoming stateless. Lack of appropriate regulation of assisted reproductive treatment in some countries can also mean that children are not able to obtain information about their origins. Women who act as surrogate mothers are at risk of exploitation, including trafficking, and there are real concerns about whether they are able to give free and informed consent to the arrangements.

179. A human rights based approach provides one way of assessing proposed legislative and regulatory responses. In our submission to the Inquiry into Surrogacy, the Commission set out a number of guiding principles drawn from an analysis of the interrelated human rights of the children born as a result of surrogacy arrangements, the surrogate mother and the intended parents. These are highlighted below in Recommendation 11.
180. There is a variety of legislative and regulatory responses that States can take to the issue of international surrogacy arrangements. These range from complete prohibition at one extreme, through to some form of regulation, and a laissez faire approach at the other extreme. At present, the approach taken at the federal level to international surrogacy is a laissez faire approach. Intended parents are permitted to engage in surrogacy arrangements overseas and bring the children born of those arrangements back to Australia. In its submission to the Inquiry into Surrogacy, the Commission did not seek to identify the most appropriate position for Australia to take, but submitted that if international surrogacy is to be permitted, then it needs to be appropriately regulated to adequately protect the rights of the surrogate mother and any children born as a result of a surrogacy arrangement.
181. If Australia is to take a regulatory approach towards surrogacy arrangements, there are a number of issues that would need to be addressed at a federal level in order to ensure legal clarity about the parent-child relationships that result from the arrangement.
182. There is no regular process or requirement for the transfer of parentage in Australia following an international surrogacy arrangement.
183. Currently, a very small proportion of intended parents approach the Family Court of Australia or the Family Court of Western Australia seeking orders to regularise their relationship with the children born as a result of an international surrogacy arrangement. The orders sought are usually parenting orders, which provide who the child is to live with and who is to have parental responsibility for the child. In some cases, intended parents also seek parentage orders which are declarations of parent-child relationships. As discussed in detail by the Family Law Council in its *Report on parentage and the Family Law Act*, the Family Law Act is currently ill equipped to deal with these applications.¹⁰⁷ This comment applies equally to the *Family Court Act 1997 (WA)*.
184. Section 60HB of the Family Law Act recognises transfers of parentage that occur pursuant to altruistic surrogacy arrangements that are approved by relevant State and Territory courts. However, this section does not apply to international surrogacy arrangements. If a decision is taken to permit certain international surrogacy arrangements, then it will be necessary for there to be a mechanism to transfer parentage to the intended parents for the purposes of Australian law and a requirement for intended parents to make such application.
185. At present, there is uncertainty about whether the Family Court of Australia can or should make a declaration of parentage in such circumstances.

186. **Recommendation 11: In the development of any regulatory regime dealing with surrogacy, the following guiding principles are followed:**
- a. the best interests of the child are protected (including the child's safety and wellbeing and the child's right to know about his or her origins)
 - b. the surrogate mother is able to make a free and informed decision about whether to act as a surrogate
 - c. sufficient regulatory protections are in place to protect the surrogate mother from exploitation
 - d. there is legal clarity about the parent-child relationships that result from the arrangement.
187. **Recommendation 12: If the Australian Government decides to permit some form of international surrogacy arrangements, then the following amendments are made to Commonwealth law to clarify parent-child relationships that result from those arrangements:**
- a. a clearer definition of 'parent' be inserted into the Family Law Act
 - b. a federal Status of Children Act be introduced that:
 - i. includes the power to make orders about the status of children and legal parentage for the purpose of all Commonwealth laws; and
 - ii. specifically deals with applications for transfer of parentage in surrogacy cases where State and Territory Acts do not apply
 - c. section 60H of the Family Law Act be redrafted to make it clear that it does not apply to surrogacy arrangements.
- (ii) Children of same-sex couples
188. The CRC provides a guarantee of non-discrimination in article 2. In particular, article 2(2) provides that States shall 'take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status ... of the child's parents, legal guardians, or family members'.
189. The Commission is aware that children of same-sex couples are at risk of experiencing discrimination if their parent-child relationships are not recognised in law. In 2007, the Commission tabled in parliament a report titled *Same-Sex: Same Entitlements, the report of the National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (the Same-Sex: Same Entitlements Report).¹⁰⁸ The Commission found that at least 58 federal laws relating to financial and work-related entitlements discriminated against same-sex couples and, in many cases, their children. In relation to family law, the Commission raised concerns that the definition of parent under the Family Law Act creates uncertainty for children of same-sex couples.¹⁰⁹
190. As discussed above in relation to surrogacy, there is no general definition of 'parent' in the Family Law Act. When the term 'parent' is used in Part VII

(Children) in relation to a child who has been adopted, it means an adoptive parent of the child.

191. In 2013, the Commission made a submission to the Family Law Council in its Review of Parentage Laws, pointing out the lack of clarity with regard to the definition of ‘parent’ under the Family Law Act, and its implications for couples and their children who use Assisted Reproductive Technology (ART) and surrogacy arrangements, which includes children of same-sex couples.¹¹⁰
192. As recommended above, the Commission considers it would be useful for the Family Law Act to contain a general definition of what it means to be a parent. In the Commission’s view, this should be consistent with current community understandings of what it means to be a parent, including de facto partners and non-biological parents, such as the female partner of a woman having an ART child, or a gay co-father of a surrogate child.
193. **Recommendation 13: The Family Law Act is amended to include a general definition of parent that is consistent with contemporary understandings of parent-child relationships including de facto partners and non-biological parents.**

6 Resolution and adjudication processes

6.1 *Appropriate dispute resolution for cases involving family and domestic violence*

(a) Cross-examination by unrepresented parties in family law proceedings

194. The Commission refers the ALRC to its submission on the Exposure draft—Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017, which is relevant to the present inquiry.¹¹¹ The Commission is broadly supportive of proposed amendments to the Family Law Act, to prevent direct cross-examination by unrepresented parties in family law proceedings, in matters involving family and domestic violence. These reforms aim to ensure that victims of family and domestic violence are not re-traumatised in giving their evidence to the court.
195. The Commission recognises the significant social and economic impact of family and domestic violence in the Australian community, and the disproportionate impact that this has on women and children.¹¹² The direct cross-examination of parties involving family and domestic violence risks reinforcing the power dynamic that typifies family and domestic violence, and consequently risks affecting the probity of evidence put before the Court, where power and control is asserted over the victim during proceedings.
196. The proposed reforms promote greater access to justice by empowering victims of family and domestic violence to participate in the family law process, which is a critical pathway to achieving gender equality.¹¹³ This is consistent with the CEDAW, which requires state parties to take appropriate measures to eliminate discrimination against women, including gender-based violence.

197. The Commission also acknowledges that children are witnesses, bystanders and direct victims of violence in the home. As a signatory to the CRC, Australia must take all appropriate measures to protect children from all forms of physical or mental violence, injury or abuse. It must also take all appropriate measures to promote the physical and psychological recovery of a child victim of abuse, in an environment that fosters the health, self-respect and dignity of the child.
198. The policy intent of the proposed reforms is also consistent with recommendations made by the UN Committee on the Rights of the Child, which has called on governments to provide comprehensive and integrated protective measures to address violence against children, including measures for prevention, identification, reporting, referral, investigation, treatment, follow-up, and judicial involvement.¹¹⁴
199. The National Children's Commissioner's Children's Rights Report 2015 included findings of a major investigation on the impact of family and domestic violence on children (Chapter 4). The ALRC is referred in particular to the findings and recommendations set out at pages 144–150.¹¹⁵
200. The Commission suggests that, in assessing the compatibility of such amendments with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified, some of the preliminary human rights issues that should be considered are:
- the protection of vulnerable witnesses and their capacity to give effective evidence balanced against the right of another party to test evidence adduced by all relevant witnesses
 - the need to take into account the views of the women and children, and the importance of the role of independent children's lawyers (ICLs)
 - procedural fairness and potential limitations on the unrepresented party's ability to effectively examine the witness
 - the particular requirements and role of the court-appointed person (for example, consideration could be given to requirements similar to those found in Part 8, Local Court Practice Note No. 2 of 2012 (NSW) for Domestic and Personal Violence Proceedings).¹¹⁶
201. **Recommendation 14: The Family Law Act is amended to prevent direct cross-examination by unrepresented parties in family law proceedings, in matters involving family and domestic violence, having regard to the following matters:**
- **the protection of vulnerable witnesses and their capacity to give effective evidence balanced against the right of another party to test evidence adduced by all relevant witnesses**
 - **the need to take into account the views of the women and children, and the importance of the role of independent children's lawyers**
 - **procedural fairness and potential limitations on the unrepresented party's ability to effectively examine the witness**

- **the particular requirements and role of the court-appointed person.**

(b) *Funding for specialised family and domestic violence services in the family law system*

202. The Commission has made a number of submissions that highlight Australia's high rate of violence against women.¹¹⁷ This issue is particularly acute for Aboriginal and Torres Strait Islander women, who are 32 times more likely to be hospitalised from family and domestic violence and ten times more likely to be killed as a result of a violent assault.¹¹⁸
203. In its submission to the *A better family law system Inquiry*, the Women's Legal Service Australia (WLSA) noted that there is an ever-growing number of women who are family violence victims and who are 'falling through the cracks' of the legal aid system.¹¹⁹ This is consistent with the Commission's consultations with the National Women's Alliances.
204. The Commission acknowledges the concerns raised by the WLSA that women find themselves unable to access legal services due to the narrowing of community legal centre intake guidelines and legal aid family law guidelines, and without the financial means to pay the fees of private family practitioners.¹²⁰ The Commission supports the need for greater access to legal aid for parties accessing the family courts, particularly for women experiencing family and domestic violence.
205. The Commission also supports the recommendations of the *A better family law system Inquiry*, regarding the need for holistic and ongoing support services to support families experiencing family and domestic violence, before, during and after engagement with the family law system, which is critical to families' ongoing safety and wellbeing.¹²¹
206. In particular, the Commission supports the Committee's recommendation to consider introducing 'wrap-around' services, co-located in the federal family courts, modelled on the provision of these legal and non-legal support services in the specialist family violence courts of the states and territories.¹²²
207. **Recommendation 15: Consideration is given to increasing legal aid funding to promote greater access to legal aid for women who are victims of family and domestic violence, in particular Aboriginal and Torres Strait Islander women, as well as providing funding for specialist family and domestic violence legal and non-legal services to be imbedded in the family courts, to better support the needs of parties experiencing family violence in the family law system.**

(c) *Children's rights in alternative dispute resolution processes*

208. In a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Family Law Amendment (Parenting Management Hearings) Bill 2017, the Commission indicated its broad support for more flexible and inquisitorial alternatives to the court process for resolving

parenting disputes, with the potential to resolve disputes in a less adversarial, more economical and prompt way.¹²³

209. However, the Commission raised a number of concerns with the model proposed in this Bill, in relation to children's rights. These concerns highlight two key issues that need to be addressed in any alternative dispute resolution processes involving parenting matters, so that children's rights are considered properly. These are:
- ensuring children have the opportunity to express their views and have them taken into account
 - ensuring that decision-makers and facilitators of alternative dispute resolution have a comprehensive understanding of the impacts of violence and abuse on children, childhood trauma and child development.
210. In its submission, the Commission considered the proposals for Parenting Management Hearings, suggesting that they would not give children who are affected by a parenting matter before a Panel sufficient opportunity to express their views in accordance with article 12 of the CRC. Although there were mechanisms set out in the Bill, such as a family consultant or an ICL through which a child's view may be expressed and conveyed to decision-makers, the proposed amendments (and the current Family Law Act consideration of parenting matters) do not *require* decision-makers to provide an opportunity for a child to express their views. As discussed below, despite such mechanisms existing in court matters, it is still the case that children may not be given an opportunity to express their views and therefore have them taken into consideration in matters that concern them.
211. The Commission also notes that, currently, the Family Law Act does not extend to considering the views of children in non-contested matters. In the sections of the Family Law Act that refer to 'non-court based family services', there is no obligation for the child's views to be considered. This is important, given that the majority of matters are resolved outside of the courts.¹²⁴
212. **Recommendation 16: Any alternative dispute resolution processes for parenting matters provide children with the opportunity to express their views, in compliance with article 12 of the *Convention on the Rights of the Child*.**
213. In its submission on the Parenting Management Hearings Bill, the Commission also noted the need for judicial decision-makers, including those in alternative dispute forums, to have a comprehensive understanding of the impacts of family and domestic violence and child abuse on children. While the provisions of the Bill aim to establish an expert, multidisciplinary Panel, with the Bill requiring Panel Members to have specialist skills and expertise in relevant fields,¹²⁵ this may not include knowledge of child development, the impacts of violence on children or childhood trauma. In this submission, the Commission recommended that all Panel Members be provided with training prior to commencement of the pilot, including training on the effects of family and

domestic violence and child abuse, including exposure to violence, on children.

214. The need for training and support for judicial and court officials associated with the family court, including those involved in mediation and counselling of children, is discussed further in Professional skills section of this submission.
215. The Commission notes that the UN Committee on the Rights of the Child, in its General Comment on article 3 of the CRC, recommended that, ‘as far as possible, a multidisciplinary team of professionals should be involved in assessing the child’s best interests’.¹²⁶ This should be the case whether or not the process occurs through the court or through an alternative dispute resolution process such as that envisaged.
216. In the *Children’s Rights Report 2015*, the National Children’s Commissioner noted the benefits of the Family Court’s Magellan Program, which is equipped with a multidisciplinary team and resources to address the complexity of Family Court cases involving children who have experienced ‘serious physical abuse or sexual abuse’.¹²⁷
217. In 2007, the Australian Institute of Family Studies evaluated the Magellan Program and found that it has been successful in responding to allegations of serious child abuse.¹²⁸ The National Children’s Commissioner recommended that consideration be given to expanding the Magellan program to incorporate the broader definitions of family and domestic violence and abuse as reflected in the 2012 amendments.¹²⁹ Similarly, the *A better family law system Inquiry* recommended that the Magellan program be extended to all parenting matters where there are allegations of family violence.¹³⁰
218. **Recommendation 17: The Attorney-General resource and support the Family Court of Australia to extend the Magellan program to all parenting matters where there are allegations of family and domestic violence.**
219. The Commission also draws the ALRC’s attention to the possibilities of a child-inclusive approach in family dispute resolution. Child-inclusive practice is an approach to family dispute resolution gaining prominence in Australia.¹³¹ It is designed to enhance collaboration between parents and keep the best interests of children at the forefront of mediation. It also helps separated parents develop co-operative parenting strategies for the future. The Commission considers that judicial officers and other professionals of the Family Court would benefit from training and information about this approach.

7 Children’s experiences and perspectives

7.1 Children’s right to participation

220. As discussed above, a child’s right to participation, enshrined in article 12, is one of the four Guiding Principles of the CRC. As core principles, these rights must be considered in the interpretation and implementation of all other rights in the CRC.¹³²

221. The CRC contemplates a child's right to participation as being especially relevant to judicial and administrative proceedings, such as those involving family law. Article 12 specifically states that opportunities to be heard must be provided 'in any judicial and administrative proceedings affecting the child'.
222. Further, article 9, which refers specifically to parental separation and a child's place of residence, states that all interested parties shall be given an opportunity to participate in the proceedings and make their views known. Children may be seen as parties with a keen interest in the outcome of such proceedings.
223. The right to participate is not only about providing a child with the opportunity to express their views: these views must also be taken into account and given due weight according to the child's age and maturity.
224. However, in General Comment 12, the UN Committee on the Rights of the Child has stated that, while the right to be heard means that children's views must be taken into account, it does not necessarily extend to making decisions consistent with those views. This reflects the interdependent and complementary relationship between the right to be heard and the consideration of the child's best interests.
225. Indeed, the UN Committee considers the seeking of a child's views as an important procedural safeguard to guarantee the implementation of the child's best interests.

A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests. Such communication should include informing children about the process and possible sustainable solutions and services, as well as collecting information from children and seeking their views.¹³³

226. Hearing the views of children is considered so essential that it is described as a 'mandatory' step in a consideration of a child's best interests.¹³⁴
227. The UN Committee has also stated that children should be given feedback about how their views have been considered in the decisions made:

States parties are encouraged to introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child.¹³⁵

228. Children's right to information is also guaranteed under articles 13 and 17 of the CRC.

7.2 *Child participation methods in Australian family law*

229. The Commission is aware that contemporary legal practices increasingly reflect a child-rights based approach that recognises the need to enable children's participation in court proceedings.¹³⁶

230. As outlined in the Issues Paper, and discussed in this submission, the Family Law Act recognises the rights of children, including the right to express their views, in various ways. It also provides for several mechanisms through which children's views may be expressed. The court can hear children's views—including accounts from others as to what the child has said to them, in reports from a family consultant, and evidence from an ICL. A judge can also interview a child, although this is extremely uncommon.¹³⁷
231. These measures all go some way to safeguarding children's rights under the CRC. However, the Commission believes that children's rights, in particular their right to participation, are not being fully implemented in the family law system.
232. Studies consistently show that children want to have more of a say in legal decisions affecting them.¹³⁸ Providing children and young people with the opportunity to make their thoughts and preferences known in court proceedings helps ensure they are satisfied with final decisions around living arrangements and contact with parents¹³⁹ and contributes to their overall psychological wellbeing.¹⁴⁰ Children do not want to be compelled to express their views: but would like the opportunity to do so.
233. Further, the National Children's Commissioner has received numerous representations from children and young people, and their advocates, about failures by courts and agencies within the family law system to solicit their views in the context of decision-making, and to provide them with accessible information about processes and outcomes.
234. There are numerous barriers that are inhibiting child participation in the family law system.
235. For example, there is nothing in the Family Law Act that requires a judge to provide a child with an opportunity to express their views, only to consider any views that may be expressed through a family consultant or an ICL. Not all children have access to these mechanisms for expressing their views. The judge has discretion both on whether to request a report from a family consultant or to direct that a child's interests are to be represented by a lawyer.
236. Further, whereas a family consultant must ascertain the views of the child in relation to a matter directed by a judge, an ICL is not required to provide a child with an opportunity to express a view, but to ensure that 'any views expressed by the child' are 'fully put before the court'.¹⁴¹ The Commission notes that the national Guidelines for Independent Children's Lawyers (2013) state that it is expected the ICL will meet with the child unless the child is under school age, or there are exceptional circumstances or significant practical limitations.¹⁴²
237. Despite the key role that family consultants and ICLs play in relaying children's views to family courts there are some concerns about whether they are sufficiently child-centred in their approach. An Australian Institute of Family Studies (AIFS) study in 2014 revealed there is diversity of practice among ICLs about meeting with children, with some lawyers not meeting with children

and relying only on sources of information such as family or expert reports.¹⁴³ Most ICLs surveyed for this study indicated that meeting with children or young people was not necessarily a routine part of their practice, with just over half of ICLs surveyed indicating they 'rarely or sometimes' had such contact, when asked to reflect on their three last cases.¹⁴⁴

238. Even when children have had the opportunity to meet with an ICL or family consultant, many have been disappointed with the process.¹⁴⁵ Some children who have been interviewed about these experiences have said they were uncertain about the role of representative. Some children also said that their views had been filtered or misinterpreted.¹⁴⁶ When asked about her experience of meeting with an ICL, one girl said: 'I met her once ... We shook hands. She said her name and left'.¹⁴⁷ Another girl said: 'It was all pretty bad ... Probably that she just didn't listen. Like, she would ask us questions and we'd tell her, but then she just didn't care what we said. And she ignored what we said'.¹⁴⁸
239. With the exception of an interview by a judge, none of the methods for eliciting a child's views under the Family Law Act necessarily involve direct participation by the child. Research shows that there is a reluctance among some Australian judges to engage with children.¹⁴⁹ In this research, judges expressed concern about lacking the skills and ability to speak directly with children.¹⁵⁰
240. There are also low levels of child consultation in family dispute resolution.¹⁵¹ A 2010 study of children's participation in Family Relationship Centres showed that staff were concerned about the lack of feedback to children following the mediation process. One staff member said, 'My sense is, we put them in that situation, they get an hour with the child consult they don't really know what gets fed into the mediation'.¹⁵²
241. Further, there are limited avenues through which children can make complaints about negative experiences and not having their right to be heard respected within the family law system.
242. The Commission considers that mediators, family law consultants and ICLs are of significant value. Indeed the AIFS study demonstrated that judges find the evidence collected by ICLs to be very helpful when they make a decision about the child. However, there are significant individual and systemic barriers that are impacting the effectiveness of child participation practices.¹⁵³
243. **Recommendation 18: The Family Law Act is amended to require a judge to provide children with an opportunity to express their views in matters that affect their rights or interests. A child should not be compelled to express a view, but should be provided with the opportunity to do so in a manner appropriate to their age and maturity.**

7.3 Children's right to be informed

244. As well as having their voices heard, children and young people have repeatedly emphasised the importance of being kept informed during court

proceedings and being advised of the outcomes as a baseline level of involvement.¹⁵⁴

245. Currently, the Family Law Act requires a court to explain court orders or injunctions that are inconsistent with an existing family violence order to a child.¹⁵⁵ However, a Bill before the Senate proposes to amend section 68P of the Act to allow the courts to dispense with this requirement.¹⁵⁶
246. In 2017, the National Children's Commissioner made a submission to the exposure draft of this Bill, raising concerns that removing this requirement could deprive children and young people of information relevant to their wellbeing, and is at odds with the principles of the child's best interests and the right to active participation, as defined by the CRC.¹⁵⁷ These concerns were also raised by the Commission in a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the proposed amendments.¹⁵⁸
247. Under the Family Law Act, the orders or injunctions that must be explained to the child are those (usually by the Family Court or the Federal Circuit Court) that require or authorise a person to spend time with a child. For example, if the Family Court makes a parenting order that authorises a person to spend time with a child, but the parenting order is inconsistent with a family violence order made by a state or territory court, then an explanation for making the parenting order must be given.
248. The explanation does not need to be given by the court itself. The court may arrange for someone else to give the explanation.¹⁵⁹ The Family Law Act provides that the explanation must be given in language that the child is likely to readily understand and must contain certain information.¹⁶⁰ The requirement for an explanation is to ensure that the child properly understands the reasons why the court has made an order that directly affects his or her interests.
249. The Commission considers the current provisions are an important requirement and do not impose overly onerous obligations on court officials.
250. There is an obvious need for children and young people to be aware of changes to their situation resulting from a court order or injunction that is inconsistent with a family violence order that was made for their own protection. The implementation or contravention of these orders or injunctions will have a direct impact on the life and wellbeing of the child involved. A failure to explain these could lead to distress and confusion on the part of the child involved, allow them to be manipulated or provided with misinformation, or place them in a situation where they feel unsafe and unsure of how to seek help or change their circumstances.
251. Informing a child about a court order or injunction that is inconsistent with a family violence order protecting them, should be the default requirement of the Family Law Act. Any exceptions to this requirement should only be permitted where there is clear evidence, such as a psychological assessment, that it would be detrimental to a child's wellbeing for the explanation to be provided to them.

252. Further, the Commission considers that children need to be informed of their rights in family law proceedings. In addition to the right to be informed, under articles 12, 13 and 17 of the CRC, article 42 of the CRC obliges States Parties to 'make the principles and provisions of the CRC widely known, by appropriate and active means, to adults and children alike'. Children could be informed of their rights, in particular their right to be heard, through a variety of mechanisms including in written and online materials, court-appointed ICLs or family consultants, or other means decided by the judicial officer.
253. **Recommendation 19: The requirement in section 68P of the Family Law Act to explain to a child court orders or injunctions that are inconsistent with an existing family violence order is retained.**
254. **Recommendation 20: Children are informed of their rights in family law proceedings that affect them, including their right to be heard, in a manner appropriate to their age and maturity.**
255. **Recommendation 21: Children are informed of decisions made in relation to parenting arrangements that affect them, in a manner appropriate to their age and maturity.**

7.4 Making sure children are safe and supported when they participate in family law processes

256. There is a dominant perception among family law practitioners that involving children in adversarial proceedings can be harmful for children.¹⁶¹ There are understandable concerns about protecting children from the stress of repeated engagement with the legal system and the desire to shield children and young people from familial conflict.¹⁶² The Commission recognises that this approach seeks to limit children and young people's interaction with court proceedings.
257. While it is undoubtedly important to prevent children and young people from being traumatised through their interactions with the court, excluding children and young people from participation in the decision-making process does not protect them from the impact of Family Court proceedings, as they will ultimately be affected by the court's decisions around living arrangements and contact orders.
258. Some parents, professionals and judicial officers may also be concerned about placing a child in a position where they feel they are choosing which parent to live with. However, seeking the views of a child should not require children express a choice. Rather, it should provide them with an opportunity to express their feelings about their own family situation.
259. Negative attitudes towards engaging children are also influenced by arguments around age and competency. Family law professionals are less likely to meet with younger children believing that they are incapable of forming their own opinions.¹⁶³ Obviously the older and more mature a child is, the greater their capacity will be to articulate their needs and give insights into the family situation. However, just because a child is young does not mean

that we do not have to ask them how they feel or what they think. The focus should be on determining the children's perspectives, not their 'wishes'.

260. Family law professionals also express concern that children can be subject to parental coaching and pressure which may distort their views. These attitudes might be justified in some instances. Some adults may manipulate their child's voice to benefit their own case or to denigrate the other parent.¹⁶⁴
261. While these concerns are understandable, many of these types of issues can be overcome with the assistance of appropriately trained counsellors who can focus on the children's insights into their family and their needs.
262. It is also important to create suitable environments for children to be heard, where they can feel safe, and confident that their wishes are respected by the adults making decisions that concern them.
263. In its General Comment on article 12, the UN Committee on the Rights of the Child stated:
- A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sightscreens, and separate waiting rooms.¹⁶⁵
264. This means putting children's voices to the forefront, and providing safe and appropriate spaces where children of varied ages and backgrounds can express their views freely.
265. This is especially important for Aboriginal and Torres Strait Islander children, children from culturally and linguistically diverse backgrounds, children with disabilities and other vulnerable children who can face additional barriers to expressing their views. Specifically in relation to children with disabilities, the UN Committee on the Rights of the Child has advised that:
- Children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognise the right to expression of views for minority, Indigenous and migrant children and other children who do not speak the majority language.¹⁶⁶
266. For at-risk children, it is especially important that child welfare professionals be engaged to facilitate interviews or mediation processes.
267. Ensuring children can express their views not only realises their rights under the CRC, it can also have concrete benefits for children and their families. Hearing from children in a dispute can shift the adversarial position of parents and bring about a peaceful settlement. There is also therapeutic value in giving children a say, because it empowers them to have a greater sense of control over their own lives. Studies consistently show that providing children and young people with the opportunity to make their thoughts and preferences

known in court proceedings helps ensure they understand final decisions around living arrangements and contact with parents¹⁶⁷ and contributes to their overall psychological wellbeing.¹⁶⁸ Research also indicates that the more heated and contested the matter, the more likely children and young people are to want to have their ideas and opinions heard.¹⁶⁹

268. In contrast, not enabling children to participate can have negative implications. For example, children who have been excluded from mediation processes have said that being kept out of the decision-making process left them feeling 'cranky and upset', 'angry', 'horrible', 'sad and bad', 'frustrated', 'an outsider' and 'left in the dark'.¹⁷⁰

7.5 Learning from children and young people

269. Since her appointment in 2013, the National Children's Commissioner has heard from a number of children about the importance of being heard, not just in family law but more broadly. In her listening tour, called the Big Banter, she met face-to-face with over 1000 children and heard from over 1300 children through an online survey or through the post.¹⁷¹ Many of these children from a variety of ages and backgrounds told her that they wanted a say in decisions which affected them and to be taken seriously.
270. The Commissioner has also heard directly from a number of children and young people affected by the separation of their families, with experience of the family law system. The following represents some of the main issues raised by a group of children in 2017, in relation to their experiences:
- They felt that children were not believed, and that an adult's word is taken over theirs.
 - They felt that court processes and how they could participate were not properly explained to them.
 - They felt they had no rights and their voice wasn't important.
 - Their ICLs did not contact them or ask them for their views.
 - They felt that being involved with courts over many years is really bad for children.
 - They thought that children shouldn't have to live or have contact with someone they are scared will hurt them.
 - Some children feel unsafe and don't want to go to contact visits.
 - Supervision at contact centres didn't really happen, the people sat in the office, so bad things happened outside without them seeing or knowing.
271. One girl told the National Children's Commissioner in 2018 that the expert witness whom she spoke to failed to tell her about her rights, misrepresented what she said, and asked questions and said things that she thought were inappropriate. She felt that the ICL seemed uninterested in her case, dismissive and rushed. She did not feel the ICL was interested in getting to know her, and did not treat her mother fairly, and favoured her father. She also felt that the ICL gave her incorrect information about whether the ICL could talk to her parents, and breached her confidentiality.

272. Children have also told the Commissioner some of their ideas to make things better for children in the family law system:
- Always listen to kids and be kind to them.
 - Make sure children and young people and people in the system know about children's rights.
 - Children's lawyers should always meet with and get to know children and young people.
 - Make sure the process is clearly explained and where and how children and young people can have their say.
 - Children should be able to get feedback on decisions that are made, and on how their views were considered.
 - Train people on how to talk to children and young people.
 - Make sure police, teachers and child welfare people understand the impact of child trauma.
 - Make sure children and young people know how to raise concerns and make complaints.
 - Improve supervision of contact visits and centres.
273. The types of issues raised by these children indicate clearly the importance they place on being able to express their views, have these views taken seriously, and be informed about processes and decisions which impact on their lives. They also raise some important concerns about safety in the family law environment.
274. The Commission considers that it is essential for the ALRC in this Review to listen and learn from children who have been involved in the family law system in order to develop recommendations that can better realise children's rights. The Commission understands that AIFS current research project on Children and Young People in Separating Families¹⁷² will provide valuable research data from children on their experiences of the family law system.
275. The Commission also urges the ALRC to consider recommending that the Family Court establish a children's board or committee similar to the Family Justice Young People's Board in the UK, to provide ongoing advice to the Family Court on how to better realise children's rights in the family law system.
276. The Commission notes that the South Australian Young Persons Family Law Advisory Group (YPFLAG), run as a pilot project through the South Australian Family Pathways Network, could provide one effective model for learning from children and young people involved in family law matters.¹⁷³

8 Professional skills

277. The UN Committee on the Rights of the Child pointed out that qualified professionals are an essential safeguard to guarantee the implementation of the child's best interests:

Children are a diverse group, with each having his or her own characteristics and needs that can only be adequately assessed by professionals who have expertise in matters related to child and adolescent development. This is why

the formal assessment process should be carried out in a friendly and safe atmosphere by professionals trained in, inter alia, child psychology, child development and other relevant human and social development fields, who have experience working with children and who will consider the information received in an objective manner. As far as possible, a multidisciplinary team of professionals should be involved in assessing the child's best interests.¹⁷⁴

278. In order to understand the needs of children, and make decisions in their best interests, it is essential that all professionals in the family law system including judges, family consultants, ICLs, mediators and other professionals have an understanding of child development and the impacts of family separation, violence and abuse on that development.
279. The Commission notes that, following the publication of the National Domestic and Family Violence Bench Book, the Australian Government funded the National Judicial College of Australia to develop a family violence training course for all judges.¹⁷⁵ The Commission commends this initiative, and urges the training model to include training specific to the impact of violence on children and child development.
280. **Recommendation 22: Judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with ongoing training and resources on family law matters relating to children including the impacts of family and domestic violence and child abuse on children, child development and applying the best interests of the child principle in parenting matters.**
281. As noted above in section 4.3 of this submission, on Accessibility for people with disability, the level of understanding of disability held by judicial officers, legal practitioners and other professionals working in the family law system may act as a barrier to access to justice. Conducting disability awareness training for judicial officers, legal practitioners and other professionals working in the family law system would be consistent with article 13 of the CRPD.
282. **Recommendation 23: Consistent with article 13 of the *Convention on the Rights of Persons with Disabilities*, judicial officers and other family law professionals are provided with disability awareness training, including on not making assumptions about a person with disability's parenting capacity.**
283. In addition, as noted above in relation to intersex children, cases regarding special medical procedures for intersex children reveal misunderstandings about intersex status. Judicial officers may benefit from training on understanding gender and sex.
284. **Recommendation 24: Judicial officers are provided with training and resources on the differences between, and issues faced by, intersex people and people who are lesbian, gay, bisexual, transgender, gender diverse or queer.**

285. It is also essential that family law professionals are able to communicate effectively with children, in order to elicit their views and take them into consideration.
286. Research shows that there is a reluctance among some Australian judges to engage with children.¹⁷⁶ While family court judges have the power to undertake interviews with children and young people, this is rarely done in practice in Australia.¹⁷⁷ In a study on children's direct participation and the views of Australian judges, many judges expressed concern about lacking the skills and ability to speak directly with children.¹⁷⁸
287. This suggests that Australian judges may not be well-equipped with the skills and the training to undertake direct interactions with children and young people. This could lead to judges and court officials adopting a default position that avoids providing children with explanations of court orders and injunctions relevant to their safety and wellbeing because they consider that the children are 'too young to understand'.
288. A child's ability to understand legal proceedings will be significantly influenced by the efforts made by courts to render the proceedings accessible and understandable to them. The UN Committee on the Rights of the Child stated that legal proceedings should be 'both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information'.¹⁷⁹
289. The Commission considers that training and resources are needed to ensure court officials have the means available to them to engage with children of all ages about difficult subjects, in a safe, appropriate and respectful manner.
290. **Recommendation 25: Judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with training and resources to assist them to engage and communicate effectively with children about family law matters that concern them.**
291. As stated in the Issues Paper, recent reports and preliminary consultations for this Review have identified 'cultural competency' as a deficiency and a gap in the skills and knowledge of family law system professionals. The cultural competence of family law system professionals is an essential component of creating an environment of cultural security for Aboriginal and Torres Strait Islander peoples within the family law system.
292. Cultural competency requires an awareness that extends beyond the individual. The family law system must incorporate systems-level change to ensure that its professionals have and maintain cultural competency skills. Creating true and sustainable cultural competency is an organisation-wide process that must include every individual in the organisation, is developed over time, and is based on respectful partnerships with Aboriginal and Torres Strait Islander organisations and communities.¹⁸⁰

293. The *Bringing them Home* report noted that it is particularly important for judicial officers to have an understanding of the cultural background of the persons with whom he or she is dealing:

Judges, in common with all other professionals dealing with Indigenous families and children, require ongoing education comprising the history and effects of forcible removal as well as Indigenous cultural values, especially those relating to child-rearing. All officers of the Family Court involved in parenting disputes will need ongoing training to ensure accessibility for, and to avoid discrimination against, Indigenous people.¹⁸¹

294. The UN Committee on the Rights of the Child has echoed this statement, noting that judicial officers should receive specific training on the rights of Indigenous children under the CRC and its Optional Protocols:

Professionals involved in law enforcement and the judiciary should receive appropriate training on the content and meaning of the provisions of the Convention and its Optional Protocols, including the need to adopt special protection measures for indigenous children and other specific groups.¹⁸²

295. The UN Committee has also stated that relevant professional categories in State judicial systems should receive training and awareness-raising on the importance of collective cultural rights in conjunction with the determination of the best interests of the child.¹⁸³

296. **Recommendation 26: Judicial officers and family law professionals, including Independent Children’s Lawyers, family consultants and mediators are provided with training and resources to assist them to have and maintain cultural competency skills, in particular in relation to Aboriginal and Torres Strait Islander peoples.**

297. **Recommendation 27: Judicial officers receive appropriate training on the content and meaning of the provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* and the *Convention on the Rights of the Child* and its Optional Protocols.**

298. The impact of colonisation and past policies of child removal continue to have a significant effect on the lives of Aboriginal and Torres Strait Islander peoples, including through intergenerational trauma. Intergenerational trauma refers to the process by which:

historical trauma is transmitted across generations ... it is transferred from the first generation of survivors that directly experiences or witnessed traumatic events to the second and further generations.¹⁸⁴

299. As noted in the *Bringing them Home* report, the impact of intergenerational trauma has meant that Aboriginal and Torres Strait Islander peoples, particularly those who have been forcibly separated from their own families, have been ‘deprived of the experiences to become “successful” parents themselves’.¹⁸⁵ There is also increasing neuro-biological evidence to show that trauma can have a severe ongoing impact on the brain and body, manifesting

itself through issues such as family and domestic violence, excessive drug and alcohol use, as well as knowledge of parenting itself.

300. To address the safety and support needs of Indigenous peoples in the family law system, it is therefore critical that a trauma-informed approach is applied, which incorporates an understanding of the specific experiences of trauma for Aboriginal and Torres Strait Islander peoples, including intergenerational trauma.¹⁸⁶
301. **Recommendation 28: Judicial officers and family law professionals, including Independent Children’s Lawyers, family consultants and mediators are provided with training and resources on trauma-informed practices, in particular in relation to the impact of inter-generational trauma on Aboriginal and Torres Strait Islander peoples.**

¹ *Australian Law Reform Commission Act 1996* (Cth), s 24(1).

² *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), article 23.

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

⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), article 3 and, before that, the *United Nations Declaration of the Rights of the Child*, GA Resolution 1386 (XIV), 14 UN GAOR Supp No 16, UN Doc A/4354 (2 November 1959), principle 2.

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