

ALRC Review of the Family Law System

Yfoundations Submissions

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About Yfoundations

For over 30 years Yfoundations has been the NSW peak body on youth homelessness, representing young people at risk of, and experiencing, homelessness, as well as the services that provide direct support to children and young people.

Our vision: Creating a future without youth homelessness. We believe that all children have the right to safety and stability, home and place, health and wellness, connectedness and participation, and education and employment (together these are the foundations of our organisation). We know these are the foundations for the prevention of, and pathways out of, homelessness.

Our values underpin all the work we do. We value:

- Young people;
- Justice and human rights;
- Diversity and inclusion;

- Optimism and hope;
- Courage; and
- Integrity.

We know that homelessness is an interrelated issue. It requires a whole of government and service response. We need to be innovative, collaborative and determined if we are going to end homelessness.

Safety and Stability

It is vital that all young people not only feel safe, but also are actually protected from risk factors that may impede their developmental process. During childhood and adolescence, young people must receive the necessary support to ensure they develop a strong safety system, both internally and within their external networks. A strong and stable foundation will foster confidence and independence within a young person, which will promote active participation in community life.

Home and Place

It is vital that all young people have access to a safe, non-judgemental home and place. A comfortable place that they identify with and feel a strong connection to. A Home and Place should be an environment that promotes growth and fosters positive development.

Health and Wellness

It is vital that all young people, particularly during the formative stages of their growth and development, are physically, socially and emotionally well. To ensure this, young people must have access to all the necessary prerequisites for achieving health and wellness. Being well and feeling healthy, will promote self-worth, and ensure young people feel competent to participate in their communities.

Connections and Participation

It is vital that all young people are given the opportunity to develop and nurture the connections in their lives. Connections to friends, family, community and society promote resilience and social inclusion. Youth people must be listened to and have the opportunity to influence outcomes. Positive connections to and genuine participation in community life during the formative stages of childhood and adolescence enables a young person to build a strong positive foundation and prepares them for adult life.

Education and Employment

It is vital that all young people are given the opportunity to pursue their educational and professional goals. Education and training is crucial to the growth and development of young people. Education and training, including formal tuition and practical life skills, promotes self-confidence and independence and provides young people with the skills and competencies.

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Introduction

Yfoundations welcomes the review into the *Family Law Act 1975*, and commends the Australian Law Reform Commission for embarking on a public consultation process to improve the protection of children and young people who interact with the family law system. We acknowledge the significant progresses already made within the family law system to adapt policies to respond to Domestic and Family Violence (DFV), including the 2012 family violence amendments to the Family Law Act. Unfortunately, the current family law system is still inadequate when responding to family violence, and child abuse and neglect.

This submission draws upon research and literature of children and young people's participation within the family law system. Yfoundations submits responses and recommendations to 4 of the 47 questions outlined in the issues paper, including:

Q 15. What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

Q 23. How can parties who have experienced family violence or abuse be better supported at court?

Q 40. How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

Q 41. What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Executive Summary

The safety and wellbeing of children and young people should be the number one priority of the family law system. Children and young people who interact with the family court are at particular risk of abuse, neglect, and family violence. The family law system needs to be improved to resolve family disputes quickly and affordably, but maintaining a focus on the safety and wellbeing of children and young people. There is a need to reform the culture and structure of the family law system and a renewed commitment to trauma-informed practice.

A longitudinal study of separated parents (Kaspiew et al, 2015) found that of the parents who had reported emotional or physical violence, 53% of fathers and 64% of mothers reported that their children had seen or heard the abuse. Children and young people are impacted negatively by experiencing family violence, and it can have far reaching consequences, including an increased risk of homelessness.

Domestic and Family violence is the primary driver of youth homelessness and the main reason a young person accesses support from a Specialist Homelessness Service (Spinney, 2013).

Domestic and family violence is not a standardized phenomenon. Each victim experiences it differently. Unfortunately, the current definition of family violence in the Family Law Act 1975 does not adequately reflect the full scope and experience of victims. Furthermore, it minimizes the involvement of children and young people who are “exposed” to family violence, and as a result distances children and young people from the abuse. Foundations consider any young person who has seen or heard any form of abuse to have directly experienced that abuse, and it is important that the definition of family violence reflects this to encapsulate the many ways family violence manifests.

Currently, court processes and decisions are largely established and imposed by adults who will have a limited understanding of their impacts on young people. Care has to be taken to make sure that young people understand what options are available to them, that they are independently supported throughout this process, and that their wishes and perspectives are taken into consideration by decision makers. The United Nations Convention on the Rights of the Child (1989) includes a requirement that children and young people have the right to have a say in decisions that affect their lives. Children and young people should be engaged in family law processes and have their voice’s heard.

In order to be successful, all staff working in the family law system should be given appropriate training and have an understanding of the impacts and effects of violence, abuse and neglect, and a commitment to trauma-informed practice. Furthermore, court processes, such as cross-examination of witnesses by an unrepresented defendant and the current considerations for the 'best interest' of the child, should be amended to prioritise the protection of children and young people.

Recommendations

1. Change the definition of Family Violence within the Family Law Act to include seeing or hearing violence and experiencing the effects, for example overhearing death threats or threats of personal injury.
2. Amend the 'best interests' of the child checklist to clearly prioritise the safety of children and provide a dedicated decision-making framework in cases involving family violence. When there is conflict between protecting children from harm and maintaining relationships with both parents, courts should always focus on the protection of children from physical and emotional harm.
3. The Family Law Act to compel a judge to consider if any vulnerable witnesses should be protected during court proceedings in family violence cases. Judges should have the power to direct all unrepresented defendants to be represented by Legal Aid to reduce the potential for re-traumatisation.

4. Fund and implement a National Family Dispute Resolution Program for Domestic and Family Violence cases supported by specialist domestic violence lawyers and trauma informed practitioners.
5. More funding for domestic violence and youth homelessness services, legal assistance services, and community centers. These support services must have additional funding to provide appropriate trauma-informed care and have skills and experience to work with children and young people.
6. Further consideration is needed on ways the family law system can best address issues of neglect and abandonment to ensure young people do not enter into homelessness.
7. Court processes should be child-centered and have the capacity to involve children and young people in appropriate ways. The family law system should be designed around maximizing opportunities for children and young people to participate, and considerations made to protect them from systems abuse (such as multiple interviews).
8. Pending the evaluation of the Young People Family Law Advisory Group (YPFLAG) pilot project, the federal government to consider a pilot YPFLAG in other states and territories to see if they work in other contexts.

9. Adopt a national risk assessment framework for use by family law and family dispute resolution practitioners to identify any history of family violence and abuse. This should be a whole-of family risk assessment process.

10. Family Law professionals, including Independent Children's Lawyers, to be skilled in regard to child-inclusive practice, including use of 'child friendly' and 'age appropriate' language.

Questions

Q15. What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

Public perceptions of Domestic and Family Violence (DFV) as a private issue between a couple or within a family has allowed it to remain a relatively hidden issue within Australian society, and as a result hidden within the family law system.

Amendments to the Family Law Act that were introduced in 2012 widened the definition of DFV in response to recommendations from Australian and NSW Law Reform Commission (2010) and the Family Law Council (2009). However, the current definition of Family Violence within the Family Law Act (1975) is still not exhaustive and does not capture the full effects of violence on children or young people (see Appendix A). The current language refers to children who are witnesses to or 'exposed' to family violence and abuse. Yfoundations consider any young person who has seen or heard any form of abuse to have directly experienced that abuse. Minimising violence through language, such as 'exposed', distances the

young person from abuse perpetrated within the family. This has the indirect consequence of the child or young person not being considered a victim of abuse and plays into the perpetrators rationalisation and minimisation of abuse (e.g. *"I would never harm my child"*).

Young people are not secondary victims or 'exposed' to DFV. Children and young people are participants and may be significantly affected. *"Beyond 'Witnessing': Children's Experiences of Coercive Control in Domestic Violence and Abuse"* (2015) reports that children who are exposed to DFV are often vigilant about their safety. Children and young people monitor the perpetrators moods and learn to cope by modifying their language, their appearance, their expressions, and interactions in order to protect themselves from violence or abuse. The report states *"far from being passive witnesses, [children] are not exposed to violence and abuse, rather they live with it and experience it directly, just as adults do"* (Callaghan, et al, 2015).

Furthermore, young people can be directly involved in DFV, either by providing physical protection to a parent, or being the direct victim of abuse or violence. Others are affected vicariously through feelings of guilt for not being able to change the situation. Regardless, the short-and-long term effects of DFV can be devastating for children and young people.

Outcomes for children and young people are poor if their experience of DFV is ignored, not believed, or not responded to in a timely manner. It is important that perpetrators of violence are held accountable and decisions are made in the best interest of children and young people. Currently, one of the primary considerations

for the court when determining the best interest for the child is *“the benefit to the child having meaningful relationship with both parents”*. This consideration suggests that the courts are focused on parental rights rather than on the safety of children. Amendments to the Act in 2012 sought to address this conflict by prioritising a child’s safety and direct the court to give greater weight to protect a child from harm. However, a 2015 AIFS evaluation of those amendments has found that they have *“largely not achieved the objective of improving safety [of children]”* (Kaspiew et al, 2015). When there is conflict between protecting children and young people from harm and maintaining relationships with both parents, child protection should always be the primary consideration.

Recommendations:

- Change the definition of Family Violence within the Family Law Act to include seeing or hearing violence and experiencing the effects, for example overhearing death threats or threats of personal injury.
- Amend the ‘best interests’ of the child checklist to clearly prioritise the safety of children and provide a dedicated decision-making framework in cases involving family violence. When there is conflict between protecting children from harm and maintaining relationships with both parents, courts should always focus on the protection of children from physical and emotional harm.

Q 23. How can parties who have experienced family violence or abuse be better supported at court?

A high proportion of clients who enter the family law system have experienced or are experiencing Domestic and Family Violence (DFV) at the time they engage with the system. Research conducted by the Australian Institute of Family Studies (AIFS) found that 60% of separated parents report a history of emotional or physical abuse before or during separation (Kaspiew et al, 2015). The Family Law System can better support people who are victims of DFV through trauma informed practice, changes to cross-examination rules, offering alternatives to court such as Family Dispute Resolution (FDR), considering the financial pressures of victims, and increased funding to legal assistance, homelessness, and domestic violence services.

Specific support must be available to children and young people within the family law system when there are allegations of DFV, particularly when the defendant is self-represented. Currently, unrepresented perpetrators of DFV are able to cross-examine witnesses in Federal Family Law proceedings. Cross-examination can be re-traumatizing for victims and the occurrence of self-represented cross-examination is unacceptable and tantamount to abuse. In the Victorian Family Law System, there are provisions that regulate cross-examination of witnesses in state court. A judge can declare a child or young person a “protected witness” in family violence cases, which prevents the accused from being able to cross examine them, even if the accused has no lawyer (Victorian Department of Justice, 2010). The court must also control proceedings to protect vulnerable witnesses, for example by allowing witnesses to give evidence via video-link (Victorian Department of Justice, 2010). These provisions provide a good model of practice for the federal family law system.

Recommendation:

- The Family Law Act to compel a judge to consider if any vulnerable witnesses should be protected during court proceedings in family violence cases.

Judges should have the power to direct all unrepresented defendants to be represented by Legal Aid to reduce the potential for re-traumatisation.

A 2015 study 'Experiences of Separated Parents' (Kaspiew et al 2015), explained that families affected by physical and emotional abuse were more likely to approach services such as counseling, mediation, and Family Dispute Resolution (FDR), confirming that families with complex needs rely on these services. A FDR service helps people to resolve their family law dispute without going to court by inviting the parties to attend mediation.

Since July 2008, separated parents who cannot reach agreement about their children must attend FDR and make a "genuine effort" to resolve any disputes before they can apply to the family law court to determine the matter (Armstrong, 2010).

FDR presents an early opportunity to detect and provide an appropriate response to family violence. Measures to protect children should also capture risk of emotional manipulation of children by perpetrators of family violence, including that the violence can be perpetrated after separation through contact with children.

The evaluation of the 2006 family law reform, which included an increased emphasis of FDR concluded the process was an "important step" for about one-third of

separated parents in resolving their disagreements with their former partner (Kaspiew et al 2009). For most parents FDR also facilitated an agreement that suited the parents and was child-focused. Most reported the FDR processes were prompt, affordable, and fair (Kaspiew et al 2009).

Recommendation:

- Fund and implement a National Family Dispute Resolution Program for Domestic and Family Violence cases supported by specialist domestic violence lawyers and trauma informed practitioners.

Financial stress is a significant issue for victims of family violence. More often than not, the victims of family violence suffer great financial hardship and are at an increased risk of homelessness (AIHW, 2012). DFV is the leading cause of homelessness and housing instability in Australia (Spinney, 2013). Victims often lose access to family homes and shared finances, which often leads them to seek support from Specialist Homelessness Services (SHS). Available data shows that there is a strong correlation between DFV and youth homelessness (Spinney, 2013). DFV is the primary driver of youth homelessness and the main presenting reason for a young person accessing SHS. According to the AIHW SHS report (2013-14), 10,157 children and young people aged under 25 presented at SHS due to family violence or family breakdown. This number equates to 45% of all SHS clients aged under 25 (AIHW, 2014).

The family law system must consider that victims of DFV are will need to make financial concessions when leaving a violent or abusive family environment and may rely on specialist homelessness and domestic violence services. Children and young people are particularly vulnerable as they will likely have no source of income and may not yet qualify for any financial assistance (Centrelink).

Recommendation:

- More funding for domestic violence and youth homelessness services, legal assistance services, and community centers. These support services must have additional funding to provide appropriate trauma-informed care and have skills and experience to work with children and young people.

One aspect of abuse that is often overlooked within the family law system is neglect and abandonment, as child abuse is often only associated with physical and emotional harm. Yfoundations' member services report that a significant proportion of young people they assist are homeless due to parental neglect and abandonment. The omission of care (i.e. leaving a child alone, on the street, or in a refuge) can lead children and young people to experience ongoing trauma. Parents have a responsibility to their children, and this should continue until the child turns 18. Under the Family Law Act, there is a presumption that both parents will have an equal parental responsibility, that is, they will both have a role in making long-term decisions such as where a child goes to school. If parents separate their parental responsibility does not automatically change. Yfoundations member services have highlighted that they feel the Family Court should be more active in enforcing

parental reasonability to ensure that children and young people do not enter into homelessness.

Recommendation:

- Further consideration is needed on ways the family law system can best address issues of neglect and abandonment to ensure young people do not enter into homelessness.

Q40. How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

The family law system needs to be more child-centered. Researchers have noted a lack of children and young people's voices in legal decisions. Although the principle of children and young people being able to have a say in decisions that affect their lives is becoming more recognized in Australian policy, in reality children's voices are not often heard in court and decisions are generally made for them, without their input.

Children and young people who are caught up in family conflict often feel unsafe in expressing their thoughts and feelings. Children and young people are unlikely to have been given a choice about attending court hearings or meeting with a legal representative, and they will have varying degrees of knowledge and understanding about the family law system. Bulter et al (2003) found that children were often 'resourceful' in seeking out information about the legal aspects of separation by observing their parents, overhearing conversations, or through movies or television. Sometimes this leads to misunderstanding, which can increase anxiety.

Yfoundations acknowledge that resources are stretched, but we need greater responses by the family law system to support children and young people so that they understand the legal aspects and processes to alleviate anxiety and confusion. It must be acknowledged that for children to adequately participate they will need support (i.e. through an Independent Children's Lawyer (ICL)).

Systems abuse can occur when children and young people are further traumatized by the legal system. In some cases, they will have been subjected to far too many interventions which have either not been conducted appropriately or where interviewers are not aware of the number of other interviews the young person has already done. ICLs should avoid too many interventions and should better coordinate existing services to avoid further trauma.

The guidelines for an Independent Children's Lawyer (ICL) states that the *"practitioner should see the child as soon as possible and, where possible well before the first hearing"* (Bell, 2015). *"Contact with the child should occur where and when it is comfortable and convenient for the child, not merely where and when it is convenient for the practitioner"* (Bell, 2015).

Yfoundations believes that children and young people who have experienced the family law system first hand have the best insight into how the system works. Their experiences provide the best source of information for improving it. Children and young people should be engaged in decision making to help achieve the best possible outcomes. This includes having a say in where they live and who they have contact with. These questions should be asked routinely to see if their wishes or circumstances change. Where appropriate children and young people should be able to seek independent advice and support to inform their decisions.

Recommendation:

- Court processes should be child-centered and have the capacity to involve children and young people in appropriate ways. The family law system should be designed around maximizing opportunities for children and young people to participate, and considerations made to protect them from systems abuse (such as multiple interviews).

The Young Peoples Family Law Advisory Group (YPFLAG) is a new pilot project being run through the South Australian Family Law Pathways Network, funded by the Federal Government. The object of the YPFLAG is to select a group of young people who have experience with family separation and to offer them a forum to voice their experiences within the family law system, such as Family Dispute Resolution, courts, counseling, medication, or any other experiences they have had since. The YPFLAG involves a group of 12-17 year olds meeting 4 times a year. Evaluation of this pilot project is currently being conducted.

Recommendation:

- Pending the evaluation of the Young People Family Law Advisory Group (YPFLAG) pilot project, the federal government to consider a pilot YPFLAG in other states and territories to see if they work in other contexts.

Q41. What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Establishing core competencies for those working in the family law system will ensure that they can adequately address the needs of families who have experienced violence and abuse, as well as work appropriately with any children or young people involved.

There is need for training, collaboration, and common procedures across the sector. However, we note that the success of any reform is dependent on whether there are sufficient resources to adequately train and build the capacity of family law professionals.

All staff working in the family law system should have at least introductory knowledge of family violence and a commitment to trauma-informed practice. Family law professionals working with victims of violence and abuse should receive additional specialist support and supervision. Under the more holistic model of support, family law professionals could benefit from skills transfer, and learning from evidence-based reports published by family violence professionals.

Recent AIFS research has found that an unacceptable number of family law clients who have experienced family violence are not being assessed as family violence affected (Kaspiew et al, 2015). For example, of those who had experienced emotional abuse, 53% stated their lawyers did not ask them about emotional abuse. This indicates inadequate risk assessment processes across the family law system. Currently there is no common risk assessment approach used across state and federal family courts. In its 2009 report, *Improving responses to family violence in the*

family law system, the Family Law Council had “considered that it is essential that all people involved in the family law system screen for matters likely to impact on children and parenting, including, amongst other things, family violence” and “recommended that a consistent framework for screening and risk assessment be developed in accordance with principles adopted in the common knowledge base”. Yfoundations support this recommendation and agree that all family law and family dispute resolution practitioners must risk assess to identify any history of family violence.

Recommendation:

- Adopt a national risk assessment framework for use by family law and family dispute resolution practitioners to identify any history of family violence and abuse. This should be a whole-of family risk assessment process.

Using ‘child-friendly’ or ‘age appropriate’ language is a key for family law system professionals when communicating with children and young people. Even if law professionals are used to talking to young people in social or familial contexts, this will be very different to legal setting where concepts may need to be explained or sensitive information discussed, and which may be stressful for the young person. The child or young persons developmental progress will influence the best way to talk to them, as children learn language skills at different times

Recommendation:

- Family Law professionals, including Independent Children’s Lawyers, to be skilled in regard to child-inclusive practice, including use of ‘child friendly’ and ‘age appropriate’ language.

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Appendix A. FAMILY LAW ACT 1975 - SECT 4AB

Definition of family violence etc.

(1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.

(2) Examples of behaviour that may constitute family violence include (but are not limited to): (a) an assault; or (b) a sexual assault or other sexually abusive behaviour; or (c) stalking; or (d) repeated derogatory taunts; or (e) intentionally damaging or destroying property; or (f) intentionally causing death or injury to an animal; or (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or (h) unreasonably withholding financial

support needed to meet the reasonable living expenses of the family member , or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or (j) unlawfully depriving the family member , or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child: (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.