

Submission: *ALRC Review of the Family Law System Issues Paper 48*

The Centre for Excellence in Family Welfare ('the Centre') is the peak body for child and family services in Victoria. For over 100 years we have advocated for the rights of children and young people to be heard, to be safe, to access education and to remain connected to family, community and culture. We represent over 150 community service organisations (CSOs), students and individuals throughout Victoria working across the continuum of child and family services, from prevention and early intervention to the provision of out-of-home care.

The Centre believes in the right of all children to grow up in a safe and nurturing environment as part of a family, and emphasises the importance of child-centred practice in decision making affecting children. All decisions need to be 'in the best interests' of the child.

We know from our members that many children and families assisted by CSOs are involved, or have been involved, in family law proceedings. Families who seek the assistance of CSOs are often dealing with a range of complex issues, including challenges relating to mental health, family violence, drug and alcohol, homelessness, housing or financial stress.

These families may also be negotiating legal matters in several courts at the same time. For example, families could be involved in the Magistrates' Court for Intervention Order applications or criminal matters, and the Children's Court for Child Protection or youth justice matters. In addition, some families might have family law proceedings running concurrently or adjourned pending resolution of Child Protection proceedings. Our experience indicates that family law proceedings are especially challenging to negotiate for families and children managing multiple vulnerabilities. As the Productivity Commission found in its Access to Justice Report in 2014, 'disadvantaged Australians are more susceptible to, and less equipped to deal with, legal disputes'.¹

The Centre represents child and family service providers who are assisting families at this point of crisis. In our response to the Issues paper we highlight the importance of understanding the needs of vulnerable children and families as they navigate the family law system.

Children and families need to be confident that the welfare of the children is continually being assessed, and that decisions are made in their best interests. This is particularly important for children who come from families with complex needs as they may be experiencing significant trauma which can be exacerbated through interactions with the family law system. Of particular concern are children who do not meet the threshold for state Child Protection intervention but may still be at risk.

¹ Australian Government Productivity Commission (2014) [Access to Justice Arrangements, Inquiry Report No. 72](#), p. 2.

Objectives and Principles

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

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

Since the passing of the Family Law Act in 1976, Australia has undergone considerable social, economic and technological change, including changes in the structure and needs of Australia's families and households. As the Issues Paper notes:

*safety concerns for children are now a common feature of the family law system's workload, and ... many of the system's client families are affected by issues that may pose a risk of harm to the child, including issues of family violence, mental ill-health and substance misuse.*²

Given this, the Centre proposes that the primary function of the family law system in cases involving children should be to advance the child's best interests. This will mandate the prioritisation of their safety, and developmental, social and economic needs in all decision making.

The Centre supports the proposal that an overarching set of principles should be developed for the family law system. The suggestions listed on page 20 of the Issues Paper all have merit. The Centre suggests that three additional principles be considered relating to the need to:

- promote the participation of children in decision making that affects them
- recognise the importance for children of remaining connected to culture
- recognise the importance of siblings and extended family connections.

The Royal Commission into Institutional Responses to Child Sexual Abuse identified the empowerment of children as a key protective factor for children in institutions. It is important to note that the federal family courts are institutions. In its discussion of child safe institutions the Royal Commission found:

*Child safe institutions facilitate and value children's contribution to decision making and listen to their concerns. Children are more likely to raise complaints in an institution that empowers and listens to them. Policies and practices that are shaped by children's views can better prevent harm to children; for example, children may be able to identify risks that are less visible to adults in institutions.*³

Maintaining connection to culture is vitally important for Aboriginal and Torres Strait Islander children. The Royal Commission found:

The broad literature on Aboriginal and Torres Strait Islander child safety suggests that 'provided the necessary social conditions' are in place, Aboriginal and Torres Strait Islander cultures 'act as a protective force for children and families'. Aboriginal and Torres Strait

² Australian Law Reform Commission (2018) [Review of the Family Law System: Issues Paper](#), p. 17.

³ The Royal Commission into Institutional Responses to Child Sexual Abuse (2017) [Final Report Volume VI: Making Institutions Child Safe](#), p. 158.

Islander cultures – where children are the collective responsibility of the community – are highly protective of children. Strong culture is also protective because it builds resilience in communities to help mitigate the negative consequences of past policies and contemporary racism.⁴

A large number of vulnerable families who are accessing the family law system are blended or sole parent families, with siblings living with a different parent. Often children may be cared for by a grandparent or other family member. This may be through informal arrangements or following Child Protection intervention. Maintaining a strong sibling connection can be a strong protective factor for vulnerable children. It is also important for children to maintain extended family relationships, particularly with grandparents, as in times of family crisis it is often the grandparents who can meet the safety needs of their grandchildren.

Access and engagement

Question 3: In what ways could access to information about family law and family law related services, including family violence services, be improved?

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

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

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

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

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

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

The Issues Paper highlights the difficulties faced by families when attempting to access the family law system. In particular, Aboriginal and Torres Strait Islander families, culturally and linguistically diverse families, people with a disability and LGBTIQ families face significant systemic barriers to full participation in the family law system. These systemic barriers are exacerbated for people living in rural and remote regions. The Centre supports the initiatives presented in the Issues Paper to address these issues.

It is important to recognise the specific experiences of Aboriginal and Torres Strait Islander and culturally and linguistically diverse (CALD) children. This includes recognition of the experiences of

⁴ The Royal Commission into Institutional Responses to Child Sexual Abuse (2017) [Final Report Volume VI: Making Institutions Child Safe](#), p. 174.

intergenerational trauma for Aboriginal and Torres Strait Islander children and the ongoing effects of dispossession and colonisation.

Aboriginal and Torres Strait Islander cultures can help to protect and support the healing of Aboriginal children and young people. Protective factors such as strong kinship networks, connection to spiritual traditions, to country and community have facilitated the healing of Aboriginal and Torres Strait Islander children and communities.⁵

Children with refugee backgrounds may have experienced persecution, instability, violence, cultural dislocation, loss of family members, family separation and prolonged periods in refugee camps.⁶

Particular attention should be paid to the needs of children and young people when attempting to navigate the family law system. Information targeted at children and young people should be accessible from the Family Court webpage and in hard copy. This information should be available at family court locations and schools and include:

- an introduction to the family law system
- the 'legal journey from initial application to final decision
- how children and young people can participate in the process
- family violence and children and young people
- links to support services and resources, including Legal Aid and Community Legal Centres.

Alongside the systemic barriers identified above, the issue of cost is considerable. As the Issues Paper identifies, cost is a significant deterrence to being able to participate fully in the family law system. Of particular concern to the Centre is the impact of the cost of proceedings and determination of risk. In cases where one or both parties are self-represented, the issue of risk to children may not be fully articulated or missed entirely.

The Productivity Commission's Access to Justice Arrangements Report also highlighted the limited availability in the family law system of resolution avenues that are proportionate to the issues in dispute. It noted that financial barriers to accessing the family courts may lead parties to not act on their legal problems, to not seek legal advice, or to withdraw from or settle cases prematurely. In these circumstances, parties may agree to unsafe, unfair or unworkable arrangements. This may leave children exposed to ongoing parental conflict or family violence, with significant negative impacts on their wellbeing. Parties who have experienced violence may also be exposed to continuing violence through these arrangements or feel pressured to accept unfair property settlements that leave them and their children financially disadvantaged post-separation.⁷

The Issues Paper identifies the problems of reliance on the Independent Children's Lawyer (ICL) in situations where one or both parents are self-represented. This is particularly acute in situations where there is family violence. ICLs are not all familiar with the dynamics of family violence, or trained in family violence risk assessment.

⁵ Atkinson, J. (2013) [Trauma-informed services and trauma-specific care for Indigenous Australian children](#), p. 2. Australian Institute of Health and Welfare.

⁶ NSW Kids and Families (2014) [Youth health resource kit: An essential guide for workers](#), p. 126.

⁷ Australian Law Reform Commission (2018) [Review of the Family Law System: Issues Paper](#), p. 36.

The Centre supports further consideration and development of a Counsel Assisting model to assist judicial officers in matters where a party is not legally represented. Evidence relating to family violence or other safety concerns could be presented to the court through this model.

Legal principles in relation to parenting and property

Question 14: What changes to the provisions in Part VII of the Family Law Act could be made to produce the best outcomes for children?

Question 15: What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

Parenting Orders

As discussed above, the Centre is a strong advocate for greater participation of children and young people in decisions that concern them. Reliance by the court on the ICL and/or expert reports is not sufficient to give full weight to the views of the child in parenting proceedings. The decision making framework should be amended to prioritise consideration of the child's views when making decisions. For more detailed consideration of the participation of children in decision making, please see below.

Again, as discussed above, the court should be required to consider issues of sibling contact in situations where sibling groups will be broken up as a result of a parenting order.

Family Violence

Family violence affects a large number of children. In 2016/17, Victoria Police attended 76,500 incidents of family violence and children were present at 23,857 (31%) of them.⁸ The Centre has prepared a paper on family violence and children and young people which is attached to this submission.

Section 4AB of the Family Law Act provides a non-exhaustive list of examples that may constitute family violence. The Centre recommends that Part VII be amended to require the court to consider the impact of family violence on the child as a victim in his or her own right, and not as a member of a family group, or as an extension to the primary victim (in most cases the mother). This will ensure the court considers the risks and protective factors as they apply to each child in a family group and make orders accordingly.

The Centre welcomes further reforms to the decision making framework in Part VII, and further consideration of:

- a specialist family violence list in all family courts
- requirement that a risk assessment for family violence and other child abuse risks be undertaken upon a matter being filed and at each hearing or court event thereafter.

Welfare jurisdiction

The welfare jurisdiction of the court in s67ZC highlights the importance of prioritising the

⁸ Victoria Police (2017) [Family Violence Data Portal – Data Tables](#), Table 15.

empowerment and participation of children and young people in decision making that affects them. In relation to intersex children, the Centre is of the strong view that the court should not make any orders in relation to medical procedures regarding a child's gender identity without the consent of the child, even if taking this approach will delay the commencement of medical intervention until the child has capacity to consent. The potential consequences of this medical intervention, which may result in infertility or the loss of sexual sensation, are too great to be made without a child's full and active participation.

The Centre does not support the use of the welfare jurisdiction in s67ZC to make sterilisation orders for children with a disability.

Arrangements for children and family diversity

Question 16: What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?

Fifty per cent of Victoria's out of home care placements are in kinship care⁹ and the majority of those kinship carers are grandparents.¹⁰

The Family Law Council report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems highlights the difficulties faced by kinship carers to seek family law orders to formalise their care arrangements. These include cost barriers, and for Aboriginal and Torres Strait Islander carers:

*issues of continuing mistrust of family law and child welfare courts among Aboriginal people, associated with the removal of Aboriginal children from their families.*¹¹

The Centre supports changes to the provisions of Part VII to better reflect the diversity of families in which children are cared for, and to better support decision making by the courts in cases where children are living in non-traditional families.

Legal principles in relation to parenting and property

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

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

Question 29: Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

The impact of trauma on children

Trauma from experiences of abuse, including family violence, can have significant impact on children.

⁹ AIHW (2018) [Child Protection Australia 2016-17: Data Tables](#), Table S36.

¹⁰ Ibid, Table S37.

¹¹ Family Law Council (2015) [Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems, Interim Report](#), p. 34.

*Trauma is the emotional, psychological and physiological residue left over from heightened stress that accompanies experiences of threat, violence, and life-challenging events.*¹²

Early experiences affect the development of brain architecture. When children experience adversity during childhood, the stages of brain development are disrupted and foundational neural pathway connections are not made.¹³ This can have lifelong consequences for social, emotional and physical health and development.¹⁴

The adversarial and stressful nature of family law proceedings can re-traumatise children who have already experienced trauma in their lives. The Issues Paper notes the impact of trauma on adults and that there is a:

*growing recognition of the negative effects of adversarial processes on people who have experienced trauma, and the potential adverse implications of this for their parenting capacity.*¹⁵

Given the impact of trauma on brain development, the potential impact of exposure to prolonged adversarial court proceedings on children could be significant.

The Centre recommends that child-focused trauma-informed support workers are also embedded in the family courts. When children are identified as having experienced abuse, including family violence, they can be referred to the support worker, who will then be able to assess the needs of the individual child, and make appropriate referrals.

Court responses to families with complex needs

The Centre supports the position that the adversarial nature of the court process does not meet the needs of children in families with complex needs. The Centre also questions:

*the appropriateness of the single event model of civil litigation for disputes about the care of children where parents have complex needs, particularly where there is ongoing conflict and risks to children. These concerns reflect the empirical evidence that a significant number of client families engage in repeated use of the family courts, particularly when the matter involves issues of family violence or other safety concerns for children. The limitations of the single event model of litigation for these kinds of matters have also been noted by the courts.*¹⁶

The Centre welcomes further consideration of alternative, more iterative approaches to decision making that can better support the management of risk to children over time. The Issues Paper proposes two potential decision making models which could address these concerns:

¹² Australian Childhood Foundation (2010) [Making space for learning: Trauma informed practice in schools](#), p.12.

¹³ McLaughlin, K. A. Sheridan, M. A. Lambert, H. K. (2014) [Childhood adversity and neural development: Deprivation and threat as distinct dimensions of early experience](#), p. 579 in *Neuroscience & Bio-behavioral Reviews* 47, pp. 578-591.

¹⁴ Center on the Developing Child (2016) [Applying the science of child development in child welfare systems](#), p. 6. Harvard University.

¹⁵ Australian Law Reform Commission (2018) [Review of the Family Law System: Issues Paper](#), p. 56.

¹⁶ Australian Law Reform Commission (2018) [Review of the Family Law System: Issues Paper](#), p. 64.

- A hybrid model, in which the court transfers the role of monitoring the parties' engagement with services to a registrar of the court or to a community-based family relationships agency.
- An administrative model, such as a non-judicial tribunal. A version of this approach is embodied in the recently developed Parenting Management Hearing Panel, a consent-based inquisitorial style process to support self-represented parties that will be piloted in Parramatta, NSW and one other location.

Other measures identified in the Issues Paper include:

- Legally- assisted Family Dispute Resolution (FDR)
- Specialist Family Violence workers to be embedded in the family courts.

The Centre encourages further investigation into the viability of these alternative options. The outcome of these investigations, including pilots, should be evidence informed, with particular emphasis on the risk outcomes for children.

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

In principle, The Centre supports the expansion of the Family Group Conference/ Family Led Decision Making process to the family law system. These approaches could have significant benefits for families in crisis, who do not meet the threshold for state child welfare intervention. They could be particularly powerful in situations where extended family members are willing and able to participate in the decision making process.

Further exploration of how this would work in practice is needed. For example, would the conferences be led by a judicial officer/court register or outsourced to an external agency? Would the convener have authority to make parenting orders? The latter is the preferred option, as it could save extended family members (such as grandparents) from having to initiate costly applications to the family courts when seeking to formalise their care arrangements for their grandchildren. The Centre strongly encourages the family courts to consider trialing this process through an evidence informed pilot.

Integration and collaboration

Question 31: How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

Question 32: What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

Question 33: How can collaboration and information sharing between the family courts and state and territory Child Protection and family violence systems be improved?

The Family Law Council's 2015 report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems closely considered the difficulties faced by families when attempting to navigate the two systems. These include:

- difficulties experienced by families in negotiating the different legal frameworks, terminology and procedural rules across the different jurisdictions;
- the need for parents and children to re-tell their story and re-litigate the question of risk in different forums;
- the limited capacity for federal judicial officers to address a family's multiple legal needs by exercising the protective jurisdictions of state and territory courts, as a result of the High Court's decision in *Re Wakim*; and
- barriers inhibiting access to the family courts by family members who are encouraged to seek family law orders by a state or territory Child Protection department, including barriers associated with the relative cost, pace and formality of family law proceedings by comparison with those of state courts. These barriers can be particularly arduous for Aboriginal and Torres Strait Islander families and grandparent carers.¹⁷

The Victorian Royal Commission into Family Violence found that the lack of information sharing that occurs between institutions and organisations provides inadequate protection for victims of domestic violence. It heard evidence that the lack of information regarding existing family law orders, and magistrate court orders have real impacts on the ability of judges and magistrates to make appropriate and timely decisions.¹⁸

Since 2012, there have been co-located senior Child Protection practitioners stationed with Victoria Police and the Melbourne and Dandenong registries of the federal family courts. The Victorian Royal Commission heard evidence that this scheme has had real benefits, but that the lack of information sharing has been a challenging barrier. It is hoped that the information sharing legislative reforms introduced in Victoria will have a positive impact and facilitate greater cooperation between Child Protection and the federal family courts.

The Centre supports the recommendations of the Family Law Council including;

- the development of a national database of court orders from the family courts and state and territory children's courts and magistrates' courts that can be accessed by each court;
- the expansion of the co-located Child Protection worker model to all family court registries;
- increasing the circuiting of FCC judicial officers and locating family court registry staff in state and territory magistrates' courts, including specialist domestic violence courts; and
- the development by the National Judicial College of Australia of a continuing joint professional development program for judicial officers from the family courts and state and territory courts, in which judicial officers preside over matters involving family violence.¹⁹

The Centre supports a 'one court' model, where state courts are able to exercise their family law powers when parties with family law needs are already before the court. This is particularly relevant for child welfare proceedings, and intervention order matters.

¹⁷ Australian Law Reform Commission (2018) [Review of the Family Law System: Issues Paper](#), pp. 72-73.

¹⁸ Neave, M. Faulkner, P. Nicholson, T. (2017) [Royal Commission into Family Violence Volume IV: Report and Recommendations](#), pp. 187-219.

¹⁹ Australian Law Reform Commission (2018) [Review of the Family Law System: Issues Paper](#), p. 74.

Children's experiences and perspectives

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

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

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

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

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

Question 39: What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

Question 40: How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

The Family Law Act recognises the rights accorded to children and young people under the Convention on the Rights of Child (the CRC). These include participation rights, which afford children the right to freedom of expression (Article 13), access to information (Article 17), and to make their views known and participate in processes relevant to their care (Articles 9 and 12).

Section 60CC(3)(a) of the Act requires the family courts to have regard to the views of the child when deciding their best interests, however this requirement is qualified by a stipulation that children are not required to express their views.

In many cases a final decision is made in parenting matters without the court having received any independent information about the views of the child. The Centre strongly supports reforms to the family law system to make it easier for children to be active participants in decisions that affect them.

The Centre supports a model that will enable a child to present to the court their view. This could be by way of letter, drawing or even a short recorded clip. This material could be presented to the court as an attachment in a simple online or hardcopy form. The court will then be able to consider this as part of the decision making process. If the court requires more information the judicial officer could meet with the child directly.

The Centre strongly supports measures that will provide children with an opportunity to meet with an independent person who can explain the court orders and the accompanying written decisions. Further consideration of how this could be supported is required.

The Centre supports further trials of a child inclusive approach to FDR processes. Further consideration is needed regarding how programs such as Kids Talk could be expanded for all children, and not just those whose parents are assessed as 'willing and able' to take their child's perspectives into account.

The issue of whether there is increased risk to children if they are active participants in family law proceedings is of critical importance. The Centre notes that the Children's Court in Victoria does hear

the views of children over the age of 10, through the child's legal representative. The child's lawyer acts on his or her instructions, unlike the ICL in the family law system.

In cases of family violence, or other forms of abuse, it is important that children are recognised as victims in their own right, with individual safety needs. It is therefore important that the family law system allows for children to be active participants in this decision making process, if it is safe to do so. The Centre strongly recommends that further examination of ways to facilitate children's participation in the family law decision making process commences as a matter of priority.

The Centre supports the establishment of children and young person's family law advisory boards or councils. This could become a powerful way for children and young people to have direct input into the way the family law system can become more child centered and child inclusive.

Professional skills and wellbeing

Question 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Question 42: What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

The Centre shares the concerns identified in the Issues Paper regarding the gaps in skills and knowledge of professionals working in the family law system. These have been identified as:

- understanding the nature and dynamics of family violence and child sexual abuse and their impact on children, including knowledge of the ways in which perpetrators of family violence can use the family law system to continue abuse;
- understanding the impacts of trauma on clients and an ability to practice in a trauma-informed way
- the capacity to identify risk, including the risk of family violence and risk of suicide
- cultural competency, including an understanding of Aboriginal and Torres Strait Islander kinship systems and child rearing practices, the family violence experiences of Aboriginal and Torres Strait Islander peoples and an understanding of the experiences and access to justice barriers affecting clients from culturally and linguistically diverse backgrounds, parents and children with disability, and LGBTIQ clients and families
- knowledge of the intersections of the family law, Child Protection and family violence systems.²⁰

The Centre also suggests that a deep understanding of the developmental impact of trauma on children is required. The Centre supports the following recommendations:

- modules on family violence and child sexual abuse to be included in the National Family Law Specialist Accreditation Scheme and/or continuing professional development requirements
- joint professional development and training for family law, Child Protection and family violence sector professionals

²⁰ Australian Law Reform Commission (2018) [Review of the Family Law System: Issues Paper](#), p. 83.

- greater training around family violence in the accreditation process for FDR practitioners to improve consistency of practice
- the development of a national accreditation program for family consultants
- a greater focus in legal training and professional development on non-adversarial and non-court options for dispute resolution
- training in risk identification for family lawyers
- and improved training for ICLs to enhance skills in working with children.²¹

The Centre further recommends that the training and modules identified above include a broader focus on all forms of child abuse, and are not limited to family violence and child sexual abuse.

²¹ Ibid, p. 84.