



PeakCare
Queensland Inc.

Submission to the

Australian Law Reform Commission

*Review of the Family Law System
Issues Paper, March 2018*

7 May 2018

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Part One: INTRODUCTION

On 17 August 2017, the then Attorney-General of Australia, Senator the Hon George Brandis QC, requested the Australian Law Reform Commission (ALRC) to inquire and report about whether, and if so what, reforms to the family law system are necessary or desirable, including amendments to the Family Law Act 1975 (Cth).

The Attorney-General's request noted a range of issues and intersections of the family law system with other Commonwealth, state and territory systems relating to child protection, domestic and family violence systems, family law services, and child support systems.

The Attorney-General's request also noted that the ALRC should refer to relevant existing reports and consult widely to ensure experts, stakeholders, and the community have the opportunity to contribute. The March 2018 Issues Paper is the first consultation document released by the ALRC.

PeakCare Qld Incorporated (PeakCare) welcomes the opportunity to make a submission in response to the *Review of the Family Law System Issues Paper*.

Part Two: ABOUT PEAKCARE AND THIS SUBMISSION

PeakCare is a peak body for child and family services in Queensland. Across Queensland, PeakCare has 54 members. These organisations are a mix of small, medium and large, local and statewide non-government organisations that provide prevention and early intervention, and generic, targeted and intensive family support to children, young people, adults and families. Members also provide child protection and out-of-home care services (e.g. foster care, kinship care, residential care) to children and young people who are at risk of entry to or who are in the statutory child protection system, and their families. PeakCare's membership also includes a network of 25 individual members and other entities supportive of PeakCare's vision of 'Safe and well children. Safe and well families'.

PeakCare was established in 1999 having evolved from the Child and Family Welfare Association of Queensland and prior to that, the Board of Governing Authorities for residential care.

Our interest in the review of Australia's family law system is at the intersection with legislation, policy and services relating to child protection and family support, and domestic and family violence, particularly as they apply in Queensland. Our focus centres on families with dependent children aged 0 to 18 years.

As the ALRC knows, Aboriginal and Torres Strait Islander children and families are over-represented in statutory child protection systems and under-represented in services and systems that support child and family wellbeing, improve family functioning through intervening early before concerns

escalate, and prevent unnecessary entry to more intensive service systems. With regard to children¹ and families from culturally and linguistically diverse backgrounds, quantitative data are limited about their involvement in Queensland's child protection system. Even without these data, as the Issues Paper conveys, there are well established barriers and enablers relating to structural and other responses to language and cultural differences that children, women, men, families and communities experience across a range of service systems.

Data published by the [Australian Bureau of Statistics](#) states that the percentage of divorces involving dependent children has declined since 1996 and was less than 47% of divorces granted in 2016, with an average number of 1.8 children per divorce involving children. This is relevant because an objective of Australia's family law system is for only the most complex of cases to reach the court as family relationships services, dispute resolution, mediation and other interventions should be available and used to reach agreement rather before court is needed. These families have or are experiencing concerns such as child abuse and neglect, child sexual abuse, domestic and family violence, substance misuse, mental ill-health, and structural disadvantage, the same characteristics of many of the families in contact with statutory child protection and other intrusive, intensive service systems.

The Family Court of Australia's [Annual Report for 2016-17](#) includes data about the number of cases in which a *Notice of Child Abuse, Family Violence or Risk of Family Violence* has been filed which, it is noted, does not reflect all cases in which family violence is raised or is an issue as allegations of abuse or risk of abuse and family violence or risk of family violence can be raised by parties in other ways. All of these cases would also not necessarily involve children. The number of Notices increased from 405 in 2012-13 (representing 14.1% of final order cases) to 653 in 2016-17 (representing 23.8% of final order cases). The number of Magellan cases started and finalised over the last five years is also reported. The number of cases started has decreased since 2013-14, with the number finalised almost halving from 121 in 2015-16 to 69 in 2016-17. As in other jurisdictions, Queensland's statutory child protection agency has arrangements in place with the Family Law Court for their involvement where relevant information relating to child protection matters is held.

The submission now turns to commenting on the Issues Paper.

¹ The terms 'child' and 'children' have been used to refer to children and young people aged 0 to 18 years unless otherwise indicated.

Part Three:

FEEDBACK IN RESPONSE TO THE REVIEW OF THE FAMILY LAW SYSTEM: ISSUES PAPER

Given the scope of our interest in this review – families with dependent children where abuse and neglect are apparent or alleged - this submission only responds to some of the questions posed.

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

PeakCare is generally supportive of the three key functions noted in paragraph 38 that refer to academic research asserting the relevance of children's safety, development and economic support interests; protecting adult rights to physical safety and equitable distribution of resources; and regulating processes for resolving post-separation problems to ensure they are affordable and cost-effective.

Reflecting our interest in families with dependent children and intersections with the child protection and domestic and family violence systems, we support a re-drafting of two of the suggested key functions so as to read:

- children's rights to safety, development and economic support
- protecting adult rights to safety and equitable distribution of resources

The family law system should explicitly state support for children's rights. A broad definition of 'safety' is needed to encompass physical, emotional, personal, and cultural safety both in respect of the way that the family law system operates with children and adults and the objectives sought for children and adults throughout their contact with the family law system.

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

The Issues Paper queries whether there should be an overarching set of principles, and if so what they should be, to guide the family law system. Indeed the largely unchanged original principles are outdated and do not reflect contemporary family compositions or community views about marriage and intimate relationships. Paragraphs 43 and 44, based on the Terms of Reference and preliminary consultations, include relevant matters and proposed additional principles for the family law system.

In the Queensland Government's recent review of the paramount principle, other general principles, additional principles for Aboriginal and Torres Strait Islander children, and other principles included across the child protection legislation, an intention was to have the principles 'in one place' and be applied consistently in administration and decision making. A similar approach should be taken for the 'family law system' whereby an overarching set of principles should apply to the administration of the Act. Of course, specific principles should be included in respect of the family law system and Aboriginal and Torres Strait Islander children and families.

The purpose of the principles should be clear, for example, whether they clarify thresholds for 'entry to' and pathways or interventions within the family law system; guide decision making; and / or as



more generic statements or commitments to the protection of child and parental rights. Currently, they serve a mix of purposes.

Reflecting on paragraphs 43 and 44, principles with resonance for PeakCare, given our vision of 'Safe and well children. Safe and well families', are:

- access to early intervention, family mediation and dispute resolution services at the earliest opportunity and in the least costly and harmful manner
- affording dignity, privacy, confidentiality and safety to parties in separating families
- meeting the needs of (and doing no more harm to) children and families who need to resort to the family law system
- supporting access for all parties to affordable legal information, advice and representation
- protecting and promoting the needs and rights of children of separating families
- children having the opportunity to 'have their say' to the decision maker
- child centred and trauma informed processes and practice
- equality of treatment for children regardless of their family structure
- culturally relevant and competent practice
- use of independent, expert witnesses informed by rigorous, contemporary research, and
- ethical professional practices.

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

As the Issues Paper acknowledges (paragraph 59), 'mainstream' family law services are not necessarily designed or delivered in ways that recognise the lived experiences of Aboriginal and Torres Strait Islander peoples. Recommendations and strategies coming from various inquiries and submissions are cited for improving the existing system or particular aspects of the system.

As the ALRC may be aware, [Family Matters. Strong Communities. Strong Culture. Stronger Children](#) is a national campaign focused on addressing the over-representation of Aboriginal and Torres Strait Islander children in child protection systems across Australia by 2040. PeakCare is an active campaign partner and a Gold-level Sponsor of the campaign. Based on evidence that service design and delivery works best for Indigenous peoples when it is Indigenous-led, the Family Matters' Roadmap includes an immediate change priority that calls for community-controlled Aboriginal and Torres Strait Islander organisations to lead "...the design and delivery of integrated and holistic child and family services based on their knowledge of local needs." Implementation requires "...preference in procurement processes in all jurisdictions for Aboriginal and Torres Strait Islander services, or where they are not available, genuine partnership with local Aboriginal and Torres Strait



Islander services or communities. It also requires funding of Aboriginal and Torres Strait Islander services that reflects community need.”²

In the context of this review of Australia’s family law system, this ‘principle’ has significant implications for the design and delivery of family support and intervention, family relationships, family violence, dispute and mediation, legal and other non-government-delivered services targeted to Aboriginal and Torres Strait Islander children and families across Australia.

Question 11: What changes could 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?

While there is a range of reasons why individuals are not legally represented, access to (appropriate and timely) legal representation is a barrier, in part or perhaps largely because of the cost associated with accessing legal services. Nevertheless ‘family law’ is a legal process.

Reflecting recommendations made in Queensland’s Child Protection Commission of Inquiry that reported in 2013, PeakCare supports provisions to ensure before a matter progresses, the family court should be sure that children *and* adults have received legal information and advice; have been assisted if necessary to complete and provide documentation; and are adequately represented.

PeakCare is also supportive of the strategies, for example those raised by the Productivity Commission, described in the Issues Paper (paragraphs 113-118).

Question 14: What changes to the provisions of 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?

As the Issues Paper notes (see paragraph 130), there is a range of concerns about the presumption of equal shared parental responsibility for a child’s care. PeakCare agrees with the concerns identified about the current definition of ‘family violence’ and is supportive of the ALRC’s consideration of potential reforms to the decision making framework in Part VII of the *Family Law Act* and to reforms of the definition of family violence as set out in paragraph 133.

PeakCare is also supportive of Part VII of the *Family Law Act* being amended to reflect what has always occurred with diverse family arrangements (i.e. children being raised collectively by family or community, or by adults who are not their biological or adoptive parents) and therefore supportive of a consistent approach to decision making for all children irrespective of their family structure.

² <http://www.familymatters.org.au/wp-content/uploads/2016/11/TheFamilyMattersRoadmap.pdf> p.21

In all instances, hearing the child's voice, as well as consideration of their *Gillick* competency, should be integral to judicial decision making.

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?

In the context of cases involving child protection matters and / or domestic and family violence, PeakCare agrees with the concerns cited in paragraph 170 and, where there are safeguards in place for the child/ren and the protective parent, is supportive of the reform strategies noted in paragraph 171.

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?

Calls for a better understanding of the impact of trauma on an individual and their behaviours, and embedding trauma-informed approaches in program and service design and delivery are understandably happening in many and varied settings in which children and adults who have experienced child abuse and neglect, child sexual abuse, domestic and family violence, and other traumatic experiences present.

The Issues Paper refers to changes that have already been developed for the courts and notes recognition of 'a constellation of long-standing and contemporary issues' for Aboriginal and Torres Strait Islander peoples and peoples from culturally and linguistically diverse groups (paragraph 181). PeakCare views addressing the latter as fundamental if future reforms are to ensure accessibility and equity.

Much work has been undertaken by the Healing Foundation, for example, to articulate understandings about impacts and how best to respond to Aboriginal and Torres Strait Islander children, women, men and communities that have or are experiencing trauma. The purpose of referring to the Healing Foundation is to assert that 'trauma' is multi-faceted. Consistent with calls from the Family Matters campaign described above, the [Healing Foundation](#) argues that:

For Aboriginal and Torres Strait Islander people, healing is a holistic process, which addresses mental, physical, emotional and spiritual needs and involves connections to culture, family and land.

Healing works best when solutions are culturally strong, developed and driven at the local level, and led by Aboriginal and Torres Strait Islander people.

The Issues Paper canvases options around embedding specialist family violence workers in the family courts and / or the 'development of alternative dispute resolution processes to reduce the potential for re-traumatisation' (paragraph 183). PeakCare does not see these as mutually exclusive options

and as indicated earlier in this submission supports conceptualising 'safety' as encompassing physical, emotional, personal and cultural safety.

Question 29: Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risks 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?

Risks to children relating to, for example, abuse and neglect or allegations of same, reduced parenting capacity relating to family violence, and more generally systems abuse from delayed or prolonged decision making need to be managed. The availability of resources should not determine approaches to managing risks to children (or to other parties). Alternative approaches are described in paragraph 220: a hybrid model where monitoring parties' engagement is transferred to a court registrar or community-based relationships service, or an administrative model such as a non-judicial tribunal utilising a consent based inquisitorial process. Paragraph 222 refers to using 'family group conferencing' / family inclusive processes to reach agreement. As the Issues Paper states, these family-centred approaches have their history with indigenous peoples but are used more widely to inform or determine child protection decisions prior to and as an element in the court's deliberations.

All of the approaches have merit, particularly family inclusive decision making processes. Where people are involved in making a decision, they are more likely to be understanding of the outcome of deliberations. All of the approaches are resource intensive and ensuring children and adults feel and are 'safe' is critical. Additional dedicated resources will be required as will further exploration to ensure, for example, access in different geographic areas and cultural appropriateness. It is also important to note the importance of prospective tribunal members, registrars, 'family group meeting' facilitators and others having the necessary skills *and* knowledge to operate using age-appropriate, inclusive, trauma-informed approaches with a wide range of children and families, all with complex needs. Again as stated above, PeakCare supports Aboriginal and Torres Strait Islander design and delivery of service responses for Aboriginal and Torres Strait Islander peoples.

Question 35: What mechanisms are best adapted to ensure children's views are heard in court proceedings?

Paragraph 255 states that the *Family Law Act* recognises rights accorded to children under the United Nations Convention on the Rights of a Child. This submission has raised the importance of children participating in decision making in respect of children having the opportunity to put their views directly to the judicial officer. PeakCare is therefore supportive of developing guidelines for this to occur, in all scenarios, not only if the judicial officer wishes to do so (see paragraph 257). Also as mentioned earlier, PeakCare supports incorporating provisions for the court to check, in this

instance with children, that legal information, advice and representation is or has been adequate and is understood.

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 41: 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?

The topics listed as areas for improvement in paragraphs 281, 282 and 283 are broad-ranging and reflect issues raised in various parts of the Issues Paper as needing to be considered and / or addressed. Another topic around which knowledge is required by professionals and judicial officers is child and adolescent development. Access to evidence-informed information and / experts about specific disabilities and their impacts may also be necessary in some matters.

Part Four: **CONCLUSION**

Reform of the Australia's family law system is necessary and timely to address longstanding concerns about timeliness of decision making, cost, access, cultural appropriateness and, unfortunately, safety concerns for women and children.

PeakCare appreciates the opportunity to make this submission.



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