



**Australian  
Human Rights  
Commission**

**National Children's Commissioner**

**Megan Mitchell**

16 December 2019

Joint Select Committee on Australia's Family Law System

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Dear Joint Select Committee,

Thank you for the opportunity to make this brief submission to the Joint Select Committee's inquiry into Australia's Family Law System. The Australian Human Rights Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

This submission refers to previous work of the Commission highlighting human rights issues relevant to the family law system. As National Children's Commissioner, I wish to draw the Committee's attention to some of the issues and recommendations relating to the rights and wellbeing of children in the family law system, relevant to terms (f) and (h) of the Committee's inquiry.

### **Australian Law Reform Commission Review of the Family Law System**

As the Committee will be aware, there have been a number of parliamentary and other inquiries relating to the family law system over the past decade. Most recently, the Australian Law Reform Commission (ALRC) conducted a Review of the Family Law System, issuing its final report, *Family law for the future — an inquiry into the family law system*, in March 2019. The final report includes 60 recommendations for reform. I urge the inquiry to consider closely these recommendations, as well as the many relevant issues raised in the Review's Issues Paper and Discussion Paper.

The Commission made a comprehensive submission to the ALRC Review Issues Paper in May 2018, covering a broad cross-section of human rights issues in family law. This included key human rights principles; accessibility for Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse

communities and people with disability; legal principles in relation to parenting and the welfare jurisdiction of the family court; dispute resolution processes; children's experiences and perspectives; and skills and expertise of family law professionals.

Many of the concerns with the family law system raised in the Commission's submission in 2018 remain relevant. However, the Committee should note that several bills amending the *Family Law Act 1975* (Cth) (Family Law Act) discussed in our submission have now become law.<sup>1</sup>

I attach the Commission's submission for the Committee's information.

### **The rights and wellbeing of children in the family law system**

One the key human rights concerns raised in the Commission's submission to the ALRC Review is the importance of safeguarding children.

Since the beginning of my term in March 2013, the issue of family and domestic violence in the context of the family law system has been raised with the National Children's Commissioner by children, by adults on behalf of children, and by adults reflecting on their childhood experiences. This includes numerous representations from children and young people, and their advocates, about failures by courts and agencies within the family law system to solicit their views in the context of decision-making, and to provide them with accessible information about processes and outcomes.

In 2015, I conducted a national investigation into how Australian children under 18 years of age are affected by family and domestic violence. This included consideration of children affected by family and domestic violence who are involved with the family law system. The findings and recommendations of this investigation are contained in my *Children's Rights Report 2015*.<sup>2</sup>

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<sup>1</sup> The Family Law Amendment (Family Violence and Other Measures) Bill 2018 passed both Houses of parliament on 22 August 2018; The Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 passed both Houses of parliament in December 2018.

<sup>2</sup> Australian Human Rights Commission, *Children's Rights Report 2015* (2015). See <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2015>.

A primary means of ensuring child safety is to give children the opportunity to express their views and have these taken into account by decision-makers, as guaranteed in article 12 of the United Nations *Convention on the Rights of the Child* (CRC). Children are often directly affected by the separation of their parents and can be the victims of abuse and violence. Children and young people consistently say to me, and to others, that they would like to have more of a say in, and be informed about, legal decisions that affect them. However, there are numerous barriers that are inhibiting child participation in the family law system. This includes a lack of understanding and concerns about children's participation and how to facilitate it. While a child should not be compelled to express a view in a family law matter, the Commission considers that children should be provided with the opportunity to do so in a manner appropriate to their age and maturity. This includes children whose parents are involved in alternative dispute resolution processes.

In the submission to the ALRC Review, the Commission made a number of recommendations relating to children's rights. These include that:

- the Family Law Act is amended to require a judge to provide children with an opportunity to express their views in matters that affect their rights or interests. A child should not be compelled to express a view, but should be provided with the opportunity to do so in a manner appropriate to their age and maturity (Recommendation 18)
- children are informed of their rights in family law proceedings that affect them, including their right to be heard, in a manner appropriate to their age and maturity (Recommendation 20)
- children are informed of decisions made in relation to parenting arrangements that affect them, in a manner appropriate to their age and maturity (Recommendation 21)
- judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with ongoing training and resources on family law matters relating to children including the impacts of family and domestic violence and child abuse on children, child development and applying the best interests of the child principle in parenting matters (Recommendation 22)
- judicial officers and family law professionals, including Independent Children's Lawyers, family consultants and mediators are provided with

training and resources to assist them to engage and communicate effectively with children about family law matters that concern them (Recommendation 25).

The Commission also urged the ALRC to consider recommending the Family Court establish a children's board or committee similar to the Family Justice Young People's Board in the UK, to provide ongoing advice to the Family Court on how to better realise children's rights in the family law system.

The Commission has raised similar issues to the above in a recent submission to the United Nations Committee on the Rights of the Child (UN Committee), in its consideration of Australia's progress in implementing the CRC. In its submission to the UN Committee, the Commission welcomed amendments made to the Family Law Act in 2012 to better protect victims of family and domestic violence, but expressed ongoing concerns, including:

- insufficient priority given to enabling the views of children to be heard and considered
- amendments to the Family Law Act in August 2018 that remove the requirement that certain court orders in parenting matters be explained to children.<sup>3</sup>
- the need for judges and other family law professionals to have expertise and training in child development and trauma, the impacts of family and domestic violence on children, children's rights, and how to communicate effectively with children and young people.

We recommended that the Australian Government amend the Family Law Act to require that children are provided with an opportunity to express their views in all matters that affect their rights or interests. The Commission's submission to the UN Committee is available on our website at <https://www.humanrights.gov.au/publications-home/all>.

Following this, in October 2019, the UN Committee issued its Concluding Observations on Australia. These included recommendations that Australia:

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<sup>3</sup> The Family Law Amendment (Family Violence and Other Measures) Bill 2018 passed both Houses of parliament on 22 August 2018. The Australian Human Rights Commission made a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Bill. See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/FamilyViolence/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FamilyViolence/Submissions).

- amend the Family Law Act to provide all children, in accordance with their age and maturity, the opportunity to have their views heard in all matters concerning them, including in 'non-court based family services'
- provide training and support to the Independent Children's Lawyers to ensure they have direct contact with the children they represent in Family Courts.<sup>4</sup>

Recommendations relating to children and family law and the Concluding Observations of the UN Committee will be included in my forthcoming Children's Rights Report, to be released early in 2020.

I would be pleased to answer any questions relating to children's rights and the family law system arising from this submission.

Yours sincerely,

**Megan Mitchell**  
**National Children's Commissioner**

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<sup>4</sup> United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) para 22(a) and 22(c). See [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2fCO%2f5-6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAUS%2fCO%2f5-6&Lang=en)