

# Uniting

## Submission

Uniting Centre for Research, Innovation & Advocacy

14 May 2018

## Review of the Family Law System

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**Australian Law Reform Commission Issues Paper 48 (IP 48)**





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## Executive Summary

We welcome this opportunity to respond to the Australian Law Reform Commission's issues paper on the *Family Law Act 1975 (Cth)*.

### About Uniting

Uniting is one of the largest providers of services to support vulnerable children, young people, older people and families in NSW and the ACT. We provide two kinds of service of direct relevance here. First and foremost, this submission has been informed by consultation we conducted with managers and practitioners of our counselling and mediation services. We provide these in nine locations in NSW (Campbelltown, Fairfield, Gosford, Newcastle, Nowra, Parramatta, Penrith, Sydney and Wollongong), and through them we work with around 7,500 clients every year, most of whom are referred to us by the Family Court. Second, we provide NSW government-funded child and family services across the continuum of care, spanning prevention and early intervention, intensive family support, out-of-home care (OOHC) and aftercare. In these services, we work with over 6,000 clients every year, and although these families are not referred to us by the Family Court, there is substantial overlap between the experience of the two cohorts. Our counsellors and mediators in some offices estimated that between half and two thirds of their clients were also in contact with the child protection system. Members of our child protection teams estimated that a similar proportion of their clients had been in contact with the Family Court at some point in ways which had ongoing implications for their work.

### Our submission

In this submission, we argue that the family law system should provide holistic support to separating families as they resolve disputes and make decisions about their separation. Its decisions, and the manner in which they are reached, should enhance family relationships to the extent possible, reduce conflict between adults and ensure the long-term wellbeing of children. Within this system, the Family Court should be the ultimate guarantor of fair and final decisions over matters of dispute. It should, however, be an option of last resort; the majority of families who enter the system should be supported to resolve their separation through other means.

To achieve this system should facilitate access to specialist counselling, mediation, psycho-education, parenting and legal information programs at every stage of the process. These programs should work together to address the underlying psychological needs of separating families as well as their need to resolve disputes. Doing this will require education, training and resourcing, to ensure that those parts of the system which must necessarily remain legally-oriented can support a more comprehensive shift towards alternative forms of dispute resolution and better outcomes. Ensuring all parts of the family law system are informed about the impact of trauma on parents and children, and are able to work in ways which are sensitive to and minimise it, should be a priority.

In this submission, we draw on our experience as a provider of one particular set of services within the family law system. We endorse the Family and Relationship Services Australia submission, which draws on a broader range of research and public documents, and which deals with many of the issues we raise here in broader terms.

## Objectives and principles

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

The family law system should provide holistic support to separating families as they make decisions about their separation. Its decisions, and the manner in which they are reached, should enhance family relationships to the extent possible, reduce conflict between adults and ensure the long-term wellbeing of children. Within this system, the Family Court should be the ultimate guarantor of fair and final decisions over matters of dispute. It should, however, be an option of last resort; the majority of families who enter the system should be supported to resolve their separation through other means.

We are concerned that the family law system is currently attempting to address relationship issues through the law. The prevailing culture within the family law legal system is that judges and lawyers can solve these problems forensically, without drawing on the wealth of knowledge from psychology, social work and social science about what works, and with little training in relevant issues such as family violence, attachment, relationship, education, child protection, or development psychology. Indeed, in some cases those with legal training appear to be actively hostile to this kind of expertise.<sup>1</sup>

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

The redevelopment of the family law system should be guided first and foremost by the principle that the making of judicially determined orders through an adversarial process should be the option of last resort. The authority of the court is a crucial foundation for the family law system as a whole, and there will always some families for whom no alternative will be appropriate or effective. However, the current system is poorly adapted to the needs of too many families, and some aspects are so poorly adapted that they are arguably exacerbating conflict and trauma between already vulnerable people.

This over-arching principle should be implemented by also recognising the importance of:

- Addressing the therapeutic needs of separating families. All families who reach the point of calling on the family law system to resolve their disputes will require therapeutic support. The system should facilitate access to specialist counselling, mediation, psycho-education, parenting and legal information programs at every stage of the family law continuum. These specialist programs should work together to address the underlying psychological needs of separating families, as well as their need to resolve disputes. Implementing this principle will also entail changes within the court system as it currently stands. In our experience, many legal practitioners and judicial officers do not have a sufficient understanding of the impact of trauma on parties to disputes. Certain aspects of the adversarial system can even exacerbate conflict and trauma, including the long duration of cases, the nature of cross examination and other aspects of hearings, and the opportunities for process abuse. One example of how trauma can manifest is when perpetrators of past or current violence or intimidation present at Court as calm and rational whereas victims can present as disorganised and highly reactive due to their past or continuing experience as a victim.

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<sup>1</sup> Bitá, Natasha (2018) *Judge's damning verdict on social workers deciding custody battles*. The Courier Mail, 21 March 2018. The views expressed publicly by the judge, cited in this article, are consistent with those our counsellors and mediators report encountering among many legal practitioners and judicial officers.

- Non-adversarial processes. All families should be required to participate in pre-filing or pre-hearing specialist programs such as mediation, arbitration, and counselling. This would require expanding the range and capacity of these programs considerably, but the increase would be offset (at least in part) by the lower cost of these processes compared with the court, and likely reductions in downstream costs (e.g. families returning to court, and use of medical and social support services). We believe there would be significant merit in trialling an inquisitorial model of judicial decision-making, and requiring collaborative family law practice as a first resort.
- Child-centric. The different elements of the family law system do not currently employ a clear and consistent definition of this concept, and in practice it is effectively treated as a secondary priority by the system as a whole. To be child centred is to recognise that children are capable of participating in all levels of decision-making. A very large proportion of children are currently not seen by professionals in the Court, which means their voices are being silenced; in some cases, the system operates in ways which actively work against their best interests (we provide examples later in this submission). There are currently no mechanisms for seeing all children/young people within the family court system, and within some family relationship services. The family law sector would benefit from borrowing models from child protection and education on working inclusively with children.
- Ensuring the resolution of parenting and property disputes at the earliest opportunity.
- Protecting the confidentiality of non-reportable counselling and mediation.
- Protecting the safety of families.
- Promoting collaborative family law practice.

We develop these themes in the rest of our submission, below.

## 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?**

In our experience, a very high proportion of couples enter family law proceedings with unrealistic and even naïve views of how long court processes can take, the likelihood of reaching a decision they consider acceptable, and the impact it can have on finances and family relationships. Most are also not particularly well-informed about alternative models of dispute resolution, or of the support services which may be available. Although some families are able to afford access to legal practitioners who are able to advise them on many of these things, there is a widespread unmet need good information.

We therefore suggest all families, on first entering the system, be referred to a program which prepares them for the court process, and which includes psychosocial education. This would include education on bringing in a child focus, and on the pitfalls of an adversarial process, and information about legal principles and court processes, including an estimate of court/legal costs and estimated timeframes. If our proposals for mandatory pre-hearing counselling and mediation are accepted, education could be included as a standard component.

This education program would not need to be created from scratch. Some relevant resources currently exist (for example, some of our practitioners refer clients to online videos developed by other providers). Self-represented litigants could be required to

attend a compulsory pre-hearing module for coaching/preparation purposes, with a view to diverting litigants to mediation and counselling programs, if appropriate. This could be supported with a public education and marketing campaign to ensure designated providers are the first point of contact for separated families. Provider organisations should be visible, and uniformly branded in a manner consistent with the approach taken with Family Relationship Centres.

We also recommend the development of a program in conjunction with Community Legal Centres and Legal Aid, to facilitate the provision of legal advice. This could take several forms (for example, Parramatta Court has a duty lawyer who is available to provide advice at particular times).

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

Our proposal for mandatory education on first application for orders would assist families to navigate the system more effectively.

There should also be a more effective triage system for families approaching the court for first orders, to identify appropriate responses for families in different situations, and divert as many as possible from the court itself (e.g. those who are under-prepared or are vexatious applicants). It should be compulsory, as part of this triage process, for all families applying to the Court for first orders to participate in family dispute resolution process and/or counselling. To support this, the range of alternative programs should be expanded. In addition, all programs should be supported to incorporate child inclusive practice, to undertake risk assessment for family violence, and to facilitate referrals (e.g. where new needs are identified in the course of working with a family).

Assistance should be provided to groups experiencing particular kinds of vulnerability to navigate the system. In addition to the issues discussed under Questions 6-9, we wish to draw attention to the following:

- Gender. A very high proportion of women presenting to all our programs are victims of family violence. The mandated programs we call for above should include evidence based risk-mitigation programs for high risk partners. In addition, women frequently face significant barriers to access and participation because they more frequently take on the greater share of parenting responsibilities in separating families. The availability of casual child care services within easy reach of the Courts and related services would help address one significant practical barrier many women in this situation face. As we discuss elsewhere in this submission, our practitioners also identified that small numbers of men also experience very significant vulnerability (including as unacknowledged victims of family violence, and due to the interaction between employment and financial thresholds for public legal assistance). There have historically been few services support specifically for men, and they appear to be shrinking rather than growing.
- Poverty. This can be both a barrier to access and to achieving good outcomes.<sup>2</sup> We discuss the second below under Question 10. As a barrier to access, this manifests

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<sup>2</sup> Poverty and disadvantage are also major structural contributors to the conditions within which family breakdown occurs. Although outside the scope of the current inquiry, programs to prevent chronic disadvantage would be likely to reduce relationship pressure on families with children (e.g. policies to guarantee a living wage from 'standard working hours' and access to affordable quality housing). In addition, broad public education about gender equality, respectful relationships, behaviours that improve relationship quality (in non-abusive relationships) and ways of resolving conflict without violence – would also form part of the policy background designed to improve primary prevention of relationship breakdown.

itself in many ways, including difficulties with transport and child care. Several of our teams serve economically disadvantaged areas on the urban fringe, where poverty means parties are unable to attend meetings, either because they rely primarily on public transport (which can be infrequent and unreliable) or because they need to ration petrol. This could be addressed by providing services with brokerage funds to assist with ad hoc transport. These are also areas where child care and supervised contact facilities are few and/or difficult to access for people facing transport difficulties. In these areas, poverty is often associated with social isolation, which may affect the ability of one or both parties to a dispute to continue through to the conclusion.

The option to dismiss applications “without merit” (p60) is supported.

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

According to our client record system, Aboriginal and Torres Strait Islander people make up just under 5% of clients of counselling and mediation services overall. While this is slightly higher than their proportion in the general population, it varies considerably from place to place and is lower than their proportion in many social services. We believe that Aboriginal and Torres Strait Islander people are likely under-represented in our data, and that this may be due to a combination of barriers to access, and choosing not to identify themselves to providers (our practitioners have heard from some members of Aboriginal communities that they feel they will get a different kind of treatment, and potentially a reduced service, if they identify as Aboriginal to any service provider).

This constitutes a significant lost opportunity, because some alternative models of family dispute resolution appear to be much more culturally appropriate than the adversarial court system (e.g. Family Group Conferencing, discussed later in this submission). More generally, effective work with Aboriginal families requires hybrid models which can work even in cases where State child protection authorities are involved, and with kinship structures that are larger and more diverse than the nuclear families which mainstream services often presume is the norm. The Sydney Federal Circuit Court Registry has been reporting great success with an Indigenous List service they have been providing in recent years.

Our experience in other contexts (notably child and family services) suggests that the most effective approach must begin with engagement and partnership with Aboriginal and Torres Strait Islander families, communities and referring agencies. This engagement should involve joint work to identify and implement models of dispute resolution which the community supports, and which reflect cultural norms about family structure, child rearing, property and other matters covered by the *Family Law Act*. We support the principle that services should be provided by Aboriginal community-controlled organisations where possible. We note, however, that the nature of therapeutic work can sometimes pose challenges for practitioners working in small and tightly-linked communities, particularly involving confidentiality and professional distance. This suggests, at minimum, that providers in this space may need particular support with clinical supervision.

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

Cultural and linguistic diversity can affect both access to and outcomes from the family law system. The risk of poor outcomes is particularly acute when only one party to a dispute experiences this form of disadvantage, but not the other.



Cultural and linguistic diversity may contribute to difficulties accessing the family law system in several ways. Members of newly-arrived refugee communities, for example, often have acute needs for the full range of family law services, especially when they arrive with a legacy of trauma and face challenges which rapidly lead to marital breakdown (such as unemployment and the stresses of arranged marriage).

Unfortunately, new arrivals are often unaware of the existence of the family law system, or have very imperfect knowledge of available services (perhaps because poor command of English means they must rely on word of mouth). Barriers can also exist among more established communities, particularly where culturally-specific beliefs about the nature of the family and the appropriate manner for resolving such disputes are incompatible with the secular and liberal assumptions that underpin the mainstream family law system. In some communities, religious leaders may be the most widely-accepted means for resolving these matters. Some of our mediators raised concerns about religious leaders obtaining FDR qualifications, because of the potential impact of their religious authority on their independence as mediators and on the ability of participants to speak up for their own needs where religious perspectives favour one party over another. It is possible that, when viewed over the long term, these are temporary issues: our practitioners reported that more established migrant communities (such as Spanish and Slavic speaking communities, and those from Asia) do not appear to experience these barriers to access.

For those clients who do successfully gain access to the system, our experience suggests single most important cultural or linguistic factor influencing outcomes is competency in English. Where clients lack this competency, we prefer to offer counselling and mediation in the client's language, but this requires staff who have sufficient competency of their own. All too often, we must fall back on translators and interpreters, which make counselling and mediation slower, less effective and more costly. Interpreters are a particular challenge for community languages which have with fewer speakers (as often occurs for recently-arrived communities). We have concerns about the professional standards of interpreters and their capacity to remain neutral in cases where they have a pre-existing connection with one or both parties. Funding for more interpreters, and better regulation of the industry, is required.

There should be specialist programs for culturally and linguistically diverse communities and indigenous communities, which could aim to:

- establish a safe hub for community information and services;
- facilitate an understanding of family law cultural and legal context;
- develop safety plans for persons at risk; and
- establish partnerships and warm referral pathways with local community agencies.

Core intervention components could include:

- engagement of a Cultural Liaison Officer or Aboriginal Liaison Officer to case-manage and coordinate service delivery;
- legal advice appointment/s pursuant to partnership agreements with Community Legal Centres or Legal Aid;
- screening and assessment by practitioners with cultural diversity training;
- legally-assisted FDR, where appropriate;
- coordinated FDR (incorporating therapeutic support), where appropriate; and
- individual counselling, where appropriate.

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

Very few of our clients have identified disabilities. We believe this indicates the family law system poses significant barriers to access for people with disability, a belief which is consistent with our experience providing disability services. Given our lack of experience working with these clients in this context, have no specific suggestions. We do, however, believe there may be opportunities to link family law services more closely with mental health services and to explore how NDIS-funded services can work effectively with the court.

**Question 8 How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?**

In our experience, LGBTIQ families do not necessarily face significant barriers to accessing the family court system. They make up a relatively small proportion of clients in our counselling and mediation services, but the proportion is in line with their prevalence in the general population and has increased distinctly in recent years.

LGBTIQ people are, however, vulnerable to poorer experiences within the family law system, due to factors such as discriminatory beliefs on the part of staff, and real or perceived discrimination. As an arm of the Uniting Church, we are particularly aware that there have historically been values conflicts for some religious provider organisations in working respectfully and effectively with LGBTIQ people. In our experience, overcoming this requires a range of responses, including:

- Staff selection processes which require candidates to demonstrate a commitment to non-discriminatory service provision;
- Promotional and marketing material which are inclusive of LGBTIQ people;
- LGBTIQ awareness training for service staff, accredited family lawyers, Independent Children's Lawyers and court personnel;
- Supportive organisational policies and procedures; and
- Accreditation by recognised LGBTIQ representative organisations (Uniting, for example, has a Rainbow Tick accreditation, and we have found this extremely helpful in driving internal culture change and promoting awareness of our commitment to LGBTIQ issues among relevant communities).

**Question 9 How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?**

Improving the accessibility of family law in regional, rural and remote areas will require investment. This investment should favour alternative family dispute resolution mechanisms, which are generally cheaper than the courts. Designated providers could also increase the reach and variety of programs with on-line enhancements, including:

- information videos on matters such as legal information, program information, impact of separation on children, separation and trauma, and child-inclusive-practice;
- coaching apps covering things such as parenting after separation, emotional regulation, and pre-mediation coaching;
- a property mediation tool; and
- systems to support telephone counselling and mediation such as private sessions and the ability to share notes and documents in real time.

These technologies and materials could easily be integrated into the mandatory education and triage process recommended earlier, and made available to families across Australia (i.e. not just in rural and regional areas).

**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?**

There are several ways in which the cost of resolving family law disputes could be reduced. Pursuing these should be a very high priority: poverty was frequently cited by our practitioners as the greatest impediment to access to and achieving fair outcomes from the family law system. The risks are particularly acute in disputes where the parties have unequal financial resources. Under most circumstances, the party with greater resources is better able to cope with the stresses of the process (because they can afford therapeutic and professional services), and has greater scope to engage in certain forms of process abuse to exhaust the funds available to the other party. For various reasons, the parties with these advantages are often men. This is not always the case, however: our practitioners identified that employed men with low incomes may also be vulnerable, because they earn too much to qualify for publicly-funded legal aid but cannot afford private legal services.

Investment in early intervention programs will reduce costs associated with lengthy court processes. Early intervention (pre-filing) specialist programs include Family and Relationship Services, such as couples therapy and family therapy. These programs have been under-resourced for decades, as demonstrated by long waiting lists (which mean couples are often unable to access them until problems have escalated).

Our recommendation, under Question 2, that all families be required to participate in pre-filing or pre-hearing specialist programs such as mediation, arbitration, and counselling should substantially reduce the cost to clients who reach the court system. This is not merely a matter of monetary cost. As we have noted elsewhere in this submission, adversarial processes have psychological as well as financial costs for participants. These are currently not well accounted for, but are likely to manifest themselves in process delays, high rates of contravention or future disputes following final orders, and increased reliance on other publicly-funded services such as mental health. These costs could be reduced in a number of ways:

- Diversion of as many families as possible from court into specialist programs, into the pre-filing, pre-hearing or interim-ordered options which we have recommended elsewhere in this report. These could also address the fact that the court does not provide integrated case-management approaches to support families holistically.
- Early-stage collaborative legal practice, incorporating information provision and legally-assisted FDR. Private lawyers could be trained in collaborative approaches before representing parties in legally-assisted FDR.
- Reportable counselling models could form part of the suite of interim-order programs for cases where non-reportable pre-filing or pre-hearing programs did not result in resolution of the issues in dispute. There are no publicly funded forensic counselling services, which disadvantages litigants who cannot afford expert witnesses/reports. Funded community-based forensic counselling programs, operating alongside existing confidential therapeutic programs, would improve the quality of information available to the court. It would also help address a potential source of process abuse which arises when one party in a dispute has greater financial resources, and is better able to obtain reports from (say) forensic psychologists which present their case in a favourable light.

- The adoption of inquisitorial processes. These may take more time than adversarial processes, but are more compatible with sustainable outcomes and the use of therapeutic, psycho-education and dispute resolution interventions.
- Compulsory post-ordered programs to divert families from returning to court in the event of contravention or future dispute. Importantly, post-orders programs represent an opportunity for long-term engagement, establishing designated providers, and not the court, as the first point of call in the event of contravention or future dispute

Assessment of the cost of these proposals against current approaches should not just include cost of service provision, but include the cost-savings achieved through therapeutic intervention measured over at least 2 years for pilot programs. There is a history across of not allowing sufficient time to conduct and evaluate government-funded interim-ordered and post-ordered pilot programs. This may require establishment of mechanisms to track families' post-final orders to enable evaluation of longer term program impact.

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

There are several reasons why parties to family law disputes may lack legal representation, and each requires a different response.

As the Issues Paper correctly identifies, in some cases one party (often a man) may choose to self-represent, in order to cross-examine their former partner (often a woman) on things such as their sexual history. This is a form of process abuse, and as such it should be prevented rather than encouraged. Although we have not conducted a systematic analysis of the characteristics of perpetrators, this situation was most frequently cited as an issue by our practitioners in offices located in more affluent areas.

In other cases, parties may self-represent out of necessity rather than choice. This is most often due to the cost of legal representation, and so the most straightforward solution would be to increase funding for legal aid and community legal centres. It is important to note that poverty is not the same thing as unemployment. Our staff frequently cited particular challenges faced by employed men in less affluent areas, who earn too much to qualify for legal aid, but not enough to afford a private solicitor. Several of our staff expressed concern that this was contributing to perceptions among men that the family law system is “stacked against them”, because their former partners will usually qualify for legal aid due to having been responsible for child-rearing instead of working. It is also contributing to poor attachment between fathers and children in separating and separated families.

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

In our experience, self-represented clients are generally ill-informed about courts and the law, and at a competitive disadvantage against trained legal representatives. They should be referred into alternative (non-adversarial) mechanisms wherever possible. The compulsory pre-filing or pre-hearing specialist programs we discuss under Question 3 could incorporate modules to educate those who may be self-represented by choice (who are, in our experience, often naïve about the timeframes and risks involved). As noted above, the provision of legal aid based on income can inadvertently contribute to inequities where one party qualifies, and the other does not and cannot afford a private lawyer. To avoid this both parties should either both receive legal aid, or should be required to pursue non-legal mediation.

**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?**

No comment.

**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?**

Producing the best outcomes for children from family law disputes will require more than amendments to Part VII. Notwithstanding the requirement of s60CA that the best interests of the child should be a paramount consideration in making parenting orders, the way the family law system operates in practice means that the interests of children are often secondary considerations.

As we noted above, the various elements of the family law system do not currently operate as if they were using a common and coherent definition of “child centred”. To be child centred is to recognise that children have the capacity to voice their needs and make choices independent to their parents. While this may be endorsed in law and in principle, in practice many processes effectively treat children as dependent, vulnerable and not capable of participating in matters that affect them. However, in our work we have seen that children have voices separate and independent to their parents; for example, they often have their own views about contact arrangements, informed by clear and reasonable feelings of fear, being unheard or misunderstood, or experience of family violence.

The family law system would benefit from having a clear definition and explanation of children’s rights, and parent’s responsibilities and obligations towards children and young people. While many of many of these things are embedded in the law as it currently stands, they are unclear and not consistently applied, and as a result our practitioners encounter too many legal professionals who express views inconsistent with these rights.

Independent Children’s Lawyers (ICLs) are essential to ensuring the best outcomes for children, but in practice they have not lived up to their promise. Several staff in our child-specific counselling program reported that a tiny minority of children they work with meet with their ICL. In some cases, ICLs will seek information about the child from the counsellors, which poses ethical and legal challenges. Our staff identified that this may be a result of very high workloads. ICLs should be required and resourced to meet with every child, ideally twice, and also to meet with the parents. To ensure they are able to engage sensitively and interpret answers correctly, ICLs should have training in child development/psychology, and adopt a trauma- and therapeutically-informed approach to structured interviewing. These concerns could be addressed, at least in part, by ensuring ICLs are employed by an organisation (such as the Children and Family Court Advisory Service). At present, ICLs are independent professionals, and must therefore bear the administrative burden of these activities themselves.

The presumption of shared parental responsibility is frequently misunderstood and should be clarified. In our experience, parties often perceive it to mean a presumption in favour of equal shared time, notwithstanding the note to s61DA(1). This misunderstanding is often not corrected by legal practitioners. In our experience, this presumption is often counter-productive, because the time children spend with each parent is also linked with calculations of child support obligations, and this means children often become bargaining chips in negotiations between parents over financial settlement. Related to

this, we draw attention to the comments we make under Questions 15 and 33 and elsewhere about the lack of evidence-based systems for courts to identify and assess risks to children and problems in ensuring all relevant information is available to the courts.

The development of reportable interim specialist programs could ensure all children participate in a best practice child-inclusive approach, incorporating feedback to parents, and on-going, non-reportable counselling, where appropriate.

**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?**

The current broad definition of family violence is valuable, as it compels court personnel, lawyers, program providers and families to reflect on the consequences of a wide range of behaviour which can constitute abuse. The definition should be expanded to explicitly include process abuse. We note that family violence has a range of impacts which go far beyond the scope of the *Family Law Act*, including economic and housing costs for partners and children who seek to leave abusers.

We note that there is a risk that a broad definition of family violence will be applicable to the majority of separating families, and that this may inadvertently lead to an under-appreciation of the significance of family violence. This risk is all the more significant because the Family Court currently does not consistently employ evidence based tools for assessing risk to children, or capacity to parent. Our practitioners report that registrars and family consultants are making assessments based on initial meetings with parents, and sometimes after a single meeting with parents and children together. This is insufficient. To address this, and to support consistency of decision-making, court personnel, lawyers and program providers should adopt a common risk assessment tool, such as the Detection of Overall Risk Screen (DOORS), and employ best practice for who and how to meet with family members.

Definitions, processes and services should continue to recognise that the majority of victims of family violence are women and children. However, the existence of a small number of male victims of family violence is not well recognised across the system. Our services in less affluent areas to the South of Sydney estimate these might make up around one in ten families where DV is present, but noted that cases are difficult to identify because the men themselves are often uncomfortable with the label or are reluctant to report it to avoid humiliation.

We do not support the presumption that it is necessarily in the best interest of children for parents engaged with the Family Courts to have equal shared parental responsibility. Often, families that require Family Court intervention are unable to negotiate and manage equal parental responsibility (e.g. medical treatment, choice of school, religion). We also have concerns about equal parental time. This presumption as currently implemented does not take into consideration the child's voice, and the child's development needs and stages. The presumption is parent- and adult- driven and has not taken in to full consideration the child's voice or needs.

The fact of family violence should be the starting point for an inclusive approach. Assessment and support, rather than an exclusory approach, which automatically classifies a case as not suitable for family dispute resolution. As we discuss elsewhere in this submission, the range of family dispute resolution models available should be expanded to include legally-assisted FDR and coordinated FDR as a matter of course. In addition, non-reportable domestic violence counselling should form part of the suite of specialist programs available to all parties in the family law system. Furthermore,

specialist counselling programs should incorporate interventions aimed at behavioural change for perpetrators, and the Court should be empowered to mandate attendance at programs for perpetrators. As family violence is a strongly gendered phenomenon, changes should be supported by workforce initiatives to attract more men to the counselling and mediation professions.

**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?**

No comment.

**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?**

We do not have any substantive proposals for changes to the *Family Law Act* in relation to this. We note, however, that several of our practitioners and child protection workers reported instances of clients having received advice from legal professionals that they remain in the family home despite family violence, apparently on the grounds it would improve their chances of a financially favourable settlement. The legal basis of this advice is not clear to us, and it poses significant safety risks for adults and children.

**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?**

No comment.

**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?**

The manner in which child support payments are calculated and applied should be reviewed, on the grounds it encourages parents to act in ways which are not in the best interests of the child. Our counsellors and mediators report that the linking of payments to the number of nights a child spends in the care of a parent means children become bargaining chips in financial negotiations between their parents. This occurs even when not openly acknowledged by parties to a dispute, and has significant impact on familial relationships in the short term, and on child wellbeing over the long term.

## **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?**

In our experience, the timeliness of court processes requires urgent attention. Our counsellors and child protection caseworkers report that it is not uncommon for clients to wait two to three years between first application to the Court and final orders. Prolonged conflict and uncertainty are traumatic for all those involved; long delays can be particularly harmful for children, as interim arrangements and the risk of being used as “bargaining chips” impact on their ability to form healthy relationships with one or both parents. Our suggestions elsewhere in this submission, particularly those concerning the need for greater emphasis on non-adversarial forms of dispute resolution, and better education and information, are relevant here.

In addition, there may be merit in introducing procedures to test and agree on statements of fact made by parties earlier in proceedings. Our staff reported that, in many cases, claims made by one party are not tested by the other until cross-examination in the final hearing. Given the length of time it takes for cases to be resolved, this can mean that statements can go unchallenged for years, exacerbating conflict.

Provisions in s60I relating to the issuing of certificates should be significantly amended. The prescribed certificate types are open to misinterpretation, and can lead to escalating conflict and client complaints. For example:

- To state a person did not make a genuine effort requires a subjective assessment which cannot be easily tested in court given rules around confidentiality and admissibility. Moreover, requiring mediators to make such statements is contrary to the principles of mediation. This type of certificate is most likely to escalate conflict, lead to complaint, and potentially places other parties and the practitioner at risk.
- To state a person failed to attend implies fault, although there may be a reasonable explanation.
- To state family dispute resolution is not appropriate having regard to Regulations that refer to family violence, may cause anger and place a party at risk of harm.

The 60I certificate could be revised to simply state the issues could not be resolved. The existing types of certificate should be replaced with a statement of “genuine steps taken”, similar to those required under the *Civil Dispute Resolution Act 2011*. This would ensure the Court is informed of the circumstances under which mediation was not successful; as discussed under Question 25 below, it might also discourage certain forms of process abuse.

**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?**

Emphatically, yes.

Every person seeking orders for parenting or property should be required to attend a pre-hearing program before they could engage in litigation. In our experience, many parties to these disputes approach court proceedings with an unrealistic view of the time it takes, the likelihood of success, and the personal and financial costs involved. Compulsory dispute resolution would facilitate timely and cost-effective resolution of many disputes, and would also decrease the safety risks to parties from delays associated with litigated proceedings (which we have identified elsewhere in this submission). There would naturally need to be a triage mechanism to ensure that urgent cases were dealt with expeditiously by the courts.

Implementing this would require the range of pre-hearing programs to be expanded, to ensure the availability of options for as many families as possible. Where no model of family dispute resolution is appropriate, options should include intensive post-separation therapeutic services incorporating child-inclusive practice, individual counselling, and psycho-education groups for men and facilitated by men.

A similar approach could also be used to divert families from returning to court in the event of contravention of orders or future dispute. This might take the form of compulsory final-ordered programs, which provide an opportunity for long-term engagement. This would establish designated providers, and not the court, as the first point of call in the event of breakdown occurring.



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

Current dispute resolution processes could be modified relatively easily to improve outcomes in small property matters, particularly where there is no family violence, abuse or mental health issue present. We currently address property issues within our mediation services, even though we are not funded to do so, because it is an effective way of meeting an obvious need (clients are at a disadvantage if they need to engage in separate processes to resolve property and parenting matters). However, our ability to do so is limited by available resources. Our proposal under Question 21 for compulsory pre-hearing or interim-ordered specialist programs is relevant here: it could be compulsory for parties seeking orders for property to attempt mediation or arbitration for property matters. Designated providers of family dispute resolution could conduct mediation for property matters, and Family Relationship Centres could be mandated to provide property mediation. FRCs could also be supported to work with Community Legal Centres, which are funded to provide low-cost resolution of some property matters. Our mediators reported that where they have been able to work with CLCs in the past, they have achieved timely and cost-effective outcomes for families.

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

See comments below about family dispute resolution and process abuse.

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

Yes, families who have experienced violence or abuse can and should be diverted where possible from the court into appropriate, non-adversarial forms of dispute resolution.

Legally-assisted family dispute resolution currently represents best practice for parties who have experienced violence or abuse. However, funding for this approach is limited, and in our experience the mere presence of solicitors in private mediation is not always sufficient. Indeed lawyers can sometimes hamper the process by encouraging their clients to take an overly-adversarial approach. Culture change among legal practitioners will likely be required if legally-assisted dispute resolution is widely adopted, and could be supported through training and requirements to take a collaborative approach.

In addition, legally-assisted FDR does not in and of itself address the therapeutic needs of families. Enhanced and coordinated approaches should therefore also be considered, encompassing therapeutic support at every stage of the family dispute resolution process. Such models exist, and have already been trialled in Australia. These include Coordinated Family Dispute Resolution, which was trialled for two years and enjoys strong support among our staff as an effective model. This should be supported by the use of consistent tools and processes to identify family violence and abuse, and to triage and refer families swiftly and appropriately. Other approaches include hybrid case-management models, where therapist/ FDRP/lawyer work together, to better meet the complex needs of separated families: mental health issues; substance abuse; family violence; poverty.

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

Our experience is consistent with the range of forms of process abuse identified in the Issues Paper at paragraph 190. We support strengthening protections against and penalties for these kinds of behaviour.

Counselling services are open to abuse of process, when parties use subpoenas to obtain therapeutic records (“evidence-fishing”). Our staff report that this is common, and compromises the therapeutic relationship. Most counselling records are confidential and inadmissible, but the status of intake and assessment records is unclear. These often contain material which is just as sensitive as records of counselling sessions, and production of these in court may place parties at risk of harm. We recommend that section 10E and section 10J of the *Family Law Act* be amended to explicitly ensure evidence of anything said, or any admission made, in the course of assessing for intake into family counselling/family dispute resolution is not admissible.

Mediation services are also open to abuse. Our most frequent experiences of this involve one party failing to make a genuine effort to engage, or participating in a manner which delays resolution, or repeatedly calling for mediation in order to delay resolution or force the other party to meet face-to-face. This could be discouraged by requiring applicants for certificates under s60I to provide a statement of genuine steps taken, similar to those required under the *Civil Dispute Resolution Act 2011*. The claims made in these statements could then be tested in the same manner as other evidence and submissions.

**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?**

There is already an existing practice of *ad hoc* government-supported trials of new models of dispute resolution and conciliation. This could be expanded and formalised as a systematic effort to identify, test and roll out new processes and models. One recent example is the Post-Orders Intervention Pilot Program conducted by Uniting in Parramatta in 2016/17. The model encompassed an intensive case-management approach. An experienced therapist and an accredited family dispute resolution practitioner worked together to tailor interventions on a case-by-case basis. Our experience suggests that existing Parenting Orders Programs (interim-ordered programs) could be enhanced to provide child interviews in all cases, and encompass a mix of psycho-education, coaching, therapeutic and dispute resolution interventions.

Options for further enhancing family dispute resolution models include:

- funding Community Legal Centre and Legal Aid partnership agreements to expand the provision of legal advice;
- providing legally-assisted models as a matter of course;
- providing coordinated models encompassing therapeutic support throughout the FDR process; and
- requiring designated providers to conduct FDR for property and children’s matters.

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

There is scope to increase the use of arbitration. Our suggestion above for compulsory pre-hearing programs should include arbitration as an option for appropriate cases (such as disputes involving relatively simple property matters where there is no family violence, mental health or other complex needs). Consideration could also be given to interim arbitration (as an alternative to interim orders) when families are at an impasse and decisions need to be made.

**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?**

Technology may be a useful support for alternative dispute resolution under certain circumstances: online tools might facilitate resolution of simple property matters, and conference calls are already used for mediation in some circumstances. Used appropriately, these can improve access for regional and remote parties, and facilitate faster resolution of less complex or lower conflict cases. However, it must be recognised that there will be costs as well as benefits in the adoption of technology as a substitute for face-to-face processes. Risks include reduced opportunities to refer parties to additional supports, the difficulty of ensuring confidentiality and voluntary participation in online processes, and the associated risk that on-line options may provide conditions for the continued perpetration of abuse between parties due to lack of personal contact with professionals.

**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, there is significant scope to improve decision-making in relation to children who are at risk and/or in families with complex needs. Our counselling, mediation and child protection staff all strongly expressed the view that adversarial processes are a major contributor to poor outcomes for, and risk of harm to, many children. The proposals we have made elsewhere in this submission for the expansion of non-adversarial decision-making, and counselling and therapeutic services, provide a framework for moderating risk. We note, for example, that the development of new models of collaborative decision making (discussed under Question 30) provide the opportunity to engage with child protection agencies. This would be a step towards integrating the legal systems that regulate public and private family relationships respectively, to better meet the needs of separated families.

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

Yes. There are several models of family-inclusive decision-making processes which could be incorporated relatively easily into the family law system. One example is family group conferencing (which is used in child protection contexts, and is supported by Aboriginal peak bodies such as SNAICC). Since this would involve adapting a model which has evolved in a different context, we would support a staged implementation process involving progressive piloting and innovation. This could either involve a straightforward adaptation of the model, or development of hybrid conferencing/mediation/therapy models. This would expand the reach of specialist family law programs to include:

- complex cases with multiple family members;
- cases involving multi-generational disputes;
- cases with child protection concerns;
- cases with children in care;
- cases involving carers, case-workers and support persons; and
- culturally sensitive cases.

## 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?**

There are many parts of the family law system where better coordination, up to and including integrated service delivery, could benefit all families undergoing separation. We recommend caution in attempting to target reform solely at families with “complex needs”, because in our experience a very significant proportion of families in the system need support from more than one service. For example, in our experience the number of families presenting with more than one risk factor (family violence, drug and alcohol misuse, mental health distress, children protection issues) has increased over the last ten years. Organisational collaboration to support integrated service approaches will:

- deliver consistency of approach;
- deliver uniform policy, procedures and best practice principles;
- facilitate cross-referrals;
- facilitate case-sharing;
- provide clearer pathways; and
- reduce confusion for separated families.

Prevention and early intervention prevention could be improved through better coordination and collaborative relationships between family law providers and universal services, notably schools and health services. These are an untapped source of referrals into programs which can support families in the early stages of separation, such as couples counselling, family therapy, and individual counselling for children. Our staff consistently identified school counsellors as crucial points of contact, but also reported that the counsellors with whom they work often appear overworked and under-supported, and that these positions tended to be subject to significant turnover. Possible responses to this include training, and support for outreach programs from family law services and mental health programs (such as “Kids Matter”). Our staff also spoke favourably to formal programs within some schools on grief and loss (such as “Seasons for Growth” in Catholic schools).

There are significant potential benefits in greater coordination between the courts and services working with families who have entered law system. Several aspects of the relationship with therapeutic support services could be improved, including:

- Referrals. Our counselling practitioners report that court ordered referrals often include specific provisions that hamper high-quality therapeutic responses, and that these may reflect an imperfect understanding of the services by the Court. Examples include requirements that children and parents participate in joint counselling (which can harm children if it occurs too early in a separation, when they are still experiencing fear or distress at parental behaviour), requirements to attend specific forms of counselling or mediation which are not appropriate to presenting needs or family situations, and timeframes which cannot be met by the mandated service model. These problems could be addressed in several ways. First, by ensuring legal practitioners and judicial officers have better information about what services are available, the circumstances in which they are most effective, and the outcomes they can reasonably be expected to achieve. Second, by encouraging judicial officers to order that parties attend a service provider, for assessment and follow-up as determined by the provider (rather than requiring participation in a particular service). It would be helpful if orders also provided guidance about the issues which the court believes require attention, and/or the

changes which it wishes to see in family dynamics. Orders of this kind would allow therapeutic support services to respond appropriately, and assist us to provide more informative reports back to the Court (consistent with confidentiality, discussed below).

- Confidentiality and admissibility. At present, disclosures made in the course of counselling are confidential and inadmissible under sections 10D and 10E of the *Family Law Act*. These protections are absolutely essential foundations for effective therapy, and should be extended to protect intake and assessment records (as discussed under Question 25 above). We recognise, however, that these principles pose challenges for the courts. Counselling records are a rich source of information about family dynamics. Our counselling staff report that they often receive requests from legal practitioners for information which they are legally prevented from providing. In some cases, it may be appropriate for courts to refer parties to reportable counselling services, which would not attract these protections. Such services would need to be provided separately from existing non-reportable services to avoid confusion over the status of records.
- Parenting Orders Programs (interim-ordered programs) could be enhanced to provide child interviews in all cases and include a mix of psycho-education, coaching, therapeutic and dispute resolution interventions. An example of a successful enhanced program is the Post-Orders Intervention Pilot Program conducted by Uniting in Parramatta in 2016/17. The model encompassed an intensive case-management approach, in which an experienced therapist and an accredited family dispute resolution practitioner worked together to tailor interventions.

**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?**

Our child protection workers report that many families they work with are involved in both the Family Court and the Children’s Court. In one of our counselling programs for children, our practitioners estimate half of families they see are in contact with both courts in relatively prosperous areas, and that the proportion is likely closer to two thirds in more disadvantaged areas. These families experience anxiety and confusion when the two systems do not work consistently or reach consistent decisions. For example, our practitioners report that families who are in contact with FACS in relation to processes related to Children’s Court matters may be directed to cease contact, only to be penalised by the Family Court for doing so. Our practitioners report that processes for working with clients who are in contact with both courts are cumbersome and time consuming for them as well. There may be merit in considering whether, under a truly child-centric system, resolution of proceedings in the Children’s Court should take precedence over those in the Family Court.

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

There is significant scope to improve information sharing between the Family Court and state and territory systems. Our counsellors and child protection workers expressed acute concern that, at present, the Family Courts often appears to make decisions about matters such as contact orders without sufficient information about child protection and family violence risks which are known to other authorities. Our practitioners are permitted to disclose to the Court under ss10D(4)(a) and 10H(4)(a), but there is little guidance around how the information will be used or about how to negotiate the complex

challenges around admissibility and maintaining the therapeutic relationships which disclosure raises. Our practitioners are required to disclose information which is necessary to comply with other laws, including mandatory reporting to NSW child protection authorities, under s10D(2) and s10H(2) of the *Family Law Act*. However, it is not clear to us that this information is reliably communicated back to the Family Court by those authorities. Indeed, our staff report that state child protection authorities appear to disengage from cases where they are aware the Family Court is involved. We believe there would be significant merit in ensuring judicial officers and ICLs have routine access to information held by child protection authorities. This could take the form of providing direct access to child protection databases, although we recognise that this would raise significant legal and privacy concerns.

## **Children's experiences and perspectives**

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

We strongly support child-focussed and child-inclusive practice throughout the family law system. We, along with many other non-government organisations who provide similar services, have a long history of investing in approaches to working with children that are inclusive, and that respect their autonomy, voice and other rights. We recommend consideration of the participatory approach developed by Harry Shier. We are concerned that, although many of these principles currently appear in the *Family Law Act*, they are not consistently honoured in practice.

We believe being child-centric means disputes involving children should be resolved through non-adversarial means wherever possible, and that children should participate in decision-making processes (after adequate consideration of the risks as well as the benefits; see discussion under Questions 37 and 38 below). Our suggestions elsewhere in this submission for improving the effectiveness of Independent Children's Lawyers, and ensuring family law practitioners and court officials are appropriately trained and skilled, are relevant here.

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

In our experience, children and young people are often not well-informed about the nature or outcome of court processes which affect them. Our counsellors, mediators and child protection staff report that, at present, children are frequently not informed by any independent third party, and are left to discover the outcome piecemeal as they are told by one parent or the other about specific decisions relating to things like parenting arrangements that affect them. This could be addressed simply by ensuring a legal professional (perhaps their Independent Children's Lawyer) informs all children and young people involved in every case of the outcome. Ideally, the outcome and its implications should be explained in ways which are developmentally-appropriate and that they understand. The recommendations for training in child-inclusive practice which we make elsewhere in this submission would assist with this.

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

The Family Court should have clear best-practice principles for child-focussed and child-inclusive practice. These principles should ensure that disputes involving children are

resolved wherever possible using non-adversarial mechanisms, and children's voices are heard in all family law proceedings, not just those before the court.

Our counselling, mediation and child protection staff were unanimously of the view that it is not in the best interests of the child to link decisions around child support obligations to decisions concerning time spent with the child. Linking these two issues means children are too often used as bargaining chips in disputes between parents over finances. This can have destructive long-term impacts on the child's relationships.

Independent children's lawyers (ICLs) are a crucial mechanism for ensuring child-centric principles are implemented, and in practice they are currently not as effective as they could be. Two particularly common proposals which emerged in consultations we conducted were:

- Currently all ICLs are lawyers; we believe consideration should be given to allowing those with qualifications in social work or psychology, and relevant experience in working therapeutically as children, to qualify as ICLs (subject to undergoing suitable legal training). Regardless of their professional background, ICLs should have thorough training in trauma-informed and therapeutic practice. ICLs are not and should not be therapists, but this training would significantly improve their ability to engage with the children and young people they represent, and to accurately interpret their clients' responses.
- ICLs should be required to meet with the children and young people they represent, for an adequate amount of time, and at least once before any proceedings. Our counsellors and mediators report that it is common for ICLs not to meet with children or young people at all, or to have only one brief meeting. As a result, it is not uncommon for children and young people (and even other family members) to be unaware of the ICL's role. Our staff also report that ICLs seek information from them instead of the children and young people themselves, and that this raises issues of professional ethics and confidentiality. It is not appropriate for therapists to serve *de facto* as the voice of the child in this way.

Implementation of best-practice principles should also be supported by the following:

- Mandating child-inclusive practice in mediation provided by Legal Aid.
- Reviewing the practice of family consultants interviewing siblings together. Siblings should be interviewed separately, as they may have different views and may adjust their position when interviewed together in light of their relationship with each other.
- Requiring family consultants and ICLs to follow a script when first meeting children, to ensure clear, consistent information is provided about matters such as the roles of different officers, court processes, reports, decisions and so on.
- Ensuring contact orders are based on a thorough understanding of the experience and preferences of the child. Provisions around shared parental responsibility are frequently misunderstood as establishing a presumption of equal contact time. As noted earlier, this may lead to decisions which are not in the child's best interests (if there is a history of violence on the part of one parent of which the court is not sufficiently aware). It would be more helpful to frame this simply in terms of shared decision-making responsibility.
- Support for ICLs and family consultants to engage more effectively with parents.

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

We strongly support child-inclusive practice, but do not believe this necessarily requires that children participate directly in *all* decision-making processes which affect them. Indeed, we have significant reservations about a presumption in favour of direct participation in some forms of family dispute resolution - we believe it would be more appropriate for participation to be subject to a risk assessment.

For the same reasons as apply to court processes (discussed above), child inclusive practice in family dispute resolution should employ evidence-based models which reflect best practice principles, and services should be provided by designated providers who can demonstrate compliance. Interviews with and feedback to children should be guided by clear policies and procedures, consistent with the comments we have made elsewhere in this section. This should be supported by research and evaluation to ensure models are available to meet the needs of the full range of families in the system.

In our experience, Legal Aid does not provide child-inclusive practice in mediation, and should be funded and supported to do so.

Any family dispute resolution process must take account of the fact that almost all the parents involved will be struggling with parenting; indeed, our mediators report that a very large proportion of those they work with are not aware that they lack basic parenting skills. We have found that hybrid mediation models can be effective, because they allow for flexible work to support parents to build self-awareness and look after their children while they resolve their disputes with their spouse.

**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 long-term therapeutic benefits to children from participating in child-inclusive decision making and dispute resolution processes. There are also inherent risks to children from involving them directly in those processes, including exposure to arguments between their parents and the sense of being made responsible for decisions which are beyond their capacity. These risks should be managed through appropriate assessment by practitioners. This should include adoption of standard tools to assess parents' capacity to hear the child's voice, and to guide practitioners to relay the child's concerns in a safe way, as well as evidence-based assessment of the parents' reflective capacity. Risks to children can be mitigated by ensuring practice models are evidence-based, and services are provided by specialist organisations which can demonstrate compliance with those principles. For example, practitioners who interview children should be trained to work therapeutically; and family dispute resolution practitioners working with parents should not interview children directly, as evidence suggests children should be interviewed by an independent child consultant.

**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?**

It should be possible to meet culturally-specific needs of children who wish to participate in family law processes through careful selection and implementation of appropriate models of non-adversarial dispute resolution. Some of these models have already been trialled in other contexts in Australia. For example, family group conferencing (FGC) has been trialled in some Aboriginal communities in NSW for use with families where children are assessed as being at Risk of Significant Harm and removal is being considered. The



Secretariat of National Aboriginal and Islander Child Care identifies FGC and similar approaches (such as Aboriginal Family Decision-Making) as appropriate for work with Aboriginal families.

Providing culturally-sensitive and safe services is not merely a matter of adopting particular mechanisms. Organisations which provide these services must be supported to employ an appropriately-skilled and supported workforce. This will involve employing staff with a high degree of competency in relevant community languages. Our mediators and counsellors alike reported that the use of interpreters makes both processes much more difficult. This difficulty is compounded in the case of small linguistic communities, where there may be few professional interpreters and staff have to rely on other members of the community to interpret. This brings significant risks around privacy/confidentiality and impact on family relationships, particularly when young people are more competent in English than adults. Practitioners should also have deep knowledge of relevant cultural norms about family life for the communities they work with.

### **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?**

The proposals discussed earlier for adequately training, resourcing and supporting legal professionals should help the family law system to better understand and respond to the experiences of children and young people. These proposals could be further supported by a formal research program. Consistent with a fundamental commitment to child-inclusive practice and the rights of the child, this research should be undertaken with the children and young people concerned, or even child-led, rather than simply treating them as objects of scrutiny. Specialist program providers should be supported to collaborate with universities and other researchers to do this. In our experience, families are often hesitant to engage directly with the court and research institutes. They are more likely to engage with research when research is conducted in collaboration with front-line workers.

## **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?**

Accredited family law practitioners and independent children’s lawyers (ICLs) should demonstrate competencies in non-legal issues which have an impact on the conduct and outcomes of family law, including:

- risk assessment;
- family violence;
- child-development and attachment theory;
- trauma-informed practice;
- child-focus and child-inclusive-practice; and
- cultural awareness as it pertains to these issues.

Additionally, training for ICLs should include working therapeutically with children. Although their role is not to be therapists, in our experience therapeutic techniques would help them to elicit and interpret the perspectives of the children they work with.

This would be beneficial for many reasons, including:

- legal professionals are significant sources of timely information and advice for their clients on the availability of counselling, mediation and other relevant services;
- the advice legal professionals give their clients can have a significant impact on whether the dispute is resolved in a timely and cost-effective way;
- ICLs play a vital role in ensuring a child-centric system, and they cannot do this unless they are able to understand the children they work with.
- judicial officers must often make judgments about the credibility of oral testimony, and there is a risk of error if these are not made based on an understanding of the impact of trauma on this process.

We believe there may be scope to achieve this through Continuing Professional Development. Our counsellors and mediators report that legal professionals appear to have a very wide degree of discretion over their professional development. They are not required to develop or maintain knowledge of related fields which is relevant to the areas in which they specialise. We suggest the government work with law societies in each jurisdiction to require legal professionals to develop and maintain relevant 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?**

We believe that judicial officers should also be competent in the areas identified in our response to Question 41 above. We understand that judicial officers are likely to be exposed to some of the latest thinking in these areas through submissions and oral testimony from informed experts. We do not believe this alone is sufficient to support them in the challenges of consistently making informed decisions in difficult circumstances.

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

Our staff frequently observe legal professionals acting in ways that exacerbate conflict between parties to family law disputes. We recognise that these practices are, in part, encouraged by fundamental features of the adversarial system itself (in which the role of the advocate can easily be understood as seeking the best outcome for their client as an individual). But the causes do not appear to be solely structural. Anecdotally, our staff report that legal professionals working in regional areas may be more likely to encourage clients to take an adversarial approach, suggesting that there may be local cultures rather than a single monolithic system. We have also experienced difficulties in ostensibly non-adversarial contexts. For example, one of our metropolitan Sydney offices recently trialled the use of solicitors in a mediation. One party's solicitor treated the process as if it was adversarial, which lengthened negotiations by several hours. In the end, the family reached an agreement through a compromise which everyone except the solicitor (but *including the solicitor's client*) supported. Our staff reported this to us as indicative of a broader trend among solicitors of "not appreciating the culture of mediation".

One possible response to this would be to mandate family lawyers engage in collaborative practice as an initial stage of handling any dispute. This could be incorporated into the suggestions we have made earlier about mandatory education, counselling and mediation/family dispute resolution.

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

Family law professionals and judicial officers would both benefit from:

- being better informed about vicarious trauma (perhaps as part of the continuing legal education proposed above); and
- having readier access to support services for themselves.

Experience of the family law system report that this knowledge appears to vary significantly across the State and among those working within each court. Better information and support would help improve the wellbeing and the effectiveness of legal professionals. It might also have the indirect benefit of reducing stigma within the system associated with acknowledgement of trauma and the use of counselling services.

## **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?**

No comment.

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

No comment.

### **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?**

No comment.