INVOLVING CHILDREN?

Should children be involved in family law proceedings? And, if so, how? This is such a pivotal issue, dominated by anecdote and ideology rather than evidence and logic, that we have taken considerable time here to discuss it. The conclusion is simple:

"Children should be involved less,
not more, in adversarial court proceedings."

This is not to say that children should not be empowered to express their own views, or kept well-informed of any proceedings likely to affect their lives, but that this becomes intrinsically unsafe within any adversarial context. We believe that it should be a primary recommendation of any inquiry into our family law system that we need to do much more to keep children out of family courts, not that we need to involve them even more!

In its recent review, the ALRC suggested that children should be more involved in family court proceedings and that the 'views of children' (which, concerningly and consistently, it conflated with 'what children say') should be given greater weight. The ALRC suggested that this perspective was supported by a number of submissions, though not by all.[1] However, it failed to note that many submissions supporting greater involvement of children[2] are organisations operating in the safe space of counselling, mediation or conciliatory law rather than adversarial, family law.

We should not gloss over the profound differences between involving children in a collaborative, conciliatory, problem-solving and child-friendly environment and involving them – often for unconscionably long periods of time – in the hostile, adversarial and torturous environment of the family court. There is a world of difference between empowering children and allowing their voices to be heard in a safe and conciliatory environment and allowing them to participate, even indirectly, in adversarial litigation.

The adversarial process tends to promote unhealthy and potentially abusive parent-child interactions. This is not simply the opinion of our organisation, or of some radical, activist group, but is based on objective evidence (not to mention, common knowledge) and is stated unambiguously, for instance, in the American Bar Association's own *Judge's Guide*[3]:

> Another unhealthy parent-child interaction that may occur after a divorce is when one parent attempts to control a rather suggestible child's feelings toward the other parent. Again, the adversarial process

[1] ALRC (2018). *Discussion Paper DP86*, 2 October 2018

[2] e.g. Relationships Australia (2018). *Submission to ALRC Review*, May 2018

[3] American Bar Association (2008). *A Judge's Guide: Making Child-Centered Decisions in Custody Cases*. 2nd ed. American Bar Association, USA

> tends to promote this kind of manipulation of the parent-child relationship.

This "turning a child against a parent", as we commonly know it, is not just some minor inconvenience that happens to make a judge's decision-making a bit harder. It's actually one of the most sinister and widespread forms of abuse to which children in separating families are exposed – particularly by virtue of the involvement, or mere presence, of adversarial family law.[4] It not only frequently results in a child's relationships with a loving parent and half a family being severed, sometimes for life (with all the grief and trauma that this entails) but, at the same time, leaves that same child in the constant care of a parent who's responsible for carrying out the usually-undiagnosed psychological child abuse.[5]

It is hard to conceive of a more pernicious form of family violence and child abuse (and one that clearly meets current definitions) and yet, though widespread, is this at the forefront of the ALRC's (or anyone's) thoughts each time "family violence" is mentioned?

In our opinion, recognition that the adversarial process itself tends to promote harmful relationships should not merely give pause for thought; it should give cause for radical reconsideration of what we're doing to our kids. Were a medical procedure found to be causing harm, it would be stopped immediately. If the ALRC genuinely wishes to adopt a public health approach, which we wholeheartedly endorse, then it needs to embrace a far broader view of the sorts of changes needed to the current system.

> *"If a medical procedure were found to be harming children, it would be stopped immediately. As soon as any treatment in a scientific research project is found to be causing harm, it must be stopped on ethical grounds. There is incontrovertible evidence that our adversarial family law system is causing harm to children and their families. Why are we effectively turning a blind eye?"*

What do children say?

The ALRC posits that "research has suggested that some children want to directly participate in proceedings", a view echoed by the National Children's Commissioner,[6] and "considers that there should be no bar to this in appropriate cases".[7]

However, closer examination of what children say paints a different picture, not least because different desires about "involvement" are being conflated. From our analysis, the predominant themes of children's comments may be summarised as follows:

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[4] Bernet, W. *et. al.* (2016). Child affected by parental relationship distress. *Journal of the American Academy of Child and Adolescent Psychiatry*, 55 (7), 571-579

[5] Warshak, R.A. (2015). Ten Parental Alienation Fallacies That Compromise Decisions in Court and in Therapy. *Professional Psychology: Research and Practice*, Vol. 46, No. 4, 235–249

[6] Australian Human Rights Commission (2018). *Submission #217 to ALRC Review*, May 2018

[7] ALRC (2018). *Discussion Paper DP86*, 2 October 2018

1. SEPARATION
    a. Children don't want their family to separate at all;
    b. If their family has to separate, children want to spend us much time as possible with both parents (and with other family members and pre-existing friends);
2. FAMILY COURTS
    a. Children do not like the family law system;
    b. They don't want any other children to go through what they did;
3. INVOLVEMENT
    a. Children want to understand much more about what's going on;
    b. Children want to have a say and feel they're being listened to;
4. MANIPULATION
    a. Children commonly report feeling manipulated by family law professionals ("everyone had an agenda");
    b. Children commonly report feeling pressured, manipulated or told what to say by parents, relatives or friends.

It would be wrong to suggest that having their views given more weight in family courts is the predominant desire or concern of children. Children far more commonly and strongly express the wish to keep their family together and the desire to have nothing to do with courts. Should we not respect these desires too? When children, and young adults who've been through the family law system, do talk about their involvement in courts, their sense of powerlessness appears to derive from the facts that:

1. Their parents were pre-occupied with court stuff and, often quite suddenly, no longer had time for them; and
2. They had nobody helping them understand what was going on and, often for the first time in their lives, were getting limited but conflicting versions from those they trusted most.

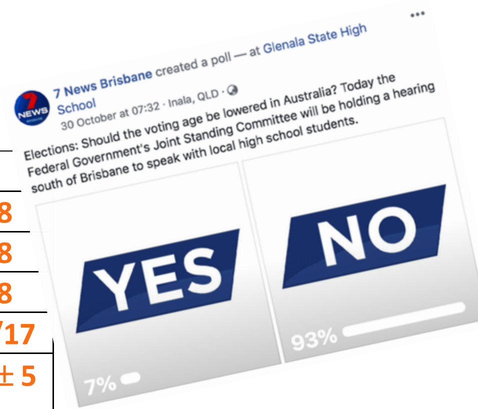
Children expressed a concern about being manipulated when engaging with court processes as often as they expressed the desire to have more weight given to what they said. Anecdotal evidence suggests too that, were rigorous research to be done, there would be a strong correlation between those children asking most strenuously to speak with a judge and those most strongly and abusively influenced by a parent and briefed in detail about the proceedings. There is a genuine risk that the children who most want to participate are precisely those who shouldn't.

If, nonetheless, we accept that some children say they want to have a say in family court proceedings, should we listen? What do we do in other contexts?

What does society say?

There is a striking mismatch between what the ALRC and some others propose for our family courts and what our society appears to believe acceptable in other aspects of life. If we don't think a child or teenager is 'mature enough' to be able to choose between PMs, or for their views to be given weight on a wide range of issues, should we be accepting that their views on something as profoundly important as choosing between parents, and potentially determining their future wellbeing, should be given significant weight?

What children can/can't do	
Age you can vote for PM	18
Age you can purchase alcohol	18
Age you can purchase cigarettes	18
Age of consent	16/17
Age you can choose a parent (in a family court)	12 ± 5



There are major differences between adult and younger brains[8] and there are reasons why Australia, like other nations, places restrictions on what children can do or decide, whether it's buying fireworks, solvents or cigarettes, or voting for a prime minister. We want to protect children from health risks to which they're more vulnerable either due to their lesser level of awareness or to the stage of development of their bodies and brains, and we believe there are some decisions children should not be making, both for their own good and for that of others.

Just as age-of-consent laws are designed to protect children and young people from sexual exploitation and abuse,[9] so too we need our laws to protect children from the high risks of psychological abuse and trauma to which adversarial litigation exposes them. The harm done to children by forcing them to play a role in choosing between two fit and loving parents, for instance, lasts a lifetime.

Should we be doing more, though – and are we perhaps obliged as a matter of human rights – to treat children more like adults? After all, as President of the UK Supreme Court, Baroness Hale, has said: "We have some way to go in recognising that children are indeed real human beings".[10]

What do International Conventions say?

At first glance, the position that children's views should be heard and given more weight in family law proceedings may appear entirely in line with Article 12 of the Convention on the Rights of the Child – a Convention that *For Kids Sake* believes should be incorporated explicitly into Australia's Family Law Act (within what is currently Section 60CC).

Article 12 provides that:

> 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.

[8] Blakemore, Sarah-Jayne (2018). Inventing Ourselves: *The Secret Life of the Teenage Brain,* Doubleday, New York City, NY, USA

[9] Age of consent. Retrieved from: https://aifs.gov.au/cfca/publications/age-consent-laws

[10] Baroness Hale. World Congress on Family Law and Children's Rights, Dublin, 2016

In part because of the risk of naïve interpretation of this Article, the United Nations, in 2009, issued a clarification of its intentions with respect to Article 12. [11] In particular – and crucially with respect to the ALRC's proposals – the UN Committee stated:

> The child has the right "to express those views freely". "Freely" means that the child can express her or his views without pressure and … must not be manipulated or subjected to undue influence or pressure. "Freely" is further intrinsically related to the child's "own" perspective: the child has the right to express her or his own views and not the views of others. The Committee emphasizes that a child should not be interviewed more often than necessary … the "hearing" of a child is a difficult process that can have a traumatic impact …
> The Committee … emphasizes that adult manipulation of children, placing children in situations where they are told what they can say, or exposing children to risk of harm through participation are not ethical practices and cannot be understood as implementing article 12.

We see no way, within the current, adversarial legal system and given the extreme scarcity of highly qualified and experienced specialists, in which the interviewing of children as part of Australian family law proceedings does not represent a practice that would be regarded by the UN as unethical.

The European Court of Human Rights raises an even more fundamental issue, challenging the supremacy increasingly given to children's interests (let alone "children's views") as "an ignorance of the need to interpret this notion harmoniously with other fundamental rights."[12]

What does evidence show?

The arguments against greater involvement of children in adversarial proceedings include:

- **CHILDREN SHOULD NOT BE GIVEN HEAVY BURDENS OF RESPONSIBILITY**
  Children should be allowed to be children. Making them feel that they are responsible for major decisions, such as choosing one parent over another, is a form of abuse in its own right. This is the evidence-based view of the leading, international experts in child psychology;[13]
- **THE NATURE OF CHILDREN'S STATEMENTS**
  Although the mantra that "children don't lie" is still promoted by some ideological warriors to this day, there is now a substantial body of scientific literature about the nature of what children say. It is clear that children's statements:
  - Are highly subject to influence, e.g. from: suggestive questions/comments, non-verbal cues, deliberate manipulation or a desire not to disappoint (especially where parents or trusted authority figures are involved);

[11] UN Committee on the Rights of the Child. General Comment No. 12 (2009) *The right of the child to be heard*. Fifty-first session Geneva, 25 May-12 June 2009

[12] In: *Soares de Melo v Portugal (2016)* Retrieved from: https://hudoc.echr.coe.int/eng?i=001-160938#{%22itemid%22:[%22001-160938%22]}

[13] e.g.Warshak, R.A. (2003). Payoffs and pitfalls of listening to children. *Family Relations*, 52, 373–384

- Should not be taken at face-value;[14]
- May not be accurate: "Research has demonstrated children can speak sincerely and emotionally about events that never occurred" and "even professionals cannot differentiate between false and accurate reports";[15]
- Are a poor proxy for, and are not synonymous with, a child's views;
- Vary with context or mood and fluctuate considerably over time; and
- Even when authentic, not influenced by others, and consistent, do not always represent what society believes to be best for them (refusal to go to school or eat green vegetables are familiar examples);

- **CHILDREN'S STATEMENTS ABOUT ABUSE ARE OFTEN HIGHLY COUNTER-INTUITIVE**

  It is a question that has often been asked in the academic literature, and in the popular press: Why does a person in a psychologically abusive relationship stay? Scientific research shows us that one of the most extraordinary and counter-intuitive aspects of ongoing psychological abuse is that its victims (and sometimes even its perpetrators) often do not know that abuse is occurring – and they are almost powerless to escape it. Whether in the remarkable instances of so-called Stockholm Syndrome, or within intimate partner relationships, victims actually develop a particular, unhealthy bond with, and dependence upon, their abuser.

  This is particularly the case for children who are, more so than adults, dependent upon their parents and thus more prone to becoming victims of psychological abuse. Contrary to popular expectation that such abused children might volunteer information about the abuse, or make negative statements about their abuser, such children, if asked, usually defend their abuser – sometimes passionately. In the context of family separation, children are especially vulnerable to one particular form psychologically abusive behaviour by their parents whereby parents may, either wilfully or unknowingly, seek to influence a child's views against the other parent. Such children consistently defend the parent who has abused them psychologically while, at the same time, attacking the parent they've been told, wrongly, is bad.

  The behaviour of children subject to these various forms of psychological abuse may manifest itself in such a counter-intuitive fashion that it takes a questioner of enormous experience and with considerable specialisation to correctly interpret what an abused child says.

- **COURT PROFESSIONALS DO NOT HAVE THE NECESSARY COMPETENCIES**

  A majority of professionals within the court system (whether social workers, psychologists, lawyers or judges) do not have the prerequisite, specialist skills to assess children in an adversarial, litigious setting. It is a highly specialist skill to interview children and to assess what they say (which, as indicated above, is a very

[14] American Bar Association. (2008). *A Judge's Guide: Making Child-Centered Decisions in Custody Cases*. 2nd ed. American Bar Association, USA

[15] Amelia Courtney Hritz, Caisa Elizabeth Royer, Rebecca K. Helm, Kayla A. Burd, Karen Ojeda, Stephen J. Ceci (2015). Children's suggestibility research: Things to know before interviewing a child. *Anuario de Psicología Jurídica*, 25, 3–12. sciencedirect.com/science/article/pii/S1133074015000124

unreliable proxy for their authentic views, especially in an adversarial setting).

Many court professionals are not, for instance, sufficiently experienced or qualified to reliably distinguish between a child physically abused by one parent or psychologically abused and manipulated by the other. Nor do they have the pre-requisite qualifications and experience to assess a child's "maturity" or the weight that should be given to an individual child's views (being far too easily swayed by a child's eloquence, apparent conviction, or elaborate narratives, for instance).

Most do not even have the skills to ask open and non-leading questions and many consequently themselves contribute to the psychological abuse of children by asking highly inappropriate questions.[16] This, again, is the evidence-based view of the world's leading experts in the fields of child psychology and child suggestibility; see e.g. Hritz *et al.* (2015)[17] for summary of issues involved in interviewing children;

- **COURTS EVEN LACK COMPETENCE TO ASSESS THE EXPERTISE OF THEIR EXPERTS**
  Even the process by which courts choose their experts is unsafe and unsound. Experts are chosen on the basis of legal argument between advocates, not on the basis of specialist qualifications or accreditation. One UK study, in a comparable jurisdiction, rated 65% of expert reports as being between poor and very poor; 30% of the "experts" had no experience of mental health problems; and 20% of experts were unqualified;[18]

- **GREATER INVOLVEMENT OF CHILDREN INCENTIVISES GREATER ABUSE**
  If children's statements are given greater weight in courts, this dramatically incentivises, and can cause, their abusive manipulation by parents and other relatives, many of whom may be unaware of the coercion and psychological abuse for which they're responsible;[19]

- **THE VIEWS OF OLDER LIVED-EXPERIENCE CHILDREN/ADULTS WARN AGAINST INVOLVING CHILDREN MORE**
  Although it is a not-uncommonly stated view of children that they do not feel listened to in family court proceedings or wish to have more of a say, it is an equally commonly stated view of older children and young adults who have experienced the system that they should never have been given the responsibilities forced upon them.

  Many talk of having felt manipulated by court professionals, or of feeling that such 'professionals' all had an agenda (see above); many talk of suffering life-long guilt as a consequence; and some express disbelief that the court should have placed such high weight on statements that they made (which may have been transient or consequent to undue influence) when they were just young children.

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[16] Hritz *et al. op. cit.*

[17] Hritz *et al. op. cit.*

[18] Ireland, J.L. (2012). *Evaluating Expert Witness Psychological Reports: Exploring Quality*. University of Central Lancashire, UK.

[19] Warshak, R.A. (2015). Ten Parental Alienation Fallacies That Compromise Decisions in Court and in Therapy. *Professional Psychology: Research and Practice*, Vol. 46, No. 4, 235–249.

Involving Children: Conclusion

So, how do we reconcile an evidence-based approach to children's involvement with the position of the ALRC and others that children should be allowed to participate in family law proceedings and that their statements should be given more weight?

In a nutshell, by using a system other than a family court.

Children can be fully and relatively safely engaged in conciliatory processes; they can be kept fully informed of the processes if provided with a nominated friend or representative; and they can avoid the high risks of abuse associated with adversarial proceedings (and we use that term consistently with both perceived meanings) by doing so in a child-friendly, non-court environment. Children's rights are upheld. Their safety assured as best possible.

To the extent that family law remains involved, our proposals provide for a child:

- To have a nominated "Children's Friend" to support them and keep them informed;
- To have a "Children's Representative" in court proceedings who has a personal connection with that child or has high-level professional experience in child psychology (i.e. importantly, not a lawyer with merely legal qualifications).

We largely do not see a role for – and see great dangers in appointing – a Children's Lawyer in many cases. If that lawyer is to represent "the best interests" of a child rather than the apparent wishes of that child (an important distinction that many children's lawyers do not successfully recognise), then that becomes synonymous with the role of the court itself and of the presiding judicial officer.

As such, we believe it is generally more appropriate for a single judicial officer to be appointed for each family/case and for that judicial officer to ensure strict case-management and to conduct hearings with an inquisitorial, problem-solving and urgent approach.