

16 December 2019

The Hon Kevin Andrews MP
Chair, Joint Select Committee on Australia's Family Law System
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Chair,

Inquiry into Australia's family law system

Save the Children makes this submission as the leading international independent child rights organisation, and as an experienced Australian provider of family violence, family support, and other child and family services in every State and the Northern Territory.

The conduct of the inquiry itself needs to be in children's best interests

Children's best interests must be paramount in the family law system. The Family Law Act clearly states that the child's best interests must be paramount in court proceedings and when making orders.¹ More broadly, children have a fundamental right to their best interests being a primary consideration in all matters affecting them, as recognised in the United Nations Convention on the Rights of the Child (CRC) which Australia ratified in 1990 and is legally obliged to implement.

Save the Children considers it to be critical that the Committee's inquiry is itself conducted in accordance with children's best interests, and in a manner that is safe for children and all other people. In particular, the inquiry should be informed by a strong understanding of the complexity and dynamics of family violence, including the harm it causes to children, and other child abuse. We recommend that family violence awareness training be provided for all parliamentarians, including Committee members.²

Given the complex and sensitive matters being inquired into, particular care must be taken to ensure the inquiry itself does no harm. In particular, the inquiry should avoid disseminating harmful misconceptions and mistruths for which there is no evidence, and which, when repeated, are likely to incite violence against women and cause harm to children, whether as direct targets of violence or through exposure to violence.

The inquiry should give significant weight to the Australian Law Reform Commission's (ALRC) report on its inquiry into the family law system released earlier this year,³ and to other relevant past reports such as those of the Family Law Council. The inquiry should pay particular regard to past reviews of how the family law system deals with family violence and complex needs, given the system's continuing and increasing failure to protect children where these circumstances exist.

The family law system does not protect children's best interests

As noted above, children's best interests must be paramount in the family law system. Yet for a complex set of reasons, Australia's family law system is failing children. The system is failing in its responsibility to

¹ For example, section 60CA in making parenting orders or section 67V in making a recovery order.

² We note that the Law Council of Australia has made a similar recommendation in its preliminary submission to this inquiry: Letter to Chair, Joint Select Committee on Australia's Family Law System, 'Joint Select Committee on Australia's Family Law System', Law Council of Australia, 25 September 2019, p 2.

³ Australian Law Reform Commission, 2019. *Family law for the future – An inquiry into the family law system*, Final report, ALRC report 135 (ALRC Report).

protect children's best interests and keep them safe. These failings, and the harm they cause to children, represent a significant and ongoing breach of children's rights in Australia.

In 2002, the Family Law Council said: 'There is no greater problem in family law today than the problems of adequately addressing child protection concerns in proceedings under the *Family Law Act*'.⁴ Seventeen years on, despite many subsequent reviews and multiple rounds of legislative reforms, this remains true.

The family law system does not deal adequately with child protection issues. It is not equipped to identify or address serious risks to children's safety, and it does not have capacity to determine the truth about allegations of violence and abuse, even where evidence of such behaviour is available. The system is poor at discerning risk to children and, relatedly, poor at determining the truth where there are competing claims about such risks. It gives too much weight to continued contact with parents in situations where such contact could harm children.⁵

Most parenting matters heard by family courts involve allegations of family violence and child abuse.⁶ Family violence has a significant traumatic effect on children, whether directed at children or through exposure to it being directed at other family members,⁷ as do other forms of abuse. Ongoing contact with perpetrators causes continued trauma and often creates an unacceptable risk of further harm.

Reforms to the Family Law Act are needed to better place children's best interests at the centre of decision-making. These reforms include:

- It must be clear that the best interests of children and their safety must be paramount in all decision-making. To this end, the presumption of equal shared parental responsibility when making parenting orders should be removed. The presumption relates to parental responsibility, and not to the amount of time a child spends with their parents.⁸ However, in practice the provision creates 'widespread confusion'⁹ and its improper application puts people affected by family violence and abuse, including children, at 'unacceptable risk'.¹⁰ The presumption is harming children by leading to them being placed in contact with parents where such contact is unsafe.

The ALRC has highlighted the problems caused by the presumption and recommended removing it and replacing it with a presumption of 'joint decision making about major long-term issues'.¹¹ Save the Children's view is that, while this would be an improvement on the current position, the presumption should instead be removed altogether. Save the Children also notes that removing this presumption is not intended to derogate from the important principle that parents should continue to have obligations as a parent to their child, irrespective of the amount of time the child spends with the parent, except in rare circumstances.

- Similarly, to ensure that the best interests of children and their safety always come first, the requirement to consider the possibility of the child spending equal time, or substantial and

⁴ Family Law Council, 2002. *Family law and child protection*, Final report, Commonwealth Government, p 15.

⁵ In relation to these points, see generally: Family Law Council, 2015. *Families with complex needs and the intersection of the family law and child protection systems*, Interim report – June 2015 (Terms 1 & 2), chs 1, 2 and 7; House of Representatives Standing Committee on Social Policy and Legal Affairs (SCSPLA), 2017. *A better family law system to support and protect those affected by family violence*, Commonwealth Parliament, ch 6; ALRC Report, ch 5.

⁶ Family Law Council, 2015, above n 5, pp 4 and 96.

⁷ Campo, M., 2015. *Children's exposure to domestic and family violence: Key issues and responses*, CFCA Paper no 36, pp 5-13.

⁸ This is made explicit in a note to 61DA(1) of the Family Law Act. As defined in the Act, parental responsibility means 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': s 61B.

⁹ ALRC Report, p 176. An important caveat in the ALRC Report is that this is about widespread confusion outside of family law system professionals. However, the issue remains significant given the numbers of self-represented litigants in the system, and the high rate of consent orders and other arrangements for parental contact that are made without contested court orders.

¹⁰ SCSPLA, p 222, recommending that consideration be given to removing the presumption.

¹¹ ALRC Report, pp 172-6.

significant time with each parent, when making an order for equal shared parental responsibility, should be removed, as recommended by the ALRC.¹²

Save the Children notes that the presumption of equal shared parental responsibility does not apply where there are reasonable grounds to believe a parent has engaged in child abuse or family violence.¹³ However, those exceptions are not achieving the objective of improving children's safety.¹⁴

In considering reforms to the Family Law Act, it is also crucial to consider the broader context in which family difficulties arise. In addition to the family law system reforms described in this submission, there is an urgent need for significantly increased investment in early intervention to support family functioning. In many cases, early intervention can support a family to avoid entering the family law system or the removal of a child into out-of-home care, leading to far better outcomes for the child. This includes services aimed at strengthening parenting confidence and skills (including parenting skills and life skills), positive family relationships (including healthy parent-child attachment), child health and wellbeing, and other services including intensive family support.¹⁵

Children's views are not heard in family law proceedings affecting them

Children must be involved in decisions about their future welfare and upbringing when their parents separate. Where children participate in decisions affecting them, it both empowers them and safeguards them from harm. Article 12(2) of the CRC specifically recognises children's right to be heard in proceedings affecting them, and the United Nations Committee on the Rights of the Child has highlighted the importance of this right in family-related matters, including divorce and separation proceedings.¹⁶ Children's views are of 'fundamental importance' in family law matters.¹⁷

Yet in the family law system, children's voices are often not heard, and their views are not given enough weight. It is common for children to not have the opportunity to provide their views, let alone have those views be taken seriously.¹⁸ Reforms are needed to enable children to participate effectively in family law processes that affect them, often with dramatic effects on their welfare. These reforms include:

- Courts should be required to ensure that children have the opportunity to express their views in matters relating to them. Currently, courts must consider any views expressed by a child,¹⁹ but there is no requirement for children to have an opportunity to express their views. The ALRC has also identified this gap,²⁰ as has the UN Committee on the Rights of the Child.²¹ The Family Law Act should be amended to address this problem. The current section 60CE, providing that children cannot be required to express a view, should be retained.
- Independent Children's Lawyers (ICLs) should be required to meet with the children whose interests they are representing, and to ensure the child's views are presented to court and taken into account. In principle, ICLs can play a valuable role in enhancing children's participation in family law proceedings. In practice, however, ICLs frequently do not meet children, seek their

¹² ALRC Report, pp 176-82.

¹³ Family Law Act s 61DA(2).

¹⁴ See SCSPLA, above n 5, pp 190-4.

¹⁵ References to parents include other carers.

¹⁶ *General Comment No 12 (2009): The right of the child to be heard, CRC/C/GC/12*, paras 51-6.

¹⁷ ALRC Report, p 168.

¹⁸ See ALRC Report, p 169, fn 81 and the sources cited therein.

¹⁹ Family Law Act s 60CC(3)(a).

²⁰ ALRC Report, p 324. The ALRC recommends addressing the gap through a Practice Note.

²¹ Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, 30 September 2019, para 22(a). The Committee recommends addressing the gap through legislative amendment.

views, seek to have any views of the child taken into account, or sufficiently understand children's needs – particularly in situations of violence and abuse – to represent their best interests.²²

The ALRC has recognised these deficiencies and recommended that the Family Law Act be amended to require ICLs to comply with the *Guidelines for Independent Children's Lawyers*.²³ Save the Children supports the ALRC's recommendation, but notes that the Guidelines may be amended from time to time, creating a risk that the Guidelines' current requirements about facilitating participation may subsequently be weakened. Accordingly, Save the Children's view is that, in addition to requiring compliance with the Guidelines, the Family Law Act should be amended to specifically provide that ICLs have a duty to enable the child to be involved in decision-making and, in discharging that duty, should ordinarily meet with the child and put evidence of the child's views before the court. Save the Children also notes that these reforms should be accompanied by additional training and support for ICLs to perform their role in supporting children's participation.

- Children should be supported to participate effectively. One implication is that all family law system actors must have a good understanding of child development and parental attachment, family violence, child abuse and trauma, and their effects on children, including how trauma may cause children to be inconsistent, and sometimes seek to appease abusive parents, when giving their views. This includes judges, family lawyers (including solicitors and barristers), ICLs, family consultants and other family report writers (whose reports to the court are highly influential, despite repeated criticism of the wide variation in their levels of expertise and the quality of their reports²⁴), lawyers (both solicitors and barristers) and others.

Save the Children supports the ALRC's recommendation that relevant statutes be amended so that the appointment criteria for judges exercising family law jurisdiction include possession of the knowledge, experience, skills and aptitude relevant to hearing family law cases, including cases involving family violence.²⁵ Save the Children also considers that, at a minimum, there should be mandatory regular training for judges, family lawyers, ICLs, family consultants and other family report writers about family violence, child abuse and trauma, and their effects on children.²⁶ This training should encompass child development and parental attachment, as understanding these matters is necessary context for understanding the harm caused by abuse and violence.

Save the Children notes that the principle of children's best interests and their right to participate are consistent with each other, and indeed complementary. A child's best interests cannot be realised without the ability to enjoy the right to be heard and taken seriously on matters affecting them.²⁷

²² See, eg, Kaspiew, R., Carson, R., Moore, S., De Maio, J., Deblaquiere, J., and Horsfall, B., 2014. *Independent Children's Lawyers study*, Final report (2nd ed); ALRC Report, pp 371-7. The Committee on the Rights of the Child has recommended that training and support be provided to ICLs to ensure they have direct contact with the children they represent: above n 21, para 22(c).

²³ ALRC Report, p 371. The *Guidelines for Independent Children's Lawyers* are endorsed by the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court of Australia.

²⁴ For example, the Standing Committee on Social Policy and Legal Affairs has highlighted evidence of 'family consultants recommending action to the court that "routinely places children at high risk" due to outdated understandings of family violence and child abuse' and evidence that 'family consultants frequently recommended that children spend significant time with the perpetrators of family violence': SCSPLA, above n 5, p 207.

²⁵ ALRC Report, p 397. This includes other judicial officers exercising family law jurisdiction.

²⁶ See ALRC Report, pp 397-414 for some discussion of how this could be achieved, including the challenges of assuring the quality and knowledge of private family report writers and their reports.

²⁷ For more detail, see Save the Children, 2019. *'Free and equal': An Australian conversation on human rights*, esp pp 5 and 11-15, available from [https://www.savethechildren.org.au/getmedia/6d6bab16-f219-47b5-b0b6-68ffc88057d4/save-the-children-submission-protecting-human-rights-in-australia-final-\(1\).pdf.aspx](https://www.savethechildren.org.au/getmedia/6d6bab16-f219-47b5-b0b6-68ffc88057d4/save-the-children-submission-protecting-human-rights-in-australia-final-(1).pdf.aspx).

If we can provide further detail, or to discuss anything in this submission, please do not hesitate to contact either myself or Howard Choo, our Australian Social Policy and Advocacy Adviser, at howard.choo@savethechildren.org.au.

Kind regards,



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