



Your Ref:  
Our Ref: 851

18 December 2019

Hon Kevin Andrews  
Chair  
Joint Select Committee on Australia's Family Law System

By email: [familylaw.sen@aph.gov.au](mailto:familylaw.sen@aph.gov.au)

Dear Chair

**Re: Joint Select Committee on Australia's Family Law System**

Thank you for the opportunity to make a submission to the above inquiry.

Role of the Commissioner for Children and Young People (Tas)

The Commissioner for Children and Young People is an independent statutory officer responsible to the Parliament of Tasmania and established under the *Commissioner for Children and Young People Act 2016* (Tas) (the CCYP Act).

The CCYP Act sets out the guiding principles, functions and powers of the Commissioner and includes specific provisions which acknowledge the independent and impartial role of the Commissioner.

The Commissioner's general functions (section 8 of the CCYP Act) include:

- a) Advocating for all children and young people in the State generally.
- b) Acting as advocate for a detainee under the *Youth Justice Act 1997*.
- c) Researching, investigating and influencing policy development into matters relating to children and young people generally.
- d) Promoting, monitoring and reviewing the wellbeing of children and young people generally.
- e) Promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters that may affect their lives.
- f) Assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.



- g) Encouraging and promoting the establishment by organisations of appropriate and accessible mechanisms for the participation of children and young people in matters that may affect them.

Section 3 of the CCYP Act describes the principles which govern the manner in which I perform my role as Commissioner as follows:

Principles to be observed:

- (1) The Commissioner or any other person performing a function, or exercising a power, under this Act, must –
  - (a) do so according to the principle that the wellbeing and best interests of children and young people are paramount; and
  - (b) observe any relevant provisions of the United Nations *Convention on the Rights of the Child*.

Consistent with my statutory functions, the focus of this short submission is on issues arising in the family law context that are particularly relevant to promoting and protecting the rights, wellbeing and best interests of children and young people in Tasmania. This aligns with paragraph (f) of the Committee's Terms of Reference:

*the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings.*

**Comment**

**Promoting the best interests of children, including by protecting them from violence, abuse and harm**

One of the most important functions of the family law system is to provide a framework for determining parenting arrangements for children whose parents have separated.

Consistent with Article 3 of the United Nations *Convention on the Rights of the Child* (CRC), s60CA of the *Family Law Act 1975* (FLA) provides that in deciding whether to make a particular parenting order, the best interests of the child in question must be regarded as the paramount consideration.

Article 19 of the CRC makes it clear that children and young people have a right to be free from violence and abuse:

***Article 19***

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.





Section 60CC of the FLA outlines how a court is to determine what is in a child's best interests, including by setting out a list of factors to be considered. This framework should also guide parenting arrangements made by agreement and without the need for court intervention and determination.

Section 60CC (2) of the FLA describes the primary considerations as follows:

- a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Section 60CC (2A) specifically provides that the Court is to give greater weight to the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

In its April 2019 report *Family Law for the Future: An Inquiry into the Family Law System-Final Report*,<sup>1</sup> the Australian Law Reform Commission (ALRC) considers whether there is a need for legislative amendment of the FLA decision-making framework regards parenting arrangements to ensure it promotes the best interests of children, and, in particular, promotes their safety. For example, the ALRC recommends simplifying the decision-making framework so that it:<sup>2</sup>

- emphasises the paramount importance of the best interests of the child;
- provides core factors to be applied in determining what is most consistent with a child's best interests, with an emphasis on safety, while recognising that other factors may be relevant to a particular case; and
- emphasises that parenting arrangements should be shaped around the circumstances of the particular child.

Based on the above, **Recommendation 5** of the ALRC is as follows:

Section 60CC of the *Family Law Act 1975* (Cth) should be amended so that the factors to be considered when determining parenting arrangements that best promote a child's best interests are:

- what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm;
- any relevant views expressed by the child;
- the developmental, psychological, and emotional needs of the child;
- the benefit to the child of being able to maintain relationships with each parent and other people who are significant to them, where it is safe to do so;

<sup>1</sup> <https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/>

<sup>2</sup> Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System – Final Report* April 2019, paragraph 5.38 page 164.



- the capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child, having regard to the carer's ability and willingness to seek support to assist them with caring; and
- anything else that is relevant to the particular circumstances of the child.

Given the relevance of the ALRC's recent inquiry to the work of the Committee, I respectfully recommend that the Committee examine and take into account:

- a) the Recommendations made by the ALRC in its April 2019 Report, particularly as they relate to the promotion of the wellbeing and best interests of children, noting the fundamental requirement that our FLA system should protect children from harm and abuse and promote their safety; and
- b) the expressed rationale for those Recommendations.

### **Children's voices**

Article 12 of the CRC reads as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Currently, in determining which parenting arrangements promote a child's best interests, decision makers are to consider "any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's view" (60CC(3) (a) of the FLA). Consideration of a child's wishes should also guide decision - making processes undertaken outside of a Court context, noting that there can be no real appreciation or understanding of what is in a child's or young person's best interests without according them the right to be heard and to have a say on matters that affect them.<sup>3</sup>

The importance of taking the views and wishes of children and young people into account when determining parenting arrangements – and the extent to which this occurs – was examined in the 2018 Australian Institute of Family Studies (AIFS) Final Report *Children and young people in separated families: Family law system experiences and needs*.

As the AIFS report notes:

Consistent with the substantive body of Australian and international family law research establishing the importance of facilitating participation by children and young people in decision making affecting them, more than three-quarters of young participants wanted their parents to listen to their perspectives and communicate with them regarding the separation and when making parenting arrangements.

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<sup>3</sup> Committee on the Rights of the Child *General Comment No. 12 The Right of the Child to be Heard*, paragraph 74.





In stark contrast with this expressed need for participation, the majority of young participants said that they had limited say in the decision-making process about parenting arrangements in their case. In fact, most young participants indicated that their views had no impact or limited impact on the decision-making process (56%) and more than half (55%) stated that one or both of their parents did not listen to them, with a further third of young participants unable or preferring not to answer this question. Of those young participants who stated that both of their parents listened to their views during the separation process (21%), all except one reported being either quite close or very close to their parents.<sup>4</sup>

In terms of being listened to by service providers and other actors in the family law system, the AIFS Report states as follows: <sup>5</sup>

Young participants' responses suggested that children and young people had mixed views and experiences of their interactions with family law system professionals in relation to the extent to which these interactions facilitated participation in the decision-making process. While some positive experiences of participation emerged in the data, the responses of a substantial proportion of children and young people with experiences of the family law system suggest that the approaches adopted by the service professionals with whom they interacted, operated in a way that limited their practical impact or effectively marginalised their involvement in decision making about parenting arrangements. In particular, children and young people were more likely to describe feeling excluded from parenting arrangements made pursuant to family law proceedings if they did not have the opportunity to speak with or meet with the legal professionals or court personnel in their cases.

The length and complexity of legal proceedings were also identified as giving rise to detrimental effects from the perspective of children and young people.<sup>6</sup>

Some children and young people taking part in this study suggested that children should be able to speak directly to the Court, prompting the authors of this study to comment as follows:<sup>7</sup>

These data, together with previous research (see e.g. Fernando & Ross, 2018; Kaspiew et al, 2014; Qu & Weston, 2015; Parkinson & Cashmore, 2008 and Tisdall, 2016), suggest that steps taken to shield children and young people from their parents' litigation, while benevolent in their intention, may be associated with the experience of harm on the part of children and young people where their agency and capacity to participate in decision making affecting them is not acknowledged and accommodated.

I commend this AIFS Final Report to the Committee and respectfully suggest that the Committee considers ways in which the family law system can be modified to ensure that the views and opinions of children and young people are appropriately ascertained and taken into account in parenting proceedings.

I also commend to the Committee the following recommendation made by the ALRC in its recent review of the family law system:

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<sup>4</sup> Australian Institute of Family Studies Final Report *Children and young people in separated families: Family law system experiences and needs*, 2018, page 89.

<sup>5</sup> Ibid, page 92.

<sup>6</sup> Australian Institute of Family Studies Final Report *Children and young people in separated families: Family law system experiences and needs*, 2018, page 92.

<sup>7</sup> Ibid, page 93.



**Recommendation 50** The Family Law Council should establish a Children and Young People's Advisory Board, which would provide advice and information about children's experiences of the family law system to inform policy and practice.

### **An understanding of the effects of family violence on children**

As is pointed out in the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs report *A better family law system to support and protect those affected by family violence*:<sup>8</sup>

The family law system has a central role in identifying and responding appropriately to family violence, yet in many cases, it can fail to protect families from violence on a multi-dimensional basis. Evidence to the inquiry suggests that the family law system 'does not recognise the reality of family violence', nor 'recognise and address power imbalances, financial and emotional abuse tactics and ... victims' right to safety'.

Although there is 'some great practice in the family law system', problems arise in the failure to achieve consistency within and across jurisdictions, and the experience of parties is that this can be destabilising, uncertain and creates fear for families

This chapter presents the evidence received that identifies the key challenges of the current family law system's response to family violence including that:

- the adversarial system is inappropriate for resolving family law disputes;
- it does not respond appropriately to reports of family violence;
- it is inaccessible for most families;
- it is open to abuse of process, including ongoing coercion and control of victims;
- it does not respond sufficiently to perjury and false allegations; and
- the structure and interaction with other jurisdictions including the state and territory family violence legislation and child protection systems is fragmented, leading to inconsistent approaches and exposing families to a greater risk of harm.

As the ALRC notes in its recent Report:<sup>9</sup>

Family violence and abuse is a sustained and growing issue for the family courts: There has been an increase in the number and proportion of matters in the Family Court where a notice of risk was filed, and almost half (45%) of all final order applications in the Federal Circuit Court were referred to child welfare agencies.

Given the prevalence of family violence as a factor in many matters coming before the court for resolution, and the relevance of family violence to determination of proceedings relating to parenting orders, I respectfully recommend that the Committee inform itself of the complexities and dynamics of family violence, and, in particular, the effects of family violence

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<sup>8</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs report *A better family law system to support and protect those affected by family violence*, paragraphs 3.1-3.3.

<sup>9</sup> Australian Law Reform Commission April 2019 report *Family Law for the Future: An Inquiry into the Family Law System- Final Report* page 80-81.





on children and young people.<sup>10</sup> This will, in turn, assist the Committee's consideration of submissions and evidence provided in any hearings that occur, and inform the Committee's assessment of options for reform and any associated recommendations.

For related reasons, I also respectfully recommend that the Committee examine and consider the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs report *A better family law system to support and protect those affected by family violence*.

## **Conclusion**

I thank the Committee for the opportunity to contribute to this inquiry.

Yours sincerely

**Leanne McLean**

Commissioner for Children and Young People

*cc Hon Will Hodgman, Premier, Minister for Prevention of Family Violence*

*cc Hon Roger Jaensch, Minister for Human Services*

*cc Hon Elise Archer, Attorney-General and Minister for Justice*

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<sup>10</sup> See for example the Child Family Community Australia Paper No. 36, December 2015 *Children's exposure to domestic and family violence: Key issues and responses* <https://aifs.gov.au/cfca/publications/childrens-exposure-domestic-and-family-violence>