

Introduction

YACSA is the peak body in South Australia representing the interests of young people, youth workers, organisations and networks throughout the non-government youth sector. Policy positions are independent and not aligned with any political party or movement. YACSA supports the fundamental right of all young people to participate in and contribute to all aspects of community life, particularly the decision-making processes that impact them.

YACSA is pleased to take the opportunity to respond to the Review of the Family Law System. The question of whether children and young people should participate in family law disputes is a contested concept. Since 2012, the United Nations Convention on the Rights of the Child (UNCRC)¹ has been enshrined in the Family Law Act and requires that the views of children and young people must be given due weight (in accordance with their age and maturity) by the state in all matters affecting them. However, with previous prevailing views that children and young people lack the emotional and intellectual maturity to perceive the gravity of family disputes, coupled with Courts seeking to protect children and young people from further harm, the views of children and young people haven't always been given due weight in determining parenting disputes.

YACSA believes that all young people have a fundamental right to participate in and contribute to all aspects of community life and the decisions that affect them. The Family Law Act will play an important role in providing the guidance and balance necessary to protect children and young people from further harm while enabling their right to participate in the decisions made by the Family Court.

Why children and young people should be involved in decision making

Children and young people should have greater involvement in the decisions made by the Family Court for a number of important reasons. Firstly, there is a legislative mandate. Section 60CC(3)(a) of the Family Law Act and in accordance with the UNCRC, is clear that the Family Court must take into consideration the wishes of the child or young person as part of decision making processes. Whether or not this occurs is decided by the Court. The Court makes the determination that a child or young person can participate in decision making processes based on the following considerations; their level of maturity; their level of understanding; whether their views are informed; and whether the child or young person has had their views influenced by a parent or other family members. Unfortunately, the application of this function of the Act and the way the law responds has often been hamstrung by assumptions about the capacity and maturity of children and young people influenced by outdated child development theories².

¹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

² Taylor, N.J. (2010). Children and the Law. Centre for Children and Young People Background Briefing Series, no.2. Lismore: Centre for Children and Young People, Southern Cross University. Viewed 11 April 2018
https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1028&context=ccyp_pubs

Thankfully there are a range of studies that suggest children and young people have a much keener and more sophisticated perception of the nuances of family disputes and parental separation than previously thought. We know that children and young people have the ability to form and review their understanding of the dynamics of family separation as well as being able to effectively articulate their feelings, experiences and wishes. All of which have the potential to provide the Court with valuable insights into the decisions that affect them³.

Furthermore, children and young people want to participate in family law matters. For example, an Australian study of the post-parental separation reports of 623 children and young people (12-17) found that a majority of children and young people wanted to participate in decisions about their living arrangements and many believed that their views should be taken into account⁴. Participation provides other personal benefits for children and young people with evidence suggesting that the increased sense of control felt by children and young people who participate in family law proceedings has a direct correlation with positive psychological and physical health⁵.

The benefits of greater engagement with children and young people in Court processes for the Family Court are also substantial. Studies suggest that incorporating the views and experiences of children and young people into processes and practices provides a more complete picture of family disputes and the impacts of parental separation⁶.

The risks of participation

Despite the inclusion of the UNCRC in the Family Law Act and a general willingness of the Courts to entertain the idea of the participation of children and young people in mediation and Court procedures, there is still concern about the competence and capacity of children and young people participating in the system and the potential risks posed by parental coaching, unskilled interviewers⁷, the implications of placing children and young people at the centre of a family dispute, and children and young people who may already be experiencing distress being burdened with the responsibility of decision-making⁸. Children and young people may also experience loyalty conflicts or be subjected to manipulation and pressure by one or both parents while engaging with the Court⁹.

These are undoubtedly all serious potential issues for children and young people engaging in the family law system but they highlight the important role that the Family Law Act has in ensuring that

³ Qu, L & Weston, R. (2014) Children's views about parental separation, LSAC Annual Statistical Report 2014. Viewed 18 April 2018, <http://data.growingupinaustralia.gov.au/pubs/asr/2014/asr2014b.pdf>

⁴ Ibid.

⁵ Fernando, M. (2013). Children's direct participation and the views of Australian judges. Family Matters, 92, 41-47. Viewed 18 April 2018, <https://aifs.gov.au/publications/family-matters/issue-92/childrens-direct-participation-and-views-australian-judges>

⁶ Cashmore, J., & Parkinson, P. (2009). Children's participation in family law disputes: The views of children, parents, lawyers and counsellors. Family Matters, No. 82, 15-21.

⁷ Taylor, N.J. (2010). Children and the Law. Centre for Children and Young People Background Briefing Series, no.2. Lismore: Centre for Children and Young People, Southern Cross University. Viewed 11 April 2018 https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1028&context=ccyp_pubs

⁸ Graham, A. & Fitzgerald, R. (2010). Exploring the promises and possibilities for children's participation in Family Relationship Centres. Family Matters, 84, 53-60. Viewed, 18 April 2018, <https://aifs.gov.au/publications/family-matters/issue-84/exploring-promises-and-possibilities-childrens-participation-family-relationship-centres>

⁹ Cashmore, J., & Parkinson, P. (2009). Children's participation in family law disputes: The views of children, parents, lawyers and counsellors. Family Matters, No. 82, 15-21.

children and young people have the mechanisms available to them to contribute safely and meaningfully in mediation and Court processes.

The development of an agency similar to the Children and Family Court Advisory and Support Service (CAFCASS) in the United Kingdom would also assist in reducing the risks to children and young people participating in the family law system. CAFCASS, through a multi-disciplinary team, safeguards the wellbeing of children and young people participating in family law proceedings. CAFCASS works with children, young people and their parents and provide advice to the Courts about what they believe is in the best interest of the child or young person.

Supporting children and young people to participate in the family law system

While there are a range of issues to consider when children and young people participate in the family law system, we can't lose sight of the inalienable rights of young people to participate in the decisions that affect them.

There will be particular challenges faced by the Courts in engaging some children and young people, including very young children or children or young people from diverse backgrounds but a range of mechanisms and supports could be implemented to ensure children and young people who want to participate can do so freely and safely¹⁰.

To increase the participation of children and young people in the family law system, the following elements should be present:

Advocacy, representation and safety of children and young people

- YACSA supports the formation of a board or advisory committee similar to the [Family Justice Young People's Board](#) of young people (who have experienced the family law system) supported by CAFCASS in the United Kingdom. The purpose of the board would be shape the policies, procedures and strategies of an independent organisation tasked with representing the interests and wellbeing of children and young people experiencing the family law system. The board would also undertake reviews of services related to the family law system, review feedback and complaints, develop resources to encourage meaningful engagement with children and young people, and develop child and young person appropriate information about the family law system.

The capacity, agency and wellbeing of children and young people

- Ensure that the articles of the UNCRC enshrined in the Family Law Act are followed and underpin the ways in which the system and the Court engage with children and young people.
- In accordance with the UNCRC there needs to be greater acknowledgement of the capacity and agency of children and young people to understand and contribute to decision making processes and procedures. This needs to be reflected in a legislative, systemic and practical context.

¹⁰ Taylor, N.J. (2010). Children and the Law. Centre for Children and Young People Background Briefing Series, no.2. Lismore: Centre for Children and Young People, Southern Cross University. Viewed 11 April 2018
https://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1028&context=ccyp_pubs

- The family law system should be underpinned by theories of child development that accurately describe more contemporaneous ideas of the capacity of children and young people to have the emotional and intellectual maturity to participate in family law disputes.
- Guidelines should be developed based upon the UNCRC, contemporary child and youth development theories and best practice in child and youth participation that guides the work of judicial staff in their engagement with children and young people.

Support services

- YACSA supports the formation of a new independent organisation (similar to CAFCASS in the UK), provided for in the legislation and funded by the Federal Government to represent the interests and welfare of children and young people in the family law system. The organisation should be staffed by a multi-disciplinary team including lawyers, social workers, psychologists, child protection workers and other related disciplines. The team will be tasked with engaging with children and young people and supporting them through their participation within the family law system.
- If a new independent organisation (described above) isn't supported subsequent to this review then YACSA would like to see a model of representation developed that provides legal representation with therapeutic support to ensure that children and young people are supported through the family law system.
- A range of services should be available to children and young people to assist and support them through the process; these services could be provided by the formation of an independent support and advocacy organisation (as described above) or by the Courts or through non-government organisations.
- The Court should ensure that they monitor children and young people throughout the family law process to assess psychological and emotional wellbeing, continued consent and whether the child or young person is experiencing undue influence and pressure by parents or family members.

Information & informed consent

- Easy to read and understand information about the Family Court, the family law system and ways in which children and young people can participate in family law disputes should be developed in a range of languages and in a range of formats to reach children and young people of all ages.
- Before a child or young person agrees to participate in the family law process, detailed information should be provided to them that explains the entire process, what is expected of them and any potential negative consequences. The child or young person's participation can only be agreed upon once they have understood the process.
- While every effort should be made to engage children and young people in the family law process, participation should always be voluntary, and children and young people should not feel pressured to participate if they'd prefer not to.
- Young people should be engaged to develop this information to ensure relevancy and appropriateness of messaging across a range of ages.

Mechanisms to participate

- Children and young people are not one homogenous group. Mechanisms of engagement or participation will work for different groups of young people at different times. A range of direct and indirect mechanisms should be developed with young people and regularly reviewed to ensure relevancy and appropriateness.

In conclusion

YACSA believes that all young people have a fundamental right to participate in and contribute to all aspects of community life and the decisions that affect them. However, meaningful participation can only occur when young people are valued, are informed about their involvement, consider their involvement relevant and beneficial, are appropriately supported and resourced to participate, and have ownership of the experience.

There is an increasing recognition of the importance of seeking the perspectives of children and young people within decision making processes in the family law system. Children and young people can be vital in providing the Court with a more complete picture of family disputes and can present a middle ground within an adversarial family breakdown.

Participation also brings significant benefits for young people. Participation in Family Court decision making processes provides children and young people with a mechanism to describe their perspectives, thoughts, experiences and wishes. All of which can contribute to feelings of agency, respect and value.

The current review of the Family Law Act provides an important opportunity to increase the mechanisms available for young people to engage in Court processes and practices that enable them to more meaningfully participate in the decisions that affect them.

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