



# North Australian Aboriginal Family Legal Service

ABN 94 099 016 613 | ICN 4641

## SUBMISSION

*Submission to the Australian Human Rights Commission  
regarding its examination of children affected by family and domestic violence*

## Table of Contents

<b>1</b>	<b>Introduction</b>	<b>1</b>
<b>2</b>	<b>Our Organisation</b>	<b>1</b>
<b>3</b>	<b>Context of Our Submission</b>	<b>1</b>
<b>4</b>	<b>Responses</b>	<b>2</b>
4.1	What are the definitional issues in relation to family violence affecting children?	2
4.2	What do we know about the prevalence and incidence of family violence affecting children, including who is involved in family violence events?	6
4.3	What are the impacts on children of family violence?	7
4.4	What are the outcomes for children engaging with services, programs, and supports?	7
4.5	What are the outcomes for children of public policy approaches and educational campaigns targeting family violence?	7
4.6	What are the surveillance and data gaps/needs in relation to children affected by family violence?	9
<b>5</b>	<b>Conclusion</b>	<b>9</b>

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## 1. Introduction

The North Australian Aboriginal Family Legal Service ('NAAFLS') welcomes the invitation to make a submission to the Australian Human Rights Commission ('AHRC') to assist in its examination of how children are affected by family and domestic violence.

NAAFLS recognises that family and domestic violence, referred to in this submission as family violence, is a significant issue affecting children, particularly in Indigenous communities.

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## 2. Our Organisation

NAAFLS is a government funded Aboriginal organisation and National Association of Community Legal Centres ('NACLC') accredited community legal service. We provide professional, comprehensive and culturally safe assistance and advice to Indigenous victims of family violence in remote Top End communities in the Northern Territory.

NAAFLS provides the following services:

- a) legal advice and assistance in areas of Family Violence, Care and Protection of Children, Victims of Crime Compensation, Family Law, Wills, Superannuation, Housing and Debt Management;
- b) information, support and referral services;
- c) community legal education and family violence prevention initiatives; and
- d) law reform activities.

As of July 2015, NAAFLS has expanded its service delivery to 44 communities in the Top End, including Katherine.

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## 3. Context of Our Submission

Our submission is strongly influenced by our experience in working as a legal service with remote Indigenous communities throughout the Top End.

As a community legal service, we do not have expertise in assessing or determining the effects of family violence on children beyond practical experience working with such children and their families. Instead, our submission comes from a legal perspective, particularly a Northern Territory legal perspective, and our experience in providing legal advice and assistance. Generally, however, we agree with the research and findings about the effect of family violence on children as set out in the AHRC's invitation for submissions.

As an Aboriginal organisation, we are particularly concerned about the effect of family violence on Indigenous children and again more particularly on Indigenous children living in the remote Top End of the Northern Territory. Accordingly, our submission addresses our concerns for this group and speaks from our experience working with this group of children and families.

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## 4. Responses

### 4.1 What are the definitional issues in relation to family violence affecting children?

(a) *Legal protection of children from family violence*

The *Domestic and Family Violence Act 2007* (NT) ('the NT Act' or 'the Act') seeks to protect children from direct family violence and exposure to family violence. The Act specifically refers to children when stating that one of its objectives is 'to ensure the safety and protection of all persons, *including children*, who experience or are exposed to [family] violence' (emphasis added).<sup>1</sup> We submit that the Act should more specifically recognise the prevalence, vulnerability, and impact of family violence on children and families in Indigenous communities. To do this we recommend the inclusion of a provision explaining the nature, features and dynamics of family violence expressly stating:

- i) that children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing; and
- ii) whilst family violence is a significant problem for Australia generally, it is particularly prevalent in Indigenous communities.

In relation to this recommended acknowledgement, we note statistics indicate that in 2012-2013, Aboriginal women made up 73% of domestic assault victims, and were almost 22 times more likely to be victims of family violence assaults than non-Aboriginal women.<sup>2</sup> We also point to the literature referred to by the AHRC in its current invitation for submissions.

The Act seeks to protect children in the same way that it protects adults, that is, by providing a means for the making of family violence protection orders<sup>3</sup> that prohibit certain forms of family violence and criminal penalties for contraventions of such protection orders.

(b) *Definition of family violence*

It is our experience that culturally and linguistically diverse ('CALD') clients, and specifically our clients in remote Indigenous communities, often struggle with understanding the workings of the NT Act and the legal concept of family violence. In particular, confusion arises over the interchangeable use of the terms 'domestic violence' and 'family violence' in society and across various jurisdictions. We recommend that the Act be simplified by removing the term 'domestic violence' and replacing it with 'family violence'.

In defining 'family violence', we recommend that the reference to 'family relationship' be used in preference to 'domestic relationship'. Currently,

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<sup>1</sup> Section 3(a) *Domestic and Family Violence Act 2007* (NT).

<sup>2</sup> Australian Bureau of Statistics, *The Health and Wellbeing of Aboriginal and Torres Strait Islander Women: A Snapshot, 2004-05*. Cat. No. 4722.0.55.001; 2007 (cited 4 September 2013); available from: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4722.0.55.001Main+Features12004-05?OpenDocument>.

<sup>3</sup> In this submission we use the term 'protection order', however we note that under the *Domestic and Family Violence Act 2007* (NT), the applicable term is 'domestic violence order'. We do this to avoid confusion where we recommend the use of the term family violence instead of family violence. We note in particular that our reference to protection order in this submission does not relate to child protection orders including those made under the *Care and Protection of Children Act 2007* (NT).

section 5 of the NT Act defines 'domestic violence' as being certain conduct (which is listed) against someone with whom the person is in a 'domestic relationship'. Section 9 then lists the various types of domestic relationships, which include 'family relationship'. 'Family relationship' is then defined in section 10 (as occurring when the other person is a spouse or de facto partner, or is a relative).

It is recommended that the list of relationships provided in section 10 ('domestic relationship') and section 9 ('family relationship') be amalgamated in the one section, under the definition of 'family relationship'; as follows:

A person is in a 'family relationship' with another person if the person:

- i) is or has been the spouse or de facto partner of the other person;
- ii) is or has been a relative of the other person;
- iii) has or had the custody or guardianship of, or right of access to, the other person;
- iv) is or has been subject to the custody or guardianship of the other person or the other person has or has had a right of access to that person;
- v) ordinarily or regularly lives, or has lived with:
  - A. the other person; or
  - B. someone else who falls within paragraphs (i) and/or (ii) above;
- vi) is or has been a spouse, de facto partner or relative of a child of the other person;
- vii) is or has been in an intimate personal relationship with the other person; or
- viii) is or has been in a carers relationship with the other person.

Any terms used within the new and broader definition of 'family relationship' such as 'relative' could then be separately defined in the same way that 'intimate personal relationship' and 'carers relationship' are currently separately defined in sections 11 and 12 of the Act.

Further, in our experience, many of our clients face threats of violence from family members and/or the current partner of an ex-partner. These persons do not fall within the current definition of 'family relationship' and so do not fall within the operation of the Act. In order to protect a person from family violence perpetrated by such an associate (for example a family member or partner) of a person with whom he or she is in a 'family relationship', we recommend that the definition of 'family relationship' be expanded. This could be achieved by:

- i) inserting a definition into the Act of 'family member', as being 'someone who is in a family relationship with the Protected Person as defined in section [insert section number where "family relationship" is defined]'; and
- ii) incorporating into the definition of 'family relationship', 'a person who is so closely connected with a family member, that the family member can influence the actions of the person, either directly or indirectly'.

It is noted that the *Family Violence Protection Act 2008* (Vic) provides a definition of 'associate' in its section 4, and enables a final protection order to be made against such a person where a final order has been made against the Respondent (or Defendant). It is not recommended that the NT Act limit the making of an order against associates of the 'family member' (as defined above), in this way. It is our proposal that both interim orders and final orders should be able to be made against such persons where appropriate, even when a protection order has not been made against the ex-partner or other 'family member'.

(c) *Definition of child*

The Act's definition of child as a person under the age of 18 years<sup>4</sup> is widely accepted and generally unproblematic, however, the definition of young person for the purpose of a child/young person making his or her own application for a protection order is more contentious (see discussion in (d)(ii) below).

(d) *Children experiencing family violence (direct family violence)*

The Act seeks to protect children from direct family violence by allowing a child to be listed as a Protected Person on a protection order that prohibits such violence,<sup>5</sup> requiring in certain circumstances that a police officer or child protection officer make an application to list a child as a Protected Person on a protection order,<sup>6</sup> and allowing in certain circumstances an older child/young person to apply for his or her own protection order.<sup>7</sup>

(i) *Physical discipline*

Following the definition of family violence as including conduct causing harm, an argument could be made that physical discipline of a child constitutes family violence. This argument is difficult to maintain however, in light of a cross reference to the exclusion of 'any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community'.<sup>8</sup> There does remain however, an issue about what is considered acceptable, incidental, and social interaction or life in the community.

In NAAFLS' experience this has not been a significant definitional or practical issue.

(ii) *Definition of young person*

According to the Act, a young person may only apply for a protection order with the leave of the Court.<sup>9</sup> A young person is defined as a person aged between 15 and 18 years.<sup>10</sup> The Court may grant leave only if it is satisfied that the young person understands the legal effect of the application and the protection

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<sup>4</sup> Section 4 *Domestic and Family Violence Act 2007* (NT); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1 ('CRC').

<sup>5</sup> Sections 13 and 18 *Domestic and Family Violence Act 2007* (NT).

<sup>6</sup> Section 29 *Domestic and Family Violence Act 2007* (NT).

<sup>7</sup> Section 28(1)(a) *Domestic and Family Violence Act 2007* (NT).

<sup>8</sup> Section 1A(4) of Schedule 1 *Criminal Code Act 1983* (NT).

<sup>9</sup> Section 28(3) *Domestic and Family Violence Act 2007* (NT).

<sup>10</sup> Section 4 *Domestic and Family Violence Act 2007* (NT).

order as sought and that the young person has the capacity to make the application.<sup>11</sup>

The age threshold that a child needs to reach before he or she can seek leave to make his or her own application for a protection order differs between jurisdictions. We understand that under the equivalent New South Wales legislation the age is 16 years<sup>12</sup> and in Victoria it is 14 years.<sup>13</sup>

NAAFLS recognises that the evolving capacities of children differ and are difficult to pinpoint however, we submit that a uniform threshold age of 14 years across all jurisdictions is appropriate and would avoid definitional confusion. We submit that it is important for young persons to have the ability to make their own applications for protection orders as this allows young persons to exercise their right to be heard,<sup>14</sup> empowers them, and recognises their family violence experiences.

However, we maintain that the process of a young person seeking the leave of the Court and the requirement that the Court is satisfied of the young person's understanding and capacity is important in family violence situations. As such, we are concerned about an inconsistency in the Act where there is no requirement for a young person to seek the leave of the Court to apply to vary or revoke a protection order.<sup>15</sup> We are concerned that a young person may seek to vary a protection order in a way that diminishes the type of protection afforded to the young person, for example, varying a 'no contact' protection order to a 'do not harm' protection order, or to revoke a protection order altogether. We are aware that there are various circumstances where this may occur and that they may involve familial pressure and/or family violence itself. This raises the issue of understanding and capacity. Accordingly, we recommend that a leave requirement, identical to the one set out above, be inserted into the Act in relation to any application by a young person to vary or revoke a protection order.

(e) *Children exposed to family violence*

The Act recognises the 'negative and long-lasting consequences' of family violence and the exposure to family violence.<sup>16</sup> Exposure is defined as seeing or hearing violence or witnessing harm resulting from violence.<sup>17</sup>

While exposing a person, including a child, to family violence is not considered to be an act of family violence itself, the Act does seek to prevent the exposure of children to family violence by allowing the child of the victim of family violence to be listed as Protected Person<sup>18</sup> and a

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<sup>11</sup> Section 4 *Domestic and Family Violence Act 2007* (NT).

<sup>12</sup> Section 48 *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

<sup>13</sup> Section 45 *Family Violence Protection Act 2008* (Vic).

<sup>14</sup> *CRC*, art 12.

<sup>15</sup> Section 48 *Domestic and Family Violence Act 2007* (NT).

<sup>16</sup> Preamble (b)(i) *Domestic and Family Violence Act 2007* (NT).

<sup>17</sup> Section 4 *Domestic and Family Violence Act 2007* (NT).

<sup>18</sup> Section 13 (and particularly the commentary within the section) *Domestic and Family Violence Act 2007* (NT).

protection order to be made protecting a child from exposure to family violence.<sup>19</sup>

NAAFLS' experience is that 'do not expose' restrictions on protection orders are helpful in confirming the seriousness of exposure and preventing exposure of children to family violence. By attracting the same criminal penalties for contravention,<sup>20</sup> the Act effectively treats exposure with the same seriousness as direct family violence. However, in order to clearly acknowledge the seriousness of exposure and to prevent such, we endorse and follow the recommendation of the Northern Territory Department of the Attorney-General and Justice's that the behaviour by the person using violence that causes a child to be exposed to family violence should be considered an act of family violence itself.<sup>21</sup> This should be recognised by including such behaviour in the definition of family violence.

#### **4.2 What do we know about the prevalence and incidence of family violence affecting children, including who is involved in family violence events?**

(a) *Prevalence and incidence of family violence affecting children*

NAAFLS refers to the Australian Crime Commission's ('ACC') 2014 report, referenced in the AHRC's invitation for submissions and notes the ACC's findings that 'many Indigenous children routinely witness incidents of ... family violence' and 'in most remote communities, children are routinely exposed to violence'.<sup>22</sup> Our experience follows these findings in that we are aware there are significant incidences of exposure of Indigenous children to family violence in remote Top End communities.

Consistent with the statistics set out above at (4.1), our client base supports the generally understood fact that victims of family violence are predominately female. In many of the legal matters in which we assist Indigenous women, their children or children they are caring for are included as Protected Persons on protection orders and/or are protected by 'do not expose to family violence' restrictions on protection orders. We are very rarely approached to represent or provide legal advice or assistance to children or young persons in relation to family violence matters.

Further, in relation to the prevalence and incidence of family violence, we note the acknowledged underreporting of family violence, including family violence involving children, in remote Indigenous Top End communities.<sup>23</sup> NAAFLS routinely faces difficulties in engaging client victims of family violence who do not wish to report family violence in a small and remote community and/or do not wish to engage with the formal 'white Australian' legal system, amongst other reasons.

(b) *Who is involved in family violence events affecting children?*

As set out above, NAAFLS' legal experience predominately involves children as Protected Persons on protection orders or as protected by 'do not expose' restrictions on orders that also protect their mothers or female

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<sup>19</sup> Section 18(2) *Domestic and Family Violence Act 2007* (NT).

<sup>20</sup> Sections 120, 121, and 122 *Domestic and Family Violence Act 2007* (NT).

<sup>21</sup> Department of the Attorney General and Justice (NT), *Review of the Domestic and Family Violence Act – Issues Paper, April 2015*, recommendation 5-1.

<sup>22</sup> Australian Crime Commission, *The Final Report of the National Indigenous Intelligence Task Force 2006-2014* (2014), 10.

<sup>23</sup> See for example *ibid.*



relatives/carers. In most cases these protection orders flow from family violence between the child's mother or female relative/carer and her male partner or former partner. In these cases the perpetrator of the family violence is considered to be the father of the children. Also, as set out above, we often see instances of family members and/or a current partner of our client's ex-partner perpetrating family violence type behaviour against our client.

We understand that in the context of reported significant young person to young person violence and harassment,<sup>24</sup> there may be a considerable amount of family violence occurring between child relatives and young persons in relationships. We are aware of several remote Indigenous communities experiencing problems with online bullying and harassment between young persons. We point in particular to a request for assistance from a community where online bullying via social media between young persons was leading to significant mental health problems and concerns. We also point to a case where a young person sought to obtain a protection order against her ex-boyfriend, however, as the ex-boyfriend was under 15 years of age, a protection order against him could not be made.<sup>25</sup> These examples suggest a range of family violence situations involving young persons that may not be captured or addressed by the law.

#### **4.3 What are the impacts on children of family violence?**

While assessing, determining, and treating the impacts of family violence on children are beyond the scope of NAAFLS' work, experience and expertise, on an anecdotal level we can confirm the adverse effects of family violence on children's behaviour and on the cycle of intergenerational family violence.

We note again that the NT Act specifically recognises the 'negative and long-lasting consequences' of family violence and exposure to family violence.<sup>26</sup> The Northern Territory child protection/welfare legislation, the *Care and Protection of Children Act 2007* (NT) also recognises the harmful effect of exposure to family violence, providing an example of harm in its section 15 as 'a child witnessing violence between the child's parents at home'. This type of harm can lead to a child protection order being made.<sup>27</sup>

#### **4.4 What are the outcomes for children engaging with services, programs, and supports?**

Similar to our response above at (4.3), NAAFLS is not in a position to provide authoritative proposals on this question. We only note that there are limited, if any, services, programs, and supports available for Indigenous children subject to direct family violence and/or exposure to family violence in remote Top End communities.

#### **4.5 What are the outcomes for children of public policy approaches and educational campaigns targeting family violence?**

Again, as a legal service, NAAFLS does not provide or assess non-legal approaches or educational campaigns targeting family violence, and so we are limited in our ability to respond to this question.

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<sup>24</sup> Ibid.

<sup>25</sup> Section 14(3) *Domestic and Family Violence Act 2007* (NT).

<sup>26</sup> Preamble (b)(i) *Domestic and Family Violence Act 2007* (NT).

<sup>27</sup> Sections 20 and 129 *Care and Protection of Children Act 2007* (NT).

(a) *Education in schools*

NAAFLS submits that family violence prevention education and respectful relationships programs should be delivered in schools throughout the Northern Territory. To date, we have generally declined requests to provide legal education to children regarding sexting, sexual assault, and family violence issues on the basis that it is vital such education be provided in conjunction with relevant supports being made available to the children, young persons, and their families, such as appropriate counselling. Further, in Indigenous communities, significant consultation with elders and families is often required at the outset to minimise any negative response to providing such education as part of a legal service.

A more integrated program, such as the Love Bites Program offered by National Association for Prevention of Child Abuse and Neglect ('NAPCAN'),<sup>28</sup> is recommended for delivery in schools throughout the Northern Territory. Ideally, respectful relationships programs should commence as early as possible in primary school and progress in an age appropriate manner throughout each child's schooling years.

(b) *Men's Behaviour Change Programs*

We recommend mandatory Court ordered attendance at an accredited Men's Behaviour Change Program following the making of a final protection order, subject to the Defendant satisfying the intake criteria or 'assessment'. Further if the Defendant fails to attend or complete an assessment, or the prescribed program, this should be treated as a separate offence to that of breaching a protection order.<sup>29</sup> In making this recommendation we acknowledge that the implementation of a mandatory program would require a significant increase in facilities able to provide this program.

We also recommend the Men's Behaviour Change Program implement a holistic approach, which allows for reflection on identity, community and cultural values relevant to Indigenous men, including those in remote communities. Programs such as the Strong Aboriginal Men programs developed and facilitated by New South Wales Health, Education Centre Against Violence, should be considered.<sup>30</sup>

(c) *Victim Programs*

We further recommend there be scope for a victim-oriented program to be developed to operate concurrently with the Men's Behaviour Change Program, so as to provide support and education for the victim; for instance by informing the victim as to the nature of the Men's Behaviour Change Program, assisting in understanding the cycle of family violence and the impact family violence has on the development and welfare of children, as well as supporting victims to engage in relevant support services and counselling.<sup>31</sup>

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<sup>28</sup> The Love Bites program is a school based family violence and sexual assault prevention program for 15 to 17 year olds. For further details go to <http://napcan.org.au/our-programs/love-bites/#a41>.

<sup>29</sup> Section 121 of the *Domestic and Family Violence Act 2007* (NT) provides the current maximum penalty for breach of a 'domestic violence order' is 400 penalty units or imprisonment for 2 years. A lesser penalty should apply to breaches of assessment and counselling orders. Similar provisions in respect to assessment and counselling orders are set out in Part 5 *Family Violence Protection Act 2007* (Vic).

<sup>30</sup> See <http://www.ecav.health.nsw.gov.au/>.

<sup>31</sup> It is noted there is a Strong Aboriginal Women's group which is also made available through New South Wales Health, Education Centre Against Violence, which assists in providing a holistic approach towards community attitudes in respect to family violence and other social impact issues. Again, see <http://www.ecav.health.nsw.gov.au/>.

#### 4.6 What are the surveillance and data gaps/needs in relation to children affected by family violence?

As noted briefly above at (4.2), there is an acknowledged underreporting of family violence in Northern Territory Indigenous communities, including in remote Top End communities. In NAAFLS' experience, difficulties in monitoring and reporting on family violence in these communities include language and cultural barriers, lack of understanding, acceptance, and confidence in the 'white Australian' legal system that defines and seeks to protect against family violence, fear of reprisals in small and remote communities, and a desire to protect family members.

A system of mandatory reporting of family violence and harm or likely harm to children exists in the Northern Territory. It involves section 124A of the Act requiring an adult to report his or her reasonable belief that another person has caused, or is likely to cause, harm to a person with whom he or she is in a domestic/family relationship, and/or to report that the life and safety of a person is under serious or imminent threat because of family violence. A similar provision relating to the reporting of harm or exploitation, or likely harm or exploitation, of children is set out in section 26 of the *Care and Protection of Children Act 2007* (NT). This system is limited by the monitoring and reporting difficulties set out above and does not necessarily resolve the problem of underreporting. In some cases, mandatory reporting may even inadvertently lead to underreporting, with victims of family violence reluctant to report family violence, or if they do report it, downplaying its severity because of a warranted fear of having their children removed as a result of the violence.<sup>32</sup> Victims may even fail to seek medical or other attention for fear of a report being made on their behalf.

NAAFLS recognises the importance of obtaining full and representative data about family violence, including about children affected by family violence, and we encourage appropriate information sharing and community education to address underreporting.

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## 5. Conclusion

We thank the AHRC for inviting NAAFLS to make this submission on the important issue of the impact of family violence on children. We would be happy to provide further information and/or clarification if required. We look forward to attending the Roundtable in Darwin on 4 August 2015.

13 July 2015

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<sup>32</sup> As noted briefly at (4.3), the *Care and Protection of Children Act 2007* (NT) recognises exposure to family violence as harm to a child. The Act provides that the Court may make a child protection order that could effectively remove a child from a parent's care where the Court is satisfied the child is in need of protection because of such harm and such an order is necessary.