

21 May 2018

**Association of Family and Conciliation Courts
Australian Chapter Submission to Australian Law
Reform Commission – Review of the Family Law
System – Issues Paper 48**



Introduction

The focus of this submission is the benefit to the community of the engagement of appropriately skilled professionals in the family law system.

The AFCC is a national multidisciplinary professional organisation comprising members from the legal profession, judicial officers, social scientists, psychologists, social workers, researchers, mediators and other professionals working in Family Law.

The Australian chapter of AFCC was commenced in 2012 and since then members have joined from across Australia. The chapter has had four very successful conferences and a variety of professional development activities and opportunities for members to contribute to the betterment of Family Law practice. One of these activities includes an annual Think Tank workshop comprising a collaboration of various professionals thinking creatively about problems, difficulties, obstacles and improvements for the Family Law system. Although a relatively new organisation, the chapter holds various professional development and training activities for family law professionals all around Australia including metropolitan and rural areas.

The AFCC in Australia is a public company and registered charity.

Chapter conferences have been held in Melbourne (15 August 2014 - 'Children as the Starting Point: Assessing Families for Family Law Disputes'), Sydney (14 and 15 August 2015- 'Building Bridges: A multidisciplinary approach to Family Law'), Brisbane (18 to 20 August 2016 - 'Assessing and determining children's best interests in the flood of family violence claims') and Melbourne (17 to 19 August 2017- Decisions! Decisions! Decisions!), whilst the 2018

conference is to be held in Adelaide (16 to 18 August 2018 – Alienation? Myths, complexities and possibilities . . .').

The AFCC Australian chapter membership includes a cross-section of highly skilled professionals practising in family law and is well placed to deal with some of the difficulties and problems in the family law system, with subcommittees dealing with specific responsibilities:

- Current Legal Issues,
- Advocating for therapists and initiatives to modify the APS Guidelines for dealing with young people,
- Complaints to professional bodies about Single Expert Witnesses,
- Initiatives with Hague Convention cases,
- Think Tank - Innovations in Family Law,
- Accreditation of Single Expert Witnesses,
- Family Dispute Resolution,
- Publications and Training and
- a New Zealand Network.

Question 5 – Aboriginal and Torres Strait Islander communities

The AFCC Australian Chapter welcomes the review of access to justice issues identified in the family law systems for litigants from Aboriginal and Torres Strait Islander communities. It is acknowledged that the existence of barriers to use of the family law system by Aboriginal and Torres Strait Islander communities has been identified in multiple reports and AFCC Australian Chapter notes that many of these barriers continue to exist. We are aware of the grossly disproportionate number of indigenous children living in out of home care when compared with non-indigenous children. The AFCC Australian Chapter shares the widely held view that if the family law jurisdiction was more accessible to indigenous families and therefore better understood and better utilised, the numbers of indigenous children in out of home care would come down.

The AFCC Australian Chapter notes the significant improvements in the Family Court and Federal Circuit Court administration in response to the barriers identified. In 2014, the Federal Circuit Court was the first Australian Court, State or Federal, to develop a Reconciliation Action Plan in consultation with Reconciliation Australia. The existence of working groups within the

Courts designed to actively address identified barriers is to be welcomed and applauded. The trial of specific Court lists for matters involving Aboriginal and Torres Strait Islander litigants, such as that piloted in the Sydney Registry of the Federal Circuit Court should be encouraged on a continuing basis to ensure that indigenous support workers have an active advisory role in the Court process and the conduct of litigation is undertaken in a way that seeks to implement the Family Law Council's recommendations in its' report, Improving the Family Law System for Aboriginal and Torres Strait Islander Clients.

The AFCC Australian Chapter suggests that the use of court resources to conduct specific lists for matters involving Aboriginal and Torres Strait Islander communities is likely to have the effect of developing a culturally secure court hearing and will allow the Courts to funnel resources to appropriate matters. For example, by conducting a specific list, the availability of a culturally experienced Family Consultant is likely to be more achievable given that scheduling of such availability will be pre-planned.

It is critical that Aboriginal and Torres Strait Islander personnel, including liaison officers, are employed by family law registries to facilitate a strong connection between indigenous communities and the family law system. It is noteworthy that in Victoria, the establishment of specialist Koori courts in the criminal law jurisdiction has resulted in a substantial increase in the numbers of indigenous employees in the court system. It is recommended that indigenous lists be resourced and extended to other FCC registries. It is recommended that working parties be established at the same time as each list, to oversee the Court's process, the majority of members to be indigenous and if possible, to include community elders. Members of these working parties would provide support to litigants and facilitate referrals to relevant service providers on list days. Members of the working parties would engage with indigenous agencies in their region to educate those who work with indigenous families about the family law system and keep the Court informed about indigenous service providers and legal services available to indigenous parties in that region.

The AFCC Australian Chapter encourages the use of alternate methods of court attendance in matters involving Aboriginal and Torres Strait Islander communities. Experience of practitioners within the family law system suggests that there is a great practical difficulty in ensuring the personal attendance at court of clients from Aboriginal and Torres Strait Islander communities. There are many identified reasons for this, including, but not limited to, the tyranny of distance in remote communities, the financial impediment of travel, a history of distrust of the intervention of

courts into the lives of Aboriginal and Torres Strait Islander communities, and a lack of available childcare.

It is recommended that the Family Court and Federal Circuit Court consider the implementation of a policy that actively promotes the use of telephonic and video link communication for matters involving litigants in Aboriginal and Torres Strait Islander communities. Remote communities are often serviced by schools and health services that may be able to offer video link services for use in these matters. The use of Local Court facilities is also another option to address access to justice issues due to travel.

The AFCC Australian Chapter also recommends the recruitment of Family Consultants and expert social workers with cultural links to, or experience in working with, Aboriginal and Torres Strait Islander communities. At present, both the Family Court and Federal Circuit Court are under resourced in this area. Training of existing staff is unlikely to properly address the cultural idiosyncrasies required to assess families of Aboriginal and Torres Strait Islander communities given the complex nature of working with both adults and children of these communities. Whilst cultural training of all staff should be welcomed, the funding of specific Aboriginal and Torres Strait Islander staff would assist with gaining the confidence of Aboriginal and Torres Strait Islander communities using the family law system and provide for expert assistance to Judicial Officers and legal practitioners, which in turn could see an increase in resolution of these cases without the need for hearing.

The AFCC Australian Chapter has had the opportunity to read the draft submission of the Indigenous Issues Committee of the NSW Law Society with which it agrees. It shares its view that indigenous communities need knowledge and awareness of the family law jurisdiction so that solutions can be found and implemented for children in a timely way, before crises arise resulting in the intervention of State agencies. This will include capacity building for trusted existing Aboriginal community-controlled agencies and organisations. It agrees that the legal framework will require the support of indigenous service providers, including therapeutic services, to ensure supportive scaffolding can be put in place around the legal framework. This requires both community education and education for professionals working within the State care and protection systems and family law jurisdictions, including training for FACS caseworkers to identify matters appropriate for early referral to the family law system.

The AFCC Australian Chapter recommends that all those engaged with indigenous parties in the family law system receive cultural training, including lawyers, family consultants, court

officers and judicial officers. When service providers are not culturally attuned, they do not provide an effective service to indigenous clients. In addition, those engaged with indigenous parties in the family law system need to understand the impact of trauma.

The AFCC Australian Chapter highlights the need for the training (in relation to the family law jurisdiction) of indigenous service providers and of case workers in the State welfare departments who engage with indigenous families. Service providers need the capacity to identify matters which should be directed to the family law jurisdiction, rather than the child protection system.

The AFCC Australian Chapter provides discussion opportunities for the improvement of the family law system in respect of Aboriginal and Torres Strait Islander communities, such as an upcoming plenary to be held on 17 August 2018 at the fifth annual conference in Adelaide entitled 'Improving access to the courts for indigenous Australians: Why and how?' with panellists Judge Charlotte Kelly, Federal Circuit of Australia, Adelaide; Ms Robyn Sexton, former judge of Federal Circuit Court of Australia, Sydney, New South Wales; Ms Melissa Clarke, Acting CEO, Aboriginal Legal Rights Movement, Adelaide, South Australia; Ms Jean Walla Counsellor/Support Worker, Nunkuwarrin Yunti, Elizabeth, South Australia; Mr Alec Wanganeen Family Dispute Resolution Practitioner Family Relationship Centre, Christies Beach, South Australia; and Mr Trent Shepherd, Policy Officer, Federal Circuit Court of Australia, Sydney, New South Wales.

With the numbers of indigenous children being placed in out of home care at unacceptable levels, this session is an interactive panel discussion around why, how and what special measures and pathways in the family law system are needed to help indigenous people keep children with their families and their communities.

Question 9 – People living in rural, regional and remote areas

The Family Court and Federal Circuit Court have experienced fluctuations in their financial and judicial capacity to service regional areas by Circuit sittings, and the AFCC Australian Chapter suggests that an increase in judicial appointments and resourcing will greatly assist access to justice in rural, regional and remote areas. It is suggested that increasing Circuit sittings will assist in the early resolution of matters as the frustration of delays experienced by litigants can be reduced and their conflict contained. An increase in Circuit sittings will obviously require additional judicial resources and an increase in judicial appointments.

The AFCC Australian Chapter supports the proposals for an increase in access to digital court services, including audio visual links, and recommends that consideration be given to engaging in service agreements with community resources, such as Local courts, education facilities and health services where such technology is in existence and available to community members. It must be recognised however that there are limitations to the conduct of litigation by digital means. The conduct of final hearings, where the tender of documents and cross-examination on documents is often required, is more appropriate to in person litigation, which is best facilitated by an increase in Circuit sittings.

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?

The AFCC Australian chapter suggests that consideration be given to the following.

- Enforce the use of parenting plans and their registration with the Court (as currently permitted by s. 63DB) as a first instance parenting agreement.
- Issue guidelines on age appropriate overnight care arrangements (based on the current research) to be easily accessible from the FCA/FCC and community organisations website to be incorporated into parenting plans/consent orders.
- Small and/or simple asset pool property matters should be referred to FDR in the first instance and if unresolved in FDR, should proceed to a binding arbitration.

The AFCC Australian chapter endorses and adopts the position of the Law Council of Australia (LCA), expressed as follows:

The LCA rejects any suggestion that the provision of expert reports by private providers is somehow a “closed shop”, inclusion in which is somehow controlled by the providers themselves (as was suggested in certain submissions and evidence to the Legal and Constitutional Affairs Legislation Committee into the proposed Parenting Management Hearings Bill) or that the fees charged by those providers are unreasonable. The preparation of an expert report will usually involve many hours of face to face engagement, reading of court documents, subpoenaed material, and may require contact with relevant third parties before reflection, analysis and drafting of a report, in response to terms of instruction or an order of the court specifying the matters to be

addressed. The parties engaging in this process are usually unrestricted in their ability to select or nominate the relevant expert. It is not surprising that those whose expertise comes to be recognized and highly regarded will be in greater demand and increasing cost, reflecting that expertise, in itself cannot be a ground for criticism.

The LCA supports initiatives which would encourage more experts to consider working in this field which might increase competition and put downward pressure on fees charged.

The AFCC endorses the submissions of the Australian Association of Collaborative Professions and the Victorian Association of Collaborative Professionals of

“Respectful and accessible diversion from litigation by the incorporation of Interdisciplinary Collaborative Practice provides an effective and efficient methodology for moving beyond dispute resolution into interest-based negotiation to provide long term solutions for children and families, and is a valuable part of ADR processes for some families. This was discussed favourably in the Family Law Council Report of 2007, but not acted upon”.

AFCC endorses the conceptual framework of Collaborative Professions and the inclusion of its practitioners as ‘Family Dispute Resolution Practitioners’ per section 10G of the Family Law Act.

Further, the AFCC Australian chapter supports the encouragement of more expert practitioners into Family Law practice by providing and facilitating relevant training, and by seeking to protect expert practitioners from the stress and wasteful distraction of complaints made by disgruntled litigants who are motivated by what they perceive as tactical advantage and/or a desire for retribution. Further details of the chapter’s efforts to encourage more practitioners into Family Law are set out in subsequent parts of this submission.

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

Training programs designed for self-represented litigants that covers court procedures, rules of evidence and cross examination, preparation of applications and affidavit material offer the

greatest potential for assistance. These programs could be run either as an on-line course or at court premises.

Upon successful completion of the above program, self-represented litigants should be required to attend a face to face assessment with a court officer. The purpose of a face to face assessment would be:

- Triage of issues in dispute with an aim to limit issues to be heard in court;
- Refer non-complex issues to legally assisted FDR or binding arbitration

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?

Part VII needs to be rewritten and simplified with the overriding question remaining 'what is in the best interests of a child', with a priority (as now) on the need to keep children safe from harm. Part VII is currently too prescriptive resulting in longer hearings and unnecessarily long judgments.

S. 60CC(2)(a) talks about the benefit of a meaningful relationship with a child. A meaningful relationship can take many forms.

The provisions relating to presumption in favour of equal shared parental responsibility and the ramifications of such an order, should be repealed. In the experience of members of the AFCC they have caused confusion and misunderstanding in the community, including the legal community, and resulted in a marked increase in litigation.

If the focus in the FLA is shifted towards promoting a meaningful relationship between a child and parents instead of a requirement to consider an order for equal time in the first instance, conflict in parenting cases may be reduced significantly. There is a strongly held view in the community that the current wording of the FLA enshrines a *“right to equal time”* and creates an incentive to seek maximum nights of care possible, without any regard for development needs of children and practical considerations.

Instances where one parent demands equal shared care *“because the law says so”* are sadly common. This holds true even where one parent is battling mental health, substance abuse, has a history of family violence and lacks appropriate and safe accommodation. The situation is further complicated by the child support formula is based on the nights of care, not quality of contact. E.g. where a parent spends time with a child on a daily basis but provides no overnight care (where a child is very young, has high care needs or a parent cannot secure suitable

housing) that parent is penalised by paying a maximum level of child support with no recognition for time and costs of spending time with the child. Whilst in theory it is possible to enter into a binding child support agreement, in practice the costs of engaging two private solicitors makes such agreements out of reach for most parents.

If there is to be any default pathway, “Substantial and significant time” as a default legislative pathway is a better option that would cover a broad range of arrangements, including equal time. For example, a toddler or a baby can live with one parent but have several hours of contact with the other parent every 2nd day. A parent of a high school student takes him or her to every sporting game during the week, spends the whole of Saturday and a Saturday night together, but the child has one home as a primary base. Both are examples of meaningful relationships and time spent with a child is at least significant if not substantial.

The child support formula needs to be reviewed to recognise that a parent may not be able to provide overnight care for a number of reasons out of his/her control, for example shift work; living in a shared household; living with a new partner who is not open to children staying overnight; a long commute to and from a child’s school. Some of these parents feel that they are currently doubly penalized; paying the full rate of child support; and their former partner receiving an extra percentage of property settlement as a primary carer. The CSA formula should consider how often a parent sees a child, not how many nights a child spend with them. Child support based on the number of nights of care has resulted in higher rates of litigation.

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 AFCC Australian chapter recognises and endorses the need to enhance protection measures offered to those who have experienced family violence, when navigating the Family Law system.

In this regard the AFCC Australian chapter would welcome the expansion of the definition of family violence in the *Family Law Act 1975* (Cth) (the **Act**) to include specifically an abuse of process as an example of family violence with sufficient specificity to outline certain behaviours, including but not limited to bringing frivolous and vexatious claims and delinquency in providing full and frank disclosure.

Further, the AFCC Australian chapter would welcome and endorse the expansion of the definition of family violence in the Act to ensure parity with state and territory legislation by

providing a non-exhaustive list of examples of behaviour that constitute family violence. It is recognised that while there will remain difficulties in gaining parity between state and territory legislation pertaining to family violence, the legislation governing the federal jurisdiction of the Family Law system should be sufficiently broad and detailed to ensure its users, nationwide, are offered the same protections, irrespective of the state or territory in which they live.

The AFCC Australian chapter would also support the expansion of the definition of family violence in the Act to include a dedicated subsection that is designed to provide protection to and capture the experiences of persons who experience family violence within Aboriginal and Torres Strait Islander communities.

The AFCC Australian chapter would welcome amendments to the Act that would prioritise the protection of persons who have experienced family violence, especially children, and mandate judicial officers to have regard to allegations of violence when exercising jurisdiction pertaining not only to parenting matters, but also property matters.

It is submitted that one method by which this could be achieved, as set out in the ALRC Issues Paper, would be to enact requirements for an early risk assessment for family violence to be undertaken and for findings of fact to be made about allegations of family violence as soon as possible after proceedings in respect of parenting or property are filed. The AFCC Australia would endorse such amendments and would also support further amendments to the Act which would see those matters in which a positive finding of fact as to family violence is made, being streamlined into a list where a separate dedicated pathway for decision making, particularly with respect to parenting matters, is provided.

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

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

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

The AFCC Australian chapter considers that amendments to the Act that mandate parties to comply with the requirements of section 60I of the Act prior to filing applications for a division of property or spousal maintenance would greatly assist in the early resolution of matters and, in turn, reduce the number of applications filed in the Family Court system.

For those applications that are filed in the Family Court system, as an overriding principle, the AFCC Australian chapter would support and welcome the establishment of an early and comprehensive triage system designed to quickly identify the needs of clients and thereafter to have the ability to streamline matters into specialised lists and programs suited to their needs, including to highly specialised Family Dispute Resolution (**FDR**) services designed to support families where family violence is a feature.

The AFCC Australian chapter would support and welcome the increased use of practice directions designed to enhance efficiency and safety such as the recent introduction of Practice Direction No. 2 of 2017 in the Federal Circuit Court of Australia, which limits the length of interim affidavits to 10 pages with a maximum of 5 annexures. Consideration could also be given to amendments to the Rules and or the use of further practice directions to govern the number of affidavits filed in any one matter as well as the number of witnesses allowed in any one matter, without prior leave of the Court.

It is also submitted that stricter compliance with relevant Court Rules regarding the time frames for service be required, potentially with the use of costs orders imposed in certain circumstances.

Early and clear communication of such requirements could be provided to all potential users of the Family Law system via information (in the form of a fact sheet, or similar) provided contemporaneously with the issue of a section 60I certificate as well as in a readily accessible and understandable source of online information.

As a goal, it is submitted that all matters should have engaged with an FDR service provider, either by virtue of compliance with section 60I of the Act or as a result of early diversion to specialised services designed to meet the needs of clients with complex issues, within six months of first interaction with the Family Court system. This position however should be read in conjunction with the answers to the next questions.

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

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

The AFCC Australian chapter considers that, generally speaking, the current FDRP pool has only limited expertise in property matters, mostly due to very few professionals coming from finance/accounting backgrounds. FDR accreditation requires only minimal training in property mediation. Many property dispute resolution practitioners do not have an adequate understanding of the concepts involved.

A specialist accreditation for property dispute resolution practitioners and a requirement to undertake on-going training would enable the creation of a dedicated property dispute resolution pool for small and/or simple property matters.

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

Family violence and abuse are epidemic and IVOs are a common feature for around half of clients attending FDR. However, in most instances family violence is historical and erupted at the time of separation, was mutual and de-escalated/stopped post separation.

FDR providers do not take on cases where there is a current or pending investigation by Child Protection or where family violence is ongoing and severe. In these situations, parties receive a s60I(b) certificate (“FDR not appropriate”) and are referred into the court system.

Often, they are the most vulnerable parties who have limited or no access to litigation funding, are traumatized and lack the necessary skills to represent themselves. Many do not pursue the issue further, live in fear, agree to unsafe arrangements for their children.

Legally assisted FDR would provide the next step for these families. It should be a compulsory option for cases involving parents seeking time with the children where there is a current IVO or where an IVO is between third parties such as a step parent and a parent. There should also be a central “portal” for cross referencing information supplied to the Magistrates Court and Child Protection to that provided in family law matters. Apart from reducing the need for a vulnerable party to recount their experiences to multiple authorities and relive the trauma, it would identify cases that are more likely to be abuse of process (as information supplied to various authorities is likely to be inconsistent and contradictory).

Question 23 – how can parties who have experienced family violence abuse be better supported in court?

There has been a widespread misperception that family report writers and those who assess families therapeutically are not trained in family violence and have no expertise in this area.

There are a variety of ways that social scientists and welfare professionals can become involved in family law matters.

Practitioners who privately prepare reports are required to adhere to Chapter 15.5 of the Rules. These Rules require that an expert report must be addressed to the court and the parties, have attached to it a summary of the instructions given and a list of documents relied on in preparing the report, be verified by an affidavit of the expert witness, and that the expert witness must make declarations that they have made all the inquiries they believe are necessary and appropriate, that relevant matters have not been omitted from the report except as otherwise stated, that the facts within the expert's knowledge have been included in the report, that they have read and complied with Divisions 15.5.4, 15.5.5 and 15.5.6 of the Rules and understood and complied with their duty to the court. Additionally, they must declare that they have complied with the requirements of their particular professional code of conduct and name their professional association.

The Rules require that the report must state the reasons for the expert witness's conclusions include information about methodology, record the expert witness's qualifications, detail the literature or other material used in making the report, provide relevant facts matters and assumptions on which the opinions in the report are based, information about the facts that are in the report that fall within the expert witness's knowledge, details about any tests, experiments, examinations or investigations relied on by the expert witness and, if they were carried out by another person, details of that person's qualifications and experience, the reasons for the expert witness's conclusions and if there is a range of opinions on the matters dealt with the report, these must also be provided, a summary of the conclusions reached, and disclosures about whether areas fall outside the expert witness's expertise, qualifications if the report or conclusions are incomplete, inaccurate or unable to be concluded.

The Rules emphasise that an expert witness has a duty to help the court with matters within the expert's knowledge and capability, and the duty to the court overrides the obligation to the person instructing, or paying the fees and expenses of, the expert witness. The expert witness has a duty to *"give an objective and unbiased opinion that is also independent and impartial on matters that are within the expert witness's knowledge and capability"*.

For those practitioners who make assessments and write family reports, the Australian Standards of Practice for Family Assessments and Reporting - February 2015, a publication jointly released by the Family Court of Australia, the Federal Circuit Court and the Family Court of Western Australia, applies.

Additionally, there are other published guidelines and standards of practice for completing family reports that apply such as Association of Family and Conciliation Courts (AFCC)'s Model Standards of Practice for Child Custody Evaluation, AFCC's Guidelines for Court-Involved Therapy or the American Psychological Association (APA) Guidelines for Child Custody Evaluations in Family Law Proceedings amongst others.

Those working as Single Expert Witnesses to prepare Family Reports must also adhere to ethical standards set by their professional bodies such as the codes of ethics, policies and guidelines published by the Medical Board of Australia, the Australian Psychological Association, and the Australian Association of Social Workers as applicable. Codes of ethics for each profession contain principles about not working outside a field of competence.

In addition, continuing professional development is required to maintain eligibility to such professional associations and is a necessary prerequisite for formal registration for those who come under the Australian Health Practitioners Registration Agency (AHPRA) legislation such as psychiatrists and psychologists.

AHPRA is the organisation responsible for the implementation of the National Registration and Accreditation Scheme across Australia, to decide policies and ensure the registration scheme works effectively and this includes managing, investigating and determining complaints about registered practitioners (that is, psychologist and psychiatrists).

Continuing professional development requirements are different for each profession, and with medical practitioners including psychiatrists and psychologist, they become a formal part of the registration procedure and professional development is linked to continued registration in their professions.

For family law professionals working as single expert witnesses, there is no specific requirement for training in family violence, although Family Report Writers are required to adhere to the Australian Standards of Practice for Family Assessments and Reporting, published in February 2015.

Those Standards require that practitioners must make reasonable efforts to obtain information to conduct risk assessments (paragraph 26) and where family violence is identified they must conduct “an expert family violence assessment as part of their report” including considering the contents of “the Family Court of Australia and Federal Circuit Court of Australia Family Violence Best Practice Principles – edition 3.1 (2013, or the Family Violence Policy of the Family Court of Western Australia” with specific advice about how these matters are to be approached.

The sections of the ‘Standards of Practice’ guide dealing with family violence are included in full below:

Paragraph 26

Family assessors must make reasonable efforts to obtain sufficient information from the parties, documents or collateral sources to assess the level and nature of risks to the welfare of the children, and to provide assessments of risk.

- *These risks include, but are not limited to, concerns about or allegations of family violence, child abuse or neglect, mental illness, or drug or alcohol misuse.*
- *These risk assessments must be conditional on different possible determinations by a court on any significant disputed or non-agreed facts.*
- *When making recommendations, the assessor must consider and recommend according to any assessed risk of future harm. Recommendations must also be conditional upon different possible findings of a court of any significant disputed facts that would impact on future risk.*

Paragraph 27

Where family violence is identified as an issue in a matter, the assessor must conduct an expert family violence assessment as part of their report. They should use commonly accepted interpretive frameworks for family violence.

When assessing risk of harm from family violence, the family assessor must consider the Family Court of Australia and Federal Circuit Court of Australia Family Violence Best Practice Principles – edition 3.1 (2013, or the Family Violence Policy of the Family Court of Western Australia. In doing so they should:

- *address the issue of family violence or abuse or the risk of family violence or abuse*
- *assess the harm the children have suffered or are at risk of suffering if the orders sought are or are not made*
- *consider whether or not there would be benefits, and if so, the nature of those benefits, if the child spent time with the person against whom the allegations are made*
- *assess whether the physical and emotional safety of the child and the person alleging the family violence or abuse can be secured before, during and after any contact the child has with the parent or other person against whom the allegations are made*
- *ascertain the views of the child or children in light of the allegations of family violence or abuse or the risk of family violence or abuse when it is safe to do so, and*
- *be informed whether the whereabouts of the party making the allegations has been suppressed and that those whereabouts not be revealed in the assessment and reporting process.*

Where family violence or abuse is established, the family assessor should report on:

the impact of the family violence or abuse on the children and a parent/adult who may be a victim

- *any steps taken by a parent or adult to act protectively or protect the children and minimise the risk of further family violence or abuse*
- *whether the person acknowledges that family violence or abuse has occurred*
- *whether the person accepts some or all responsibility for the family violence or abuse*
- *whether, and the extent to which, the person accepts that the family violence or abuse was inappropriate*
- *whether the person has participated or is participating in any program, course or other activity to address the factors contributing towards his or her violent or abusive behaviour*
- *whether there is a need for the child and the other parent or carer to receive counselling or other form of treatment as a result of the family violence or abuse*

- *whether the person has expressed regret and shown some understanding of the impact of their behaviour on the other parent in the past and currently, and*
- *whether there are any indications that a person who has behaved violently or abusively and who is seeking to spend time with the child can reliably sustain that arrangement and how it will occur so that the child feels safe.*

Additionally, the AFCC has several practice guidelines specific to dealing with family violence in family law cases.

The 'Practice guide for family court decision-making in domestic abuse related child custody matters' ('the practice guide') are identified as a:

"compilation of research-based practice guides is designed to support and enhance substantive and procedural decision-making by family court professionals involved in domestic abuse-related child custody matters. It provides guidance on how to identify, understand and account for the nature, context and implications of abuse at every stage of the family court proceeding by any person who is involved in the case. It promotes informed decision-making that focuses upon the lived experiences of the parents and children whose lives are being adjusted by and within the family court system. The practice guides contained in this compilation were developed by the Battered Women's Justice Project, in consultation with the National Council of Juvenile and Family Court Judges and representatives from the Association of Family and Conciliation Courts, with generous support from the U.S. Department of Justice Office of Violence Against Women. The practice guides were informed by researchers, scholars, and expert practitioners, as well as battered and battering parents across the country and around the world".

The practice guides contain detailed and specific advice around assessment and understanding of family violence and focus on separating families including information on training for those who undertake 'custody evaluations' and lawyers. The guides also contain information about assessment and safeguards for mediation and co-parenting amongst parents where there are allegations of family violence.

The AFCC Australian Chapter currently has an initiative underway for formal training for Family Report Writers with plans to introduce an accreditation system for family report writers. The AFCC Australian chapter is in the process of appointing an accreditation panel and advisory

committee to work on assessment procedures for accreditation of family report writers. The AFCC Australian Chapter family report writer accreditation model will be based on the Law Institute of Victoria's model for accreditation of specialist family law lawyers that involves intense assessment with written, practical and interview components.

The AFCC Australian Chapter has also set up a training schedule for Family Report Writers that includes modules on risk assessment and intensive training on assessing and dealing with families who have experienced family violence. This is likely to be a joint initiative with Women's Legal Service Victoria or another leading family violence program provider.

All professionals who work as single expert witnesses are required to maintain competency in their profession, with psychologists and psychiatrists having enforceable obligations to maintain their registration by undertaking continuing professional development.

There are a variety of programs and training that professionals can attend on a voluntary basis.

The AFCC Australian Chapter provides opportunities for training and professional development through an annual conference devoted to family law topics. For example, the 2016 annual conference in Brisbane had the theme of family violence where leading researchers, academics, lawyers, judges and social scientists presented on such topics as:

- Stalking and persistent harassment- Dr Lorraine Sheridan
- Coordinating responses: Plugging the gaps in the system- Judge Tom Altobelli, Professor Heather Douglas, Dr Phil Watts, Ms Anne Marie Rice, Ms Pam Hemphill, Inspector Regan Carr, Inspector and Manager of the Domestic, Family Violence, and Vulnerable Persons Unit.
- Stalking and family violence: Course, nature, and interventions- Dr Lorraine Sheridan
- Flashpoints in Family Law: When current models of risk assessment fail- Dr Simon Kennedy, Dr Jennifer Neoh
- Family reports and family violence- Ms Zoe Rathus
- The challenges of dealing with family violence allegations at interim hearings in the Federal Circuit Court – Panel session - Judge Alexandra Harland, Mr Stephen Page, Dr Jacoba Brasch QC, Judge Kevin Laphorn, Mr Steve Atkinson
- Engaging and intervening with at-risk male clients: Practical 'How Tos' and 'How Not Tos'- Mr Tony Christie, Mr Owen Pershouse
- Critical Forensic Issues in Family Law Interventions and Assessments- Dr Robert Simon, Dr Phil Stahl

- Wasn't this supposed to be helping? Recognising and redirecting problem therapy- Dr Lyn Greenberg
- Domestic and family violence and self-represented litigants: Can we address the power imbalances?- Dr Jacoba Brasch QC
- Risk assessment for lawyers- Ms Leanne Sinclair, Ms Allyson Foster
- Treatment outcomes for those who are violent towards family members- Professor Michael Daffern, Professor of Clinical Forensic Psychology with the Centre for Forensic Behavioural Science at Swinburne
- Children's best interests where there are allegations of family violence: Does the legislative framework support good decision making? - Chief Justice Diana Bryant, Professor Richard Chisholm, Dr Rae Kaspiw, Mr Rod Hooper SC, Ms Robin Cohen
- Stepping Stones: Legal barriers to economic equality after family violence-Ms Emma Smallwood
- The refugee and asylum seeker context - Ms Lois Whiteman
- 'Best interests of the child' - How has this term been interpreted under the Family Law Act 1975 (Cth) and in the context of family violence, and have the 2011 reforms made any difference - Dr Renata Alexander
- Flashpoint, self-care, and managing your own risk - Dr Phil Watts
- Breadth, depth and universality in whole of family risk screening – putting the Family Law DOORS into practice. Family Violence Screening in Preliminary Assessments -Dr Claire Ralfs and Dr Jamie Lee
- Research Informed Early Intervention – Catching them Before Too Much Damage is Done- Dr Lyn Greenberg
- The magic tool box – understanding the strengths and limits of psychological testing-Dr Phil Watts
- A short film 'Degree of Separation' produced by Mr Darren Mort
- Domestic violence, child abuse, abduction risk, Oh my!! - Dr Robert Simon, Dr Phil Stahl

The Australian Psychological Society (APS) and other organisations such as Australian and New Zealand Association of Psychiatry, Psychology and the Law (ANZAPPL) host leading international and national presenters that include professional development and training on family violence.

Practitioners who work as SEW may also attend international conferences, training and activities on family violence.

As there are currently no standard qualifications or registration of practitioners who work as single expert witnesses, there is some variability in competence, expertise and capacity to appropriately deal with family violence. These issues have prompted the AFCC Australian Chapter to work towards specialist accreditation of single expert witnesses.

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

As noted above in reference to Question 14, the AFCC Australian Chapter endorses amendments to the Act that widen the definition of family violence to include abuse of process and related behaviours. Further, the AFCC would endorse the inclusion of matters relating to delinquency in providing full and frank disclosure (as one example) in section 75(2) of the Act for consideration in the division of property.

Going beyond this, the AFCC Australian Chapter would also support measures being taken to strengthen penalties, including the making of costs orders, against parties to address instances of an abuse of process.

It is submitted by the AFCC Australian Chapter, that a comprehensive triage system at the time of filing all new applications would assist in the identification of litigants who instigate and re-instigate multiple proceedings, including in different courts, which may in turn trigger the matter being allocated into a designated list, created for the purpose of hearing claims by those litigants.

The AFCC Australian Chapter submits there is merit in a pilot program introducing a Counsel Assisting model for matters that involve self-represented litigants in the Family Law system, particularly in those matters where family violence is a feature, to limit the cross examination of vulnerable witnesses by self-represented litigants.

Further, the AFCC Australian Chapter would support measures taken to reduce the number and length of adjournments granted in any given matter and impose stricter compliance requirements with Court Rules and Court directions including, for example, the possibility of adopting a self-executing 'Deemed Abandonment' model (where appropriate) as currently exists

in respect of Appeals or a similar 'Deemed Undefended' model with the remainder of a matter progressing on an undefended basis in certain circumstances. Greater use of costs orders would also be appropriate.

Further, the AFCC Australian Chapter submits that consideration should be given to requiring all applicants who have filed a certain number of prior applications (particularly for final and/or contravention orders) to automatically require the prior leave of the Court before service of such an application on the other party. Again, it is submitted that a triage system would assist in the identification of such situations.

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

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

As noted above, the AFCC Australian Chapter encourages and would welcome amendments to the Act that mandate parties to comply with the requirements of section 60I of the Act prior to filing applications for a division of property or spousal maintenance. In this regard, it is suggested that an expansion of legally assisted FDR processes would be of benefit to users of the Family Law system in reaching a timely and cost-effective resolution to their matter.

It is suggested that Legal Aid commissions, might, with further funding, establish panels of private practitioners who are able to offer 'un-bundled' legal services to parties involved in small property matters, both in a representative capacity and in the capacity as an FDR facilitator.

For those matters where family violence is a feature and as such, identified as not being appropriate for FDR in accordance with the exceptions set out in sections 60I(9)(b)(i)-(iv) of the Act, it is submitted that with the assistance of a triage system as referred to above, such matters might be diverted to specialised conciliation lead jointly by a Registrar and a Family Consultant within the Court structure. It is accepted that this would require an increase in the resources available to the Courts to cater for such services.

The AFCC Australian Chapter would support the use of practice directions for the diversion of

non-complex small property matters to a small claims division of the Federal Circuit Court of Australia, where less adversarial processes are adopted, or, with the consent of the parties, to a panel of appropriately qualified and registered arbitrators for Arbitration, as a means by which Court resources are reserved for families with complex needs. Again, it is submitted that suitable matters for such diversion to a small claims division or arbitration might appropriately be identified in an early triage process established within the Court system.

For the dispute resolution process to be improved, the following needs to be addressed:

- Introduction of an online initial questionnaire/booking system to log a request for FDR. The initial questionnaire can also use a “red flag” system (e.g. by asking questions about intervention orders, family violence and relationship dynamics) where some clients are contacted by a community legal representative or a family violence worker to see if they require assistance. The request is then forwarded to available FDR providers.
- Funding linked Performance Indicators that a client be seen for an initial assessment within a reasonable amount of time (let say 2 weeks) with cases involving family violence or safety risks within 72 hours.
- Consistent approach to intake and initial risk assessments between various FDR providers.
- Where some or all issues were resolved during the FDR session, a FDR provider should be responsible for formalizing agreements in a parenting plan to be registered in the court. Clients should not be sent home with copies of broad notes.
- s. 60I certificate requirements to include two additional sections: (f) “issues resolved” and (g) “issues partially resolved”. A signed and dated parenting plan should accompany these types of certificates.
- Clients should not be sent away with a bunch of leaflets with phone numbers as referrals. FDR services should be responsible for making contacts with e.g. family violence workers, housing assistance or legal services as well as guide the client to the next stage in the process (currently court application).
- FDR should be the first step in the family law ladder and accountable to the family court for the outcomes.

Question 33 – Cross jurisdictional collaboration

Jurisdiction over matters relating to children and their welfare is divided between the States and Territories and the Commonwealth. The Commonwealth has jurisdiction for family law matters in relation to disputes between individuals. In contrast, State and Territory Care and Protection jurisdictions concern public law issues involving the intervention of the State into families.

As far back as 1997, a study tracking 200 Family Court matters in which child abuse allegations had been made, concluded that the two jurisdictions had “reached a position not only of mandated coordination, but of mutual resource dependence”¹. Indeed, the Family Court in the matter of *Re Z* (1997) 20FAM LR 651 at 661 noted *“while it is true that the area of child protection and the normal area of jurisdiction of the Family Court of Australia emanate from different sources and from a different historical background, it is not possible to compartmentalize jurisdictions and indeed they overlap in the sense that both are concerned with the welfare of children...The considerations to be brought to bear in the size of both jurisdictions are often the same or similar, and are particularly so in determining whether a child has been, or is likely to be subject to an unacceptable risk of abuse.”*

It has also been apparent for many years, that the lack of coordination between the family law and care and protection jurisdiction is a serious concern to society at large, as well as those who practice in the jurisdictions. The current jurisdictional arrangements are noted to present difficulty in ensuring that the children who come before the Courts have the entirety of their interests served.

Chief Justice Nicholson of the Family Court in the matter of *Re Karen and Rita* (1995) 19 FAM LR 528 at 556 stated *“the problem really lies in the fact that family law in general is the province of the Commonwealth Government and child welfare, the province of the States and Territories. It is more than time that this issue was addressed as it has been in countries like the United Kingdom and New Zealand where there is an integrated jurisdiction that enables Courts to consider all welfare issues in relation to children. The situation in this country leaves open the very real possibility that some children’s welfare will be jeopardized. For those that practice in either both or one or either of the jurisdictions it would be no surprise that the interception of the two areas of the law and indeed the failures of this interception arise prominently in matters*

¹ Brown, T., Frederico, M., Hewitt, L., Sheehan, R. (1997). Mandated coordination; Aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Services’ *Paper Children at Risk; Now and in the Future*, Australian Association of Family Lawyers and Conciliators seminar Melbourne April 1997.

involving family violence and child abuse. Whilst the Children's Courts are designed as a specialist jurisdiction to deal with matters involving child protection, it is common for child protection concerns to be raised in parenting applications under the Family Law Act."

A 2007 study, involving an assessment of 300 Court files involving parenting disputes in both the Family Court and what was then the Federal Magistrates Court, revealed that allegations of child abuse were raised in between 19% to 50% of all cases and that more than half of those cases involved allegations of family violence, many at the severe end of the spectrum².

Statistically this is perhaps not a surprise given the following:

- A 2010 report from the NSW Department of Family & Community Services showed that 26.7% of all children in NSW under 18 years were known to the Department³.
- Between 12% and 23% of Australian children are exposed to family violence⁴.
- International research indicates that between 30% and 50% of children internationally are exposed to family violence⁵.
- Children's safety is especially compromised in situations where there is both family violence and child abuse⁶.
- Children who die as a result of a fatal assault are often in households in which domestic violence is a common factor⁷.

It is a common scene amongst both the family law jurisdiction and the child protection jurisdiction that the complexities of families experiencing family violence or child abuse is ever increasing. It is reported by both the Family Court and the Children's Court of NSW that family violence of itself is rarely a standalone issue. Both jurisdictions note that cases involving

² Moloney, L., Smyth, B., Weston, R., Richardson, N., Qu, L. & Gray, M. (2007). *Allegations of family violence and child abuse in Family Law children's proceedings; a pre-reformed exploratory study. Research Report No.15*, Melbourne: Australian Institute of Family Studies.

³ Zhou, A. (2010). *Estimate of NSW children involved in the child welfare system*. Sydney: NSW Department of Community Services.

⁴ Price-Robertson R, Bromfield L & Vassallo S. (2010). *The prevalence of child abuse and neglect*. Melbourne: Australian Institute of Family Studies.

⁵ Brown, T. & Alexander, R. (2007). *Child abuse and family law: Understanding the issues facing human service and legal professionals*. Crows Nest, N.S.W.: Allen & Unwin.

⁶ Laing, L. (2003). *Domestic violence in the context of child abuse*. Australian Domestic and Family Violence Clearing House. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.463.4143&rep=rep1&type=pdf>

⁷ NSW Child Review Team, *Annual Report 2008*.

domestic violence also generally have issues related to mental health problems and parental substance abuse⁸.

There is indeed an overlap, which AFCC Australian Chapter acknowledges, of matters that could quite properly be ventilated in either the family law jurisdiction or the care and protection jurisdiction.

In essence, there are four stages of overlap between the jurisdictions, namely, those matters where:

1. During the Department's investigation, but before it has commenced proceedings in the Children's court, the Department may identify a viable and protective carer for the child and refer the carer to the Family Court.
2. The Department may have already commenced proceedings in a Children's Court and identified a viable and protective carer so with leave of the Children Court may withdraw its application and advise the carer to make an application for a parenting order in the Family Court.
3. After a hearing in the Children's Court, it may become apparent that although the child protection matters are resolved, there is still a dispute between the parents as to spend time with arrangements which the Children's Court have not addressed and accordingly the Children's Court orders may be registered in the Family Court dealing with the issue of parental responsibility and the issue of contact orders is ventilated in the Family Court.
4. Proceedings may commence in the family law jurisdiction with an invitation to the Department to intervene being made and the Department so electing to intervene.

In relation to the first and second stages identified above, there are often real problems experienced in the family law jurisdiction. These matters often arise when there are serious concerns about the children being at risk of family violence or drug abuse. In essence, these matters start with a report being made to the Department and for example, the Department may conclude that the mother is protective provided that she separates from the father and refuses contact between the father and the children. In these circumstances, the protective parent is often advised by the Department to go to the Family Court for a parenting order. From the Department's prospective, their records are often closed on the basis that the children are with a

⁸ Children's Court of NSW. *Submission family violence 2037* to the Australia Law Reform Commission, 22 July 2010.

protective carer and accordingly the legislative conditions for a care order to be pursued no longer apply. The children will be considered, safe with plan, that plan often being that the children remain in the care of the protective parent.

Unfortunately, what is often experienced, is that the protective parent applicant does not receive formal support from the Department to make their application to the Family Court. It is often presumed by the Department that a family law jurisdiction will exercise their discretion in the same way that the Department consider “safe with plan” and accordingly the Department do not intervene. Indeed, it is common to see litigants that tell their legal representative that the Department have informed them to commence proceedings urgently however there is nothing in writing from the Department to verify such. This leaves a problem where the applicant has difficulty obtaining evidence of violence and abuse and providing that evidence to the Family Court or the Federal Circuit Court to a standard sufficient to satisfy them that either a no time or supervised time order is required. Largely, this is because in practice, the concerns are known to the Department and the documents are held uniquely by them. It is often the Department’s caseworkers who have told the protective parent about the issues and not the parent themselves who hold that information.

Accordingly, the outcome may not be the one envisaged by the Department and it may be one that places the children at risk. The Family Law Council identified this as an issue as early back as 2002 when it reported that it is *“an abrogation of the public responsibility to ensure that children are protected”* by referring a protective parent to orders in the Family Court when Child Protection concerns are identified. The Family Law Council went on to say *“a parent may find it very difficult to take responsibility for presenting a case to Court. There may be language problems, problems understanding the legal system, or problems receiving or maintaining legal aid. Victims of domestic violence or other abuse may find it very difficult to take responsibility for a legal battle with the perpetrator when they remain fearful of the former partner’s propensity for violence. For these reason, if the child can be adequately protected through orders made under the Family Law Act, then in some cases it may be very important for child protection authorities to take the lead in presenting the case for orders which will protect a child”*⁹.

Indeed, a study in 2002 of child protection cases in the Victorian Children’s Court, revealed that the Department of Human Services sought to withdraw the Children’s Court application in 80 out

⁹ Family Law Council. (2009). *Family law and child protection. Final report*. Canberra: Attorney-General’s Department.

of 113 cases because the viable carer had been identified and that carer had been referred for Family Court orders. The study showed that 62 of the 80 cases were tracked in the Family Court. Family Court orders in favour of the protective parent were obtained in 56 of the tracked cases but in 6 cases the orders were not in favour of the protective carer. For example, in one case, it was identified that the agency identified the father as the protective carer and referred the family to the Family Court but then had no further involvement. The children were then placed in the care of their mother from whom the Department of Human Services had twice removed them. The study also identified that of the 62 cases the Department intervened in only 6. This is despite some cases involving serious violence and high risks of the children's safety being compromised if left without orders¹⁰.

The woman's legal service also provided a submission to the Australian Law Reform Commission family violence forum on this issue and noted that it was a common case for them to receive clients with the following dilemma:

"For instance, the Department gets contacted in relation to the safety of a child due to family violence allegations etc. They advise the mother to take out an intervention order excluding the father from the home or they will have no choice but to remove the child from her care. The mother then takes out an intervention order excluding the father. The Department then make an assessment that its' involvement is not warranted in the case as they deem the mother to be acting protectively. The problem... arises when an application is made in the Family Court jurisdiction by the father to spend time with the children. In a Family or Federal Magistrates Court, the mother explains why she is seeking that the father have no contact or supervised contact with the children. She says that she was advised by the Department to restrict contact. The Department however have not provided any written evidence of this advice, except to advise that Court they have no reason to be involved where the mother is acting protectively. The mother is then left in Court by herself, without the Department providing support to the mother's position. The mother then has to explain why she is acting as an unfriendly parent by not facilitating.¹¹"

A problem often encountered in the family law jurisdiction in the identified series four scenario, that is, when the Department is invited to intervene in Family Law proceedings, is that there is

¹⁰ Kelly, F. & Feinberg, B. (2002). Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection. *International Journal of Law, Policy and the Family*, 16, 38-70.

¹¹ Comment on ALRC family violence online forum' woman's legal service.

no consistent definition of child abuse. The definition of child abuse and family violence under the Family Law Act is one of the wider interpretations of family violence and abuse that is seen across the legislation. It encompasses physical abuse, sexual abuse, emotional and psychological abuse, neglect and exposure to family violence. It is most consistent with the broad concept definition of child abuse advocated by Holzer and Bromfield as one which engages the concept of maltreatment noting that “*maltreatment refers to non-accidental behaviour towards another person, which is outside the norms of conduct and entails a substantial risk causing physical or emotional harm behaviours may be intentional or unintentional and include acts of admission and commission. Specifically abuse refers to acts of commission and neglect and acts of admission.*”¹²

As a result of the different definitions of child abuse, the threshold that triggers intervention from the Department of Family & Community Services also differs. The Department’s intervention is often predicated on them considering the children to have experienced significant harm from abuse and neglect that has been substantiated from the Department. The thresholds vary depending on the extent of harm, risk of harm and whether the definition focuses on the actions of the abuser or the consequences of the actions. In NSW, the test is a risk of significant harm.

A secondary, and perhaps most significant problem that arises in scenario four is the refusal of the Department of Family & Community Services to intervene despite an invitation to do so.

Section 67Z of the Family Law Act requires the Registry Manager of the Court to provide to the Department of Family & Community Services the Notice of Child Abuse or Family Violence, or Notice of Risk document that is filed in proceedings. Pursuant to Section 67ZA(2), where an officer or professional in a Family Court has reasonable grounds in suspecting that a child has been abused, or is at risk of being abused, that person must notify the Department of his or her suspicion as well as the basis for such. The obligation to report to the Department extends under Section 67ZA(3) in relation to the ill-treatment of children and provide that a person working at the Court may notify the Department if they have reasonable grounds for suspecting that a child has been ill-treated, or is at risk of being ill-treated, or has been exposed or subjected to behaviour which psychologically harms the child.

¹² Bromfield, L. & Holzer, P. (2008). *A national approach for child protection: Project report [A report to the Community and Disability Services Ministers' Advisory Council]*. Melbourne: National Child Protection Clearinghouse, Australian Institute of Family Studies.

In cases in which the abuse, neglect or risk concerns are particularly elevated, the Family Court and Federal Circuit Court will, pursuant to Section 91B of the Family Law Act, request intervention of a child protection officer in the proceedings. By virtue of Section 92A, a prescribed welfare authority can intervene in proceedings of their own application where it is alleged that a child has been abused or is at risk of being abused. An invitation pursuant to Section 91B however is not binding and the request to intervene can be denied.

Burr J commented in the case of *Denny and Purdy* [2009] FAMCA 34, that requests for information and intervention by the Department were frequently met with refusal and commented on the frustration to the Court of such occurring. These comments were also noted by Benjamin J in the case of *Ray v Males* [2009] FAMCA in which His Honour expressed dismay that the child protection agency decided not to intervene despite the Judge notifying them of concern that there was no viable parent to care for the children.

Noting the problems that are experienced in having the Department intervene, the Magellan Case Management program was devised and initiated in the Family Court. The program applies to serious cases of child abuse and relies on non-statutory regulation by way of Memorandum of Understanding (“MOU”) between the Department of Family & Community Services and the Family Court. Effectively, the Case Management program and the related MOU relies on the formal and informal agreement to share information which is designed to ensure that Courts have evidence they need from child protection agencies. Whilst the exchange of information will allow for relevant information to be provided where the Department has been aware of an allegation and has in fact investigated and formed a position on that allegation, it is of little utility when the abuse allegation is first known to the Department by way of filing of a Notice of Risk. What is commonly experienced in the provision of the Magellan Report, is a summary of the Notice of Risk and a comment that the Department has not investigated the allegation and is satisfied that the Family Court is handling the matter.

The exchange of information itself, does not place the Department under any obligation to in fact investigate the allegations of abuse. It appears that there is a lower priority given to notifications coming through the Court’s exercising family law jurisdiction and a perception that if the Family Court is looking at the matter then sufficient protective measures are in place. The Family Court and Federal Circuit Court do not hold any investigatory capacity and often rely on the Department to do so. When the Department assumes the position that the Court will investigate the allegation there is a significant gap in the protection afforded to children in both the short and long term because without the capacity to formally investigate specific allegations

of abuse, the Family Court or Federal Circuit Court is entirely reliant upon the parent's evidence, which is often contradictory, and information able to be garnered by subpoena generally issued by an Independent Children's Lawyer. If the State child protection agency has failed to investigate an allegation on the basis that the Court is working with the family, then such independent material is unlikely to be forthcoming.

The AFCC Australian Chapter is concerned that what is inevitable in the current climate of underfunding and disjointed approaches to violence and abuse issues, is that there will be no adequate government response to address the many children and families who fall through the gaps in both the family law and child protection jurisdictions. It is unlikely that any Constitutional change is on the horizon to create a consolidated judicial response to children suffering violence and abuse and so practical alternatives must be considered.

The AFCC Australian Chapter welcomes proposals such as the development of a national database of court orders. This is a practical solution to difficulties experienced in the exchange of information expediently. Often in urgent matters coming before the Family Court or Federal Circuit Court involving allegations of violence and abuse, access to information on the existence of family violence orders particularly will facilitate the court properly discharging their onus to consider family violence orders and act protectively.

The AFCC Australian Chapter also recommends consideration be given to a more efficient and streamlined approach to obtaining the Court files from State and Territory jurisdictions by the Family Court or Federal Circuit Court. There is often a significant delay in obtaining such records which can provide significant information in assessing the ongoing risk of family violence and resolve disputes in evidence about proceedings in State and Territory jurisdictions through the use of Court records and transcripts. A memorandum of understanding for expedient access to these records would be of significant practical assistance.

The AFCC Australian Chapter also recommends that consideration be given to the placement of child welfare staff and police liaison staff in each Registry of the Family Court and Federal Circuit Court to facilitate the expedient access to relevant child protection information. This is particularly so for matters in the early stages of litigation where information about the need to protect victims of violence is most limited. Whilst requiring significant resources, it is submitted that such a program would limit the number of future appearances and prevent adjournments for Departmental records to be obtained. Such adjournments, given the delays in Court lists, are likely to continue to expose children to risk of harm and exacerbate conflict between litigants.

They also intensify the lack of resources of the court and require additional listings to be allocated thereby of themselves creating further delay. Accordingly, the shift of resourcing will allow for quick and meaningful assessments of risk and obviate the need for further interim hearing time.

Question 34 – how can children’s experiences of participation in court processes be improved?

This is a difficult question to answer in that it depends on the age and stage of development of the children as well as the specific issues that arise in each particular case. However, where an Independent Childrens Lawyer (ICL) is appointed, the ICL should meet with children or touch base with them when important issues arise that have a direct impact on the children.

Some people have a concern that multiple meetings with children draws them into the proceedings – this may have some merit in high conflict cases where children are aligned - but for the majority of cases, this should not be an issue. If important decisions are going to be made, children should meet with their lawyer (or the Family Consultant) to have a say. It is important children understand their wishes may not be determinative but their contribution to the discussion is important.

Question 35 – what changes are needed to ensure children are informed about the outcome of core processes that affect them?

Independent Children’s Lawyers need better training to understand their role and obligations. It is difficult to think of how children can be informed in a neutral manner where there is no ICL. In cases like this, Family Consultants may need to be involved but this would be a resource issue.

Question 36 - what mechanisms are best adapted to ensure children’s views are heard in court proceedings?

One option might be more child inclusive conferences or children’s wishes reports.

If there is an ICL appointed, consideration could be given to the ICL filing a report or an affidavit setting out their interactions with the child and the child’s wishes. In Western Australia, we have a practice of the appointed ICL facilitating the child meeting with another ICL, who prepares the report. This then protects the appointed ICL for being called as a witness.

Regrettably, the skill base and attitudes of ICL's meeting with children is variable. Training would be useful and the Court may want to consider making orders directing ICL's to meet with children (depending on the circumstances of the case).

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

Question 38 – are there risks to children from involving them in decision-making or dispute resolution processes question how should these risks be managed?

For FDR to better support families, the AFCC Australian Chapter recommends:

- the Attorney-General's (AG's) office collect and make available statistical data on the uptake and delivery of FDR assessment applications and their outcomes, and separately the volume of exemption of cases within the FDR system
- there should be mandatory FDR for smaller or simple property issues
- allowing FDR where there is Family Violence, but where all parties to a dispute wish to proceed, and where all parties to a dispute, and the circumstances to a dispute have been assessed as suitable to continue into FDR
- updating the AG's Family Justice website to offer clearer, intuitive signposting from a home page to locate culturally appropriate, competence confirmed providers and suppliers of FDR – with more intuitive geographical maps showing all providers on an individual named basis alongside larger contacted federally subsidised suppliers and providers
- ensuring the AG's database of providers is accurate, up to date, and allows for on line updating of contact details
- allowing more information to be added to Exemption Certificates, following perhaps the NZ FDR Model where a Provider has to specifically state that parties were not suitable, or that circumstances were not suitable or that one party chose not to engage at all or that another situation existed which meant that FDR was not suitable
- allowing universal access to FDR irrespective of an individual's capacity to pay, or at the very least, funding for FDR needs to be far greater than funding for other family legal aid matters

- allowing countrywide specialist Family Violence FDR services, as has been trailed on a localised within state/territory basis, with specialist FDR coordinators working to Nationwide competencies prescribed by the AG's department
- Judicial training on understanding what happens within both an FDR assessment environment and within a family mediation environment.
- allocating significant resources to advertising on the widest range of media platforms, to help educate members of the public on routes into the Family Justice system, as the Federal Government have with the importance of No to Drink Driving and No to Intimate Partner and Family Violence. Signposting should specify 'first contact' being with FDR Providers whether working in the for profit or the not for profit environment
- additional competences for FDR Providers working with children within the FDR processes should be identified, and training standards with registered/accredited FDR Training Providers updated to ensure sufficient levels of competence are available country wide, so that no matter where parties to a dispute, and their children are located, they will have a choice of FDR Providers who are able to offer Child inclusive FDR Family Mediation
- articulating clearly how Australia's FDR service fulfils Australia's obligations under Article 12 of the 1989 UN Convention on the Rights of a Child to have freedom of opinion - that the Child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child

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?

There is an assumption in this question that is quite concerning, that is, that changes are needed.

Children in separated families can be very vulnerable. Parental separation obviously involves huge changes and frequently parents can be in conflict. Some parents can work their way through these changes and upheavals with little distress, whilst others require adjudication and a system to make decisions for them when they cannot.

Having a skilled practitioner make assessments of children's maturity and development within the context of their family is likely to be the best way for children's interests to be protected.

Please see response to question 41 below in relation to AFCC's plans to improve consistency and standards of family reports and assessments of families by providing specialised training and offering accreditation.

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?

There is an absence of current research on children's experiences in the family law system. The AIFS currently have a reference to conduct research into this issue and any changes should be informed by their findings.

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?

It is submitted on behalf of the AFCC Australian Chapter, that with the exception of judicial officers, who are addressed below, all professionals working in the Family Law system should have to comply with a minimum level of family violence and trauma specific training to comply with their governing bodies' requirements for registration.

In respect of legal practitioners in particular, the AFCC Australian Chapter submits that any practitioner who nominates the area of Family Law on their application for a Practising Certificate, ought to be required to complete, as a component of their existing continuing legal education (**CLE**), units in Family Violence and associated Trauma and best practices in facilitating successful FDR on an annual basis.

It is also suggested that Family Law Specialist Accreditation courses across the country be expanded to include a module on Family Violence and associated Trauma and that 'bolt-on' courses in this area be offered to existing accredited specialists.

The AFCC Australian Chapter submits that the needs of current and future users of the Family Law system in Australia would be better met by a legal profession that is more focused and dedicated to early participation in non-adjudicative FDR processes than adopting a highly adversarial and litigious path as a 'one size fits all' approach. It is suggested that best practice

guidelines regarding such a shift away from a more adversarial model should be released and that there be a greater emphasis on training for legal practitioners, practising in Family Law, in non-adversarial FDR options including less adversarial negotiation techniques, mediation in the context of both parenting and property matters, child inclusive FDR options and Collaborative Practice.

In relation to family report writers, recent AFCC Australian Chapter initiatives have including setting up training for private family report writers.

Family Reports in Australia have long been a mechanism assisting the court to understand the psychological processes and dynamics occurring within a family and generally involves assessment and interviewing of parents and children and making assessments of family relationships. Family Reports have been an invaluable tool assisting judicial officers in the determining children's best interests. Nevertheless, how family reporters are appointed, and which system is activated to have them appointed is commonly misunderstood.

Family Reporters and those appointed under Court Orders to make family assessments are generally organised through three distinct systems.

Family Consultants are employees of the Court who are appointed as officers of the Court. Their role is defined under the Family Law Act 1975. They generally provide two types of assessments and reports to the court. One type of assessment is called an 11 F report which is usually employed in urgent cases and matters of high-risk where the Family Consultant makes assessments of family members and provides a mostly oral report to the court. They are also involved in assisting with mediations and conciliation matters, as well as more comprehensive assessments and written reports for the Court. Family Consultants are generally Social Workers and Psychologists and there are important employment criteria set by the court about their level of experience that includes at least postgraduate studies and five years appropriate experience in assessment of families with particular emphasis on assessment of risk.

Regulation 7 Family consultants are not employees of the court but independent contractors who provide assessments of families and written reports, as selected and requested by the court's officer whose responsibility it is to manage such appointments.

Single Expert Witnesses (SEW) are private practitioners, independent of the court, and are appointed under chapter 15 of the Family Law Rules 2004. SEWs can be Social Workers,

Psychologists and Psychiatrists. While there is no minimum qualification and the system is ad hoc in appointment of SEWs under Court Order, there are two mechanisms that influence their appointment. Firstly, the parties and their lawyers generally select the practitioner to be engaged, and secondly there is a supply and demand issue where few practitioners have the qualifications or robust nature to enter and stay in this area of practice. Neoh, Papaleo & Kennedy (2010)¹³ provide a review of the risks for practitioners under various headings including the 'Problems of semantics', 'Problems particular to parental separation', 'Problems with the legal context', 'Problems of complaints by litigants to psychologist registration boards' and 'Problems of safety'. Further, the explosion of social media has also allowed lowered thresholds for harassment and defamation of practitioners (see Appendix F for a social media site dedicated to criticism of family report writers).

A common misperception is that a Court selects a SEW, when anecdotally this is rare and parties typically consent jointly to a particular SEW and this is ratified by the Court under Consent Orders.

It should be easily understood that working in Family Law can be professionally risky for practitioners as emotions run high, the risks are intense, the positions polarised and the parties often feel some confusion, frustration and difficulty navigating the Family Law system. There are also frequent misperceptions about the role of the reporter; in particular that Family Reports can deal with factual evidence, such as whether or not family violence occurred, when this is not within the scope or focus of the report. A Family report is to provide to the Court information about family dynamics and provide information or comment on the allegations if this falls within the focus of the family law dispute. For example, when faced with mutual allegations of mental illness in the other parent, social scientists have a significant role to play in assisting the Court. When faced with mutual allegations of family violence or allegations of family violence by one parent and denial by the other parent, family report writers are likely to rely on collateral information (e.g. police reports, hospital files etc) and, as appropriate, leave the determination of the allegations to Court on the whole of the evidence.

¹³ Neoh, J., Papaleo, V., & Kennedy, S. (2010). Run for the hills: Why would you specialise in family law assessment? *Inpsych: The Bulletin of the Australian Psychological Society Ltd*, 32. 42-15. Provided in full as Appendix D

The supply and demand problem in conjunction with the high level of professional risks means that there are very few SEW practitioners who remain in Family Law and the area is very specialised.

There are many myths about SEWs that are perpetuated in arenas such as the recent House of Representatives inquiry into Family Violence and Family Law¹⁴ where the Association of Social Workers argued that anyone without qualifications or those who designate themselves as a counsellor can complete Family Reports, statements which are not valid having regard to the requirement to have expertise and to comply with all the requirements of the Family Law Rules and the practitioner's relevant professional body. Although the inquiry made many excellent recommendations, this inquiry and the conclusions drawn sometimes appeared flawed by virtue of the incorrect and misleading information provided to it. Disaffected social media groups with pseudo-legitimate sounding names such as Australian Paralegal Foundation, National Children's Protection Alliance and Help Family Law¹⁵ were prominent contributors to the misinformation. In the age of social media and false news there is sometimes the appearance of weight when false news is shared and keyboard warriors take to the internet en masse in a way that magnifies and distorts the disaffected voices of a few. Unfortunately, this appears to have been the case with the 2016 inquiry.

There are a variety of other misconceptions that include opinions by Ms Zoe Rathus about problems with 'private family consultants' when there is no such legal category.

It is also noted that there are significant concerns about the amplification of results of Ms Rathus' and Griffiths University's criticism of family reports (Jefferies, Field, Menih & Rathus, 2016¹⁶) taken from very small sample sizes, and the reliance on other research about family reports where the information is taken from court judgements (i.e. Shea Hart, 2011, see below for a further analysis of Dr Hart's research). So too any research that assumes that family

¹⁴ House of Representatives Standing Committee on Social Policy and Legal Affairs. (December 2017). *A better family law system to support and protect those affected by family violence: Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence*. Parliament of The Commonwealth of Australia, Canberra.

¹⁵ A website run by Mrs Annie Kelly (AKA Ms Annie D'Ambrosi or Ms Annie Jackson of 'Help Family Law' formerly APhi 'Advocating for your Privacy and Health Information' formerly "Groove your bag") who self describes as a 'Family Report Analytical Expert' and whose curriculum vitae comprises apparent attendance at parenting after separation programs.

¹⁶ Jeffries, S., Field, R., Menih, H., & Rathus, Z. (2016). Good evidence, safe outcomes in parenting matters involving domestic violence? Understanding family report writing practice from the perspective of professionals working in the family law system. *University of New South Wales Law Journal*, 39, 1355-1388.

violence allegations are not taken seriously using samples obtained from disaffected family law litigant social media sites (e.g. Roberts, Chamberlain & Delfabbro, 2014¹⁷).

Similarly, Professor Kate Hegarty's submission which reads:

“there seems to be a poor understanding within the legal system of the detrimental impact upon children of the exposure to violence inflicted by one parent against another. Rather than recognise the detrimental impact of family violence on children, it is often assumed that the perpetrator has and will be a good parent provided they have not engaged in violence directly against the children”,

when the opposite is true and Family Law researchers have led the way to a better understanding of how Family violence affects children and parenting (see Professor Jennifer McIntosh's wide body of research, frequently disseminated not just in the family law arena but through presentations and training at AFCC).

Nevertheless, there is a need to standardise the training and experience needed for Family Report Writers whether they are Family Consultants, Regulation 7 Family Consultants, or SEWs.

AFCC is well placed to manage the training and accreditation of Family Report Writers. In August 2018, AFCC will provide an introductory workshop as the first step towards accreditation of private report writers. Masterclasses in Family Report writing and Family Therapy with Family Law clients will follow later in 2018. The introduction training will comprise modules

- Introduction to Family Report writing
- Family law Assessment
- The practicalities of Family Report writing
- Family Violence and risk assessment

Where Master Classes are planned with modules including

- Complex family therapy

¹⁷ Roberts, D., Chamberlain, P., & Delfabbro, P. (2014). Women's Experiences of the Processes Associated with the Family Court of Australia in the Context of Domestic Violence: A Thematic Analysis. *Psychiatry, Psychology and the Law*, 22, 599-615.

- Psychometric Testing and Risk Assessment
- The complexities and subtleties of Family Violence dynamics
- Dealing with Culturally and Linguistically Diverse (CALD) communities
- Specific issues for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ)

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

There appears to be significant misperceptions about how complaints about professionals in family law are dealt with.

Please see appendices A, B, C and D which relate to submissions from the Australian Psychological Society Family Law Interest Group to the Senate Standing Committee on Finance and Public Administration References - Inquiry into the administration of health practitioner registration by the Australian Health Practitioners Regulation Agency (AHPRA) in 2011 and the AFCC submissions to Senate Enquiry into *‘Complaints mechanism administered under the Health Practitioner Regulation National Law’* in 2017 which explain that the difficulties with complaints in relation to psychologists and psychiatrists are not that they are dealt with appropriately and rigorously, but that they can inappropriately interfere with Court processes.

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?

Please see Appendix D and a paper by Ms Robin Cohen, Legal Aid Western Australia, now Magistrate Cohen at the Family Court of Western Australia at the AFCC Australian Chapter 5th Annual conference Crown Conference Centre, Melbourne 17 to 19 August 2017 as part of a plenary entitled ‘Section 121- The tensions between harm to children, protection of individuals’ rights to privacy, public interest, and transparency’ moderated by Ms Julie Jackson Director Family Law division Legal Aid Western Australia, then Chief Justice Diana Bryant, Dr Adiva Sifris, Associate Professor Monash University & Ms Denise Healy, Media Liaison Family Court of Australia.

Magistrate Cohen paper eloquently describes a personal and professional conflict that highlights the need for children (and others) to be protected in Family Law proceedings and that the

disclosure of intimate details of a family law disputes are rarely in the public interest and that children's needs are often obscured by the blaze of social media campaigns. The Honourable Diana Bryant's paper for this presentation is also provided in Appendix E and provides an exploration on the publication of details of family law cases. She concludes that:

“Cases can be reported on – in all manner of detail – however - parties can't be identified... I believe that Australia has struck the right balance. While they are looking at making changes now, family law matters in the UK have always been dealt with within closed courts and do not allow publication of parties' names. On the other extreme is the US which has no restrictions – and we've all seen how that plays out in the media”.

Appendix A

The April 2011 APS Family Law and Psychology Interest Group submission to Senate Standing Committee on Finance and Public Administration References - Inquiry into the administration of health practitioner registration by the Australian Health Practitioners Regulation Agency (AHPRA) and attached to the AFCC submission Senate Enquiry into ‘Complaints mechanism administered under the Health Practitioner Regulation National Law’ in 2017

Submission by the Australian Psychological Society (APS) Family Law and Psychology Interest Group to the Senate Standing Committee on Finance and Public Administration References - Inquiry into the administration of health practitioner registration by the Australian Health Practitioners Regulation Agency (AHPRA)

- The impact of AHPRA processes and administration on health practitioners
- AHPRA’s complaints handling processes

Since the introduction of the new Australian Health Practitioners Regulation Agency (AHPRA) to investigate complaints about psychologists’ professional conduct, those psychologists who work in the family law arena have been beset with complaints and AHPRA’s handling of these types of complaints has been negligent, incompetent and uniformed. Further, psychologists have been placed in untenable positions where they could potentially face legal ramifications and consequences if they follow the demands of AHPRA staff and investigators.

Psychologists who undertake assessments in family court matters are routinely regularly reported to AHPRA following family court assessments.

This has been recognised internationally in family law to be reflective of the nature of Family Law processes, and generally represent the litigant’s attempt

- to invalidate the opinion of the clinician,
- to use legal leverage by excluding the psychologist from future court proceedings
- and to gain revenge and retribution on the psychologist when the opinions expressed in reports do not favour them

AHPRA fails to consider the particular professional, financial and physical risks for psychologists specialising in Family Law and the potential for competing responsibilities between our duty to the court and current parameters for professional practice.

While we do not suggest that Family Law psychologists should be exempt from complaints about their professional practice, we submit that the high number of complaints to psychologist registration boards and professional bodies, not just in Australia but internationally, represents a base rate problem that we are seeking AHPRA acknowledge in their initial investigation of complaints.

We submit that there needs to be some changes in the way AHPRA approaches these complaints.

Firstly, some of our concerns relate to the failure of AHPRA to consider the motivations of complainants. We submit that there needs to be some mechanism where these complaints are screened to avoid wasting time, energy and money in undertaking investigations where the litigant obviously has malicious motives.

We also emphasise that AHPRA consistently fails to appreciate the legal context and our obligations under the *Family Law Act 1975* and the *Family Law Rules 2004*. For example, it is not uncommon for AHPRA to demand our file or reports when the disclosure of such information is constrained under section 121 of the *Family Law Act 1975*.

AHPRA also routinely ignores the rights of other parties and children involved in assessments. It is typical practice for AHPRA to rely on the complainants' view without seeking input from the other party and to demand files and reports without consideration for the other participants' rights and our ethical and legal responsibilities to them.

It has also become clear that some Family Law litigants who do not get the professional psychological opinion that they expect in a Family Law assessment frequently use the complaint process to pervert the legal process.

In Victoria, the Psychologists Registration Board of Victoria had historically recognised that complaints about psychologists arising from litigants in Family Court matters have particular attributes and require some consideration about the motivations of the complainants, the context of the complaint and the legal jurisdiction.

Importantly, up until AHPRA took over responsibility the Psychologists Registration Board of Victoria had refused to investigate complaints about psychologists who had been appointed by the court to undertake assessment for the court, when the matter is still proceeding through the court. As having an ongoing AHPRA investigation of a complaint naturally forces the psychologist to withdraw from the case, this was some recognition that litigants can use the complaint process to exclude the psychologist in the legal matter and reject the psychological opinion given in a report as a legal gambit.

We also know of examples where lawyers have encouraged clients to make a complaint as a legal strategy to prevent an unfavourable opinion of their client being admitted to the Court.

Since the evolution of APRHA, complaints are now being actioned and investigated during the progress of the legal matter. We submit that AHPRA should develop some protocols to prevent this occurring. If a litigant is unhappy with a psychological opinion, the proper jurisdiction to challenge this in the first instance is before the Court, not AHPRA.

We are also concerned about the confusion of investigation and judicial powers and that AHPRA does not have open and transparent processes. We have grave concerns about the lack of independence and have noted that investigating board members may also sit on the Board and participate in decision making.

Additionally, APRHA have typically had psychologists assess these complaints whose experience does not allow them to be fully equipped to evaluate the practice of the psychologist,

as it is well recognized that the family court arena poses specific challenges that are outside the expertise of most psychologists. Soon our members may be forced, under new mandatory reporting rules, to begin making allegations of professional incompetence against psychologists working for AHPRA for undertaking forensic interviews and investigations without competence in either forensic investigations or psychological practice in family law.

It is a significant failure of AHPRA's operations that there has been no education of their staff or attempts to understand these issues.

We submit that changes should be made in how investigations of complaints by AHPRA are undertaken, specifically

- that complaints are not actioned until the legal proceedings are completed
- that complaints are initially screened by someone who has Family Law experience to avoid unnecessary investigations by vexatious litigants
- that AHPRA investigators acknowledge of our legal responsibilities, including appreciating that the court is our client, that a health model is not appropriate and an understanding of the legal parameters under which we work so they do not repeatedly demand that we violate those responsibilities
- that AHPRA psychologist investigators have competence in forensic investigation and family law experience
- that investigation and judgement become independent and separate processes

Appendix B

AFCC Submission to Senate Enquiry into *‘Complaints mechanism administered under the Health Practitioner Regulation National Law’* dated 21 February 2017

Senate Enquiry into *‘Complaints mechanism administered under the Health Practitioner Regulation National Law’*

Terms of reference

- **the implementation of the current complaints system under the National Law, including the role of the Australian Health Practitioner Regulation Authority (AHPRA) and the National Boards;**
- **whether the existing regulatory framework, established by the National Law, contains adequate provision for addressing medical complaints;**
- **the roles of AHPRA, the National Boards and professional organisations, such as the various Colleges, in addressing concerns within the medical profession with the complaints process;**
- **the adequacy of the relationships between those bodies responsible for handling complaints;**
- **whether amendments to the National Law, in relation to the complaints handling process, are required; and**
- **other improvements that could assist in a fairer, quicker and more effective medical complaints process.**

Introduction

To provide context we have attached (Appendix A) the submission made 11 April 2011¹⁸ by the Australian Psychological Society (APS) Family Law and Psychology Interest Group (FLAPIG) to the Senate Standing Committee on Finance and Public Administration References - Inquiry into the administration of health practitioner registration by the Australian Health Practitioners Regulation Agency (AHPRA) which address the terms of reference of that enquiry in relation to the impact of AHPRA processes and administration on health practitioners and AHPRA’s complaints handling processes.

The paper below summarises the particular legal and ethical problems faced by practitioners who work within the Family Law population and specifically assessments as a Single Expert Witness SEW for the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia. The paper also explains why SEW attract more complaints across psychiatry and psychology than any other types of practice both in Australia and internationally

¹⁸ Included above

and explores why this is so, the motivation of Family Law litigants and the problems with how AHPRA has dealt with these types of complaints.

Since the 2011 submission was made, the Psychology Board of Australia has published an “Interim” policy paper (Appendix B) entitled the ‘Management of Notifications about Single Court Appointed Psychologists in Family Law Courts Proceedings’ dated 21 October 2011.

This Psychology Board policy notes “*The Court has jurisdiction to control proceedings before it, and this includes management of Experts appointed by the Court. The Court also retains ownership of documents generated for its purposes or by orders. To date, the Family Court of Australia and Family Court of Western Australia have not issued specific practice notes or protocols in relation to complaints against Experts*”.

The policy states “*In relation to psychologists who have been appointed as Experts, the Board must seek leave of the Court before exercising its powers under the National Law in relation to a registered practitioner who is a Court appointed Expert*”.

There are some important points to note in this policy, such as that the Board recognises the sovereignty of the Court to deal with complaints in the first instance, that documents generated as part of Family Law proceedings belong to the Court and at the time of the policy Family Court of Australia and Family Court of Western Australia had not issued specific practice notes or protocols in relation to complaints about experts.

This last point is no longer valid and the Family Court of Western Australia now employs Standing Orders as follows:

1. *The parties and the Independent Children’s Lawyer be restrained and an injunction is hereby granted restraining each of them from providing copies of any Single Expert’s report prepared for the purpose of these proceedings, or permitting any other person to do so, to any person or entity other than their solicitor or counsel in these proceedings, without first obtaining leave of the Court.*
2. *The parties and the Independent Children’s Lawyer be restrained and an injunction is hereby granted restraining each of them from making any complaint to a professional body or association concerning the conduct of the Single Expert or concerning the content of the Single Expert’s report, or permitting any other person to do so, without first obtaining leave of the Court.*
3. *The preceding orders shall remain in full force and effect following completion of the proceedings.*
4. *For the purposes of the preceding orders, leave of the Court may be sought by:*

- a. *the filing of a written request by the Independent Children's Lawyer, copied to both parties to the proceedings;*
- b. *the filing of a Minute of Consent orders signed by the Independent Children's Lawyer and all parties or their legal representatives; or*
- c. *by a formal application with a brief affidavit in support.*

The relevant issues in these Court Orders from Western Australia are that parties are prohibited from making complaints about Single Expert Witnesses unless they obtain the leave of the Court, the Orders remain in place beyond the completion of the proceedings and the mechanisms to obtain leave to make a complaint are clearly set out.

The terms of reference addressed in this submission concern “*the implementation of the current complaints system under the National Law, including the role of the Australian Health Practitioner Regulation Authority (AHPRA) and the National Boards*” and “*whether amendments to the National Law, in relation to the complaints handling process, are required*”.

Submission

It is clear to psychologists (and psychiatrists) who work as a Single Expert Witnesses in the Family Law Courts that despite initiatives to better manage complaints about them there are significant failures and administrative problems with AHPRA that cause interference with Family Law cases and compromise the role of the practitioner.

The problems appear endemic

- Practitioners are routinely contacted and informed of complaints by Family Law litigants during Family Law proceedings, this immediately compromises the practitioner and raises the issue of apprehended bias
- Practitioners are routinely asked to supply Family Law documents and the file notes which creates ethical, legal and professional dilemmas for the practitioner who is required to make declarations and adhere to provisions in the Family Law Act 1975 in relation to confidentiality of the parties and under ethical responsibilities also potentially compromises the confidentiality and rights of others involved in the Family Law proceedings including the other parent, the children and other family members whose consent is not obtained
- Practitioners are subject to the numerous harassing complaints by one party in Family Law proceedings.
- AHPRA officers appear unaware of the Psychologists Board of Australia policy regarding Single Expert Witnesses
- For complaints from Western Australia AHPRA Officers appear unaware of Family Court of Western Australia Standing Orders

We refer to the APS FLIG submission of 2011 to emphasise that Single Expert Witnesses involved in Family Law proceedings attract complaints due to the very nature of the work. Family Law litigants are motivated to find fault and discredit opinions given in the course of Family Law proceedings with the most common motivations to invalidate the opinion of the clinician, to use legal leverage by excluding the psychologist from future court proceedings and to gain revenge and retribution on the psychologist when the opinions expressed in reports do not favour them.

In addition to being regularly asked to respond to complaints from current litigants with requests to supply documents and files, some case examples that underscore our concerns follow.

- The regional Psychology Board in Queensland looked at a transcript of evidence given by a SEW in a Family Law matter and ‘determined’ that she had committed perjury and made a complaint to the Australian Federal Police (and without notifying the practitioner)
- AHPRA accepted and investigated five serial complaints from one Family Law litigant over a three-year period, and not until the practitioner threatened to obtain an Intervention Order against the litigant for stalking and harassment and joining the Board as a party did AHPRA appear to refuse to accept the litigant’s complaints
- A psychologist responded to a complaint that was eventually dismissed, but the complaint resubmitted another complaint soon after, which was also eventually dismissed
- A woman who made a complaint against a practitioner prior to the introduction of the National Law was allowed to submit the exact same complaint to AHPRA seven years later
- Three separate complaints about a Victorian psychologist that took years to complete (and all eventually dismissed) where the issues were the litigant’s disagreement with the opinions expressed rather than transgressions of professional practice

Conclusions

It is clear that a policy published by the Psychology Board of Australia has little practical utility. It is proposed that changes to the National Law incorporate some fundamental exclusions such as that leave must be obtained from the Family Law Courts before pursuing investigations (including restrictions on contacting the practitioner during ongoing Court proceedings) and that documents generated in Family Law Courts proceedings remain the property of the Court.

Although the Family Court of Western Australia indicate Standing Orders extend beyond the completion of the family law proceedings and litigants must return to the Court to obtain leave to

pursue complaints against practitioners, we consider that the National Law should contain either a statute of limitations on complaints or endorse the Family Court of Western Australia's position.

We would also endorse any mechanism which allows for the agreement of both parties before complaints are taken by AHPRA.

Appendix C

AFCC Opening statements to Senate Inquiry into *Complaints mechanism administered under the Health Practitioner Regulation National Law* 4 May 2017

Statement to the Senate enquiry

Complaints mechanism administered under the Health Practitioner Regulation National Law

17 March 2017

We are here representing the Association of Family and Conciliation Courts AFCC and have representatives from two subcommittees. The legal issues subcommittee in the subcommittee dealing with professional complaints.

AFCC is a professional organisation for practitioners who work in family law. It was commenced in North America in the 1960s and is now an international organisation comprising members from the judiciary, lawyers, social scientists both research and practitioners and many other allied professionals who work in the family law arena. AFCC has been behind many family law initiatives to improve the process of family law and ultimately parents and children's experiences through parental separation.

AFCC commenced a chapter in Australia in 2012 and since that time has had three annual conferences focusing on family law. We currently have about 200 individual and institutional members nationally and this figure is growing rapidly.

The AFCC's work on dealing with professional complaints about practitioners emerges from earlier concerns raised by the Australian Psychological Society's Family Law Interest Group and we have provided the 2011 submission to the Senate on our concerns about AHPRA's management of complaints by family law litigants.

What we would like to emphasise today is that family Law litigants represent the highest frequency of complainants to professional bodies in terms of numbers in Australia and internationally and research has shown that these complaints generally result in the least number of sanctions or findings of professional misconduct.

Since 2010 and the introduction of the National Law, psychiatrists and psychologists have become increasingly concerned about how these complaints are managed as there appears to be no understanding that this is a forensic context and a health model is not appropriate and the application of professional guidelines regarding conventional health models do not apply.

Firstly, the individual or family is not the client. The court is the client.

Those working with family Law litigants come under very strict legal parameters and guidelines, including the Family Law Act 1975, the Family Law Rules 2004, the evidence act *** ..

Psychiatrists and psychologists are also required to carefully balance the tensions between these all legal parameters and ethical guidelines.

Family law practitioners already come under great scrutiny through the family law system.

The second point to make, and the reason we are here, is that AHPRA handling of complaints against family law practitioners often creates untenable professional, legal and ethical dilemmas.

Some examples include

- being asked for documents that include confidential information about the other party and children that have not given consent to provide them
- contacting practitioners during the proceedings to inform us of the complaint and in doing so introduced the idea of apprehended bias, but we are then biased against a party because they have made a complaint about us
- under Family Law Rules 2004 we are required to be transparent in our communication with parties and AHPRA frequently demand that we are not to contact parties

The high court ruling in *Hearne and Street* in makes clear that documents generated for legal proceedings should not be used in other contexts. *Vicary and Ors* in the Family Court of Western Australia was even more specific that documents made available for the Family Court were not to be provided to AHPRA as part of a complaints process.

In 2012, the psychology board of Australia published a policy regarding Single Expert Witnesses, that he is in this case psychologists who provide reports to the court, that essentially recognised the role of the court and said that documents generated in family law proceedings remain the property of the court and that, unless there is exceptional circumstances, AHPRA investigations would not be carried out without the leave of the Court.

All well and good, although the policy does not apply to Single Expert Witness psychiatrists.

In addition, AHPRA investigators often appear to be unaware of this policy, contact practitioners, interfere in ongoing family law proceedings, demand documents and here is the big one retry cases or issues that have been determined by a judge but based only on information from one litigant in family law dispute.

There are numerous examples that we can provide from across Australia from practitioners that have faced the stress of complaints made about their professional practice where AHPRA

- appears to apply the principle of ‘guilty until proven innocent’,
- disregarded the complainant’s status as a vexatious litigant in the court arena and continued with investigations against practitioners despite strong information that the complainant is motivated only to harass the practitioner
- disregarded the principles of natural justice
- Litigants upset by their outcomes at court, pursue complaints against psychologists and psychiatrists as a form of retribution

We are here to ask that the National Law is changed to recognise the difficulties in forensic Family Law and that the psychology board of Australia's single expert witness policy is adopted across the board to include recognition that documents generated remain the property of the court and that the leave of the Court should be sought before any investigation of complaints is undertaken. It would be unfortunate if AHPRA or a professional board was found to be in contempt of Court yet there are many instances where this could be argued.

Appendix D

Paper by Ms Robin Cohen, Legal Aid Western Australia, now Magistrate Cohen at the Family Court of Western Australia at the AFCC Australian Chapter 5th Annual conference Crown Conference Centre, Melbourne 17 to 19 August 2017 as part of a plenary entitled ‘Section 121- The tensions between harm to children, protection of individuals’ rights to privacy, public interest, and transparency’ moderated by Ms Julie Jackson Director Family Law division Legal Aid Western Australia, then Chief Justice Diana Bryant, Dr Adiva Sifris, Associate Professor Monash University & Ms Denise Healy, Media Liaison Family Court of Australia

I would like to share a story.

Around *****, I was appointed the Independent Children’s Lawyer for a young child *****The proceedings were commenced by the *****.

Shortly after filing a Notice of Address for Service, I was inspecting subpoenaed documents on another matter when the Chief Judge’s Associate found me. She advised me that a media outlet had made an application under s121, the Chief had listed the application for 2.15pm and he wanted me to appear.

I remember saying something like “sure no worries” and as she walked away I realised it was around 2.05pm. I looked at my pen, my pad of paper and my iPhone and was praying for some type of MacGyver moment where I was going to craft something unbelievable out of nothing. As I made my way to His Honour’s courtroom, I was madly trying to google s121 to refamiliarize myself with the provisions of the legislation and had hoped, foolishly noting the Chief’s precision when it came to punctuality, I might have time to read some relevant caselaw. Regrettably, time was not on my side.

No sooner had I reached the courtroom was the matter being called on. Counsel for the media outlet made a raft of submissions but the nub of his argument appeared to be that this particular case was of public interest owing to a number of factors, including but not limited to, intervention by the State to override a parent’s inherent right to make decisions for, and on behalf of their child. His Honour then motioned to me and said, “well what do you have to say.”

Shortly after I started speaking, His Honour raised his hand and with a withering look (which I am convinced is a unit in Judge’s school) – he said, “Ms Cohen, hasn’t the horse already bolted.”

In that moment, I was madly trying to find an eloquent way to backtrack and agree with His Honour, as what he said was 100% correct. The story had already found its way to Facebook and it appeared as if people everywhere were talking about it.

Before I could open my mouth, an image of Rita Pierson flashed across my mind. Ms Pierson was an African American Educator who is a hero of mine. Although we worked in vastly different professions, we shared a common passion – advocating for children.

I appear almost exclusively as an Independent Children’s Lawyer. I have a motto which is “CHILDREN DESERVE CHILDHOODS.” My motto is supplemented by a quote from Rita Pierson which is:

“every child deserves a champion: an adult who will never give up on them, who understands the power of connection and insists they become the best they can be.”

Whilst not directly relevant to the role of an Independent Children’s Lawyer, Ms Pierson’s words provide me with an anchor when things get tough.

In the *Matter of Re K: [1984] FamCA 21* – the Full Court considered several issues relevant to the appointment of a separate representative, as we were then called. It is a seminal case in the separate representation of children. One of the considerations was the role and function of a separate representative. I believe Her Honour appeared on behalf of the First Appellant in that matter –ICL geek moment - super cool.

In that decision, the Full Court referred to the matter of *Bennett and Bennett*, which summarised the role of a separate representative, in which the Court made this salient comment:

“we therefore consider that a separate representative must of, necessity, form a view as to the child’s welfare based upon proper material and, if appearing, may make submissions in accordance with that view or instruct counsel to do so. We think that the role of a separate representative is broadly analogous to that of counsel assisting a Royal Commission in the sense that his or her duty to act impartially but, if thought appropriate, to make a submission suggesting the adoption by the Court of a particular course of action, if he or she considers that the adoption of such a course is in the best interests of the child.

HERE IS THE GOOD BIT “**unless the separate representative does this, it seems to us that there is little purpose in having a separate representative.**”

Let’s go back to my story briefly – we left off where the Chief Judge put up his hand and gave me a withering look. My mind was trying to find a way to eloquently back track and agree with the Chief because in my experience he almost inevitably makes sense – we had a flash to Rita Pierson – there is Full Court authority in essence telling me not to be a lump on a log – ok that might not have been precisely what the Full Court was saying but I was channelling the sentiment, which was to make those submissions I considered to be in the best interests of the child.

Do you see where this is going? On my left shoulder sat the little Angel telling me to agree with the Chief – you can never go wrong agreeing with the Chief, particularly if you can complement his logic. On the other shoulder sat the naughty Angel – the one telling me to be this child’s champion.

In the deep recesses of my mind, I remembered the decision of *Knibbs & Knibbs* which is a 2009 decision of Murphy J in which his Honour made the following comments:

1. the Independent Children’s Lawyer is, immediately upon appointment, is an invidious position. He or she is obliged to look beyond the assertions and counter assertions advanced by children’s conflicted parents (and others). In doing so, he or she is presuming, by dint of statutory and other responsibilities, to interfere, to one degree or another, with what can be seen to be a basic right: the right of a parent to parent his or her child in the way they best think fit;
2. Yet, when parents, through their conflict or the nature and extent of their assertions one makes against the other, abdicate to the court decisions about the best interests of their children, views other than their own, including the views of an ICL can, and in the case of the court will, intervene. In that situation, rights and considerations relevant to a determination of best interests enshrined in the Act predominate, **as do duties owed to the Court by an ICL;**
3. The obligation upon an ICL to act objectively and impartially should not be seen as meaning that he or she should act as a benign or ambivalent mouthpiece for competing evidence. Frequently, doing so can involve abdication of their proper professional responsibilities; and
4. The ICL (and counsel appearing for the ICL) should be no less courageous, and no less firm, and no less cogent, in advocating for a result or findings – based on a careful analysis of the evidence properly before the court – than any other advocate or legal practitioner.

Ok, so back to my mind palace – this is great as you are going to see how it all came together – Hand – Withering Look – the Horse has Bolted – Rita Pierson – EVERY CHILD DESERVES A CHAMPION – the Full Court in *Re K* referencing Bennett – the Court gets no value out of a bump on a log – Justice Murphy acknowledging that ICL’s come into the lives of families uninvited (shout out to Robert Simon and Phil Stahl on this point as they remind me of the importance of leaving the smallest footprint possible when I work with families and to discharge my obligations by aiming for the ceiling) – ICL’s owes a duty to the Court in assisting the Court when it is asked to make a determination in the best interests of the child – Justice Murphy reaffirming that ICL’s should not act as benign or ambivalent mouth pieces and reminding ICL’s that it is ok to be courageous...

So here is what I intended to say:

“Your Honour makes an astute observation. You are quite correct that the horse has bolted and in those circumstances, it would seem appropriate to make an order allowing publication of a fair and accurate account of the proceedings.”

As you will have probably surmised this is what did not come out of my mouth. Instead, I said something like this:

“Your Honour, I was appointed by this Court a few days ago. I have not had an opportunity to read all the material provided to me and I have not yet had a chance to consider my position in relation to the substantive matters before this Court.

*However, in relation to the matter before you today, I find it hard to believe that any Independent Children’s Lawyer worth a pinch of salt would submit to this Court, even if the horse has already bolted, as is the case in this matter, that it would be in the best interests of **** and his parents to be played out in the media.*

Whilst my friend will give you assurances firstly, that a fair and accurate account will be provided by the press, regrettably my experience tells me otherwise. With respect to the media, my experience again tells me that interest in Family Court proceedings usually arises where salacious information is sought – the genuine impact on the child or that child’s family is not a genuine consideration.

*Second, my friend will tell you about the reasonableness of journalists and their readers or audience. Again, with respect to my friend, experience tells me otherwise. My concern is that this case has all the hallmarks of being a media circus, which should not be conducted anywhere near this child or *****.*

My third point is this; the Court and the ICL are required to have regard to the child’s best interests as the paramount consideration. However, it is accepted by me that the Court will often have other considerations it must turn its mind to – including the two principles of open justice often commented on in the case law, namely the ability of individuals to observe proceedings and the other, to access outside of the proceedings – generally via the media.

These are with the greatest of respect, issues for the Court and not for an ICL, whose views should be solely focused on what is in this child’s best interests having regard to the circumstances of this case.

Australia is a signatory to the Convention on the Rights of the Child to which Article 19 makes clear that State parties are to take steps to protect the children from all forms of harm...maltreatment or exploitation (including sexual abuse) – in my submission exploitation should, in this modern age, be interpreted to include exploitation via the media – as it is capitalising on this child’s circumstances to make a profit.

This child deserves the right to fight for his life with privacy.”

When I reflected on my submissions for this talk, there were a few points I consider salient for ICL's who may find themselves in a similar situation:

1. think broadly about the possible implications for the child should the Court make an order allowing publication of a fair and reasonable account of the proceedings;
2. there may be merit in arguing the reporting of proceedings up to judgement and the publication of the judgement itself – there is case law on this point – see *Re W: publication application*;
3. remember the Court has policy considerations the ICL does not – however in my example – I did discuss concern for ***** the wider community; and
4. if the horse has bolted you may need to think about injunctive orders to address the impact of the issues relevant to the proceedings becoming public – the use of social media sites such as Facebook, Instagram and Snap Chat during the proceedings; and most importantly...and
5. be courageous – you were appointed by the Court for a reason – make wise use of your voice but use it.

His Honour ultimately made orders allowing publication of a fair and accurate account of the proceedings...he did however put in place many injunctions in line with my submissions, which restrained the media from *****

As I left the Family Court that afternoon, my mind moved to self-criticism and rumination – had I embarrassed myself in front of the Chief and more importantly – was I going to read in the West “Independent Children’s Lawyer left in the dust as horse bolted” – with a caricature of me desperately clinging to a horse!

I understand Avita’s position. I also agree wholeheartedly with Her Honour’s comments – however, the role of the ICL is a unique one, which we must not lose sight of.

That evening when I was trolling Facebook, a quote popped up from Marian Wright Edelman – an American activist who became one of American’s strongest voices for children and it is the sentiment I would like to leave you with...

“If we don’t stand up for children – then we don’t stand for much.”

Section 121 – The Tensions Between Harm to Children, Protection of Individual’s Rights, Public Interest and Transparency

AFCC Melbourne 18 August 2017 Friday session – 11 – 12.30pm

Presentation by Chief Justice Bryant and Denise Healy, National Media and Public Affairs Manager - Family Court of Australia – to accompanying power point presentation slides

I have been involved in family law for a very long time, even before the inception of the Family Law Act in 1975, so it’s fair to say, “I’ve seen it all” over the years.

I was a young lawyer when the fault-based divorce regime under the *Matrimonial Causes Act 1959* (Cth) existed – when they were dealt with in the State courts.

Under this regime, there were terrible examples of humiliation in parties’ having to prove who was at fault for the marriage breakdown. Accusations and allegations were readily on display in open court, with one party attempting to outplay the other on the moral (and sometimes religious) battleground fighting to prove innocence or guilt.

Judges presiding over divorce proceedings were seen holders of the moral barometer and as outlined in Shurlee Swan’s book, “Born in Hope,” “Their judgments were framed in terms of guilt and innocence, winners and losers. Whoever won the divorce.... Usually won everything else, including property and kids¹⁹ (page 4)”

The use of private investigators was rife and was common practice – often trying to prove that adultery had occurred. Lawyers would hang outside the courtroom, saying to each other, “Have you seen my photos?”

The stakes were high and the media loved it.

Newspapers like *The Truth* were replicated around Australia and many had columns dedicated to stories of family breakdown and property battles.

The abolition of the fault-based divorce and introduction of the Family Law Act was an attempt to end the moral blame-game.

When the Family Court was introduced to hear cases under the Family Law Act, it was closed to the public, and the Family Law Act contained section 121 outlining the publishing restrictions – essentially putting a stop to publishing the identities of parties involved in divorce proceedings.

While the salacious media reporting of adultery and other marital misdemeanors faded away in mainstream media with the introduction of the Family Law Act, media reporting certainly didn’t stop – it simply changed tack.

¹⁹ Swann, S. (2012) *Born in Hope: The Early Years of the Family Court of Australia*, UNSW Press, Sydney.

The current buzzword “disruption” aptly describes the relatively quick shift in the way the media reports family law issues.

With the introduction of the Family Court, media reports focused less on the cases and more on attacking the legislation, the Court and the judges.

Interestingly, when our current Prime Minister Malcom Turnbull was young reporter for the Bulletin, he published an article in 1978 titled, “*It’s the innocents who suffer: Family Law – courting disaster*”²⁰.

“The sheer pornography of those old divorce trials no longer graces the pages of the afternoon Press, but the same ghastly pageantry of lies, exaggeration and venom is unleashed by one spouse on another in the battles for custody of children.”

Sadly, not much has changed and very similar complaints that we saw in the early years of the Court, prevail today.

During my years as a lawyer, the past 17 as a judge, I have to admit that my views have oscillated on whether the publishing restrictions covered under s121 should remain in place – or removed.

There have been times, especially with the proliferation of social media, when I’ve thought...well, everyone’s sharing (some might say, oversharing) every aspect of their life on Facebook, Twitter, Instagram, Snapchat etc, so why shouldn’t we remove the restriction that litigants and others are ignoring on a daily basis?

We have a division now, whereby the mainstream media largely abide by the s121 restrictions, and yet, the litigants themselves (and their supporters) are flagrantly ignoring them – when it suits of course.

One can understand that most people would not even be aware that their actions may be in breach of the law.

Despite my occasional entertainment of the idea to remove s121, when I consider what is really important – the best interests of the child – it seems to me that we should retain it, at least for parenting cases.

I simply cannot see the benefit of having the names and details of everyday mums and dads and their children published for all to see.

How can it be of benefit to a child to have a school mate Google details of a class mate’s parenting dispute?

Family law proceedings are not criminal proceedings. In fact, I genuinely believe that many in the community (and in politics) don’t view the Family Court for what it is – a court.

²⁰ Malcolm Turnbull (1978) ‘It’s the innocents who suffer: Family Law – courting disaster’, *Bulletin*, 17 January

If publishing restrictions were lifted and media coverage returned to an “open slather” approach, I believe it would impede access to justice as parties may settle on terms that may not be in their best interests if they thought their case could end up in the newspapers or on social media.

The Family Court is frequently accused of operating behind an “iron curtain”, that it lacks transparency and accountability.

I take great offence to that.

I mentioned earlier that when the Court was introduced, it was closed to the public. To clarify that - relatives, friends, counsellors, and others if it was in benefit to the parties, were allowed to attend as observers. The innovation was intended to protect the parties. In hindsight, it may have backfired as it gave the media and the critics a reason to further attack the Court for supposed lack of transparency.

While the restrictions on access to the courtroom were lifted in 1983 the labels of “operating in secrecy”, “lacking transparency” and the “iron curtain” prevail today. It has been incredibly difficult to cut through the public rhetoric and swathes of misinformation on this issue. The Family Court operates no differently to any other court in conducting its matters in an open court that is accessible by anyone.

Cases can be reported on – in all manner of detail – however - parties can’t be identified.

Acutely aware of this reputation, when I was appointed as Chief Justice of the Family Court, I immediately put in place a policy whereby all Family Court judgments would be anonymized and published.

I believe that Australia has struck the right balance. While they are looking at making changes now, family law matters in the UK have always been dealt with within closed courts and do not allow publication of parties’ names. On the other extreme is the US which has no restrictions – and we’ve all seen how that plays out in the media.

In Australia, we have our own recent cases of celebrity disputes that have aired publicly.

Do we really want to open the flood gates for attempts at “trial by media?”

The Court simply does not make its decisions based on public opinion – judges make decisions that are in the best interest of the child, based on the individual facts of that individual family.

Appendix E

Run for the hills: Why would you specialise in family law assessment?

By Dr Jennifer Neoh MAPS, Vincent Papaleo MAPS and Dr Simon Kennedy MAPS

APS Family Law and Psychology Interest Group

Psychologists involved in preparing assessments and reports for families involved in family law litigation face a variety of ethical, legal, practical and personal issues that appear to be peculiar to this branch of psychology. It seems that the majority of psychologists in health and welfare practice, and even many forensic psychologists, are ill-informed about both the personal and professional risks of this work. Those risks become clear upon examining the sheer number of complaints against the small ratio of psychologists who specialise in this area.

Psychologists who specialise in family law assessment need to have expertise in forensic assessment of families, a detailed knowledge of child development, particular skills in placing information in context, a knowledge of family law, and some understanding of the broader legal context. This work is conducted under the umbrella of responsibilities to the court, which govern professionals' roles and actions as specified in the *Family Law Act 1975* and the *Family Law Rules 2004*. In addition, the work is governed by psychologists' professional standards of conduct, so we are simultaneously expected to behave professionally under the terms of two different regulatory regimes that are not always perfectly compatible. There is potential for confusion about our role when only part of these responsibilities is examined, such as when we are scrutinised about professional standards and our particular legal responsibilities are not taken into account.

The aim of this article is to broaden the understanding of forensic psychology in the Family Court context and to identify the inherent difficulties that present professional and personal risks for psychologists engaged in this work.

Problems of semantics

One of the primary problems in family law evaluation arises from the meaning implied when the families assessed are seen as 'clients' or 'patients', as this assumes an erroneous premise from the start. The families that are referred to us through the court system or through parties' legal representatives are primarily 'litigants' in a court case, rather than clients or patients. Our role is defined and constrained by the legal requirements of an expert witness under the *Family Law Act 1975* and/or the *Family Law Rules 2004*. In a very real sense, our client is the court rather than

the family or any individual family member. Knowledge of the parameters of the role is vital both for the quality of work and for professional existence. The rules require that a declaration is made when undertaking each assessment that the court is the client and the duty of the psychologist is to the court and not the family or individuals in the family.

The role of assessment is to assist the court by providing psychological information and opinion to be placed in the broader context of evidence-testing to (hopefully) allow the court to make better informed decisions regarding the best interests of a child or children in specific cases.

Parents are often ignorant about the role played by psychologists in this arena and have great difficulty appreciating the notion of the court as our client. Plain language explanations are often made to little avail. When cautioned that the report writing process is not confidential, as plainly as "if you don't want me to know something don't tell me, because it may be important and I will need to put it in the report", it is not uncommon for a parent to then make disclosures and say something like "but I don't want that in the report".

In a similar way, parents caught up in the confusing protocols and archaic customs of a court system frequently see the psychologist as the face of that legal system.

Problems particular to parental separation

It is well documented that the population of litigants who reach the end stages of the family law process have particular qualities. It is a special person who is prepared to fight to the death for what is often a pyrrhic victory and who resists a more sensible resolution from the available alternatives.

Parental separation is most often a traumatic time for parents and children. This might be stating the obvious, but through all the research about the negative outcomes for children, often the emotional status and adjustment of the parents is obscured.

It is not the intention of this article to minimise the plethora of research on the effects of parental separation on the children, as this generally informs the primary basis of our work with these types of families. However, one aspect that becomes evident in working with these families is that some parents seem to go through a 'separation psychosis', where their behaviour is irrational and they plumb the depths of human nature. Often parents find it difficult to recognise their own personalities and behaviours during and after their separation.

Psychologists who work with these families often see parents at their very worst and behaving in ways about which parents would normally be horrified. Sometimes this effect can account for, or at least partly explain, why some parents find the need to attribute all the blame and responsibility to the other parent and absolve themselves as a form of self protection. The psychologist is also an easy target that enables avoidance of self reflection and responsibility.

Problems with the legal context

The adversarial nature of family law in Australia is an anathema to the way in which most psychologists see themselves and their work.

The family law arena exposes psychologists and their work to intensive criticism. There is a myriad of people whose task is to take a very critical examination of the psychologist's work, opinions and logic, in addition to the litigants who are motivated to find fault with family reports and often disagree with the opinions expressed. The report and psychologist come under critical scrutiny and frequently cross-examination in a very formal process.

Outside of the court, the adversarial system creates motivations for lawyers and clients to embroil the psychologist in arguments in attempts to gain advantage or to discredit the psychologist. Long-winded letters from lawyers to argue their client's position that require a response, demands containing false premises about the psychologist's legal duties, and seemingly interminable arguments around making appointments for assessments, are all too common and easy traps for the unwary psychologist.

Problems of complaints by litigants to psychologist registration boards

Psychologists working in the family law area are reported to registration boards more frequently than any of their colleagues in other branches of psychology. The reasons for this phenomenon are not difficult to understand. By the time a court order is made requiring a family report, the parties have been involved in lengthy and often costly litigation, their positions have become all the more polarised, and they have failed in the many avenues provided to them for alternative dispute resolution. While the vast majority of families going through the process either resolve issues themselves or with the assistance of mediation services, the families referred for a family report usually reflect the most embedded, conflict ridden and litigious group.

Complaints made when a matter settles out of court (usually at the courtroom door arising from multiple stressors to reach agreement, as opposed to matters which go through the court system to eventually be heard at a trial or final hearing by a judicial officer) present psychologists with the most serious risks. In this situation, litigants may have some grievance about the outcomes or processes of the legal system and feel they have been unfairly treated or simply want an opportunity to gain a different opinion or outcome. This situation leaves the single expert psychologist as a prime target for disgruntled litigants to vent their displeasure or anger. If a complaint is made to a registration board, by the time the matter is investigated the possibility for any complaint to be aired in court has evaporated and the best opportunity for its status being assessed in the proper context has been lost.

Registration boards and professional associations in Australia and internationally have traditionally ignored the particular contexts of these types of complaints and generally have had little understanding or knowledge about the 'client' population or what the work entails. Recently, however, there has been a groundswell in reaction to these problems with some practical and

innovative solutions being put forward. These include that both litigants should agree about deficits in any psychologist's professional practice before a complaint is made, or that the judicial officer involved in a matter as representing the client (i.e., the court) should determine whether there are questions about professional conduct to be answered.

Problems of safety

The litigants' focus on the psychologist report writer as the reason for the outcome of their case can create ethical tensions with profound implications for individual family members and for psychologists themselves. There are the ever-present physical risks to family members, and to psychologists and their families.

In litigious families where there has been a high degree of emotional and financial investment, often psychologists and their opinions become the focus of individuals' anger at the legal system and the outcomes. At times, this has created extreme safety issues. Although the numbers are not known, anecdotally the reports of threats of violence, physical and verbal intimidation, property damage and harassment of psychologists have, unfortunately, become expected consequences of this work.

Conclusions

Despite the difficulties involved in this specialty, psychologists who work in the family law field tend to be passionate advocates for children. The driving force is usually the satisfaction that is gained from assisting children through what may be the most difficult point in their lives, by providing an objective psychological overlay for the courts to use in determining their best interests. Psychologists specialising in family law assessment tend to be motivated by the possibility of these children having a greater degree of protection and their families achieving better outcomes.

References

Family Law Act (1975).

Family Law Rules (2004).

Appendix F



Family Report Writers Exposed Hi Luke--

there are actually a lot of Family Report writers, ICL's and Judges looking for what we refer to a 'FRESH MEAT' they are looking for children who will be in the next child porn, 'snuff movies' are actually found through the family court system

These so-called Family Report writers, ICL's and Judges are not here just to take away children from loving families and divide families they have another sinister agenda

These Family Report writers, ICL's and Judges issues goes way deeper than families being disgruntled at an unjust Family Court system

