Childhood Matters:

Towards an evidence-based approach to family law &
alternative, healthier ways of addressing risks, harm and trauma to children
from family separation and family violence

Submission to the Australian Law Reform Commission

Review of the Family Law System, May 2018

Protecting Children - Beyond Family Separation
forkidssake.org.au

CONTENTS

"There can be no keener revelation of a society's soul
than the way in which it treats its children"

"Our children are the rock on which our future will be built,
our greatest asset as a nation"

Nelson Mandela

Introduction

There are few issues to which more people bring more deeply held views than family separation, family violence and family law. Often these views were forged in their own childhood experiences or trauma, or from their own experiences of relationships as adults. As a consequence, because so many view this issue through their own lenses, anecdotal experiences or ideology, an inclusive, evidence-based approach to this subject has proved elusive. And, partly because this issue provokes such strong sentiments, no Australian government has yet been brave enough to propose the major changes that are necessary.

Australia can be proud that it has introduced some progressive reforms in family law. But, with no-fault divorce in 1975 we also got an entire family law system that, by its very nature, was based on finding fault. And, though our relationship centres now cater for thousands, they (and other alternatives to our family courts) have not been adequately marketed or viewed as the mainstream, healthier alternatives they needed to be.

The family court system remains centre-stage for separating families throughout Australia, and for some 60,000 children exposed to separation each year. For all that we may be told that most separating families manage to avoid courts, we should not underestimate their influence: our family courts set the tone for family separations throughout the country.

> "Even though only a small percentage of parents end up in court to resolve their custody issues, custody laws affect all separating parents by establishing norms about what their state or their country believes is in children's best interests." [1]

There are reasons why our family courts have often, over several decades, been described as the most hated institution in Australia. They can intervene in what is, for most of us, the most important aspect of our lives: our relationship with our children. Their decisions, activities and personnel are protected, to a highly unusual degree, from scrutiny, review, or further legal action, through a combination of legislation, case law, and inaccessible and narrow appeal processes – creating a profound and widespread sense of injustice. And, they essentially remain the only court in the land that can still take a life – of a child from a parent, and of a parent from a child.

---

[1] Nielsen, L. 2018. Journal of Divorce & Remarriage.
https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1455303?src=recsys

We believe this Family Law Review is of great importance. It has certainly been billed as the most substantial in over forty years. So, we hope that what needs to be the broadest and most open possible investigation of issues surrounding family separation will not be unnecessarily circumscribed – either by this review's Terms of Reference (which do explicitly allow for consideration of any related matters) or by the Issues Paper and questions posed. In this spirit, we have taken the liberty of proposing some additional questions ("Some questions we should be asking", page 36) that we believe to be of great importance to the long-term welfare of children.

We believe that the appropriateness of our family court system for dealing with family separation or family violence should be more strongly questioned and that alternatives to adversarial court systems should be a primary focus of any review. We do not believe there should be any presumption that the solutions to the issues at hand (whether exposure to family violence, or to childhood trauma from prolonged family separations) somehow lie within family law or that family law is the appropriate way to address them.

If our family courts can decide that they will no longer intervene in cases where children with gender dysphoria have the permission of their parents and treating doctors to undergo surgery[2], shouldn't they similarly consider bowing out if they recognise that greater expertise in looking after children exposed to separation lies outside their mantle? Ours are certainly not the inquisitorial, "problem-solving courts" of which Sir James Munby, President of the Family Division of the UK's High Court, dreams.

We also think it would be of great value to have scientific and medical researchers, leading social scientists, and/or medical practitioners on any committee established to work out, in essence, what's best for children. We hope that, notwithstanding the existence of a broader advisory panel, the absence of such experts on the main Committee will not make a broader, more holistic and inter-disciplinary review any less achievable or diminish the chance of bringing valuable evidence and diverse expertise to the table.

> Family separation is, most importantly, a child health issue, not a legal issue. This review provides an opportunity we can't afford to miss to truly reform family law – by recognising its limitations and inherent characteristics that make it ill-suited to looking after anyone's best interests, and by focusing on alternative, healthier initiatives.

We hope that, in the spirit of the 2003 *Every Picture Tells a Story* report that came before it, the Committee will give high priority to alternatives to family courts and consider the many examples of better practices from around the globe. We thank the Committee for the opportunity of making this submission and, prior to answering its specific questions, we have addressed what we see as some key issues in this field.

[2] http://www.abc.net.au/news/2018-03-16/children-wanting-surgical-gender-change-no-longer-need-court/9557444

About Us

For Kids Sake is a health education, not-for-profit organisation dedicated to protecting children and their families from one of the most widespread, yet least-recognised, health risks they are likely to face: family separation.

Our mission is to:

- protect children from the mental & physical health risks associated with family separation, including all forms of harm, violence and psychological abuse;
- ensure that children's rights and needs are widely understood, protected and observed, in accordance with the UN Convention on the Rights of the Child;
- develop and promote a fresh approach to family separation that is evidence-based and outcome-focused, and that better prioritises the long-term wellbeing of children.

View policy launch: 19 October 2017, Parliament House, Canberra

Our vision is to create a major shift in how we think about family separation in order to create the safest, healthiest and best long-term outcomes for the tens of thousands of Australian children exposed to it each year.

We urge the federal Government, and all political parties and State/Territory Governments, to adopt and implement the following, six-point National Action Plan. And we ask the Australian Family Law Reform Commission to give consideration to these recommendations.

Executive Summary: Family Separation/Divorce

The for kids sake 6-point Plan[3]

Recommendation 1:

RECOGNISE family separation as a child health issue

Family separation needs to be considered first and foremost a child health & welfare issue, not a legal issue. The latest and best scientific and medical evidence should play a key role in determining what is best for children's long-term welfare.

Family separation is a major social issue best-suited to a Health, Family, or Children's portfolio, and we recommend that this critical issue should be addressed holistically and pro-actively under a dedicated Minister for Children & Young People. Continuing to view family separation primarily as a legal issue, managed by the Department of the Attorney-General, will result in ongoing, serious and avoidable harm to our children and future generations.

Recommendation 2:

EDUCATE & SUPPORT families better – especially during separation

Investment should be made in education and early, comprehensive support for families. This should include a national educational campaign on better managing relationships and separation, including raising awareness of the potentially harmful consequences to children of family breakdown and the extreme risks, consequences and prevalence of some forms of psychological child abuse and family violence. The availability and benefits of coaching, conciliation, family-friendly resolution services, and comprehensive, online resources for separating parents and their children should also be promoted nationally as mainstream, healthier alternatives to family court proceedings.

Recommendation 3:

INTRODUCE specialised training, accreditation & high levels of accountability for all professionals involved

All professionals involved in making decisions that profoundly affect the lives of children must be properly qualified in this specialisation. An accreditation system for the necessary skills should be implemented, new training courses developed, and a database of qualified specialists made publicly available. This should include, but not be limited to: social workers, counsellors, psychologists, family dispute resolution practitioners, family court report writers, lawyers and judges.

New standards of accountability should be introduced, guaranteeing routine and more open analysis of performance, conduct and outcomes – replacing the current culture where scrutiny is inhibited (even by legislation). When the lives of children are at stake, no health or legal professional should be immune from legitimate scrutiny and independent and transparent review.

[3] For more detailed recommendations, see pages 40-49 of our full policy document (available on request)

Recommendation 4:
INVEST in healthier, modern alternatives to legal procedures

Investing in our children is one of the most cost-effective investments of all. The government should prioritise investment in a diverse range of government and private sector initiatives that are less harmful and more cost-effective than family court proceedings. These should include programs such as: earlier education and health-focused support; high-quality coaching and counselling for parents and children; better conciliation, mediation and family dispute resolution services; Medicare-supported health/family care plans; the development of comprehensive, practical, family-friendly online resources; and online/smartphone apps that facilitate parental cooperation and provide ready-access to educational resources for families who need help and support more than they need lawyers and courts.

Recommendation 5:
PRIORITISE non-adversarial conciliation & arbitration

When governments do intervene in matters that affect children, such interventions should be urgent, expertly managed, evidence-based and outcome-focused. Above all, they should "do no harm". Family courts are slow, unaffordable, frightening and adversarial – and they neither monitor, nor obtain feedback from, the outcomes of their decisions. They are not fit-for-purpose and cannot ensure that the best interests of children are achieved.

For most family separations (where there is no history of family violence, abuse or neglect), a streamlined, more cost-effective, healthier government intervention should be introduced nationally – and private sector equivalents supported – based on the most effective, existing models of conciliation and arbitration. Attendance at this new Tribunal or Commission should be a pre-requisite for accessing the family court system.

Preliminary decisions about parental care arrangements should be made on an urgent basis and pro-actively and professionally monitored thereafter. Failures by parents to adhere to arbitration decisions should be referred automatically to local courts for expedited rulings and enforcement. Appeals against arbitration decisions should be heard in the appropriate court. Non-adversarial arbitration should be funded, promoted and marketed as a mainstream alternative to family courts.

Recommendation 6:
MAKE family law – and its implementation – simpler, fair and focused on the long-term welfare and rights of children

The Family Law Act – originally framed in the context of parental disputes, rather than children's welfare – should be comprehensively revised, simplified, shortened, and based on the core principles of:

i) the paramountcy of the long-term welfare of children (as distinct from "best interests");
ii) prevention of exposure of children to all forms of physical and psychological harm;
iii) the maintenance of a child's relationships with fit and willing parents, and other family members, central to the child's long-term wellbeing;
iv) natural justice and gender equality; and
v) the Universal Declaration of Human Rights and the United Nations Convention on the Rights of the Child.

Executive Summary: Family Violence

1. **UNIFORM, NATIONAL POLICY**
   Uniform national legislation, definitions and treatment of family violence should be adopted;

2. **SEAMLESS, INTERSTATE INTEGRATION**
   Pathways to ensure seamless information-sharing between Federal, State and Territory agencies addressing family violence should be introduced or reinforced;

3. **EARLIER INTERVENTION**
   Earlier interventions than family law can offer should be considered a high priority to prevent the onset of family violence, including educational programs and stronger, earlier and ongoing support for children and families through existing educational, medical, health and social networks;

4. **LOCAL COURTS SHOULD ASSESS FAMILY VIOLENCE**
   The safety of children and adults who may be affected by family violence is best served by State-based child protection agencies, courts and police systems, acting urgently, rather than by our current family court system;

5. **(EX-)PARTNERS SHOULD NOT CROSS-EXAMINE ONE ANOTHER**
   Nobody should be cross-examined by a partner or ex-partner. This is an inappropriate process not only for victims of intimate partner violence;

6. **A NON-ADVERSARIAL APPROACH**
   For family separations with no history of family violence, the creation and promotion of non-adversarial approaches is essential for the long-term wellbeing of any children involved; this will also help prevent the onset of family violence - especially towards children - that is associated directly with prolonged, adversarial court proceedings. More broadly, a more inquisitorial approach should be considered for all investigations of family violence;

7. **INTERVENTIONS MUST PROVE THEIR WORTH**
   Courts and alternative interventions to address family violence must demonstrate accountability, success and an outcome-based approach if they are to receive support and financial investment from government;

8. **SPECIALISED PROFESSIONAL TRAINING**
   All professionals involved in interviewing or assessing children in the context of family violence (or family separation) must have appropriate accreditation in this specialty;

9. ACCOUNTABILITY

A new system of accountability, and associated accreditation, should be introduced for all professionals and this should be open to public scrutiny;

10. A SINGLE REGULATORY BODY

A new, single agency should be given regulatory oversight over all social workers, counsellors, psychologists and other such professionals working in the field of family law;

11. A BETTER, EARLIER CHILD ADVOCATE

In any family law proceedings, children should have early and ongoing access to a suitably qualified professional upon whom they can rely. Even earlier intervention is highly preferable, and lessons should be learned from international practices such as the Scottish "Get It Right For Every Child" model where every child has an assigned, welfare-focused contact person or advocate (of a very different nature) from birth;

12. COMPENSATION

Victims of family violence should be financially compensated where this is found to be due, wholly or in part, to institutional failings. However, linking financial distribution of family assets to other, independent issues – including the occurrence of family violence or the percentage of parental care – risks creating incentives and complexity that may ultimately not be in the best interests of children;

13. A NEW, NATIONAL "NO CONTACT ORDER"

Consideration should be given to a new form of no-fault protection order – a "No Contact Order" – that truly prioritises safety by being able to be issued administratively – swiftly and automatically – yet neither implies blame or criminal conduct by one party (which may take longer to assess or require higher standards of evidence), nor risks the major trauma to children of potentially wrongful, sudden separation from a loving parent;

14. A HOLISTIC, CHILD-FOCUSED APPROACH TO REFORM

There should be an evidence-based, child-focused and holistic approach to family law reform; making changes based purely on any one issue, however expedient or popular, may compromise fundamental aims of the family law system as well as the long-term welfare of children subject to it.

Some key changes to legislation

(and family law rules & practices)

1. The Family Law Act should be significantly shortened, simplified and largely re-written, using plain English;
2. The principles of the Universal Declaration of Human Rights, the United Nations Convention on the Rights of the Child, of natural justice, and of gender equality should be explicitly incorporated into the legislation;
3. The paramount principle of the Act should be the long-term welfare of children. How to achieve that, based on the best medical and scientific evidence, should be made more explicit in legislation. This should include, but not be limited to:
    a. a requirement to make determinations on an urgent basis, within a specified time-frame, wherever children's health, safety or maintenance of significant relationships are at stake;
    b. recognition of the life-long and intergenerational impact of childhood trauma as a consequence of aspects of family separation such that the following are avoided:
        i. a child's exposure to all forms of abuse and violence (clearly and better defined to include both physical and psychological forms); and
        ii. loss of any of a child's significant, pre-existing and positive relationships with parents and extended family members;
4. Where scientific knowledge cannot be explicitly incorporated into legislation, family law should explicitly permit all litigants, whether legally or self-represented, to present relevant, peer-reviewed scientific evidence to the court. At present, case law largely precludes the presentation of such evidence, except by a recognised expert involved with the case;
5. Usage of the current phrase "the best interests of the child" should be reconsidered. It is too vague, poorly defined and inconsistently interpreted. It is not being applied consistently and objectively;
6. Legislation should require that applications to the family law system in matters of abuse or violence should be directed urgently to local, State-based courts, where seamless integration with State-based child protection and other agencies should be prioritised;
7. Applications in matters relating to family separation should be accepted by a Family Court only where applicants can demonstrate such endeavours as having:
    a. attended pre-requisite counselling and coaching (e.g. 'Mums and Dads Forever' courses) and read/viewed prescribed materials about children's welfare during separation, and alternative resolution methods;
    b. made genuine and significant attempts at mediation, conciliation and family dispute resolution with accredited professionals on multiple occasions;

c. engaged in using readily available aids to parental collaboration, such as online or smartphone apps that facilitate and document parental communication and engender greater collaboration;

d. attended a session with a court official explaining the consequences and procedures of entering the family law system.

8. Once an Application has been accepted, it should be a requirement that all parties attend a preliminary, substantial hearing at which major issues should be ventilated and potential solutions explored;

9. The Act should stipulate the qualifications and accreditation required of any expert witnesses or other professionals it appoints. Such qualifications should explicitly include highly specialised training in working with children;

10. All judicial officers should be required, by legislation, to have highly specialised skills not only in understanding family law rules and legislation, but in understanding children's development, behaviour and welfare. Minimum levels of ongoing, annual training should be stipulated;

11. Legislation should stipulate what level of knowledge is expected of a judicial officer and what should be regarded as common knowledge that can be brought to bear on any judicial decisions, instead of leaving this to case law to establish;

12. The amount of any financial settlement (whether distribution of assets or future income) must be decoupled from the amount of parental care. At present, the direct and ongoing linkage between the two both prolongs harmful parental interactions and is a key factor inhibiting otherwise swift decisions about children's care arrangements;

13. It should be a requirement that courts ensure that all children are appropriately monitored and followed up after judicial decisions and that the courts obtain feedback on the short- and long-term outcomes of their decisions;

14. Self-represented litigants should be permitted to have assistance, including at the bar table, from a friend or colleague, whatever the qualifications of either. At present, some self-represented litigants are unfairly denied the opportunity of having such assistance, commonly referred to as "a McKenzie friend";

15. Family courts should not be permitted to inhibit or interfere with independent investigation of any professional involved in family law proceedings by the appropriate regulatory body, and a new regulatory body overseeing all such professionals should be established;

16. s121 should be replaced with wording that opens up the family law system to scrutiny and permits the open discussion of family law matters, subject only to it being in the national interest. The current clause protects the system, not the children;

17. Family law should adopt an inquisitorial, rather than adversarial, approach to resolving family matters, recognising the otherwise extreme risks to children and their families.

Responses to questions

Objectives and principles

Question 1: What should be the role and objectives of the modern family law system?

1. To help ensure and contribute to the long-term welfare of families, and especially children, and secure social justice for them, based on:
    i) the principles of international conventions on human rights and the rights of children; and
    ii) evidence from the best scientific and medical research.

2. To model, for society as a whole, processes and outcomes of family separation that are fair for all family members and proven, through research, evidence and feedback, to be best for children's long-term welfare.

    While it may be true that a majority of families avoid prolonged court proceedings, our family law system nonetheless sets the tone for separations throughout the country:

    > "Even though only a small percentage of parents end up in court to resolve their custody issues, custody laws affect all separating parents by establishing norms about what their state or their country believes is in children's best interests." [4]

3. To become an intervention of last resort – for both children's and financial matters – not to presume it can contribute positively or effectively to the lives of children and their families given its inherent characteristics of being slow, unaffordable, adversarial and frightening to most who encounter it.

Once it is recognised that every child in a separating family is at risk, and that our family law system inevitably adds to those risks, the system should be required to pro-actively seek to minimise its intrusion into the lives of children.

Once it is recognised that adults in separating families generally need great support, compassion and understanding, and that the family law system is well-suited to provide none of these, it should seek to ensure that these adults are directed to more appropriate services prior to entering the system.

Once it is recognised that systems other than family law can resolve the majority of financial settlements in ways that are better, more cost-effective and, importantly, more enduring, the system should be required to take measures to minimise the involvement of family law in financial as well as children's matters.

---

[4] Nielsen, L (2018) [cited above]

Question 2: What principles should guide any redevelopment of the family law system?

1. **DO NO HARM**
   This should be a fundamental principle at the core of any family law system. If and when a government agency chooses to intervene – or not to intervene – in the lives of children and families, it must ensure that it does not contribute to the risks, harm or trauma to which people, especially children, may be exposed;

2. **CHILDHOOD MATTERS**
   Every day in the family law system puts, or keeps, a child at risk – yet, many spend months or even years there. All matters involving children must be dealt with urgently;

3. **CHILDREN'S RIGHTS & NEEDS**
   Children deserve to be protected from all forms of harm. The Family Law Act already explicitly recognises this but fails to give proper consideration or weight to one of the most widespread forms of harm experienced by children: loss of a relationship with a parent, extended family members or long-time friends. Our family law system should more explicitly recognise children's rights and needs to have those who've played a central role in their lives – whether biological or other parents, grandparents, or close friends – continuing to do so after separation, providing they are fit and willing;

4. **EVERY CHILD IS VULNERABLE**
   A recognition that every child in a separating family is at risk and that family law does not offer effective prevention or cure for the harm or childhood trauma to which children may be exposed;

5. **COMPASSION**
   Parents in separating families should be treated with respect, empathy and compassion, as we would with adults experiencing other difficult times or social issues, and other human frailties;

6. **RECOGNISE THE LIMITS OF FAMILY LAW**
   A recognition that family law offers neither cure for, nor prevention of, family violence; solutions require a fresh, broader approach including earlier interventions & education;

7. **FEEDBACK AND ASSESSMENT**
   Assessment, monitoring and feedback are essential components of most systems, but largely absent from our family law system. If family courts cannot follow up on the welfare of children after decisions, another mechanism must be put in place to ensure the ongoing welfare of children and routine feedback to judicial officers to improve their decision-making;

8. **THE REAL STAKEHOLDERS**
   Children and their families – not judges, lawyers or social workers – should be considered the primary stakeholders of any family law system (and of any review of it). Their long-term welfare should be paramount.

Access and engagement

Question 3: In what ways could access to information about family law and family law related services, including family violence services, be improved?

1. Better national coordination and consistency;
2. Simplified, readily accessible and more comprehensive online content.

However, a diverse range of alternative government and private sector initiatives would be better-placed to address family violence and family separation issues more cost-effectively.

Question 4: How might people with family law related needs be assisted to navigate the family law system?

1. By providing strong, clear direction on how to access healthier, alternative methods of dealing with 'family law related needs';
2. By providing face-to-face access to a court officer, for all parties, prior to lodgement of any Applications;
3. By creating comprehensive, online resources using plain English, and online forms that are simple to use for those without legal training or with limited computer or English skills;
4. By completely reconsidering the use of Applications, Affidavits and the current processes of family law. It is a widespread and legitimate view that much better outcomes could be achieved largely by talking openly and directly with participants at the very start of proceedings, rather than allowing prolonged processes, based on written words, to obfuscate and make complex what could have been much simpler.

Question 5: How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

This question highlights the inappropriate nature of family law proceedings for a majority of those involved in them, not just Aboriginal and Torres Strait Islander people. Our organisation has extensive experience in aboriginal communities and is fully aware of how foreign and daunting, if not impossible, any court proceedings are.

As for all Australians, the opportunity at the very start, prior even to the initiation of any legal proceedings wherever possible, for people to sit down and talk about the issues and solutions – with real people who understand any cultural issues involved – is critical.

Question 6: How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

As above, the current system is foreign and unnavigable even to well-educated, fluent English-speakers. Creating a system focussed on people actually talking directly to people who understand, would be an invaluable, if radical, shift from today's highly technical, and sometimes archaic and arcane, written-English approach.

Question 7: How can the accessibility of the family law system be improved for people with disability?

Most courtrooms by now are hopefully equipped for people with a wide range of abilities. A substantial shift to online procedures, accessible to people with limited and varied skills, would be of significant benefit to all.

Question 8: How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?
Question 9: How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

The changes we propose would greatly benefit all people, from all cultures and parts of Australia, and of all genders and backgrounds. A substantial shift away from court proceedings to human interactions with counsellors, coaches, mediators or conciliators who can readily be based in rural Australia, operate online, or specialise with respect to culture, LGBTIQ people, and other aspects of human diversity, offers improvements for all Australian families.

Question 10: What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

1. The family law system should, prior to entry, strongly facilitate (and require demonstrated attempts to use) other quicker, healthier mechanisms for resolving family issues;
2. It is profoundly wrong that decisions affecting the lives of children can be determined by the relative wealth of litigants. An adversarial legal system, staffed by lawyers charging high fees, will nearly always create, rather than diminish, inequity between the parties. There should be financial incentives to settle, not to continue with, litigation;
3. Consideration should be given to standardising or capping the costs of reports (and legal services) which vary widely in cost and cannot effectively be challenged and scrutinised by litigants, given the sensitive nature of their involvement in proceedings;

"There should be financial incentives to settle, not to prolong, litigation"

Question 11: What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

1. The current system is difficult for almost any unrepresented litigant to manage, even those with high-level qualifications in other fields;

2. Again, a shift from court- and paper-based procedures to up-front face-to-face contact, including resolution, coaching or the provision of advice and educational materials, as well as to online methods, will assist in this area;

3. Family courts should each have one or more staff members dedicated to liaising with, and readily accessible to, self-represented litigants;

4. A further shift from adversarial litigation to a range of alternatives is essential, including a renewed focused on coaching and education, enhanced mediation, and arbitration as a readily available, well-marketed supplementary alternative to court procedures. To quote former UK family court judge, Sir Paul Coleridge, "arbitration is a no-brainer";

5. In some family courts in Australia, judges deny self-represented litigants the opportunity of having assistance at the bar, or a "McKenzie friend". This further and greatly disadvantages self-represented litigants and contributes to denying them natural justice;

6. Appeal processes need to be substantially changed and simplified. At present, it is all-but-impossible for the majority of self-represented litigants to mount a successful appeal, however valid it may be. The costs are prohibitive; the bureaucratic requirements of the court arbitrary and onerous; and the manner in which prior judgments can be questioned so narrow and technical that few individuals can access natural justice and, potentially, protect their children from harm due to poor or unsafe decisions.

Question 12: What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Family Courts are, in our view, no place for unrepresented litigants. They are frightening and highly specialised arenas where only lawyers and judicial officers are at home.

Much greater efforts are needed to keep all potential litigants, and especially those without legal representation, out of court and away from legal proceedings where they are likely to be out of their depth, and their children are likely to suffer as a consequence.

Question 13: What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

Australian family courts are largely designed to be imposing and, in effect, frightening. We can see no reasonable argument in favour of adding to the stress of people involved in family law proceedings in this way. Resolving family issues should take place in family-friendly environments, not courtrooms where a judge sits, literally, on high and treats the venue as his/her own.

Alternative, family friendly locations can readily cater for having multiple entrances and multiple rooms to address any safety concerns.

Legal principles in relation to parenting and property

Question 14: What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

1. At present, despite its enormous length, the Family Law Act is both highly prescriptive and extremely vague (often in just the places where, respectively, more inclusive or more precise wording is needed). This results, among other things, in the law's failure to give sufficient direction to judges to base their determinations on the best, scientifically valid evidence and risks allowing judges, instead, to make idiosyncratic decisions informed by personal prejudices rather than medical research or objective and repeatable science;

2. Notwithstanding the clearly articulated position of the Chair of this Review with respect to parental conflict and its apparent omission from Part VII[5], and the reference to conflict in the last major review of Australian family law[6], we urge great caution and a wholly evidence-based approach to the key issue of parental conflict. Conflict, even serious conflict, does not necessarily preclude co-parenting (or shared parenting).

   In our considered opinion, it would be harmful to many children were the view that "high conflict" or even "destructive parental conflict" is incompatible with co-parenting to be reflected in legislation because, *inter alia*:

   a. Such a position is not supported by the most recent and thorough science and the latest, comprehensive meta-analysis of studies on this specific subject[7];

   b. Co-parenting can actually contribute positively to a reduction in parental conflict, as parents re-establish how to cooperate, whereas limiting access to children for one parent can significantly increase conflict, sometimes with extreme, adverse outcomes;

   c. Determining what level of conflict crosses any supposed threshold would, in practice, be impossible to accomplish objectively or consistently; and

   d. This would establish a profoundly dangerous incentive whereby parents who create more conflict, or at least the appearance of it, are rewarded with more care of children and more money, and children would be harmed as a consequence.

> "The view that parental conflict and co-parenting are incompatible is not supported by the best evidence and, were it to be enshrined in legislation, would create a powerful incentive for the escalation of conflict and cause greater harm to many children."

[5] e.g. Rhoades, H. (2014). Families, policy and the law. AIFS. https://aifs.gov.au/sites/default/files/fpl17.pdf
[6] "Every picture tells a story" (2003). House of Representatives Standing Committee Report.
[7] Nielsen, L (2018). Journal of Divorce & Remarriage. https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1455303?src=recsys

3. Current legislation does not adequately reflect the diverse nature of families in 2018 nor, most importantly, does it provide an understanding of either the science of what's best for children or of children's views of who is important to them. Such factors should be explicitly incorporated into revised legislation;

4. We believe that, notwithstanding its mantra of the best interests of the child, the Family Law Act had its origins in, and was developed in the context of, determining parental disputes; it needs to be substantially reframed from the perspective of children if we are genuinely putting them first;

5. Truly child-focused legislation should require that judicial officers explicitly consider all individuals with whom a child has had a close connection or bond and, if they are fit and willing to maintain that connection, determine how each of those significant relationships will be maintained after separation;

> "Revised legislation should require judicial officers to explicitly consider how a child will maintain relationships, after separation, with all individuals with whom s/he had prior, significant and positive relationships."

6. Further, given that precedent has made it difficult (especially for self-represented litigants) to introduce scientific evidence into court proceedings, and that judicial officers may not have sufficient knowledge of the best and most recent scientific research, we strongly advocate that changes to the legislation clearly guide judicial officers by reflecting the best medical and scientific research, especially with respect to the impacts of childhood trauma and physical and psychological harm, and the emotional (and financial) benefits of ensuring that all of a child's important and healthy relationships are fully maintained after separation;

7. Adversarial law is, in many ways, the antithesis of science. And choosing to rely upon legal arguments based on advocacy to determine children's futures, rather than scientific evidence, does harm and injustice to children. Science is repeatable and consistent; by contrast, the idiosyncrasy of judicial decisions is even anticipated in legislation that expressly precludes appeals on the basis that a different judge might have made a different decision.

   Science is the best way we know to predict future events: the arrival of a comet, the risks and likely outcomes of smoking, and how children will best thrive after separation. Family law is being asked to do something that intrinsically it cannot do; unlike other aspects of law where judgments are based largely on past events, family law is, in addition, attempting to predict what's best for the future of children. Yet, it does so without primary reliance on available science and its repeatable analyses of large sample sizes, preferring instead to insist that every family is different and that an individual judge knows best.

> "Revised legislation should place greater weight on scientific evidence and less reliance on legal advocacy in order to reduce harm to children exposed to the family law system."

To produce the best outcomes for children (which, in our view, cannot be accomplished within a family law system), revised legislation should reflect the latest scientific evidence; permit the presentation of scientific evidence in the courtroom (notwithstanding existing case law); and monitor, and obtain feedback on, all decisions made at least on an annual basis until children reach the age of 18.

Question 15: What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

1. Decisions concerning children exposed, or potentially exposed, to family violence are of the utmost urgency. We believe that violence is a criminal matter and should therefore be dealt with, urgently, in local courts;

2. The issue of family violence and abuse of all forms towards children should be given much greater prominence. As should a recognition that science has documented how the psychological components of abuse and violence, whether or not physical violence is involved, are the most pernicious and enduring; at present, insufficient weight is given to psychological abuse/violence in general;

3. The definition of family violence should, more explicitly, cover the forms of violence to which children are most commonly exposed. In addition to referring to sexual/physical abuse, it should, more explicitly address psychological abuse and violence, the harm from which can be lifelong rather than immediately visible. *Inter alia*, this should explicitly include the extreme and abusive psychological manipulation (commonly referred to as "poisoning a child's mind" or "turning a child against a parent") to which many children are exposed during family separations, especially those involved in protracted family law proceedings.

Question 16: What changes could be made to Part VII of the *Family Law Act* to enable it to apply consistently to all children irrespective of their family structure?

As above, instead of being focused in effect on which of two parents gets the kids, genuinely child-focused legislation should require judicial officers to give explicit consideration to all people with whom a child has had a significant connection or bond and to determine how each of those significant relationships (unless proven harmful to the child) will be genuinely and substantively maintained after separation.

The findings of scientific and medical research, which prove both the harm done to children when excluded from loving family members and the benefits of children having both parents playing central roles in their future lives (instances of family violence or abuse excepted), should strongly inform how the legislation is framed.

> "Judicial officers should be required to give explicit consideration to all people with whom a child has had a significant connection … and to determine how each of those significant relationships will be genuinely and substantively maintained after separation."

Question 17: What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Question 18: What changes could be made to the provisions in the *Family Law Act* governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Question 19: What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

It is important to keep financial matters as separate as possible from children's matters. The nexus between financial settlement (both assets and income) and percentage parental care creates a powerful incentive for outcomes that are not best for children's long-term welfare and greatly prolongs and inhibits more rapid settlement of children's matters in many cases.

The law should, as a baseline, routinely consider the assets of parties at the start and end of their relationship, and the net change. A simpler, more formulaic approach to finances could also be applied, unlike the often-arbitrary approaches in many judicial decisions.

> "Although introduced for understandable reasons, the nexus between the percentage of any financial settlement and the percentage of parental care results in great harm to many children. This direct connection needs to be dismantled."

Resolution and adjudication processes

Question 20: What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

A high proportion of cases could be resolved far quicker and far more cheaply by holding a more substantial first hearing, before an experienced judge or an experienced family consultant, where all issues are ventilated and considered, other family members and those with knowledge of the children could participate, and litigants are permitted to talk openly rather than hide behind the obscure language of affidavits and lawyers acting in their individual interests rather than the broader interests of the children and family as a whole.

Family court cases become more complex the longer they are within the system. For many, children's matters can be resolved relatively swiftly, especially if kept largely separate from financial matters.

"Family courts create complexity"

Even more importantly, courts should ensure that all avenues of coaching, education, mediation, conciliation and arbitration have been exhausted before costly and harmful court proceedings are allowed to begin.

Question 21: Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

Yes. In fact, as above, courts should require that, other than in demonstrably exceptional cases, all alternative services and processes have been exhausted prior to accepting an Initiating Application.

> "Alternative, non-court methods of dealing with family separation should be a primary focus of this review."

These alternative processes – including coaching, enhanced mediation, conciliation and arbitration for both financial and children's matters – should be a primary focus of this Family Law Review.

Question22: How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

Financial matters should consistently be diverted to high quality mediation and arbitration (as can occur under the AAT). The family law system should be obliged to ensure that all such avenues, whether through the private sector or government, have been exhausted prior to accepting Applications.

Question 23: How can parties who have experienced family violence or abuse be better supported at court?

1. See Executive Summary: Family Violence (above);

2. Parties who have experienced family violence or abuse should be treated with the utmost understanding and compassion. The family court environment is not well-suited to do this. Such individuals need appropriately qualified support workers and health professionals, rather than lawyers;

3. Such individuals should not be required to encounter those who have committed the violence or abuse, and should certainly never be cross-examined by them. It is our view, more broadly, that cross-examination is an entirely inappropriate and inhumane

procedure for partners or ex-partners under all circumstances;

4. Parties seeking to prove potentially criminal matters such as family violence or abuse should do so through local courts, not family courts, where adversarial cross-examination by professionals may be appropriate. Adversarial cross-examination is not appropriate for the majority of separating families, especially where children are involved and their parents need help to work together for the sake of their children, not a system that pulls them significantly further apart.

Question 24: Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

1. Assessing violence/abuse:
   As above, where parties are seeking to prove family violence or abuse, the expertise of local courts should be urgently employed;

2. Helping victims/perpetrators:
   Given that family law offers no prevention, cure or solution to family violence or abuse, other processes should certainly be prioritised. Both perpetrators and victims are likely to need help, coaching, counselling and/or education and support. Courts are not the appropriate venue for this and courts do not have the necessary expertise in-house to determine the most appropriate remedies;

Question 25: How should the family law system address misuse of process as a form of abuse in family law matters?

Misuse of process is, in our view, not merely commonplace, but an almost inevitable part of the current family law system and one of the many reasons why it will never be fit-for-purpose. The best way to address this is to keep families away from such a system.

As it stands, our family law system empowers and rewards individuals who are unreasonable, coercive or manipulative at the expense of individuals who are reasonable or genuinely focused on what's best for any children involved.

Furthermore, the very existence of this system, and community understanding of how it operates and can be abused, contributes to settlements that are not best for children in many families who avoid court. The implicit threat of going to court is sufficient to coerce a reasonable parent into an unfavourable settlement, both for themselves and their children, because they realise the damage of court proceedings will be even greater.

For families allowed to enter such a system, it is imperative, among other things, that:

- Orders are consistently and reliably enforced;
- Judicial officers are supported in making brave decisions that disincentivise misuse of process; and
- Parents are not rewarded for improper conduct, including the withholding of children from fit and loving parents without good reason or court order.

Question 26: In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

1. See Executive Summary: Family Separation/Divorce (above);

2. A diverse range of private sector and government alternatives to family courts must, as a high priority, be created, incentivised and encouraged;

3. Unlike the family court system, where scrutiny and feedback is almost entirely absent, these fresh, alternative approaches should be subject to ongoing review such that evidence is created of the relative success of different methods;

4. Such alternatives must be properly and widely marketed as mainstream alternatives to courts and, given the long-standing presence (or market-advantage) of the family courts, the government should facilitate and, to some extent, fund this promotion;

5. Alternative processes include: high quality apps for smartphones or computer usage that can address all issues ranging from communication between parents to educational coaching; high quality personal coaching, as much as counselling, for parents; enhanced mediation and conciliation, where parents may be prepared (as in some parts of New Zealand) with pre-emptive coaching and mediators/conciliators are highly trained;

6. It is imperative that such alternatives are somehow mandatory and that the family law system ensures that all such options have exhausted before allowing families access to our much more expensive, less cost-effective, and less effective family courts. Especially where children are involved, it must never be acceptable to say some parents simply can't mediate and must therefore be allowed to go to court. Our greatest responsibility must be to those children;

7. The onus must be placed on the family law system to protect children from entering a family court process that will inevitably cause further harm to them.

Question 27: Is there scope to increase the use of arbitration in family disputes? How could this be done?

Arbitration, whether through a government agency such as a new Tribunal or Commission or through equivalent private sector initiatives, should be mandatory prior to acceptance of applications by family courts – both for children's and financial matters.

Courts should only become involved in a minority of cases – where, for instance:

i) a party wishes to prove family violence or abuse (in which case it should be local, not family courts);
ii) a party wishes to appeal otherwise-binding arbitration; or

iii) a party can demonstrate that they have genuinely attempted to engage in the use of online/ smartphone apps; coaching/counselling; mediation/conciliation; and arbitration, but the other party has refused to do so.

Question 28: Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

Yes, online dispute resolution processes should be part of a diverse range of government and private sector initiatives that provide more cost-effective and healthier alternatives to courts.

Such processes can best be supported by making them mainstream through marketing and education and by ensuring that family courts do not allow access to those who have not attempted to use such alternatives.

Like the family court processes themselves, all interactions between family members via any such process are subject to abuses. Many new approaches, however, including smartphone apps, allow monitoring by a third party, whether a lawyer, mediator or counsellor. Such measures can minimise risks much better than the court system.

Question 29: Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

Yes, but why do this within the family court system when it can be done so much more effectively without?

We also believe that the phrases "complex needs" and "complex cases" are often misused. Much of the complexity of family law proceedings arises from the proceedings themselves: the excessive duration, with ever-changing circumstances; the prevalence of psychological child abuse as a consequence of this; the use of legal advocates to exaggerate, minimise or hide the human frailties of those involved. The evidence of what is going on in a family is often much easier to elicit at the start of proceedings – or, better still, before they have even begun.

Question 30: Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

We're unclear as to the meaning of, or anticipated answers to, this question. At every stage, families should be given the best possible tools to resolve matters without putting them in the hand of a government agency such as the family court. Australia's government agencies do not have a good track record of being good parents, and our family courts are no exception.

Integration and collaboration

Question 31: How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

See above.

Question 32: What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

Safety concerns for children come in several categories. Some need to be dealt with urgently by the appropriate authority. Many can be best addressed without accessing any court at all.

> "The safety of children and adults who may be affected by family violence is best served by State-based child protection agencies, courts & police systems, providing all professionals involved have specialised training and performance and outcomes are independently monitored."

1. Where there are concerns for the safety of children that amount to potential criminal activity, including violence or abuse, an individual should be able to access a local/criminal court on an urgent basis;

2. Where those concerns may not be about behaviour amounting to criminal activity, an individual should have ready access to State-based child protection services, as at present;

3. It is very common in family court proceedings, for instance, for both parents to express safety concerns for their children when with the other parent. Where concerns are minor or about parenting differences, or where it has been not been found that children's safety is at risk, it is imperative for the long-term safety and welfare of children that such concerns are not allowed to be used to manipulate decisions about a child's parental care or access to parents and extended family members.

Question 33: How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

Uniform national policies, and seamless integration between agencies, are important. But far more substantial changes to the current system are required (see above) if children are genuinely to be better protected from harm.

Children's experiences and perspectives

Question 34 How can children's experiences of participation in court processes be improved?

"The family court completely failed us." Amelia C, WA

These were the words of a teenager whose mother had killed herself, after murdering her two other daughters, and who could clearly see the impact that court processes had on her mother and family.

> "My overall experience of the Family Court has been one of immense negativity, distress and trauma. The social workers, counsellors, and psychologists who interviewed me throughout my childhood caused me to develop a deep mistrust of mental health care workers, a mistrust that lasted until I was well past 14 years of age."

The biggest issue here is not children's experiences of court processes, though these are bad enough, but their experiences of the outcomes: being left with abusive or mentally unwell parents; being removed suddenly from loving parents; losing significant relationships with multiple family members; becoming depressed or suicidal; and being exposed to life-threatening family situations.

Family separation, where family courts have been involved, is a common denominator in the tragic deaths of many Australian children.

Firstly, and most importantly, we need to keep as many children and their families as possible away from court systems entirely – with much earlier interventions, education programs etc. (see above). Involvement in court proceedings adds significant risk of harm to many children.

Once involved, however, a child should have automatic and ongoing access to a single, highly qualified professional. This person should have highly specialised skills as a child psychologist/psychiatrist, well-trained in working with children, forensic analysis and fully aware of the susceptibility of children to repeated, leading or suggestive questioning and to psychological manipulation and abuse.

Neither independent children's lawyers, nor judges, have the prerequisite training for this specialised task and ICL's, trained to represent the wishes of their client, often fail to distinguish the subtle, but significant, difference between representing the statements of a child and representing the best interests of that child.

> "My young children were interviewed by sixteen different people from the family court and child protection during our three years in court. That's psychological abuse in my view, but I was powerless to stop it."
> Lorraine M, VIC

It is imperative that children are not interviewed multiple times by multiple people. They should be interviewed once by a highly qualified specialist and this interview should be recorded so that the conduct and conclusions of that specialist are open to scrutiny.

Question 35: What changes are needed to ensure children are informed about the outcome of court processes that affect them?

This question illustrates further how the current system is wrong. Children should have someone they can trust to talk to at all times before, during and after the process – not just someone who comes and tells them "the outcome".

Children should be able to talk to long-trusted individuals – grandparents, godparents, school counsellors etc. – at all times. And, lessons should be taken from international schemes such as Scotland's 'Get it Right for Every Child' (GIRFEC) where children might have an assigned representative long before involvement in any family law proceedings.

Question 36: What mechanisms are best adapted to ensure children's views are heard in court proceedings?

Much more must be done to prioritise systems that keep children out of court proceedings entirely.

Judges, lawyers and most court professionals do not have the specialist skills to listen to, and correctly interpret, what children say. As above, children should be given the opportunity, early on in proceedings, to speak with a highly skilled professional.

Long-time family friends and extended family members are generally better placed to provide children's views to a court than an expert who sees a child for an hour or two and may not be able to tell the difference between a child who has been physically abused by one parent, or psychologically abused and manipulated by the other.

It is imperative that people who have known a child for a long time, and are trusted, are involved.

Question 37: How can children be supported to participate in family dispute resolution processes?

See above.

1. Individuals who know the children well, and who have known them for some time – extended family members, school counsellors etc. – should be given the opportunity to provide evidence. This evidence should be given significant weight, especially in consideration of the fact that court experts usually only meet a child for an hour or two;
2. Where necessary, children should speak with a single, highly trained professional who can share their views with the court. At present, there is a great shortage of professionals with the necessary experience of working with children, forensic analysis and understanding of court processes.

Question 38: Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

There are enormous risks in involving children in decision-making processes. The clear consensus of international experts is that children should NOT be involved in decision-making. Allowing them to think they have to choose between their parents is generally recognised as a form of psychological abuse.

> "There is a world of difference between empowering children and making them feel responsible. One is good. The other can harm them for life."

A strong distinction must be drawn between empowering children – not leaving them in the dark for months about what's happening to their family and allowing them to have a voice – and making them feel responsible, which can be deeply harmful.

Involving children also creates the most powerful of incentives for one parent or another to influence their stated views – and this "turning a child against a parent" or "poisoning a child's mind" is now so commonplace in family law proceedings, and causes such profound, lifelong, psychological harm to children, that many family court judges and lawyers have described it as one of the most difficult problems of all to deal with.

Children are, of course, enormously susceptible to the views and behaviour of their parents. In most circumstances, this is good; it's what parenting is all about. But, in the context of family separation, where most parents are not functioning at their best, children become exceptionally vulnerable to inappropriate, extreme or undue influence.

> "No slave was ever so much the property of his master as the child is of his parent" Maria Montessori

Question 39: What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

This question again highlights one of the great dangers of involving children in court proceedings at all.

No child should be left in the dark about what is happening to their family; they are all, by definition, involved or participating in their family's separation, whether or not courts are involved. In our model of family separation, children would always be able to participate through trusted family members and friends, and through a single, well-qualified expert.

However, when a child expresses an explicit wish to participate in "family law system processes", this should be approached with great care (see above). The younger the child, the more likely that the child requesting this has been subject to undue influence, and the more likely that the views and "wishes" they put forward are not genuinely their own.

Question 40: How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

1. By thoroughly analysing the existing literature, and academic papers, on children's lived experiences;
2. By liaising with organisations like *For Kids Sake* who speak with many children who have experience of family law processes;
3. By producing an objective meta-analysis of all such data;
4. By conducting large-scale surveys of young people's experiences (as some Children's Commissioners, for instance, have already begun to do);
5. Most importantly, by routinely following up on all children whose lives have been affected by a government decision (whether in a family court or through a child protection or other department).

"Imagine if a hospital never followed-up on major, life-changing procedures it did on children, and never got feedback to improve its decisions and operations. It would be a national scandal and front-page news. Yet, every year, our family courts make profoundly life-changing decisions for thousands of children – with no routine follow-up or feedback."

"In terms of whether it's a positive or negative outcome, [judges] would probably never know." Former Family Court CEO, Richard Foster, 2016 Senate Estimates.

Professional skills and wellbeing

Question 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Core competencies:

1. Highly developed personal skills for interacting with children of all ages, dispositions and cultures;
2. Highly developed personal skills for interacting with adults under extreme stress who are often in need of great compassion and understanding;
3. High-level understanding of child psychology and behaviour;
4. High-level understanding of adult psychology and behaviour;
5. Specialist training in child psychology and psychiatry and in objective observation and reporting;
6. Specialist training in forensic skills, especially when dealing with children. It is essential that all professionals come to each task with an open mind and do not pre-judge any individual. Adopting, in advance, any specific approach – including, for

instance, Trauma-Informed Care and Practice that makes an up-front assumption that an individual has been harmed – can be highly detrimental to children;

7. Specialist training in child suggestibility, in the susceptibility of children to influence, and in methods of appropriate, open questioning and of avoiding leading or suggestive approaches;
8. Specialist training in court procedures, and a thorough understanding of an adversarial family law system;
9. Specialist training in report-writing for courts, including:
    a. avoiding jargon and writing in plain English;
    b. understanding how an adversarial system may readily use careless words; and
    c. not over-stepping the limits of their knowledge or role.

Required measures:

1. A new, national accreditation system for professionals able to demonstrate each of these core competencies, without which professionals should not be able to practice on children or within the family law system;

2. A requirement for ongoing, annual training in each of these core competencies and in the latest scientific and academic research;

3. A new, independent, national regulatory body to monitor the conduct and performance of all professionals involved in this field, including but not limited to social workers, counsellors, psychologists, psychiatrists, lawyers and ICLs, and potentially even judges.

    AHPRA does not have the core competencies to do this work; is not transparent in its review processes; is not responsible for all professionals, such as social workers; and is not able to function wholly independently of the family court system, which currently prohibits its investigation of professionals during proceedings and must give its permission for any investigation to occur and for any court documents to be used.

    "All professionals who make life-changing decisions about children should be subject to transparent and objective scrutiny. Such scrutiny must be carried out in a timely manner."

4. An independent, publicly available, online database of professionals showing their accreditation to be involved in children's and family law matters, and showing any reviews of their work by the regulatory body and, in particular, any positive or adverse findings.

Question 42: What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

Core competencies:

1. Highly developed personal skills for interacting with adults under extreme stress and, often, in need of great compassion and understanding;
2. An awareness of the risks of their own conduct being coercive, given the great power-imbalance in 'their' courtrooms; a recognition that with great power comes great responsibility;
3. High-level understanding of adult psychology and behaviour;
4. Specialist training in objective observation and assessment of evidence, and in avoiding confirmation and other biases;
5. Specialist training in child suggestibility, in the susceptibility of children to influence, and in methods of appropriate, open questioning and of avoiding leading or suggestive approaches;
6. High-level knowledge and understanding of the latest scientific and medical research on all relevant issues, including but not limited to: factors that affect the long-term wellbeing of children; the lifelong impacts of childhood trauma, physical and psychological abuse, or the loss of close family members; the relative success of children in intact, single-parent and co-parenting environments; the impact of family conflict on best outcomes for children; the importance for children's development of not being exposed to violence, abuse or neglect and of maintaining pre-existing relationships with all family members who are fit to do so.

Required measures:

1. A requirement for ongoing, annual training in each of these core competencies and in the latest scientific and academic research;

2. An independent, publicly available, online database of judicial officers showing evidence of their core competencies and of further, ongoing training, as well as any reviews of their work on appeal, or by the proposed, new regulatory body;

3. Despite their life-changing decisions, judicial officers receive little or no feedback about their work or the outcomes of any of their decisions. Senior judicial officers cannot be sued for improper conduct, and their findings can only be questioned, via appeal, under a narrow range of circumstances, and often only with the permission of the judicial officer in question. This profound lack of transparency and scrutiny is not acceptable. Not when children's lives are at stake.

   All judicial officers should be subject to investigation and monitoring by a new, independent, national regulatory body that should be established to routinely monitor and assess the conduct and performance of all professionals involved in this field, including but not limited to social workers, counsellors, psychologists, psychiatrists, lawyers and ICLs, and even magistrates and judges.

Question 43: How should concerns about professional practices that exacerbate conflict be addressed?

Australian family law is adversarial; finding fault and creating conflict is an inherent part of the system. The idea that one can make it less so, for instance by introducing a Less Adversarial Trial system, is flawed.

The best way to address these concerns is with a paradigm shift: separating families should be kept away from an adversarial, conflict-generating system and helped in healthier, more child-focused environments.

Many aspects of the current family law system exacerbate conflict:

1. The stress of meeting lawyers and entering a frightening court building and process;
2. The high stakes created by the current system – of one's future, financial security and one's access to children;
3. The fact that lawyers are paid by the hour, rather than incentivised to settle;
4. Some lawyers encourage their clients to show greater hostility towards, or conflict with, their (ex-)partners;
5. Lawyers rarely communicate with self-represented litigants in a humane or compassionate manner and rarely recognise their obligations as officers of the court which, notwithstanding what they want for their client, should still put children's best interests first;
6. Lawyers frequently file documents late, at hearings, or contrary to orders, and appear to use this as a means to disadvantage other parties, especially self-represented litigants;
7. Legal and judicial conduct prolongs rather than minimises negative interactions between parents.

Each of these, and many other such examples, could be individually addressed. But only with a more holistic approach to dealing with family separation, treating it as child health issue rather than as a legal issue, will such concerns be properly addressed.

Question 44: What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

Working within the family law system can be highly stressful; everyone knows that the stakes are high, and workloads can be extreme.

The most important approach would be to dramatically reduce workloads by keeping a major proportion of potential family law cases out of courts, in healthier, alternative systems, and by creating systems that help resolve them well before they reach court.

The culture of coercive conduct and bullying that appears to pervade the judiciary, at least in some jurisdictions, must also be addressed as a high priority.

Governance and accountability

Question 45: Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

1. s121 should be substantially amended. In our view, it currently serves primarily to prevent scrutiny of the system, rather than to protect children. It is not in the best interests of children, or society as a whole;

2. For a start, s121 does not successfully safeguard the privacy of families and children; it purports to shut a stable door when that particular horse has bolted. What matters most to children is what their family, friends and school know, and what's said at home, at school and on social media used by family and friends. None of this is effectively prevented by s121; in fact, this potentially provides a further example of systems abuse as reasonable individuals are likely to observe its provisions strictly, while unreasonable parties are rewarded (and rarely, if ever, penalised) for making their stories public and defying this piece of legislation;

3. Anyone should be allowed to make notes in courtrooms (a right currently and routinely denied at least in courtrooms in the Family Court of WA); parties should be allowed to discuss their proceedings publicly; and media, subject to normal codes of conduct, should be allowed to publish information about any cases that are in the national interest;

4. The fact that a major national newspaper[8] feels unable, in 2018, to publish the name of a court-appointed expert in family law proceedings whose behaviour was so egregious that he has been sent to a State Administrative Tribunal for professional misconduct, illustrates the far-reaching consequences of s121 as it stands.

   Media should be encouraged to report responsibly on family law proceedings, not inhibited by draconian legislation.

5. Importantly, like the family law system in general, s121 sets the tone for all separations across the country and contributes to the perpetuation of the stigma associated with family separation and divorce: that it should not be talked about in public. This is harmful to society as a whole, and children in particular; we need to accept that family separation is part of life and facilitate it being talked about in a normal manner.

[8] *The Australian*, May, 2018

Question 46: What other changes should be made to enhance the transparency of the family law system?

1. See above;

2. It is imperative that all professionals involved in family law procedures, whether social workers or judges, be subject to scrutiny, review, monitoring and fair and transparent complaints processes;

3. The establishment of a new, independent regulatory body should be a high priority;

4. The establishment of a transparent, publically accessible accreditation system for all professionals is essential;

5. The fact that even note-taking is still prohibited in courtrooms, such as in the Family Court of WA, is an illustration of how far we have to go to make our family courts transparent and to override the culture of secrecy (under the false pretext of protecting children) that pervades the entire system and contributes to maintaining an unhealthy model for how family separations may best occur.

Question 47: What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

1. See above;

2. There should be one, uniform, national system of family law, with a single administration that minimises expenditure on bureaucracy and complexities of procedures;

3. Salaries, allowances and benefits for judicial officers should be regularly reviewed, performance-based and readily available to the public;

4. All judicial officers and officers of the court should be subject to routine and transparent assessment, scrutiny and performance analysis;

5. One reason for the lack of public confidence is that the system appears to be a law unto itself. Few professionals are more immune to scrutiny, complaint or prosecution, for instance, than family court judges.

   By legislation and case law, it is not possible to take legal action against a judge, even if their conduct has been highly and demonstrably unprofessional; even heart surgeons do not enjoy such immunity. There is no clear pathway for a litigant even to make a complaint against a judicial officer, and few self-represented litigants or legal professionals would dare do so during litigation anyway. The appeal process, furthermore, provides only a highly complex, unaffordable, and narrow avenue for disputing the decision of a judge; it does not address other aspects of their conduct.

   To many, this gives rise to a strong sense of injustice; for some, it gives rise to an appearance even of corruption. If greater public confidence is sought, family court judges, and all judicial officers, should not have privileged status or immunity relative to other professionals. And, nor should barristers or expert witnesses. Legislation should be revised to reflect this;

6. The establishment of a new, independent body with regulatory oversight over all professionals involved in family law matters would go a significant way to improving the current situation. The stakes are far too high – the welfare of thousands of children – to leave oversight to any in-house Legal Practitioners' Complaints Committee, or to AHPRA, which rarely investigates allegations of professional misconduct in a timely manner or at all, and is not responsible for all professionals working in family law, such as social workers;

7. Australia's family law system, however, has too many fundamental and inherent flaws to warrant great public confidence or for confidence to be greatly improved. Though this was one of the primary, publicly stated goals of the last Chief Justice of the Family Court, it proved impossible; there is simply too widespread a view that our family courts are the wrong tool for the job for most families and not fit-for-purpose.

Some questions we should be asking

A much broader Inquiry into Family Breakdown/Separation is urgently needed. Terms of reference should not be focused primarily on family law, but on much more holistic and health-focused approaches. These are the questions we should be asking in the inquiry that we believe is needed: Protecting Children Beyond Family Separation.

We request that the Australian Federal Government inquire and report into the adequacy and ability of current policies, procedures, services and legislation to provide the best long-term outcomes from family breakdown/separation for children, with a focus on:

1. the long-term mental and physical health of children and their families exposed to family separation in general, and family court proceedings in particular;

2. the adequacy and appropriateness of evidence used in imposing outcomes on children and, in particular, the extent to which the best scientific research on what's important and best for children is, or should be, used as a foundation for decisions about their future;

3. the adequacy of any measures of accountability or outcome-based assessment of professionals, agencies and institutions involved (including the Family Court of Australia, the Federal Circuit Court and the Family Court of WA) and the extent to which each of these monitors, assesses and obtains feedback from the results of their interventions;

4. the appropriateness of the qualifications and experience of professionals involved in assessing children and their families, the adequacy of their training, and the appropriateness of the methods by which they are engaged;

5. whether current agencies involved in mediation, relationship counselling, and family dispute resolution are adequately qualified to do so and whether their approaches are sufficiently evidence-based and outcome-focused;

6. the extent to which family court proceedings increase the conflict and complexity of cases and to which modern alternatives – including expertly managed conciliation or arbitration in non-court environments – might minimise such factors;

7. the adequacy, availability and accessibility to families, prior to and during separation, of educational resources and support regarding emotional, health and legal aspects of the process of separation and of its specific, extreme health risks to children;

8. the adequacy of promotion, marketing and cultural awareness of the healthiest and most cost- effective routes to family separation;

9. the financial costs of family separation to the Australian economy, including: budgets of family courts, legal aid and family relationship centres; costs of legal services to families; loss of family earnings; lifetime consequences for children due to diminished finances in critical years; consequent medical and financial costs due to diminished mental and physical health, self-harm, disability or the death of children and/or members of their families.

Conclusion

Major changes to our family law system, and to the Family Law Act, are urgently needed. But, we must recognise that family law will never prevent, let alone cure, family violence. And it will neither prevent nor cure the childhood trauma to which family separation can expose children. In fact, it can exacerbate both.

A paradigm shift is needed in how we view and address family separation. We must recognise that, most importantly, this is a child health issue, not a legal issue. As one Canadian family court judge recently put it, family separation and divorce are a "public health crisis that doesn't belong in the courts".[9]

This Review will be of great benefit to children if it recognises the limits of family law and strongly advocates making alternative ways of dealing with family separation mainstream. Family courts must be absolutely a last resort; the number of court proceedings each year demonstrates that this is not currently the case. Our courts must also model, for the whole of our society, procedures and outcomes that are demonstrably best for children.

Some of the most progressive and necessary measures may seem counter-intuitive or, at least, contrary to the direction in which policy changes appear to be heading. But, if a rigorous, evidence-based approach is adopted, rather than any resort to anecdote or ideology, the appropriate policies become clear:

1. Yes, children should not be left in the dark about decisions that may transform their lives. And they should have a voice. But, in seeking to empower children we must, at all costs, avoid forcing them to bear responsibilities that children should never have to bear. And, even more importantly, we have a responsibility not to facilitate their abuse by incentivising parents to exert coercive, undue influence on them;
2. Yes, children do better when conflict is minimised – in intact as well as separating families. But, children suffer far more through losing parents and other loved family members than through being exposed to some levels of conflict;
3. Yes, there are many ways in which family separation and family violence intersect. But, they are also distinct phenomena. It is important that we do not produce bad policy for the majority of children by conflating the two;
4. Yes, parents need additional financial support after separation, especially if their working careers have been sacrificed to bring up children. But, linking the percentage of financial settlements directly to the percentage of parental care – however sensible this may seem – results in great harm to many children. There are much better ways to address this that don't result in long delays in resolving children's matters and don't prolong conflict between ex-partners to the financial and emotional detriment of their children.

We wish the ALRC well in considering our and other proposals for important changes.

[9] http://www.cbc.ca/radio/outintheopen/conquering-divide-1.4249833/a-family-court-judge-calls-divorce-a-public-health-crisis-that-doesn-t-belong-in-the-courts-1.4250087