

# ANROWS

AUSTRALIA'S NATIONAL RESEARCH  
ORGANISATION FOR WOMEN'S SAFETY  
*to Reduce Violence against Women & their Children*

**Attention: Special Rapporteur**

Office of the High Commissioner for Human Rights (OHCHR)

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**Input for SR VAWG's report on violence against women and children in custody cases**

Dear Special Rapporteur

Australia's National Research Organisation for Women's Safety (ANROWS) thanks you for the opportunity to provide input for the *Special Rapporteur violence against women and girls report on violence against women and children in custody cases*.

ANROWS is an independent, not-for-profit company established as an initiative under Australia's first *National Plan to Reduce Violence against Women and their Children 2010–2022*. Our primary function is to provide an accessible evidence base for developments in policy and practice design for prevention and response to violence against women and children, nationally.

Every aspect of our work is motivated by the right of women and children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and children, and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

Due to the word limit imposed on submissions, we have focused on two specific terms of reference: (a) and (g). Our submission provides brief insight into what Australian research tells us about the manifestations of domestic and family violence experienced by women and children, including the use of "parental alienation" and related concepts in child custody and access cases. It then outlines some examples of promising practice and remedies for victims and survivors, drawing upon both ANROWS research and other rigorous peer-reviewed Australian evidence. We would be delighted to support the Special Rapporteur with additional information for this report as required.

Yours sincerely



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## A note on terminology

In Australia the Federal Circuit and Family Court of Australia (FCFCoA) deals with complex legal family disputes, including cases relating to divorce or separation, financial and property disputes, and arrangements relating to parenting and the care of children. The FCFCoA applies the law set out in the *Family Law Act 1975* (Cth). The FCFCoA was established by the *Federal Circuit and Family Court of Australia Act 2021* (Cth) and merged two separate courts, the Family Court of Australia and the Federal Circuit Court of Australia. The merger came in response to a series of inquiries, including one by the Australian Law Reform Commission in 2019 and one by the Joint Select Committee on Australia's Family Law System in 2021, that suggested a raft of changes to improve the family law system. As the research contained in this submission was either commenced prior to or during this merger, we have retained the terminology "Family Court".

## Response to term of reference (a)

*The different manifestations or specific types of domestic and intimate partner violence experienced by women and children, including the use of "parental alienation" and related concepts in child custody and access cases.*

### **Parental alienation in Australia**

Research indicates that the prevalence of false allegations of child sexual abuse is approximately the same when compared to the prevalence of false allegations in other Family Court matters (Brown et al., 1998 as cited in Death et al., 2019). Australian research into family law cases shows that parental alienation, which has been widely discredited in a clinical sense, continues to be raised by fathers as a "defence" to child sexual abuse allegations (Death et al., 2019). The raising of these issues is gendered, with "mothers primarily being constructed as manipulative, mentally unwell, suffering from delusions, and ultimately harming their children with the intent of punishing the other parent" (Death et al., 2019, p. 2). Other Australian research has found that our family law system does not respond as well as it should to child sexual abuse, and sometimes accepts perpetrator-generated narratives of mental illness to explain allegations, rather than investigate them (McInnes, 2014). Mental health issues in Family Court matters are also gendered, with these being given as the "reason limiting child contact with mothers in 30% of such cases, but only in 2% of cases limiting fathers", which does not align with the general prevalence of mental health issues (McInnes, 2014 as cited in Death et al., 2019, p. 7). Unsurprisingly then, both women and some of the professionals they had contact with are fearful to raise allegations of child abuse in the family court system lest they be seen as an "alienating" parent (Kaspiew et al., 2017).

Despite claims of parental alienation, research conducted in 2019 by the Australian Institute of Family Studies (AIFS) shows that court orders for no contact with one parent (3%) are rare. Using a sample of around 6,000 parents about 18 months after separation, this study found that about three per cent of separated parents use courts as their main pathway to make parenting arrangements (97% do not go to court, although 16% of those do use dispute resolution or lawyers; AIFS, 2019). This three percent is predominantly families affected by family violence, child safety concerns and other complex issues. In the small proportion of cases determined by a judge, 45 per cent of court orders provide for sole

parental responsibility by the mother, and 11 per cent for sole parental responsibility by the father (AIFS, 2019). The study also found that children were less likely to have no contact with their father when arrangements were made through the court (3%) when compared to all separated parents (9%; AIFS, 2019). Arrangements where children spend most of their time with their father are more common in orders made where litigation occurs (10–19%) than in the separated population generally (2%; AIFS, 2019).

## **Systems abuse evidenced by victims and survivors and service providers**

Systems abuse, or the concern that perpetrators can inflict further harm on victims and survivors of domestic and family violence (DFV) by manipulating systems, is a common harm to victims and survivors across the suite of ANROWS research. It has been expressed by both victims and survivors (Kaspiew et al., 2017) and the service providers who work with them (Cortis & Bullen, 2016; Kaspiew et al., 2022). Some of the tactics of systems abuse identified by victims and survivors include:

- exploiting the intersections between family law, child protection and criminal legal systems to their advantage
- raising counter-allegations and unjustifiable applications in family law or personal protection orders
- manipulative engagement with family law services
- exhausting women’s legal and financial resources
- using civil law processes to cross-examine women as self-represented litigants
- non-compliance with court orders (Kaspiew et al., 2017).

Early identification of, and response to, DFV would assist in curtailing systems abuse through litigation (Connolly et al., 2017). This would require resourcing and supporting all family law actors with professional development and systems that enable them to employ a DFV-informed lens.

More recent ANROWS research into compliance with parenting orders found some parents and carers avoided seeking assistance with breaches of parenting orders because of systems abuse, believing litigation would cause a resumption of, or escalation in, violent or abusive behaviour by the other party (Carson et al., 2022). In circumstances where parties feel compelled to comply with unsafe orders, children are living with parenting arrangements that are not consistent with their safety and wellbeing (Carson et al., 2022). This research made it clear that system responses must identify children’s experiences of trauma and ensure that the safety of children is centred in parenting arrangements, with their recovery from DFV supported (Carson et al., 2022).

## **Family law must connect to the wider response system**

Addressing the lack of co-ordination between different parts of the response system, particularly between child protection systems and the Family Court, would better support victims and survivors. The “PATRICIA” project found that connections between the DFV and child protection systems and the family law courts were disturbingly absent (Connolly et al., 2017). The child protection system’s emphasis on child safety and the family law system’s focus on shared parental care can mean that mothers impacted by DFV can be trapped in the middle of two systems with competing demands (Kaspiew et al., 2017).

In Australia, the family law system also interacts with other forms of administrative decision-making, including decisions relating to social protections. For example, Centrelink – which delivers income support and other payments to Australians – has a “couple rule” which is used to determine whether a person should be considered a member of a couple for social security purposes. ANROWS research has shown that this rule can adversely affect DFV victims and survivors (Sleep, 2019). By examining decisions made by the Administrative Appeals Tribunal (AAT) that involved DFV and the couple rule, the report found safety was compromised because data that could be used to identify and locate women was publicly available in the AAT decisions, potentially exposing them to their perpetrator. This research also found that information collected through the application for a one-off crisis payment might later be used against women as evidence that they were in a relationship (Sleep, 2019).

Information sharing in the family law system must be focused on perpetrator risk and history, as this prevents compromising the safety of women and children (Connolly et al., 2017). Research indicates information sharing must be designed using a victim-centred approach that requires the victim’s and survivor’s informed consent, ensuring they have a clear understanding of what information will be shared, when it will be shared, and with whom it will be shared (Jones, 2016).

## **Impacts on victims and survivors**

Australian research has also shown a majority of victims and survivors of DFV have negative experiences with the family court system concerning safety issues, further coercion or re-traumatisation, and traumatic legal processes (Kaspiew et al., 2017; Taylor et al., 2017). In many cases, these negative experiences meant that participants did not raise their experiences of DFV with family law system professionals (Kaspiew et al., 2017). Participants in an ANROWS study into complex trauma “spoke extensively of their contact with the family court system and the ways in which their ex-partners manipulated court processes as part of campaigns of harassment and control” (Salter et al., 2020, p. 106). This research, which also examined the women’s experiences with criminal justice processes, found similar themes emerging from the women’s encounters with the Family Court. These themes were that the women were “frequently not believed or supported, disempowered and then left all the worse for the legal process, all of which is re-traumatising” (Salter et al., 2020, p. 107). Losing faith in the protective power of the law can have serious consequences for women with experiences of DFV (Salter et al., 2020).

## **Family law and intimate partner violence homicide**

ANROWS research into IPV homicide, conducted in conjunction with the Australian Domestic and Family Violence Death Review Network (ADFVDRN), indicated that women who separated or intended to separate from their partners faced heightened (ADFVDRN & ANROWS, 2022). In a report presenting data on the 311 IPV homicides that occurred in Australia between 1 July 2010 and 30 June 2018, actual or intended separation was a feature in over half of the male-perpetrated IPV homicides, with male-perpetrated IPV homicides making up 77.2 per cent of the sample. The majority

of actual separations in this cohort occurred within three months of the homicide. Similarly, where an intention to separate had been expressed, the majority of IPV homicides examined involved the female partner expressing her intention to separate within three months of when she was killed. Given the relatively high rates of actual or intended separation in this dataset, active family law proceedings were found in only a small number of cases (3.8%), however not all cases of separation or divorce are escalated to the Family Court (ADFVDRN & ANROWS, 2022).

## Response to term of reference (g)

*The good practices, strategies adopted by different organs of the state or other non-state actors, at local, national, regional, or international level to improve the due consideration of domestic and family violence, including intimate partner violence against women and abuse of children in determining child custody, as well as in providing remedies and redress for victims and survivors.*

### **Preventing direct cross examination of victims and survivors by men alleged to have used violence**

As an example of promising practice, in September 2019, the Family Violence and Cross Examination of Parties Scheme (the Scheme) was introduced as part of a wider system of improvements and adjustments in Family Court settings designed to improve the safety of women and children who are victims and survivors of DFV. Under the Scheme, direct cross-examination by self-represented litigants is prohibited on a mandatory or discretionary basis in certain family law matters involving allegations of DFV (Wangmann et al., 2022). ANROWS research being conducted at the time of the Scheme's introduction signalled its importance, with one research participant stating, "I can see that really making a massive difference" (quoted in Wangmann et al., 2020, p. 166).

The Australian Human Rights Commission (AHRC) confirmed the importance of safeguards like a ban on direct cross-examination by a self-represented party when considering how to best protect alleged victims of sexual harassment who are witnesses in civil proceedings (AHRC, 2020).

Recommendation 39 from their seminal *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report supports a range of safeguards including "being protected from direct cross-examination by a self-represented party" (AHRC, 2020, p. 573). This recommendation was supported by the Australian Government (Attorney-General's Department, 2021).

ANROWS research indicates that there are limitations to the application of this safeguard, and some victims and survivors can be deemed to sit outside of their protections (Wangmann et al., 2020). For example, one self-represented litigant in this study complained that while the judge did prevent the father from asking certain questions in his personal cross-examination of her, he did not "address ... the fact that there was family violence being played out in the court ... the impact on me and my family was almost irrelevant" (quoted in Wangmann et al., 2020, p. 145). Another research participant described the legal systems abuse she endured as worse than anything her former partner had done to her, which included rape, because it meant that she had "no faith in the law at all anymore" (quoted in Wangmann et al., 2020, p. 145). While this ANROWS research illuminates some unintended consequences of the Scheme, there is a need for further research that incorporates lived expertise by

examining how the Scheme is experienced by the people it was designed to assist (Wangmann et al., 2022).

## **Supporting judges to use a range of safety provisions**

While the Scheme can see judges prevent direct cross examination of victims and survivors, this in and of itself is not always sufficient to prevent harm. In one case examined by Wangmann and colleagues' (2020) research, the judge directed the lawyer acting as the independent children's lawyer (ICL) to conduct the cross-examination on behalf of the father. In retrospect, the legal representative interviewed for this study explained, they realised that the victim and survivor "was completely terrified" even though the perpetrator was not cross-examining them (quoted in Wangmann et al., 2020, p. 117). This fear no doubt impacted the quality of her evidence, and her access to justice. Situations like this one point to the need for all legislative protections to be utilised with a DFV-informed lens that takes into account the safety needs of each individual victim and survivor.

Keeping victim and survivor safety central to decision-making provides a firm basis to ensure procedural fairness in cases where DFV is involved. For example, the research also found that victims and survivors of DFV can be prevented by the Scheme from cross-examining even when they want to conduct a cross-examination. One judge interviewed for the research explained "an unusual matter where the alleged victim wanted to cross-examine her former partner and became angry when the judge informed her that this was not allowed" (Wangmann et al., 2020, p. 122). This sits in stark contrast to trauma-informed legal practice which seeks to restore agency and self-determination to victims and survivors (Salter et al., 2020). While it is necessary to balance procedural fairness and victim and survivor agency in this type of matter, having some judicial discretion might enable individual solutions that help victims and survivors heal from trauma.

Wangmann and colleagues (2020) also examined the use of allowable judicial adjustments and interventions to assist in personal cross-examination in the various courtrooms they visited. These adjustments include the ability for judges to limit questions that are insulting, offensive, abusive or humiliating as provided under s 102 of the *Family Law Act 1975* (Cth); alternative methods of providing testimony as specified in s 102C; and changing the order of cross-examination. The most commonly used judicial strategy was changing the order of cross-examination, even if that meant that the respondent testified first (Wangmann et al., 2020). Changing the order is often done so the ICL asks questions first, both to model how questioning is done, and to ensure most questions are asked before self-represented parties take their turn. Some judges interviewed in this research pointed out they would only change the order if the ICL agreed (Wangmann et al., 2020).

Alternative arrangements for giving testimony continue to be used rarely in Australia, with research by Wangmann and colleagues (2020) confirming earlier research findings (see for example Carson et al., 2018). In some cases judges noted that this may be due to an audio visual link (AVL) or separate room being unavailable, which is more likely to occur in regional and circuit courts (Wangmann et al., 2020). Pursuant to s 102NB of the *Family Law Act 1975* (Cth), which seeks to make courts take responsibility for protective measures being in place, safety in family court settings should not be dependent upon where a matter is heard.

Wangmann and colleagues (2020) also raised that judicial decisions about who is removed from the courtroom can be significant to DFV victims and survivors. One lawyer interviewed for the study pointed out that many DFV victims and survivors “will be sent to another courtroom to appear by AVL ... some of them would prefer to actually be in court and have the perpetrator excluded from the room so that they feel some ownership” (quoted in Wangmann et al., 2020, p. 117). Some judges interviewed for the study seemed cognisant of the impact of excluding victims and survivors, placing perpetrators in separate courtrooms and allowing victims and survivors to remain “in the main courtroom with all its supports and processes” (Wangmann et al., 2020, p. 117). Judges should be resourced with clarity and encouragement to use the available suite of judicial interventions and adjustments. This should occur alongside professional development and support for employing a DFV-informed lens that keeps the safety of victims and survivors at the forefront in all decision-making.

### **Additional family law system changes**

In addition to the changes to the court merger mentioned at the start of this submission, responding to inquiries into the family law system and complexities generated by COVID-19 has seen additional changes introduced to the family law system to improve the safety of women and children experiencing DFV. With court data showing DFV was a factor in 80 per cent of parenting cases filed, these changes have included a new National Contravention List aimed to triage and assess contravention matters, and the wider rollout of a risk screening, triage and case management system called Lighthouse (FCFCoA, 2022). While it is too soon to evaluate the impact of these safety provisions, it is a promising development to see the family law system opening up to and responding to DFV risk.

## References

- Attorney-General's Department. (2021). *A roadmap for respect: Preventing and addressing sexual harassment in Australian workplaces*. <https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>
- Australian Domestic and Family Violence Death Review Network, & Australia's National Research Organisation for Women's Safety. (2022). *Australian Domestic and Family Violence Death Review Network Data Report: Intimate partner violence homicides 2010–2018* (2nd ed.; Research report 03/2022). ANROWS.
- Australian Human Rights Commission. (2020). *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>
- Australian Institute of Family Studies. (2019). *Family arrangements after separation*. <https://aifs.gov.au/publications/parenting-arrangements-after-separation>
- Carson, R., Kaspiew, R., Qu, L., De Maio, J., Rhoades, H., Stevens, E., Horsfall, B., Press, L., & Dimopoulos, G. (2022). *Compliance with and enforcement of family law parenting orders: Final report* (Research report, 20/2022). ANROWS.
- Carson, R., Qu, L., De Maio, J., & Roopani, D. (2018). *Direct cross-examination in family law matters: Incidence and context of direct cross-examination involving self-represented litigants*. Australian Institute of Family Studies.
- Connolly, M., Healey, L., & Humphreys, C. (2017). *The collaborative practice framework for child protection and specialist domestic and family violence services: Key findings and future directions* (ANROWS Compass, 03/2017). ANROWS.
- Cortis, N. & Bullen, J. (2016). *Domestic violence and women's economic security: Building Australia's capacity for prevention and redress* (ANROWS Horizons, 05/2016). ANROWS.
- Death, J., Ferguson, C., & Burgess, K. (2019). Parental alienation, coaching and the best interests of the child: Allegations of child sexual abuse in the Family Court of Australia. *Child Abuse and Neglect*, 94, Article number 104045.
- Federal Circuit and Family Court of Australia (2022, December 5). *Federal Circuit and Family Court of Australia launches major family law reform to improve safety and support for children and families* [Media release]. <https://www.fccoa.gov.au/news-and-media-centre/media-releases/mr051222>
- Jones, C. (2016). *Sense and sensitivity: Family law, family violence, and confidentiality*. Women's Legal Service NSW.
- Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022). *Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers* (Research report, 01/2022). ANROWS.



Kaspiew, R., Horsfall, B., Qu, L., Nicholson, J. M., Humphreys, C., Diemer, K., ... Dunstan, J. (2017). *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report* (ANROWS Horizons 04/2017). ANROWS.

McInnes, E. (2014). Madness in family law: Mothers' mental health in the Australian family law system. *Psychiatry, Psychology and Law*, 21(1), 78-91. <https://doi.org/10.1080/13218719.2013.774688>

Salter, M., Conroy, E., Dragiewicz, M., Burke, J., Ussher, J., Middleton, W., Vilenica, S., Martin Monzon, B., & Noack-Lundberg, K.(2020). "A deep wound under my heart": *Constructions of complex trauma and implications for women's wellbeing and safety from violence* (Research report, 12/2020). ANROWS.

Sleep, L. (2019). *Domestic violence, social security and the couple rule*. (ANROWS Research Report, 04/2019). ANROWS.

Taylor, A., Ibrahim, N., Lovatt, H., Wakefield, S., Cheyne, N., & Finn, K. (2017). *Domestic and family violence protection orders in Australia: An investigation of information-sharing and enforcement with a focus on interstate orders* (ANROWS Horizons, 07/2017). ANROWS.

Wangmann, J., Booth, T., & Kaye, M. (2020). "No straight lines": *Self-represented litigants in family law proceedings involving allegations about family violence* (Research report, 24/2020). ANROWS.

Wangmann, J., Kaye, M., & Booth, T. (2022). Addressing the problem of direct cross-examination in Australian family law proceedings. *UNSW Law Journal*, 45(4), 1415-1448. <https://www.unswlawjournal.unsw.edu.au/article/addressing-the-problem-of-direct-cross-examination-in-australian-family-law-proceedings>

## **Legislation**

*Family Law Act 1975* (Cth).

*Federal Circuit and Family Court of Australia Act 2021* (Cth).