

# Submission: Review of the Family Law System Issues Paper

*May 2018*



Bringing the light of Christ into communities



### About Churches of Christ

Churches of Christ in Queensland has a significant presence in Queensland, Victoria and Vanuatu with hundreds of local services, positively impacting tens of thousands of lives each year. We operate a range of missional and community care services to assist families, the elderly and people in need through church communities and our care services groups operated through Churches of Christ Care and Churches of Christ Housing Services.



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Churches of Christ Care welcomes the opportunity to provide comment on the Australian Law Reform Commission's review of the family law system. Our organisation operates a range of services designed to support children, young people and families and we regularly operate between the domestic and family violence, family law and child protection systems. The following submission is written from our experiences supporting women and children navigate this environment, and has a focus on fairness for people experiencing violence and steps to ensure the safety and wellbeing of children.

## About us

Churches of Christ Care delivers family support services that provide information and practical assistance to give families the help they need to become stronger, more capable and resilient. All programs are aimed at improving the quality of life for children and their families. Our family support services assist vulnerable families address multiple and complex needs and build their capacity to safely care for and protect their children. Domestic and family violence is present in approximately 80 percent of the families we work with in our intensive support services.

We are also one of Queensland's largest providers of out-of-home care. We work with over 3,000 children and young people each year and recruit and support over 1,000 foster and kinship carers. We are also a leading provider of housing solutions for individuals and families facing housing stress and homelessness. Our Housing Services manage a portfolio in excess of 1,200 properties, we are responsible for housing more than 3,000 people and providing homelessness advice and assistance to many more. In 2016-17, 14 percent of the social housing tenants coming to our services were escaping violence.

In our response, we discuss women's experiences of family violence and their experiences of the family law system as they are acting to protect their children. While women can use violence against men, the statistics tell us that women are experiencing violence by men at a much higher rate. While 1 in 19 men<sup>1</sup> have experienced violence by an intimate partner they were living with, 1 in 4 women<sup>2</sup> have experienced violence by an intimate partner. They are also more likely to be killed as a result of this violence<sup>3</sup>.

## Overarching comments

The *Family Law Act 1975* (the Act) contains a number of principles and rules around how domestic and family violence is taken into account when exercising the court's powers. This includes expectations that histories of domestic and family violence are disclosed to the courts, particularly when this is relevant to the safety and wellbeing of children. However, our

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<sup>1</sup> Australian Bureau of Statistics. (2013). *Personal safety, Australia, 2012*. Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4906.0Main%20Features12012?opendocument&tabname=Summary&prodno=4906.0&issue=2012&num=&view=>

<sup>2</sup> ANROWS. (2015). *Violence against women: Additional analysis of the Australian Bureau of Statistic 'Personal Safety Survey, 2012': key findings and future directions*. Available at: <http://anrows.org.au/publications/compass/PSS>

<sup>3</sup> Our Watch. (2017). *Facts and figures*. Available at: <https://www.ourwatch.org.au/Understanding-Violence/Facts-and-figures>



experience working with families going through this system highlights a range of issues preventing this happening in practice.

In Queensland, we are aware of instances where women are being advised by solicitors not to raise issues or share evidence of domestic and family violence when going through the family law courts. The rationale for this is that they will get a better outcome if they avoid being seen as an ‘alienating partner’. We are aware of this advice being given to women by solicitors even when they have video evidence of abuse.

This advice and the impacts it has on the safety of women and children is a serious cause for alarm. It is also worth noting that this is occurring in an environment where the Act already contains principles, provisions and obligations for the court to examine and take into account family violence and the safety of children. This highlights that addressing issues in the family law system cannot be done by changing legislation alone.

**Churches of Christ Care recommends** ensuring any changes to the Act and the broader family law system are underpinned by well-resourced documentation and implementation plans, including robust education and communication strategies. This will ensure legislative change translates to practice change and better outcomes for women and children.

We also support the *Safety First in Family Law* five step roadmap developed by Women’s Legal Services Australia in 2016<sup>4</sup>. We believe this accurately summarises a number of issues and potential solutions to make the family law system a safer environment for women and children who have experienced family violence. A number of our specific recommendations are in line with this work.

## Guiding principles

Churches of Christ Care supports reviewing and strengthening the principles of the Act. These principles play an important role in how the powers of the Family Court are enacted, and can be used to drive culture change across the family law system.

**Churches of Christ Care recommends:**

- Extending the principle of protecting the rights of children and promoting their welfare to include their right to live in safe, stable, nurturing and supportive environments.
- Retaining the need to ensure protection from family violence and for experiences of violence to be considered in decision-making and court proceedings.
- Incorporating a principle to ensure decisions impacting children and young people are informed by an analysis of their history of trauma. This includes the impact of the intergenerational trauma experienced by Aboriginal and Torres Strait Islander children and families.

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<sup>4</sup> Women’s Legal Services Australia. (2016). *Safety First in Family Law Five Step Road Map*. Available at: <https://safetyinfamilylaw.org.au/the-solutions/>

## Access and engagement

### Improving access to information and providing more support

We believe the Act, and any piece of legislation that impacts people's lives, rights and family relationships, should be easily accessible and understood by those subject to it. People's voices and particularly children's voices are often silenced in complex legal settings and simplified, more accessible information is an important step towards improving this.

Information on family law and court processes is shared by solicitors, but can be variable. Information on the Family Court website is also quite complex and difficult to navigate. There is also a lack of basic practical information about attending court, the timeframes and possible delays to proceedings. This can make preparing for court difficult, increase people's anxiety, and lead to unplanned and costly child care and time away from work arrangements.

People accessing the family law system also often require support with court paperwork. For people escaping violence, access to family, friends and support services may be limited. They are also less likely to have access to financial resources and must rely on Legal Aid and community legal services. Solicitors are may not spend time with people to complete court paperwork and if people have not had contact with specialist community services, they may not know help is available. People may also choose not to access support services, particularly if they are associated with state-based child protection agencies. Support completing paperwork is also necessary for people who do not have English as their first language or have poor literacy skills.

Difficulties completing court forms means they may not be completed correctly or on time. This can cause delays to court processes which in turn can delay decision making, resulting in courts not receiving appropriate information. This may have a negative impact on how a person is viewed within the system and may influence the final outcome.

#### Churches of Christ Care recommends:

- Developing information on court processes in multiple, accessible formats. This should incorporate plain language principles and include audio or video formats and translated information.
- Providing additional resources to support people with court forms and clearly directing people to this via the family court website. This could be provided through additional support or navigation programs within community-based legal services, or services attached to the court.

### Improving the physical design of courts and making them more accessible for families

Family courts are physical spaces where people regularly experience extreme stress, anxiety and conflict. They are not family friendly and despite access to safe rooms, safety cannot always be guaranteed. In the context of family violence, they are often places where people who use violence are able to gain access to partners who have left them and exert fear and control over them. This can have a particularly negative impact where people have been in relationships with a high degree of sexual assault and violence.



Alternative arrangements for hearing cases screened as high risk for family violence or where no contact Domestic Violence Orders are in place must be considered. The Victorian Neighbourhood Justice Centre model has significant strengths and should be considered for use across all jurisdictions. However, where risk of domestic and family violence is high, we believe alternative methods for people to participate in court processes should be explored.

**Churches of Christ Care recommends** considering how people who've experienced violence can be physically represented by their solicitor and attend court and give evidence via video conferencing. This would allow them to be physically safe at family-friendly locations where additional support is available.

## Legal principles in relation to parenting and property

### Identifying and holding people who use violence accountable for the safety of their children

The current primary considerations in determining a child's best interests and the weight given to children's safety is appropriate. Unfortunately, weighting of children's needs when making parenting orders does not always occur in practice. Children's voices are easily lost in legal processes, and despite legislative guidance, decisions are often made in favour of parental rights and preferences rather than children's rights and preferences. Children's exposure to trauma, such as abuse or witnessing family violence, also needs to be considered when making parenting orders. Children who've experienced trauma need consistency and stability in physical location and parenting style to recover.

In cases where women are actively advised not to raise domestic and family violence instances in court, the presumption of equal shared parental responsibility cannot be rebutted and children's wellbeing and safety is being put at risk.

In cases where a history of violence is known but a person is arguing to maintain access to children, we are aware of several family court orders overruling domestic violence orders, including no contact orders and orders issued by police. We have also seen instances where interim orders are made allowing people who use violence to have contact with their children in their former partner's house. In some of these cases, child protection has become involved because this court-ordered arrangement is extremely unsafe. If the court is determining access to children and a history of domestic violence is known, behaviour change and safety measures must be ordered prior to custody being granted to manage children's safety. Exposure to trauma also needs to be considered when parenting orders are being made.

In the child protection system, there are a range of requirements parents often must meet before they are able to access their children once harm has been substantiated. These include evidence of attending and completing parenting courses, alcohol and other drug counselling, and engaging with support services. We believe these should be considered in a family law setting to hold people who use violence accountable for their behaviour and to protect children.

### Churches of Christ Care recommends:

- Conducting risk assessments by domestic and family violence specialists of all cases at their early stages to make sure family violence is identified and accounted for by court processes.
- Examining how behaviour change and safety measures commonly used in the child protection system can be included in parenting orders where family violence is present.
- Removing the language of “equal shared time” and “equal shared parental responsibility” from the Act to shift culture and practice towards a greater focus on the best interest, safety and risk to children.
- Considering further changes to the Act to ensure decisions around the best interests of children and young people carefully consider their developmental, educational, cultural, emotional, health and physical needs.

## Resolution and adjudication processes

### Supporting people who have experienced family violence or abuse better at court

#### *Improving access to legal services*

When someone flees domestic and family violence, they usually leave everything behind. So when women who've fled violence are coming into the family law system, they are often dependent on Legal Aid while their partners are able to hire private solicitors. As Legal Aid services are over-stretched and their solicitors have highly variable experience in dealing with domestic and family violence, women or the person who has fled a violent relationship is placed at a significant disadvantage.

The power differential between two parties where one person is able to access private legal support and the other must rely on over-stretched public legal support must be addressed. It is not appropriate that this level of inequity exists in a legal setting, which holds that income, assets and resources are shared equally within relationships. It is also unacceptable that people leaving violent and abusive relationships are at a material, legal disadvantage before cases even begin.

As women escaping domestic and family violence often experience financial stress and can fall into homelessness, it is vital steps are taken to reduce additional and unnecessary legal costs. A significant expense women experience is providing family law reports, which can cost up to \$8,000 per report. These reports are expensive, and in family violence cases are often spuriously requested to prolong legal proceedings, cause additional stress and uncertainty, and 'burn off' people's resources.

### **Churches of Christ Care recommends:**

- Expanding family law legal services to assist the most disadvantaged, high risk families in the family court system.
- Creating a specialist Legal Aid funding pathway for domestic violence family law cases.

### *Getting legal support for people leaving the state due to family violence*

There are particular issues associated with accessing Legal Aid for women with children who have fled violent relationships into other states. For example, we have worked with a woman whose children were being harmed by an extended family member that was living in the house with her family. Her partner did not believe the abuse was occurring, despite the children displaying a range of behaviours indicating it had. She left the relationship with her children and moved interstate to keep them safe. Because she had moved interstate without a court order, she is unable to access Legal Aid and she also has extremely limited financial resources.

In cases of child abuse, the law requires parents to act to protect them. In this case, the woman acted quickly to protect her children, meeting this requirement, but as a result is facing significant legal repercussions and cannot access legal assistance.

**Churches of Christ Care recommends** considering how actions to protect children who are at an unacceptable risk of harm are accounted for and balanced against parental rights. As children are often the most vulnerable members of a family, their safety is paramount and a parent acting in good faith to protect them should not be materially disadvantaged.

### **Providing legally-assisted family dispute resolution processes where there is family violence**

In a family violence context, mediation and other early dispute-resolution processes have historically been high risk as they provide significant access to partners and can encourage further abuse. However, recent trials of mediation models using specialist domestic and family violence lawyers and social workers have been successful. Given the long timeframes and expense associated with matters going to court and the possibility this creates for abuse of process, rolling out specialist dispute resolution processes should be considered.

**Churches of Christ Care recommends** delivering a mediation model with specialist domestic violence lawyers and social workers based on the 2012 Co-ordinated Family Dispute Resolution Pilot. This should be done in stages across multiple locations, and must include rigorous monitoring and evaluation to ensure people who have experienced violence are safe through these processes.

## Reducing misuse of process as a tool of further abuse

Reducing misuse of process as a tool of further abuse requires proactively identifying cases where family violence is present, and introducing specialist pathways for domestic and family violence cases in family courts.

## Integration and collaboration

### Using integrated services to assist families with complex needs

There is a need for more support and better integration of services to support families with complex needs across the family law system. Homelessness and financial stress are common for women as they go through the family law system. In Australia, divorce has a substantial short-term negative effect on women's equivalised household incomes. The study also found that the negative effect of divorce on women's financial living standards is larger, on average, than on men's financial living standards<sup>5</sup>. This short-term negative financial impact on women is exacerbated when they are leaving a violent relationship, where they often fall into homelessness.

Our experience supporting women and families demonstrate that when people's incomes are low their rent payments can be deprioritised in favour of other essentials, such as food and costs of caring for children. For women living in the private rental market, missing one or two rent payments often results in eviction as real estate agents and landlords are unlikely to provide alternative payment options or rent relief. For women in social or community housing their tenancies can also be put at risk when funds are tight, particularly when child support payments suddenly cease and they can no longer pay their income-based rent.

We believe these along with other issues can be addressed by developing a specialist pathway for domestic violence cases in family courts. This will allow cases with family violence and other complex needs to be quickly identified and connected to specialist support and legal advice. This approach should include court-based support services for women from high risk groups, and workers with expertise in housing, domestic violence and children and young people. This would also embed workers with specialist domestic violence and child protection experience in the court system.

**Churches of Christ Care recommends** establishing court-based support services to assist families in crisis. These services should include support with housing, financial assistance, domestic violence, and children and young people.

## Children's experiences and perspectives

### Ensuring children's views are heard in court proceedings

Churches of Christ Care supports strengthening the Act to give children and young people the right to express and have their views heard in decisions that affect them. Currently, Independent Children's Lawyers can be appointed to represent children's views in court. While these lawyers play an important role in representing children and young people, our experience working with families demonstrates a high degree of variability in this being done

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<sup>5</sup> de Vaus, D. Gray, M. Qu, L. & Stanton, D. (2015) The economic consequences of divorce in six OECD countries. Available at: <https://aifs.gov.au/publications/economic-consequences-divorce-six-oecd-countries/export>



effectively. We are aware of several instances where Independent Children's Lawyers have not met with or had any conversation with children before representing their interests in court. This is disappointing as children and young people can actively participate in decisions impacting them if someone engages with them and builds trust using child-centred and culturally sensitive strategies.

A high degree of skill is required when seeking the views of children in a legal setting, as this must be done in a developmentally appropriate way. Children often internalise what is happening around them and blame themselves for a parent's behaviours and family breakdown. This can limit their willingness to speak out and make what they see as negative outcomes very damaging. More consideration should also be given to how children and young people's views are considered when they:

- Are too young to verbally express their views and wishes
- Have developmental, learning, language and/or speech delays that affect their ability to clearly express their views and wishes
- Are experiencing effects of complex developmental trauma, which can often be related to exposure to family violence.

#### **Churches of Christ Care recommends:**

- Establishing a specialist Children's Advocate service to engage appropriately with children and young people and ensure their views are considered in family court proceedings. This function could support Independent Children's Lawyers as they seek to engage with children and young people.
- Requiring children's views to be sought in ways that are developmentally appropriate and ensuring any information shared with them is in a format they can understand.

## **Professional skills and wellbeing**

### **Determining core competencies of professionals in the family law system**

Given the complex nature of cases reaching the family law system it is imperative all professionals working in the family law system receive training on:

- domestic and family violence
- cultural capability
- impacts of family violence and trauma on children

**Churches of Christ Care recommends** establishing comprehensive training programs for professionals in the family law system covering domestic and family violence, cultural capability and trauma.

## **Governance and accountability**

### **Publishing information about people's experiences of court proceedings**

We do not support publishing information about people's experiences of court proceedings where domestic and family violence is present. This could provide an alternative, public forum for disgruntled abusive partners to further misuse court process.