

Review of Family Law System Submission to ALRC

Research Team

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Introduction

The research team writing this submission have been undertaking research about family reports and family consultants since 2015. Our submission is based on that work. We have only provided responses to Questions 41, 34, 45 and 47 as they enable us to refer to this research and make an original contribution to the Inquiry.

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?

Summary of Core Competencies for Family Report Writers

Our submission reports on research undertaken by the above team. Our research, and knowledge of the extant relevant literature, leads us to suggest that family report writers require the following knowledge and understandings about domestic and family violence (DFV):

- the on-going impact of having lived with DFV on mothers and their children;
- the frequent continuation of DFV after separation, sometimes in new and more insidious ways - which partly explains the on-going hyper-vigilance and protection exercised by women who have separated from abusive partners.
- the fear that often continues for children even after the parents have separated, and especially when with the perpetrator;

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- the consequences of this fear on the well-being of children;
- how this history affects the mother's conduct and presentation during the assessment process;
- how it also affects her post-separation behaviour⁵ – she may appear to be disorganised, erratic or unreliable – but she may not have had any autonomy in decision-making in the relationship and now she is being asked to make decisions;
- how charming and convincing some perpetrators can be;
- when children apparently respond positively to their father at the assessment, this cannot be interpreted simply – there are many reasons this may happen – including fear of not pleasing him and of retribution to be visited on them or their mother, seeking approbation and genuine love;
- the lack of capacity for selfless nurturing by many perpetrators of DFV;⁶ and
- how the experience of DFV may negatively impact on the mother's apparent nurturing capacity and how this may change when the perpetrator is absent.

Overview of Our Research

The *Issues Paper* notes that 'significant concerns' have been raised about the skills and knowledge of family law professionals'.⁷ Our study provides information about the experiences and perceptions of both professionals working in and clients of the family law system regarding how family consultants deal with allegations of family violence. Over 2015 – 2016 the research team conducted a pilot project regarding how family violence is dealt with in family reports. Prior to this there was little Australian research specifically about family reports, but the few studies that existed suggested that consideration of family violence by family report writers was not always entirely adequate.⁸ Further, observations from Women's Legal Services suggested that the expertise of family consultants with regard to family violence deserves attention and development.⁹ Our findings are broadly consistent with the concerns noted by the House of Representatives Standing Committee on Social Policy and Legal Affairs in its 2017 Report (SPLA Committee Report).¹⁰

There were four major components to the pilot project: a detailed literature review; a review of the legal rules, guidelines, standards and other documents which comprise the

⁵ The impact of DFV on the post-separation behaviour of women was discussed in K Rendell, Z Rathus and A Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family*, Women's Legal Service Inc (Brisbane), 2000.

⁶ See: R Kaspiew, et al, *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report*, ANROWS Horizons Sydney, 2017.

⁷ Australian Law Reform Commission, *Review of the Family Law System: Issues Paper 48*, March, 2018, Australian Government at [281].

⁸ A Shea Hart, 'Children exposed to domestic violence: Undifferentiated needs in Australian family law', (2004)18(2) *Australian Journal of Family Law*, 170; A Shea Hart, 'The Silent Minority (2003)28(4) *Children Australia* 31; A Shea Hart, 'Child Safety in Australian Family Law: Responsibilities and Challenges for Social Science Experts in Domestic Violence Cases', (2011) 46 *Australian Psychologist* 31; L Moloney et al, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study*, Australian Institute of Family Studies, 2007; P Hemphill, *On the Crest of a Wave: The Australian Family Violence Reforms One Year Later*, Paper presented at the Association of Family and Conciliation Courts 50th Annual Conference, California, 2013.

⁹ A Lynch, *Assessment of Family Violence in Family Law – Letter to Senator the Honourable George Brandis QC*, Women's Legal Services Australia, Brisbane, 2013 (copy on file with authors).

¹⁰ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A Better family law system to support and protect those affected by family violence*, Parliament of Australia, 2017 at [6.73-6.85].

professional framework of a family report writer; a series of focus groups with professionals in the family law system and interviews with survivors of family violence who had been through the family report writing process. The results of the first two components were published in a 2016 article in the *Journal of Judicial Administration*. This concluded that family reports were influential documents inside and outside the courtroom, but that ‘there are still challenges in dealing safely and effectively with allegations of family violence’.¹¹ It was apparent that the family law system would benefit from more research specifically about family reports and family violence.

In 2016, results from the focus group study were published in the *University of New South Wales Law Journal*¹² (UNSWLJ). Results suggest that the dynamics and effects of family violence are not well understood by some family report writers. Recommendations for children to spend significant time with perpetrators of violence are frequently made, perhaps partly as a response to the emphasis on ongoing parental relationships in the *Family Law Act* (FLA).¹³ Coercive control and non-physical family violence are especially poorly understood by family report writers and therefore the conduct of the mother post-separation, and during the report writing process, may be misinterpreted. Women’s credibility was often at issue while abusive men were taken at face value. Practical recommendations about changes in the report writing process relating to time, structure and environment were also provided by focus group participants.

The data from the interviews with the women, which generally confirm the views of focus groups participants, are currently in a draft article format intended to be submitted for publication within the next few months. However, we have presented some preliminary findings at conferences¹⁴ and are able to report on some these findings in this submission.

Background and Key Findings of Our Research

Despite what is known about domestic violence, the negative impacts on children of living with it, the questionable parenting capacities of abusers, and family law legislation directing that the best interests of children are dependent on protecting them from harm, research suggests that the family courts are still at times prioritising parent-child relationships over safety. The result is that perpetrators of domestic violence continue to obtain significant and substantial unsupervised time with their children. This is a potentially physically, psychological or emotionally dangerous situation for children and their mothers and can be traced to a strong pro-relationship narrative within the family courts. Coercive control poses significant challenges in this narrative. We argue that a set of discursive strategies is

¹¹ R Field, S Jeffries, Z Rathus and A Lynch, ‘Family Reports and Family Violence in Australian Family Law Proceedings: What do we know?’ (2016) 25 *Journal of Judicial Administration* 212 at 235.

¹² S Jeffries, R Field, H Menih and Z Rathus, ‘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’ (2016) 39(4) *University of New South Wales Law Journal* 1355

¹³ 1975 (Cth)

¹⁴ Australasian Institute of Judicial Administration, *Family Improving Court Practice in Family Violence Cases*, Melbourne, June, 2106; *Stop Domestic Violence*, Brisbane, December, 2016; *World Congress on Family Law and Children’s Rights*, Dublin, June, 2017.

employed throughout the family law system which can minimise, dismiss, negate or invalidate domestic violence. Judicial officers are not generally domestic violence experts and rely on the expert evidence adduced before them. A crucial piece of evidence used by the judiciary to determine a child's best interests in cases of domestic violence are the assessments compiled and recommendations made by family report writers.

Focus Groups

Our research was a Queensland-based pilot project. The focus group aspect of the project explored the practices of family report writers from the perspective of those providing legal and social support to victims of domestic violence in South East and northern Queensland. While the views expressed in the focus groups could be locale-specific, this research provides an important contribution to the understanding of family report writing practice, specifically in cases concerning domestic violence. The stories from the focus groups demonstrate the importance of understanding the complexity of such cases and the implications of family assessment reports.

Our findings, which are supported not only by an extensive international literature but also the extant Australian research, suggest that some family report writers tend to invalidate coercive control and other forms of family violence when they look for ways to build and maintain the children's relationships with the perpetrator of the abuse. Our UNSWLJ article discusses our data in detail. They suggest that family violence is invalidated by:

- re-constructing domestic violence as inconsequential and thereby diminishing its relevance to parenting arrangements;
- reconstituting coercive control as something else - it is 'not that serious', episodic, 'only parental conflict', and/or an act from the past that victims needed to 'get over';
- adopting normative gender misconceptions that demand maternal support of the perpetrator/child relationship and call into question women's credibility by labelling them dishonest and manipulative; and
- the selective silencing and misconstruing of children's voices.

There was a general view that some family report writers lacked training and expertise in family violence and were also influenced by the legislative and jurisprudential encouragement of shared parenting responsibility and time. The result is assessments and recommendations that fail to elucidate the potential harm posed by perpetrators to the children and their mothers. This included, for example, frequent recommendations for shared parental responsibility and for children to spend significant unsupervised time with the perpetrator. This placed victim mothers and their children in a situation of ongoing risk because family reports are influential in parenting negotiations and litigation.

According to the focus group participants, little has changed in family report writing practice since the 2012 family violence amendments, which now require the prioritisation of child safety over relationships. However, it was hoped that practice could be improved in the future via:

- family report writer training (to increase knowledge and understanding of coercive control);

- the provision of support, supervision and increased family report writer accountability;
- making the family report assessment process more thorough (through provision of additional time, utilising a broader range of information, and mandatory risk assessments and/or guidelines);
- creating a less sterile/intimidating assessment environment; and
- moving to a pro-safety narrative in the family law system.

Interviews with Victim Mothers

We interviewed women in south-east Queensland who were recruited through legal and community sector networks of the researchers. They ranged in age from late 20s to mid-40s and were born in a number of countries. There were from one to five children in the families and a few step-children as well. The ages of the children under discussion went from 2 years to young adults.

The violence that the women had experienced was serious, but varied in its nature. Some of the men were physically violent and used sexual violence, others were more controlling and emotionally abusive. Many of the women reported financial control by the father. A majority specifically reported being the target of violence when trying to nurture the children. For example, one woman said:

“I would be breastfeeding my baby and he’d be standing over the top of me screaming at me. ... I’d feel his spit on my face.”

Some of the women’s stories confirmed the information we had heard from the focus groups. One woman spoke of the minimisation of the violence:

“Maybe I felt like she [family report writer] was minimising it ... and I’m guilty of doing that now too... I feel like I’ve built up a bit of resistance to domestic violence. You know when I said to you before when he told me he is going to cut my throat, I really get so dismissive about that and I shouldn’t because that’s quite a really serious thing.”

Another explained how the violence was now being placed in the past and rendered irrelevant:

“Then she [family report writer] wanted to focus on ‘well what's happening right now’ and so I was really confused by that because I said ‘well’ ... and she's like ‘is he threatening you right now?’ I'm like no. She's like ‘well is he being physical with you right now?’ and I'm like no, and I said, but he has said ... and she's like ‘I don't want to hear about what's happened prior, I want to know what's going on right now.’ I said, well he's not seeing me much. He's not seeing his kids much so there's not a lot going on. She's like ‘well how do you feel about him now?’ and I'm like I'm scared and she's like ‘but what have you got to be scared of?’ I left because of all this stuff that has happened. She's like ‘I don't want to hear about what's happened.’”

The issue of the lack of time for doing a family report was also raised:

“Then there was a two-hour interview in there with her. Two hours is not long enough, do you know what I mean, when things have happened. So then... [interviewer asks] she interviewed him and then did she watch both of you with the kids? [Olive continues] Yeah, she did that. That lasted for five minutes here, five minutes there, didn't have enough time. Realised that she didn't really have enough time to do the interview. Second of all, it's clinical. How can you possibly think that an actual real-life situation you can sort out in an office for a whole day?”

Taken Forward to SPLA Inquiry

When we submitted to the SPLA Committee in 2017 we made four recommendations in the light of our research:

- (a) Provide training in domestic and family violence for family report writers.
- (b) Provide support, supervision to and require increased accountability from family report writers.
- (c) Make the assessment process more thorough.
- (d) Create a less sterile and intimidating assessment environment.

The Committee reported on many of our concerns, which were shared by other submissions. The Report noted problems with the quality of family reports, including how allegations of DFV were dealt with, the processes for developing family reports, availability and costs. It recommended that private family consultants be abolished.¹⁵ We take this opportunity to comment on this Report.

Firstly, we correct the record. At paragraph 6.78 the report says that we ‘examined a series of family reports’. This is incorrect, as will be seen in our comments on Q 45. We did not examine family reports. However, we undertook focus groups with legal practitioners, social service providers and interviewed victim women who had been involved in a family report process as reported above.

Secondly we express our appreciation for the attention paid to our submission and those of others concerned about DFV. The committee has made important observations about the current problems with family reports and its examination of the issue provides excellent background for this Review. However, we believe that the committee’s recommendation re: the abolition of the pool of private family report writers would be an unfortunate response to the concerns raised. As a pilot project our research does not provide a basis for generalisation regarding the relative quality of reports by private vs. court based family report writers. In the data collected from our focus groups, it is not possible to distinguish between comments made about family report writers employed at the courts and others. In any further research, it will important to endeavour to make this distinction. It is true that a number of the women who offered to participate in our project had been allocated to

¹⁵ SPLA Report, recommendation 22 at [6.156]

private family report writers. It was also clear from our data that problems arise with understandings of DFV with family consultants based at court. There is insufficient empirical evidence for the SPLA Committee's recommendation, but there would be value in further exploring any differences between reports done in-house and those commissioned externally to understand if, and if so why, the court based family consultants may produce reports that demonstrate a better understanding of DFV.

The family courts have provided significant training and resourcing to their employed family consultants but family report writers in private practice will only be required to meet the requirements of their professional body. There are also various sets of practice directions and professional guidelines used in the courts and this approach may well enhance the quality of reports from the court-based family consultants.

The pool of private report writers is large and varied and holds significant experience and expertise which would be lost. Some are former employees of the court and others have significant experience in being expert witnesses. It would be detrimental to exclude this whole pool. We also consider that are advantages in having a group of family report writers who do other work – who have other clients dealing with different issues and who have opportunities to perform clinical and therapeutic work and not just forensic assessments.

Rather than abolishing private consultants, we consider that a more appropriate approach would be to establish a process for proper and rigorous accreditation of private professionals who wish to prepare family reports and to develop an ongoing system of regulation and annual certification which will be discussed further under Q 47. These professionals should have access to the resources available to family consultants based at the courts to the greatest extent possible. There should also be an effective complaints mechanism, also discussed in Q 47.

Recommendations

- that an appropriate process for initial and ongoing accreditation of family report writers in private practice be implemented as outlined in Q 47;
- that there be a clear set of rules for which documents can be called 'family reports' and that such documents can only be prepared by appropriately accredited professionals;
- that there be ongoing training and mandatory continuing professional development for family report writers;
- that there be a requirement for a person to have demonstrated understanding and knowledge of domestic and family violence to become an accredited family report writer and family violence must continue to be included in the ongoing professional development work;
- that a process of formal supervision of private reports be considered;
- that a complaints process be implemented as outlined in Q 47;

- that new processes and procedures be considered for the preparation of family reports where interviews with different parties occur over different days, the most relevant people are interviewed on more than one occasion and a period of time elapses between the interviews.

An Association of Family and Conciliation Courts Initiative

The Association of Family and Conciliation Courts, the premier family law body in the USA, has spent a number of years developing a specific set of guidelines for family report writers (custody evaluators) when dealing with cases involving family violence.¹⁶ They include ideas such as:

- An evaluator strives to remain attuned to ongoing and past intimate partner violence. Without understanding the dynamics and context of past intimate partner violence, an evaluator is less likely to comprehend the nature and level of present and future risk for family members. Past violence is a significant risk factor for future violence. Furthermore, the form, frequency, and severity of intimate partner violence may change over time.
- A traumatized party may react or respond unexpectedly to evaluator inquiry. A party traumatized by abuse may experience short- and long-term effects of abuse that include memory loss, processing difficulties, and atypical presentation of affect.
- An evaluator may expect to invest substantial time and energy conducting a vigilant and thorough investigation of the impact of intimate partner violence on children and parenting.

Question 34

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

The issue of children's participation has not been a specific focus of our research project on family reports to date, although we would like to include this more explicitly in the future. Because of this we do not have views formed from our own empirical data. However, we are aware that appropriate and timely participation by children in the family law system has been the subject of considerable research and comment in Australia. We are unable, in this document, to provide a comprehensive account of this research and we are certain that the committee has been referred to a number of resources.

There is no question that Australia could improve the ways in which children participate in family law proceedings. Children have a right to express their views and be heard in judicial proceedings under article 12 of the *United Nations Convention on the Rights of the Child*. At present the main ways this occurs in Australia are as follows:

- through the family report writer - by way of interviews and other information that professional may collect or obtain;

¹⁶ Association of Family and Conciliation Courts, *Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation*, 2016 at <http://www.afccnet.org/Portals/0/Center%20for%20Excellance/Guidelines%20for%20Examining%20Intimate%20Partner%20Violence.pdf>

- through the independent children’s lawyer (ICL), although the role of the ICL is to act in the best interests of the children. They are not the direct advocate of the children and do not act on the children’s instructions; through child focused family dispute resolution;
- through child inclusive family dispute resolution;¹⁷ and
- very occasionally, judicial meetings with children.

Although some material is available about children’s experiences with family report writers, this specific area seems to be under-researched. There are obvious ethical difficulties with actually ascertaining whether a child considers that the contents of the family report reflect their discussions with the author. To the extent that research has been undertaken there are suggestions that some children feel uncomfortable with the family report writer and did not feel listened to.¹⁸ However other research suggests that the family report is the only experience of participation for many children.¹⁹

More research into children’s experiences of family reports is required. It must be understood that meeting with and interviewing children requires a particular skill set, and social workers and psychologists do not automatically possess those skills.

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?

The point we wish to make about s 121 is not quite what the question asks but shows a different issue that this section raises in terms of empirical research. Early in the project we obtained ethical approval from Griffith University’s Human Research Ethics Committee (HREC) to undertake the focus groups and interviews.²⁰ However, as the project progressed we realised that we wanted to read the family reports of the women we were to interview. We returned to Griffith’s HREC and developed a protocol which involved the women providing their reports to a solicitor at the Women’s Legal Service, a student volunteer who had no other connection to the project de-identifying the reports and those de-identified reports then being made available to the research team in hard copy.

After the recruitment process had begun, but before the interviews had been undertaken, a meeting with our funding body²¹ determined that we should also submit an ethics

¹⁷ See: L Kochanski, ““Can You Hear What I Hear?” The Voice of the Child in Australian Family Dispute Resolution’, *World Congress on Family Law and Children’s Rights*, Dublin, June, 2017

¹⁸ Alison Hay, ‘Child Protection and the Family Court of Western Australia: the experiences of children and protective parents’ Conference Paper, *Child Sexual Abuse: Justice Response or Alternative Resolution*, Australian Institute of Criminology, Adelaide, 2003; Braveheart foundation, *Abbey’s Project: A Braveheart’s Paper on the Family Law System*, 2016, Arundel, Qld; Jess Hill, ‘Suffer the Children: Trouble in the Family Court’, in *The Monthly*, November, 2015.

¹⁹ D Bagshaw, T Brown, S Wendt, A Campbell, E McInnes, B Tinning, B Batagol, A Sifris, D Tyson, J Baker and P Fernandez Arias, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006*, April, 2010.

²⁰ And QUT’s because Professor Bond was based there at the time.

²¹ Australasian Institute of Judicial Administration

application to the Research and Ethics Committee of the Family Court of Australia and the Federal Circuit Court of Australia. The main issue of concern was whether or not we could access the family reports. This raised interesting questions regarding s 121. Section 121 is primarily aimed at preventing parties to family law proceedings from being identified in the general media,²² however, it also means that parties to proceedings cannot distribute their court documents amongst their family and friends, nor post them on Facebook. The section appears to contain certain exceptions which could include access for research purposes, however, it is not clearly expressed. There are exceptions for:

(e) the publishing of any publication *bona fide* intended primarily for the use of members of the profession, being:

(i) a separate volume or part of a series of law reports; or

(ii) ***any other publication of a technical character***; or

(f) the publication or other dissemination of an account of proceedings or any part of proceedings:

(i) to a person who is a member of the profession, in connection with the practice by that person of that ***profession or in the course of any form of professional training in which that person is involved***²³

Apart from the constraints presented by s 121 other factors impinge on the accessibility of family reports to researchers. Some family reports are specifically released pursuant to an order from the judge restricting access to those directly involved in the proceedings and statutory authorities such as the child welfare department and legal aid. Although our research does not require the family courts themselves to release the reports to us, this did not mean that the courts had no authority or control over these reports. All had been filed in the courts during the proceedings – usually by the independent children’s lawyer (ICL) rather than the parents. It may well be that the women did not have authority to release the reports to us because those reports are not really *their* documents. They are as much the documents of the fathers (and the children) but it would clearly have been unsafe and inappropriate for us to seek consent from these fathers who our interviewees had described as violent and / or controlling.

In initial negotiations with the FCA Ethics Committee the research team agreed that we only sought to access family reports which had been ordered under s 62G of the FLA. However, when we endeavoured to identify which reports fell within this category, it became clear that many documents formally titled ‘family reports’, referred to as such through family law proceedings and brought to us by our interviewees as their ‘family reports’, were not ordered under s 62G. Many were simply commissioned by the ICL, and our discussions in the practice community suggest that this is how many ‘family reports’ arise. The reports in this category were prepared by private family report writers.

²² This provision was publicly flouted by the *Courier Mail* and other media publishing photographs, names and information about four sisters who had been brought to Australia from Italy by their mother. This series of cases was allocated the name ‘Garning’ in the courts. De-identified cases published on Australia’s major online court reporting publishing service are often discussed in the media using the pseudonyms.

²³ s 121(9). The words italicised and bolded represent the exceptions that could apply to research.

We anticipated that reading the family reports would provide us with powerful insights into the experiences of the woman we had interviewed and an ability to bring some objectivity to analysing how family violence was actually dealt with in family reports. We would be able to speculate on the reasons for any differences between the women's perceptions of how DFV was dealt with and what a more objective view might suggest. Access to the reports would also allow exploration of the implications of the necessarily forensic rather than therapeutic nature of family reports. A number of focus group participants spoke of the negative impact of the sense of being judged on the woman's ability to perform well in the family report process. This is a recurring and deeply damaging aspect of family violence – the sense of always being judged and under surveillance. And with abusive partners, it is almost impossible for the women to perform in the required manner - and there are often serious consequences for the women – and her children - in being judged and found wanting.

Access to the reports would also assist in understanding the question of how family report writers deal the constraints of our legal system which render the judge the only finder of facts. It seems somewhat disingenuous to suggest that a social worker or psychologist of many years' experience would not be building a picture of life in that family while compiling the family report, and building such a picture must require making some decisions about what has really happened. To suggest that such professionals do not draw conclusions of fact in determining whether or not this is a family in which violence and abuse has occurred insults the skills and professionalism of those appointed to the role. This project may be able to suggest some pathways forward in terms of further investigating this contentious issue.

Members of the Family Court of Australia kindly met with us to discuss what might be possible it was considered that access could be granted to family reports where the proceedings between the parties were finalised. However, most of the reports were from the Federal Circuit Court and that court considered that it was not able to approve access because that may be contrary either to orders made in a particular case or to other legislative provisions, particularly s121 of the *Family Law Act*.

It is apparent from some of the research undertaken by the Australian Institute of family Studies that it has been given access to de-identified family reports as part of its data collection. Other researchers may also have been given access to de-identified reports, but we are unaware of any research where it has been possible to bring together the experiences of people who were subject to a report with that report. This would also apply to accessing other court documents in conjunction with interviewing parties involved in those actual cases.

We believe that diverse and innovative research on the family law system in Australia is a necessary requirement of ongoing improvement of this complex and challenging space. It is important for independent researchers to be able to access court documents which can be discussed with the parties they involve and that legislative reform to enable this should be enacted.

Recommendation

- That the *Family Law Act* be amended to clarify the situation regarding access by *bona fide* researchers to court documents filed in proceedings involving persons whom they are interviewing or working with. Such a process needs to ensure that no person can be identified by the way in which the documents are used in any publication. The process should not require the consent of all parties affected by the proceedings.

Question 47

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

Accreditation of Family Report Writers

As indicated, our research suggests that there is a lack of rigour around the system regarding who can write a document called a 'family report'. We believe that much tighter regulation is required, with a strict initial accreditation process and ongoing requirements regarding mandatory professional development. There must be continuing education and training around DFV as it is a critical feature of so many of the cases which reach the point of requiring a family report. Some features to be considered include:

- Minimum of 5 years' experience in relevant practice;
- Demonstrated understanding and knowledge of DFV;
- Some system of supervision across the board of court based and private family reports;
- On-going mandatory training and professional development;
- Access to the same data and knowledge centre available to court based family report writers;
- Adherence to the procedures and practice guidelines implemented in the family courts.

Complaints Process

The SPLA Committee asked us to take a question on notice regarding the operation of the complaints process for family report writers. We provide our answer below:

The unsatisfactory nature of the complaints system for family report writers has been a problem for many years. We note that it was recently raised by in submissions to the Senate Community Affairs Committee on the Australian Health Practitioner Regulation Agency and the National Law.²⁴

Family reports are prepared by two different kinds of professionals and by people with different employment circumstances. Both social workers and psychologists are engaged to write family reports. Further, some family report writers (called 'family consultants') are employed by the court, as public servants, and others are in private practice and appointed to the role by the CEO of the Family Court under the *Family Law Regulations*.

²⁴ Women Legal Services Australia (WLSA), 24 February, 2017 and Australian Chapter of the Association of Family and Conciliation Courts (AFCC), 21 February, 2017

This means that there is confusion and uncertainty about how to proceed when there is a complaint and where a complaint should be directed. However, it now seems to be settled that there is little, if any, role for the professional associations of the two groups. The Australian Association of Social Workers (AASW) has issued a policy document which says that, by virtue of s 121 of the *Family Law Act 1975* (Cth) the AASW cannot investigate complaints about social workers who have written family reports because that section prohibits the publication or sharing of any material filed in a family court which would identify parties. Clearly a complaint must identify the parties and the children, so it cannot proceed in that way. The only exception to this situation is where the conduct is clearly professionally unethical such as offering a favourable report in exchange for sexual favours.²⁵

The Australian Psychological Society (APS) also developed an interim policy and made a submission to the Inquiry relating to the Australian Health Practitioner Regulation Agency. This Agency is now the recipient of complaints against Australian health practitioners – so this includes psychologists but not social workers.²⁶ It would also cover psychiatrists who are often expert witnesses in family law cases, although not ‘family report’ writers. However, as the submission of the Australian Chapter of the Association of Family and Conciliation Courts to the Australian Health Practitioner Regulation Agency Inquiry noted, the APS is also constrained by s 121 FLA. Further the APS policy states that an investigation can only proceed either with the leave of the court or after any proceedings have been completed, whichever is earlier.

As can be seen, these are very unsatisfactory arrangements. These difficulties are heightened by the fact that the report is part of legal proceedings and family consultants are protected ‘in performing his or her functions as a family consultant’ by an immunity under s 11D FLA. In fact, according to Neil Wareham:

“An attempt ... to attack a Family Report and to investigate the conduct of the reporter in these circumstances may, ... depending on the circumstances, amount to contempt of court as an interference with the justice system.”²⁷

It seems that the only places that complaints can be made are to the family courts themselves²⁸ and such complaints will only be dealt with after the proceedings are finalised. Any complaint about the content of the report is considered to be something that can only be dealt with as part of the court process – ie by cross-examination of the family consultant. This is a fraught process when these witnesses have the special imprimatur of being an independent / neutral court witness – possibly even an employee of the court. Obviously it becomes almost impossible if the party who is unhappy with the report is self-representing. It is complicated by the fact that parties (whether through their lawyer or self-representing)

²⁵ Australian Association of Social Workers, *Complaints relating to Social Workers and the Family Court of Australia and Federal Circuit Court of Australia*, July, 2014, p 2.

²⁶ In a paper by Legal Counsel for the Family Court, Neil Wareham, he states that in 2012 ‘it was concluded that court ordered work was outside the jurisdiction of the then psychological boards and did not amount to psychological practice in a health setting ...’: N Wareham, *The Complaints Against Family Consultants*, 2015.

²⁷ N Wareham, *The Complaints Against Family Consultants*, 2015, p 5 at <http://afccnet.org.au/wp-content/uploads/bsk-pdf-manager/10_WORKSHOP_6_HAND_OUT.PDF>

²⁸ Both the Family Court of Australia and the Federal Circuit Court have procedures outlined on their websites.

are nervous to 'go in too hard' against the family report writer because of the influence they wield.²⁹ If the criticism is not accepted by the court, the family consultant's view may become unassailable and the party who challenged them loses enormous credibility on a range of issues.

An examination of the scant literature and information available about this issue suggests that many litigants try to make complaints about family report writers. Some lodge them with the courts, and others try through the professional associations. It is apparent that many complaints are made against psychologists³⁰ and this raises a number of concerns. Psychologists themselves argue that there are some invalid reasons why complaints might be made against them in family law proceedings including trying to discredit the expert witness, for strategic legal reasons of delay, hoping for a new family consultant who might take a different view to revenge. Others, such as Women's Legal Services Australia, have seen many clients whose stories have been poorly told in family reports, and are concerned that the current situation makes valid complaints almost impossible. They specifically speak of 'repeat offender' family report writers whose reports seem to repeatedly deal inadequately with allegations of family violence and child abuse.³¹ This was an issue the writer of this part of the submission observed when she worked at Women's Legal Service, Brisbane from 1989 to 2004. There were family report writers who were over-represented in terms of the women who came to us because the family report they had received neglected or minimised the abuse they had experienced.³²

We believe that a special unit to which complaints about family report writers – and perhaps other expert witnesses – can be made should be established. It could be independent from the court and the usual professional bodies of the people involved and could specialise in dealing with the issues that arise. There could be special vigilance in respect of the concerns raised about inappropriate or strategic complaints, but such a unit would also develop a bird's eye view of what is happening and would be able to take note of professionals about whom numerous complaints are made. At present, in the individualised system we rely upon, a lawyer or litigant in a particular case probably cannot legitimately make reference to evidence that a family report writer might have given in another case. There is no possibility of general oversight. Given the reasonably small professional communities operating in family law in Australia it might well be that a lawyer would know of judicial criticism of a particular family report writer in another case, but it is not clear what use could be made of this. They may even be aware of existing complaints about a particular family consultant, but it is unlikely that this could be used in a case involving that consultant.

Such a unit would need to be multi-disciplinary with a panel to determine the complaints lodged. Perhaps the panel should always comprise a legal practitioner with family law experience, at least one person with the same qualification as the person about whom the complaint was made and someone with genuine expertise in any issue central to the

²⁹ The influence of family reports was noted in our original submission.

³⁰ Submission to Australian Health Practitioner Regulation Agency Inquiry by Australian Chapter of AFCC, 2017 and D Wilmoth, APS, 2007 at <http://www.psychology.org.au/inpsych/family_court/>

³¹ Submission to Australian Health Practitioner Regulation Agency Inquiry, WLSA, 2017, p 5.

³² Interestingly in the research project our submission to this Inquiry was based on a small number of report writers were complained about more than once by the 10 women we interviewed.

complaint, such as family violence. A preliminary investigation of the complaint should be made to ensure that possibly frivolous or vexatious complaints are identified. There should also be consideration of whether any investigation should proceed during the currency of family law proceedings. It may be necessary or desirable in some cases.

This recommendation will require legislative reform, particularly in respect of s 121 FLA, but in our opinion, that section has far reaching effect, well beyond its intended role of keeping families involved in family law proceedings out of the public eye. It also needs to be amended to clarify access to family law proceedings for the purposes of academic research.

Recommendation

- That a special unit, independent from the courts, be established for dealing with complaints against family report writers. Matters which will require consideration would be:
 - Who should constitute the panel to hear such matters?
 - What would be the basis of complaints – it is something different from unprofessional unethical conduct because it may be more about lack of expertise?
 - When should matters be referred to the disciplinary body of the relevant profession?
 - What are the consequences of an adverse finding?