

# Australian Law Reform Commission Review of the Family Law System – Issues Paper (IP48)

APS Response

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Dr Louise Roufeil  
Executive Manager | Professional Practice  
[l.roufeil@psychology.org.au](mailto:l.roufeil@psychology.org.au)

Jacinta Connor  
Policy and Research Officer | Professional Practice  
[j.connor@psychology.org.au](mailto:j.connor@psychology.org.au)

Heather Gridley  
Manager | Public Interest  
[h.gridley@psychology.org.au](mailto:h.gridley@psychology.org.au)

Emma Sampson  
Policy and Research Officer | Public Interest  
[e.sampson@psychology.org.au](mailto:e.sampson@psychology.org.au)

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## **Executive Summary**

The Australian Psychological Society (APS) welcomes the opportunity to respond to the Australian Law Reform Commission's Review of the Family Law System. The APS is the largest professional organisation for psychologists in Australia representing approximately 24,000 members, of whom a significant portion deliver evidence-based psychological services. In preparing this submission, the APS sought feedback from members who conduct research and/or provide services within or related to the family law System.

Psychologists are experts in human behaviour including the processes determining how people think, feel, behave and react. They apply their expertise using reliable and scientifically supported methods. Psychologists often work as researchers and/or service providers with individuals and groups who have had experience with the family law system including offering assessment services to provide the court with a social science perspective to assist with their decision making. Psychologists also play a significant role in supporting individuals, families and children leading up and following their involvement with the family law system, and have the capacity to be engaged at a broader level.

Australian families have been changing significantly since the family law system was established via the Family Law Act 1975. It is timely for the Family Law Act and system to be updated to reflect the diversity of families in Australia and support a consistent approach for decision-making for all families regardless of their structure.

A modern family law system should provide Australian families with an accessible, safe, inclusive, and affordable resolution of family disputes. There is a need to recognise and strengthen psychological responsiveness throughout the family law system, acknowledging the distress families are likely to be experiencing at this time in their lives. In particular, trauma-informed practice should be a key principle throughout system. Where possible, the system should be strengths-based and non-adversarial.

In addition, given that many families accessing the family law system are or have been affected by family violence, it is imperative that the current system better identify and respond in a way that is most protective of the safety and wellbeing of all involved, particularly victims of family violence and children. There is an urgent need to ensure better connection and collaboration between the family law, family violence, and child protection systems. Measures are also needed to ensure that the family law system itself is not misused to further harm victims. The best interests and safety of children should be paramount across the family law system. Abuse should not be minimised in order for a child to have a relationship with both parents and children should not be left in unsafe circumstances. Better

follow-up of families and children should be undertaken to ensure safety.

While the aim of the original Family Law Act 1975 was to create a 'one stop shop', aspects of the system remain difficult to navigate, particularly for families who may be disadvantaged, and there remain disparate sections of the system in Australia. Access and engagement could be improved by integrating into a hub model, ensuring written information is accessible to those without access to the internet and in multiple languages for those who do not speak English, and by exploring a 'navigator' role. This role could assist families with multiple and complex needs to navigate and access services. Integrating or co-locating family law services with other service settings, such as family violence services, housing and legal organisations, may also enhance engagement, particularly by those experiencing complex issues.

The APS notes the significant barriers that Aboriginal and Torres Strait Islander families face when accessing the family law system. There is a need for all parts of the system to take account of the impacts of colonisation, in particular the Stolen Generations and resulting, ongoing intergenerational trauma, and to better incorporate and promote the Aboriginal Child Placement Principle in all considerations for the care of Aboriginal and Torres Strait Islander children. The APS recommends working in close collaboration with Aboriginal and Torres Strait Islander peoples and organisations to ensure that all parts of the family law system are culturally responsive and competent.

The family law system is also not equitable, responsible or safe for other minority groups such as those from culturally and linguistically diverse (CALD) communities, lesbian gay bisexual transgender intersex and queer people and communities (LGBTIQ+), and people living with a disability. Acknowledgement of the diversity of family structures and forms and their unique needs, as well as further engagement with these communities and organisations, is required to enable the family law system to be inclusive of all communities that require access.

People living in rural, regional and remote communities face greater barriers to accessing the family law system (due to lack of services, distance, affordability and technical inaccessibility), including problems with accessing family violence services in order to maintain safety. The development of a rural model for the family law system that better incorporates the use of technology is urgently required if such barriers are to be addressed.

The APS acknowledges the significant costs associated with seeking outcomes via the family law system, particularly where publicly funded legal services are not available, and recommends measures to reduce costs, where possible, while duly acknowledging and remunerating relevant expertise. Given the importance of the court environment to facilitating access to justice in the family law area, there is a

need to ensure the courts are safe and accessible and do not pose further risk of harm for victims of family violence and their children.

Changes to the Family Law Act to better protect victims of family violence and ensure the safety and wellbeing of children are urgently required. In particular, the APS supports removing the presumption of equal shared parental responsibility and the language of equal shared time from Part VII and amending the best interests of the child checklist to more clearly prioritise the protection of children from physical or psychological harm, and to provide a separate dedicated pathway for decision-making in cases where there is high conflict and/or where there has been family violence. Children should not be required or permitted by the Court to be in the unsupervised care of parents who have exposed them to violence and/or continue to pose a safety risk.

The current definition of family violence needs to be strengthened. In particular, the definition should include reference to psychological and emotional abuse as common aspects of family violence patterns. Identification of family violence via a single family violence risk assessment tool would also mean early intervention is possible and would reduce safety risk for victims throughout their engagement with the family law system.

The misuse of family law processes as a form of family violence and a commonly used strategy to perpetuate patterns of abuse after separation should also be addressed within the family law system. More broadly, all professionals involved in the family law system, including psychologists, need to be informed about the nature and consequences of family violence, and be sufficiently skilled at identifying abusive patterns and working with parents and colleagues to prioritise protecting children from harm.

Unifying the family court system to link all matters pertaining to the wellbeing of a family, including child protection and family violence matters where there is a related family law matter, would better service those experiencing family violence, and would strengthen family dispute resolution processes.

There is value in exploring the implementation of a multidisciplinary panel of skilled professionals including psychologists and other experts with expertise in child development, child protection, mental health, and family violence. These experts would not act on behalf of an individual party but be contracted or employed by the court with input to all systems and processes. Examining the viability of a panel approach could better address family violence matters, as would further training for Family Consultants in the dynamics of family violence.

The APS agrees that improved pathways to resolving disputes in a more affordable and timely manner should form part of the reformed family law system, given the significant detrimental impacts on families and particularly children when dispute resolution processes are protracted. Solutions include greater use of educative

processes and more collaborative approaches from the outset; the integration of a triage system early in the proceedings to assist parents to resolve disputes would likely facilitate better outcomes and timely resolutions.

The family law system needs to become more child-focused. The voices of children are not often heard directly and mechanisms need to be developed to take account of their perspective. Psychologists have a role to play using the evidence base on child development and effective parenting. While it is recommended that the Court be better informed of children's views, concerns and matters affecting their safety and wellbeing, the direct involvement of children in court processes is a sensitive matter which requires consideration of safety, developmental stage and family violence/trauma history.

Promoting the safety and wellbeing of all professionals in the family law system should also be a priority, and includes consideration of risk of harm to professionals and family court personnel, ensuring debriefing and employee assistance processes, enhancing self-care, and implementing trauma-informed principles into all levels of the system.

It is only with substantial changes to the family law system to focus on resolving disputes while prioritising safety rather than increasing the adversarial nature of a conflict that public confidence can be improved. A Family Court that is accessible, timely, responsive, protects vulnerable parties and acts in the best interests of children, where parties feel supported and safe to resolve disputes in a just and affordable manner, is the ideal.

Psychology and social science more generally can inform high-quality research and evaluation of issues relevant to the family law system. In particular, there is a need for longitudinal research or follow-up of families post contact with the family law system to assess outcomes for all involved and to learn from their experiences.

## ***Recommendations***

**Recommendation 1:** The APS recommends that a modern family law system should provide Australian families with an accessible, safe, inclusive, and affordable resolution of family disputes and that this should be done in a way that is the least harmful and most protective of the safety and wellbeing of all involved, particularly victims of family violence and children.

**Recommendation 2:** The APS recommends that the family law system be more accessible to those facing disadvantage and suggests a range of measures to increase accessibility, including integrating into a hub model, ensuring written information is accessible to those without access to the internet and in multiple languages for those who do not speak English, and by exploring a 'navigator' role.

**Recommendation 3:** It is recommended that a single point of entry to the family law system be adopted so that the type of application required is appropriately targeted in a timely manner. A family violence risk assessment should be conducted at the earliest possible contact with the system.

**Recommendation 4:** The APS urges the ALRC and Government to work collaboratively with Aboriginal and Torres Strait Islander organisations (including legal services, family violence services, child and family services, and local communities) to improve the cultural safety of the family law system and its interface with family violence matters.

**Recommendation 5:** The APS recommends that the ALRC and Government work closely with CALD communities and organisations to ensure the family law system is accessible, culturally responsive and safe for all communities.

**Recommendation 6:** The APS recommends specific changes to the Family Law Act (including definition of family and using more gender-neutral terminology) to improve the responsiveness of the family law system for LGBTIQ+ people and families.

**Recommendation 7:** The APS recommends further engagement with services which support LGBTIQ+ communities to develop resources and training to assist all areas of the family law system to better understand and be inclusive of all families who come in contact with the system.

**Recommendation 8:** The APS recommends the development of a rural model for the family law system that better incorporates the use of technology and mobile panels.

**Recommendation 9:** The APS acknowledges the significant costs associated with seeking outcomes via the family law system, particularly where publicly funded legal services are not available, and recommends measures to reduce costs, where possible, while duly acknowledging and remunerating relevant expertise. The APS does not support capped pricing.

**Recommendation 10:** Given the importance of the court environment to facilitating access to justice in the family law area, there is a need to ensure that all premises are safe

and accessible and do not pose further risk of harm for victims of family violence and their children.

**Recommendation 11:** The APS recommends changes to the Family Law Act to better protect victims of family violence and ensure the safety and wellbeing of children. In particular, the APS supports removing the presumption of equal shared parental responsibility and the language of equal shared time from Part VII and amending the best interests of the child checklist to more clearly prioritise the protection of children from physical or psychological harm.

**Recommendation 12:** The APS recommends that family court processes and outcomes be strengthened to better incorporate the voices and experiences of children and protect their safety. Children should not be required or permitted by the Court to be in the unsupervised care of parents who have exposed them to violence and continue to pose a safety risk.

**Recommendation 13:** The APS supports ensuring that all professionals involved in the justice system, including psychologists, are informed about the nature and consequences of family violence, and are sufficiently skilled at identifying family violence and working with parents to prioritise protecting children from harm.

**Recommendation 14:** The APS concurs with the ALRC Issues Paper that the current definition of family violence needs to be strengthened. In particular, the definition should include reference to psychological and emotional abuse. Recognition of misuse of family law processes as a form of abuse and commonly used strategy within a pattern of family violence should also be included.

**Recommendation 15:** The APS recommends unifying the family court system to link all matters pertaining to the wellbeing of a family, including child protection and family violence matters where there is a related family law matter.

**Recommendation 16:** Examining the viability of a multidisciplinary panel approach consisting of psychologists with expertise in child development, mental health, and family violence as well as other specialists in child protection, family violence and family law, particularly in rural communities, as well as further training for Family Consultants in the dynamics of family violence.

**Recommendation 17:** The APS agrees that improved pathways to resolving disputes in a more affordable and timely manner should form part of the reformed family law system. The APS recognises that the design of improved family dispute resolution (FDR) services within the family law is a matter for the legal profession to devise; however, due consideration should be given to the social science evidence when designing FDR options to ensure they are fit for purpose.

**Recommendation 18:** The APS recommends that the court system to be far more responsive and quick to resolve parenting and financial matters, particularly where there is family violence and financial and/or psychological hardship. A highly skilled multidisciplinary panel approach could be adopted to identify abuse, particularly abuse of



processes, and inform the judiciary accordingly.

**Recommendation 19:** All professionals who are part of the family law system need training in how users of violence can perpetuate abuse through the misuse of family law processes. In particular the training and accreditation of family consultants could include understanding process misuse and identifying and responding within the family law system when family violence is detected or suspected.

**Recommendation 20:** The APS considers that integration and collaboration within the family law system is in need of major reform. As discussed throughout this submission there is a need for interdisciplinary collaboration, multidisciplinary approaches to family law matters and a unified family law system designed to meet the needs of all Australian families who are experiencing family breakdown, family violence, issues regarding child protection and other family law-related matters.

**Recommendation 21:** The ALRC work with the APS to develop guidelines as to when therapeutic records can be subpoenaed for family court matters, and to identify mechanisms for the courts to consider the possible consequences of compliance with the subpoena, including the impact on the family or children involved

**Recommendation 22:** It is recommended that consideration be given to a system of reportable therapy which would emphasise provision of treatment reports.

**Recommendation 23:** The APS recommends the development of further mechanisms that promote the positive participation of children and young people throughout the family law system in ways that ensure their interests and experiences are represented and their safety and wellbeing prioritised.

**Recommendation 24:** Promoting the safety and wellbeing of all professionals and personnel in the family law system needs to include debriefing processes, access to psychological support, and the implementation of trauma-informed principles into all family law systems.

**Recommendation 25:** It is recommended that the Family Court and the Psychology Board of Australia address weaknesses in the existing complaints processes to reduce the likelihood of complaints against psychologists when one party does not agree with the contents of a family court report.

## **Objectives and principles**

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

Many families across Australia access the family law system for assistance and support to resolve the legal issues which arise following separation. A modern family law system should provide Australian families with an accessible, safe, inclusive, and affordable resolution of family disputes. As the ALRC's discussion paper emphasises, this should be done in a way that is the least harmful and most protective of the safety and wellbeing of all involved, particularly children.

Substantive changes to the law could emphasise a collaborative and conflict resolution approach whereby the best outcome is a non-adversarial resolution. This involves several mechanisms from separation to the impact and outcomes of case resolution. Where possible the system should be strength-based and non-adversarial, such that each party is supported to work together co-operatively to reach the best resolution for everyone. Currently, the system can serve to exacerbate conflict between parents/parties as it forces position-taking and the reiteration of this position through the legal process. While its stated priority is the best interests of the child, often the conflict is about what each party considers to be the child's 'best interests' or where at least one party has a vested interest in prolonging the conflict.

While most parents do not access the family courts as their main pathway to sort out their parenting arrangements, parents who do are more likely to report the presence of complex issues, including mental ill-health, substance misuse, and safety concerns for themselves and/or their children (Carson & Qu, 2017). More than half the parenting cases that proceed to court involve allegations of family violence (Chisholm, 2009), and of matters involving allegations of family violence or child abuse, more than 83% involve parental responsibility that is shared (Kaspiew et al, 2015). A key role and objective of the modern family law system must therefore be the protection of participants.

Early intervention and prevention approaches embedded within and across the system can assist with avoiding lengthy proceedings. There is a need to promote more sustainable therapeutic justice outcomes for families with complex needs accessing family law servicing and support.

Australian families have changed in diversity and structure since the establishment of the original Family Law Act 1975. The Family Law Act and system should reflect the diversity of families in Australia and support a consistent approach for decision-making for all children, regardless of their family structure. This is particularly important for a child-focused approach as the law currently pertains to biological parents rather than considering the broader caring responsibilities of grandparents, stepparents, same-sex non-gestational parents, uncles, aunts and other adults, and the attachments the child may have to grandparents, siblings, and extended family members. The structure of the system is thus at odds with the diverse structures of Australian families, the child's world and in particular the kinship arrangements that exist in Aboriginal and Torres Strait

Islander families.

There is a need to recognise and strengthen psychological responsiveness throughout the family law system. Couples and families facing a separation are experiencing an emotionally difficult time. There is a need for more resources that normalise the likely responses and do not add to people's distress and confusion. These resources need to be widely available through a variety of means (i.e. online modules, face to face, telephone services), so that parties are educated about family law processes and pathways and their rights within this system.

There is a need for the family law system to be monitored, evaluated and benchmarked and for more investment in research, especially longitudinal research. These measures will facilitate a reliable feedback system to which policies and legislation can respond.

**Recommendation 1:** *The APS recommends that a modern family law system should provide Australian families with an accessible, safe, inclusive, and affordable resolution of family disputes and that this should be done in a way that is the least harmful and most protective of the safety and wellbeing of all involved, particularly victims of family violence and children.*

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

The APS believes the following principles should underpin the redevelopment of the family law system:

- A unified family court where all matters affecting a family are heard within the one court: child protection, family violence, and relevant children's court matters where there is a family court connection.
- A family law system that is affordable and accessible to all, and which:
  - is responsive to and inclusive of diverse family structures and cultures
  - prioritises the protection and safety of all parties
  - is attuned to the developmental needs of children.
- Family law processes:
  - are informed by conflict resolution principles
  - take a problem-solving approach to family disputes
  - encourage the resolution of disputes at the earliest possible point
  - are informed by and responsive to social science evidence.
- A trauma-informed model of care is implemented across the broader system.
- Decision-making processes revolve around the best interests of children, and
- Processes and outcomes are monitored, evaluated and benchmarked.

### **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?**

According to the 2014 Productivity Commission report regarding access to justice arrangements, disadvantaged Australians in particular face a number of barriers in accessing the civil justice system. These include communication barriers and a lack of awareness and resources. These barriers mean that some people are both more susceptible to, and less equipped to deal with, legal disputes including family law issues. As identified in the Productivity Commission report (2014), improving accessibility would generate social and economic benefits:

- The ability of individuals to enforce their rights can have profound impacts on a person's wellbeing and quality of life.
- It promotes social order, and communicates and reinforces civic values and norms.
- Prompt, affordable and well understood dispute resolution arrangements can help avoid issues escalating into more serious problems that can place burdens on health, child protection and other community welfare services.

The Law Commission of Ontario (2013) proposed benchmarks for improving access that reflect features of the system necessary to be responsive to differences among families and individual members of families, as well as qualities necessary for an effective resolution of their disputes, such as access to affordable and effective personal assistance. The report recommends that an effective entry to the family law system should meet the following benchmarks:

- Provides initial information that is accessible to people in their everyday lives, including information about possible next steps in their efforts to resolve their dispute.
- To the extent that the information is provided online, provides it through a single hub.
- Provides written information that is accessible to those without adequate access to the internet.
- Provides assistance for persons who might have difficulty accessing, reading, understanding or applying the information.
- Helps an individual determine the nature of their family problem(s) in a timely and effective way, including whether their dispute really is a legal dispute.
- Assists individuals to find the approach to resolving their problem that is as simple and timely as possible, minimising duplication of persons and institutions with whom the individual must deal and promoting ease of communication and collaboration between different actors in the system (this refers to a triage system that assists in allocating resources according to priorities).
- Has the capacity to respond to different educational and literacy levels; the existence of domestic violence; and factors such as cultural norms, Aboriginal status, gender, sexual orientation, age, language, disability, geographic location and other major characteristics.
- Develops programs and policies in consultation with affected communities;
- takes into account the financial capacity of individuals while ensuring the quality of service.
- Recognises and responds to the multiple problems that accompany family problems, such as mental health or financial problems that may be a stimulus for or exacerbate family legal problems.

- Offers a seamless process from early stages to final resolution.
- Is based on a sustainable model.

This report is mostly consistent with the themes identified in the Access to Justice Arrangements Inquiry report into the civil justice system in Australia (Productivity Commission, 2014).

While the aim of the original Family Law Act 1975 was to create a 'one stop shop', there remain disparate sections of the family court system in Australia and this disparity is not more apparent than the online access to information regarding family court matters. The APS echoes the concerns outlined in paragraphs 48 and 49 of the Issues Paper in that the Family Court website is difficult to navigate in order to find information about family law process, proceedings, resources, services and other appropriate and relevant resource/information/links that may guide parties through the family court system. This is especially true for people with language or literacy barriers and also for children.

The website could be redesigned to improve its usefulness and promote engagement and the resolution of family law matters. Currently, when seeking information about different facets of the family law system, parties are directed to several other websites or centres in order to access helpful information. A consolidated website offers the benefit of assisting people to discern authoritative and accurate information rather than the current separation of functions approach to accessing information about aspects of family law such as parenting orders, developmentally appropriate information for children, and information about family violence. This would align with the 'one stop shop' principle and draw all information and services together.

The website also needs to contain more developmentally appropriate information for children. Children's needs change with their stage of development and information needs to be provided in an appropriate manner for the child's age and circumstances. This is particularly important to support children who are inevitably affected by parental separation and the conflict that can occur. Children need to be empowered with information that is reassuring but that also informs them in a developmentally appropriate manner about conflict resolution, how they can stay safe, and how the family law system can support them during a time when many most likely need reassurance. The website also needs to include emergent issues in Australian families and culturally appropriate information about family structures, disabilities, and staying safe at home. The APS makes the following suggestions for improving the accessibility of information about the family law system:

- Develop an improved and consolidated website dedicated to the process of separation and family law that includes information for children tailored to developmental needs. The website should be written in plain language and available in multiple languages.
- Provide online educational modules about family violence, parenting orders, conflict resolution and conflict diffusion, the meaning of parental responsibility, the needs of children at different developmental stages, and their level of involvement in the family court proceedings.
- Provide flow charts and pathway navigation options to assist parents to navigate

the broader system.

With regard to family violence information, the APS recommends providing a dedicated section of the website that explains family violence in family law contexts and provides examples and targeted educational modules. The website should include information for families who have experienced family violence, are currently exposed to family violence, and also those who use violence. Both applicants and respondents would benefit from information on how intervention orders work and how they interface with family court orders. Consideration should be given to developing a mandatory module for users of family violence so that they understand what constitutes family violence under family law, including the requirements of an intervention order. There should also be capacity in the website to search for geographically-based family violence services.

**Recommendation 2:** *The APS recommends that the family law system be more accessible to those facing disadvantage and suggests a range of measures to increase accessibility, including integrating into a hub model, ensuring written information is accessible to those without access to the internet and in multiple languages for those who do not speak English, and by exploring a 'navigator' role.*

**Recommendation 3:** *It is recommended that a single point of entry to the family law system be adopted so that the type of application required is appropriately targeted in a timely manner. A family violence risk assessment should be conducted at the earliest possible contact with the system.*

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

The APS agrees that navigation assistance would benefit many users, particularly those with barriers to access or those who may be experiencing complex issues such as mental health problems or family violence. The adoption of a navigator may depend upon the type of issues being faced by users of the system but may also reduce the stress and anxiety and isolation experienced by users that likely amplifies any conflict. For example, a navigator could assist with triaging a consumer, act as a procedural advocate to support self-represented litigants, and assist with triaging families to services.

Navigators should have social science and/or legal qualifications and be able to use plain English. They would not give legal advice but would assist Family Court users in relation to process, triage and access to appropriate services. An example of this model is the Family Advocacy and Support Services (FASS). Navigators could also be assigned based upon their cultural or linguistic background or their area of specialisation, for example family violence, children with special needs, mental health, trauma etc.

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

As noted in the ALRC Issues Paper, reviews over a number of years have reported that mainstream family law services are not designed or delivered in a way that recognises the lived experiences of Aboriginal and Torres Strait Islander people. There is an urgent need for all parts of the family law system to recognise the impacts of colonisation, in

particular, the stolen generations, ongoing intergenerational trauma, and the chronic disruption of family and kinship ties associated with the removal of children through child protection systems. As noted in the Issues Paper, there needs to be improved recognition that access and engagement with the family law system for Aboriginal and Torres Strait Islander families cannot be separated from the history of colonisation, dispossession of land and forced removal from country, and the separation of children from families through historic government policies of child removal.

A family law system that recognises and responds to the cultural and geographic diversity of Aboriginal and Torres Strait Islander peoples is fundamental to maintaining consistency with the United Nations Declaration on the Rights of Indigenous Peoples, to which Australia is a signatory. This means specifically addressing the barriers to access and engagement with the family law system such as cost, language, cultural safety and geographic and physical accessibility. There is also a need for cultural information, including the importance of family and kinship relationships, cultural connections and identity, to be included in considerations for the care of children.

The APS urges the ALRC and Government to work collaboratively with Aboriginal and Torres Strait Islander to ensure that all parts of the family law system are culturally responsive and competent. This may include supporting Aboriginal community-controlled organisations and families to have authority and agency within child welfare and protection, police, family violence and law and justice systems. Consideration should be given to having an advocate from Aboriginal legal services located in the Court/Family Relationship Centre (FRC)/Community Legal Centre, and workers from Aboriginal and Torres Strait Islander-specific services embedded in the family courts and as liaison officers.

Improving the experience of Aboriginal and Torres Strait Islander people in the family law system also requires recognition that Aboriginal and Torres Strait Islander people are subject to higher rates of family violence and homicide across both genders compared with non-indigenous Australians (Cussen & Bryant, 2015). While the reasons for this are complex and linked to the impacts of colonisation, dispossession, family removal policies and ongoing racism and discrimination, the impact on the social and emotional wellbeing of affected individuals and communities is enormous.

**Recommendation 4:** *The APS urges the ALRC and Government to work collaboratively with Aboriginal and Torres Strait Islander organisations (including legal services, family violence services, child and family services, and local communities) to improve the cultural safety of the family law system and its interface with family violence matters.*

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

People from culturally and linguistically diverse communities, especially new arrivals and refugees, have limited knowledge of the family law system and are also likely to be financially disadvantaged in terms of accessing services. This is particularly important for newly arrived communities where there is a high rate of intergenerational conflict,

which can lead to inter-parent conflict and marriage breakdown. As the Issues Paper notes, access to information about family law can often be impeded by language and literacy barriers: information about family law and family law services may not be available in some community languages, and limited literacy even in a person's own community language may mean that even where available, translated material is not accessible. Limited access to interpreters also acts as a barrier to participation in the system. As such, the family law system is not currently accessible, equitable, or responsive to culturally and linguistically diverse families, nor is it one which "prioritises their safety", as noted in the ALRC Issues Paper.

The family law system also needs to take account of the cultural diversity in family structures. For example, the role of extended family may be culturally important compared with the normative Western nuclear family structure, with decision-making about children being a more collective process involving grandparents and others. Moreover, people from CALD backgrounds who experience family violence face additional barriers in accessing family law services, which may include a lack of understanding by family law system professionals about culturally specific instances of family violence and cultural norms and pressures regarding the disclosure of violence. As Gridley and Turner (2010) noted:

Respect for diversity is sometimes misinterpreted as cultural relativism, justifying a failure to intervene in the affairs of groups defined as 'other.' But violence is unacceptable in any form, and attention to diversity means working from within the perspectives of minority group women experiencing violence. (p.402)

The APS recommends that the ALRC and Government work closely with CALD communities and organisations to ensure the family law system is made culturally responsive and safe for all communities. For example, the use of family group conferences and CALD navigators or advisors may be employed to assist CALD clients to navigate the system.

The APS supports the recommendations identified in the Issues Paper including:

- Enhanced cultural competency in the family law system.
- Engagement and collaboration with CALD communities in the development, delivery and evaluation of services, and in the family courts and Family Relationship Centres.
- The development of accessible, culturally-responsive and trauma-informed psychoeducation programs about the family law, family violence and child protection systems to help facilitate service engagement for CALD families with complex needs and access to culturally responsive and integrated servicing and support.

**Recommendation 5:** *The APS recommends that the ALRC and Government work closely with CALD communities and organisations to ensure the family law system is accessible, culturally responsive and safe for all communities.*



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

For parents with a disability or mental health issue there needs to be a consistent approach that does not make assumptions about a person's capacity based on a diagnosis or a disability. Instead, the family law system needs to recognise that disability and mental illness do not necessarily impact on family law matters. For example, in regards to parenting arrangements, evidence suggest that a parent's capacity depends upon the form and severity of their symptoms, their relative level of independence, and their ability to manage everyday demands, including their parenting responsibilities (Maybery et al., 2009; Pollak et al., 2008; Reupert & Maybery, 2007). In this regard, professionals working within the family law system need to have knowledge and skills about disability and mental illness that enable them to respond in a supportive manner. For family consultants, this means understanding how to assess parental capacity when a disability or mental illness is present, and for other family law services it means facilitating access and engagement for people who present with higher needs.

Separation and divorce are emotionally challenging for most families, and people coming into contact with the family court and related services may well present as more distressed and confused than they would under normal circumstances. Many parents and families may also be subject to or recovering from family violence and abuse. They may be very anxious, unhappy, irritable or disorganised. This does not mean the parents are mentally unstable, and it does not mean they are not a caring and effective parent. However, they may, at least at that time, fit the criteria for a depressive or anxiety disorder, but it would be inappropriate to assume that this is a permanent state for them.

The APS recommends the following measures to improve accessibility to the family law system for people with disabilities:

- Disability support workers be allowed to attend with their client, and be consulted by the Court or family consultants, with the client's consent.
- To lower anxiety, advocates be allowed to familiarise their client with the Court.
- Improved processes to enhance access to the family law system for people with disabilities access (e.g., services for hearing impaired clients, signage and information available in braille).
- For intellectually challenged clients, an advocate or guardian be made available to instruct their legal representative.
- For physically challenged clients, access be improved to all family court and related service premises.
- For clients with mental health issues, a mental health support worker be made available for support and containment. There could be an option for the client to present to the court in ways other than face-to-face (e.g., in writing or videoconference).

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

The APS concurs with the Issues Paper that while there has been a recent focus on marriage equality and related issues of inclusion for LGBTIQ+ families, the current family law system is still largely set up to meet the needs of heterosexual couples and their families. While it might not intentionally discriminate against LGBTIQ+ clients, it certainly could be strengthened to recognise more diverse family structures and better meet their needs. Reforming the Family Law Act to better reflect diverse family structures is commensurate with the recent changes to various Australian laws pertaining to the rights of LGBTIQ+ people and communities in relation to such issues as adoption and marriage equality.

LGBTIQ+ or rainbow families are diverse in structure and form. They may include one, two, three, four or more LGBTIQ+ parents, co-parents or carers who have the responsibility for the care of children in their family. Family forms can include step parented families, separated families, children who are fostered, in permanent care or adopted, children conceived through assisted reproductive technology, children living across two or more primary homes as part of their parenting arrangement, and families with donors and/or surrogates who helped create them (Rainbow Families Victoria, 2018).

Improving the responsiveness of the family law system for LGBTIQ+ people and families could begin with change to the definition of the word 'family' in family law. Currently, there is a preference to use the term 'couple' when referring to parents or 'both' parents which does not include the diverse family forms within rainbow families and communities.

Many LGBTIQ+ people are apprehensive about family law system and fear that their relationship, sexuality, gender diversity, family form or structure will not be understood at all stages of engagement – from counselling, to dispute resolution, by the independent children's lawyer to a family court judge. Services across the family law system need to be considerate, sensitive and responsive to the needs of children in rainbow families who identify with the LGBTIQ+ community; especially in relation to parenting arrangements or the language used in court proceedings. For example, using gender non-specific terms and avoiding assumptions such as 'both parents' or 'couples' which may not reflect the uniqueness of some rainbow family forms (Rainbow Families Victoria, 2018).

There is a need for the family law system to better understand the scope and circumstances in which rainbow families experience family violence in Australia. There is some evidence that mainstream services may not meet the needs of this population yet support services that specifically target LGBTIQ+ people are limited in number, often poorly resourced and confined to inner city locations.

There is also a need to better respond to young LGBTIQ+ people who come in contact with the family law system. We refer the ALRC to the work of the [Australian Research Centre in Sex, Health and Society](#) to better understand and respond to issues for young people who may experience violence from family members as a result of their sexuality or gender

identity.

The APS has developed a number of [resources](#) relating to LGBTIQ+ parenting and family issues. Of particular relevance to the family law system is the 2008 [Review Paper on Lesbian, gay, bisexual and transgender parented families](#).

**Recommendation 6:** *The APS recommends specific changes to the Family Law Act (including definition of family and using more gender-neutral terminology) to improve the responsiveness of the family law system for LGBTIQ+ people and families.*

**Recommendation 7:** *The APS recommends further engagement with services which support LGBTIQ+ communities to develop resources and training to assist all areas of the family law system to better understand and be inclusive of all families who come in contact with the system.*

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

People living in regional, rural and remote communities face greater barriers to accessing services compared with their metropolitan counterparts. This includes reduced access to the family law system. Geographical isolation means there are limited family law services, legal services and family violence services for people living in regional, rural and remote Australia. As mentioned in the Issues Paper, there are also problems with the affordability of such services for rural and remote Australians, particularly given the added burden of travel. However, with the development of a rural model for the family law system and the use of technology, barriers to accessing and engaging with the family law system can be improved. Some suggestions are:

- Using technology to facilitate case conferences, court appearances, lodging applications, accessing family violence assistance and all other services available to Australians living in the city. For example, videoconferencing with lawyers, family law system navigators, and the court could reduce the burden associated with travel to services in more populated regions.
- Adopting a 'panel' approach that includes psychologists, judicial officers and family violence workers who could travel as a team and/or meet via videoconference to service more isolated regions to facilitate access.
- Enabling residents of regional, rural and remote areas to access services, including family assessment, using secure videoconferencing technology.
- Establishing more regional (or circuit) family courts with the same provisions for security and privacy as are available in major cities.
- Improving family court outreach to rural and remote areas targeted at people involved in a family law matters; this could include the delivery of seminars in the community prior to court hearings to improve community understanding of family court processes.

**Recommendation 8:** *The APS recommends the development of a rural model for the family law system that better incorporates the use of technology and mobile panels.*

**Question 10: What changes could be made to the family law system, to the provision of legal services and private reports, to reduce the cost to resolving family disputes?**

The preparation of expert reports for the family court is one of the most complex areas of practice for psychologists, requiring high levels of expertise and a diverse array of skills and knowledge. Psychologists who specialise in family law assessment need to have expertise in forensic assessment of families, a detailed knowledge of matters that impact on family law proceedings, including child development and family violence, skills in placing information in context, a knowledge of family law, and some understanding of the broader legal context (Neoh, Papaleo & Kennedy, 2010). This is particularly true when families present with complex issues surrounding mental health, violence, or substance use.

Family assessments for the family court have the potential to substantially influence the ongoing wellbeing of families, parents and children and thus must be done by highly skilled and experienced clinicians and appropriately remunerated to ensure experienced professionals remain in the system. It has been recommended that consideration be given to a fee schedule to regulate the costs of family reports and other expert witnesses. The APS does not support this recommendation. There is a real risk that by capping the cost of reports or developing a fee schedule, professionals with high levels of specialised expertise in this area will withdraw their services. The courts rely heavily on the information contained in such reports in their deliberations. Capping fees would serve as a disincentive to appropriately qualified and experienced psychologists providing services, thus contributing to a reduction in the quality of assessments, as has been the case in other jurisdictions. It would be preferable to have the court subsidise these costs at an earlier stage of the process, to support judicial decision making, defuse conflict where possible, and support a collaborative arrangement/resolution.

Complex cases should be triaged to identify the type of assessment that may assist the court. A rubric or decision tree could be developed for the Judiciary whereby the presence of specific issues and combinations of issues within a matter could trigger a report and provide guidance on the type of assessment required. For example, based on the particulars of the case, a broad comprehensive assessment might be ordered, or a more focused single/limited-issue assessment (e.g., a risk assessment). Implementing such a decision tree is likely to be a cost effective approach. A single/limited issues report could make it easier for the Judiciary to determine whether an Expert Report is required or whether a report through the Family Court's Child Dispute Services will cover the issues.

Implementing the family assessment report process earlier in proceedings would enable timely intervention, such as providing psychoeducation to support a collaborative process and dispel myths, encouraging dispute resolution outside of a court hearing, assessing the developmental needs of children, and identifying any more complex issues that require addressing prior to determination of parenting and other orders. Calling for expert reports earlier in the proceedings (rather than at final hearing stage) may enable areas of conflict

and risk to be foregrounded so that a more targeted and cost effective response is deliverable. Earlier intervention following on from specific findings in such reports could reduce the length of proceedings, reduce disputes occurring as a consequence of a lengthy process.

**Recommendation 9:** *The APS acknowledges the significant costs associated with seeking outcomes via the family law system, particularly where publicly funded legal services are not available, and recommends measures to reduce costs, where possible, while duly acknowledging and remunerating relevant expertise. The APS does not support capped pricing.*

**Question 13: What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?**

The APS concurs with the ALRC Issues Paper that the court environment is an integral part of facilitating access to justice in the family law area. Given the incidence of family violence in family law cases and the likelihood of violence to escalate at the point of separation, and of the court system being used as part of the process of control and coercion, there is a need to ensure the courts are safe and accessible and do not pose a threat of further harm for victims of family violence and their children.

The APS concur with the Royal Commission into Family Violence (Victoria)'s findings that recommended:

- Safe waiting areas and rooms for co-located service providers.
- Accessibility for people with disability.
- Proper security staffing and equipment.
- Private interview rooms for use by registrars and service providers.
- Remote witness facilities to allow witnesses to give evidence off-site and from court-based interview rooms.
- Adequate facilities for children and child-friendly courts.
- Multi-lingual and multi-format signage, and
- Use of pre-existing local facilities and structures to accommodate proceedings or associated aspects of court business (for example, for use as safe waiting rooms).

**Recommendation 10:** *Given the importance of the court environment to facilitating access to justice in the family law area, there is a need to ensure that all premises are safe and accessible and do not pose further risk of harm for victims of family violence and their children.*

**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?**

The APS agrees with the critique outlined in paragraph 130 of the Issues Paper that there are currently issues in the family law that lengthen the process of resolution, and cause complexity and confusion that contributes to conflict escalation and may not be effective in protecting children from harm or considering their views. An example is the presumption of equal shared parental responsibility as opposed to parental responsibility that exists outside of parenting orders and the misinterpretation that equal shared parental responsibility equates to a right to equal time.

The APS Professional Advisory Service, which is designed to assist psychologists to navigate ethical and legal practice concerns, often receives calls about the ethical and legal issues surrounding seeing a child where the parents have separated. For the most part, confusion arises as to who has parental responsibility, whether the other parent needs to consent to psychological services, who has access to the records, and whether the provision of psychological services is considered a long term health issue to be decided jointly where there are parenting orders. This remains a very difficult issue for psychologists to navigate and sometimes means children cannot access much needed psychological care.

The way parental responsibility is managed, in practice and in the law, is sometimes not in the child's best interests, particularly when the issues are complex and/or there are high levels of conflict. There is little information about how parents in conflict manage their parental responsibilities where no orders are in place and often children are exposed to conflict through this mechanism, with the only resolution being to wait until orders are made by the court. For example, one parent can exercise parental responsibility without the other parent's agreement and this can exacerbate conflict with children inevitably caught in between. On the other hand, where there are complex issues, it is often prudent for children to receive psychological services to assist their adaptation and coping with their parents' separation, and in cases of family violence there may be a need to manage safety risks and to assist the child to recover from exposure to violence. In the latter case, it is likely that the parent who uses violence will object to the service. These situations are frequently raised by psychologists to the APS Professional Advisory Service as the clinician tries to find ways to ensure the child is able to obtain psychological support.

There is currently considerable interest in shared-time parenting as a way of supposedly ensuring the best outcomes for children. However, there is a diversity of findings for children experiencing shared-time parenting. The research is plagued by differences in definitions, study designs, sources of information, and sampling strategies (Sanson & McIntosh, 2018), making it difficult to identify key findings. Smyth, McIntosh, Emery and Howarth (2016) reviewed all peer-reviewed outcome studies of post-separation shared-time arrangements since 2000 and concluded that it remains unclear whether and in what ways children fare better in shared-time parenting. While some research has pointed to benefits, these benefits appear to be inextricably linked to the developmental needs of the child, the capacity of the parents to respond to their needs, the level of conflict between parents and the distribution and management of logistics and resources between homes (Sanson & McIntosh, 2018; Emery, 2006). However, shared parenting arrangements are relatively new and longitudinal social science research is needed to provide insights in such a contested field of study.

More instructive studies are those that look at the factors which predict child wellbeing. In general, the factors predicting child wellbeing are the same for children in separated families and those in stable families. The presence of inter-parent conflict and family violence reduces child wellbeing, while responsive, warm, consistent and authoritative parenting is associated with improved outcomes for children (Sanson & McIntosh, 2018). Additionally, where there is high conflict and family violence, the capacity of parents to enact shared time increases the risk of exacerbating conflict and provides opportunities for those who use violence to continue to intimidate and cause fear to the other parent (Cashmore et al, 2010).

The APS recently developed a *Position Statement on Child Wellbeing after Parental Separation* which was based on a commissioned literature review (Sanson & McIntosh, 2018). It is attached to this submission and provides further evidence-based information on this issue.

There are several ways in which APS psychologists have suggested that the law could be amended to ensure the child's best interests are paramount and produce better outcomes for children:

- Remove the presumption of equal shared parental responsibility and the language of equal shared time from Part VII of the Act.
- Amend the best interest of the child checklist to more clearly prioritise the protection of children from physical or psychological harm, to provide a separate dedicated pathway for decision making in cases where there is high conflict and/or where there has been family violence.
- Take steps to ensure that all parties to a dispute involving children are clear about the way the family law system measures what is in a child's best interest.
- Consider the child's developmental needs in relation to the parents' responsibility and capacity to be responsive to these needs.
- Stress the importance of parents demonstrating capacity to protect their child from psychological and physical harm, including from parental conflict, given there is clear evidence of the long term harmful impact that exposure to these behaviours has on children.
- A "meaningful relationship" is not well defined and should be refined or removed from the law. The concept of a meaningful relationship can take many forms and the law currently only requires the assessment of a meaningful relationship with biological parents. Written in this way, the current law does not account for meaningful relationships in diverse family structures such as stepparents, when there is a surrogacy arrangement, open adoption, kinship arrangements, families/parenting where the culture drives the structure (as in many Indigenous family constellations). Given the diversity of families in Australia and the potential for meaningful relationships for children with other carers, it is prudent to consider all attachments that are salient for the child.
- That the term "both" parents be changed to allow for diverse family structures, as described above. The restriction to "both" parents can mean that where there are more than two parents/parental figures, the fracture of those relationships means children suffer unnecessary loss.
- Section (2A) 3 should encompass other significant caring relationships which

may include close family relationships with stepparents, aunts, uncles, cousins and so on where these relationships include significant parenting responsibilities to the child.

- Given the substantive value of the Family Law Act, it is appropriate that the Law be clear about the role of parents/significant carers in supporting the healthy development of children in the context of parental separation.
- Establish a multidisciplinary panel of relevant professionals to advise parties about the best interest of children and to make recommendations regarding interim parenting orders in a timely manner.

**Recommendation 11:** *The APS recommends changes to the Family Law Act to better protect victims of family violence and ensure the safety and wellbeing of children. In particular, the APS supports removing the presumption of equal shared parental responsibility and the language of equal shared time from Part VII and amending the best interests of the child checklist to more clearly prioritise the protection of children from physical or psychological harm.*

**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?**

The APS understands family violence is defined in the Family Law Act as “violent, threatening or other behaviour by a person that coerces or controls a member of that person’s family... or causes that person to be fearful”. The definition could be strengthened by including reference to *psychological* and *emotional* abuse which are both frequently part of family violence. Recognition of the potential for misuse of family law processes as a form of abuse within a pattern of family violence should also be included.

Along with changes in the formal definition of family violence, it is imperative that all those involved in the family law system understand these changes, and more broadly, the nature and dynamics of family violence. For example, the control tactics used by perpetrators frequently involve using children as a way of further punishing and harming the primary victim. This strategy may be a direct attack, coercing children to insult the other parent, or undermining the parental authority through criticism and actions (Humphries, 2007). Such tactics have obvious implications for post-separation parenting and custody disputes.

It is noteworthy that while in a majority of cases, violence de-escalates over time, for 18.5% of families there is continued fear post separation (Kaspiew, 2009). Thus, the family law system plays an important role is not just addressing justice, but in ensuring on-going safety. While a history of abuse and family violence does not always mean that a cooperative relationship post separation is impossible, due consideration needs to be given to the risk of family violence recurring during the post-separation period and the role the law can play in reducing conflict and the time taken to resolve disputes (Kaspiew, 2015).

Contact with parents who engage in family violence behaviours can be harmful, compromise the safety of children and the family, and contribute to poor wellbeing and developmental outcomes. This is particularly problematic when shared care arrangements



are in place as it increases opportunities to re-instigate abusive behaviours (Cashmore et al, 2010).

There is a need to prioritise safety early on in the family law process. For example, in other systems (e.g., Boston) custody and child support are organised at the point of application for an intervention order in the context of family violence. This means safety is prioritised from the start and the best interest of the child are considered early in the process.

There is a need to improve the responsiveness of the courts by addressing long waiting periods, following up on relevant evidence of allegations of abuse, increasing the expertise in family violence support and interventions, and developing procedures for improving the safety of children and their families while the family court matter is being resolved. At all levels of the family law system there needs to be appropriate screening for family violence to ensure the detection of harm and provide interventions aimed to keep children and families safe. This includes assessing for past and current family violence and asking about the level of fear experienced by parent or carer exposed to these behaviours as this has been found to be an indicator of future incidents/harm (Hanson et al., 2007).

Where screening measures indicate past or current family violence, these cases require thorough assessment to ascertain appropriate earlier intervention pathways to ensure the safety of the family and children. Additionally, referral pathways and investigators require a thorough understanding of the dynamics of family violence and the variety of ways it can be enacted, including manipulative behaviors such as misuse of family court processes. Optimally, this assessment process should consider the actions of a parent or family member has taken to protect children from exposure to family violence. This is especially important in order to contextualise efforts by parents to protect their children so that their actions are not misconstrued as alienation.

**Recommendation 12:** *The APS recommends that family court processes and outcomes be strengthened to better incorporate the voices and experiences of children and protect their safety. Children should not be required or permitted by the Court to be in the unsupervised care of parents who have exposed them to violence and continue to pose a safety risk.*

**Recommendation 13:** *The APS supports ensuring that all professionals involved in the justice system, including psychologists, are informed about the nature and consequences of family violence, and are sufficiently skilled at identifying family violence and working with parents to prioritise protecting children from harm.*

**Recommendation 14:** *The APS concurs with the ALRC Issues Paper that the current definition of family violence needs to be strengthened. In particular, the definition should include reference to psychological and emotional abuse. Recognition of misuse of family law processes as a form of abuse and commonly used strategy within a pattern of family violence should also be included.*

## **Resolution and adjudication processes**

***Question 20 What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?***

***Question 21 Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?***

The APS agrees that improved pathways to resolving disputes in a more affordable and timely manner should form part of the reformed family law system. As discussed in the Issues Paper, there are significant detrimental impacts on families and particularly children when conflict resolution processes are lengthy. An increase in the availability of procedures and processes that provide expedient outcomes is likely to benefit all parties, particularly children. It has the potential to reduce conflict earlier and disrupt the forming of adversarial positions that exacerbate conflict in families and reduce the growing cost of litigating disputes. This is especially relevant in children's matters where, as the level of conflict increases, so too does the risk of harm from conflict between significant adults and other family members.

As identified elsewhere, the cost of legal support can be a huge financial burden and where proceedings are drawn out the whole process can leave the parties feeling disempowered. Where there is a disparity in financial circumstances, the risk of systemic abuse is particularly obvious.

There could be greater use of educative processes to note what is agreed and focus on the points of disagreement later, in a problem-solving manner based on principles of conflict resolution. There is also scope for dispute resolution to be conducted online, however measures would need to be put in place to prevent people using the system to coerce or cause distress to another party.

The integration of a triage system early in the proceedings to assist parents to resolve disputes would likely facilitate better outcomes and timely resolutions. This could include practical assistance with drafting parenting orders and earlier intervention where family violence is present. Coupled with a variety of alternative dispute resolution pathways, a triage system would increase the possibility of resolving conflict before it escalates to the point where court intervention is required. Currently, participation in dispute resolution is voluntary and what constitutes genuine effort to resolve conflict is judged by the FDR practitioners themselves, with little recourse for a party where the other party is misusing the process. Alternative dispute resolution options, including legally assisted mediation and arbitration, may assist parties to resolve issues earlier. However, the APS recognises that cases involving allegations of family violence may not be amenable to such processes and require their own pathway within a triage system to properly assess risk and maximise safety.

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

There is a need for earlier identification of family violence which could be achieved by the development of an appropriate evidence-based risk assessment tool. At present, there is no validated, evidence-based risk assessment tool that can predict the level of risk associated with family violence. It is important to understand the difference between *screening* for risk factors commonly associated with the presence of family violence (for which screening tools exist) and *predicting* level of risk: risk screening is not a valid tool for assessing whether a person is at risk of using violence towards their family, but it can operate within the family law system to identify *the presence of behaviours that are harmful*. The APS suggests that risk screening be the appropriate term used among professionals in the sector to ensure a mutual understanding of family violence assessment and to also distinguish between evidence-based prediction of risk and screening for factors known to be associated with risk.

While it is preferable that screening tools be nationally consistent, there are likely to be cultural nuances within Australia that require different tools to be used with different populations. For example, harm caused by interrupting connection to land might be an important factor among Aboriginal people but may not represent harm for individuals from non-Aboriginal cultural backgrounds. Further, the APS contends that risk screening be conducted upon entry into the family law system by multiple means and is not confined to when applications are filed. All services involved with the family law system need to be screening for the presence of family violence to ensure that families affected by violence are appropriately referred to family violence services.

In addition to screening measures, there is also a need for the development of a national and comprehensive professional development program for judicial officers and other professionals associated within the family law system regarding family violence. As per the Parliament of Australia report (2017), the APS recommends the content of such training include: the nature and dynamics of family violence, working with vulnerable clients, cultural competency, trauma informed care/practice, family law, and 'The Safe and Together Model' for understanding the patterns of abuse and impact of family violence on children.

In addition, the adversarial nature of court processes is not supportive for most users of the family system but in particular, those who have or are experiencing family violence, with some noting that this approach actually mirrors the dynamic of an abusive relationship and can re-traumatise those who have experienced family violence (Family and Relationship Services Australia, 2017).

An approach that is trauma-informed, which reduces the likelihood of re-traumatisation of those who have experienced family violence is urgently needed. As the ALRC Issues Paper notes, this includes the way evidence is given and orders not allowing cross-examination of witnesses by the user of violence where family violence has been identified. The APS also supports the recommendation of embedding specialist family violence workers within the family courts to provide support for families exposed to family violence. A more unified family law system would see both federal and state authorities reduce the burden on families exposed to violence by either moving family violence and child protection proceedings to the family court jurisdiction, or by requiring all family violence and child protection information to be communicated through the secure and safe sharing of

information to the family court for their consideration where there is a family court matter.

In lieu of a unified system, Family Advocacy and Support Services in family courts across Australia should be established to assist families moving between the federal family law system and the state family violence and child protection systems. Integrating a duty lawyer and family violence support services in family law court registries shows promise (Parliament of Australia, 2017) and the Neighbourhood Justice Centre (NJC) in Collingwood, Melbourne has co-located support and welfare agencies with the Court which has enabled the development of innovative programs to support court users through a problem-solving approach that employs therapeutic techniques to address the underlying social problems that lead to people being in court. While it has no jurisdiction to hear Family Law Act matters, the APS understands those who have experienced family violence have been assisted through this system (Fitzroy Legal Service, 2018).

The APS recommend that in light of positive evaluations and evidence from social science supporting these programs, consideration be given to expanding this service model to the family law system. One way of achieving this would be through a network of Family Justice Centres to link dispute resolution, violence prevention, support and related services within one location. This should include consideration of how the family law, family violence and child protection systems can be accessible for clients in one place, rather than as is currently the case where each has separate courts, procedures and requirements.

The APS recommends the use of a panel to assist the judiciary in making decision about children and individuals exposed to or who use family violence. The panel would consist of psychologists with expertise in child development, mental health and family violence, as well as other specialists in child protection, family violence and family law, and would be employed or contracted by the court to advice on cases. These panels could be particularly important in rural communities.

**Recommendation 15:** *The APS recommends unifying the family court system to link all matters pertaining to the wellbeing of a family, including child protection and family violence matters where there is a related family law matter.*

**Recommendation 16:** *Examining the viability of a multidisciplinary panel approach consisting of psychologists with expertise in child development, mental health, and family violence as well as other specialists in child protection, family violence and family law, particularly in rural communities, as well as further training for Family Consultants in the dynamics of family violence.*

**Recommendation 17:** *The APS agrees that improved pathways to resolving disputes in a more affordable and timely manner should form part of the reformed family law system. The APS recognises that the design of improved family dispute resolution (FDR) services within the family law is a matter for the legal profession to devise; however, due consideration should be given to the social science evidence when designing FDR options to ensure they are fit for purpose.*

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

While mediation and dispute resolution have not previously been considered safe or appropriate options for families experiencing family violence, more recent experience suggests that a 'well-supported and safe mediation process, with expert lawyers and/or mediators' who have a sound understanding of family violence and family law 'can be an empowering process for a victim' (Parliament of Australia, 2017). While the option of mediation is usually bypassed in cases where there is family violence, this means that people exposed to violence do not have the option to pursue alternative means of dispute resolution. This is particularly pertinent for people who have been exposed to violence as they may be further disempowered and disadvantaged if the choice is not open to them.

**Question 25 How should the family law system address misuse of process as a form of abuse in family law matters?**

There is a wider understanding that misuse of the family law processes constitutes a problem for families and the court as was identified in the Issues Paper. Not only does misuse and abuse of family proceedings constitute a continuation of controlling behaviours, it may also be an extension of family violence patterns. This misuse and abuse of processes not only exposes family members to further harm, but is a waste of limited family court resources through lengthy and costly delays for individuals, unnecessary court time and administrative burden within the family law system.

As described by APS members consulted for this submission:

- Patterns of abuse can be facilitated using family court processes with members reporting that some clients have admitted that their intention is to cause further harm and prevent their ex-partner from moving on.
- This abuse can include behaviours such as refusing to attend meetings, rescheduling mediation sessions, refusing to sign documents, increasing the time the other person has off work to attend to the matter, additional costs for legal representation and drawing out the legal process. Some psychologists have observed that this pattern is often reflective of abuse that occurred prior to the separation.
- This abuse can have significant impacts on the target by causing them psychological distress and exacerbating physical and mental ill-health issues.
- The time spent on dealing with these matters puts significant pressure on targets and can impact on the time available to parent their children.

Where the legal process can be drawn out over a long period, sometimes years, the ongoing stress and uncertainty has a major negative impact, including on children of the relationship where parenting arrangements are uncertain and children can feel caught between their parents and are at an increased risk of being exposed to detrimental conflict. Even for adult children, the experience of parents' ongoing conflict and pressure for divided loyalties can impact significantly, including on their own children.

Financial abuse can occur when matters are drawn out over a long period, especially

where there is a disparity in the financial situation of the parties. Disadvantaged parties can end up bankrupt and facing poverty and homelessness.

The APS agrees that individuals who use violence should not be permitted to cross examine people exposed to their violence as this can be an extension of the abuse.

A highly skilled multidisciplinary panel approach could be effective in identifying this misuse of process and family consultants could be further trained in the dynamics of family violence to be more clearly able to name process misuse when they have formed that opinion.

**Recommendation 18:** *The APS recommends that the court system to be far more responsive and quick to resolve parenting and financial matters, particularly where there is family violence and financial and/or psychological hardship. A highly skilled multidisciplinary panel approach could be adopted to identify abuse, particularly abuse of processes, and inform the judiciary accordingly.*

**Recommendation 19:** *All professionals who are part of the family law system need training in how users of violence can perpetuate abuse through the misuse of family law processes. In particular the training and accreditation of family consultants could include understanding process misuse and identifying and responding within the family law system when family violence is detected or suspected.*

**Recommendation 20:** *The APS considers that integration and collaboration within the family law system is in need of major reform. As discussed throughout this submission there is a need for interdisciplinary collaboration, multidisciplinary approaches to family law matters and a unified family law system designed to meet the needs of all Australian families who are experiencing family breakdown, family violence, issues regarding child protection and other family law-related matters.*

The APS is particularly concerned about the misuse of subpoenas of confidential psychological therapy records or files, which has become a common event in court proceedings and could be considered a form of abuse. For example, some litigants ask their lawyer to subpoena therapy notes so they can obtain access to confidential material they can then use to continue to intimidate their ex-partner. Courts can be asked to resist issuing subpoenas to obtain the confidential clinical notes of psychologists unless significant reasons are advanced. In many cases, it would be sufficient to request a treatment report, and to pay the reasonable cost of preparing such a report.

Consideration should also be given to a system of 'reportable therapy' which would emphasise provision of treatment reports. This would encourage parties to participate in therapy, protect parties from unnecessary subpoenas, and ensure that Courts are informed about therapies provided to participants. Reportable therapy should not be used to stigmatise a participant nor undermine the therapeutic relationship between therapist and client. It is important that treatment reports describe therapy that has been provided, as this distinguishes a treatment report from a character report. A treatment report describes therapies that have been applied whereas a character reports simply affirms that

a person is of good character. This distinction is not always understood by judicial officers.

**Recommendation 21:** *The ALRC work with the APS to develop guidelines as to when therapeutic records can be subpoenaed for family court matters, and to identify mechanisms for the courts to consider the possible consequences of compliance with the subpoena, including the impact on the family or children involved*

**Recommendation 22:** *It is recommended that consideration be given to a system of reportable therapy which would emphasise provision of treatment reports.*

**Question 26** *In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?*

**Question 28** *Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?*

**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?*

**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?*

These matters have been covered in earlier sections of this submission.

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

Children should not be directly involved in family law decision-making unless a family consultant has worked with the family to determine any risk of violence, complex needs, and the developmental needs of the children. Children who are not yet mature minors should not be placed in any position where they are asked to choose between parents. Rather consultation with children should be around developmental needs, the presence of the parents, the strengths and vulnerabilities of each parent in their relationship and responsibility towards the child, and also the presence of siblings and the impact of time away from siblings and other substantial people in their life.

## **Integration and collaboration**

The APS considers integration and collaboration within the family law system is in need of major reform. As discussed throughout this submission, there is a need for

interdisciplinary collaboration, multidisciplinary approaches to family law matters, and a unified family law system designed to meet the needs of all Australian families who are experiencing family breakdown, issues regarding child protection and other children's matters, and the family violence system. APS members have provided feedback about how integration can occur from the perspective of enhancing consumer experiences and improving the outcomes for families and children in the short, medium and long term. Integral in this system is the need for monitoring, benchmarking and designing a system that is informed by social science evidence.

A unified family law system provides a single-entry point for the resolution of matters affecting children and families. In a similar manner to problem solving approach adopted in specialist drug courts in Australia, consolidating family law matters in a unified way would allow the process to move from an adversarial system to a system where the process fits the problem (Babb, 2013). It has the potential to encourage a broader understanding by all of both legal and non-legal issues a family faces during the breakdown of relationships and the judicial power to integrate all aspects of a conflict and other matters into one system. In Australia, the separation of the family law system from child protection and family violence systems means that several judicial officers make decisions that do not necessarily integrate well or provide for sufficient transparency about all matters impacting the family. For instance, the family court may be made aware of a family violence intervention order but may not have the details of the behaviours and any breaches that impact on the family and children in a family law dispute.

Adopting a unified system that incorporates an interdisciplinary approach to understanding matters involving a family has the potential to improve the experience of all parties in a family court matter and also enhance decisions in a way that acts in the best interests of children when a parenting matter is involved. Additionally, inter-agency coordination through one family court system has the potential to optimise outcomes for vulnerable children and families with complex needs.

The APS recommends promoting culturally responsive policies and integrated service responses through a unified family law system that adopts a multidisciplinary approach and integrates service responses through cross sector partnerships/initiatives that seek to collaboratively promote family safety and wellbeing and aim to:

- Enhance safety and wellbeing of families with complex needs (who may be experiencing a multiplicity of justice and health-related problems).
- Promote family-focused, strengths-based and culturally responsive service modalities.
- Balance the needs for family safety and wellbeing through trauma-informed care and practice initiatives.
- Strengthen parenting practices and support the preservation of family ties as appropriate and safe.

A unified court would enhance the potential for servicing the needs of children in families with multiple and complex needs, recognizing the importance of developing services for at-risk children and families, and providing comprehensive early intervention strategies (Toumbourou et al, 2017). Given the multiplicity of issues faced by families with complex needs, it is appropriate to consider a family law system able to apply a collective approach



to a complex set of problems with the aim to strengthen the safety and wellbeing of children and families.

## **Children’s experiences and perspectives**

The APS recommends that the Court be better informed of children’s views, concerns and matters affecting their safety and wellbeing given evidence to suggest that decisions are routinely made without any independent information about the views of children or young people (Kaspiew et al, 2015). The involvement of children in court processes is a sensitive matter which requires consideration of safety, developmental stage and family violence/trauma history. APS members have cautioned that there is a risk of children becoming further involved in parental conflict and thus placed at further risk of harm.

There are risks to children of their involvement, including reprisals and/or being included by parties in the conflict. The risks can be managed in part by a suitably qualified professional’s judicious decision about what to report to the parties and/or the Court. Children should not be required to express their views in front of parents who are in dispute over care of them. They need access to appropriately trained psychologists to support this process, if necessary, over more than one session. Children’s views can then be presented in professional reports. These specialists need to provide advice to the courts on children being repeatedly interviewed and use discretion about whether an interview beyond the first one is necessary or advisable.

Children who are of sufficient maturity should have the right to attend Court, however, the option should be made available to them to be present in a private room with remote access to proceedings. They should be well briefed in the potential stress and trauma of being present in the Court room. While children should not be subject to cross-examination, in individual circumstances it may be appropriate for the Judge to speak to the child directly in a private session. There is scope for someone like a child navigator to take the children to tour the court to demystify the processes.

**Recommendation 23:** *The APS recommends the development of further mechanisms that promote the positive participation of children and young people throughout the family law system in ways that ensure their interests and experiences are represented and their safety and wellbeing prioritised.*

## **Professional skills and wellbeing**

The APS received a significant amount of feedback from members regarding the competencies of professionals working within the family law system. In particular, members offered extensive feedback pertaining to the competence of family consultants and report writers. This feedback generally echoes the matters identified in the Issues Paper. In particular, members highlighted the need for all professionals involved in family law matters to have an understanding of:

- The nature of family violence and child abuse, including the ways in which the

family law system can be used to continue abuse.

- Trauma-informed practice at a systems level.
- How to identify and respond appropriately to risk of harm to self or others without exacerbating the issue or placing others at increased risk.
- Awareness of and sensitivity to the range of diversity in Australian society (e.g., CALD, Indigenous, LGBTIQ+, as well as in family structures and relationships)
- Integrated and practical knowledge about the intersection of the family law system with children's court, child protection and family violence systems.
- Conflict resolution.

APS members generally supported the development of accreditation and training to improve the competence of professionals working within the Family Law system. In addition to the accreditation and training suggestions provided in paragraph 283 of the Issues Paper, APS members suggested that:

- The skills of Independent Children's Lawyers (ICLs) in working with and interviewing children be assessed by psychologists skilled in interviewing children. Where the ICL does not have these skills or is developing these skills, that they are accompanied by a professional with the requisite skills and experience.
- The skills of family law professionals could be enhanced to ensure they manage client expectations in relation to conflict resolution rather than exacerbate conflict. In this way early contact with the family law system can facilitate diffusion of conflict rather than exacerbate adversarial positions between parties.
- Training be implemented to foster collaboration between dispute resolution services and external family consultants.
- A multidisciplinary forum be established to promote interdisciplinary sharing of knowledge, issues and evidence that enhance professional practice in this field.
- All family law professionals, including proposed navigators, be trained in conflict resolution skills and be competent in communicating with consumers using these skills.

### **The exacerbation of conflict**

APS members who work extensively in the Family Law system have strongly suggested that there needs to be a professional standards board for family law professionals in relation to practices that exacerbate conflict as well as practices that do not reflect an interdisciplinary approach to family law disputes.

The implementation of a process for the training and accreditation of family consultants and report writers to ensure appropriate consultation and high quality reports was recommended by the APS College of Forensic Psychologists and the APS Psychology and Family Law Interest Group. In addition to such training and accreditation, members recommended that accredited family consultants and report writers commit to professional development and supervision, at a minimum level, to maintain their accreditation status. This training and accreditation would have the benefit of:

- Ensuring specific skills sets and experience commensurate with the complex and multifaceted nature of the family consultant role.

- Decreasing the variability in reports tendered to the Court, thus improving the reliability of the process and subsequent reporting.
- Contributing to the implementation of the Australian Standards of Practice for Family Assessments and Reporting (Family Court of Australia, 2015).
- Ensuring that skills, experience, training and expertise are set at a minimum so appropriately skilled social science professionals are operating in the family law system.

## **Professional wellbeing**

Family law professionals often deal with clients who are distressed or are victims of trauma, observe some of the more difficult and complex impacts on children, and are exposed to traumatic situations vicariously. As such, family law professionals are at risk of role-related stress and its consequences. Stress, vicarious trauma, burnout, and compassion fatigue are just some of the occupational hazards for such workers.

Family law professionals should be supported to engage in self-care through quality supervision, and be able to access compulsory debriefing following complex cases or trauma-related content. The APS is happy to work further with the family law system to develop processes for enhancing the wellbeing of professionals working within the system.

**Recommendation 24:** *Promoting the safety and wellbeing of all professionals and personnel in the family law system needs to include debriefing processes, access to psychological support, and the implementation of trauma-informed principles into all family law systems.*

## **Governance and accountability**

### **Formal complaints system for all professionals**

Following an increase in the rate of family law-related notifications to the Psychology Board of Australia and the reported tendency for parties to a family court proceeding to shop around for an expert who provides a wanted opinion, the Board introduced a policy for the management of notifications about psychologists acting as a single court appointed expert in family law court proceedings (Psychology Board of Australia, 2011). Essentially, AHPRA must not make any decision about a notification until it seeks leave from the relevant court, with the exception of making a finding of 'no further action' in relation to the complaint. However, there are no specific mechanisms within the family law system to handle complaints about experts despite the Court's responsibility for managing court-appointed experts. There is a need for an appropriate collaboration between the professional registration board(s) and the Family Court to ensure transparency of process for the practitioner and reduce the likelihood of complaints when one party does not agree with the contents of a family court report. Additionally, the APS would like to see this complaints mechanism extended beyond court-appointed experts to all psychologists conducting family assessment for the court. It is recommended that complaints are initially screened by a practitioner with family law experience. This is particularly important as these assessments are not completed for individual clients but for the court as the client,

hence the framework is different to most psychological services.

**Recommendation 25:** *It is recommended that the Family Court and the Psychology Board of Australia address weaknesses in the existing complaints processes to reduce the likelihood of complaints against psychologists when one party does not agree with the contents of a family court report.*

**Question 45:** *Should s 121 of the Family Law Act be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?*

While judgements are currently published on the website in a de-identified manner, there remain substantial risks to children when parenting proceedings are published, such as the capacity to identify families when complex matters reveal details, for example, of their school situation. While there may be value in publishing aspects of judgements, further discourse is required to consider the impacts on children and families in the long term. However, there are suggestions that improving the transparency and public understanding of family law matters may be facilitated by allowing the media to publish principles of a case in a factual manner.

Alternatively, the family court website could publish educative articles related to the principles of a composite case to assist with wider understanding about how the family law system and the Act work in practice. APS members have suggested that this educative function could help parties to a case better understand how the law is applied in practice and potentially reduce misunderstandings that exacerbate conflict.

The APS believes that any proposal to allow parties to publish information about their experiences of proceedings would be open to abuse by aggrieved parties seeking to prolong a dispute and/or harass a former partner. The appropriate place for provision of feedback about one's experience of the family law process is via a court-established complaints or appeals process with the power to act on substantiated complaints and make procedural recommendations to improve future proceedings.

**Question 47:** *What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?*

APS members have suggested that public confidence can only be improved when the system is substantially non-adversarial. That is not possible when the most intransigent parties choose to be adversarial and to seek retribution, validation or righting a wrong. Television, films and other media give a perspective to clients that all courts are adversarial. Family law inhabits a different space and is attempting to use the Westminster factual approach to a relational dynamic which is volatile, changeable and where opposing parties can be expected to remain in contact, at least to the extent that are connected through their children. Substantial changes to the family law system are needed to enable a focus on resolving disputes while prioritising safety rather than increasing their adversarial nature.

## **About the Australian Psychological Society**

The Australian Psychological Society (APS) is the national professional organisation for psychologists with more than 24,000 members across Australia. Psychologists are experts in human behaviour and bring experience in understanding crucial components necessary to support people to optimise their function in the community. A key goal of the APS is to actively contribute psychological knowledge for the promotion and enhancement of community wellbeing.

This submission has been developed in consultation with relevant APS member groups, including the College of Forensic Psychologists, the Family Law and Psychology Interest Group and the Women and Psychology Interest Group.

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