Whitlam Institute
WITHIN WESTERN SYDNEY UNIVERSITY

“THEY THOUGHT IT WAS SAFE— BUT IT WASN’T.”

RECOGNISING CHILDREN’S RIGHTS AS A MEANS OF SECURING CHILDREN’S SAFETY IN AUSTRALIA’S FAMILY LAW SYSTEM

2021 E.G. Whitlam Fellowship

Associate Professor Camilla Nelson

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About the Author

Associate Professor Camilla Nelson

Camilla Nelson is Associate Professor in Media at the University of Notre Dame Australia. Her work focuses on questions around voice and representation, and how they shape outcomes for people. A former journalist, Camilla has a Walkley Award for her work at the Sydney Morning Herald. Her fifth book Broken: Children, Parents and Family Courts – co-authored with Professor Catharine Lumby – was published by Black Inc/La Trobe University Press in 2021.

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Contents

Foreword 4

1. Summary 5

2. Hearing Children's Voices 6

3. Children's Rights: Where are We, How Did We Get Here, and What Does it Look Like? 8

4. Methodology 9

5. What Does Children's Lived Experience Say? 10

6. Recommendations 13

1. All children have rights, no matter who they are. Courts have a responsibility to ensure that children's rights are protected. 13

2. Children have a right to be safe. Children should feel confident about the standards established by the Courts, particularly as it affects their safety. 13

3. Adults must do what is best for children. The individual child should be at the centre of every determination. Any list of "best interests" factors should not make assumptions about what the individual child needs or how to prioritise those needs. 14

4. Every child has a right to grow into autonomy. Young people's decision-making capacity demands explicit recognition. 14

5. Children's rights are not served by an adversarial system. Legal matters affecting children must be decided in a less hostile context. 15

6. Use of a "substitute decision-maker" model of legal representation cannot be justified when a child is competent and able to provide instruction. Independent Children's Lawyers must adopt an advocacy or rights-based role as the child's capacity for independent decision-making evolves. 15

7. Children's rights demand a radical re-conceptualisation of the decision-making processes used in children's family law matters. 16

8. The child's rights must be considered in any legal decision that binds the child, including any consent orders reached through mediation, arbitration, or negotiation "in the shadow of the law." 16

9. Orders must be flexible and open to change as children grow. Children's best interests must continue to be served, moving forwards. 17

10. Children have a right to be free from sexual abuse. Child safety must be prioritised above other considerations in cases involving a risk of child sexual abuse and legal decisions must be risk adverse. 17

11. Privacy provisions (s121) should not be used to silence victims or conceal injustice. Children whose parents went to court should not be bound by s121 in their adult lives. 18

12. Children and young people have valuable insights to inform law and policy development and a right to have their views heard. System design should be regularly informed by the people it is meant to help. 18

Notes on terminology 19

Abbreviations 19

Acknowledgements 19

References 20

Foreword

'Resistance to Change' is the title Gough Whitlam gave to the final chapter of his 1985 book, *The Whitlam Government 1972-75*. It is, in reality, a testament to how much can be achieved in the face of resistance.

While acknowledging particular failures of his Government, Whitlam confidently asserted that "the great law reforms endure", citing: the Federal Court, the abolition of Appeals to the Privy Council, family, law, legal aid, trade practices law, the Law Reform Commission, and the Ombudsman.

Associate Professor Camilla Nelson's paper, *"They thought it was safe – but it wasn't"*, at one level supports the claim that the significant reforms in family law are enduring while at the same time recognising that they were incomplete.

More than this Nelson's paper starkly reminds us that any reform is at risk of erosion to the point of collapse in the absence of clear principles, adequate resourcing and, in human relations, an abiding respect for the rights of those most vulnerable.

Most telling in this new research is the personal evidence from seven in-depth interviews with adults whose parents went to court when they were children. Their experiences are varied but common to each of them is the profound impact on their lives when the law – and the courts and officials administering it – fail to acknowledge their capacity to speak for themselves and to be respectfully heard.

Recognition of a child's rights is hardly new. They extend back at least as far as the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959. They are recognised in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights, and in the International Covenant on Economic, Social and Cultural Rights.

They are the explicit subject of the 1989 Convention on the Rights of the Child which obliges Australia and all parties to that convention in all actions concerning children, to give primary consideration to the best interests of the child. This explicitly includes actions undertaken by courts of law, administrative authorities, or legislative bodies (Article 3). The child who is capable of forming his or her own views is to be assured the right to express those views freely in all matters affecting them, with due weight being given to those in accordance with the child's age and maturity. This includes, in particular, the opportunity to be heard in any judicial or administrative proceedings (Article 12).

It is difficult to understand how we could have lost sight of these essential obligations when comes to children under Australia's system of family law.

Here at the Whitlam Institute, we have deeply appreciated Associate Professor Nelson's time with us as the E G Whitlam Research Fellow 2021. We are particularly grateful to those seven adults who were prepared to tell of their own experiences. I recommend this paper to you and urge you to consider the twelve recommendations Associate Professor Nelson has put before us.

Eric Sidoti

Interim Director, Whitlam Institute
September 2021 – April 2022

1. Summary

In matters before the Federal Circuit and Family Court of Australia, and Family Court of Western Australia, children are often victims of domestic abuse and are directly affected by the separation of their parents. Yet children report their encounters with family law actors—including lawyers, family report writers, and contact supervisors—can be intimidating, insensitive, age-inappropriate, and hostile (Carson, *et al.* 2019). Studies also demonstrate that the adversarial culture of the court and associated legal institutions work to marginalise children, and can profoundly silence them, including when children express safety concerns (Nelson and Lumby, 2021).

This report makes policy recommendations designed to enhance children's safety by bringing the family law system into alignment with children's rights. It illustrates its case for reform with the findings of a multiple case study project comprising seven in depth interviews with adult survivors of family violence whose parents went to court when they were children. These reflective accounts of childhood experiences illustrate the diverse ways in which children attempt to use whatever agency they have to negotiate a hostile legal terrain. Sometimes the child's resort to agency can improve their situation. At other times, the child's resort to agency for the purpose of self-protection can lead to adverse outcomes because adult actors do not respond in the way the child anticipated. The common theme in every instance is the hostile situation in which adult actors do not offer a safe space in which children can freely speak, do not listen carefully when children attempt to speak, frequently limit children's access to important information that affects their circumstances, or else ignore, discredit, or silence children.

These adult recollections of childhood encounters demonstrate that children are not a homogenous group, but they also share common experiences. These include feelings of powerlessness, trauma around the execution of court orders, distress associated with being disbelieved, ignored, or "kept in the dark," the ongoing social, emotional, and financial impacts of Family Law litigation, and the ways in which trauma associated with family court encounters resurfaced in children's adult lives, profoundly affecting their wellbeing.

so, they thought it was safe, but it wasn't—it wasn't safe … we were just terrified of him. Really, really scared …

The descriptions of family court encounters included in this paper date from the 1990s to 2010. Worryingly, similar themes emerge in Rachel Carson's 2019 report for the Australian Institute of Family Studies, based on interviews with 61 children between the ages of 10 and 17 about legal matters that were mostly finalised between 2016 and 2017 (Carson *et al.*, 2019). This persistence of themes across time—dating both before and after the 1995, 2006 and 2012 family law reforms—suggests that the silencing of children is deeply embedded in the adversarial and paternalistic ideologies of legal traditions and institutional culture.

Finally, the paper presents a series of recommendations designed to minimise harm to children by bringing the practices of the family courts into alignment with the National Principles for Child Safe Organisations (Australian Human Rights Commission, 2018). Underpinned by a children's rights approach and based on the child-safe standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, these child-safe standards were designed to create institutional conditions that reduce harm to children and young people, increase the likelihood of identifying harm, and better respond to children's concerns and disclosures when harm is reported.

The recommendations in this paper draw attention to the need for greater institutional transparency and accountability, including the need to inform children and young people about their rights, the need to adopt measures to support children and young people's active participation in decision-making that affects their rights, and the need to provide a child-safe institutional environment in which it is possible for children and young people to speak freely about their concerns, and be taken seriously.

2. Hearing Children's Voices

Donna is in her 30s. When she was eight, her mother went to court to try to make safe arrangements for her care. But the judge, setting aside a family history of domestic abuse, ordered Donna and her younger sibling to spend time alone with their father, appointing a supervisor to ensure that the children would be "safe" from any physical violence that might occur. Looking back, Donna says that the court's disregard for her needs and those of her sibling generated an emotional harm that Donna describes as "more traumatic" than the experience of serious family violence leading up to the court events. She says,

> ***so, they thought it was safe, but it wasn't—it wasn't safe … we were just terrified of him. Really, really scared …***

Donna explains,

> ***when you come from a situation of family violence as a child, your mother is your place of safety—generally—and when mum [is] removed, and you're faced with the perpetrator and his violence, you know, those times I was made to spend time with him without her was terrifying. And that was probably more traumatic than the years and years of trauma leading up to that.***

Speaking as an adult, Donna characterises the behaviour of family court actors as ill-considered. "It just wasn't thought out, you know, it wasn't thought out," she says. Although the family history of domestic abuse in Donna's case had necessitated the appointment of an Independent Children's Lawyer (ICL) neither Donna nor her sibling were given the opportunity to speak to the ICL until after the interim orders for shared time had been handed down by the primary judge. "So, I felt like that came too late really," said Donna. When Donna was finally permitted to meet with the ICL, he said "What do you want to do?" Donna told the ICL that her father's behaviour frightened her.

> ***I said I never want to see [my father] again and I'm scared of him. And [my father] had been drinking a lot when he was with us and made threats to kill [my mother]. I actually really almost broke down … in that interview, with my [sibling] who was with me. And yeah, he took that back to the family court and we were still made to spend [supervised] time with our dad … so they thought it was safe, but it wasn't … and so even after talking to that lawyer and walking out and thinking, oh, good, we are safe now, we weren't safe.***

Donna recollects that the family court actors she encountered had very little insight into the mechanics of domestic abuse or the impact of family violence on children. Instead, the court's attention was focused on her father's claims. She explains,

> ***The court said he had to be given a chance to parent—children need their fathers. We don't, we don't need a father that's abusive, we don't we need a father that's 'addressing' his behaviour and, you know, 'changing the way he parents' and does things. We don't need a father that is sitting in that space of aggression … and not doing anything to address that behaviour. You know, I could never understand. He never attended any of the courses and things that the court recommended, yet he was still able to have access to us—[it] didn't make sense.***

Eventually, after almost three years of litigation, Donna's mother was able to make safe arrangements for her children's care. But this only happened after Donna's father physically assaulted the court-appointed supervisor during one of the court-ordered visits. The violent assault took place in front of Donna and her younger sibling. Donna reports that the emotional harm stemming from court ordered contact arrangements resurfaced in her early adult life. She explains,

> ***when I was 20, 21, I think, I had flashbacks. I started to have flashbacks, and that's when I realised that I needed to get some help because I couldn't sleep because I just kept having flashbacks.***

Donna was not alone in reporting adult trauma arising from childhood memories surrounding the execution of court orders. Nikos, now in his 20s, reports experiencing serious trauma that he relates to serial family court events. Nikos believes that both his parents were responsible for the abusive dynamics but alleges that the family courts facilitated and enabled the parents' conduct, by providing a mechanism through which conflict could be escalated. Nikos said that at the first court event the judge ordered Nikos and his siblings to live with their mother and have only periodic supervised contact with their father at a contact centre. Then, in the wake of another court event, the judge changed the orders. Nikos explains,

> ***Because the Court, the Court process itself and how it was handled actually allowed [the] police [to] come and take us out of school and take us back home from the school grounds … because of abuse claims … and so that gave the police extra power in that kind of situation and … that's kind of—at the time—for a kid—traumatising to be dragged out of the school by police officers in uniform.***

Another traumatic memory relates to the abuse of court ordered telephone calls. Courts frequently order telephone calls to be made by children at a set time of day, allegedly to promote the child's relationship with a non-resident parent if contact is sporadic or deemed unsafe. Nikos recollects that his father used these telephone calls as an opportunity to make further threats. Nikos explains that the telephone would be placed on speaker mode for the children to hear their father, including:

> ***dad threatening to abduct us, dad threatening to make sure mum never sees us again … that kind of stuff is scary for a kid going through that [court] process to hear. You know, and then hearing, hearing your dad—as well [as] this court process—threatening to kill your stepdad is even more horrifying … and it still sticks to me this day him on the speaker phone at the time I'm going [through the court process] … and it's like that stuff stays with you, it doesn't just go away.***

Nikos explains,

> ***the whole scenario was … traumatising to go through, and even to this day, it's still … it still lingers. I would almost classify the whole scenario as like a type of PTSD, and looking back now, is … constant anger, sadness, a lot of frustration, I guess, can be thrown in there.***

Nikos reports that the family court's six-to-seven-year involvement in his life caused serious difficulties for him as a child. He explains, "being that age, I didn't quite know how to vocalise a lot of it." This resulted in what he calls "acting out, and throwing tantrums, as a child." He explains that had the court listened to him, as the serial court events unfolded—had he been given the opportunity to meet with an adult who did not have an "agenda"—that the events and their aftermath might have been less "traumatic." He suggests that, even if events had not proceeded differently, and the court outcome was the same—due to his parent's conduct—it would have "felt different." He explains that a significant part of the problem was that "what I wanted, and what I thought would be better for me was completely irrelevant to the courts."

Nikos' reports that although the litigation extended from his childhood into his teenage years—and despite the serious nature of the factual background, which included successive police interventions, "stalking," "[death] threats" and physical violence—Nikos never actually met the ICL. He says,

> ***I never met [the ICL] at all, I only knew him by name, never even knew what he looked like or anything … Mum had her own Solicitor, Dad had his own and here we are in the middle of this disgusting custody battle through the courts and not knowing what's going to happen, who is helping us, who is on our side, or if anyone even wants to hear what we have to say …***

More than a decade after the family court litigation concluded Nikos is still able to provide the full name of the ICL he was not allowed to speak to as a child. He explains that fear of his parents and the behaviour of court appointed family report writers also caused him to lie to both the court-appointed experts and police at different junctures. He gives the example of being interviewed by police towards the end of the litigation, as a teenager. He explains he had felt unable to reveal what was happening at that point because the police interview was conducted in the presence of a parent and stepparent. This meant he was unable to disclose serious concerns about his own safety for fear of retaliation from family members.

Nikos' experience of family court litigation suggests that the mechanisms that were allegedly put in place to protect him as a child—mechanisms built around the ideological conviction that children are too vulnerable to speak (Nelson and Lumby 2021)—ultimately presented insurmountable barriers to adequate intervention. Family court actors appeared to make decisions on Nikos' behalf without a clear knowledge of the facts. They also failed to give Nikos a reasonable opportunity to inform them of those facts. Nikos reports that all his family relationships, including his relationships with siblings, were strained to breaking point as a result. Nikos reports that, as an adult, he has not spoken to some family members for many years.

Unlike Nikos, Mei, also in her 20s, has a clear memory of being listened to by her mother's lawyer, even though she describes her contact with other family law actors as unhelpful. Mei reports she was 11 when her parents went to court, separating in the wake of what Mei characterises as more than a decade growing up in an environment of domestic abuse. Mei reports, "[my mother's] lawyer was great." She says the lawyer said, "'Okay, I hear you; I hear that you don't want to go … so I'm going to put that before the judge.' That was probably the most helpful thing," said Mei. She explains,

> ***She really advocated for what I wanted instead of, you know, saying, 'Oh, this is what usually happens in these cases,' and like 'we're going to have to present it to the judge that,' and like 'I know you don't want to see your dad, but in most cases you do [have to], so we're going to, you know, just say this to ensure that the process goes smoothly.'***

Mei's experience was unlike that of Donna, who reports that her views were heard by the ICL mid-way through the court proceedings but appeared to have little impact on the court's decision, or Nikos, who reports that decisions were made on his behalf without a coherent understanding of the facts. Mei reports that her experience of being listened to decreased her feeling of powerlessness and helplessness and contributed to her sense of safety and well-being. Significantly, the legal actor she recollects appeared to accept that Mei was a competent witness to her own life and experience and had a right to an age-appropriate measure of decisional autonomy. In more recent times, this kind of outcome—as discussed in Part 3, following—is increasingly rare.

… not knowing what's going to happen, who is helping us, who is on our side, or if anyone even wants to hear what we have to say …

3. Children's Rights: Where are We, How Did We Get Here, and What Does it Look Like?

In 1975, Australian children had more—not fewer—rights under Australian family law. The Family Law Act—as it was enacted by the Whitlam government—placed a new emphasis on the "wishes of the child." It established a judicial obligation to listen to the child, and to respectfully consider the child's "wishes" in any legal decision that affected them. The Act also conferred a right of decisional autonomy on older children, stipulating at Section 64 [1] (b) that where a child had attained the age of 14 years, the court could not make a "custody" order contrary to the "wishes of the child" unless "special circumstances" required the court to do so. Moreover, Section 64 [8] of the Act provided that once any child who was subject to family court orders attained the age of 14 years, an application could be made to "discharge" or vary those orders in accordance with the child's views.[1]

By framing the Act in such terms, the Whitlam government recognised the child's right to grow into autonomy. Here, autonomy means more than a right to "have a say" or "express a view" but refers to the child's right to actively contribute to decision-making that affects their lives and interests, and—for children over age 14—to actively make decisions in accordance with their will and preferences. In policy terms, the wording of Section 64 [1] (b) and Section 64 [8] was consistent with arguments the Whitlam government made when it lowered the voting age from 21 to 18, effectively recognising that young people were critical and confident in their judgments and well-placed to contribute to the society around them (Commonwealth Electoral Bill, 1973). Attorney General Lionel Murphy twice rejected advice from the Senate Committee on Constitutional and Legal Affairs to omit Section 64 [1] (b) and 64 [8] from the Act, refusing to countenance the suggestion that there was any legal or moral basis from which to invoke a "substitute decision-maker" or "best interests" principle when a young person was capable and competent. Though the legislation acknowledged that "special circumstances" may arise that justified a decision contrary to the young person's "wishes"—for example, to protect a child from harm—it is clear from discussions around the passage of the Act that the "special circumstances" envisaged did not encompass ordering a frightened child to spend time with a parent who was abusive or violent, as in Donna's case.

But while the Whitlam government sought to recognise and facilitate the exercise by children of their rights—as part of an ambitious package of policy reforms that attempted to create a more equitable foundation for the family—the history of amendments to the Family Law Act shows that subsequent governments soon ignored or overruled them, while judicial and administrative changes further obscured them. Sections 64 [1] (b) and 64 [8] were repealed by the Fraser government in 1983, on advice from the Joint Select Committee on the Family Law Act. In their submissions to the 1980 inquiry, father's rights groups exhibited a newfound, hyper-gendered and strangely moralistic interest in children, arguing, for example, that children raised by mothers "tend to be extremely vindictive" and boys in particular turned into "sissies at school."[2] Under the influence of men's lobby groups, and conservative women's groups, the Committee's final report found that children and young people's "moral judgments have not usually reached the level considered acceptable for adult decision-making" and consequently Sections 64 [1] (b) and 64 [8] were "too rigid and restrictive of the court."[3]

Under the 1983 amendments, judges were given stronger legislative direction through the insertion of a list of "child's best interests" factors into the Act. This list of factors required judges to give weight to certain issues when making decisions about children. The list was amended in 1991, and again in 1995. It grew longer and more complex as politicians with varying political affiliations moved to pacify a range of divisive—sometimes fringe or extremist—lobby groups.[4] Prior to John Howard's 2006 reforms, there were 14 criteria. In 2006, the Howard government further increased and amended the list, dividing it into two tiers, titled the "primary" and "additional" considerations. The "primary considerations," including the child's "right" to know and be cared for by both their parents (which effectively functions as a proxy for "parents' rights") and the need to protect the child from harm, were quickly dubbed the "twin pillars" of the law.[5] The "additional considerations" comprised 14 factors, in no particular order, including the child's age, developmental needs, the capacity of their parents to meet those needs, and the notorious "friendly parent" consideration, which effectively penalised parents who raised domestic abuse allegations that they were subsequently unable to prove in court (See Young, 2012, de Simone, 2008, and Rhoades, 2008). This "hostile parent" provision was repealed by the Gillard government in 2012, acting on recommendations contained in Richard Chisholm's 2009 report for the Attorney General's Department, and as part of a wider national strategy to reduce violence against women and their children (Chisholm 2009; see also, Department of Social Services, 2010). At this time, the Gillard government also inserted a clause into the list of "child's best interest" factors directing judges to prioritise the child's right to safety over the parent's proxy "right" of contact when the so-called "twin pillars" were in conflict. The Gillard government also expanded the definition of family violence within the Act, in line with new knowledge about the "red flags" for serious offending. The new definition included coercive and controlling abuse, such as stalking and surveillance, and financial abuse, as well as deliberately causing death or injury to an animal, intentionally damaging property, and making repeated derogatory taunts.[6] But domestic abuse of this type only operates as an example of family violence under the revised definition if the threshold question is first satisfied—that is, the court must be convinced that there is coercive and controlling behaviour, or behaviour that would cause a "reasonable person" to be fearful. In the course of these amendments, what the Whitlam government had called the "child's wishes" was renamed the "child's views" and dropped into the Howard government's "additional considerations" category, where it has remained ever since. In 2019, the Australian Law Reform Commission (2019) recommended extensive changes to the Family Law Act, including a simplification of the child's best interest factors, with the emphasis being placed on the child's right

to safety and the child's views. These recommendations were effectively rejected by the Morrison government in 2021 (Government response to ALRC Report 135, 2021).

Parliamentary interventions into family law are largely driven by political considerations. But the culture of law and legal tradition also brings its own peculiarities to bear on children's concerns. Historically, legal traditions are built on a cultural assumption that children are unable to articulate their own interests. In this view, children are styled as vulnerable beings with inadequate cognition and erroneous opinions about the world. However, several decades of social scientific research has established that the problem is not that children are unable to form a coherent view but that they are not accurately heard by adults or—as the Royal Commission into Institutional Responses to Child Sexual Abuse forcefully demonstrated—within the adult-centric structures of institutions. Unlike in some other legal jurisdictions, children are not heard directly in family courts. Instead, children's views are filtered to the judge by a range of court-appointed intermediaries, including family report writers and ICLs, who are charged with assessing and evaluating the child's words. If an ICL is appointed, the ICL does not appear as advocate for the child, but as the advocate for the child's "best interests," according to the ICL's assessment of the available evidence and the list of child's best interest factors handed down by parliament. Studies have demonstrated that this filtering of the child's views often works to silence children by pre-judging, discrediting, or undermining the child's evidence, including when children raise concerns about their safety (Carson *et al.*, 2019).[7]

According to the Australian Institute of Family Studies (AIFS), most separating families—97 per cent—do not go to court, although 16 per cent use mediation, dispute resolution and lawyers to help them settle their disputes. The remaining 3 per cent of separating parents who are compelled to use the courts as their main pathway to making children's arrangements are predominantly families affected by domestic abuse and safety concerns, often with complex risk factors, including drug and alcohol abuse and mental health issues. Up to 85 per cent of litigated family law matters involve domestic abuse. This figure includes 54 per cent of families reporting physical violence, 50 per cent reporting safety concerns, and 85 per cent reporting emotional abuse (Australian Institute of Family Studies, 2019). There is limited data on the prevalence of financial abuse although it is a significant factor in court proceedings (See Douglas, 2020; and Scott, 2020a, 2020b). The Federal Circuit and Family Court acknowledged in 2021 that over 50 per cent of notices of risk lodged with the court involve family violence allegations with compounding risk factors (Full Stop Australia, 2021).

Despite the serious nature of this factual background, the Family Law Act has been written by politicians with less troubled families in mind. The belief that legal institutions stand outside society and politics—or, indeed, "above" it—is a fiction. In family courts, the opposite is more often true. Over the course of the last half-century, the family court has functioned as a primary forum for a series of highly charged political and cultural debates about the institution of the family, and the role that children, and women and men play in maintaining or disrupting it. Gender stereotypes flourish in legal culture, including the myth that violence towards a mother "doesn't make him a bad father." Paternalistic—indeed, patriarchal—logic is frequently reproduced in judicial decisions that characterise children as unreliable fantasists who make up stories about domestic or sexual abuse for "no reason," or else because they have been "schooled," "coached" or "influenced" by a parent. A persistent form of this narrative that is routinely employed by lawyers, and taken up with alarming alacrity by judges, describes a "malleable" child who "fabricates" allegations because they have been "alienated" by a parent who is "vengeful," "deceitful" and "manipulative" (See Rathus, 2020; and Rhoades, 2002). These narratives are also underpinned by the pervasive view that it is nearly always better to have contact with a dangerous parent, if some kind of protection can be put in place to defray the associated risks.[8]

Even in cases in which the child's evidence of abuse is compelling, the child's experience can be pushed to the side. Violence is frequently framed in family court culture as existing only in the past, never to happen again, or as something that will disappear once the "bright lights" of the court are shone upon it. Future contact with an alleged perpetrator of harm is frequently portrayed as positive and beneficial. The family report is primarily intended as a forensic tool to test the veracity of the parents' evidentiary claims, not to discover what the child thinks or how the child constructs their experience—or, indeed, what the child needs (see Rathus, Jeffries, Menih and Field, 2019). The court inadequately listens to children, and can seek to profoundly silence them, discrediting and delegitimising the child's views about their needs and safety in order to support a legislatively skewed pro-contact agenda.

4. Methodology

This paper presents findings from a multiple case study project comprising seven in-depth interviews with 18+ adults whose parents went to court when they were children. This is a difficult-to-reach demographic as participants are not necessarily associated with legal and family support services, and they have moved on with their lives.[9] University ethics clearance restricted the call for participants to established networks of legal and family support services but permitted snowball sampling.[10] All adults who chose to participate in the study were child survivors of domestic abuse and family violence, including two adult survivors of child sexual abuse. Two participants identified as male, and five as female. Three participants identified as culturally diverse. Six participants described family court encounters that took place between 1990 and 2010. One participant recounted their experience of legal proceedings prior to the passage of the Family Law Act, 1975. This interview has been quoted in the paper but is set out separately from the interviews that describe litigation under the current Act. The legal encounters set out in this paper have been selected because they are different from one another; they demonstrate that children are not a homogenous group. The paper draws on multiple case study design methodologies.[11] Each singular account is considered to have intrinsic value because it illustrates a problem in the system—or, more precisely, in a child's encounter with the system—that demands attention.

5. What Does Children's Lived Experience Say?

INT: Is there a preferred pseudonym you would like to go by?

RES: No, I want to use my name. I'm, I've been waiting a long time to speak up about this stuff so happy to use my name.

In Australia, it is a criminal offence for a person to identify themselves as a party to a family law proceeding, including a person whose parents went to court when they were children. While there is a clear need to protect children's privacy, the impact of the privacy provisions contained in s121 of the Family Law Act is so broad that it has effectively severed the connection between law and children's lived experience. The court does not know what happens to the children whose lives it has dramatically reshaped, and sometimes shattered. It therefore has no capacity to learn from its mistakes, and no mechanism through which children's lived experience can be used to inform structural change.[12] Researchers regularly attempt to bring survivors' lived experience to the attention of policy makers—in the manner that the law allows—but there are significant legal, ethical, and financial barriers to research and investigation. On a deeper level, s121 allows society to "unsee" the trauma that the adversarial system inflicts on children and disempowers the very people who are best placed to provide the information that is necessary to bring about meaningful change (Anonymous, 2021).

Adults participating in this study said they wanted to ensure that other children did not experience the kind of trauma that the family court had caused them. As Anna, in her 30s, explains,

So … when I saw that you were researching this, I definitely wanted to be involved, because I think talking to children who have been through it is really important. Nobody really does it either …

The adults who participated in this study provide a perspective that is missing from the research data—that is, information about the ways in which a given family court encounter impacted the adult life of the child whose "best interests" the court was meant to serve. It is possible—and, indeed, hoped—that there are children whose experience of the family court was more benign than that of the children whose lived experience is set out in this research. Theoretically, adults with a positive experience of the family court as children may be less likely to participate in a research study.

In the first court event in Anna's case, the family court judge decided that the family violence order that had been made by a magistrate was not "something that was relevant to anything." He ordered unsupervised contact between Anna, a younger sibling, and her father. Anna suggests that because her mother attempted to "stand up for herself … that's why it got worse." She explains,

I think it was my mum trying to do the right thing and protect us, yeah. Because mum was very angry and very inconsistent with me. But I think she would not have been like that if family court was not happening. If the court had just said in the first place, 'Look, your dad's really dangerous, don't see him,' she would have been a lot more settled and not under the same financial pressure. So, I think that we would have had a much better upbringing.

She adds,

I honestly think that even though my dad was extremely violent, family court made it so much worse.

The court events in Anna's case stretched over an approximate eight-to nine-year period and generated tremendous financial and emotional stress for her family. Financial stress caused by legal costs was a theme for Donna, who referenced financial hardship caused by debts to private lawyers and a lowered standard of living as a direct consequence of legal fees. Anna says,

Um, it really affected us, because everyone was always angry, and [the family court] just made everyone fight all the time. And it was scary going to my dad's house, and my brother would get really traumatised about going, and try and hide, and [it] was just—traumatic.

Anna gives specific examples,

Um, the access visits for my brother, who was just a little baby, [and] never wanted to go there. And then parents meeting [at] change overs, that was extremely violent. Like, my dad would often grab the car keys, or scream, or—like, it was awful.

Court orders were inflexible and strictly enforced by Anna's father. She says,

we had to call him [at] exactly 6:00pm on Sunday, and that would always cause issues as well … if we were late, he would go insane. He would file in court. Um, and then we would sort of be forced to talk to him. But you know, when you're a little kid, you're tired, or your game's interrupted … it's quite a difficult … thing.

She adds,

it's not normal to adjust your behaviour so you don't inflame someone's violence.

As an adult, Anna suggests that part of the problem was that her parents were confused by the complexities of the family law system, and that private lawyers took advantage of this. She says,

I think … their solicitors, um, inflamed it … I just get the impression that because my parents don't really understand the law … that solicitors did not try and settle or negotiate or anything.

In hindsight, Anna suggests that her father was also opportunistic in the way he manipulated the legal situation. She says,

he was able to understand enough about court to kind of make it go a bit longer, I think, too, and put my mum under pressure on purpose.

I honestly think that even though my dad was extremely violent, family court made it so much worse.

Looking back, Anna suggests that the family court was misguided in the way it construed her "best interests" by enforcing contact at the very time that family relationships were most violent and inflamed. Anna says, "my dad is still my dad," and that she still sees him once or twice a year. She says,

> ***but I didn't have to know him when you're like, six and you're looking after [my brother and] trying to hide them so [my father] doesn't hurt them, you know? Or listen to—why are they getting assaulted … or just being terrified of him fighting … Like, you just don't need that.***

After years of family court litigation Anna's father assaulted her 11-year-old brother so violently that her brother was hospitalised because of his injuries. On this occasion the hospital reported the assault to police under mandatory reporting guidelines. This precipitated another police investigation. Anna reports that—despite the gravity of the assault on her brother—at the time the police were more interested in proceeding with the investigation due to a death threat made by her father against her mother in front of a police officer. They were not particularly interested in investigating the serious assault against her younger brother because he was "just a child." In hindsight, Anna suggests that the assaults should have been treated as a criminal matter, but they weren't. She says, "mum did want to protect my brother. I'm sure of that. Yeah. And there was no way to do it."

Anna describes her relationship with her mother throughout this period as increasingly "difficult." In an email sent to the researcher in the wake of the interview Anna sought to clarify and amplify how her relationship with her mother was impacted by the ongoing litigation. She wrote,

> ***I thought afterwards that probably the most unaddressed issue is how badly family court affected the relationship between my mum and I. [My mother] wasn't the main perpetrator of family violence, and she did try to protect us from it, but because she couldn't when the court ordered her to send us to dad's house, it really has caused quite irreparable damage.***

In the interview Anna acknowledged that her mother did the best she could. "Um, so—yeah, she just knew what was fair, and she tried to, you know, protect my brother, and kept going to court."

Like Nikos, whose parents' litigation extended over many years, Anna reports that the end point of the almost decade-long court action was ill-defined. She says,

> ***Yeah, everything just dissolved. Because we got older, and we were just going to do what we wanted anyway, [the court] just gave up. So, I don't think anything was ever really resolved by that court in terms of, um, access or custody.***

In the wake of the final court event, Anna ran away. She claimed in the interview that the court decision therefore had "no effect" on her. "[The court] made their decision and I just ran away from home." Nikos—whose story is told in the opening section of this paper—similarly claimed to "resolve" the legal situation for himself when he reached his teenage years. He did this by defying family court orders to move in with his father after Nikos' relationship with his stepfather turned physically violent. Unlike Nikos, when Anna ran away from home, she was forced to leave school. "So [family court] did affect me a lot … in, like, your views and like, leaving school early, and things like that." Anna returned to formal education as an adult and now works in a specialised professional field.

Looking back, Anna, Donna, Nikos and Mei assessed the conduct of the family law actors they encountered as children as inept, even when they acknowledged the adult actor's personal demeanour had been "nice" or "lovely." Anna reports her ICL was "really nice" but points out the ICL was also ineffectual. She says,

> ***I think it—like … she was not incompetent, but she was young, and it was, um, you know, she was probably working for Legal Aid, like, with a heavy case load, and I reckon even, uh, 12 months later, if the same ICL had more experience—she was just really, really inexperienced …***

The nature of private family law litigation—structured as an adversarial legal contest between parents with competing claims, in which children are marginal or collateral—was also singled out as part of the problem. Anna says,

> ***I think [the ICL] could tell we were scared of both [our] parents … but … they can't refer you to Child Protection. They can only make a submission to the court. So, she tried to ask where we should go [and how she could] help us, but that's all she could do.***

She adds,

> ***I think I would have been about 14 when it all ended, I—nothing was ever explained to me. I never understood anything.***

Nikos and Mei also reported that the family law actors they encountered appeared to have little insight into their needs or experience. Mei—who was 11 at the time her parents went to court—explains that the family report writer assigned to her case forced her to communicate using materials designed for kindergarten age children, such as using cartoon characters in pictures, when Mei says she had been perfectly capable of explaining her needs and feelings in her own words, had she been given the opportunity. Nikos, by way of comparison, reports being interviewed by a family report writer at a very young age. He explains that the report writer used a complicated technical vocabulary that was a major obstacle to communication given that Nikos spoke English as a second language as a child. No attempt was made to interview Nikos or his siblings in their first language, despite the serious nature of the allegations. Donna explains that the appointment of a male ICL in her case added a barrier to effective communication because the severity of her father's violence had left her and her younger sibling—at that stage of their lives—"frightened of men."

A significant theme that emerged in the interviews was the feeling of powerlessness. Participants also reported that childhood memories associated with their interactions with family court actors re-emerged in their early adult lives. Mei, who reported a positive encounter with her mother's lawyer, described being listened to as the "most helpful thing." Neither Donna, Anna nor Nikos could point to a supportive interaction. Nikos said, "Absolutely nothing, absolutely nothing positive about it whatsoever, no, no way, no way."

Anna and Donna both singled out the sense of social stigma surrounding people who are brought before the family courts. Anna says,

> ***I think people think if you don't go to court and agree, and this still happens, that, um, you're unreasonable. But sometimes there's really serious issues that are not, like, family issues … I think a lot of cases don't really belong in family court. They should just be in criminal court.***

She adds,

> ***I do look back at it and I'm just so horrified about it … And I think that still happens in family court.***

In 2019, the AIFS study of children's experience of family law proceedings evinced similar themes to those described by Anna, Donna, Nikos, and Mei (Carson *et al.*, 2019). It is also notable that half the families in the AIFS study reported safety concerns as a result of ongoing contact with the non-resident parent.[13] Children and young people told AIFS researchers that they did not feel the family law actor they had spoken with had listened to them or had taken their views seriously. They said they were not given important information about what was going on, including having legal processes explained to them, or being given important information about legal decisions that affected their rights and interests. Children and young people told the AIFS that they wanted to participate in legal decision-making about matters that closely affected them. This persistence of themes across time suggests that Anna is correct when she states that little has changed for children caught up in the family law system in the decades that separate her own case and the cases of the children who told their stories to the AIFS.

Children in the AIFS study indicated that their words were not just ignored, but that they were actively undermined. Michael, age 15+, explained one interaction with a family law actor as a process of being systematically discredited.

> ***Well, they listened but at the same time … it kind of felt like I was being not so much pressured or attacked, but, you know, it was as I was saying things, they were like, 'Do you really think that, like is that what you fully believe?' They were like, 'Why do you not want to see your father?' and I was saying that, and they were like, 'Is that a real reason though?' (Carson et al., 2019, p. 54).***

On a similar note, Lilly, age 12–14, told AIFS researchers,

> ***What's the point of telling her if she's not going to listen. She spoke like down to me, like 'cause I was a child my views didn't matter. And she had this tone in her voice like she didn't believe anything that I was saying. She didn't ask many questions … she didn't even write anything down that I said … She'd already basically picked who she thought was right. And what would happen—what should happen … I don't know, she just spoke in this really horrible way to me … (Carson et al., 2019, p. 54).***

Alana, age 12–14, described how, immediately after she disclosed her father's abuse to a family court actor, she was confronted by her father in a co-joint session, without her consent. Alana says,

> ***it was like one of the worst things I think a psychologist could ever do … she was like, 'So, tell me about it …' So I basically explained everything, like how like I witnessed [my father] chase Mum through our house with a knife. How he used to pick me up by arm and throw me in my room … [and] how abusive he was and then she's like, 'Oh, okay,' and she's like, 'So, if I got him in here do you think we could talk about it?' And like, I'm—I'm one of those people who doesn't know when to say no. So … I'm like, 'Ah'. And she's like, 'Okay, we'll get him in here.'***

Alana explains,

> ***And she's like, 'Okay, [Alana] told me,' and then says everything I said. And looks at me and is like, '[Alana] is that true?' And I'm like, 'Uh' … I'm freaking out because I'm only, like, six or seven … and then she's like, 'Oh, okay, so do you promise never to hurt the kids again if they go back up?' And my dad's like, 'Yeah.' And he—and she turns to me and she's like, '[Alana] do you feel safe with that answer?'***

Alana told researchers that she had been too afraid to speak. She says,

> ***And I'm like, 'Yeah'. Because I didn't know what else to say … And like, it was so confronting because I didn't believe him, but I felt like I had to do it for my personal safety just in case we were sent back up. (Carson et al., 2019, pp. 57–58).***

Alana's experience shares some similarities with Nikos, who recollected that he concealed important information because he feared for his safety. It is also uncannily reminiscent of a description Lily gives of a court encounter in 1968, almost a decade before the Family Court of Australia was established. Lily, an adult survivor of sexual abuse perpetrated against her by her father, now in her 60s, describes being called into the court room, in front of the judge.

Lily explains,

> ***On one side of this room, my father and his lawyer were sitting, and then on the righthand side facing this man, sitting at a bench, you know, was me, my mother, and her lawyer. And they were talking, and then at some stage, my father's—no, my mother's solicitor got up to ask me some questions, and I refused to answer anything.***
>
> ***The next thing I know is that I'm in the Judge's chambers … with my father in the room, who had sexually abused me forever—[and the Judge is asking] why—whether I wanted to live with [my father] or let him visit me … and I refused to talk … I was terrified. Absolutely terrified.***
>
> ***And I—and I sat in, and [my father] was in the room with the Judge, and the Judge is asking me. He was nice to me, and he says, 'Do you—do you think you want to see your father?'***
>
> ***I didn't open my mouth. I didn't open my—I was petrified. Absolutely petrified.***

Almost half a century separates the legal proceedings described by Lily and Alana, and the law—and the wider society—has changed. But the dramatic disparity in power that characterises the child's encounter with the legal system is uncannily similar. In each instance, the situation is weighted heavily in favour of adults. In each instance, the child has been given insufficient information about what is going on, including what will be asked of them, and how this information will be used. In each instance, the child is unsupported and is left to traverse a hostile legal territory alone.

As Donna says, "I felt like power was completely taken away from me by the family court. They took all of my power as a child..."

6. Recommendations

In the negotiations leading up to the passage of the Family Law Act, 1975, which passed both houses of Parliament by a narrow margin on a conscience vote, Attorney General Lionel Murphy informed his advisors that there had to be a point at which private litigation must cease. Effectively, under the 1975 Act, this endpoint was deemed to be reached when a child turned 14, unless "special circumstances"—such as the child's safety—indicated otherwise. This report supports the reintroduction of a series of presumptions against private litigation in children's matters, particularly in cases where there are safety concerns that are better considered matters of public law (Young, 2012). More radically, it suggests that—if children are recognised as bearers of rights by virtue of being human—perhaps it is time to legislate a series of legal presumptions that significantly restrict the capacity of adults to litigate in respect of children, as if children were property.[14] As Anna put it, "there shouldn't really be a right just to see your children because they're your children."

1. All children have rights, no matter who they are. Courts have a responsibility to ensure that children's rights are protected.

Australia signed the Convention on the Rights of the Child in December 1990 but has long resisted making the Convention and its articles operational for the purposes of family law. In June 2012, the Gillard government inserted a reference to the Convention into the Objects of Part VII; the section of the Family Law Act that articulates the principles the court must follow when making decisions about children. Although children's advocates hoped the reference would impact the court's decision-making, this was not the case. The government subsequently issued a clarification stating that the reference to the Convention did not bind the courts or open new opportunities for young people's decisional autonomy or child-centred decision-making.[15] Instead, the Convention was only to be used as a reference to the extent that it did not conflict with the existing Act, which continued to emphasise parents' interests.

It is recommended that the Convention and its articles be given statutory force in Australian family law.

2. Children have a right to be safe. Children should feel confident about the standards established by the Courts, particularly as it affects their safety.

The Human Rights Commission developed the National Principles for Child Safe Organisations from the Child Safe Standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse. The National Principles address children's safety concerns well beyond those investigated by the Royal Commission, including psychological, emotional, and physical abuse, and child neglect. Historically, as superior courts, it has never been perceived that there should be any accountability or oversight of family courts in relation to their handling of children's safety concerns. Until 2019, the government did not perceive a need to regulate the conduct of legal actors, family report writers or private business enterprises engaged to work with children on the court's behalf, including private business enterprises charged with carrying out supervised contact regimes under court orders, and is yet to formulate or implement an appropriate regulatory regime.[16] Although the Royal Commission into Institutional Responses to Child Sexual Abuse did not investigate the family courts, there is no reason to believe that family courts have nothing to learn from the failings of other institutions. The Child Safe Principles are designed to protect against such failures, and to enhance accountability by building a culture that prioritises children's rights, interests, and needs.

According to the Human Rights Commission, implementing the National Principles for Child Safe Organisations:

- creates an environment where children's safety and wellbeing are the centre of thought, values and actions;
- places emphasis on genuine engagement with, and valuing of children;
- creates conditions that reduce the likelihood of harm to children and young people;
- creates conditions that increase the likelihood of identifying any harm; and
- responds to any concerns, disclosures, allegations, or suspicions. (National Principles for Child Safe Organisations, 2018)

It is recommended that the National Principles for Child Safe Organisations be adapted for use by the courts and any private business enterprises charged with carrying out court orders.

3. Adults must do what is best for children. The individual child should be at the centre of every determination. Any list of "best interests" factors should not make assumptions about what the individual child needs or how to prioritise those needs.

In 2021 the Morrison government rejected the Australian Law Reform Commission's recommendation to replace the two-tiered formulation of the child's "best interests" factors set out in Part VII of the Family Law Act with a simple and concise list of six factors designed to prioritise children's needs (Government Response to ALRC Report 135, 2021). The problem with the existing two-tiered list is that it functions to pre-empt legal decision-making by privileging certain outcomes over others in advance of the facts. Although the Gillard government amended the Act to clarify that a child's claim to safety should outweigh the parent's desires in any court deliberation, the contradictory logic that frames the top-tier factors—or so called "twin pillars" of the law—can mislead a decision-maker into compromising the child's safety to better realise a parent's desires (Chisholm 2019, pp. 23–25). At the very least, the convoluted logic may lure the decision-maker into assuming that the child's interests are identical to the parent's interests, when this is clearly not the case.

It is recommended that the list of child's best interests factors set out in Section 60CC of the Family Law Act, 1975 be reduced to six points, as set out by the ALRC. Family courts must be directed that the first factor—the child's right to safety—takes precedence over all other criteria. The criteria should include:

- 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 a relationship with each parent and with other people who are significant to the child, where it is safe to do so;
- 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 with caring; and
- anything else that is relevant to the particular circumstances of the child. (Australian Law Reform Commission, 2019, p. 40).

4. Every child has a right to grow into autonomy. Young people's decision-making capacity demands explicit recognition.

A child does not transform from dependence into autonomy—all in a flash—on reaching the age of 18. It is through making age-appropriate decisions about their lives that children work out how they would like to live and what sort of person they would like to be. The maturity a child acquires by making age-appropriate decisions that are "genuinely their own" is the foundation for responsible citizenship in a democracy (See Dimopoulos, 2021). But because family law is so deeply politicised—and the system lacks transparency and accountability—legal traditions have failed to mature. Unlike some other legal jurisdictions, in which the rights of Gillick competent children are now better recognised, the family courts have moved backwards, not forwards in this regard (Young, 2019). In recent years, the opportunities that a child is given to participate in decision-making about family law matters that affect their rights and interests have narrowed significantly. If anything, the law has appropriated the language of children's rights to confer "proxy rights" on adults.[17]

It is recommended that the rights of young people are given explicit recognition. Section 64 [1] (b) and 64 [8], as enacted by the Whitlam government, should be reinstated. As originally drafted, these clauses required:

a. Where the child has attained the age of 14 years, the court shall not make an order under [Part VII] contrary to the [views] of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so; and

b. On an application for the discharge or variation of an order under this section in respect of a child who has attained the age of 14 years, if the court is satisfied that the discharge or variation of the order would be in accordance with the [views] of the child, it shall discharge or vary the order accordingly unless the court is satisfied that it is undesirable to do so by reason of special circumstances.[18]

5. Children's rights are not served by an adversarial system. Legal matters affecting children must be decided in a less hostile context.

The UN Committee on the Rights of the Child states that a "child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his or her age."[19] In Australia, it is routinely alleged that children should not participate in legal decision-making that affects their rights and interests because the adversarial culture of the court has become dangerously toxic. This topsy-turvy logic needs to be inverted if the child's "best interests" are genuinely held to be the "paramount" consideration of family law. An onus must be placed on the court to reduce the toxicity of its procedures.

Up to 85 per cent of cases before the family courts involve allegations of domestic abuse (Australian Institute of Family Studies, 2019). A significant body of evidence demonstrates that the adversarial system escalates family conflict by replicating and amplifying the dynamics of abusive relationships. Adversarial legal tactics frequently operate to obscure facts, directing attention away from the child's needs by focusing attention on adult agendas.[20] Research demonstrates that violent perpetrators manipulate the legal system to coerce and control vulnerable parties (Douglas, 2021). It is recognised that exposure to sustained high level conflict is a major predictor of poor outcomes for children (See Australian Institute of Family Studies, 2020). Moreover, in 40 per cent of family law matters, one or both adult parties will be self-represented (Wangmann, Booth and Kaye, 2020). Studies demonstrate that the most common reason for a party to self-represent is the cost of legal representation (Productivity Commission, 2014). Only eight per cent of parties to a family law proceeding will be eligible for Legal Aid (Wangmann, Booth and Kaye, 2020). Lack of access to justice means that equitable outcomes for children are not assured.

It is recommended that if a children's matter cannot be mediated—or a dispute is intractable—then the child's rights demand any determination is made in a less formal context, with a focus on finding viable options and solutions.

Children's matters should not be heard by a judge. Children's matters requiring a decision should be considered by multi-disciplinary panels comprising a senior lawyer, a psychologist, and a medical or social science professional with expertise directly relevant to the issues in the case. The overarching principle that should guide their decision-making is that a Gillick competent child's capacity for shared or supported decision-making should be respected.

6. Use of a "substitute decision-maker" model of legal representation cannot be justified when a child is competent and able to provide instruction. Independent Children's Lawyers must adopt an advocacy or rights-based role as the child's capacity for independent decision-making evolves.

At present, Independent Children's Lawyers do not work as advocates for the child, but as substitute-decision-makers who advocate for what the ICL determines is the child's "best interests." ICLs have no training in child development. Their training is narrowly confined to the application of legal doctrines. Studies indicate that most ICLs understand their role as forensic—that is, concerned with evidence gathering, such as issuing subpoenas and engaging family report writers (Kaspiew *et al.*, 2014). Studies also suggest that children can be "harmed" and feel "betrayed" when they find out that "their" lawyer will not be representing "their" views (Carson *et al.*, 2019). Children report feeling powerless, helpless, or hopeless. The impact of this disempowerment is reported to persist into adult life (See Noble-Carr, Moore and McArthur, 2020). Evidence suggests that use of "substitute decision-making" principles has led to unsafe outcomes (NSW State Coroner, 2021). A significant body of evidence has drawn attention to the inability of ICLs to separate the child's views from their own views of the child.[21] Children report their interactions with family law actors are characterised by a lack of trust, in which their interests are subordinated to hidden adult "agendas."[22]

It is recommended that an Independent Children's Lawyer must take on a rights-based role as advocate for the child when a young person is Gillick competent and able to provide instruction. ICLs should not make recommendations that are inconsistent with a Gillick competent child's views unless they have clear, transparent, and adequate reasons.

7. Children's rights demand a radical re-conceptualisation of the decision-making processes used in children's family law matters.

Article 12 of the Convention on the Rights of the Child establishes the right of every child to freely express their views, in any legal or administrative matter that affects their interests, and the right for those views to be given due weight, according to their age and maturity. It sets aside a centuries old legal tradition built on an ideological assumption that children are "incompetent" and "incapable" of participating in legal matters that affect them (Tobin, 2019). It establishes a legal presumption that children can form views and that the child's right to express those views is actively "assured." Article 12 applies to all children, not merely to children who can demonstrate a level of confidence and self-assertion that is equivalent to an adult. In other domains of social life—outside the legal frameworks established by the Family Law Act, including in legal jurisdictions outside the family courts—children are actively encouraged to participate in making age-appropriate decisions about their lives. In fields such as medicine, children's decision-making is seen to run along a continuum from making decisions collaboratively with adults, to making decisions that are facilitated by adults, who provide support and information, through to decision-making that is "genuinely their own" and does not require adult facilitation or support.

State obligations under Article 12 demand a radical re-conceptualisation of the legal process used in children's matters (Lundy, Tobin and Parkes, 2019). Decision-making that affects children's rights and interests may include adults listening to children to understand their views, including by respecting the different ways in which children express their views. It may include collaborative decision-making between children and adults, and decision-making in which adults support the child by providing information and advice. There may be times when a "best interests" approach to decision-making is required, and adults must step in and take responsibility for decisions. In such cases, Article 12 requires those adults to explain their decisions to the child, including how the child's views were considered. But there will also be occasions on which adults must accept that a Gillick competent child is able to make decisions about how to live their life in accordance with their will, rights, and preferences—including decisions about where they will live, whom they will see, what they will study at school, and what name they are allowed to use.

Article 12 does not infer that a child's preferences will be decisive, but it does create a binding obligation to actively seek out the child's views to the greatest extent possible, and to give those views "due weight." The term "due weight" means that more weight must be given to the views of children as their decision-making capacity evolves. At present, children's participatory rights are insufficiently recognised in family courts and their views are inadequately respected in the "substituted decision-maker" approach used in family law.

Figure 1: The Decision-Making Continuum[23]

It is recommended that a decision-making framework be established to support and facilitate children's safe participation in family law matters that affect their rights and interests.

8. The child's rights must be considered in any legal decision that binds the child, including any consent orders reached through mediation, arbitration, or negotiation "in the shadow of the law."

At present, the Family Law Act requires a judge to take account of the child's views when reaching a formal decision. However, if a children's matter is settled by way of orders made by consent between adult parties, or in mediation or negotiation in the "shadow of the law," there is no practical mechanism or requirement for the child's views to be considered. This means that orders binding children to particular and sometimes onerous regimes of contact or conduct (orders may also be made in relation to the child's schooling, religion, and access to medical treatment or counselling, for example) frequently proceed through the courts with little or no attention being paid to the child's rights at all.

It is recommended that the principles of Article 12 apply to all orders that are made by family courts, not just in judicially determined cases.

9. Orders must be flexible and open to change as children grow. Children's best interests must continue to be served, moving forwards.

Studies indicate that children who are subject to family court orders crave the same rights that children who are not subject to court ordered regimes of conduct currently enjoy (Carson *et al.*, 2019). This includes the right to make age-appropriate decisions about their lives, such as being able to spend occasional time with friends—instead of being required to comply with regimented court ordered "clock time." It also includes contact regimes that become increasingly unsuitable as the child matures and grows.[24] The opportunity to make age-appropriate decisions that are "genuinely their own" is an important component of a child's development (Dimopoulos, 2021). Moreover, in cases in which the court has ordered supervised contact due to demonstrated safety concerns, there is no moral justification for sending a child into a supervised contact situation if a child who is capable of giving consent does not give consent, or when a child is fearful, anxious, reluctant, or hesitant.

Where appropriate, court orders that bind a child should be written in ways that are flexible and open to review as children grow and their needs change. Court orders frequently break down because children and their families are not supported to safely manage change. After high conflict proceedings, guidance and support should be routinely offered to children and their families by specialised services.[25] Such services could make recommendations for the review of orders in cases in which the child's "best interests" are not being served by an existing court order, moving forwards.

It is recommended that orders that bind a child must be written with a view to the child's inevitable growth. Where appropriate, courts should consider making flexible orders, gradually attenuating orders, or orders for a period of time, which can be reviewed later.

10. Children have a right to be free from sexual abuse. Child safety must be prioritised above other considerations in cases involving a risk of child sexual abuse and legal decisions must be risk adverse.

In the family law system, child sexual abuse claims are litigated, not investigated. The court has no powers or capacity to examine child abuse allegations itself. Although abuse allegations will be referred to state child protection services these referrals frequently fail to meet the threshold for urgent action either because the family courts are seen to be dealing with the matter, or child protection services decide that the child is not at immediate risk if they are living with a protective parent while legal action is ongoing. If there is no investigation, or if an investigation finds there is insufficient evidence to make a finding, child protection services inform the court that the allegation is "not substantiated." In the adversarial system, this finding usually triggers a counter claim that the protective parent has fabricated abuse, when it is simply a finding that there is insufficient evidence, and it may even be a finding that the issue was not deemed urgent enough by child protection services to warrant investigation.[26]

In cases in which parents have financial resources—or if an adult party is eligible for Legal Aid—a further report may be commissioned from a single expert witness who works outside the court system with little or no clinical oversight. Currently there is no requirement for the single expert witness or family report writer to have any specific training or expertise in identifying child sexual abuse or working with child sexual abuse victims. A significant body of evidence demonstrates that the sexual abuse of children is more widespread than commonly believed.[27] Studies demonstrate child sexual abuse generates serious psychological harm, including life-long social, emotional, educational and economic harm (Cashmore and Shackel, 2013; McPhillips *et al.*, 2019). A significant study of family law cases has concluded that it is statistically improbable for the court to make so few findings of child sexual abuse and it is highly likely that the court is making incorrect findings and failing to protect children (Webb, Moloney, Smyth and Murphy, 2021).

It is recommended that child safety must be prioritised above any other consideration in cases involving a risk of child sexual abuse. Court orders facilitating supervised contact with known child sex offenders should be disallowed. Child sexual abuse allegations raised in family courts must be investigated by recognised child protection experts with clinical experience in the field. Legal decisions must be risk adverse and prioritise child safety.

11. Privacy provisions (s121) should not be used to silence victims or conceal injustice. Children whose parents went to court should not be bound by s121 in their adult lives.

The privacy provisions set out in s121 of the Family Law Act were originally designed to protect the privacy of children and their families from the kind of sensational tabloid reporting that was common prior to the Act. Section 121 criminalises the publication of details of a family law proceeding that might identify a party or witness. In the 1990s, s121 was amended to clarify that it did not prevent communications about safety concerns being made to police, child protection or medical services. In 2019, the ALRC recommended further clarification to ensure s121 did not prevent complaints being lodged with professional regulators or government agencies, or prevent communications about safety concerns between service providers, or private conversations and personal communications between friends.

The ALRC also recommended it is necessary to address the "perception" that s121 prevents "victims of family violence from speaking out about their experiences" (Australian Law Reform Commission, 2019, pp. 436–437). Though the court is able to grant permission for details of a case to be made public on application to the court, the prohibitive costs associated with returning a matter to court effectively means that the only victims and survivors who get to speak are those whose cases are newsworthy enough for media organisations to fund the cost of going to court.[28] In 2017 Nina Funnell's #LetHerSpeak campaign began raising funds to cover the legal costs of sexual assault survivors seeking permission from the criminal courts to talk about their experiences, including child sexual abuse survivor and 2021 Australian of the Year Grace Tame. #LetHerSpeak has been unable to raise sufficient funds to expand their services to family court survivors, despite demand (Funnell, 2021).

It is recommended that children whose parents went to court should not be bound by s121 in their adult lives. It is recommended that government fund the legal costs of domestic abuse survivors seeking the court's permission to speak out about their experiences.

12. Children and young people have valuable insights to inform law and policy development and a right to have their views heard. System design should be regularly informed by the people it is meant to help.

In its 2019 report, the ALRC recommended that a Children and Young People's Advisory Board be established to provide advice about children's experience of the family law system to inform policy and practice development. It recommended that the board be composed of people who have lived experience of the family law system as a child or young person, and may also include a judge or a senior lawyer, a child psychologist, and community or NGO appointments, so that the lived experience of children and young people can be used to inform systemic change (Australian Law Reform Commission, 2019, pp. 395–397). The board would conduct annual reviews of progress in implementing child-safe policies within the court and any private business enterprises that are engaged to carry out court orders, including oversight of a complaints system. The Board should also have the power and resources to initiate its own reviews. The Board would report publicly on annual basis, in order to foster cultural change, to facilitate public education and debate, and to help ongoing child-focused improvements to the family law system.

It is recommended that an Advisory Board is established comprised of people with lived experience of the family courts as children or young people to provide advice on how to improve the family law system for children.

Notes on terminology

Contact supervisor

In cases where there is a demonstrated history of violence the court often elects to appoint a supervisor to ensure children's physical safety during court ordered contact visits. This role is sometimes carried out by registered charities in "contact centres" or else families must pay private business enterprises to supply security during court ordered visits. To date, these private business enterprises have been unregulated. Sometimes—when families are unable to afford supervision fees—a friend or family member may be appointed supervisor by a judge.

Domestic abuse

Where possible, this paper uses the term "domestic abuse" in lieu of the term "domestic violence." This is because in some of the worst cases that come before the courts, physical violence is rare before family situations escalate into serious criminal offending, including murder. Coercive control—or abuse—is often a more useful predictor.

Family courts

Australia's family law system encompasses an historic array of institutions including the former Family Court of Australia, the Family Court of Western Australia, the former Federal Magistrates Court, and the Federal Circuit Court, which in September 2021 was merged with the Family Court of Australia and renamed the Federal Circuit and Family Court of Australia, containing two divisions. In this report the term "family courts" is used as a generic label for all courts in which family law is applied.

Family report writer

Australian family courts have historically relied on "counsellors" to assess litigants and provide advice to the legal decision-maker. This person may be a social worker, psychologist, clinical psychologist, or psychiatrist. In this paper, the term family report writer is used to designate this role. It is applied generically to "family consultants"—now called "court consultants"—and single expert witnesses, sometimes referred to as "chapter 15 experts." Some family report writers are directly employed by the court but most of this work is contracted out to the private sector.

Family violence orders

Australia has a fragmented family violence system with eight separate legislative regimes. In this paper, all domestic violence orders are referred to as family violence orders regardless of the state jurisdiction.

Gillick competence

Gillick competence is a legal term that refers to a child's functional ability to make a decision. It is task specific, so more complex decisions require greater levels of competence. Emerging in the United Kingdom, Gillick competence was incorporated into Australian law by the High Court in Marion's case.

Abbreviations

AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
ICL	Independent Children's Lawyer
FamCA	Family Court of Australia
FCWA	Family Court of Western Australia

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Endnotes

1 Family Law Act 1975 (Cth) s 64 (1) (b) and 64 (8), later amended by Family Law Amendment Act 1983 (Cth) s29 (b). For an excellent discussion of the legal principles around children's autonomy versus best interests, see Young (2019).

2 Family Law in Australia: Report of the Joint Select Committee on the Family Law Act (1980, vol. 1, p. 857).

3 Family Law in Australia: Report of the Joint Select Committee on the Family Law Act (1980, vol. 1, pp. 52–53). See also Swain's discussion of the early court (2012).

4 See, for example, former Australian Law Reform commissioner Helen Rhoades (2006); an early discussion can be found in Kaye and Tolmie (1998); journalistic accounts include Cork (2016) and Hill (2019b).

5 Richard Chisholm (2009. P. 127) attributes the phrase to the comments of J. Brown in Mazorski & Albright [2007] FamCA 520.

6 See Stark (2009) and Monckton-Smith (2021). Coercive control is also the dominant analytic in David Mandel's "The Safe and Together Model" (2013) for understanding patterns of abuse and the impact of family violence on children. Mandel's model has been adopted for training purposes by the Australian family courts, on recommendation by the House of Representatives Standing Committee on Social Policy and Legal Affairs in their report, A Better Family Law System to Support and Protect Those Affected by Family Violence (2017).

7 For a different view, see Parkinson and Cashmore (2008).

8 See Young's discussion of Mills v Watson (2012).

9 Journalists—who are not restricted by the demands of university ethics committees—have conducted important research. See, for example, Hill's interviews with child survivors (2019a).

10 Thanks to the Youth Law Centre, Relationships Australia, Bravehearts, Full Stop Australia and Berry Street for supporting the call for participants.

11 Multiple case study design investigates social phenomena as inextricably connected to the environment in which they occur. See Flyvbjerg (2010).

12 The Australian Institute of Family Studies was established by the Family Law Act to conduct research to improve family law, but the court is not bound to act on any of its findings.

13 Carson *et al.* note that "The main issues of concern were: emotional abuse (64%), mental health issues (61%), violent or dangerous behaviour (32%) and alcohol or substance abuse (21%)" (2019, p. vi).

14 In most common law countries, children's living arrangements tend to be considered matters of private law. By way of comparison, in the UK, the Children's Act supports a system of public litigation as well as private litigation.

15 The "Explanatory Memorandum" to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 states, "To the extent that the Act departs from the Convention, the Act would prevail. This provision is not equivalent to incorporating the Convention into domestic law" (2010–2011, p. 6).

16 Australian Law Reform Commission, especially Chapter 13: Building Accountability and Transparency (2019, pp. 385–422). In 2021, the Attorney General's Department has released a call for submissions with a view to creating minimum standard regulations.

17 Robert Van Krieken argues that it is "a mistake to take the 'best interests' standard at face value, and that it should be recognised as being, inherently, in large part a 'code' or 'proxy' for other concerns, particularly the rights, concerns, interests and emotions of the parents" (2005, p. 39).

18 Family Law Act 1975 (Cth) s 64 (1) (b) and 64 (8), later amended by Family Law Amendment Act 1983 (Cth) s29 (b).

19 UN Committee on the Rights of the Child (2009, p. 9). See also the analysis of Article 12 in Tobin (2019, pp. 397–434).

20 The ALRC (2019, p. 295) states, "This Inquiry is the latest in a long line of inquiries into the family law system. Many of those earlier inquiries have reached broad agreement that the adversarial nature of courts operating within the family law system is inappropriate for resolving family law disputes. In part this is because adversarial litigation tends to escalate hostility and costs, which has the potential to have lasting negative consequences for the parties involved and their children. Adversarial litigation, traditionally, was left entirely to the parties with the court taking no interest in its progress unless an issue was put before it by the litigants. Reasons for the costs, complexity, and delay in civil litigation include the intricacy of the substantive laws, the conduct of the legal profession, and the conduct of the courts."

21 See the adverse finding made against the Independent Children's Lawyer by the NSW State Coroner (2021). See also Kaspiew *et al.* (2014).

22 See Grace Cuzen's account of her interactions with family law actors in her letter to the WA State Coroner, reproduced in Nelson and Lumby (2021, pp. 176–180).

23 I am indebted to Helen Makregiorgos at the Independent Mental Health Advocacy Service for her advice on re-envisaging the decision-making continuum for children. The language of the continuum is drawn from the UN Convention on the Rights of People with Disabilities. Similar continuums are applied in other fields including legal and non-legal advocacy for the elderly. See, Bennetts, Maylea, McKenna and Makregiorgos (2018).

24 The need for flexibility was a key recommendation in the Carson *et al.* study (2019).

25 The "Child-Friendly Justice Guidelines" promulgated by the Council of Europe note: "After judgments in highly conflictual proceedings, guidance and support should be offered, ideally free of charge, to children and their families by specialised services" (Council of Europe, 2011, para. 79). Despite procedural difficulties, including resistance from the legal profession, they also state: "judicial authorities should consider the possibility of taking provisional decisions or making preliminary judgments to be monitored for a certain period of time in order to be reviewed later" (Council of Europe, 2011, paras. 79 and 52).

26 There is a growing list of experts and scholars who are concerned about the ways in which the family courts manage allegations of child sexual abuse. Their scholarship includes but is not limited to: Young (1998); Brown and Alexander (2007); Young, Dhillon and Groves (2014); Parkinson (2014); Ferguson *et al.* (2018); and Death, Ferguson and Burgess (2019).

27 Michael Salter (2018) cites meta-analyses of international prevalence studies based on self-reporting, which find considerable similarities across countries, with an average of 18 per cent for sexual abuse among girls and 7.6 per cent for sexual abuse among boys.

28 For example, Seven West Media funded the legal costs that permitted Grace Cuzens to speak after her sisters Jane and Jessica were murdered in the wake of a ten-year family court litigation. See Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens [2016] FCWA 6.

Whitlam Institute
WITHIN WESTERN SYDNEY UNIVERSITY

Female Orphan School
Western Sydney University Parramatta campus
Cnr James Ruse Drive & Victoria Road Rydalmere NSW 2116
Locked Bag 1797 Penrith NSW Australia 2751
T+ 61 2 9685 9210 E info@whitlam.org
whitlam.org

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