

4 June 2018

Dear National Children's Commissioner, Ms Megan Mitchell

**Re. Submission to the National Children's Commissioner for the November report to the United Nations Committee on the Rights of the Child**

FRSA would like to thank the Children's Commissioner, Ms Megan Mitchell, for the opportunity to make this submission that may contribute to her report to the UN Committee on the Rights of the Child.

The main focus of this submission is on the participation of children in the Family Law System. It is FRSA's position that the experiences and perspectives of children must be taken into consideration when family matters are determined in the Family Law System.

The Family Law Act 1975 gives effect in family law proceedings to the United Nations Convention on the Rights of the Child making express provision for upholding the rights of the Child (ie: Article 3.1; Article 12.1 and Article 12.2).

However, based on research and the direct feedback of children themselves regarding the Family Law System, it would appear that perhaps practices do not always 'give life' to the intention of the Act and the operations of the services, systems and courts within the System. We eagerly await the result of the AIFS research report into the experience of children and young people in the Family Law System for a contemporary reflection on these matters.

In our recent submission to the Australian Law Reform Commission's review of the Family Law System we presented the views of FRSA member organisations in regards to the barriers and enablers to the participation of children, which correlate with the following articles of rights used by Committee on the Rights of the Child:

3. General principles

- respect for the views of the child (article 12)

4. Civil rights and freedoms

- right to seek, receive and impart information (art. 13)

5. Violence against children

- abuse and neglect, including physical and psychological recovery and social reintegration (arts. 19 and 39)

6. Family environment and alternative care

- family environment and parental guidance in a manner consistent with the evolving capacities of the child (art. 5)
- separation from parents (art. 9)

This submission addresses:

- How children's participation can be better supported and their safety ensured and maintained;
- Barriers and risks to children participating;
- What FRSA services are doing well to maximise children's participation; and
- How to better support children's participation and ensure their safety in family law courts.

We would welcome the opportunity to discuss the content in this submission in person.

Yours sincerely

Jackie Brady

## Introduction

FRSA believes it is imperative that the work of family and relationships support services in the community services sector, including Family Law Services, be guided by recommendations and principles for ensuring and maintaining children's rights set out by yourself as the National Children's Commissioner. As you know, 16 recommendations were made in the Australian Human Rights Commission Children's Rights Report 2015, as well as five key themes:

1. A right to be heard: children's voice and participation in decision-making processes; specifically involving children in issues that affect them; and ensuring that existing mechanisms for resolving disputes are accessible and available to children.
2. Freedom from violence, abuse and neglect: ensuring safe environments and respect for the dignity of the child; specifically making sure that the commitments made in national frameworks are achieved and built upon, through adequate resourcing and action; encouraging a proactive approach to issues of child safety that places a premium on prevention, through enabling safe communities and environments for children; and building resilience among our children.
3. The opportunity to thrive: safeguarding the health and wellbeing of all children in Australia, which includes promoting and supporting children through early intervention and prevention; and identifying and focusing on the most marginalised and vulnerable children.
4. Engaged citizenship: promoting civic engagement and active citizenship through education and awareness-raising.
5. Action and accountability: taking deliberate and proactive steps to protect the wellbeing and rights of children, specifically by collecting comprehensive national data about the wellbeing and human rights of Australia's children; progressing a national vision for Australia's children through intergovernmental partnerships and agreements; developing outcome-based reporting and monitoring of government service delivery and policy development; and developing a children's impact assessment process for law, policy and practice.

It is FRSA's position that the Family Law System must adopt more child-focused approaches (incorporating the practitioner's knowledge of the research literature on children's development into the negotiation process<sup>1</sup>) and child-inclusive approaches (incorporating the views of the particular child who is subject to the process through the involvement of a specialist child consultant<sup>2</sup>). This currently occurs, albeit in a non-systemic way, in the services provided by FRSA members.

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<sup>1</sup> Webb, W & Moloney, L. 'Child-Focused Development Programs for Family Dispute Professionals: Recent Steps in the Evolution of Family Dispute Resolution Strategies in Australia' (2003) 9(1) Journal of Family Studies 23

<sup>2</sup> Moloney, L. & McIntosh, J. 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10(1) Journal of Family Studies 71

In the latter approach, the consultant speaks to the child about their experiences and views and feeds this information back to the parents during the dispute resolution process, with the aim of this information being the focus in negotiations<sup>3</sup>.

FRSA appreciates that the Family Law Act (1975, Cth s 60CC [3]) recognises the rights accorded to children and young people under the Convention on the Rights of Child (the CRC), which include participation rights and freedom of expression (Article 13), access to information (Article 17), and to make their views known and participate in processes relevant to their care (Articles 9 and 12).

In the present Family Law System there are several ways the courts may receive information about the child's views (as articulated in the Family Law Council *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* [2016]):

- through the appointment of an Independent Children's Lawyer who has the role of representing the child's best interests and ensure any views expressed by the child are put before the court;
- the preparation of a report for the court by a Family Consultant or external report writer, who are required to ascertain the child's views and include these views in the report; and
- the judicial officer meeting directly with the child (albeit this approach being rarely used).

However, as reported by the Australian Institute of Family Studies (2015), it is not uncommon for the court to not receive any independent information about the views of the child or young person in cases where an application for final orders is filed requiring resolution by judicial determination or consent (before or during trial)<sup>4</sup>.

### **How children's participation can be better supported and their safety ensured and maintained**

FRSA takes the position that it is vital for Family Law System professionals to take into consideration the experiences and perspectives of children by ensuring their participation—as well as their safety.

FRSA concurs with the findings in the *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report* (Family Law Council, 2016) that this occur outside as well as inside a court room—with judges endorsing the recommendation made by the Family Law Council in 2016 for judicial officers to more regularly meet directly with the child.

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<sup>3</sup> McIntosh J., 'Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors' (AFRC Issues Paper No 1, Australian Family Relationships Clearinghouse, 2007).

<sup>4</sup> Kaspiw, R. et al, 2015, 'Court Outcomes Project: Evaluation of the 2012 family violence Amendments' (Australian Institute of Family Studies 26–9).

Often an Independent Children’s Lawyer will present evidence on behalf of the child, and is often the only representative for the child in the room. However, the Independent Children’s Lawyer is often criticised for not representing the views of the child. Often children and young people reported negative or counterproductive experiences with Independent Children’s Lawyers representing them<sup>5</sup>, including the need for more interaction with the Independent Children’s Lawyer representing their interests in order to have court outcomes and how their views are fed into the court’s decision-making process explained to them<sup>6</sup>. It is clear that there is grave misunderstanding about the current function and purpose of the ICL and as such, the role either requires a name change and/or a re-scoping of function and purpose.

Further to this, FRSA supports the numerous proposals made by the House of Representatives Standing Committee on Social Policy and Legal Affairs (n13, [6.119]) for the appointment of a children’s advocate and similar proposals and recommendations.

The involvement of children in developmentally appropriate ways is central in the delivery of Family Relationship Centres. The *Operational Framework for Family Relationship Centres* (September 2017) outlines that Family Relationship Centres make information resources available for children and, where appropriate, conduct information or group sessions for children. This involves either including children in the Family Dispute Resolution process (if the family wishes and the Centre has capacity and skills), or make arrangements with other services with experience in child inclusive practice.

A wide range of FRSA member organisations have expertise in working with children in delivering Family Law Services and other family and relationship services. FRSA agrees with the notion that children’s participation in the Family Law System must be better supported, to have their experiences and perspectives be better heard and incorporated in the making of decisions. Children are affected by the decision so therefore they deserve a voice. In doing so, it is imperative their safety is ensured and maintained. FRSA member organisations have found that where it is safe and appropriate to do so, there are a number of factors imperative for a child’s participation to be better supported and their safety ensured and maintained:

Giving children a voice: much more must be done to give children a voice both inside and outside the court system;; developing processes and practices that consider the child/young person as active participants and decision makers; implementing children's evaluation/survey for capturing their wishes; negotiating consent with children (to the extent that the child is developmentally capable); increase the use of child focussed workers such as psychologist, family therapists, social workers;); Children's Orientation in Children’s Contact Services—in which children's feelings around contact with the non-residential parent are discussed between practitioner and child; always take into consideration the child's age, their ability to clearly express their views and the maturity of

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<sup>5</sup> Parkinson, P. & Cashmore, J. ‘The Voice of a Child in Family Law Disputes’ (Oxford University Press, 2008).

<sup>6</sup> Kaspiw, R. et al, ‘Independent Children’s Lawyers Study’, n 330, 165–7.

their views; the quality of resolution is enhanced through the voice of the child coming into the mediation; making Child Inclusive Practice available to clients – which involves children being interviewed about the experience of their parent’s separation and what they see as their needs; ensuring that there is support for child informed/inclusive practice within all parts of the Family Law System; changing the Family Law Act to make the child’s voice a primary consideration could make a significant difference; using feedback forms that are suitable for kids to use;

Family therapy models: conjoint work between Contact Services Staff and Family Law (Supporting Children After Separation Services) has enabled the provision of Therapeutic Children’s Contact Services. This specialised work is undertaken at the child’s pace and prepares and supports them through the potential reunification. This has applied particularly when there has been an impact on the attachment between parent/child i.e. extensive time since last parent/child contact and when children have been witness to behaviours of concern i.e. domestic violence, alcohol/drug consumption. This child focused support has enable children to identify their concerns, build understanding and strategies for safety, express their choice associated with the frequency, duration and level of contact over time;

Support from practitioners: develop an understanding among practitioners that in all parts of the Family Law System child inclusive practice is a longer process but beneficial; build greater connections between Independent Children’s Lawyer and Family Dispute Resolution practitioners; provide appropriate training for Child Consultants to become Family Dispute Resolution practitioner accredited to ensure standards and quality; provide greater training for service providers to increase the court’s capacity to respond quickly in situations where children's safety is at risk; professionals in court and family service processes should have an understanding of research findings on the desires, needs and wants of children;

Collaboration: Independent Children’s Lawyers, where possible and practicable, to meet with children about their concerns and be able to provide all relevant information to the court; where there are reconnection/reintroduction cases e.g. Parenting Orders Program, family counsellors need to co-work especially in sessions where children are seeing their parents for the first time (these are very resource intensive interventions); share adequate information between the legal fraternity/Courts and Family Law Services to be better informed as to whether parent-child contact should occur or not;

Ensuring safety: taking a Community of Practice approach to developing a framework on how to support children's participation whilst keeping them safe; safety can be ensured by comprehensive risk assessments and working with parents to ensure that they are able to take on board the children's views and stories without repercussions; regular contact throughout the family law process (whether that is through Family Dispute Resolution or through litigation) and regularly in the following two years by a trained child consultant/counsellor with the child to ensure safety and risk assessments are continuously

conducted; continual monitoring and safety planning by the practitioner ensures safety is maintained;

Parental involvement: parents are engaged and participating first as the pathway for children to follow; regardless of the needs of children through a service intervention, parents need to understand, be equipped and prepared to support this process with the child; separating couples to move their focus away from their interpersonal issues and onto the wellbeing of the child; not requiring both parents to provide consent to a child's participation, as one parent may not want a child to voice his or her perspectives;

Federal support: Funding Child Inclusive Practice would provide practical support for the rights of children to have their voices heard; circulating more government booklets or other ways of promoting the value of Child Inclusive Practice to encourage parents to engage in Child Inclusive Practice; supporting further research to identify the value of Child Inclusive Practice; in cases involving separation, more money available for Child Consultancy Service for Service Providers to meet with children when parents are separating;

Screening and assessment: Adequate screening of family violence including children's experiences and impact on parental capacity; implementing effective risk assessment prior to engaging parties in any service is also required, with the emotional capacity of parents needing to be established before facilitate Child Inclusive Practice in Family Relationship Centres.

## Barriers and risks to children participating

There are a number of barriers to children participating and having their perspectives and experiences taken into consideration. A variety of adverse family circumstances can complicate the child's right to participate, including a home environment characterised by violence or abuse<sup>7</sup>. Such circumstances create complications for practitioners in determining whether and how to uphold the child's right to participate, yet protecting the child from harm that may be caused through participation in the context of both court proceedings and dispute resolution processes<sup>8</sup>. FRSA concurs with the Victorian Royal Commission into family violence *Report and Recommendations* (2016, vol II, 108) that improving children's experiences of participation in the courts and other dispute resolution processes should be sensitive and responsive to the fact that, like adults, the needs of individual children differ, which is particularly the case for children requiring culturally-specific support, such as Aboriginal and Torres Strait Islander children and children from culturally and linguistically diverse communities, and children with disability can face particular barriers in seeking assistance to deal with abuse<sup>9</sup>.

Victoria's Royal Commission into family violence *Report and Recommendations* (2016, vol II, 114) report that children in newly arrived migrant families may face unique challenges to their participation in circumstances where they have adapted more quickly to life in Australia than their parents, for example by learning English, which can affect the power dynamic between children and their parents. The Family Law Council in the *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds Report* (2012, 37) suggest this leads to intergenerational conflict.

Children and families face a number of risks when needing to deal with multiple systems. The Family Law Council in its *Interim Report to the Attorney-General in Response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (2015, 33–4) identified that families engaging with the Family Law System following proceedings for family violence related orders in a state or territory court or, to a lesser extent, after contact with a state or territory child protection department or children's court. The Interim Report identifies a number of problems affecting safe outcomes for children and their families as a result, including:

- difficulties experienced by families in negotiating the different legal frameworks, terminology and procedural rules across the different jurisdictions;
- the need for parents and children to re-tell their story and re-litigate the question of risk in different forums;

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<sup>7</sup> Kay, E. & Tisdall, M. 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38(4) *Journal of Social Welfare and Family Law* 362

<sup>8</sup> Bell, F. 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30 *International Journal of Law, Policy and the Family*

<sup>9</sup> See also Taylor, J. et al, 'Deaf and Disabled Children Talking about Child Protection' (The University of Edinburgh Child Protection Research Centre, 2015).



- the limited capacity for federal judicial officers to address a family's multiple legal needs by exercising the protective jurisdictions of state and territory courts;
- barriers inhibiting access to the family courts by family members who are encouraged to seek family law orders by a state or territory child protection department, including barriers associated with the relative cost, pace and formality of family law proceedings by comparison with those of state courts;
- barriers that can be particularly acute for Aboriginal and Torres Strait Islander; and
- families and grandparent carers.

FRSA acknowledges that a related concern is that children in such cases may be overburdened or further traumatised by being interviewed by too many professionals<sup>10</sup>, although others argue that children experiencing family problems are often only too willing to voice their concerns, with child-inclusive practice playing a significant role in ensuring the child's voice is heard<sup>11</sup>. Other practitioners argue that the application of child-inclusive practice in these circumstances may intensify the pressures on the child and expose them to retribution from the perpetrator for speaking out. While these concerns tend to focus on matters involving family violence, consideration of methods to facilitate children's safe participation in court proceedings and dispute resolution processes are relevant to all matters in which a child is the subject of a dispute.

FRSA identify that major barriers include: a lack of ability/support from some practitioners; (some) parents; time sensitivities; safety issues; unreasonable cost: a lack of collaboration; and a lack of federal support.

A lack of ability/support from some practitioners: the view of some practitioners that children's participation is not important or appropriate; inadequate skill level of practitioners and difficulty in recruiting appropriately trained and skilled child consultants; the belief that children do not understand, and are too young to have an opinion, and hence are not listened to for their views; there can be a lack of clarity around the purpose of children participating - especially when a court ordered family report is being completed simultaneously;

Parents: parents can be caught in their own grief and anger and attempting to 'use' the children to harm / punish the other parent; parents attempting to influence what the child says or how the child presents (some parents even refusing to allow their child to be seen); difficulty in getting both parties' (parents') consent for the child to participate; parents thinking that the children are OK and don't need to participate; parents not giving consent to their child participating - particularly when parents are separated and in high conflict; parental alienation; children feeling conflicted in telling their story and the impact it may have on parent relationships; parental conflict and acrimony, including bargaining around the final orders that do not account for the needs of the child;

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<sup>10</sup> Kaspiew, R. et al, 'Independent Children's Lawyers Study', n 330.

<sup>11</sup> Harris, N. 'Family Group Conferencing in Australia 15 Years On' (Child Abuse Prevention Issues No 27, Australian Institute of Family Studies National Child Protection Clearinghouse, 2008)

Time sensitivities: there can be pressure from legal services and organisations to get people through the Family Dispute Resolution process as quickly as possible – with reluctance to prolong the process to include child consultancy;

Safety: the need to balance the risks to children emotionally and otherwise in participating; safety issues regarding family violence and child abuse;

Cost: service and transport cost can also be a barrier for children participating in counselling;

Lack of collaboration: a lack of communication between services; a non-child friendly System;

Lack of federal support: there is a lack of adequate federal funding to properly hear children's voices.

### **What FRSA services are doing well to maximise children's participation**

There are a range of ways children can participate that centre giving them a voice. Practitioners hearing what they'd like to do and receive from services, with appropriate boundaries, is imperative. Family Law Service providers in the FRSA network have found that strong outcomes are obtained when taking an opt out rather than opt in approach in child inclusive practice, unless there are sound reasons that they should not be involved, such as they are already seeing a counsellor or they have been interviewed for a Section 7 report. Service providers also find beneficial Child Informed Meditation, which involves bringing the voice of the child into the mediation process to determine parenting arrangements and developing the final parenting plan). Meaningful outcomes are also achieved by focussing on the needs of children in designing services and assessment processes, and implementing child orientations (in the delivery of Children's Contact Services) and periodical child reviews to discuss with the children about how the contacts are going and how they are feeling. Taking a whole of family and family therapy approach, inclusive of children's voices, is also good practice in getting children to participate.

There are numerous aspects of child-centred services that foster greater participation among children. It is beneficial to ensure services and staff support the participation of children as much as possible and where it is safe, and ensuring children are not required to tell their stories repeatedly to numerous professionals and agencies. Family Law Service providers in the FRSA network indicate that Family therapeutic camps, practitioners being inclusive of children during home visits, working one to one with children, linking children with children's supports has also been found to engage children effectively. Screening for family violence and safety aspects, offering dedicated children's counsellors and rooms, providing a confidential environment (unless there are safety concerns) and ensuring access to counsellors who specialise in children's work is also valuable. Specifically, reconnection work in Parenting Orders Program and providing a "wrap around service for counselling in one location" in such services as Family Dispute Resolution, Family Relationship Centres, Parenting Orders Program, Family Law Counselling and Family and

Relationship Services counselling also achieves desired outcomes in enhancing the participation of children.

It is also been deemed appropriate by Family Law Service providers in the FRSA network for services to work with the whole family unit, involving educating parents that they are the primary carer and closest influence on the child, and establishing at intake with the parent/s prior to engaging with the child what the parents' goals are. The professional development of staff can ensure practitioners understand child development, and involve training family counsellors and Family Dispute Resolution practitioners in Child Inclusive Practice and supervision is tailored to support them in this work. Research is also conducted by some agencies into how to strengthen children's voices in the delivery of a variety of services.

### **How to better support children's participation and ensure their safety in family law courts**

Children's participation in court can be better supported while their safety ensured and maintained through a variety of ways. It is essential that children are consulted and listened to the children as part of the Court Orders, that their views are taken into account in the Orders and the child's opinion are reviewed on a regular basis. Also beneficial would be the provision of more timely outcomes, to better ensure the safety and wellbeing of children, and providing children with easier and greater access to supervised contact centres to maintain contact with parents while court process unfolds. Parents cannot be excluded from the picture. Parents need to be provided with clear information about the process of child engagement to allay fears, and to prepare them and have them commit to protecting their child's safety and wellbeing in the process. Greater education of parents regarding the impact their grief and anger has on the child.

It is important to increase family law professionals' understanding of children's needs, as based in research. While it is effective for Independent Children's Lawyers to speak to the child/ren and or the Contact Service, in some cases this does not happen. Providing specialised training to Independent Children's Lawyers around techniques for interviewing children and ensuring that the provision of their information takes their safety into account would also be of benefit. In addition to the Independent Children's Lawyer and family consultant, the appointment of a child advocate or supporter throughout the process that is available only to the child to speak to and gain support would also be of benefit. So too is assigning a support person who is not attached to the Family Law Court, and referring them to child practitioners in community organisations who will work with the court. Also beneficial in court is having mandatory mechanisms like Child Informed Mediation in place to ensure the voice of the child is being included in every court decision, and increasing the use of technology to assist children in providing remote presentations to the court. Courts

also need an investigation arm, as in most cases the child protection department does not investigate if there is a protective parent, and children subsequently fall through the loop due to this lack of investigation. What can help is information to be provided from the services when there is risk identified needs to be made more readily available to the court.

It is also important to ensure the participation of children when courts determine custody of children when an “alienating parent” denies the other parent access to the child/ren. Sometimes, the court will issue a “no contact” ruling where the child cannot have any contact with the alienating parent for a period of time, usually six months, which often does not consider the best interests of the child/ren, and cause psychological trauma. In these cases the needs and wants of the child should also be heard, and where appropriate some contact with the alienating parent be maintained to ensure the child/ren’s safety and wellbeing.

### **Conclusion**

Throughout this submission, FRSA makes a range of suggestions intended to foster a greater appetite and aptitude within the Family Law System to actively seek out, hear and respond to the stated needs of children, as expressed by them.

This is a challenging domain within which to have these conversations. Children do not always know what is going to be best for them when family conflict and breakdown tears their family apart but many do have a view about what they want. We also have to acknowledge that their ‘views’ may not be their own but the construct of an interfering parent or family member. The challenge for the family law system is one based on skill and expertise. We need to build a workforce and a system that is confident and capable of hearing and listening to the views of children and considering these in the midst of a broad range of evidence that must be considered in making determinations that have an impact on the lives of children.

We would welcome the opportunity to discuss the content of this submission with you in person.