

Uniting

Submission

Uniting Centre for Research, Innovation & Advocacy
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Review of the Family Law System

ALRC Discussion Paper Discussion Paper 86



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Executive Summary

We welcome this opportunity to respond to the Australian Law Reform Commission's discussion paper on possible reforms to the family law system in Australia, and the *Family Law Act 1975 (Cth)* in particular.

About Uniting

Uniting is one of the largest providers of services to support vulnerable children, young people, older people and families in NSW and the ACT. We provide two kinds of service of direct relevance to this submission. We provide counselling and mediation services in nine locations in NSW (Campbelltown, Fairfield, Gosford, Newcastle, Nowra, Parramatta, Penrith, Sydney and Wollongong). Through them we work with around 7,500 clients every year, most of whom are referred to us by the Family Court. We also provide NSW government-funded child and family services across the continuum of care, spanning prevention and early intervention, intensive family support, out-of-home care (OOHC) and aftercare. In these services, we work with over 6,000 clients every year, and although these families are not referred to us by the Family Court, there is substantial overlap between the experience of the two cohorts. Our counsellors and mediators in some offices estimate that between half and two thirds of their clients were also in contact with the child protection system. Members our child protection teams estimate that a similar proportion of their clients had been in contact with the Family Court at some point in ways which had ongoing implications for their work.

Our submission

In the main body of this submission, we respond to each of the questions posed by the ALRC in the discussion paper, and comment on the proposals it contains. Overall, we support the proposals, most of which are consistent with our previous submission on the issues paper. In that earlier document, we suggested that the family law system should provide holistic support to separating families, with the aim of enhancing family relationships to the extent possible, reducing conflict between adults and ensuring the long-term wellbeing of children. We are particularly pleased to see that our recommendations around improving information and education, requiring separating couples to attempt alternative dispute resolution, the importance of children's voices being heard in all family law proceedings, and other associated matters appear as proposals in the discussion paper.

In addition, we wish to offer two more general comments. First, the discussion paper makes no reference to the Government's recent decision to merge the Family and Federal Circuit Court. This may have significant implications for the implementation of recommendations of this review. And second, the proposals in the discussion paper will only be effective if they are adequately resourced. Currently, both the courts and the other parts of the system (such as alternative dispute resolution services) are struggling to cope with demand. These constraints are likely to become more acute without increased investment, because the proposals in the discussion paper directly envisage a significant increase in the use of alternative dispute resolution and other supports, and also imply a significantly more highly qualified workforce.

Education, Awareness and Information

We support the proposals relating to education, awareness and referrals. As noted in the discussion paper itself, these are consistent with our previous submission, and are likely to significantly improve understanding of the family law system by parties to disputes.

Simpler and Clearer Legislation

We support the proposals relating to the revision of the *Family Law Act 1975* (Cth) to clarify and simplify its provisions. We particularly support proposals to ensure that the safety, rights and best interests of the child are enshrined in law, which are consistent with our previous submission. We endorse the proposal that the Government commission further research on property/financial settlements and the economic wellbeing of former partners and of children. We are concerned, however, that the discussion paper does not give due weight to risk we identified in our previous submission (particularly our response to Question 14): our mediators report that the interaction between property and parental arrangements can lead to children being treated as bargaining chips in disputes between parents over property.

Question 3–1 How should confusion about what matters require consultation between parents be resolved?

While recognising that there may always be exceptions, we believe the Act could usefully provide more guidance to parents. For example, it would be useful if parents were required to consult with each other in relation to all matters affecting the long-term care and support of the child. In our experience, these include:

- on-going medical care;
- medical procedures, surgery or hospitalisation;
- therapy, counselling or mental health support;
- choice of childcare, school or other education facility;
- travel arrangements;
- religious education; and
- change of address or re-location.

Question 3–2 Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?

We understand the rationale for proposing a mechanism for early release of superannuation in circumstances of hardship, and note that there are currently legislative pathways for early release of superannuation in circumstances involving less hardship than many family law situations. We are concerned, however, that there are public policy implications to the early release of superannuation (including its impact on retirement savings). We suggest that superannuation splitting may be preferable from this perspective, and recommend that superannuation splitting provisions should be simpler and binding on superannuation trustees.

Question 3–3 Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the *Family Law Act 1975* (Cth):

- **amendments to increase certainty about when financial agreements are binding;**
- **amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;**
- **replacing existing provisions about financial agreements with an ability to make court-approved agreements; or**
- **removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?**

Scope should be provided to set aside financial agreements due to family violence. Based on our experience as counsellors and mediators, replacing financial agreements with court approved financial agreements likely will not make a discernible difference to outcomes for parties to family law disputes. Consideration could be given to removing the option to make pre-nuptial agreements, and introducing an option to file a Statement of Initial Financial Contribution. This would address the primary motivation for entering into pre-nuptial agreements, while avoiding the pitfalls of these agreements.

Question 3–4 What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:

- **greater use of registrars to consider urgent applications for interim spousal maintenance;**
- **administrative assessment of spousal maintenance; or**
- **another option?**

There is merit to introducing a compulsory administrative assessment of spousal maintenance, as part of the disclosure process. To do so would provide transparency and greater options for property settlement, especially in cases where assets are limited to superannuation.

Getting Advice and Support

We support the proposals in this section for Families Hubs and the expansion of FASS. This would, as the discussion paper notes, be one reasonable way of addressing many of the issues we identified in our previous submission. These include the imperative to identify the needs of families entering the family law system, to assist them to navigate a complex and fragmented system, and to provide them with information and referrals which are appropriate to their needs (including referrals into different kinds of counselling, mediation and alternative dispute resolution). Our practitioners report that there is scope for courts to make greater use of interim orders, including to encourage parties to engage with pre-order supports.

Dispute Resolution

We support the proposals in this section. Provided they are supported during implementation with adequate funding and the development of a greater range of evidence-based models, these proposals should significantly expand access to alternative

forms of dispute resolution (including new models of arbitration and mediation). This, in turn, should help families experiencing separation to resolve their disputes in ways which enhance family relationships to the extent possible, reduce conflict between adults and ensure the long-term wellbeing of children. We particularly support Proposals 5-3 (mandatory family dispute resolution with limited exceptions) and 5-4 (genuine steps statements) which respond directly to proposals in our previous submission.

Question 5-1 Should the requirement in the *Family Law Act 1975 (Cth)* that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

We believe that the proposed timeframes are appropriate, as they reduce the risk of process abuse. It is, however, important to retain provisions allowing for late applications with leave of the court. We do not support an absolute statutory limitation.

Question 5-2 Should the provisions in the *Family Law Act 1975 (Cth)* setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

In our experience, non-disclosure (or refusal to disclose) is the single most problematic aspect of alternative dispute resolution regarding property matters. We believe penalties (including criminal penalties) would provide an important support in cases where parties to a dispute may be considering not complying with their duty to disclose. This should also cover disclosure for lodging an application for consent orders.

Question 5-3 Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

This process should be aligned with the process proposed for property matters. Ideally, children's and property matters should be mediated together. Processes should be consistent and streamlined.

As we discussed in our previous submission, we believe family dispute resolution practitioners must not be asked to state whether a party has made a "genuine effort", as this is a subjective assessment. Attempts to test these assessments in court will prove difficult and counter-productive. We support the proposal in this discussion paper (which we also made in our previous submission), that parties be required to submit a genuine steps statement. We note, however, that these statements are only part of the solution; they must be backed up by courts imposing real consequences for failure to attend or participate in ordered programs.

Reshaping the Adjudication Landscape

We support these proposals to simplify court processes, and allow for triage and flexible adaptation of processes to the needs and circumstances of parties. This is particularly important given, as the discussion paper recognises and as we stated in our previous submission, parties to family law disputes are often traumatised and lack the financial and other resources to protect their interests effectively

Question 6-1 What criteria should be used to establish eligibility for the family violence list?

We believe that eligibility should be established using a validated risk assessment tool, which should be completed for all applications before the court. Eligibility should be

determined by the responses of the alleged victim alone. The tool should be administered by trained practitioners, and should be designed so it can be administered both in person at court facilities and over the phone.

We recommend that any risk assessment tool be piloted and evaluated. We expect that whichever tool is selected may need fine-tuning to ensure its relevance to the Australian family court context.

Question 6–2 What are the risks and benefits of early fact-finding hearings? How could an early fact-finding process be designed to limit risks?

In our previous submission (especially at Question 20), we argued that there may be merit in introducing procedures to test and agree on statements of fact made by parties earlier in proceedings than currently occurs. This was based on reports from our staff that, in many cases, claims made by one party are not tested by the other until cross-examination in the final hearing. Given the length of time it takes for cases to be resolved, this can mean that statements can go unchallenged for years, exacerbating conflict and exerting a significant influence on outcomes. The circumstances on which this proposal was based include, but are not limited to, instances of alleged family violence. We note, however, that there is significant risk in any process which involves determining facts without due process and due diligence.

Question 6–3 What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children’s matters? Are other changes needed to this model?

Our practitioners have serious doubts about the merits of Parenting Management Hearings, and report that these doubts are widespread across the sector. Our fundamental concern is that these hearings are a solution which looks good on paper, but which is too often only effective superficially and in the short term. As we noted in our previous submission, there are no simple family law cases. This means that effective interventions take time. Under these circumstances, interventions should be based on sound, evidence-based models, commencing with assessment and triage. The issue of long wait times for court will not be resolved in the best interests of families experiencing separation by delivering fast panel processes if these do not adequately address the underlying issues.

Question 6–4 What other ways of developing a less adversarial decision-making process for children’s matters should be considered?

Please refer to our previous submission where we discuss this extensively (especially in response to Questions 29, 30, and 34-40).

Children in the Family Law System

As we discussed at length in our previous submission, we strongly believe that the rights of the child, including the right to safety and to have a voice, are of fundamental concern in the family law system and should be given the strongest possible protection. On that basis, we support the proposals here to amend the Act, and to support legal professionals and associated services (such as alternative dispute resolution providers) to engage in child-inclusive practice.

Question 7-1 In what circumstances should a separate legal representative for a child be appointed in addition to a children’s advocate?

A separate legal representative for the child should be appointed upon the recommendation of the children’s advocate. Grounds for such a recommendation should include that:

- the child has strong views;
- there are grounds for admitting expert evidence;
- there are disclosures of abuse or neglect, or disclosures that indicate a risk of abuse or neglect.

Separate legal representatives provide one means of addressing the risk we raised in our earlier submission, that it will not necessarily be appropriate for a child to participate directly in all aspects of a family law matter. For example, we would rarely consider it appropriate for a child to speak directly with a judge as part of a hearing. This is because of the risk that a decision by the judge which is not consistent with the child’s wishes may damage the child’s ability to trust adults. It may, however, be quite beneficial for the judge to meet the child afterwards, and to explain the reasons for any orders which are not consistent with the child’s wishes.

Question 7-2 How should the appointment, management and coordination of children’s advocates and separate legal representatives be overseen? For example, should a new body be created to undertake this task?

We suggest that children’s advocates and separate legal representatives could be overseen by the proposed Family Law Commission. In our experience, Legal Aid does not have sufficient expertise or resources to fulfil this role.

Question 7-3 What approach should be taken to forensic issues relating to the role of the children’s advocate, including:

- **admissibility of communications between the children’s advocate and a child; and**
- **whether the children’s advocate may become a witness in a matter?**

Communications with the children’s advocate should not be admissible, and the children’s advocate should not be a witness. The benefit of having the separate legal representative is that recommendations can be made to initiate admissible processes. The therapeutic benefit to the child of the children’s advocate is paramount and should be protected by strict confidentiality and inadmissibility provisions. We discuss these benefits extensively, in relation to our own work, in our previous submission.

Reducing Harm

We support the proposals in this section of the paper, which are consistent with our previous submission. We strongly welcome the recognition of our concerns over any proposal to make counselling records admissible, and take this opportunity to repeat our recommendation that intake records should be offered the same protections.

Question 8-1 What are the strengths and limitations of the present format of the family violence definition?

We reiterate the comments we made in our previous submission, particularly in response to Question 15.

The current broad definition of family violence is valuable, as it compels court personnel, lawyers, program providers and families to reflect on the consequences of a wide range of behaviour. Acts which constitute abuse may go well beyond the current strict scope of the *Family Law Act*, including imposing economic and housing costs on partners and children who seek to leave abusers. As we stated previously, the definition should be expanded to explicitly include process abuse.

The main limitations of a broad definition of family violence relate to implementation. On the one hand, because any broad definition will likely be applicable to the majority of separating families, it may inadvertently lead to an under-appreciation of the significance of family violence among professionals working in the sector. This risk is all the more significant because the Family Court currently does not consistently employ evidence-based tools for assessing risk to children, or capacity to parent. On the other hand, a broad definition may also unnecessarily disadvantage some parties, if it is implemented in the context of a risk-averse exclusionary approach which automatically classifies a case as not suitable for family dispute resolution. It is essential that any definition of family violence be supported by an inclusionary approach, supported by the development of appropriate counselling and mediation services, and the recruitment of an appropriately experienced and capable workforce.

Question 8-2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

We support the proposed amendments. As noted in our previous submission, it is important that the definition of family violence remain broad, and that it continue to recognise that the clear majority of victims are women and children (while also recognising that a small but significant minority are men).

We suggest that consideration should be given to supporting the definition of family violence with mechanisms for encouraging the parties to disputes to acknowledge and manage family violence when it exists. By way of example, we understand that New Zealand recently trialled a presumption in favour of supervised contact where there were allegations of domestic violence. While it appears that this presumption is no longer in place, the results of the trial may provide useful insights into the use of legal thresholds to manage this risk. On a separate note, a significant increase in the number of contact centres would help families experiencing violence to safely manage contact.

Question 8-3 Should the requirement for proceedings to have been instituted ‘frequently’ be removed from provisions in the *Family Law Act 1975* (Cth) setting out courts powers to address vexatious litigation? Should another term, such as ‘repeated’ be substituted?

We support use of the term “repeated”, on the grounds it is clearer.

Question 8-4 What, if any, changes should be made to the courts’ powers to apportion costs in s117 of the *Family Law Act 1975* (Cth)?

No comment.

Additional Legislative Issues

We endorse the aim of the proposals in this section, to improve inclusion and participation of people with disability.

Question 9–1 In relation to the welfare jurisdiction:

- **Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?**
- **In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?**
- **What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?**

Authorisation by the court should be required for sterilisation of a child with a disability, and for intersex medical procedures. These matters go to the core of a child's human rights. We believe these procedures should be treated differently from medical interventions for gender dysmorphia, where our experience suggests existing medical authorisation processes sufficiently reflect the child's own deeply held wishes.

Question 9–2 How should a provision be worded to ensure the definition of family member covers Aboriginal and Torres Strait Islander concepts of family?

The concept of kinship should be incorporated into the definition. The definition should also reflect long-term significant relationships with persons considered, or treated, as family members. As a mainstream community organisation, we defer to representatives of the Aboriginal and Torres Strait Islander on the most appropriate means of ensuring the definition of family is culturally appropriate.

A Skilled and Supported Workforce

Our previous submission identified significant skill gaps for many legal professionals, particularly in relation to the impact of trauma on parties to disputes, and also in relation to child-inclusive practice. We support the proposals in this section, on the grounds they appear to address these concerns.

We also note that many of the proposals made elsewhere in this issues paper – including child inclusive practice and the expansion of alternative dispute resolution – will require significant training for existing staff and an increase in the numbers of available specialists (such as specialist child consultants)

Question 10–1 Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

Please see our previous submission, particularly our response to Question 41.

Question 10–2 What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?

From our perspective, significant changes to the current regime are not required. Most accredited family dispute resolution practitioners already conduct property mediations. We suggest that compulsory units on property matters should be incorporated into the Advanced Diploma.

Question 10-3 Should people who work at Children’s Contact Services be required to hold other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?

A Diploma of Community Services, with an elective on child development and the impact of conflict on children, should be a minimum qualification for person’s working at children’s contact services.

Question 10-4 What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

Federal judicial officers should have extensive, demonstrated family law experience. They should also have undertaken formal training on matters such as child development, attachment, and trauma as it relates to children post separation. Please see our previous submission, particularly our response to Questions 41-42, for more detail.

Question 10-5 What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

Our staff have reported to us that there are significant delays in appointing new judges, and that this is having a detrimental impact on the timely resolution of matters. We recommend better succession planning, including the use of judges in-waiting.

Question 10-6 Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

We believe that the cultural needs of children should be taken into account in parenting proceedings involving all Aboriginal and Torres Strait Islander people. As a mainstream organisation, we defer to representatives of the Aboriginal and Torres Strait Islander community on the most appropriate means of ensuring this occurs.

Information Sharing

Our previous submission identified several areas where more frequent sharing of a wider range of information could improve safety and dispute resolution outcomes for parties to family law matters. The proposals in this section address our concerns, and we therefore support them. We note, however, that practices of information sharing are often influenced by factors other than the strict letter of the law, including professional cultures and the knowledge/capability of those within the system. We therefore suggest that any new information sharing rules and mechanisms will need to be supported by ongoing activity to promote their use.

Question 11-1 What other information should be shared or sought about persons involved in family law proceedings? For example, should:

- **State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?**
- **State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?**
- **The *Family Law Act 1975* (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?**

- **The *Family Law Act 1975* (Cth) give family law professionals discretion to notify police if they fear for a person’s safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?**

We agree with each of the proposed examples here. We suggest, however, that developing a list of all the kinds of information which can be shared may not be the most practical approach. Any such list is likely to be both very long, and to fall out of date over time. As an alternative, we suggest that prescribed entities or categories of entities which hold any relevant information be empowered to share it in the interests of ensuring the safety of parties to family law proceedings. Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides an example of this kind of approach, albeit in relation to child protection matters.

Question 11–2 Should the information sharing framework include health records? If so, what health records should be shared?

The sharing of health records should attract particularly strong protections. These should clearly specify the kinds of information which can be shared, the circumstances under which sharing may occur, and the protection of records by those with whom they are shared. This is because there is significant potential for misuse or process abuse if such records are disclosed inappropriately to other parties to the dispute. As we noted in our previous submission, our counselling services frequently receive subpoenas to obtain therapeutic records in what appear to be efforts at “evidence-fishing”. This not only compromises the therapeutic relationship, it is also arguably an abuse of process. Furthermore, as the discussion paper notes, these records are of uncertain probative value because they are not drawn up with forensic purposes in mind, and when used forensically can be misrepresented in ways which harm the interests of the subject of the records.

Question 11–3 Should records be shared with family relationships services such as family dispute resolution services, Children’s Contact Services, and parenting order program services?

Family and relationship service providers would benefit from access to information on:

- Apprehended violence orders;
- Orders of the family courts/Children’s Court; and
- Child protection reports.

This is because the parties to disputes cannot be relied upon to self-report these issues consistently, and this poses safety risks to others.

We recognise that it may not be easy to develop means of providing access to some of this information. For example, access direct access to child protection reports will likely be difficult (and possibly contentious), given the strong legal protections these records attract, and the complexity of the information contained in child protection authorities’ databases. We believe there is significant merit in exploring the possibility of access, despite these difficulties.

Question 11-4 If a child protection agency has referred a parent to the family courts to obtain parenting orders, what, if any, evidence should they provide the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the children?

The child protection agency should provide a factual history, ideally via a prescribed form. This should include similar material to that provided to courts when resolving child protection matters, such as the basis and outcome of any formal safety or risk assessments in relation to the child, and the basis on which any other legal powers were exercised.

Question 11-5 What information should be shared between the Families Hubs (Proposals 4-1 to 4-4) and the family courts, and what safeguards should be put in place to protect privacy? For example:

- **Should all the information about services within the Families Hubs that were accessed by parties be able to be shared freely with the family courts?**
- **What information should the family courts receive (i.e. services accessed, number of times accessed, or more detailed information about treatment plans etc)?**
- **Should client consent be needed to share this information?**
- **Who would have access to the information at the family courts?**
- **Would the other party get access to any information provided by the Families Hubs services to the family courts?**
- **Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the family courts?**

We believe that the Families Hubs should integrate with – and enhance the work of – Family Relationship Centres. On this basis, they should be subject to the same rules regarding confidentiality and admissibility. Only attendance details should be shared with the courts. There should be unfettered communication and record sharing with the children’s advocate, on the basis the children’s advocate is afforded the same protections.

System Oversight and Reform Evaluation

Many of the recommendations in this section touch on matters beyond our expertise. We therefore refrain from commenting on them in general. We support proposals around a cultural safety framework. Consistent with our previous submission, we recommend that the research and evaluation program discussed at Proposals 12-6 and 12-7 should form part of a systematic effort to develop new evidence-based models of alternative dispute resolution that are effective in meeting the needs of identified cohorts in the system.

Question 12-1 Should privacy provisions in the *Family Law Act 1975 (Cth)* be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other internet-based media?

Yes. In our experience, dissemination via social media is commonplace and poses a safety risk.

Question 12–2 Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the *Family Law Act 1975 (Cth)*? If so, what should the functions of the Commission be?

We are not in a position to give a comprehensive assessment of the relative merits of the proposed Family Law Commission compared with alternatives (including the status quo). We note, however, that if it is established its impact on outcomes for families undergoing separation is likely to depend on its substantive focus as it carries out its proposed functions. Regardless of the body responsible, the rules, standards, obligations, inquiries and public information campaigns mentioned in the discussion paper should be informed by the principles we identified in our previous submission (see, for example, our response to Question 2).