

# **SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION**

3 November 2018

## **Introduction**

I write from the perspective of a private practicing psychologist who receives referrals both for clients who are separated parents with a dispute before a Federal Circuit Court and for clients who have contact with the Child Protection Department DCP in South Australia and have hearings before the State Youth Court. I have previously worked for 10 years in the South Australian Adult Mental Health Service in southern Adelaide where one third of registered clients had a significant mental illness and were custodial parents of dependent children. This work has given me extensive experience on child protection topics when one parent has a mental health condition.

There are reports that parental mental health issues are often raised in family court proceedings. There is information that parental mental health conditions including depression and anxiety can have adverse effects on children. The fact that parental mental health conditions can be treated by skilled therapists in ways that minimise adverse effects on children has been acknowledged in the 2009 COAG National Frameworks to Protect Australia's Children, but this information has not been widely disseminated.

One of my concerns is to ensure that revised legislation is applicable to both Commonwealth and State family law courts, and that revised legislation facilitates delivery of psychological therapy for both parents and children.

In my opinion, revised legislation should support the same principles in both Commonwealth and State legislation, and should encourage similar practices and standards in the two jurisdictions that involve separated families and child protection concerns.

This submission draws attention to some topics where practices and standards differ between Federal Courts and State Youth Courts.

Recent changes to the South Australian Child Protection Act are summarised in an appendix.

## Proposals

My submission begins by addressing topic 11 about sharing of information.

### 11. Information Sharing

#### 11-1. Share information between State and Commonwealth services

I support the proposal to share information about individual clients between Commonwealth and State family law services, and to share relevant information with relevant service providers including mental health therapists.

I support the proposal to remove provisions that unnecessarily guarantee privacy and that restrict disclosure of relevant information, including disclosure of expert reports. I believe that universal declarations that expert reports be kept confidential protects experts from scrutiny and reduces their accountability, and that this is not in the best interests of children or of the overall system.

I support the introduction of provisions that explicitly authorise family law agencies to disclose expert reports in appropriate circumstances.

#### Question 11-1. Disclosure of confidential information

There is evidence that mental health issues are often raised in family law proceedings. Some jurisdictions allow parties to obtain the clinical notes of mental health therapists by issuing subpoenas. I recommend that the emphasis on subpoenas be replaced by requests for mental health therapists to provide different types of report.

I recommend that legislation promote a practice where mental health therapists and experts are asked to provide written reports on specified topics so that reports can be disseminated.

I recommend that legislation recognise four types of expert mental health report:

- **Descriptive family reports** as occurs at present, that summarise how a family functions and identifies topics of concern
- **Mental health treatment plans** that describe topics where therapy is planned to be provided by a specified practitioner
- **Mental health treatment reports** that describe treatment that has been provided to individuals or family groups on topics of concern, together with a report of progress made, and recommendations about any adjustments to orders, and
- **Mental health treatment recommendations** that can be provided to services such as children's contact centres that identify behaviours staff are asked to monitor.

#### 11-2. National information sharing framework

I support the proposal to establish a national information sharing framework.

I recommend the removal of provisions that prevent disclosure of relevant information, including disclosure of expert reports. I support the inclusion of provisions that explicitly authorise State agencies to disclose relevant information to Federal courts in appropriate circumstances.

### **Question 11-1. What other information should be shared?**

I support explicit protection of mental health professionals who make disclosures to police about a parent's safety, as occurs when mandatory reports are made about child abuse.

### **Question 11-2. Health records**

I recommend that a national information sharing framework include expert reports provided by mental health treating professionals who are accredited in family law, where treatment reports are relevant to parenting capacity.

### **Question 11-4. If Child Protection services refer to a court for a parenting order what evidence should they provide?**

There is a growing practice for Child Protection services to refer cases to a Federal Court when a ruling is required about ongoing access in cases where alleged risks to children have not been substantiated.

I recommend that referrals by Child Protection services to Federal family courts pass on basic information about the nature of allegations raised with the Child Protection service, together with findings made by the Department for Child Protection DCP.

DCP should be asked to pass on a summary of information about the nature of a notification, and findings from a DCP investigation that is described in a codified manner that is easily collated.

### **Question 11-5. Information shared from Family Hubs**

I propose that a Family Hub share information about the number of services provided to each family member and the broad nature of services.

I recommend that mental health therapists be encouraged to provide summary treatment plans that identify topics of concern that are planned or provided.

I recommend that basic information in a treatment plan be viewed as administrative information and that client consent not be required to pass on this administrative information. I recommend that more individualised treatment reports be considered confidential and require consent of clients before disclosure.

I recommend that basic administrative information in a treatment plan be widely available to relevant parties to facilitate coordination of services.

I recommend that different types of mental health information be distinguished and distributed differently:

- that descriptive family reports be available to interested parties including therapists
- that mental health treatment plans be available to practitioners who provide services to facilitate collaboration and to minimise duplication of services
- that mental health treatment reports be provided to each parent and to Court
- that mental health treatment recommendations be provided to Contact Centres for their guidance and implementation.

I recommend that mental health service providers be authorised to provide written reports on request, and to give verbal evidence to a family court if necessary.

## 2 – Education, Awareness and Information

### 2-1.

I recommend that a national education system also emphasise links between family law matters and mental health conditions. This information could include that:

- family law disputes are stressful for all participants and can accentuate poor coping methods and mental health conditions
- poor coping methods by parents have serious adverse effects on children, and
- that mental health conditions are treatable by skilled mental health therapists.

## 3 – Simpler and Clearer Legislation

### 3-4. Amend objects and principles

I support the proposal to amend the wording in legislation to clarify that the paramount consideration is to promote and advance both the child's safety and the best interests of the child.

I support the proposition that children and their carers not be exposed to conditions where they are likely to encounter significant abuse or family violence. I consider this requires an assessment that is provided in a family report, where the assessment might be updated in a subsequent mental health treatment report.

The aim of legislation is for children to maintain a relationship with both parents and other significant people under conditions that do not expose a child or carer to significant abuse or to harmful levels of ongoing conflict. Family reports can provide a broad screen about risk issues. Mental health treatment reports can provide updates about changes that have been achieved from therapy to minimise risks to children and carers, together with precautions to take.

It is important for legislation to distinguish two levels of harm for children:

- an *immediate risk of substantial harm* that warrants immediate removal of a child from the care of their parent, and
- a risk in a vulnerable family where *ongoing exposure of a child to a hazardous practice introduces a risk of cumulative harm*. Vulnerable families benefit from mental health treatment that changes hazardous practices and reduces risk to a child, and this treatment can be provided while a family is intact.

Treatment reports can provide recommendations about the amount of contact and conditions for contact with a parent who has in the past exposed a child to hazardous practices that produce cumulative harm.

There appear to be different standards between Youth Courts and Federal Courts on the topic of levels of harm. Some DCP staff appear to use their power to remove children from the care of their parents based on a risk of cumulative harm rather than immediate substantial harm. In contrast

Federal Courts appear more likely to adjust the time a child spends with each parent on the basis of each parents' capacity to protect their child from harm.

I recommend that legislation introduce a clear distinction between harm that is immediate and substantial, and a risk of cumulative harm because a parent uses a hazardous practice.

### **3-5. Considerations**

I support the proposal that amendments be introduced to legislation so that relevant views of a child are heard by Court.

I draw attention to five issues:

- a. Psychological perspective on children's capacity to decide
- b. Introduce a 3-step framework that encourages children to make decisions
- c. Topics where children want to express preference and make decisions
- d. A psychological model to assess decision making capacity of children
- e. Practices by child protection workers

#### **a - Psychological perspective on children's capacity to decide**

I draw attention to a psychological perspective that:

- children under the age of about 6-7 years are likely to become distressed if they are asked to take responsibility for decisions such as how much time they spend with each parent, and they require a protective approach
- children aged about 8-11 years want to participate and for their views to be heard, in a participatory phase where support is provided, and
- many children aged over 12 years want to make decisions about selected topics that directly affect them.

#### **b - Introduce a 3-step framework that encourages children to make decisions**

The legal system has traditionally used a 2-step framework to analyse capacity of both children and adults to make decisions. A person is considered either capable and makes their own decisions, or a person is impaired and authority to make decisions is delegated to a substitute decision maker or a guardian.

Psychological research indicates that children learn to make decisions by passing through an intermediary phase where they want to be informed about topics and to participate in making decisions that impact on them. Children in the participatory phase want to be authorised and trusted to make decisions and to make autonomous decisions on some topics that are within their capacity.

Legislation can be revised to introduce a third option that encourages development of decision making skills in children.

The three steps can be called:

- protected phase
- participatory phase or 'facilitated / supported decision making' and
- delegated decision making on selected topics that impact on a child.

### **c - Topics where children want to express preferences and make decisions**

Older children often want to express preferences and to make choice on the following family topics:

- time they spend with each parent
- time they spend with friends while in the care of one parent
- extra-curricula activities that occur while a child is in the care of both parents and that require cooperation from both parents
- whether siblings always remain together or whether a child spends some time alone with a parent
- what safety skills a child is ready and willing to learn.

### **d - A psychological model to assess decision making capacity of children**

Psychological models are available that can be used to assess the capacity of children to make decisions about family topics. One psychological model emphasises the capacity of a child to understand information, while a second model assesses a child's level of emotional maturity to take responsibility for making a decision.

A 5 step psychological model that can be used to assess a child's ability to understand information relevant to a decision asks a child to:

- describe a topic or issue that requires a decision
- identify at least two viable options or alternative ways to manage an issue
- predict likely outcomes of selecting each option, including both benefits and disadvantages in both the short term and long term
- evaluate and select one option as meeting their own preferences, and
- communicate their choice, giving reasons for their preference.

A child's emotional maturity to take responsibility for making a decision rather than to select an option to please their parent, or to select the first option offered, can be assessed by examining whether a child is able to:

- calmly describe information relevant to each component in understanding a choice using the steps required to understand a choice problem as outlined above
- discuss each component calmly without displaying significant anxiety or distress
- clearly distinguish their own opinion, desire and preference from the preferences of each parent, and
- distinguish natural and logical outcomes from selecting each option from artificial inducements that might be suggested by a person who wants to manipulate their wishes.

### **e - Practices by child protection workers**

There are examples where Child Protection staff submit unchallenged reports to a Youth Court that children as young as 7 and 8 years are able to make their own decisions about time they spend with their birth parent, and then recommend that children not spend time with a birth parent based on a child's wish. Some DCP staff make recommendations that contact between a birth parent and child be minimised based on an opinion expressed by a young child. Some DCP staff submit that a child spending time with their birth parent undermines the child's attachment to an appointed carer and leads to separation anxiety, and propose that a child's time with their birth parent be severely restricted to short visits.

Another situation now arises where a foster parent can ask for responsibility to make decisions on behalf of a fostered child, and then the foster parent objects to the child spending time with a birth parent because the child shows signs of separation anxiety following a contact. Therapists regularly assist birth parents to manage separation anxiety to maintain a relationship between a child and both birth parents. The Department for Child Protection could implement a similar arrangement where children who experience separation anxiety are provided by therapy, but this practice does not appear to be emphasised by many child protection workers. Where a Federal Court might recommend that two birth parents collaborate and co-parent to manage separation anxiety in their child at handovers, the practice of encouraging therapy for separation anxiety appears not be favoured when there is a transition between a foster parent and a birth parent.

There can be a tendency for some family courts to over-protect children who in fact are able to learn safety skills to manage hazards they are regularly exposed to. Many children aged over 6 years are able to learn safety skills to deal with hazards they encounter regularly in their lives. A child who learns safety skills gains confidence in their ability to manage life difficulties and develops greater resilience and better mental health. The developmental needs of children include a need to learn safety skills to deal with regular hazards they encounter in life, including disappointments. Parents and carers who over-protect a child instead of teaching safety skills do not equip their child for adverse life experiences, and these children are more prone to anxiety and depression in their later lives.

Children can be offered an option of learning skills to deal with situations that might involve disappointment for the child.

### **3-7. Change phrase 'parental responsibility'**

I support the proposal to reduce confusion by replacing the phrase 'parental responsibility' with another phrase such as 'authority to make major decisions affecting the child.'

I support the proposal to dis-link judicial decisions about time a child spends with parents from authority to make decisions about the child. I support the presumption that it is in the best interests of a child for parents to make joint decisions about major topics affecting their child, and to consult about these decisions.

Prior to the reforms of 2006 it was common for children of separated parents to live predominantly with one parent and for that parent to make major decisions about the child, perhaps without

consulting the other parent. It has been very beneficial that the topic of authority to make decisions on major issues is now clearly addressed in the Family Law Act.

I note that some State Child Protection Services follow practices that differ from practices used in Federal Family Law services on the topic of authority to make decisions concerning a child. When DCP removes a child from the care of a parent, DCP staff introduce a substitute decision making process as they take over responsibility for making decisions concerning the child, including decisions about medical and therapeutic treatment. In some jurisdictions DCP staff continue to make major decisions when a child is placed into foster care, so for example, DCP staff might refuse a request from a foster parent to refer a disturbed child for psychological therapy.

In contrast, Federal Family Courts encourage joint decision making by birth parents on major topics that affect their child.

I support the ALRC proposal to clarify steps used in joint decision making, such as for parents to consult and to aim to reach agreement.

I recommend that three types of decision making arrangement about children be distinguished in law:

- **cooperative decision making** where both parents make joint decisions on major topics
- **parallel parenting** where each parent makes their own decision on daily topics while the child is in their care, and
- **delegated decision making** or sole decision making when a parent is found to be incapable of making decisions in the best interest of their child and authority to decide is delegated to one party.

Parallel decision making on some topics such as medical appointments has benefits for children whose parents are separated as decisions can be made by a responsible parent without a child becoming involved in prolonged dispute. Parallel decision making prevents one parent from dictating decisions about daily topics while a child is in the care of the other parent.

There is scope for DCP staff to follow a cooperative decision making approach with a single birth parent when children are removed from parental care on a temporary basis while investigations occur.

### **3-8. Revise Final orders**

I support the proposal that parents must seek leave to request a review of final orders based on a significant change in circumstances.

Therapists are often presented with a situation where one parent feels aggrieved by a court decision that restricts their access to their child because of allegations that their mental health status at one time reduced their ongoing parenting capacity. Many parents with a mental health condition see a therapist and work hard to improve their parenting skills and then apply to increase their access time. Clarifying procedures about when a parent can request a review of access based on a change in circumstances will clarify this situation for parents and therapists. This will benefit children whose



access to a parent has been restricted during a time when their parent was very distressed due to a situational crisis that accentuated the parent's mental health condition.

### **3-12. Financial matters**

Some separated partners who engage in family abuse continue to harass the other parent by seeking frequent reviews of child maintenance payments after final orders have been issued, or they engage in ongoing financial abuse.

It would be beneficial for revised legislation to ensure that information can be shared between Federal Circuit Courts and the Child Support Agency. Information that is shared might include any history of family abuse involving over-control of finances, frequency of requests to review child maintenance payments, and a reluctance to submit a tax return.

## **4. Getting Advice and Support**

I support an improved system that provides advice and support to families involved in family court proceedings, especially to families with complex needs.

There is evidence that a high proportion of parents who appear before family courts experience mental health issues that impact on their parenting, including Adjustment disorders where mental health symptoms occur on a temporary basis in response to a situational crisis. There is evidence that the mental health of children is impacted by family separation proceedings, including when a parent experiences an Adjustment disorder.

I recommend that greater emphasis be given in family court proceedings to provision of mental health therapy for parents and children under the terms of the Medicare Better Access programme, including for therapy services that are provided at a parent's request by private psychologists.

I recommend that family law services use the concept of 'families with complex needs' to describe families who experience a mental health condition including an adjustment disorder and who require individualised help.

### **4-3. Family Hubs**

I support the proposal to introduce Family Hubs that will both provide a range of co-located services and that have a capacity to refer clients to local professionals who offer relevant specialised skills.

I recommend that specialised therapy services be supported by Family Hubs, both for children and for parents. I recommend that Family Hubs have a role to refer family members to private practitioners who provide mental health treatment for parents as well as for children's difficulties.

I recommend that the role of FASS staff be clarified as being either administrative or clinical case managers. An administrative case manager refers clients to service providers and ensures that major needs are met without duplication. A clinical case manager also provides some clinical services.

It is important that case managers refer families with complex needs to specialised professionals who have appropriate skills to provide therapy for the specific needs of clients, without the case manager controlling the level of resources that is allocated to a client with complex needs. It is important that opinions of case managers about need for specialist services not supersede the opinions of clinicians who provide specialist services.

## **5. Dispute Resolution**

### **5-1. Dispute resolution**

I recommend that a distinction be made between dispute resolution that needs to remain confidential, and mental health therapy where a treatment report can be provided to Court.

### **5-10. Develop practice guidelines**

I support the proposal to clarify roles and responsibilities of professionals who are involved in an enhanced family law system.

I recommend that an enhanced family law system include private mental health therapists who are accredited, and that provision of mental health therapy not be restricted to state government departments.

## **6. Reshaping the Adjudication Landscape**

### **6-2. Triage process**

I support the proposal that a registrar manage complex cases with assistance from a family consultant. I support the proposal that the case manager arrange both a risk and a needs assessment for complex cases.

#### **Question 6.1. Criteria to establish eligibility for family violence list**

I recommend that criteria be established for families with complex needs. I draw attention to the 2009 COAG National Framework to Protect Australia's Children. The National Framework identified modifiable risk factors for maltreatment of children. The modifiable risk factors are: a parental mental health condition, parental misuse of substances, family violence, and behavioural or developmental disorder in a child. Families that contain these risk factors can be identified as being families with complex needs.

I recommend that a special pathway be established in the family law system for families with complex needs to ensure that appropriate therapy is provided for these families that is brief and focused, to promote the best interests of children in complex families. Providing a special pathway will introduce a considerable advance in reducing the inter-generation transmission of mental illness within families.

I recommend that a needs assessment for families with complex needs include referral to a specialised mental health practitioner.

I recommend that distinctions be made between different types of family violence including:

- emotionally reactive violence that occurs on a single occasion or during a brief period of time
- controlling and coercive violence that is ongoing
- mutual violence where both parties participate in violence
- a statement of the type of violence including physical abuse, emotional and psychological abuse and financial abuse.

When there is evidence of family violence, I recommend that contact between a perpetrator and a vulnerable child be suspended while an expert assessment is conducted, and that contact then be reintroduced in a cautious manner over time, using a graduated approach that is monitored by gathering information from a treating professional and relevant family members. I support the use of an early finding of fact on the topic of whether there is sufficient evidence that family violence has occurred to warrant referral to a specialised therapist.

I recommend that treatment reports be requested during the graduated approach, where an expert therapist is asked to provide information about therapy methods used to produce change, the nature of change observed, and recommendations about future contact between a parent and child.

### **6–10. Stakeholder group for post-order parenting support**

Reports show there is a high rate of ongoing conflict after final orders are issued, making it difficult to decide when to close some cases. Exposing children to ongoing conflict is harmful for children, especially when the conflict is about the child.

I support the proposal that a stakeholder group be established to work further on the topic of providing support for high conflict parents following the issuing of final orders. I support the proposal that the Australian Psychological Society be invited to participate in the working group. I recommend that the Australian chapter of the Association of Family and Conciliation Courts be invited to contribute to the working group.

Some of the ongoing conflict between separated parents reflects a coercive and controlling approach from one parent, and these parents are often less amenable to influence by therapists.

I agree with comments made that much ongoing conflict between separated parents reflects issues that are not easily addressed in orders. Ongoing conflict is often based on issues including unresolved feelings following a relationship breakdown, lack of cooperation about extra-curricula activities, and anxiety about step-parents. These ongoing concerns often can be addressed in focused therapy and do not always need further orders from Court.

On the other hand therapy that addresses ongoing issues might lead to a significant change in circumstances that warrants a review of contact arrangements, and this can be addressed in a treatment report that is submitted to a family court.

## 7. Children in the Family Law System

### 7-3. Child given opportunity to express views

The topic of the capacity of each child to be informed about topics, to participate in discussions and to make relevant decisions is especially important in family law.

Allowing children to progressively make decisions about matters that impact on their lives helps the child to develop good mental health. Children who make delegated decisions become competent agents who learn to exert a sensible influence over their own lives. Children who are not allowed to take progressive responsibility can be exposed to two extremes. On one hand, children who are over-protected and not permitted to make decisions feel helpless and disempowered. On the other hand, children who are pressured to make decisions they are not yet ready for develop anxiety. The capacity of children to make decisions increases as a child grows older and varies according to temperament. There is a need for careful assessment and guidelines on this important topic. It is difficult for a court to make a balanced judgment about an individual without receiving an individualised assessment of each child's capacity to make decisions on a topic.

I am concerned about three issues:

- first, the topic of a child's capacity to make decisions has been largely ignored by academic researchers so, while there is considerable clinical information on this topic, there is limited published research on the topic
- second, different practices and standards have emerged between Child Protection Services and Federal Family Courts. These differences in standard make life very difficult for families and therapists who become involved in the two uncoordinated systems.
- third, current family law systems do not have clear mechanisms to promote the decision making capacity of children, and might add to the over-protection and disempowerment of capable children.

I make the following recommendations:

- That a legal framework be developed to guide academic research on the topic of capacity of children to make decisions about family matters.
- That the legal framework set a balance between shielding younger children from undue pressure and manipulation, and authorising older children to participate in making decisions that impact directly on the child.
- That responsible parents be encouraged to inform their capable child about important family events including events before a family court, and to help their child to develop decision making skills by recognising natural and logical consequences of selecting options, without coaching their child to take sides with the parent or manipulating their child.
- That provisions that prevent a capable parent from informing their child about topics before a Court, and from discussing topics before a Court, be de-emphasised as disempowering capable children.

- That responsible parents be encouraged to teach their child safety skills that are relevant to protecting their child from possible and likely hazards, and
- That precautions be identified and implemented to protect children when there is evidence that a parent is likely to threaten a child who expresses opinions that differ markedly from the parent's own opinions.

### **Psychological model to assess a child's capacity to make decisions**

I draw attention to a psychological model of decision making that can be used both to help children to make decisions and to assess a child's capacity to make a particular decision. The model has two parts.

Part A: A child's capacity to understand information about a topic that requires a decision can be assessed by ascertaining whether a child can participate in each component of decision making by:

- stating the nature of the difficulty that requires a decision
- identifying at least two significant optional ways of resolving the difficulties
- without excessive prompting predict likely consequences or outcomes of each option, including both benefits and disadvantages, where outcomes occur both in the short term and in the long term over several years,
- evaluating and selecting one option as meeting their own preferences, and
- communicating their choice, giving reasons for their preference and choice.

Part B: A child's emotional maturity to take responsibility for making a decision and not simply expressing a view to please their parent can be assessed by determining whether:

- the child is able calmly to describe information relevant to each component of decision making when framing a choice using the steps above,
- the child is able to discuss each component calmly, without displaying significant anxiety or distress
- the child can clearly distinguish their own opinion and desire from the opinions and desires of each parent, and can demonstrate a lack of enmeshment, and
- the child can distinguish natural and logical consequences of options from artificial inducements of a positive and negative nature that might be offered to bribe or manipulate them.

### **7-8. Children's advocate**

There is a proposal to employ social science professionals as children's advocates to explain options to children, to inform children about progress on matters, and to support children to express their own views. These children's advocates might pass on a child's opinions in written reports or they might represent children in child-inclusive mediation and at hearings.

There are questions about whether all children will need a child advocate, and how to identify those children who are so anxious or unable that they do require an advocate to speak on their behalf. It is possible that appointing a child's advocate for all children will entrench a system that presumes all

children are unable to speak on their own behalf, and that continues current systems that disempower children.

ALRC notes that adding children's advocates to the system will be expensive. There is another option. If an anxious child has been referred for therapy provided by an accredited therapist then the therapist can be asked to pass on information about the child's wishes on topics that are identified as being in dispute.

## **8. Reducing Harm**

### **8-3. Definition of family violence**

I recommend that refinements be made to the definition of family violence.

I draw attention to three issues:

- distinguish actions that produce immediate serious harm from actions that produce cumulative harmful impacts over time
- expand definition to include system abuses involving the Child Support Agency
- distinguish actions between adults from reasonable discipline exerted by a parent.

#### **Distinguish an immediate risk of serious harm from actions that produce cumulative harmful impacts over time**

A distinction can and should be made between parental actions that pose an immediate risk of serious harm to a child, and activities where prolonged exposure has a cumulative effect of harming a child.

It is essential to markedly reduce the time a child spends with a parent whose actions produce immediate and significant harm for the child. On the other hand, when a parent's actions produce slow and cumulative negative impacts on a child it is viable to adopt a therapeutic approach where the child spends a low level of time with the parent in an intact family while the parent participates in therapy and the situation is monitored. The amount of time a parent spends with their child can increase if the parent makes improvements on relevant topics. The therapeutic approach avoids the trauma to children of suddenly ceasing contact with their parent.

The therapeutic approach is followed by Federal Courts but is less practiced by Youth Courts.

This topic is discussed in section 3.4 above.

#### **System abuse involving the Child Support Agency**

The definition of family violence can be expanded to include a parent making repeated applications to the Children's Support Agency to vary income maintenance paid to the other parent. Some parents who have a history of engaging in coercive activities use the Child Support Agency to continue to harass their ex-partner.

### **Distinguish actions between adults from reasonable discipline by parents**

The Family Law Act covers both interactions between adults, and also disciplinary actions taken by competent parents to correct their child. It is important for legislation specifically to authorise parents to use legitimate methods of discipline.

Some legitimate methods of discipline might have an indirect effect of producing fear in a child. For example a threat to withdraw a normal privilege if a child continues to misbehave in a certain way might produce fear in a child. Psychological literature encourages parents to use an authoritative approach when disciplining their child, and this includes the use of firm discipline. There is evidence that when permissive parents and agencies decline to use an authoritative approach to discipline children, this contributes to children failing to learn resilience and children later experiencing a higher prevalence of anxiety and depression.

It is important for legislation to distinguish clearly between emotional abuse of a child and legitimate discipline by a parent. This distinction is best made by referring to actions by a parent, rather than to subjective experiences of children including fear.

I believe that practicing psychologists are most concerned about parents who become disinhibited when they discipline their child, resulting in their discipline becoming harsh and abusive. Disinhibited parents often use excessive anger in their discipline. Disinhibited anger is more likely to occur when a parent has a mental health condition, misuses substances, or has a mood disorder, or a parent holds an extraordinarily strong belief about the effectiveness of one form of punishment. Mental health conditions that increase the risk a parent will use disinhibited anger can be identified by a skilled mental health clinician who can recommend therapy for the parent, and can make recommendations about appropriate discipline for an individual child and about suitable contact between the parent and child.

### **8-6. Exclude evidence from 'protected confidences'**

There is concern about over-use of subpoenas in an adversarial family law system that leads to disclosure of confidential clinical notes from the file of a mental health therapist to hostile parties. Unnecessary disclosure of confidential information has adverse effects on children and on competent parents.

Some competent therapists decline to work on cases involving disputes before a family court because of their great unease that confidential notes might be subpoenaed.

Some lawyers discourage distressed parents from seeking therapy on the grounds that their confidential therapy notes are discoverable by use of a subpoena. Clients who seek therapy are often traumatised by the thought and reality that their confidential disclosures to a therapist can be revealed to other parties, and this deters anxious people from seeking therapy.

I support the recommendation that clinical notes made by a mental health therapist be classified as having a status of a protected confidence.

I make the following recommendations about issuing of subpoenas in family court matters:

- That subpoenas not be issued as a first method of communication with a mental health therapist, but that lawyers first write to the therapist requesting a report that answers specific questions, and that lawyers offer to pay the reasonable cost of preparing a report.
- That subpoenas be issued only by a judge who is hearing a matter.
- That subpoenas include a clear statement about who will read subpoenaed information, and the purpose of the subpoena.
- That ways to appeal subpoenas be published.

I support the recommendation that subpoenaed information be excluded as evidence unless it promotes the safety and best interests of a child. I recommend that subpoenas not be used primarily to query the professional standards followed by a therapist, as a therapist who provides a written report can be cross examined to clarify the standards used by that professional.

### **8-7. Working group to develop guidelines regarding use of sensitive records**

I support the proposal to establish a working group to develop guidelines about the use of sensitive mental health records. I support the recommendation that the Australian Psychological Society be invited to participate on a working group. I further recommend that the newly establish Australian chapter of the Association of Family and Conciliation Courts be invited to nominate representatives to participate in a working group.

I support the proposal that guidelines cover the use of subpoenas in family law processes, including obligations of professionals who are custodians of sensitive records and grounds to object to a subpoena.

## **9. Additional Legislative Issues**

### **9-7. Specialised services for people with a disability**

I recommend that consideration be given to introducing a special pathway when there are allegations that a parent has a mental health condition that impairs the capacity of the parent to meet the usual standards of being a competent parent.

#### **Question 9-1. Special procedures to protect rights of child**

Special care is needed when assessing the capacity of an adult to make parenting decisions, as parenting impacts on the welfare of a child. For example a parent might be capable of managing their own finances but not be capable of caring for the welfare of a dependent child.

In the past different courts were established to address issues that arise when parents separate and when issues of child protection are raised. It is now clear that issues of child protection are often raised in Federal Family Courts. It is now important to distinguish between the capacity of an adult to make decisions that impact only on themselves (such as about financial matters) and capacity to make decisions that impact on a child's welfare. Assessments of an adult's capacity to make parenting decisions requires an assessment of the adult's capacity to make decisions that balance the best interests of their child and their own reasonable interests.



Competent parents are expected to implement steps that meet the best interests of their child as well as being in a parent's own reasonable interests. Many parents struggle to balance the needs and best interests of their child and their own reasonable interests. Parents with a mental health condition especially struggle with this balance.

Questions about the capacity of a parent to make decisions in the best interest of their child arise more frequently when a parent has a mental health condition, including common mental health conditions such as anxiety and depression. There is a professional literature about possible negative impacts of mental health conditions on parenting, including for anxiety and depression. There is evidence of treatments that are effective in reducing the impacts of mental illnesses on parenting.

The task of assessing parenting capacity is both more important and more involved when a parent has a treatable mental health condition.

I conclude there is a need to introduce a special pathway and some new procedures to address the needs of families where there is an allegation that a parent has a mental health condition.

It is timely to publicise professional procedures used to assess the capacity of parents with mental health conditions. It is timely to move away from confidentiality provisions that allow professional expert reports to be kept secret on the grounds of protecting the privacy of clients.

## **10. Skilled and Supported Workforce**

### **10-2. Workforce**

I support the recommendation to identify professional groups who work in the family law system. I recommend that mental health therapists be included as one relevant professional group.

I support the recommendation to identify core competencies that apply to all professional groups.

I support the recommendation that a new body be established that is tasked to arrange training and accreditation for professional groups.

#### **Question 10-1. Additional core competencies**

I recommend that further core competency be added.

I recommend the following core competencies:

- information about common impacts of parental mental health conditions on parenting
- information about effectiveness of treatments on parenting skills for parents with a mental illness.

### **10-9. National accreditation system**

I support the recommendation that minimum standards be developed for private report writers.

I support the principle that a range of report writers be available so that consumers can select a report writer.

### **10-11. Provide clear instructions when requesting an expert report**

I support the recommendation that expert report writers be provided with clear instructions about issues of concern they are asked to address in a report.

### **10-13. Parent with a disability**

I support the recommendation that when there is evidence or an allegation that a parent has a disability including a mental health disability that an assessment of parenting capacity be carried out by a professional who has specialised knowledge about common impacts of the condition on parenting, and about appropriate treatments for the mental health condition.

I recommend that professional assessment reports include recommendations about realistic supports that could improve parenting capacity of an impaired parent that will benefit a child.

## **12. System Oversight**

### **12-1. System oversight by Family Law Commission**

I support the recommendation that a Family Law Commission manage accreditation of professionals who work in the family law system.

I support the recommendation that the Family Law Commission issue guidelines for family law practitioners.

I support the recommendation that the Family Law Commission receive and resolve complaints about services provided by family law practitioners.

### **12-11. Privacy provisions**

I support the recommendation that family law service providers not be viewed as being part of the public for the purposes of confidentiality provisions.

I strongly support the proposal that judges publish anonymised reports that give reasons for decisions made in final orders, and that this proposal also apply to judges in Youth Courts.

Dr Don Tustin

Clinical Psychologist

## Appendix: Changes to South Australia's Child Protection Act

The South Australian Parliament amended its child protection legislation to produce a Children and Young People (Safety) Act 2017. Some sections of the revised Act are summarised.

Section 17 defines **harm** to refer to both physical harm and psychological harm, but excludes normal emotional reactions such as distress.

Section 18 defines **at risk** but does not distinguish between an immediate risk of substantial harm and a cumulative risk arising from adverse parenting practices.

Section 41 authorises the removal of children from the care of a parent if there is a significant possibility that a child will suffer serious harm.

Section 62 states that the views of a child should be heard and that children are to be given the opportunity to personally present their views about their ongoing care and protection to Court. No information is provided about how a child's capacity to give instructions will be assessed.

Section 89 states that a caregiver who has provided care for a child for 2 years can apply to the Chief Executive to be appointed as guardian for a child.

Section 91 states that the Chief Executive will usually apply to the Youth Court to approve applications by carers to be appointed guardian, while allowing this might not always occur.

Section 92 states that when a child is under guardianship or in custody decisions about contact with the parent will be made by the Chief Executive of the Department, and this might include a determination that there be no contact.

Section 93 (3) b states that if reunification is considered unlikely then a child's contact with the birth parent should not undermine or compromise a child's ability to establish or maintain an attachment relationship with their guardian.

Section 93 (5) b gives the Chief Executive authority to determine details of contact arrangements including the frequency of contacts, duration of visits, venues, persons to be present and need for supervision. There is no mention of recommended therapy.

Section 94 allows that appeals against determinations by the Chief Executive can be made to a Contact Arrangements Review Panel that will be established by the Minister.

Section 145 outlines responsibilities of the Chief Executive including to devise codes of conduct and to set standards of care.

Section 150 authorises child protection officers to obtain documents including medical documents. Refusal to comply is an offence that is punishable by imprisonment.

Section 158 states that decisions of the Chief Executive can be reviewed by the South Australian Civil and Administrative Tribunal. The review system does not connect with the Federal Family Court system.

Section 162 governs publication of information.