

**Berry Street response to  
Australian Law Reform Commission  
Issues Paper on the Family Law System**

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## Background

Berry Street is a large provider of child and family services including specialist family violence services, foster and kinship care, residential care, case management, trauma informed therapeutic services, family support, education and housing programs for young people, as well as lifelong support to adults who experienced institutional care in orphanages, children's homes and foster care. Rarely do we see a client who hasn't had some personal experience of family violence either as child, an adult, or both.

Our specialist family violence services, serving the Northern Metropolitan Region of Melbourne and the Grampians Region in Western Victoria, are the fastest growing services we provide. These services are key access points for Victoria's integrated family violence service system in these regions.

During 2017 Berry Street's specialist family violence services managed 10,621 police referrals and supported 6,410 women and children. The services included crisis accommodation, triage of police referrals, case management, counselling and support and therapeutic children's programs.

Within our other program areas such as foster, kinship and residential care, family violence is the most common underlying factor in the need for child protection interventions. Being attuned to the nature, prevalence, manifestations and impacts of family violence is critical for our staff and practitioners across every service we provide. See **Appendix 1** for a description of the Berry Street philosophy and approach to family violence.

This submission draws particularly on the experience of those working in our specialist family violence services and those who have been, or are being, assisted by these services.

## Introduction

Family law deals with disputes about parenting arrangements for children and the division of property. The family law system responds to families in crisis and change. One of its key responsibilities is to ensure the ongoing safety and wellbeing of families. Past and continuing family violence has an effect on all these matters.

Family violence is widespread in Australia. It affects people, largely women and children, across class, socio economic status and race. Every week in Australia a woman is murdered by a current or former partner in a family violence related murder. Thirty family violence incidents are reported to the police every hour, equating to 723 incidents every day. A vast number more go unreported, hidden behind the front door of everyday households (Standing Committee, P.1).

The terms of reference for the Australian Law Reform Commission review provide for a wide ranging examination of all aspects of the family law system. It has been preceded by a number of other reviews, reports and inquiries into various aspects of the family law system. These include AIFS (2012), Family Law Council (2015), Royal Commission into Family Violence (2016), Women's Legal Service-WLS (2017) and Standing Committee on Social Policy and Legal Affairs (2017). This last report provides a detailed account of its public hearings and references a large number of submissions.

All of these previous reviews, reports and inquiries have recognised the changing nature of the family law system and have noted the significant proportion of the parenting dispute workload that is characterized by family violence and safety concerns for children.

These recent reports have recurrent and repeating findings, including the following;

- The need to have a common framework across Commonwealth State and Territory jurisdictions on what constitutes family violence;
- Improving inter and intra jurisdictional collaboration, between and within jurisdictions involving the police and other key agencies;
- Incorporating specialist family violence expertise into and throughout the family law system;
- Development of an integrated case management model;
- Development and integration of a whole of family risk assessment process that provides assessments admissible in Court;
- Improving support to self-representing litigants and parameters to reduce abuses of process;
- Improving the safety of children, promotion of children's voices and giving weight to children's views;

- Developing culturally informed processes and culturally appropriate support services for Aboriginal and Torres Strait Islander families and CALD families;
- Training and resourcing of family law practitioners to better identify and respond to circumstances of family violence;
- Ensuring accountability and interventions for family violence perpetrators.

Berry Street supports the findings of much of this earlier work as summarised above.

### Focus of this submission

The Issues Paper poses a number of questions in relation to the principles and key elements of the family law system.

This submission responds through three de-identified case studies.

The case studies highlight particular difficulties faced by women and children escaping family violence and seeking a safe and non-traumatising resolution from the family law system.

Berry Street is not in a position to provide the level of detail and critique that has been provided over the last decade into the issues of family violence and the family law system. This is well tilled ground. Our intent is to use the experience of staff, women and children, involved in the family violence program at Berry Street to highlight structures, processes and the lack of knowledge and skills that impede women and children's search for safety and justice when escaping family violence.

**A number of recommendations are made. None of these recommendations are new; all have appeared in a similar form in one of the many reviews and reports that have been noted above.**

### Intersection of family violence and the family law system

The intersections between the family law system and family violence are complex. They can be best understood by listening to the stories of the women and children who have experienced it. The women and children who are involved in our family violence services at Berry Street are often in a situation of limited resources, heightened state of fear and distress and often caring for young children and/or young people. Safety and rapid non traumatising resolution of their predicament is their number one priority.

Evidence from the many recent reports, and from direct case related experience, is that the family law system is not adequately identifying, protecting or supporting families experiencing family violence.

The Royal Commission into Family Violence (2016) heard hundreds of submissions from victims of family violence and from services who work with women and children experiencing family violence. One of the conclusions of the Royal Commission (and echoed by family violence staff, women and children) is that family violence is not an event; it is a pattern of control, coercion and domination, often a prolonged pattern. Family violence is a tool used to gain control over the victim (P.19-31). And this pattern of control and domination is played out within the processes of the family law system.

It is these experiences - and the impact of these experiences - that must sit at the core of any proposed reforms to the family law system. The family law system has to be able to understand these experiences and their impact on women and children and imbed this learning and knowledge into the support and judicial processes of the family law system. It is not sufficient for the family law system to create and manage separate and parallel processes for matters identified as containing "family violence elements". The entire family law system must have the knowledge, the skills and the processes in place to ensure timely, non-traumatising and safe resolution to family law matters.

### Family Law System Principles

The principles underpinning the Family Law Act need to recognise clearly and unambiguously the nature of family violence and its impact on women and children.

The Standing Committee (2017) noted that multiple reviews and reports have recommended that in responding to family violence the family law system must be accessible, equitable and responsive, and prioritise the safety of families.

The report further suggests that the legal framework should be seamless, the system accessible in terms of costs, and it should ensure that those who use family violence are accountable for their actions and that women and children are provided with safety. The system must also be effective in facilitating early intervention and ongoing support in circumstances of family violence and be aware of the risk of harm and prioritise safety of families.

This submission notes that two principles currently exist in the Act to protect the rights of children and to ensure the protection from family violence. However these principles need to be supported by an additional principle, as suggested in the Issues Paper, that *encourages the resolution of family disputes at the earliest opportunity and in the least harmful manner*.

## Case Studies

The following case studies provide insights relevant to a number of themes in the issues paper, most particularly, *Access and Engagement, Children's Experiences and Perspectives, Legal Principles in Relation to Parenting and Property and Professional Skills and Well-being*.

### Case Study A – Abuse of Process

This case study illustrates some of the significant issues faced by victims of family violence seeking resolution in the family law system.

While not their intent, it is common that family law systems and processes reinforce the destructive and traumatic experience of family violence. The abuse and misuse of processes in ways that are not consistent with the principles that are meant to underpin the family law system exposes women and children to further harm, limits access to justice and discourages engagement.

Systems and processes must be strengthened and implemented consistently to ensure victims of family violence are not exposed to further abuse and violation through the family law system.

**Ms A** and her two children separated from Mr A in 2013. This followed repeated bouts of physical violence from her husband (Mr A). These episodes of violence were witnessed by her children.

This case has the following features:

- The matter has returned to the Family Court on 16 occasions. It is still not finalised.
- Mr A has breached the order that he have supervised access (by a family member) with his children. No court action has resulted from this breach.
- In late 2015 the Family Court ordered that the matter be adjourned while Mr A undergoes several assessments and treatments. None of these have been complied with. No action has been taken.
- Mr A continues access with his children in a central location; access is attended occasionally by a family member. He continues to request overnight and unsupervised access. Ms A has been warned by the mediator and the ICL that if she refuses this, the matter can return to court where Ms A may be regarded as a “non- contact parent”.
- FDR via Legal Aid was rejected by Ms A because of her previous experience of being cross examined by her ex-partner.

### Matters of concern

Over the course of five years, Ms A has experienced cross examination by her former husband, a retelling of her story to numerous legal aid lawyers and court officials, and the terrifying dilemma of allowing her children to have unsupervised access with her violent ex-husband. As a result of the duration of her case she has been advised that legal aid funding may cease. All of these **events**, over a prolonged period of time, have occurred in a continuing context of threats of family violence. Mr A has misused/abused the processes of the court and, by these means,

continues to exercise control and coercion over Ms A. The court appears powerless to exercise any authority over this behaviour.

The impact of historic and current family violence on Ms A and her children has not been a consideration of the family court or of any of its court appointed officials.

**The following changes and improvements to family law processes may have assisted Ms A and her children in this situation:**

Ms A could have benefited from the availability of navigation assistance perhaps via a triage point to advise, support and to ensure that relevant other services either remain involved or become involved (Standing Committee, P.107).

Ms A could have benefited from the family law system being provided with a formal risk assessment and an early determination of family violence allegations. It has been suggested that this assessment could be undertaken by an authorised court officer trained in family violence, upon the filing of applications to the court (Standing Committee, Recommendation 3 and P.151). Alternatively a specialist family violence worker embedded in the court and sourced from a state operated family violence service could provide expertise in risk assessments and safety planning (Family Law Council P.36).

Ms A could have benefited from the availability of a court based integrated service model using a court based family violence worker and other “wrap” around services (Family Law Council, P.130 WLS, 2017 P.19). The Family Law Council also notes the way services are integrated in the Neighbourhood Justice model in Melbourne is a model worth examination (P.131).

Active management by a court officer of Ms A’s case may have expedited the progress of the case.

The court needs to be able to protect vulnerable witnesses from direct cross examination by an abusive ex-partner (WLS p.10). WLS makes several suggestions as to how to do this, including employing an independent lawyer to act as the “mouthpiece” for the alleged perpetrator to ask questions. WLS notes that the judge has the power to intervene to ask questions of the parties.

A court appointed officer, counsel assisting, (Family Law Council P.134) may have created a buffer between Ms A and her self-representing ex-husband. This would also reduce the cost of legal representation.

The Standing Committee (2018 P. 89-95) noted the many concerns expressed to its Hearing about the management of family violence during the FDR processes. It noted that the AIFS study (2012) reported that “FDR practitioners are not appropriately managing family violence during the FDR process”. WLS has advocated for a supported mediation process with lawyers and mediators who have an understanding of family violence and family law (P.25).

The lack of action by the court to bring Mr A’s continuing breach of the access arrangements to account became, overtime, a totemic representation of Ms A’s powerlessness. This submission notes that the exposure draft of the Family Law Amendment Bill 2017 creates a new criminal offence for breaching a personal protection order. But this does little for the non-compliance of other court orders. Currently this involves repeated returns to court to enforce orders. In circumstances of family violence, as Ms A’s experience suggests, becomes an abuse of power and makes engagement in the process unsafe and untenable.

## Case Study B – Gaps in system knowledge and support

A number of previous studies have commented on the unintended consequences of the process and structure of the family court. Its adversarial nature does not seem to be effective in managing the power imbalance which is such a feature of family violence. The current adversarial nature of the court may in fact escalate conflict.

A sophisticated understanding of family violence dynamics should be a core competency for all family court and law specialists, including report writers. The case study below illustrates what happens when stakeholders in the family law system lack knowledge and skills in relation to family violence.

**Case Study B** illustrates the seemingly ineffectual capacity of the family law system to assess, understand and mitigate the power imbalance that is such a feature of a family violence relationship.

**Ms B** arrived in Australia from Iran on a spousal visa. Shee and her husband have two children aged 4 and 2. For the six years of her marriage Ms B has been subject to violence, emotional cruelty and control. Ms B is the primary carer of the children. Ms B has limited family support (her mother resides in Australia) and no friendship support. Ms B speaks poor English.

Following an incident where the two year old was ripped out of her arms she went to the police station. The police investigated and Mr B took both children and travelled to WA.

With the support of a local family violence service Ms B took action in the WA Family Court. The children were returned.

Mr B applied to have the orders overturned. A family consultant provided an assessment to the court. The assessment which occurred during the course of a day at the family court was critical of Ms B's parenting (young children were distressed at court). The children appeared superficially comfortable with Mr B (they had not seen him for a month). The interpreter used by the family consultant appeared to favour Mr B.

Legal Aid failed to gain supportive medical evidence of the injuries suffered by Ms B. The court interpreted this as Ms B being fanciful about the matters of family violence. According to Ms B, Mr B threatened his ex-wife with deportation, if she did not comply with his wishes.

Interim orders (by consent) returned the children to the father to live in WA. Ms B was encouraged to keep contact but she was responsible for funding her access flights to WA. Telephone contact was arranged but Mr B did not comply with enabling this access to occur he would take the call and face the phone to a wall. Final orders were made for the children to remain in WA.

After some months Mr B decided he could not manage the children. They were returned to Ms B's care where they remain.

### **Matters of concern**

Ms B was fearful of her husband and afraid that her circumstances would be used against her and lead to her deportation. Her limited language skills were exploited by Mr B. The interpreter engaged by the court was not the correct sub set of the language and appeared to collude with Mr B; information and detail about the family violence reported by Ms B appears not to have been transmitted. Mr B was self-represented as a result he had a level of access to the Judge denied to Ms B

The family consultant report contained no risk assessment or any reference to the family violence that Ms B had suffered from Mr B.

Legal Aid were unable to provide Ms B with a service that allowed her circumstances to be properly aired in court.

The needs of the children appear to have been completely overlooked. The issues of risk were simply not canvassed. Ms B had been their primary carer. How realistic is it to conclude that this relationship could be maintained, with the children, by self-funded air flights and phone calls?

**The following changes to some of the legal processes may have assisted Ms B and her children:**

The Standing Committee Report (2018) notes that “the current adversarial system is inappropriate for resolving family law disputes, particularly those involving family violence” (P. 48). It quotes one submission (Jannawi Family Centre): “It mirrors the very dynamics of families where there is violence and abuse and this in itself is abusive and ineffective” (P.49). No recommendations flow from these observations. Women’s Legal Service has however noted that the court may be become an active participant in proceedings.

There is little doubt that whatever the intent of the court and the court officers when working with Ms B, her perception of the court and its officials was that they were aligned with her ex-husband. Training in family violence may assist in providing a sensitivity and awareness to counter the layers of officialdom.

The Royal Commission (2016) raised concerns about consent orders in situations of family violence. Despite the court needing to be satisfied that the orders are just and equitable (Standing Committee P.68) levels of coercion can exist. The power imbalance between Ms B and her ex-husband led to the making of these consent orders following the threat of deportation (however ill-founded this threat may have been).

An independent and family violence and culturally sensitive informed assessment of the family situation may have led to a different outcome.

The issue of gathering information about risk is discussed at length in the Family Law Council report (2016). It notes some possible solutions to the question of who should have responsibility for gathering this information. This is becoming particularly important given the growing number of unrepresented cases and the number of cases involving risk to children. As the AIFS (2015) report noted safety concerns for children are often missed. A number of options have been canvassed.

One of the options canvassed is the proposal for the creation of an independent family law advisory service that would draw on the expertise of the family violence sector. The AIFS report describes the Children and Family Court Advisory and Support Service (CAFCASS) an independent non-government agency in Wales and England. It has a statutory responsibility safeguarding the safety of children and for providing reports to the family court. It is empowered to canvas local police and child protection authorities for past and current orders. CAFCASS can conduct a risk assessment involving all parties and provide a report to court (P.37).

WLS has argued that in all matters involving dependent children a risk assessment should be undertaken by a court based family consultant with specific family violence training to assess child safety and to provide interim care arrangements for the children (WLS, 2017. P. 8).

This case highlights the need for cultural competent practice to be imbedded in all court officials and consultants. The Women’s Legal Service (2017 P.23) submission to the Standing Committee and the Family Law Council report (2016 Rec, 16 & 17) both recommend increased training and the development of cultural awareness to better support Aboriginal or Torres Strait Islander and culturally linguistically diverse clients.



A recurring theme in reviews of the Commonwealth Family Law Act and reviews of State and Territory statutory child protection systems has been that these systems can work at cross purposes with major implications for women and children.

Case Study C illustrates how the child protection systems and family law system commonly intersect in ways that punish a protective parent and place the parental rights of a non-protective parent ahead of the best interests of children.

**Ms C** left her husband after 15 years of physical and emotional violence. She left following an incident where her husband (not for the first time) hit and choked her 13 year old child.

Child Protection investigated and informed Ms C that she needed to act protectively. Ms C left her small rural community and found accommodation in Melbourne. She was supported by a regional family violence service.

Ms C was granted an intervention order by the Magistrate’s court. This included the children.

Mr C made a family law application. He was granted an interim order with unsupervised access on weekends.

A family court consultant was engaged to provide a report. The conclusion was that Mr C had acknowledged that he had used ‘excessive discipline’ and he agreed that this was not to happen again.

Following a hearing the court returned the children to their father on grounds that Ms C had no right to remove the children from their local community.

### **Matters of concern**

Ms C’s history of prolonged family violence was discounted. Collaborative information that would have supported Ms C’s story of family violence was not sought from either Child Protection or the police who had initiated the intervention order. No advice was sought from the local family violence service about Ms C’s circumstances, her presentation and the services knowledge of the children’s experiences.

Ms C by acting protectively, as instructed by Child Protection, was penalized by the Family Court.

Four jurisdictions were involved with this family: Child Protection, the police, the Magistrate’s Court and the Family Court (including the family court consultant and the judiciary). None were able to utilize information held by the others. Critically the family court system failed to attend to the information held by the local family violence service who effectively was acting as the case manager for Ms A and her children.

### **The following changes may have assisted Ms C and her children:**

In this case there was no common assessment and understanding of the impact family violence on Ms C or her children. What would make a difference?

The introduction of a national family violence risk assessment framework for use by State, Territory and Commonwealth Governments and by non-government providers; with assessment to occur at the earliest stage of the family court application has been recommended (Royal Commission Rec 134 and WLS 2017, P.7) and should proceed as an outcome of this current review.

The Royal Commission has highlighted the need for family violence training to be provided to key work force staff where family violence is a core concern (P.15). Some have argued for a nationally accredited family violence training program (WLS, 2017 P.8).

Family report writers/consultants must undertake mandatory training in family violence, cultural competency and working with children in order to be accredited (WLS, 2017 P.12).

The only assessment undertaken in this case failed to recognise any risks to the children; the risks to the children continue despite contrary assessments from state services (child protection and the police) and the magistrate's court. Information sharing across jurisdictions is required. Legislation in Victoria, following the Royal Commission, has created a specific family violence information sharing process. In the realm of the family court where much information lies in other state and territory jurisdictions this will be a complex cross vesting matter. The complexity of cross jurisdictional powers has perhaps led the Family Law Council (without a recommendation) to suggest that protocols be developed for the collaborative exchange of information between the family courts and child protection departments, police and mental health services.

## Summary and Conclusion

Much has been written in the last decade about the intersection between family law and family violence; all the reports and reviews note that this is a complex area. All family matters are unique and peculiar to themselves.

However there is one enduring truth: family violence is damaging to women and children and this damage can be lasting and traumatic. It is reasonable to expect that our judicial systems, established for the specific reason to resolve family disputation and grief, attend to this task, in the least damaging way. As the many reports and reviews attest this is unhappily not the case.

This submission has used the experience of staff and women and children involved in the Berry Street family violence program to bear witness to this situation and to add our collective voice in calling for reform of the family law system.

Berry Street believes that the implementation of the recommendations below (all of which have been made in various wordings in previous reports) will make a real difference to the outcomes women and children gain from participating in the family court and its systems.

## Recommendations

1. That an additional Principle be included in Section 43 of the Family Law Act: **The desirability of encouraging the resolution of family disputes at the earliest opportunity and in the least costly and harmful manner.**
2. That the Australian Government through COAG develop a national risk assessment framework for use by all in the family law court registry, family court lawyers and other professionals engaged in work on behalf of the family court.
3. That the Australian Government provide funding for all family court professionals to undertake training in the national risk assessment framework.
4. That the Family Law Act be amended to require that in all cases involving dependent children and upon the filing of an application, a family consultant with specific family violence training undertake a risk assessment in relation to safety and interim care arrangements.
5. That the Family Law Act be amended so that in circumstances where family violence is alleged or identified that a referral of the effected party be made to an imbedded family violence support worker within the court.
6. That the Australian Government fund and implement a national family dispute resolution service that is supported by specialist family violence lawyers.

## References

- AIFS: *Evaluation of the 2012 Family Law Act amendments* (2015)
- Australian Law Reform Commission: *Review of the Family Law System, Issues Paper* (2018)
- Berry Street: *No Place for Violence – Submission to the Victorian Royal Commission into family Violence* (2015)
- Family Law Council: *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Report to the Attorney General* (2016)
- 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* (2017)
- State of Victoria: *Royal Commission into Family Violence: Report and recommendations* Vol 1 (2016)
- Women’s Legal Services Australia: *Submission to the parliamentary inquiry into a better family law system to support and protect those affected by family violence* (2017)

## Appendix 1

### The Berry Street approach

Violence is defined as any act that makes another person or persons feel fearful, unsafe and not in control of their own destiny. Family violence is violent, threatening or coercive behaviour that occurs in current or past family, domestic or intimate relationships. It encompasses direct or indirect threats or perpetration of physical, psychological, verbal, emotional, sexual, financial, economic, social, ritual, spiritual, cultural, domestic animal and property abuse. Family violence is any of the above behaviours that is directly or indirectly experienced by a child. Violence within relationships is a fundamental violation of human rights, unacceptable behaviour and some forms constitute criminal acts.

Berry Street provides a range of services to women and their children who have experienced family violence. The service aims to assist women and their children to remain safely within their community and maintain a life free of violence while also addressing the emotional and practical needs and issues arising from the violence. Berry Street works towards the elimination of violence against women and children.

Berry Street’s work is underpinned by a framework that attempts to promote a woman’s sense of self and encourage her own agency (empowerment) as well as trauma informed understanding of the impact of family violence on infants, children and adolescents. These frameworks incorporate an understanding of the multi factorial contributors to the experience of family violence by individual women and their children. This includes contextualising a woman within their culture. In our work with Aboriginal women and children we understand that colonisation and the resulting destruction of kinship networks, i.e. the targeted disruption to secure attachments through institutionalisation has resulted in significant transgenerational trauma which continues to impact on the Aboriginal community and influences the perception of the community towards services such as Berry Street. The service also acknowledges that women and children from culturally and linguistically diverse communities (CALD) bring experiences from their countries of origin and cultures (including political and religious status) that require recognition.

Berry Street acknowledges the power imbalance experienced by women with disabilities when they are dependent on others for their care. This imbalance increases women’s vulnerability to all forms of violent and controlling behaviours.

Berry Street operates within a collaborative and supportive team environment with a strong focus on partnerships with relevant external organisations.