Response to Discussion Paper: Australian Law Reform Commission Review of the Family Law System

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We are legal academics working in the area of children and family law with particular interest in children’s participation and representation. Thank you for the thoroughly researched and well-articulated Discussion Paper. We are cautiously optimistic that the recommendations will greatly improve the experiences of children and families undergoing family separation.

In particular, the following recommendations will ensure greater focus on children’s rights in decision-making processes:

1. Children’s views as the first consideration in determining safety and best interests (Proposal 3-5)
2. Legislating an opportunity to be heard in proceedings and FDR (Proposals 7-3 and 7-4)
3. Developing best practice guidance for child-inclusive FDR (Proposal 7-5)
4. Creating greater opportunities for children to meet with judges and appropriate guidance for judges (Proposals 7-11 and 7-12)

## Scope of Response

This response relates to ‘A new model for supporting children’s participation’ (**Proposal 7-8 to 7-10 and Questions 7-1 to 7-3**).

The creation of a new role of ‘children’s advocate’ in the court system is likely to be expensive and will add another professional role to the mix of those already involved in supporting the court in making decisions in family law matters. We must ensure that such a role, if created, fulfils its purpose of keeping children informed about proceedings and facilitating their participation by ensuring that children have opportunities to be heard and are informed as to *how* their views are taken into account in any decision. Otherwise, we risk the treatment of children’s views and participation in proceedings becoming tokenistic, while satisfying the legislature that enough has been done to protect children’s right to be heard. This would not accord with the wealth of literature telling us how children would like to be treated in proceedings.

We have some concerns about the proposed model and wonder whether it is the best way to facilitate children’s participation.

## The children’s advocate is not a lawyer

Children and young people may not perceive the role of children’s advocate as sufficient to represent their views and interests, if changes do not clearly integrate the role into legal proceedings. The children’s advocate is not a lawyer, but a social scientist. The Family Law Council canvassed the strengths and weaknesses of having either a social scientist or lawyer representing children and young people in their 2004 report, *Pathways for Children: a Review of Children’s Representation in Family Law*.[[1]](#footnote-1) Advocates with a social science background are likely to have strengths in communicating with children and understanding child development and family dynamics, but will have limited training in how to intervene on children’s behalf in legal proceedings.

Children and young people have a legitimate interest in the conduct and outcome of their matter, and to deny them legal representation in a situation where an adult would be afforded representation may constitute a denial of procedural fairness. On the other hand, it is clear from the research that ICLs often do not communicate with or engage children in proceedings adequately. Legal Aid Commissions or another responsible body can address this through selection, training and funding of ICLs at a national, state and territory level.

Research tells us that children expect that ‘their lawyer’ will represent their views.[[2]](#footnote-2) Children may not be happy to accept advocacy from a non-lawyer and may have difficulty distinguishing the child advocate’s role from that of the family consultant. Given the wealth of research on children’s lack of confidence in the family consultant’s ability to accurately portray their views,[[3]](#footnote-3) this would be problematic. It is well known that children are not happy with the ‘filtering’ of their views through a third party.[[4]](#footnote-4)

A lawyer is involved throughout the proceedings and is able to understand and stay abreast of the key legal issues that arise from time to time. An effective legal practitioner is able to explain legal processes to the child, ensure that the child’s voice is heard and advocate on their behalf, without becoming a witness. A lawyer can ascertain how the child might be able to appropriately participate in relation to any issues arising. A children’s advocate, not having legal training, may not have this understanding. It is not clear whether the proposed model envisions the children’s advocate participating throughout the proceedings, or whether their involvement is only requested at certain times. If the children’s advocate role is funded, more thought needs to be given to developing the professional relationship between this role and that of the ICL or separate representative.

**Question 7-3** asks whether communications between advocate and child should be admissible and whether the children’s advocate may become a witness. In our opinion, allowing the children’s advocate to become a witness breaches any relationship of trust between advocate and child and does not fulfil the role of advocate. A lawyer would remain in a traditional advocate role and would not be called as witness.

It may also be beneficial for children to have access to a legal representative after proceedings have completed. Children who have been the subject of complicated family law proceedings may be in need of legal assistance later, through interaction with the youth justice or child protection systems. It may be helpful for them to have access to a trusted legal adviser who can either assist or refer to a colleague.

## The role of the children’s advocate currently falls within the guidelines for the role of the ICL

**Proposal 7-8** envisions the role of the children’s advocate to be to:

* Explain to the child their options for making their views heard;
* Support the child to understand their options and express their views;
* Ensure that the child’s views are communicated to the decision maker; and
* Keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.

These are all tasks that currently appear in the National Legal Aid *Guidelines for Independent Children’s Lawyers* (2013). We are cognisant of the fact that ICLs differ in their approach to the role and that many do not meet with children or take an active role in ensuring that children are given opportunities to be heard, to participate or to be kept informed of proceedings.[[5]](#footnote-5) Indeed, ICLs’ approaches differ in different jurisdictions.[[6]](#footnote-6) We also acknowledge the concerns (highlighted in the Discussion Paper) that ICLs have multiple roles to play, and that their duties as evidence-gatherer and honest broker may be prioritised over their role as advocate for the child.[[7]](#footnote-7) Nevertheless we wonder whether more can be done to assist ICLs to be children’s advocates rather than creating an entirely new role. Appropriate training and recruitment of ICLs, for example, may assist.

The Legal Aid Commission in New South Wales has been actively building training and support opportunities for ICLs and other children’s lawyers for some time now, and this movement could be supported in other states and territories that have less developed approaches to facilitating children’s participation. Currently, ICLs rely on s 62G(3A) reports, written by family consultants or other experts, to put children’s views to the courts. If the views do not accord with those expressed to the ICL by a child, the ICL may cross examine report writers or seek further evidence of children’s views.

In New Zealand, for example, lawyers for children are able to advocate on behalf of children, as well as assisting the court and the parties. Commonly, the lawyer for the child will file a written memorandum setting out the child’s views. This forms part of the body of evidence without the lawyer becoming a witness.[[8]](#footnote-8) It is important that ICLs advocate children’s views as well as their best interests. The view that children should not be directly represented because they are unable to act in their own best interests is dismissive of children’s autonomy and contrary to principles of natural justice and due process.[[9]](#footnote-9) If a child is advancing a position that is unreasonable, unsafe or otherwise clearly contrary to their best interests, the ICL may counsel the child, just as a lawyer for an adult would advise their client against pursuing a course of action that would not be in their interests. If the views of the child are unshakable and remain fundamentally opposed to what the ICL believes to be in the child’s best interests, a separate representative may be appointed to represent the child’s best interests, as occurs in the New Zealand system.[[10]](#footnote-10)

If the ICL is to remain a ‘best interests’ representative, we wonder whether the advocacy of the child’s views would better be served through a Views of the Child Report, such as those that occur in the Ontario family law system, rather than through the creation of a children’s advocate role.

## Delegating the oversight and funding of the children’s advocate to a separate body takes control from the Family Court

**Question 7-2** poses whether the appointment, management and coordination of children’s advocates and separate representatives should be overseen by a new body to be created. Suggested models referred to in the Discussion Paper included Cafcass (UK) and the Office of the Children’s Lawyer (‘OCL’) (Ontario, Canada).

We can see some advantages in these matters being overseen by a new body. Despite its best intentions, the Family Court has clearly been unsuccessful in facilitating genuine participation of children in accordance with their rights. Importantly, organisations responsible for training and supporting either lawyers or children’s advocates need to make better use of children’s feedback. Currently, research is the only method for ascertaining general feedback from children about their satisfaction with their lawyers. Professionals throughout the family law system, including ICLs, could use feedback processes to ascertain how well they are meeting children’s expectations of being engaged in legal processes, if organisations built this requirement into these processes, and monitored how well it was implemented.

We don’t have information about the funding model for Cafcass, however we believe the system has been wound back in recent years due to its expense. This is despite the service generally being highly regarded. Anecdotally, judges have reported no trouble with social scientists with appropriate skills being appointed when requested by the court.

However, in private family law matters in Ontario, the OCL has discretion to accept or decline a request from the court to appoint a lawyer for the child (called a ‘litigation guardian’). Further, the OCL can decide what kind of involvement, if any, the OCL will provide.[[11]](#footnote-11) The OCL will accept referrals where it determines that the representation of the child will provide a meaningful contribution to the resolution of the matter and protect the child’s interests.[[12]](#footnote-12) Therefore, the OCL may decline to appoint a litigation guardian, or may appoint a clinical investigator instead, regardless of what the court has requested.[[13]](#footnote-13)

Further, despite case law that request a lawyer for the child to represent the child’s views,[[14]](#footnote-14) the OCL’s own policy states that the lawyer for the child can present the ‘circumstances surrounding the child’s views’,[[15]](#footnote-15) thereby effectively allowing the child’s lawyer to advocate a position that does not accord with the child’s views. This can frustrate the process of a child’s views being properly heard.

Anecdotally, judges and lawyer have reported frustration that the court’s determination of the best way of hearing from children in a case (eg the appointment of a lawyer for the child) may be thwarted by the OCL, an independent agency which is not bound by the court’s request. This outcome is not in the best interests of children and their families and we should be wary of creating a similar situation in Australia.

We believe that a new body, if created, would need to have close links to the Family Courts and Legal Aid Commissions to ensure that its objectives are fulfilled. A new body might develop systems that ensure children and young people are listened to, their views taken account of in decision making, and that they received feedback about how their views have been taken account of.

## Representation for children in Hague child abduction proceedings

 Any assistance offered to children who are the subject of parenting proceedings should also be made available to children who are the subject of Hague International Child Abduction proceedings. We acknowledge that, unlike provided by s60CC(3)(a) for children in parenting proceedings, there is generally no requirement for a court to consider the views of a child when deciding whether to make a mandatory return order under Regulation 16 of the *Family Law (Child Abduction Convention) Regulations 1986*. Nevertheless, children have a right (enshrined in Article 12 of the UNCRC) to be given an opportunity to be heard in *all* proceedings that affect them, and should be given opportunities to participate and be kept informed about the proceedings and *how* they may participate. This is particularly so in cases where it is alleged that the child objects to being returned.[[16]](#footnote-16)

There is nothing in the Regulations or the Hague Convention which prevents or is inconsistent with giving children opportunities to participate.[[17]](#footnote-17) Any initiatives for supporting children’s participation, such as the creation of a new role of children’s advocate, should be afforded to children who are the subject of Hague proceedings. The current s68L(3), which allows representation of children only in exceptional circumstances, needs to be repealed.

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1. Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law* (August, 2004). [↑](#footnote-ref-1)
2. Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997) at [13.57]; Family Law Council, *Pathways for Children: A Review of Children’s Representation in Family Law* (2004) at [1.53]; Australian Institute of Family Studies, *Independent Children’s Lawyers Study* (2014) at 3.8. [↑](#footnote-ref-2)
3. See M Fernando, ‘How Can We Best Listen to Children in Family Law Proceedings?’ [2013] *NZ L Rev* 387 at 391-393. [↑](#footnote-ref-3)
4. P Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (2008) at 149. [↑](#footnote-ref-4)
5. N Ross, ‘Independent Children’s Lawyers: Relational Approaches to Children’s Representation’ (2012) *AJFL* 214 at 223-231; Australian Institute of Family Studies, *Independent Children’s Lawyers Study* (2014). [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Australian Institute of Family Studies, *Independent Children’s Lawyers Study* (2014). [↑](#footnote-ref-7)
8. See M Fernando, ‘Family Law Proceedings and the Child’s Right to be Heard in Australia, the United Kingdom, New Zealand, and Canada’ (2014) 52 *Fam Court Rev* 46 at 50-52. [↑](#footnote-ref-8)
9. See A Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (2018). [↑](#footnote-ref-9)
10. Family Court of New Zealand, *Lawyer for Child Code of Conduct* (2007) at [5.5]. [↑](#footnote-ref-10)
11. Office of the Children’s Lawyer, <https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/faq/family_law_and_child_protection.php>

(30 October 2018). [↑](#footnote-ref-11)
12. See M Fernando, ‘Family Law Proceedings and the Child’s Right to be Heard in Australia, the United Kingdom, New Zealand, and Canada’ (2014) 52 *Fam Court Rev* 46 at 52-53. [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. *Strobridge v Strovridge* (1992), 10 O.R. 3d 540. [↑](#footnote-ref-14)
15. Office of the Children’s Lawyer, *Policy Statement: Role of Child’s Counsel,* revised 1 April 2006 at 5. This document may have been updated. [↑](#footnote-ref-15)
16. See M Fernando and N Ross, ‘Stifled Voices: Hearing Children’s Objections in Hague Child Abduction Convention Cases in Australia’ (2018) 32 *IJLPF* 93. [↑](#footnote-ref-16)
17. *De L v Director-General, NSW Department of Community Services and Anor* (1996) 139 ALR 417, at 427,

citing Nicholson CJ in *Director-General, Department of Community Services v De Lewinski* (1996) FLC

92-674, at 83,017. [↑](#footnote-ref-17)