



SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION'S REVIEW OF THE FAMILY LAW SYSTEM

Background

The ACT Human Rights Commission (the Commission) promotes the human rights and welfare of all people living in the ACT. Respect and protection of human rights underpins all work within the Commission. The Commission is an independent statutory body established by the *Human Rights Commission Act 2005*.

The role of the Commission is to:

- independently handle complaints in relation to a range of services, and under discrimination law
- promote understanding of human rights and the welfare of all people in the ACT
- encourage service improvement and increase awareness of the rights and responsibilities of service users and providers
- provide advice to government and others regarding their human rights obligations
- provide advocacy for children, young people and adults experiencing vulnerability
- advocate for the interests of victims of crime.

The Commission has specific responsibility for promoting human rights protected under the *Human Rights Act 2004 (ACT)* (referred to hereafter as the HRA), educating the community and public authorities about these rights, and explicit functions in intervening in ACT Courts and reviewing the impact of laws.

The Commission comprises four (4) members: the President and Human Rights Commissioner; the Discrimination, Health Services, Disability and Community Services Commissioner; the Public Advocate and Children and Young People Commissioner; and the Victims of Crime Commissioner.

This submission primarily focuses on the needs and circumstances of the clients of the Public Advocate and Children and Young People Commissioner (PACYPC). The PACYPC has legislative responsibility for protecting and promoting the rights and interests of people in the Australian Capital Territory (ACT) who are experiencing vulnerability and for consulting with children and young people in ways that promote their participation in decision-making.

The responsibilities of the PACYPC are underpinned by a range of functions including advocacy (individual and systemic), representation, investigation, and monitoring of mental health services and services that exist for the protection of children and young people. Overarching these functions is a strong focus on ensuring that the PACYPC's monitoring and oversight functions (and the recommendations we make to government and non-government agencies on legislation, policies, and practices) contribute to improvements in the accessibility, responsiveness and quality of supports and services that are available for persons experiencing vulnerability.

This submission advocates for measures to facilitate a more child-focused approach in all matters, and ensuring adequate advocacy and support services are in place to support people experiencing vulnerability to engage with, understand and navigate the family law system.

Objectives and principles of redeveloped family law system

Consistency with human rights conventions and legislation

The interactions between family law and human rights issues are potentially significant. Any changes to the family law system should therefore be informed by Australia's international human rights obligations to ensure that the family law system adequately respects and protects the human rights of families and children.

Families and children enjoy special rights particular to their status in the international human rights treaties to which Australia is a party, including the Convention of the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR). For example, the CRC requires the best interests of the child to be applied to all actions concerning children and requires active measures to protect their rights and promote their wellbeing, as well as measures to support and assist parent and others who have day-to-day responsibility for ensuring recognition of children's rights. The CRC also protects the right of children to express their own views, and those views to be given due weight in accordance with the age and maturity of the child. This right includes the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.

These obligations are reflected in the ACT through the operation of the HRA. Section 11 of the HRA protects the rights of families and children, and s 11(2) specifically provides that 'every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind'. This is a right to special or positive measures, which also requires a higher standard to be adopted in relation to children when the application of other human rights are considered. The CRC assists to elucidate the content of children's rights protected in the HR Act, and is able to be used as a guide to interpretation under s 31 of the HRA.

Guiding principles

The Issues Paper indicates that suggestions have been made for additional principles to underpin and inform the family law system, such as protecting the needs of children, child-centred and trauma-informed principles, ethical best practices, etc. Systemic advocacy by the PACYPC centres on the need for child-rights, child-focused and trauma-informed principles in legislative reforms, policy and service delivery. Child-safety principles are also essential. The PACYPC strongly advocates for these additional overarching principles to guide and underpin the family law system.

While it is essential for the above principles to be embedded into the family law system, there must also be sufficient resources allocated to achieve the requisite outcomes, including a focus on professional skill development and training so that the principles are embedded in practice, and are not just superficially applied. To ensure child-centred and child-safe practices, additional resources would need to be invested into training for all Family Law Court staff and the specialised recruitment of 'experts' with child-focused practice experience is required, particularly for key positions such as Child Representatives.

Clients of the PACYPC present with complex support needs, and may have mental health issues, disabilities, or experiences of trauma including as a result of family violence. Principles underpinning the family law system must be inclusive of the needs of people with a disability and ensure their rights, as articulated in Convention on the Rights of Persons with Disabilities, are fully upheld. It is critical that the Family Law Act is consistent with and fulfils the provisions of the CRPD.

A responsive and well-positioned Family Court system

The PACYPC agrees with the trends detailed on page 17 of the Issues Paper as these trends are also evident in other court processes in the ACT, such as the numbers of self-represented litigants. Of interest is the increased prevalence of child safety and risk of harm concerns in family law workloads and issues of family violence, mental health and substance misuse. The Family Court is now required to deal with complexities, clinical and risk issues that necessitate some rethinking about the additional skills, knowledge and expertise available to the court to enable the best judicial decisions to be made.

These trends highlight the need for further exploration and research on how the family law system can best respond to issues of co-morbidity and inherent risk and safety issues when these issues are present; and how other service and legal systems (such as child protection) need to interface with and work in collaboration with the Family Court system.

The Family Court system needs to be well-positioned and responsive to these issues both now and into the future. This necessitates access to clinical expertise (when required), and the capacity to obtain contemporary information and knowledge concerning child protection, child and family safety, and safeguarding strategies. The assistance of other professionals (such as clinicians and family safety practitioners), and the use of multidisciplinary team approaches, are important mechanisms to support the redevelopment of the family law system.

Access, engagement and support services

Barriers experienced

Concerns are held by the PACYPC regarding access to justice in the family law system for persons experiencing vulnerability. Some people with a disability or mental illness face significant barriers in accessing, understanding and navigating family law processes. These barriers are compounded by low income, limited access to legal representation, and often negative attitudes and assumptions about a person's skills and capacities. The ALRC paper's discussion on "Families with complex needs" is applicable to the situations for these individuals who require specialised support options to enable equitable access to the law.

Access to information in a way that can be readily understood by people with disability or mental illness will require a wide range of different strategies, given the broad diversity of need. Suggestions for improved websites and the use of technology will assist some people, but there may also be benefits in developing highly specialised material (including online material, communication aids, apps, etc.). Funding organisations with specialised expertise in these areas could also be considered.

Negative attitudes and stereotyping

Negative attitudes towards and the stereotyping of people with disability are still a significant barrier for people with a disability or mental illness. As noted in the Issues Paper, at times people within the Court system make assumptions that are not based on evidence from the person's life. These assumptions can have significant negative impacts for the person and their children.

Of particular concern is the assumption that because the person has an intellectual disability, acquired brain injury or mental illness, they do not have the capacity and are unable to make

decisions for themselves. Some people will need specialised assistance to ensure their legal rights are upheld, but this assistance should be provided in a manner that is the least restrictive of the person's rights. Under this principle, substitute decision making is a last resort and alternative options should be tried first, such as supportive decision-making and the use of individual advocacy. The family law system should support and provide a range of different options to enable people with complex needs to fully engage with the process in the least restrictive way.

Self-represented litigants

There are a number of reasons for the increase in the numbers of self-represented litigants, as outlined throughout the Issue Paper. However, specifically the cost of legal services, access to legal aid, legal aid withdrawing from matters where they are unlikely to have a successful outcome, and the length of time for some matters to be settled, can all contribute to the growing cost of legal services. This will also significantly impact on matters before the court, adding to the conflict within some families, and potentially placing children at further risk.

Clients can be significantly disadvantaged due to self-representation. There are clear disadvantages when one parent is self-represented rather than having a well-versed Family Court lawyer, and how this is then interpreted by the court. The discrepancy that often arises in respect of access to adequate legal advice is deeply entrenched and can result in further marginalisation.

One of the greatest barriers for people with complex needs is the limited access to low-cost legal representation, and particularly representation that is not contingent on the merits of their case. Self-representation is a feature for approximately half of cases, and it can be expected that people with complex needs will also be represented in this cohort. It is particularly concerning when self-represented litigants include people with complex needs who are in that position because they are unable to afford private, or are denied publicly funded, legal representation.

This client group finds access to justice difficult particularly if they experience difficulties or problems in their communication with legal representatives. This may similarly result in them being unrepresented. Even when judges actively intervene to try to ensure procedural fairness, self-represented parties with complex needs will not experience a level playing field. It is critical that people with complex needs, due to disability or mental illness, have access to legal representation and are not required to self-represent due to lack of options.

Having said that, when people with complex needs are able to access publicly funded legal assistance, lawyers often do not have the skills and competencies to effectively support their client. The suggestion of training for family law professionals is strongly supported. However, the highly individualised skills and capacity of each person with complex needs, requires a more tailored approach that may combine specialised workers (such as specialised navigators or advocates) who can assist trained and skilled legal professionals. This model is also consistent with, and would support the increased use of, supported decision-making rather than substitute decision-making.

Reducing costs to clients

The proposal for less complex matters to be resolved through lower cost family dispute resolution (FDR) services and low cost legal advice has merit. However, given this is proposed for less complex matters it is critical that situations involving family violence are not inappropriately considered less complex, or that these processes are used in lieu of more appropriate pathways even if they are more costly. Further, family dispute resolution processes need to ensure that people with complex

needs, people experiencing violence, and children are effectively supported so that power imbalances and financial inequity do not have a major impact on the outcomes reached.

Professionals at family dispute resolution services may need training and supervision in supporting people with complex needs or it may be useful for specialised support (such as advocates) to be available to support people with complex needs through this process.

The suggested reforms highlighted in paragraph 117 have strong merit and are worthy of exploration but should not replace options for expanding legal representation for vulnerable groups. In situations of significant power imbalance, access to legal representation may have a longer-term cost benefit compared with lower cost alternative support that may result in less desirable outcomes, particularly for children.

Navigation assistance

It is imperative that people with complex needs are not excluded due to the multiple disadvantages they experience. The proposal for case workers or navigators has value for some people with disability or mental illness. Case workers or navigators will need to have specific skills and training in supporting people with disability or mental illness. In addition, while case workers may be highly beneficial in supporting people to access effective legal representation, it is imperative that this proposal does not distract or take away from the need for accessible legal representation.

Models such as CourtNav in the UK, which assists self-represented litigants, are useful to explore for those people who are able to self-represent, however they should not be seen as a replacement for access to legal representation and advocacy support for people with disability or mental illness who are not able to self-represent.

Use of litigation guardians

The use of litigation guardians in Family Law needs to be reformed to better support people with disability and mental illness to make their own decisions, where possible, to ensure the use of substitute decision-makers only occurs when a person is unable to do so for the current matter. People with disability and mental illness also need to have a clear and straightforward way to enable them to address concerns they might have about their litigation guardian.

When substitute decision-making is needed, the process should be robust and protective of the person's rights. The current provisions for litigation guardians are complex. They vary across the different jurisdictions and are, at times, contradictory with existing state and territory guardianship provisions. There are a number of barriers for litigation guardians including cost implications and lack of knowledge. The connection with, or use of guardians appointed under state jurisdictions is recommended. In these processes, guardians are only appointed after consideration by a legal body, based on evidence of need and capacity. Further their decision-making is underpinned by clear principles that are rights-based. State and Territory guardianship provisions generally provide a robust approach to substitute decision-making.

Alternative dispute resolution

It is noted that people with complex needs experience additional disadvantage in the adversarial system but they can also experience this during FDR and other alternative dispute resolution processes if power imbalances and the ability to understand processes are not managed well. Legally assisted FDR (paragraph 186) would appear to also have strong benefits for this client group.

Advocacy assistance

Experience providing advocacy for clients with a disability or mental illness in legal proceedings highlights the value of, and need for, advocacy support. While assistance with case work in navigating the Family Court system is important, there needs to be capacity to undertake a broad range of advocacy functions that can extend beyond the Family Court system where this is necessary.

Statutory public advocacy is significant in this regard as it can support a client in different courts and service sectors. For example, the PACYPC in protecting, upholding and advocating for the rights and interests of people with a disability can attend court hearings, participate in case conferences or meetings, convene multi-agency panel meetings to resolve case coordination concerns, or the PACYPC can liaise with other agencies to achieve improved services for a client.

When considering how the Family Court system can best support people experiencing vulnerability, particularly when they have a disability or mental health concerns, statutory public advocacy is an option that may assist during family law proceedings and also post court proceedings.

Integration, collaboration and expert knowledge

Interface between family law and child protection system

For Family Courts to make the best decisions, contemporary evidence of risk and protective factors, improved integration and information pathways with child protection agencies, police, family violence services and relevant mental health services (where indicated) are required. The interface between the family law system and child protection needs further analysis and research in the development of consistent processes.

For example, the PACYPC's monitoring role of child protection services in the ACT highlights that care matters may not be pursued by child protection services if they are aware there are Family Court matters in progress, and yet there may be risk factors suggesting some role for statutory services. The PACYPC may even undertake advocacy or provide independent representation in the Children's Court recommending that child protection services intervene in a matter.

In relation to risk or protective factors, this information may only be presented in a Family Court matter as part of a client's case (when one party has filed this documentation). If specific information was more accessible to the court, for example child protection orders, or other 'community safety' related orders, the court would be able to make more informed decisions.

As suggested within the Issues Paper, a national database would allow for preliminary searches to be conducted to alert the court to any potential risk factors or specific service delivery responses required during the hearing (for example additional security staff, secure rooms, child friendly spaces etc.). Alternatively, an allocated 'service integration' or jurisdiction liaison position could be created to access this information following the court's request and provide follow up with relevant departments if required. The model in Western Australia, which facilitates information sharing and collaboration between Child Protection and the Family Court, seems to offer an effective mechanism. Improved information sharing can be achieved if care and protection staff liaison positions are located within the Family Courts, as they would have access to contemporary information about the risks and protective factors for children and young people.

Expert knowledge within the family law system

Lawyers have Family Law expertise however they may not have child protection or domestic/ family violence experience or knowledge to adequately identify and comprehend risks associated with or against their client or a child or young person.

A child representative or independent children's lawyer in Family Court will be appointed upon successful application by a party to proceedings and is not openly accessible to children or young people in all matters, noting that a child representative will not be required in all proceedings. However, a child representative should automatically be allocated to certain risk profiles, for example when child protection is involved, there is family violence, disability, long and ongoing custody battles, and/or where other 'complex needs' are evident. The Child Representative in children's court matters could potentially have some input or provide advice to Family Court matters based on their experience and knowledge of the care matters and the family history.

In addition, child representatives in the Family Court should be trained in child-centred practice, have developed skills and competencies working within an age and developmentally appropriate and trauma informed framework, and also have access to regular training to ensure continuous professional development.

Children's experiences and perspectives

Significance of the United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (the Convention) requires that legislative and administrative processes of State Parties assure that children who are capable of forming their views on matters affecting them be given the right and opportunity to express those views freely either in writing, orally, in print form, or through other mediums chosen by the child.¹

Although the Convention gives children and young people these rights, research highlights their ongoing marginalisation in legal proceedings in Australia and overseas. The views and wishes of children and young people can be selectively used or disregarded, and in matters where family violence exists, family violence can be reframed and minimised as 'family conflict'. Further, the influence of pro-contact ideologies and dominant values relating to the ongoing preservation of relationships between a child/young person and the perpetrating parent can also overshadow the individual experience of violence for children and young people.²

Enabling the participation of children and young people in proceedings

There must be greater scope for children and young people themselves to be heard directly in the legal processes, although this requires sufficient resources, competencies and expertise in establishing a trusting relationship with the child or young person and in obtaining their views in a developmentally appropriate and child-friendly manner.

¹ *United Nations Convention on the Rights of the Child*, articles 12-13.

² Hart, A. S. (2010, June). Children's needs compromised in the construction of their 'best interests'. In *Women's Studies International Forum* (Vol. 33, No. 3, pp. 196-205). Pergamon; Macdonald, G. S. (2016). Domestic Violence and Private Family Court Proceedings: Promoting Child Welfare or Promoting Contact? *Violence against women*, 22(7), 832-852; Macdonald, G. S. (2017). Hearing children's voices? Including children's perspectives on their experiences of domestic violence in welfare reports prepared for the English courts in private family law proceedings. *Child Abuse & Neglect*, 65, 1-13.

Children and young people should be seen as having agency in their own right, and provided that safeguarding strategies are in place to manage possible distress, trauma, safety and risk issues, they should have their views and wishes heard and prioritised in proceedings. The process and method of participation should be developed with and by the child or young person. This will require additional resources and time, which may require new expert specialist positions in the Family Court system in addition to the role and responsibilities of the family consultant.

Choice is important and if a child or young person seeks to put forward their own position in a Family Court matter, they should be adequately supported to do so. Discussion or consultation with a family consultant may not be sufficient as some children and young people will require more intensive supports (and at times clinical assistance) so they can express their views and wishes. Experience working in a child-focused manner with children and young people, and using appropriate strategies and creative options to assist them in expressing themselves in a manner of their choosing, are also important. For example, using expressive arts, creative media such as digital stories, adapted story boards, narrative techniques, etc. Consultation toolkits used in the child protection area may assist in facilitating opportunities for a child to be able to have a say and express their feelings and concerns.³ Some additional clinical and therapeutic assistance supporting the child or young person and managing any possible distress may also be required.

Safeguarding strategies and managing potential risk for children and young people in this process are critical as children may be conflicted or afraid to express their views, especially if they have experiences of family violence, have loyalty conflicts and fears that what they say is going to be made available to an abusive parent. This may result in a child being exposed to retribution from an angry or aggrieved parent. Even if a child does not get placed with a particular parent, they still, in all likelihood, will have some contact with that parent. The PACYPC has provided advocacy in matters where this has occurred and children and young people have been confused and anxious as they try to make sense of very complex family dynamics.

Having an experienced social worker/psychologist as part of any process where the child is being interviewed by their legal representative may assist and serve as a bridge-building exercise between the child and their parents. The social worker/psychologist can ensure the parents hear the child's views in a child-centred manner and they can assist the parents to understand how the child may be conflicted about what is being asked. How this is managed will depend on the age and developmental stage of the child. An experienced child professional or clinician (social worker/psychologist) could then provide a report to the court on the child's views and wishes which may reduce and mitigate possible risks for the child.

The Issues Paper mentions the Children's Advocacy Centre model, which uses a multidisciplinary team approach so that a child does not have to re-tell their story. To take this model further, it could also be used to provide expert advice to a court, particularly in providing additional information that may not be understood outside a specific context, for example the impact on a child witnessing family violence, and cultural considerations.

The ways in which children and young people encounter the family law system should be child-focused, for example the way in which information and outcomes are communicated should use simplified language, members of the judiciary and lawyers should explain outcomes without using jargon. There are examples of the judiciary speaking directly to children and young people and this

³ Leeds City Council, Integrated Safeguarding Unit. (Undated). *Child Protection: consultation with children toolkit*. Leeds City Council.

being prioritised. Whilst practice varies, it is important that children and young people are brought in from the margins, the challenge is finding safe and protective ways for this to occur and for children and young people to be empowered through this experience.

There is some merit to the suggestion of using a Case Management model. Having a consistent and familiar contact person for a child (and family) may increase their feelings of safety, allow for the consistency of information exchange and facilitate opportunities to promote cultural safety. It will also permit complex cases to be monitored for any changes in their situation and priorities for hearing if required. Priority should always be given to cases where there is higher risk to the child or a family member in order to reduce further prolonged risk, and to strengthen coordinated protective factors with other services such as child protection or the police.

Establishing child-friendly and child-safe spaces

Adequately responding to children also necessitates establishing child-friendly and child-safe spaces. Consideration needs to be given to the development of the physical environment, layout of courts, interview rooms and child-friendly spaces within courts. Child-friendly spaces are not simply referring to having access to age appropriate toys or play equipment, but rather the space needs to feel safe for children.

Whilst the layout of the court building and courtrooms is understandably formal, there are a number of factors that create unsafe feelings for a child, such as the heightened position of the judge which can be intimidating, the use of a witness box, and the presence of security guards and security checks before entering the court building. All of these can give the impression that the court environment is not a safe space.

Best practice in facilitating the participation of children and young people

There is scope to further investigate the use of restorative practices in the family law system. Restorative practices can effectively facilitate children and young people's participation in legal processes, particularly when in the child protection system. For example, family group conferencing, and alternative dispute resolution processes have proven efficacy.

The Family Court has initiated positive reforms, such as Magellan case management (for serious allegations of physical and sexual child abuse) and the Child Responsive Program, which seeks to provide a child-focused approach by family consultants and the judiciary. However, in building upon those reforms, a more robust and comprehensive assessment process is necessary for all matters before the Family Court particularly where children have experienced family violence. This should be informed by both a children's rights perspective and a child-focused approach that is premised on child-safe, child-friendly principles.

Further research is required on optimal approaches but the *Speaking for Themselves* pilot program in Canada provides an example of practice that combines a therapeutic/clinical approach with legal representation for children involved in high-conflict Family Court matters where family violence is indicated.⁴

⁴ Fotheringham, S., Dunbar, J., & Hensley, D. (2013). Speaking for themselves: Hope for children caught in high conflict custody and access disputes involving domestic violence. *Journal of family violence*, 28(4), 311-324; Hensley, D. & Dunbar, J. (2001). Towards best practice in balancing children's rights and best interests in high-conflict families and lessons learning from the Speaking for Themselves pilot project. *Paradoxes of Children's Rights: Essays in Honour of Professor Nicholas Bala'*, ed. Sanjeev Anand, publisher Irwin Law, June.

The *Speaking for Themselves project* involved a partnership approach combining child assessment and therapeutic counselling with legal representation for a child. Representing a team approach between a child counsellor/trauma therapist and the child's legal representative, the project aimed to enhance the safety of children (physical, psychological, emotional) and ensure children's evidence was heard in judicial best interests decision-making, while also seeking to minimise potential risks for further victimisation. The child counsellor was responsible for assisting children to deal with their trauma, to explore their feelings, to develop safety and coping strategies and to facilitate children being able to express their experiences. Clinical assessment and ongoing therapy enabled the child counsellor to provide information to decision-makers on children's views and put forward recommendations in their best interests. Lawyers also focused on enhancing the safety of children, ensuring that children's needs, their rights, views and interests were considered in decisions. Evaluations of the pilot suggest positive outcomes.⁵

In discussing best practice and continuous improvement, it is of interest that there is no formal process of oversight (monitoring and compliance) within the Commonwealth legal system or for services within the system, such as family consultants. While it can be appreciated there are other legal process in place such as appeals of orders/outcomes/ hearings, there is no oversight of the actual process of the legal system (as opposed to the legal outcomes). For example, when legal aid has been withdrawn or denied and the parent must represent themselves resulting in further disadvantage, when the process of court has not be culturally appropriate or accessible, and when there has been multiple system failures.

Child-led research to inform legislative reforms and service responses

There is a paucity of research with children and young people on their experiences of Family Court systems in this country. Challenges for children and young people's participation in this research, such as reluctance from various gatekeepers to enable and consent to children's participation, no doubt contributes to this research gap. Unique ethical challenges and methodological concerns also exist for engaging children and young people in this research, notably inaccurate perceptions about the vulnerability of children within society.

The PACYPC, together with other Australian Children's Commissioners and Guardians (ACCG), advocates for children and young people to be included and actively engaged in all research and review processes involving them, including this very review. Further, children and young people should be consulted regarding court design and child-focused service design. To enable and facilitate their participation in research, additional clinical supports, experienced child researchers, resources, support from gatekeepers, and safeguarding strategies for their participation are necessary.

The ACT Children and Young People Commissioner in 2013 prepared a report on *Talking with Children and Young People about participation in Family Court proceedings* following a consultation process with year 7 students at a local high school.⁶

Children and young people who participated in this consultation expressed their views on a number of issues about how they would like to participate in Family Court proceedings, the things they

⁵ *Ibid.*

⁶ ACT Children and Young People Commissioner. (2013). *Talking with Children & Young People about participation in Family Court proceedings*, ACT CYPC, August, p.4.

would like to have a say about, the sort of person who should represent their views, and how their representative could communicate with them about the proceedings and Family Court process.

This consultation illustrates the significance of speaking to children and young people about their experiences of the family law system. It was particularly important for children and young people to be able to express their views in proceedings. They also wanted to have greater understanding of and control over what happens with the information they provide. Young people raised the need to establish a trusting relationship with the Independent Children's Lawyer (ICL), indicating that confidentiality and respect were important to them.

As detailed in the report:

Overall, most participants thought that it was important for children and young people to have a say in Family Court matters, particularly where decisions would affect relationships with family members. They recognised a need for nuanced participation mechanisms reflecting the age and maturity of the child or young person. Participants identified a number of potential concerns for children and young people participating in court proceedings, and focused particularly on concerns about confidentiality, and how information they provide might be used. They expressed clear preferences regarding the type of person they would be comfortable speaking to about Family Court matters, and how this person should communicate with children and young people. Participants also raised broader issues about the role of the ICL and other ways in which children and young people might have their voices heard, or how matters could be resolved outside the court system altogether (p.17).

The report also considered the situation with ICL's:

They are first and foremost, 'officers of the court' whose foundational training is in the law and legal processes. This raises the obvious question of how well a lawyer is placed to seek and consider the views of children and young people.

Additionally, ICLs are usually only appointed by the Court for complex matters, and it is possibly these matters, which usually involve complicated human and social dynamics, that are least likely to be successfully understood and resolved within a strictly legal framework (p.8).

There are salient themes and practice issues drawn from this consultation with young people that are relevant to the ALRC's review. A copy of this report is an annexure to this submission.

Case study: facilitating children and young people's participation in proceedings

Matters have been referred to the PACYPC for consideration as to the need for advocacy assistance or for the appointment of a litigation or case guardian for matters in the Family Court. The Public Advocate may be appointed as a litigation guardian and, if acting in this capacity, must do everything that is necessary in the proceeding to protect the person's interests and rights.

The Public Advocate can also provide advocacy in different courts, tribunals and in the service systems, such as disability services, mental health services, child protection and in relation to family violence matters. This facilitates referrals and service integration, which can otherwise be fragmented or siloed.

Litigation guardian and advocacy support for young woman 16 years

The PACYPC was appointed as litigation guardian for a young woman aged 16 years. The court was considering parenting and care arrangements for the young woman's infant child. A conflict of interest situation existed as family members for the mother were also parties to the proceedings. No other suitable person known to the young person could undertake the role. In this matter, collaborative relations were established between with the young woman's lawyer that facilitated a joint approach in upholding her rights and best interests. This ensured appropriate advocacy for her needs and also ensured that relevant assessment and clinical material was put before the court. Intensive advocacy occurred with the young woman, with the advocate assisting her to understand the legal process, support her at court, attend all meetings with her legal representative, and support her following court hearings. A beneficial outcome was achieved. Of significance to this outcome was the advocacy provided to the young woman, which occurred throughout the duration of the matter and in a follow-up capacity. The advocate worked over a period to time to establish rapport and trust with the young woman, which assisted her to understand, engage with and navigate the court system and also facilitated her having a say in the proceedings.

Although the above case study highlights the benefits of providing advocacy support to children and young people, barriers have presented for the Public Advocate in undertaking advocacy in some Family Court matters, particularly around the possibility of being liable for costs. Despite the PACYPC advising the court that we would be prepared to become a child or young person's case guardian (in matters where no other alternative existed) and undertake advocacy on their behalf, the PACYPC is unwilling to undertake this role if there is a possibility of facing costs. Generally, this has resulted in PACYPC involvement not being required. It is possible that some children and young people may therefore not be receiving sufficient support and assistance to participate and understand the proceedings.

Matters where family violence is present

The Issues Paper highlights that changes are needed regarding the definition used for family violence. The PACYPC advocates for consistent terminology across jurisdictions, including that the definition should include abuse of process as a form of family violence.

There needs to be clear recognition that children and young people are not just secondary victims as a result of the family violence that they witness between adult family members, but that they are also primary victims, both through their own direct experience of violence and/or through the impact that family violence has on them and their social, emotional and physical development.

Empirical evidence indicates that children and young people are not passive or silent observers to violence occurring in their family,⁷ and children and young people who experience, or are exposed to, family violence can experience long-lasting effects. Children and young people are deeply intertwined in the emotional dynamics of their family, and if violence is occurring around them they may live in a state of vigilance, fear or insecurity. Further, if the wellbeing and parenting capacity of

⁷ Callaghan, J. E., Alexander, J. H., Sixsmith, J., & Fellin, L. C. (2015). Beyond "Witnessing" children's experiences of coercive control in domestic violence and abuse. *Journal of interpersonal violence*; Callaghan, J. E. M., & Alexander, J. H. (2015). *Understanding Agency and Resistance Strategies, Children's Experiences of Domestic Violence Report*. Northampton. Retrieved from www.unars.co.uk; Holt, S., Buckley, H., & Whelan, S. (2008). The impact of exposure to domestic violence on children and young people: A review of the literature. *Child Abuse & Neglect*, 32(8), 797-810.

the non-violent parent (usually the mother) is undermined by violence, this can in turn fundamentally effect the child's or young person's development.

Family and domestic violence engages several rights in the United Nations CRC:

- Every child and young person has the right to live life free from all forms of violence, abuse and neglect (Article 19).
- Children and young people have the right to participation in decision-making, and for their views to be listened to and taken seriously (Article 12).
- Government agencies, courts or community organisations working for or with children and young people must make the child's best interests their primary consideration (Article 3).
- Governments have an obligation to ensure each child has appropriate protection and care in order to support his or her wellbeing (Article 3).
- Governments have an obligation to provide assistance and services to parents and families in order to promote the care and development of their children (Article 18).

However, the current public discussion and discourse on family and domestic violence is adult-centred. Children and young people have different needs and perspectives that should receive 'explicit focus'.⁸

*Children and young people can be affected by family violence in a range of ways which are often independent of their non-violent parent, and their needs can be different to those of adults. At times children and young people's needs have been overlooked or conceived as secondary to those of adults when strategies are put in place to address family violence.*⁹

The PACYPC is a member of the Australian Children's Commissioners and Guardians (ACCG), which comprises national, state and territory children and young people commissioners, guardians and advocates. The ACCG aims to promote and protect the safety, wellbeing and rights of children and young people across Australia by contributing to public policy and program development. In considering the impact of family violence on children and young people, a shared view is that "[c]hildren's experiences of family and domestic violence must be understood in their own right and not just as part of an adult situation."¹⁰

Further, in looking at family violence from a child-centric perspective, the needs and rights of children and young people must be central to family law decision-making and resultant actions. Children's and young people's perspectives, experiences and needs differ in important ways to those of the adult victims in their home. We need to listen to children and young people in order to understand their experiences of living with family and domestic violence and then ensure that parenting arrangements do not adversely impact upon them.

Understanding each child's unique experiences of how family violence has affected them and their views and wishes for the future also requires comprehensive clinical assessment and specialised case management processes. The Family Court, in making determinations in the best interests of children, must have adequate clinical information about the situation for children who have

⁸ National Children's Commissioner (2015) *Children's Rights Report*, 165.

⁹ Commissioner for Children and Young People Tasmania (2016) *Children and Young People's Unique Experiences of Family Violence: Family violence and children and young people in Tasmania*, 3.

¹⁰ National Children's Commissioner (2015) *Children's Rights Report*, 144.

experienced family violence. This includes consideration on additional complexities and comorbidities such as mental health and substance misuse issues that may be evident. The need for detailed and comprehensive assessment information being available to the court on the complexities and nuances of each child/young person's experience of family violence is required. Ensuring a child or young person has access to independent advocacy assistance is also critical.

Often the impact of family violence on children and young people themselves is diminished by the language and references that are used in such matters (e.g. victims 'and their children'). Judicial decision-making can also fall short in centralising the experience of family violence by children and young people and the impact of this violence on their lives. It is vital that judicial decision-makers have a comprehensive understanding about the nature of family violence, the realities and traumatic impacts on individual children and young people (including on their social, emotional and physical development), dynamics and perpetrator tactics, and knowledge about the ongoing impact of violence,¹¹ and its potential long-term impacts on child victims, regardless of whether they have directly experienced violence or witnessed it against a family member.

It is important to emphasise that there are a multitude of complex issues within the family law system that have far-reaching impacts for victims of family violence and children affected by family violence. The interaction of the family law system with victims and children is a subject that requires further in-depth consideration, and we encourage the ALRC's review to engage in further consultation on these issues. This consultation process should include proactive consultation with women and children affected by family violence. Consultations must be accessible to victims and children, and be designed in such a way that is sensitive to their traumatic experiences and particular needs.

Adequately recognising and responding to the needs of victims

In recognition of the needs of victims in criminal matters, relevant legislation has been amended in sexual and violent offence proceedings. All jurisdictions now impose restrictions upon the ability of a defendant in sexual offence proceedings to personally cross-examine the complainant, and some also apply to violent offence proceedings.¹² The existing prohibitions vary in relation to their coverage, the categories of witnesses covered and the alternative methods imposed to allow the other party's evidence to be tested.¹³ In the ACT, these protections have recently been extended to prevent respondents directly cross-examining 'affected persons' in Family Violence Order proceedings.¹⁴ An 'affected person' is defined to include 'any child who hears, witnesses or is otherwise exposed to family violence committed against another person'.¹⁵ Similar legislative changes have not yet been made to the *Family Law Act 1975*.

In fact, major reforms in the family law system over the past decade have put victims, including children (who have often experienced family violence themselves in addition to being affected by having witnessed family violence), at increased risk of coming into contact with the perpetrators of violence. In 2006, the Federal Government made some wide-ranging reforms to the *Family Law*

¹¹ Thiara, R. K., & Humphreys, C. (2017). Absent presence: The ongoing impact of men's violence on the mother-child relationship. *Child & Family Social Work*, 22, 137-145.

¹² *Crimes Act 1914* (Cth) s 15YG; *Criminal Procedure Act 1986* (NSW) s 294A; *Criminal Procedure Act 2009* (Vic) s 356; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D; *Evidence Act 1977* (QLD) s 21N; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5; *Evidence Act 1906* (WA) s 25A; *Evidence Act 1929* (SA) s 13B; *Evidence (Children and Special Witnesses) Act 2001* (TAS) s 8A.

¹³ Australian Law Reform Commission, *Family Violence – A National Legal Response*, above n 22, 1341-2.

¹⁴ *Family Violence Act* (ACT) s63.

¹⁵ *Family Violence Act 2016* (ACT) s63(2)

Act,¹⁶ which moved the Family Court some way toward a less adversarial model. These reforms saw a shift requiring separating couples to use family dispute resolution prior to engaging with the court system, except where family violence is disclosed. The fact that victims of family violence are exempted from undertaking family dispute resolution generally means that the only method of resolving the dispute is the litigation process. In this context, it is essential to note that victims, particularly self-represented victims, continue to experience negative outcomes as a result of attending Family Court.¹⁷

For example, the matter of *Cameron & Walker* [2010]¹⁸ was a case on appeal in the Full Court of the Family Court. One of the grounds of appeal was that ‘as a result of the trial judge’s refusal to permit the mother to be cross-examined remotely and not in the presence and by the father in person (her alleged abuser) the entirety of the trial miscarried.’ In the trial, the mother was highly distressed while being cross-examined and sought, after being subjected to cross-examination by the father for some time, to give evidence by video link. This request was refused by the judge due to the late timing of the application. The trial judge suggested a number of ways in which the mother might be assisted during cross-examination, such as a support person sitting with her in the witness box. However, the cross-examination continued to be highly distressing for the mother and the court was adjourned on several occasions to allow her to regain composure.¹⁹

Family Court matters involving family violence are common. A sample of approximately 300 Family Court and Federal Magistrates Court files indicated half of the cases contained allegations of family violence and/or child abuse.²⁰ Meanwhile, the issue of self-representation in the family law jurisdiction has been described as a growing phenomenon;²¹ in 2013-14, the incidence of self-represented appellants in the Family Court was 38% and over a third of trials involved a self-represented litigant.²²

There has been a noticeable failure by legislatures to recognise that victims of family violence are also susceptible to re-victimisation at the hands of the perpetrator in family law proceedings. This is striking when considering that the *Family Law Act* seeks to recognise and provide safety in other ways for victims of family violence.

The PACYPC and Victims of Crime Commissioner support a prohibition against direct cross-examination of victims by their abusers. We also advocate for a prohibition against direct cross-examination by a child or young person who may, in extraordinary circumstances, be called to give evidence about violence perpetrated by a parent or family member. This may be achieved by use of the definition of ‘affected persons’ outlined above in s63(2) of the *Family Violence Act 2016*.

Implementing a prohibition on direct cross-examination of applicants and any ‘affected persons’ (defined with reference to the ACT Family Violence Act, above) will put victims and witnesses in a

¹⁶ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)

¹⁷ R Braaf & C Sneddon, ‘Family Law Act Reform: the potential for screening and risk assessment for family violence’, *ADFVC Issues Paper*, 12, 10.

¹⁸ *Cameron & Walker* [2010] FamCAFC 168 (7 September 2010).

¹⁹ *Cameron & Walker* [2010] FamCAFC 168 (7 September 2010) [80].

²⁰ L Moloney, B Smyth, R Weston, N Richardson, L Qu & M Gray, ‘Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A pre-reform exploratory study’ (Research Paper No 15, Australian Institute of Family Studies, 2007).

²¹ R Foster, ‘Australian Experience with self-represented litigants (SRLs) – A Family Court Perspective’ (Paper presented at the 21st AIJA Conference on New Challenges, Fresh Solutions, Fremantle, 19-21 September 2003), 1.

²² Family Court of Australia, *Annual Report 2013-2014* (2014); and B Fehlberg & J Behrens, above n21, 58, citing Family Court of Australia, *Annual Report 2005-2006* (2006).

better position to participate in Family Law processes. It is clear that preventing cross-examination in person by a perpetrator would be of a significant benefit to the wellbeing and accurate testimony of victims of family violence, and may contribute to a Family Law Court process that is fairer for both parties.

Research highlights that a party in domestic and family violence related cases may use a range of litigation tactics to gain an advantage over, or to harass, intimidate, discredit or otherwise control the other party. These tactics are commonly known as ‘systems abuse’ and may be referred to in legislation and by judicial officers as malicious, frivolous, vexatious, querulous, or an abuse of process.²³ Some examples include the perpetrator failing to appear in court, repeatedly seeking adjournments, or appealing decisions on tenuous grounds.

We note amendments were recently proposed in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* that seek to reduce systems abuse by perpetrators of family violence. Those amendments include increasing the power of the court to dismiss unmeritorious claims. However, the implementation of such amendments alone is insufficient to prevent systems abuse and, in the absence of legal representation for victims, may even result in more victims having their legitimate claims dismissed as unmeritorious.

Improved legal representation for victims of family violence is needed to ensure that systems abuse is identified, brought to the attention of the judiciary, and dealt with appropriately. Domestic violence advocates have persistently criticised the lack of funding available to assist victims of family violence through legal processes, including family law processes. For example, Rosie Batty has spoken about the complexity of the legal system and how overwhelming it can be for victims.²⁴ In its 2014 Inquiry Report on Access to Justice Arrangements, the Productivity Commission found that funding for the legal assistance sector is acutely inadequate and an immediate increase of \$200 million is required.²⁵ It also highlighted that justice is often inaccessible for the ‘missing middle’ – those who are neither wealthy enough to fund their own legal costs, nor on low enough incomes to qualify for legal aid.²⁶

Many of these victims lack access to legal aid or the financial resources for private legal representation – rendering them defenceless against such abuse. These tactics also result in ongoing financial abuse of the victim. The ACT Victims of Crime Commissioner regularly hears stories from victims who have found themselves tens of thousands of dollars in debt as a result of long-running child-related disputes in the Family Court. These victims are seeking safety for themselves and for their children. Some make the choice of consenting to orders that do not provide safety for their children in order to avoid further debt. Those who continue the legal process find themselves in financial hardship, which necessarily affects the children.

While the Commonwealth government has taken some measures to improve funding for access to justice for victims of family violence, these measures fall short of the Productivity Commission’s recommendations. Victims of domestic and family violence who are ineligible for legal aid are especially vulnerable to systems abuse, and likely lack the legal expertise or financial resources to

²³ Australasian Institute of Judicial Administration (2016), *National Domestic and Family Violence Bench Book*, 3.1.11.

²⁴ Rachel Browne, ‘Family Court decisions can lead to ‘diabolic’ situations, says Rosie Batty, *The Sydney Morning Herald*, 15 June 2016.

²⁵ Australian Government Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No. 72, 5 September 2014.

²⁶ *Ibid.*

combat it. An increase in resources for legal representation of family violence victims in the family law courts is necessary in order to reduce their re-victimisation in family law processes.

Family law processes have long been cited as a major cause of re-victimisation for victims of family violence and children exposed to family violence. It has also long been recognised by those working in the family violence sector that wide-ranging changes are required in order for the Family Courts to be a source of relief and justice, rather than added distress and trauma for victims.

In achieving this, there needs to be a prohibition on self-represented litigants in the Family Court personally cross-examining the victim and persons affected by the family violence; increased funding for legal support for victims of family violence throughout the family law process and the family law system needs to give greater scope for children's voices to be heard. Adopting a more child-focused approach in all matters before the Family Court where children have been exposed to family violence is necessary along with the utilising an integrated model that brings together clinical and legal approaches in representing the best interests of children in family law proceedings.

In addition to increasing funding for legal representation, further consideration and scoping of the role of litigation guardians/case guardians and independent advocates should be undertaken. There are obvious resourcing and funding issues in providing independent advocacy services, although clear benefits exist if such a service was available, particularly if the model of advocacy facilitates the provision of advocacy across service systems where both individual and systemic advocacy is possible.

Central to adequately responding to victims is ensuring that common risk assessment processes, strategies for early identification of family violence and safety planning tools exist and that all staff have received training in these assessments. Most jurisdictions have these assessment tools in place and screening, risk assessment and safety planning processes have also been previously established for use in the family law system.²⁷ Some consistency in the use of screening, risk assessment and safety planning is recommended.

Final comments

Thank you for taking the time to consider the content contained in this submission. The Commissioners can be contacted should further information be required or should you seek our involvement in consultations.

Yours sincerely,



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²⁷ Australian Attorney-General's Department (2010). AVERT Family Violence: Collaborative Responses in the Family Law System, Attorney-General's.