

Anglicare WA

The role and objectives of the family law system

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

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

We would agree with the proposal made in the issues paper that family law principles should be child-centred and trauma-informed, should ensure equality of treatment for children regardless of their family structure (though we would advocate equity, rather than equality, of treatment), should foster ethical professional practices and should promote a learning culture.

We would add that there should be more of a focus on children, on hearing children's voices and on providing children with support while their families travel through the family law system. The system should be child-friendly. There should be more advocacy for children and for vulnerable parents and family members. There should be more acknowledgement of different family forms and a willingness to find solutions which fit those forms. There should be recognition that, increasingly, core business for the Family Court and for Family Relationship Centres is working with families with complex needs. In these families, relationship problems co-exist with legal problems, and often they need an individualised approach.

We would consider that the Family Law Act's focus on children's "best interests" needs to be more clearly defined.¹ Currently, the principle of the need to protect children from harm by being subjected or exposed to violence and abuse outweighs the principle that children benefit from having a meaningful relationship with both their parents. However, both of these principles outweigh others which we believe should be highly important in decision making, notably the views of the child, the parents' present and past attitudes towards the responsibilities of parenthood, and cultural factors.² These are only specifically in relation to Aboriginal and Torres Strait Islander children, at present, and should probably be widened at least to include children from CALD backgrounds.

We would recommend that the Family Court and the family law system should be considering parents' willingness to provide safe and appropriate parenting to their children, as well as parents' sensitivity to their children's needs. We would recommend that one of the primary considerations when determining what is in a child's best interests should be the parents' attitudes towards the responsibilities of parenthood and their willingness to engage in programs designed to help them provide appropriate parenting, where necessary.

¹ Section 60CA of the Family Law Act places the child's best interests as the paramount consideration when making a parenting order.

² Section 60CA of the Family Law Act, subsections 2 and 3.

In addition, children may be prevented from accessing professional services that would help them by a parent's gatekeeping.³ Possibly parents *should* be required to provide a court with evidence that contact with both parents is in a child's best interests.⁴

Further, we would argue that relationships and parenting are not the same thing. Children have a right to a relationship with both parents, but that should not equate to an approach that children have a right to have time with both parents - if it is not safe for them, or for their parents, for them to do so. Even where violence and abuse are *not* present, continued high conflict between parents (especially if conflict is enacted in their presence) will be damaging to children.⁵

We would note that Family Relationship Centres were set up in 2006 with amendments to the Family Law Act that required parents to attempt family dispute resolution prior to applying to court. Attempting family dispute resolution prior to a court application did not become mandatory until July 2007, and did not apply to *all* clients with issues in relation to children until July 2008. Funding to FRCs has been subsequently cut, reducing staff numbers, increasing waitlists (already increased as a result of the requirement for every separating couple who wanted to use the Family Court in relation to children to attempt family dispute resolution first) and putting pressure on centres to focus on resolving issues quickly. We would argue that the family law system should focus on the original concept of family relationship centres, to keep families out of the court system where possible. Increasingly, we are seeing clients who need far more than a revolving door approach.

Several sections of the Family Law Act require the court to consider the possibility of reconciliation during proceedings for divorce or other court proceedings, and to ensure that people are provided with information about reconciliation, prior to making applications for divorce, financial orders or children's orders.⁶ We consider that these sections are probably obsolete. Couples who are married cannot apply for a divorce for at least 12 months after separation. Couples who seek orders about children must attempt family dispute resolution or receive an exemption from that requirement prior to being able to apply to court. In

³ See research by Bagshaw et al, which found that parents might prevent children from accessing help or counselling by not being available to transport the children, by not being available due to their own issues, or simply by denying consent. D Bagshaw, K Quinn, and B Schmidt, (2006). *Children and families in transition towards a child-centred integrated model of practice*. Magill, S. Aust.: Hawke Research Institute for Sustainable Societies, University of South Australia

⁴ "...courts start from the assumption that contact with both parents will be in the best interests of the child and there is therefore no requirement for either parent to provide evidence that this will be the case." *"Hearing Children in Court Disputes Between Parents"*, CFRC Briefing 65, January 2013

⁵ There is an excellent summary of the literature on the effects of interpersonal conflict between parents on children, and the effects of intimate partner abuse between parents on children, in K N Bergman and E M Cummings, 2018, *"Considering Destructive Interparental Conflict and Intimate Partner Abuse: is there a difference?"*, Family Court Review Vol 56 (2) pp 209 - 218

⁶ Sections 12A and 12C of the Family Law Act

addition, at least half of the applicants the Family Court is dealing with are people who have never married.⁷

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?

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

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

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

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

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?

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?

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

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

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?

The Family Court website is complex and the legal system difficult to navigate for people without a high level of English comprehension and analytical skills. The issues paper suggests the possibility of clients being allocated a navigator to assist them through the family law system and provide them with information on how to access services available to them. There are a number of models for how this might work.⁸

In 2006, when Family Relationship Centres were set up, there was a belief that families accessing the FRCs for family dispute resolution (FDR) would be capable of resolving their issues in about 3 hours. FRCs were unprepared for the level of complexity of the families entering their doors. The levels of therapeutic family dispute resolution and associated supports that are needed to shift the parents from a position of entrenched high conflict to

⁷ 65% of applications for parenting orders in the Family Court of Western Australia were by unmarried couples (personal communication by Principal Registrar during Walk in Their Shoes tour of Family Court, 2014)

⁸ For instance, the Family Safety Practitioner model run by Relationships Australia in Victoria, the FASS model co-located in the Family Court, the Neighbourhood Justice Officer in the Neighbourhood Justice Centre in Victoria. Another possible model might be one from the health system, such as WA's Mental Health Advocacy Centre <https://mhas.wa.gov.au/>.

a position of focusing on and understanding the child's/young person's needs are, generally, far more than can be encompassed in only three hours of service provision. In addition, as the requirement for clients to attempt family dispute resolution prior to any application about children being lodged in the Family Court was phased in for all new clients in July 2007 and then for all clients in July 2008, demand for FRC services increased markedly without a corresponding increase in resources. Over the years, the complexity of issues presenting to the FRCs has also increased markedly. The Family Court of WA notes that the number of cases where families present with more than one risk issue has steadily increased from 2012 to 2016.⁹ FRCs have noted a similar trend.

We believe that FRCs could operate as a one-stop shop for divorcing/separating families if properly resourced and if properly publicised.¹⁰ This would entail offering families access to specialist services to help reduce entrenched conflict. Typically, families presenting at the FRCs may need referrals for financial counselling, parenting help, understanding the needs of children post-separation, legal advice, individual counselling in relation to grief and loss or past/present trauma, help to obtain restraining orders, help to stay safe in their homes, individual or group counselling in relation to family violence, mental health support, support in relation to alcohol and other drug use, possible use of children's contact services for handovers or supported contact, post-separation parenting programs, children's counselling for post-separation issues and/or trauma and/or exposure to family violence...the list could go on. When many or all of these programs are provided by separate service providers, or not provided at all in some rural and remote areas, the problems of navigation between the services needed are daunting even for professionals, let alone for clients. Add in the presence of a disadvantage such as English being a second language, literacy difficulties, poverty, the presence of mental or physical disability, being trauma-affected, being Aboriginal or Torres Strait Islander, being LGBTIQ+, living in a rural or remote area where services are not available or not easily accessed, and it becomes clear that some clients will have major difficulties in accessing family law systems. These clients need additional resources provided to them to help them achieve any form of equity in outcomes.

Considering these disabilities individually (although more than one will often co-exist), we would note that Aboriginal and Torres Strait Islander clients will often also live in rural and remote areas, have issues of family and domestic violence, past trauma and intergenerational trauma, English as a second language¹¹, possible literacy issues, possible issues with hearing loss, and issues with cost of and access to family law services. They may also have co-existing contact with child protection courts. Historically, Aboriginal and Torres

⁹ Family Court of Western Australia Annual Review 2016, located at http://www.familycourt.wa.gov.au/_files/Publications_Reports/FCWA_Annual_Review_2016.pdf

¹⁰ FRCs are not particularly visible in the community, and people may have some difficulty in finding an FRC when they need one. Family Relationships Online has an algorithm for finding local help, but this will not automatically take the person to their closest local help service. For example, when searching for an accredited family dispute resolution practitioner servicing the Mandurah area, only *one* of the first 10 services listed is in Mandurah, and only two others of the first 10 are even within 20 kilometres of Mandurah.

¹¹ 60% of Aboriginal people in Western Australia speak one of the more than 100 languages and dialects as a first language, and English as a second language, according to the West Australian Aboriginal Family Law Services' 2017 submission to the Inquiry into a Better Family Law System to support and protect those affected by family violence. <https://www.afls.org.au/wp-content/uploads/Inquiry-into-a-better-Family-Law-System-to-support-to-NFVPLS-20170512.pdf>

Strait Islanders' experiences of dealing with government and legal systems are problematic, and they may avoid dealing with courts whenever possible. We note that a 2017 submission by the West Australian Aboriginal Family Law Services comments, "There is a general reluctance to access the judicial system due to the mistrust Aboriginal people have for the justice system".¹²

For Aboriginal and Torres Strait Islanders, the concept of "parents" is very different from (and considerably wider than) the concept of parents entrenched in the Family Law Act.¹³ Clients in the Northwest of Western Australia tell us "we don't get married in white fella world so we don't need to get divorced in their world". We consider that the way the family law system supports Aboriginal and Torres Strait Islanders needs to be drastically reviewed, and needs to avoid trying to force them to fit into a white person model. We would suggest exploring the possibility of using community mediators who can mediate any conflict in a culturally safe way. This may mean providing training and support for local community workers to increase their skills in family dispute resolution and family dispute resolution. It might mean providing positions for Aboriginal and Torres Strait Islander liaisons in courts and at FRCs, and possibly also in Legal Aid offices. At a minimum, we would suggest that Aboriginal and Torres Strait Islander clients of the Family Court should each have an advocate who can help them negotiate their way through the system. Such an advocate would preferably be Aboriginal or Torres Strait Islander, or at least appropriately trained. We would also recommend a whole-of-government strategy of attracting, recruiting and accrediting interpreter services for all Aboriginal languages and dialects. These interpreters should have access to specific training in law (including family law) and family violence, and there should be identification of interpreters with specific skills (perhaps via accreditation and specialist titles, see the NAATI website).¹⁴ Aboriginal clients with hearing loss may also need specific interpreters to assist with communication and understanding.

Culturally and linguistically diverse (CALD) clients will be dealing with the issue of English as a second language. This may co-exist with poverty, literacy difficulties (sometimes only in English), and trauma effects. These clients, when accessing Family Relationship Centres, may be dealing with lack of suitable interpreting services, especially when assessing clients for family violence issues or when providing information to clients about children's needs when parents separate. We would recommend that interpreters have access to specific training in family law and family violence, and that there be identification of interpreters with specific skills (perhaps via accreditation and specialist titles). This would also mean that Family Relationship Centres need to be resourced so they could use interpreters with specific skills and accreditation. Another potential issue for CALD families would be difficulties in using Children's Contact Centres (CCCS), since these, too, are drastically underfunded and cannot provide interpreting services. CCCS services also face the complexity of keeping a child safe

¹² See, for example, the Aboriginal Family Law Services' 2017 submission to the Family Law Council in relation to amendments to the Family Law Act to respond to family violence. <https://www.afls.org.au/wp-content/uploads/Family-Law-Council.pdf>

¹³ Zanghellini, Alcardo (2009) "Who Is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (Cth): A Jurisprudential Feminist Analysis", *Monash University Law review* 35(1), p 182

¹⁴ <https://www.atl.com.au/naati/naati-accreditation/>

during visits when the supervisor (worker) cannot identify whether conversations between child and parent are appropriate and safe. Avenues to explore may be to provide training and support to local CALD community workers, work in partnership with local CALD organisations, offer funding to local CALD community organisations, and perhaps offer liaison positions to CALD workers at FRCs and the Family Court. Again, we would recommend as a minimum that CALD clients of the Family Court each be provided with an advocate to help them understand and negotiate their way through the system.

People with mental and/or physical disabilities may also have co-existing issues such as being trauma affected, a higher incidence of having experienced family violence, possible issues with literacy, and less ability to manage the costs of the legal system. Where advocates for people living with disability are available, we would recommend that they should be included in any interaction that the person has with the family law system as a matter of principle and expressed policy. Where such advocates are not available, the person should have the option to have an advocate allocated to them, and that advocate should be someone who is aware of and experienced in working with the person's particular disability issue(s). In the legal system, substantive justice can only be obtained for people with disabilities by considering those people's specific needs.¹⁵ We would recommend that Government also needs to consider the provision of long-term children's contact services to parents who cannot safely care for their children because of disability. We would recommend that people who have hearing impairment should not be dealt with by telephone (or required to use telephone dispute resolution services) and should have an interpreter made available where necessary.

People who are LGBTIQ+ are likely also to be trauma affected¹⁶, may also have physical and/or mental disability, and are often likely to be earning less than the national median wage. All LGBTIQ+ people may face discrimination and rejection from their families, as well as from the community. And many, similarly to Aboriginal and Torres Strait Islander people, will have a historical distrust of the judicial and government systems. In terms of trauma, *all* LGBTIQ+ people will have been recently reminded by the tactics of the "No" campaign in Australia's 2017 plebiscite on marriage equality that they are regarded as unsuitable to be parents by a sizeable minority of the wider community. In the family law system, LGBTIQ+ people may experience discrimination and prejudice at any stage, including in FRCs and with family law service providers outside the court system. We would recommend that family law services be required to consider obtaining accreditation under GLHV and QIP's Rainbow Tick standards,¹⁷ and that Rainbow Tick accreditation status should be able to be publicised on the Family Relationships Online website, to enable LGBTIQ+ people to obtain appropriate and safe services.

¹⁵ See, for example, the Canadian Bar Association's resolutions on substantive justice for individuals with fetal alcohol spectrum disorder, at <https://www.cba.org/Our-Work/Resolutions/Resolutions/2010/Fetal-Alcohol-Spectrum-Disorder-in-the-Criminal-Ju>

¹⁶ See the statistics on suicidality and suicide attempts. Also, note that the rate of suicidality is highest for transgender people. <https://lgbtihealth.org.au/statistics/>

¹⁷ <https://www.glhv.org.au/ghv-programs>

LGBTIQ+ people are now, at least, in a position where they can legally marry and thus have the protection that both of a couple can be considered legally parents to a child. Prior to the legal changes in December 2017 to remove the requirement that marriage could only be between a man and a woman, the legal situation for LGBTIQ+ parents could be very difficult to navigate. Although LGBTIQ+ parents *could* access the Family Court, many chose not to. In addition, LGBTIQ+ parents who are not married may still have the issue of not legally being parents to children for whom they may have been the primary carer. Prior to December 2017, when same-sex partners separated one parent might not be treated as the biological parent of the child and thus might not have any legal right to have any input into the child's life. However, S60H of the Family Law Act only considers both partners to a marriage (or defacto relationship, in jurisdictions other than Western Australia¹⁸) who use assisted reproductive technology as legally being parents when one partner is a woman. The situation for male couples (married or not) is that the co-father is not legally the child's father unless the parents obtain orders through the Family Court. We would recommend a change to Section 60H of the Family Law Act to provide that if a child is born to one person (not specifying gender) in a marriage or a defacto relationship as a result of an artificial conception procedure and that person and the other intended parent consented to the procedure, that child should be the child of both the person and the other intended parent for the purposes of the Act. We would also recommend that Western Australia's Family Court Act add a similar provision. Even this change would not recognise the position where a child or family has more than two parental figures.¹⁹

Transgender (trans) parents who separate face a more difficult task – dealing with prejudice, possibly from the other parent, and a general lack of support resources in the community. Family law services, and community services, tend to offer separate services for men and for women (particularly in relation to family violence) and often follow a model where males are perceived as perpetrators and females as victims/survivors. This model does not fit for same-sex couples where there is family violence, or for people who are trans and their partners. Trans people generally are more likely to attempt suicide, and trans parents are more likely to face prejudice in the community and from their ex-partner. In addition, trans parents (or, indeed, other LGBTIQ+ parents) may be forced into seeking gendered advice on parenting, which doesn't reflect their lived experience. Even if not separated, trans people currently cannot have their birth certificates changed to reflect their new gender in most jurisdictions in Australia (except for the ACT and South Australia) without being required to obtain a divorce first.²⁰ In addition, until late 2017, transgender young people were required to seek permission from the Family Court prior to being able to use any form of hormone treatment, even where the young person concerned, their parents and their medical providers all consented.²¹

¹⁸ In Western Australia, defacto relationships are dealt with under the Family Court Act, 1997, which does not mention assisted reproductive technology at all.

¹⁹ Such as, for instance, a lesbian couple who choose to have their child/ren donated and fathered by someone known to them.

²⁰ This will change on 9 December 2018, 12 months after the Marriage Amendment (Definitions and Religious Freedoms) Act 2017 was passed.

²¹ Re: Kelvin, 2017 Family Court decision

<https://www.humanrights.gov.au/sites/default/files/Re%2BKelvin%2B30%2BNovember%2B2017.pdf>

People living in rural and remote areas of Australia have less access to services than their counterparts in urban areas. They also have less access to legal services and information, a problem that is exacerbated if they are Aboriginal or Torres Strait Islander, have hearing loss and/or have English as a second language. While technology may help to some extent with this, there is more likely to be lack of sufficient bandwidth in rural and remote areas if the NBN is not available, or perhaps even if it is. In addition, technology to access information and services available may be too costly to acquire and to maintain, especially for remote Aboriginal communities. In the future, this problem is unlikely to improve. New communications technologies will be developed and may only be capable of being supported by inner-city NBN infrastructure.

Often family law services cannot afford to provide the sort of facilities (such as teleconferencing) that can be provided by services such as Legal Aid or the Family Courts. It may be difficult for a person living in a rural or remote area to use teleconferencing, even if it can be provided by a service, because of lack of access to sufficient bandwidth in areas where the NBN is not available. We would recommend that FRCs be able to negotiate access to facilities such as teleconferencing that are located in places like Legal Aid or Family Courts in major cities. We would also recommend that telecommunications service centres be set up in rural and remote areas, and that they be made available for clients and for FRCs located in those areas. Although the Telephone Dispute resolution service is available, and is an option for some clients, the fact that it is not a free service (unless clients have child support issues) is problematic for people who are not managing financially. It is also problematic for people with hearing loss, or who cannot obtain access to private telephones easily. In addition, there need to be protocols set up for FRCs in different areas to work together with clients who are resident in those different areas. Such protocols have been set up in the past, but FRCs now may or may not choose to work with other FRCs. If FRCs choose not to work with another FRC, this may disadvantage clients who are faced with the options of travelling interstate or for long distances, or attending by telephone in a situation where their ex-partner is able to attend in person. They may also not have any local support.

The most effective means to reduce the cost to clients of resolving disputes in the family law system is probably to keep as many people as possible out of the Family Courts. However, this has to be balanced against the need to protect children's safety. Both the Family Court and the greater family law system need to acknowledge that the complex multi-needs families who are increasingly forming the core business of both courts and FRCs are not well suited to single interventions, and need ongoing case management. Ideally, we would like to see these families being dealt with in tandem by the legal system and social scientists, where the legal system has the capacity to order parents to behave in particular ways or to undertake particular courses of action, and the social science system has the capacity to recommend how parents should behave in relation to their children and what interventions would be likely to be helpful, feed parents' progress back to the legal system, and provide interventions and programs for parents. There is, to some extent, already a model which could provide part of this in the Family Court, in the form of Family Consultants and Case

Assessment Conferences. If Family Consultants were to work directly with FRCs and not-for-profit agencies, they could provide parents with an avenue to have a court decide issues they couldn't agree on or to protect children on an urgent basis. Other alternatives could include parenting coordination similar to the US model²², low-cost arbitration to provide interim orders for families, more information sharing (especially on family risk issues) between the Family Courts and the not-for-profit sector, and protocols being developed to refer clients directly and expeditiously to the court system where needed. We would also suggest that the provision of expert reports could perhaps be outsourced from the Family Courts to the not-for-profit sector instead of being provided by private psychologists at a large cost to clients. Some advantages of this would be that clients could receive ongoing support and support to children could be provided more effectively on an ongoing basis by organisations that are already providing such support. However, providers would need to be adequately resourced to train and support specialist staff to provide these services.

We consider that there need to be more legal aid services in the Family Court and also in FRCs. Some services could provide information and referral only, in the same way as the Legal Aid Commission of Western Australia does via its website. Some Community Legal Services already act as clinics where law students can gain experience²³. There are also models where legal students are co-located in multidisciplinary teams²⁴ and work together with social scientists. We would recommend that Legal Aid-funded or community lawyers should be available in FRCs, at least part-time, to assist in FDR. Legally assisted FDR needs to be more available at the Family Court and within the larger family law system, and needs to be more easily accessible to clients who are not in a financial position to afford large legal fees. We would also recommend the expansion of FASS services to all registries of the Family Court. When exercising Family Law jurisdiction, the Federal Magistrates' Courts could benefit from having Legal Aid duty lawyers and FASS workers available as well.

If low-cost arbitration were to be added as part of the family law system, that service could deal with urgent or limited matters and refer more complex matters on to the Family Court.

²² See AFCC guidelines on Parenting Coordination, 2005

<https://www.afccnet.org/Portals/0/AFCCGuidelinesforParentingcoordinationnew.pdf>

"Parenting coordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with family dispute resolution training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.

The overall objective of parenting coordination is to assist high conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy and meaningful parent-child relationships. Parenting coordination is a quasi-legal, mental health, alternative dispute resolution (ADR) process that combines assessment, education, case management, conflict management and sometimes decision-making functions."

²³ See, for example, SCALES. <http://options.wahousinghub.org.au/places/scales-community-legal-centre-southern-communities-advocacy-legal-and-education-service-inc/>

²⁴ See, for example, M K Pruett, A Shepard, L Cornett, C Gerety, and R L Kourlis. "Law Students on Interdisciplinary, Problem-Solving Teams: An Empirical Evaluation of Educational Outcomes at the University of Denver's Resource Centre for Separating and Divorcing Families", Family Court Review Vol 56 (1), pp 100 - 118

We would recommend that such arbitration be provided by a panel including at least one legally trained person and at least one social scientist, and that it should have the power to order parents to engage in appropriate programs as well as to make interim decisions about such issues as children spending time with parents (where there are no risk issues for the child). The arbitration service could also possibly provide final decisions (with clients' consent to this) about passport issue for children, relocation, change of name, adding someone's name to a birth certificate, choice of school, and similar issues.

It is clear from communications with clients that many of them feel overwhelmed and confused by the Family Court process. There needs to be consideration given to how support and information is provided to these families. For example they may not understand what forms to complete and when to lodge them. We would suggest that multi-media channels be developed that can provide this information. This could include such things as apps, information presented in groups, online resources in flowchart format, and so on. In relation to improving accessibility to the Family Court, and supporting people who do not have legal representation to resolve their family law problems, we would recommend that all unrepresented parties from complex needs families be provided with assistance to help them negotiate the Family Law system. Such assistance would not need to be provided by lawyers, and in fact social science professionals (preferably co-located in the Family Courts) would probably be more effective in the role. The service might possibly even be provided by sufficiently trained volunteers.

In relation to the physical design of the Family Courts, and making them more accessible and responsive to the needs of clients, we would recommend separate entrances for applicants and respondents (where needed), separate toilet facilities (again, to be available if needed), the provision of safe rooms, and parties having the ability to attend court by telephone from another section of the court or from outside the court entirely. It is important to note that even hearing the other person's voice may be traumatic for people who have experienced violence. We would recommend that parties be able to request not to be required to sit in the same court (or the same waiting room) as the other person or persons involved in their case. We would also recommend that waiting areas should be more child-friendly and that they should give consideration to trauma-informed theory.²⁵

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?

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?

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?

²⁵ See, for instance, <http://www.practicenotes.org/v21n2/agencies.htm> on the design of trauma-informed waiting areas

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?

We feel that the principles in Part VII of the *Family Law Act* do not necessarily produce the best outcomes for children. Especially in complex needs cases, and/or where there is significant risk to children or their caregivers, the presumption that children should have a “meaningful relationship with both parents” should not be taken to automatically mean that children should have equal time with both parents, or even substantial and significant time with both parents. As well, these principles do not take into account the situation where a child’s caregiver is not a parent, or where there are significant people in the child’s life who are not legally their parent/s.

As noted in our response to the topic of the role and objectives of the family law system, we would consider that the Family Law Act’s focus on children’s “best interests” needs to be more clearly defined. Currently, the principle of the need to protect children from harm by being subjected or exposed to violence and abuse outweighs the principle that children benefit from having a meaningful relationship with both their parents. However, both of these principles outweigh others which we believe should be highly important in decision making, notably the views of the child, the parents’ present and past attitudes towards the responsibilities of parenthood, and cultural factors.

We would recommend that the Family Court, at least, should have as primary considerations the levels of parents’ willingness to provide safe and appropriate parenting to their children, and parents’ sensitivity to their children’s needs. We would recommend that one of the primary considerations when determining what is in a child’s best interests should be the parents’ attitudes towards the responsibilities of parenthood and their willingness to engage in programs designed to help them provide appropriate parenting, where necessary. In addition, children may be prevented from accessing professional services that would help them by a parent’s gatekeeping. Possibly parents *should* be required to provide a court with evidence that contact with both parents is in a child’s best interests.

Further, we would argue that relationships and parenting are not the same thing. Children have a right to a relationship with both parents, but that should not equate to an approach that children have a right to have time with both parents - if it is not safe for them, or for their parents, for them to do so. Even where violence and abuse are *not* present, continued high conflict between parents (especially if conflict is enacted in their presence) will be damaging to children.

In relation to family violence issues, misuse of process should be considered in relation to the Family Law Act's definition of family violence. Although complex needs cases generally will not be able to be dealt with as a one-off event in the Family Court, and may require further decisions, including urgent interim decisions where parents are unable to reach their own agreements, there exists a subset of cases where orders are made that are adequate but where one party seeks to reopen the matter because they are not happy with the outcome. We would recommend that complex needs cases should be individually tracked through the Family Court, including having a single judge or magistrate assigned to manage the matter (who may need to be accessible to make a decision if parties need to have an urgent interim decision made about something that is not already covered in orders, or if they disagree about the interpretation of orders), an assistant for each of the parties who can provide information about the court process and help the person to navigate the process²⁶, and an advocate for the child/ren who can provide the child/ren with information about the court process, and advise the children on ways to have their views considered if necessary²⁷. The Family Court does have the capacity to order that parties need leave from the court to make new applications, and could exercise that power more than it currently does. In addition, where parties are ordered to attend programs or family dispute resolution as part of their court orders, it would be useful for NGO service providers to be able to give information to the court about whether clients have attended, whether they have been found not suitable, or whether they are not suitable at the moment.

Some Interim parenting matters that cannot be decided through FDR may need to be fast tracked through the Family Court (or through low-cost arbitration as suggested above), particularly where they refer to parents or family members spending time with a very young child. We know that children's attachment needs are not well understood by the general public, and that parents often focus on the amount, rather than the quality, of time spent with children.²⁸ Very young children do need to develop attachment relationships with both parents, and with extended family members, where it is safe for them to do so.

We consider that the emphasis on parents in Part VII of the *Family Law Act* does not reflect family situations where a child's caregiver is not a biological parent, such as in some cultures (including Aboriginal and Torres Strait Islander cultures), in non-heterosexual couples, or in family care/foster care. We believe it might be more appropriate to replace the word 'parent' with a word such as 'caregiver'²⁹ in sections 60B and 60CC of the Family Law Act.

²⁶ This would not need to be a lawyer. It could be one of the court staff, a volunteer, or someone from an NGO

²⁷ Again, this would not need to be a lawyer. It could be one of the court staff, a volunteer, or someone from an NGO, though it should be someone who has a Working With Children check and has training in working with children.

²⁸ See, for example, Justice Strickland's comments on attachment theory and family violence. Strickland, S, "Attachment Theory and Family Violence: a Judicial Perspective" AFCC 49th Annual Conference, Chicago, 2012 "Nevertheless, despite what judgments, orders and data will tell us, I believe the inescapable reality is that maintaining a statutory framework in which legislative presumptions then trigger mandatory consideration of time means that the family violence reforms are compromised in their ability to protect children from harm associated with family violence. Viewed from an attachment perspective and indeed from that of anyone concerned about the safety and wellbeing of children and young people, the family violence reforms can be seen as an opportunity lost." p40

²⁹ Sections 60B and 60CC, *Family Law Act*

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?

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?

Question 22 How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

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

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

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

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?

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

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?

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?

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

We believe that one change to Court processes in order to facilitate early and cost-effective resolution of disputes would be onsite early family dispute resolution at the Family Courts (ideally, with legal assistance). In 2005, the West Australian Family Court used Case Assessment Conferences as the first Court event for all cases involving children. This no longer occurs. However, it would be possible to have legally-assisted family dispute resolution on site. In many cases, having legal advice involved during family dispute resolution would allow parties to be more realistic about children's needs and about what remedies the Family Court can offer. This could be provided by extending the FASS system, or by co-locating/seconding existing family dispute resolution practitioners from the non-government sector to the Family Court.

We consider that it would be helpful for every family that enters the Family Court system with issues in relation to children to have an assessment about the level of legal and social support that they need. This would tailor interventions to be specific to each family rather than taking a broad brush approach. We believe that it is also important for the courts to consider multigenerational trauma. This may be in relation to multiple generations of trauma in families, who are over-represented in the Court population. This is the case, for

instance, in relation to Aboriginal and Torres Strait Islander clients. However, multiple generational experiences of trauma are not limited to Aboriginal or Torres Strait Islander populations, and it may be useful for the Courts to consider the effects of adverse childhood experiences on clients.³⁰

Families with complex needs have relationship problems, not only legal problems, and often these problems are of long standing. We believe that complex needs families should be approached from a family systems perspective³¹. As social scientists we would prefer to consider the terminology of family enhancement rather than problem solving. We believe clients are more likely to accept a more positively expressed term. In addition, 'problem-solving' implies that problems are finite and limited, which may well not be the case for these families. A family systems approach will understand family dynamics and help the family to manage risk. The family is likely to need ongoing intervention rather than once-off or piecemeal contacts with the Family Court.³² For complex needs families and also for clients who have experienced family violence or abuse who are dealing with the Family Court system, options available should include legally assisted FDR, case management, case coordinating and multi-disciplinary services,³³ as recommended by the FRSA, and possibly also parenting coordination, following the US model³⁴ where the parenting coordinator works in tandem with the Court system. Many cases and many clients do not conform to a nuclear family two-parent model. Other family members may be involved in care for the children, and their input is likely to be important in decision-making in cases involving complex needs, young parents, intergenerational trauma, Aboriginal and Torres Strait Islander clients, CALD clients and some cases involving LGBTIQ+ clients. Family Group conferences and Family-Led Decision-Making Conferences would seem to be useful models to explore in the wider Family Law system as well as for Family Courts.

The Court needs to have access to information from social scientists when dealing with families who have experienced family violence or abuse. Since clients who attend FDR, or

³⁰ See, for example, <https://www.cdc.gov/violenceprevention/cestudy/index.html> and <https://acestoohigh.com/got-your-ace-score/> for information about the studies on Adverse Childhood Experiences, protective factors, and links from multiple adverse childhood experiences to problems such as family violence (as perpetrator or survivor), drug use, mental health issues, suicide risks, etc.

³¹ See, for example, Salvador Minuchin's work on family systems theory, "Families and Family Therapy", Harvard University Press, 1974

³² For example, see "An integrated response to supporting children refusing contact within the children's contact services, Anglicare WA", paper presented at the FRSA conference 2017 by Karen Barker and Yuyun Tan

³³ FRSA submission to the Family Law Council, September 2015, p.14

³⁴ See AFCC guidelines on Parenting Coordination, 2005

<https://www.afccnet.org/Portals/0/AFCCGuidelinesforParentingcoordinationnew.pdf>

"Parenting coordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with family dispute resolution training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.

The overall objective of parenting coordination is to assist high conflict parents to implement their parenting plan, to monitor compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy and meaningful parent-child relationships. Parenting coordination is a quasi-legal, mental health, alternative dispute resolution (ADR) process that combines assessment, education, case management, conflict management and sometimes decision-making functions."

indeed clients who attend FRCs, receive an exhaustive risk assessment, this information could be shared with the Courts. It would mean that FRCs would no longer be working completely confidentially with clients, however. Additionally, we consider that it should be possible for the court to receive advice from social science professionals with different levels of qualifications and experience, without those professionals necessarily having to be open to cross-examination in a trial setting. Such advice would not, of course, qualify as evidence.

We believe that it is important that there be Information sharing between courts, Family Relationship Centres, children's contact services, and between post-separation, drug abuse, mental health and family violence programs. This might be only on the level of whether clients attend, whether they comply with programs ordered by the Court or embarked on by the client themselves, what court orders are made, what programs are being provided where and what waiting lists exist. Such information sharing could be by way of a database, perhaps administered by a body such as the Family Law Pathways network, accessible to courts and to the programs and centres mentioned above. We would recommend a central database to which the Family Court and community programs would have access. The database would track clients through programs and perhaps show misuse of process. Additionally, perhaps comments about the client/s' use of the program could be attached. The database could also be used to provide the courts and relevant agencies with information about program availability, wait lists, and referral pathways. However, there needs to be a common approach to waitlists. We would propose that the measure should be how long it takes from the time a client contacts a centre until the date they receive an intake and assessment. This central database could also link to specific agency websites. We also consider that we need to embed an outcomes framework such as Results Based Accountability across the whole of the Family Law sector so we can use the above data to measure if we are making a difference.

At the moment, FRCs are dealing with more and more complex and high-needs cases, and waitlists are expanding. There are proposals to extend mandatory FDR before court filing to financial matters as well as child matters. While we think that in principle this would be helpful for clients, we would hope that the expansion of demand would be resourced commensurately. If courts are to provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes, those dispute resolution processes need to be adequately resourced so that clients do not experience two sets of delays. In particular, cutting funding to Family Relationship Centres, while expecting that the services will deal with huge increases in client loads and client complexity, is counter-productive. It is also counter-productive, in our experience, for government to force the sector to engage in competitive tendering for services. This siloes service providers and results in inconsistency in practice across centres.³⁵ A model of legally-assisted FDR where a legal aid or community lawyer was co-located in each FRC would be helpful in dealing with complex and high-needs cases as well as in dealing with financial issues.

³⁵ Note, for instance, "Competitive tendering may produce more efficient services for government and the public, but may also discourage collaboration between providers. Equally, encouraging collaboration among service providers may be perceived as at odds with the current competitive-tendering environment." *Attorney-General's Department Final Report on Future Focus of the Family Law Services, January 2016*

We believe there is scope for arbitration, perhaps as a third tier of family law positioned between FRCs and Family Courts. We would recommend that arbitration be conducted by a panel consisting of at least one legal professional and at least one social science professional.³⁶ We would recommend access to a low-cost and quick arbitration system, for interim decisions and (some) urgent situations (not, in general, those where there are allegations of risk to the child or of family violence).

Consensual use of arbitration is already available as part of the Family Law system. However it is not widely used, and possibly this is because it is seen as second class compared to attending court. If arbitration were to be used, it would need to be part of the family law pathway and have the option of referrals to and from the Family Courts and FRCs.

We would agree that misuse of process should be included in the definition of family violence as a form of abuse. The issues paper notes a number of possible ways that clients may abuse the processes of the family law system to delay resolution. They may also misuse FRC services as a way to harass the other parent, in relation to requirements for family dispute resolution to happen prior to court applications, or in relation to court orders that specify family dispute resolution as an avenue to resolve disagreements. If the Family Court orders that a person attend and complete a program, they should not be permitted to raise the same issues in court again until they have attended and completed the program, or the program has assessed them as unsuitable. In relation to this, we would recommend that Section 70NED of the Family Law Act be expanded to cover any person who has been ordered to complete a program by the court, and not be restricted to clients who have contravened court orders (as it is currently). If the section were expanded, it would allow programs to inform the courts that clients have not been found suitable for the program, possibly at this stage or possibly not at all.³⁷

In relation to online dispute resolution, we consider that there would need to be a thorough assessment for risk factors, including but not limited to family violence. There are already online tools available for separated parents³⁸, and some parenting coordinators use such tools to prescribe parenting behaviour for clients. We consider that there would need to be attention given to keeping the content of online dispute resolution processes secure. We also consider that there would need to be limits as to what data can be subpoenaed for any later court process.

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?

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?

³⁶ This was recommended by the 2003 report on the parliamentary inquiry into child custody arrangements in the event of family separation, *Every picture tells a story*, Recommendation 12, p. xxiv

³⁷ Section 70NED, Family Law Act 1975

³⁸ For instance, *Our Family Wizard*, also available as an app, which has a capacity to be used not only by parents but also by professionals working with them. <https://www.ourfamilywizard.com/>

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

It is noticeable to anyone who has been working in the family law system (or indeed the helping professions) over time that the family law system can have huge effects on children's future development. We as practitioners are now seeing evidence of intergenerational family trauma as a result of separation. Where there is extremely high conflict, or perhaps interparental hatred³⁹, between parents, interventions need an enormous amount of resources and work by social science professionals at FRCs.

As noted, client families often present with a variety of needs and a need for - or pre-existing involvements with - a variety of agencies. Referrals to other agencies by local FRCs for issues such as housing support, financial support, legal advice, mental health and drug/alcohol support needs, family violence needs and therapeutic needs can be effective to some extent. However, there are issues such as waitlists, lack of provision of some services in particular communities, inconsistencies in relation to which provider is providing what services in particular areas⁴⁰, siloing between service providers and lack of information-sharing between agencies. Where these clients enter the Family Court system, there often continue to be the same presenting issues as when they approach FRCs. We consider that the approach to such families by the Family Court should be proactive rather than reactive. The court can use FRCs or local providers to assist clients. However, in many cases there will be a need to incorporate some court input, to motivate clients to attend and complete programs and to monitor clients' progress. We would suggest that judicial officers should not be working in isolation with these families, but alongside family advocates and/or parenting coordinators and/or a Family Safety Practitioner (located at an FRC) and/or a FASS worker (located at the court). FASS workers located at courts could refer clients to a Family Safety Practitioner located at an FRC in order to support an integrated whole-of-family approach to the family's needs.

Another model of integrated services might involve current non-government sector workers being seconded to act as family advocates for a (limited!) number of families as they progress through the Family Court system. This model would also help to support CALD, Aboriginal and Torres Strait Islander, and LGBTIQ+ families.

At a minimum, there needs to be sharing of information about families across child protection courts, family violence courts (and local magistrates' courts where specialised family violence courts do not exist) and the Family Court/Federal Magistrates' Court. It would be useful for child protection courts and family violence courts to be able to make recommendations to the Family Court and vice versa. If, for instance, foster carers, grandparent carers and wider family carers were able to proceed to the Family Court with a

³⁹ B M Smyth and L J Moloney *Entrenched postseparation parenting disputes: the role of interparental hatred?* (2017) Family Court Review Vol 55 (3) pp 404 -416

⁴⁰ For example, financial counselling services are up for tender regularly and may over time be provided by different services in a local area, with consequent difficulties in working closely with the FRC and its clients. In addition, service criteria for accepting clients may change as a new service takes on service provision. This is even more obvious with family violence services for perpetrators and victims, where service provider changeover may result in services not being available for some months as new staff are recruited and trained.

direct recommendation from the State child protection court after the end of wardship provisions, this would make applications to legalise safe care arrangements for children much easier.

It would be helpful to families for Federal Family Courts and Federal Magistrates' Courts to be able to make orders for protection of children and families that are enforceable by State police. However, most families would probably still end up using state and local courts for protection orders, since the state and local courts are more readily accessible.

The model adopted by the WA Family Court, where a worker from the State child protection services is located at the Family Court, has been very helpful for information-sharing about child protection issues. We would recommend that it should be extended to all Family Courts and preferably also to Federal Magistrates' Courts exercising Family Law jurisdiction. Perhaps such a model could be extended to provide a co-located state police officer at the Family Courts in order to provide information to the Family Court about criminal law and family violence issues for clients.

If the priority is to keep children safe, information has to be shared. A national database of court orders accessible to judicial officers in each court would seem to be the first step towards this. This could be followed by consideration of what additional risk-related information needs to be shared between courts in order to ensure children's safety. In relation to rural and remote areas, there may need to be consideration given to providing local Justices of the Peace with access to information about previous court orders affecting families. JPs in rural and remote areas are often the people applied to for family violence protection orders.

It would be useful if we could have MOUs (memoranda of understanding) with the Family Court, Legal Aid and other service providers that detail how we share information and provide feedback about clients in common. We need to become more integrated as we currently work in silos.

Children's experiences and perspectives

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

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

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

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

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

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?

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?

We believe that it is important that children should have the opportunity to participate, be heard, be informed, and be (where possible) consulted about decisions that affect their future. We need to ensure their views are taken into account when decisions are made that affect their future. This includes listening and acting on any safety concerns they have. Children should be seen as reliable witnesses and have their experiences listened to and believed. This work needs to be undertaken by highly trained social scientists based in the community sector. Children need to be provided with ongoing support once the initial consultation is conducted. Unlike the current single expert review process, where the child is seen but no ongoing work with the child is provided, we would argue that work with children needs to be ongoing. Building a therapeutic alliance with a child can take several sessions. They may be reluctant or scared to share their experiences with a stranger, fearful of what the outcome may be. Children need ongoing support throughout this period. A thorough understanding of the family dynamics that have impacted on the child needs to be undertaken over a period of time. We know a leading cause of children's and young people's mental health issues is family breakdown. This work must be seen as early intervention and funded accordingly if we are to protect children and young people's long term mental health.

We believe that children should not be denied access to services which would support them because of the equal shared parental responsibility requirement to consult both parents and seek permission from both. We would suggest that this requirement needs to be removed from the Family Law Act as it is not in the best interests of the child to deny them support at a time when they feel vulnerable and need someone to talk to. If parents cannot focus on the best interests of the child then the courts end up having to do this for them and order it. Alternatively, we would recommend that there could be an exception in the Family Law Act covering post-separation services for children (counselling and supporting children after separation programs such as SCASP) so that such services do not require the consent of both parents.

Additionally, far too many children fall through the cracks between the two sectors of Family Law and Child Protection. The Family Court needs to have an investigative body or division at its disposal that can investigate allegations of abuse and provide information and recommendations back to the court. All too often allegations of abuse and risk to children are not followed up by child protection agencies due to the abuse not meeting the threshold for the department's intervention to occur (or, sometimes, *because* the case is in the Family Court!). The protection of the child is left to the protective parent who is often disregarded and labelled as hysterical as they fight to keep the child safe. We believe that this needs to change.

There is considerable research into children's experiences of the Family Court system, and into children's views of how they would like to participate. However, in practice, children do not have much opportunity to participate. One possible avenue to inform children and to have their views presented to the Family Court is via an Independent Children's Lawyers, where one is appointed. Although the Family Court's Guidelines for Independent Children's

Lawyers note that “it is expected that the ICL will meet the child” unless the child is under school age, the child lives in a rural or remote area, or there are particular risk circumstances,⁴¹ not all ICLs do meet with children (just over half the ICLs surveyed by the Independent Children’s Lawyers Study indicated that they “rarely/sometimes” meet with children, and only just over a third indicated that they meet with children “often/always”), and not all ICLs feel confident in doing so.⁴² Judicial officers, non-legal professionals and non-ICLs are more likely than ICLs to consider that the role of an ICL should include informing the child of the nature of proceedings and their options for involvement, informing the child of potential outcomes and seeking their feedback, and informing the child of the outcomes of the process and the implications of court orders. The majority of ICLs surveyed in the study, if they do meet with children, limit those meetings to familiarisation, introduction of themselves as the ICL and explanation of the Family Court process rather than inviting the child to participate in the process or consulting with the child on their views. Where children are at risk due to family violence or allegations of other risk issues, ICLs are *less* likely to meet with them. Since, typically, ICLs are more likely to be engaged in cases where there are concerns about risk to children, already vulnerable children are thus even more likely to be prevented from being informed about or having any participation in the processes which will determine their futures. These children are already experiencing a lack of safety in their lives. They are almost certainly also experiencing at least one parent or caregiver not listening to them, not considering their needs, not believing them and not valuing their views. Although they will also, typically, be involved with other professionals, not being able to participate and express views about their contact with the Family Court system is likely to further disenfranchise these children. In addition, the child’s own perception of their safety is likely to be useful information when considering decisions about the child.⁴³

At the minimum, we believe that all children of school age and above whose parents are involved with the Family Court should receive some information about how the process works, what the Family Court does, and ways that they can participate in the process if they wish to do so. This could be provided in a number of possible ways. There could be regular information sessions (in school holidays, perhaps?), provided at the courts by Legal Aid or by social scientists. Such information sessions should also be provided by ICLs for their child-clients. There could also be resources available for children’s use at any child-care facilities provided by the Family Court (where such facilities are provided). Online information services could be made available, perhaps via an interactive app, and could be provided to children by parents, schools, the Kids Helpline⁴⁴, FRCs, children’s post-separation programs, and so on. The Family Court could monitor whether children have had the opportunity to

⁴¹ <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/guidelines-independent-childrens-lawyer>, Section 6.2

⁴² R Kaspiew, R Carson, S Moore, J DeMaio, J Deblaquiere and B Horsfall, “Independent Children’s Lawyers Study, Final Report (2014), pp 33 - 52
<https://www.ag.gov.au/Publications/Documents/IndependentChildrensLawyersStudy/IndependentChildrensLawyerStudyFinalReport.pdf>

⁴³ T Petridis and J Hannan, “Innovations in Practice: A Safety Assessment Approach to Child-inclusive Family Dispute Resolution” *Journal of Family Studies*, Vol. 17, No. 1, Jun 2011: pp 36-43, and also A Shea Hart, “Centralising Children’s Needs in Dispute resolution in Family Violence Cases”, *Children Australia* 38 (4), 2013, pp 178 -183

⁴⁴ <https://kidshelpline.com.au/>

receive this information as part of case management. There is already an app being developed by Uniting, The Anchor's, Supporting Children After Separation Program for young people whose parents have separated,⁴⁵ though the app is more about finding services, monitoring mental health and risky behaviour than about explaining the family law process and children's options for participation.

We would also recommend that every child whose parents are going through the Family Court system and are in dispute over the child should be tracked and have some form of child advocacy made available to them as the case progresses. There are a number of possible models for this. One possibility would be Independent Children's Lawyers, in accordance with the recommendations made by the report on ICLs⁴⁶. Another would be a system similar to the Children and Family Court Advisory and Support Service (CAFCASS)⁴⁷ in the United Kingdom or the Ontario Office for Children's Law in Canada. Another would be a guardian ad litem system such as that provided by various jurisdictions. Meetings between children and judicial officers would be a possibility.⁴⁸ So would the secondment of a current NGO worker or child protection worker to act as child advocates for a (limited!) number of children/families as they progress through the Family Court system. A further possibility would be a system of advocacy similar to, for instance, Western Australia's Mental Health Advocacy Service, where children *must* be contacted by the service, so that they know it is available, but do not need to engage with the service unless they wish.⁴⁹ We would also recommend that children's advocates should have experience and/or training in working with children from CALD communities, Aboriginal and Torres Strait Islander communities, or children with disabilities if the advocate is working with children with these specific issues.

We believe that children should have a voice in the process of decisions about their future. This will necessarily be limited by the child's age, maturity and understanding as well as the family situation and the availability of methods to offer children such a voice. One such method is child-inclusive practice. Where resources for child-inclusive practice are limited (as they are, in every setting) there need to be decisions about which children might most benefit by being offered the opportunity. We note, however, that there is one FRC in Queensland where all family dispute resolution involves FDRPs meeting with children as well as with the parents. This approach has the potential to give children more of a feeling that they are involved in the process and more information about how the process works, even when the approach doesn't involve feedback to parents. At least these children have had

⁴⁵ See presentation on "Connect Youth" made at the 2017 FRSA Child-Inclusive Practice Forum, <https://kaigi.eventsair.com/QuickEventWebsitePortal/the-child-inclusive-practice-forum/info/Agenda/AgendaItemDetail?id=d36a5170-a169-4adf-8a44-de257c2a9de5>

⁴⁶ R Kaspiew, R Carson, S Moore, J DeMaio, J Deblaquiere and B Horsfall, "Independent Children's Lawyers Study, Final Report (2014), pp 33 - 52 <https://www.ag.gov.au/Publications/Documents/IndependentChildrensLawyersStudy/IndependentChildrensLawyerStudyFinalReport.pdf>

⁴⁷ <https://www.cafcass.gov.uk>. CAFCASS works directly with children who are in the Family Court system, in the child protection court system, or children who are being adopted. Similarly to ICLs, the involvement of CAFCASS Family Advisers is requested by the Court. Unlike ICLs, they are primarily social scientists. Their duty is "to safeguard and promote the welfare of children going through the Family Justice system", and to ensure that children's needs, wishes and feelings are taken seriously.

⁴⁸ This is possible in the Family Court, but rare. It is common in the New Zealand Family Courts.

⁴⁹ <https://mhas.wa.gov.au/>

the chance to speak to a sympathetic and caring adult who listens to their concerns and cares about their needs, whether or not their concerns are fed back to their parents.

A protectionist view of children would hold that there are risks to children from involving them in decision making and dispute resolution processes. Although this is true, there are also risks to children in *not* giving them the chance to be involved in decision making and dispute resolution processes, if they wish to have such involvement. Most children involved in family law systems do not have the opportunity to participate in any way. Most do not even receive information about the process that they are involved with. Many children have to live with the experience of their parents making decisions that do not support them and that may be unresponsive to their needs. Literature about children's wishes suggests that children would often prefer not to be directly involved in decision making but do want to be consulted and provided with a safe space to share how they are feeling.

We would recommend giving children information about the process and about options that are available to them, and giving them the option to participate if they choose. If they do choose to participate, this should *not* just be because a parent says that their child wants to talk to someone. It needs to come freely from the child. In addition, the practitioner speaking to the child needs to consider risk to the child from any potential feedback to the parents and/or to the legal system, as well as risk to the child from *not* providing such feedback.

In contrast to the New Zealand or UK approach, children in Australia are often placed in the middle of the conflict between their parents. Children are then denied access to services as parents cannot agree.

We would recommend that there should be a formal avenue for children and young people to feed back their experiences of the family law system as consumers. Whether as an advisory group or a Board, this would allow children and young people to have some input into future decision-making about the family law system and about the services that were helpful to them or that they had wished were available. One model is the Family Justice Young People's Board (FJYPB)⁵⁰ resourced by and forming a part of the operations of CAFCASS UK. It is noteworthy that this Board has come up with a series of resources developed *by the young people themselves* for practitioners working with children and young people in the Family Courts, working with children and young people with disabilities, children and young people who are diverse, children and young people with autism, and for workers to keep children and young people informed. They are working on developing resources for practitioners working with children and young people affected by domestic violence, LGBTIQ+ children and young people, refugee and migrant children and young people, and working with sibling groups. The FJYPB also runs an annual conference on the Voice of the Child. We would recommend that ICLs and people who work with children directly take the time to familiarise themselves with these resources. We note that the South Australian Family Law Pathways Network set up a Young Peoples Family Law Advisory

⁵⁰ See <https://www.cafcass.gov.uk/family-justice-young-peoples-board>

Group in 2016 as a pilot project.⁵¹ We would recommend that this be extended to each State and territory.

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?

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?

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

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

Ideally, core competencies for professionals working in the family law system should include a knowledge of family violence dynamics and their effects on adults and children, including an understanding of abuse of process as a form of family violence; understanding the dynamics of sexual abuse and its effects on adults and children; an understanding of trauma and its effects, and an ability to work in a trauma-informed way; an understanding that families and children may have complex needs and that each such family needs an individual approach; an understanding of risk, and a common approach to assessment of risk across the family law system, a cultural understanding of Aboriginal and Torres Strait Islander families and children, childrearing practices and the effects of intergenerational trauma; a cultural understanding of CALD families and children, including the traumatic effects of the refugee experience, and barriers to justice for these clients; an understanding of the experiences of families and children who live with disability, and the barriers to justice for these clients; an understanding of the experiences of LGBTIQ+ families and children, and the effects of trauma on these families, including the trauma of being rejected by their families of origin; and a knowledge of - and experience with - working with family violence and child protection professionals.

Families with complex needs have relationship problems, not just legal problems. They should be worked with in a holistic way, incorporating both social science and legal approaches. If anything, they should have *more* social science input when they cannot resolve problems and are in the legal system, not less.

Ideally, it would be useful for judicial officers and legal professionals working in the family law field also to possess the above competencies. However, this would require them to possess high levels of social science competency in addition to a high level of legal competency, which is probably unrealistic. A more realistic expectation would be that legal professionals and judicial officers recognise the different kinds of expertise required by

⁵¹ See presentation made at the 2017 FRSA Child-Inclusive Forum, <https://kaigi.eventsair.com/QuickEventWebsitePortal/the-child-inclusive-practice-forum/info/Agenda/AgendaItemDetail?id=1bbcfbec-2f4f-4a4d-bdf5-4439345ac594>

social science professionals within the family law system and are willing to work alongside and in partnerships with them.

Family law system professionals and judicial officers are increasingly working with highly complex families who have experienced trauma. As such, there is a risk to the worker in relation to experiencing vicarious trauma effects and in relation to working with high levels of conflict⁵². Although one of the factors that reduces risk to workers is positive support from the body they work for, such support is sometimes difficult for an organisation which is insufficiently resourced by government and has requirements to meet unrealistic performance indicators. Organisations need to be resourced to avoid workers having large and unmanageable caseloads, which reduces wellbeing and exacerbates vicarious trauma. They also need to be resourced to prioritise effective supervision of workers, in order to promote their wellbeing and capacity for effective work⁵³. There is also a risk to the organisation that it will start to mirror the dynamics of the clients it is working with.

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?

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

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?

We would like to see more outcomes measurements frameworks implemented across the sector. For example implementing a framework like Results Based Accountability (RBA) which asks questions such "Is anyone better off?" and encourages programs or whole service systems to review the performance of their interventions to see if they are making a difference.

RBA provides a framework so that whole service systems such as the Family Law sector (including the community sector, Legal Aid and the Family Court) can work together to develop agreed outcomes and then integrate data collection so client outcomes can be tracked and measured. This provides evidence that the sector is effective or not (collectively) in meeting the needs of the client group.

We believe that the tracking of client outcomes, in tandem with a willingness to review the effectiveness of the system rather than individual programs, would contribute to improving public confidence in the family law system.

⁵² See, for instance, statements by practitioners in C Lundberg and L Moloney, *Being in the room: Family Dispute Resolution practitioners' experience of high conflict family dispute resolution*, Journal of Family Studies (2010) Vol 16 (3) pp 209 - 223

⁵³ Ibid, page 219