



The Royal  
Australian &  
New Zealand  
College of  
Psychiatrists

Australian Law Reform Commission  
Review of the family law system

May 2017

# advocating for equitable access to services

# Royal Australian and New Zealand College of Psychiatrists submission

## Review of the family law system

### About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises government on mental health care. The RANZCP is the peak body representing psychiatrists in Australia and New Zealand and as a bi-national college has strong ties with associations in the Asia-Pacific region.

The RANZCP has more than 6000 members including more than 4000 qualified psychiatrists and over 1500 members who are training to qualify as psychiatrists. Psychiatrists are clinical leaders in the provision of mental healthcare in the community and use a range of evidence-based treatments to support a person in their journey of recovery.

### Introduction

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) welcomes the opportunity to provide feedback to the Australian Law Reform Commission's review of the family law system (the review). Where relevant, we have provided responses (below) to the questions posed in consultation with our expert committees including the Faculty of Child and Adolescent Psychiatry, Family Violence Psychiatry Network and Aboriginal and Torres Strait Islander Mental Health Committee.

### RANZCP responses

#### *Question 2*

The RANZCP supports the development of principles to guide any redevelopment of the family law system which recognise the importance of:

- meeting the contemporary needs of families and individuals
- protecting the safety of individuals, particularly children
- affording dignity and privacy to separating families
- timely and cost-effective resolution of family disputes
- protecting the needs of children
- child-centred and trauma-informed approaches
- equality of treatment for children regardless of family structure
- ethical professional practices.

The RANZCP would also note the importance of holistic care provided through an integrated services approaches, as well as culturally appropriate approaches, and would suggest that s 43(b) of the *Family Law Act*, if maintained, be amended to reflect the various meanings which 'family' may have in different cultures, particularly among Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities.

#### *Question 4*

The RANZCP supports reforms to assist people with family law related needs to navigate the family law system. Case workers have proven a useful support to people with mental illness when navigating complex systems, including within the health and disability sectors, and the RANZCP would support the

# Royal Australian and New Zealand College of Psychiatrists submission

## Review of the family law system

use of case workers or ‘navigators’ within the family law system, particularly for people with complex needs such as those with mental illness, harmful substance use or family violence experiences.

### Question 5

The RANZCP supports reforms to improve the accessibility of the family law system for Aboriginal and Torres Strait Islander people. In particular, the RANZCP supports the recommendations detailed in the issues paper including:

- developing and delivering family law system responses by or in conjunction with Aboriginal and Torres Strait Islander communities and organisations
- developing and embedding an Aboriginal and Torres Strait Islander workforce across the family law system with recruitment and training involving Aboriginal and Torres Strait Islander people – in the RANZCP’s view, it is important that the Aboriginal and Torres Strait Islander workforce extend beyond a single worker in any given location considering the needs for workers to be able to take leave, for individuals to be able to engage with workers from the same gender, and for individuals to be able to engage with workers who are not from the same community
- developing suitable educational programs for relevant professionals about Aboriginal and Torres Strait Islander experiences of the family law and child protection systems, and how these systems may best address the needs of Aboriginal and Torres Strait Islander children and families
- providing for culturally secure family assessment reports and culturally secure court hearing processes
- developing strategies to encourage the use of cultural healing and trauma-recovery approaches, grounded in Indigenous knowledge, within the family law system.

### Question 6

The RANZCP supports reforms to improve the accessibility of the family law system for people from culturally and linguistically diverse communities.

### Question 7

The RANZCP supports the suggested reforms to improve the accessibility of the family law system for people with disability, including cross-sector collaboration, training and accreditation for family law system professionals and the incorporation of the *Convention on the Rights of Persons with Disabilities* into the *Family Law Act*, particularly with regard to supported decision-making.

The RANZCP notes that court processes can be re/traumatising experiences for some people with living with mental illness who may have childhood family law experiences or other adverse legal experiences. As a result, simply entering a courtroom can be a stressful experience. As a result, it is important to offer skilled, trusted and meaningful support to people with mental illness in need of family law services. This may be useful for a number of purposes including assisting individuals to provide evidence, follow legal processes, and read and respond to statements with legalistic language and potentially distressing content.

### Question 8

The RANZCP supports reforms to improve the accessibility of the family law system for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people. These reforms should address the fact that

the lives and experiences of many LGBTIQ people and families may be unknown to the courts, and that longstanding cultural biases may contribute to this. In particular, better understanding of the complexity of same-sex parenthood is warranted, including with regard to non-biological co-parents.

### *Question 9*

The RANZCP supports reforms to improve the accessibility of the family law system for people living in rural, regional and remote areas of Australia.

### *Question 10*

The RANZCP supports reforms to reduce the cost to clients of resolving family disputes in recognition of the effects which financial strain can have on the mental health of individuals, particularly in the context of family violence. In the RANZCP's view, efforts to reduce costs in family law proceedings are important but should not compromise community access to high-quality expert reports from senior psychiatric specialists.

It is important to highlight that the costs from family law proceedings are mostly due to legal costs rather than the costs of single expert reports per se. Psychiatric reports are costly due to the nature of assessments involved. Assessments of both parents and children are clinically detailed and frequently involve extensive reviews of large volumes of documents. Child and adolescent psychiatrists with forensic training and experience are highly trained senior medical specialists, having gone through at least two decades of medical training including many years of dedicated specialist training. Report fees are set in the free market and so the RANZCP is concerned that compelling a fixed 'lower cost' schedule will result in more experienced and qualified psychiatrists declining family law reports in future.

One way of reducing costs would be to promote efficiencies in legal processes. Often, requests for expert reports are overly broad – for example, requests may be for all family members to be assessed when the material otherwise makes it clear that psychiatric issues are only present in the parent/s. In the RANZCP's view, costs could be reduced by developing processes whereby report requests can be informed by psychiatric expertise and medicolegal best practice to avoid costly and unnecessary assessments.

### *Question 13*

The RANZCP supports reforms to improve the physical design of courts to make them more accessible and responsive to the needs of clients. Segregation of parties is recommended to avoid unnecessary eye contact and the exchange of threatening words. The RANZCP is concerned that such exchanges may harm the mental health and well-being of victims while often going unnoticed by authorities where there are language barriers.

### *Question 14*

The RANZCP supports reform to Part VII of the *Family Law Act* to produce better outcomes for children, particularly with regard to the welfare jurisdiction. The RANZCP is concerned at reports that family courts have focussed on disability rather than capacity when considering forced sterilisation. In the RANZCP's view, the forced sterilisation of a young person on the grounds of their disability alone constitutes discrimination and is a breach of human rights. At a minimum, such procedures should only ever be

approved on an involuntary basis when the person lacks the capacity to make valid decisions about their healthcare.

The RANZCP also notes its support of the Senate Community Affairs Reference Committee's recommendation that all proposed intersex medical interventions for children and adults without the capacity to consent should require authorisation from a civil and administrative tribunal or the Family Court, considering the potential later-life implications that an involuntary procedure may have on an individual's mental health.

### *Question 15*

The RANZCP supports changes to the definition of family violence in the *Family Law Act* to include reference to psychological abuse and misuse of process as examples of behaviour that may constitute family violence. The RANZCP would also support the inclusion of medical neglect within the definition of family violence – for example, obstructing access to medical and psychological care for the child or refusing to attend appointments when the child is in their care. Coercive demands including dowry-related extortion should also be included within the definition of financial abuse. The RANZCP also supports efforts to ensure that the definition adequately reflects the lived experiences of Aboriginal and Torres Strait Islander people as well as people from culturally and linguistically diverse communities. The RANZCP further notes its support of reforms to the decision-making framework to:

- more clearly prioritise the protection of children from *all* kinds of harm
- provide dedicated pathways for decision making in cases involving family violence
- ensure that risk assessment for family violence are undertaken as a matter of course.

### *Question 16*

The RANZCP supports reforms to ensure that PART VII of the *Family Law Act* apply consistently to all children irrespective of their family structure.

### *Question 19*

The RANZCP supports reforms to provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes, particularly considering the effects of unequal bargaining power in domestic relationships on the mental health of individuals, particularly in the context of family violence and financial abuse.

### *Question 20*

The RANZCP supports the proposed reform strategies to facilitate the timely and cost-effective resolution of family law disputes in recognition of the effects which lengthy separations can have on the mental health and safety of individuals, particularly children.

### *Question 23*

The RANZCP supports reforms to better support parties who have experienced family violence or abuse during court proceedings in recognition of the profound impacts violence of this sort can have on long-

# Royal Australian and New Zealand College of Psychiatrists submission

## Review of the family law system

term health and well-being. The RANZCP supports trauma-informed approaches to service delivery in the family law system, including through legally-assisted family dispute resolution, the *Family Violence Best Practice Principles* and the embedding of family violence workers in courts. These should incorporate an understanding of the specific experiences of different social groups including Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds as well as people with lived experience of mental illness and lesbian, gay, bisexual, transgender, intersex and queer people.

### Question 25

The RANZCP supports reforms to address misuse of process and forms of abuse in family law matters including by amending the definition of family violence to include abuse of process, strengthening penalties for abuse of process, amending legislation to protect vulnerable witnesses from direct cross-examination by family violence perpetrators, and clarifying and modernising the power of the Family Court of Australia to dismiss applications without merit.

The RANZCP is particularly concerned about patient–psychiatrist confidentiality being undermined by the misuse of subpoenas to gain access to clinical records. The clinical records of ex-spouses are regularly sought in custody disputes and documented instances exist where a parent has used this information to try to damage the relationship between the other parent and their children, or where it has been relied upon to stigmatise the other parent and to cast doubt upon their parenting skills. This issue is exacerbated by the adversarial legal system in which there is an incentive to ‘win’ rather than to resolve conflict.

Effective diagnosis and treatment often requires a patient to disclose intensely personal matters to their doctor. Patients must be able to trust that these matters will not be disclosed to third parties. When their clinical records are disclosed against their will, patients frequently feel ashamed, helpless and stigmatised. Successful therapy may become impossible in such circumstances; the relationship of trust with the psychiatrist may be permanently damaged, and in some cases, patients may be re-traumatised by the forcible disclosure. The RANZCP therefore urges law reform that recognises the importance of confidentiality in mental health care. For more information, see RANZCP [Position Statement 89: Patient–psychiatrist confidentiality: the issue of subpoenas](#).

When compared to other common law countries, Australian law offers less protection for patients against access to their clinical records and the protection that does exist varies greatly across the federal, state and territory jurisdictions. The RANZCP notes Practice Direction 2 of 2011 issued by the Family Court of Western Australia, as detailed on page 60 of the issues paper. In the RANZCP’s view, this would not be a suitable strategy to mitigate the risks associated with the misuse of subpoenas. Instead, subpoenas should not be issued until after the psychiatrist has given oral evidence; then the lawyer would have to show cause as to why that oral evidence is insufficient and why the written records are also needed.

### Question 29

The RANZCP supports the use of culturally appropriate problem solving decision-making processes to be developed within the family law system, whether through a hybrid or administrative model, to help manage risks to children in families with complex needs. In particular, the RANZCP strongly supports the strengthening of links between the family law system and mental health, behaviour change, and addiction services. The RANZCP notes that problem gambling services should not be overlooked considering the significant effects which problem gambling can have on families.

# Royal Australian and New Zealand College of Psychiatrists submission

## Review of the family law system

### *Question 30*

The RANZCP supports the incorporation of family inclusive decision-making processes, such as Family Led Decision-Making, into the family law system, particularly for Aboriginal and Torres Strait Islander communities, and families from culturally and linguistically diverse backgrounds. The RANZCP also supports the incorporation of such process into the family law system for families experiencing family violence. It may at times also be appropriate for such processes to be used for people living with mental illness, with their valid consent.

### *Question 31*

The RANZCP supports reforms to improve the use of integrated services approaches to assist client families with complex needs, including through Family Advocacy and Support Services and Children's Advocacy Centres. Psychiatrists well recognise the complex interactions between mental health and other needs so the RANZCP strongly supports efforts to improve referral pathways to culturally appropriate services including health, addiction, housing, employment, behaviour change and parenting services, based on risk assessments and safety planning for people in the family law system

### *Question 32*

The RANZCP supports reforms that reduce the need for families to engage with more than one court to address safety concerns for children, particularly considering the mental health risks associated with the repeated recounting of traumatic histories.

### *Question 33*

The RANZCP supports reforms to improve the collaboration and information sharing between the courts and state and territory child protection and family violence systems. However, the RANZCP also recognises the serious risk that expanded information sharing processes may be misused by family violence perpetrators. It is therefore essential that any effort to strengthen the information-sharing capacities of relevant organisations be accompanied by robust safeguards to ensure that perpetrators are unable to access information via the processes identified.

### *Question 34*

The RANZCP supports reforms to improve children's experiences of participation in court processes, including proposals to appoint a children's advocate. The RANZCP is particularly supportive of proposals to develop a combined clinical–legal model for children's representation and/or establish an agency responsible for the provision of a multidisciplinary approach to child representation. Such a strategy would support the integrated services approach by ensuring that children would have access to any and all appropriate services.

### *Question 37*

The RANZCP supports reforms to help children participate in family dispute resolution processes. Where appropriate, the participation of children can improve outcomes relating to their care while also providing a potentially protective factor for their mental health. This should only ever be done when developmentally appropriate and with the valid consent of the child.

### *Question 38*

The RANZCP recognises the need to balance the benefits and risks to children associated with involving them in decision-making or dispute resolution processes, particularly in the context of family violence. The RANZCP strongly supports any efforts to manage these risks while facilitating the involvement of children where appropriate.

### *Question 39*

The RANZCP supports reforms to provide culturally specific support to children who participate in family law system processes.

### *Question 40*

The RANZCP supports reforms to improve children's experiences in the family law system by learning from children and young people who have experience of its process. In recognition of the importance of community consultation, the RANZCP maintains a Community Collaboration Committee which it consults with regularly on relevant issues and would encourage other organisations to develop similar bodies and processes.

### *Question 41*

The RANZCP supports reforms to ensure that family law system professionals have and maintain relevant competencies including with regard to:

- the nature and dynamics of family violence and child sexual abuse
- the impacts of trauma, including trauma-informed approaches to relevant professional practices
- risk identification and assessment including with relation to family violence and suicide
- cultural competency, including Aboriginal and Torres Strait Islander kinship systems and child rearing practices, and experiences with family violence and the family law and broader justice systems
- intersections of family law, child protection and family violence systems
- child-inclusive practices.

The RANZCP supports the proposals for relevant educational programs detailed in the issues papers including modules, accreditation programs, and professional development and training.

The RANZCP would also note that it is important to acknowledge the differences in decision-making depending on the age of the children involved. The best interests of the child with regard to their particular stage of social and emotional development must be considered when determining parenting rights. For instance, in cases with 0–3 year-olds, time is more of the essence while the child's developmental needs will be different while a timely response will be more important. The RANZCP would there also support decision-makers maintaining competency in the developmental needs of children.



# Royal Australian and New Zealand College of Psychiatrists submission

## Review of the family law system

### Question 44

The RANZCP recognises the seriousness of vicarious trauma and supports approaches to promote the wellbeing of relevant professionals. Like family law system professionals and judicial officers, psychiatrists may often experience vicarious trauma with unreasonable complaints, high workloads and violent or threatening behaviour contributing to these experiences. The RANZCP supports the proposals detailed in the issues paper to mitigate the risk of vicarious trauma, including:

- training on how to identify and manage vicarious trauma
- effective supervision and caseload management
- staff and peer support
- support programs and wellbeing activities
- safe workplaces including supportive workplace cultures.

### Question 45

The RANZCP considers that any amendment to s 121 of the *Family Law Act* to allow parties to family law proceedings to publish information about their experiences of the proceedings must be balanced by robust safeguards to protect the privacy of families and children who may be at risk of further victimisation by perpetrators using relaxed laws to publish information inappropriately. Opportunities for families to provide confidential feedback regarding their experience of family law process may be preferable – this would be validating and would support continuous improvement practices to enhance trauma-informed approaches.

### Question 46

The RANZCP supports reforms to enhance the transparency of the family law system, including facilitation of information-sharing with professional regulators.

### Question 47

The RANZCP supports reforms to the family law system's governance and regulatory processes to improve public confidence in the family law system, particularly considering the importance of sensitive and well-managed complaints procedures to improve mental health outcomes for people who have had negative experiences of services within the family law system.