

8 November 2018

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email to: familylaw@alrc.gov.au

Dear Executive Director

Re: Review of the family law system

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) welcomes this opportunity to provide feedback to the Australian Law Reform Commission's review of the family law system (the review). We recognise the complex needs of many families and individuals in contact with the family law system and therefore strongly support the aims of the review considering the relationship between mental health issues and the range of experiences associated with the family law system.

The RANZCP is the principal organisation representing the medical speciality of psychiatry in Australia and New Zealand and is responsible for training, educating and representing psychiatrists on policy issues. The RANZCP represents more than 6000 members, including more than 4000 qualified psychiatrists, and is guided on policy matters by a range of expert committees, including the Section of Child and Adolescent Forensic Psychiatry, Aboriginal and Torres Strait Islander Mental Health Committee and Family Violence Psychiatry Network.

The RANZCP previously provided a [submission to the Australian Law Reform Commission's issues paper](#) and now welcomes the release of the discussion paper which addresses a number of the concerns raised. The RANZCP particularly commends Proposal 8–7 which suggests the convening of a working group to develop guidelines in relation to the use of sensitive records in family law proceedings. We would warmly welcome the opportunity to appoint representatives to such a group and are pleased to see our inclusion in the group specifically recommended.

Please see the attached submission which has detailed responses to relevant proposals and questions contained within the issues paper.

If you would like to discuss any of the issues raised in the submission, please contact Rosie Forster, Executive Manager, Practice, Policy and Partnerships [REDACTED]

Yours faithfully

Dr Kym Jenkins
President

Ref: 1288o



The Royal
Australian &
New Zealand
College of
Psychiatrists

Australian Law Reform Commission discussion paper
Review of the family law system

November 2017

advocating for equitable access to services

Royal Australian and New Zealand College of Psychiatrists submission

Review of the family law system

About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises government on mental health care. The RANZCP is the peak body representing psychiatrists in Australia and New Zealand and as a bi-national college has strong ties with associations in the Asia-Pacific region.

The RANZCP has more than 6000 members including more than 4000 qualified psychiatrists and over 1500 members who are training to qualify as psychiatrists. Psychiatrists are clinical leaders in the provision of mental healthcare in the community and use a range of evidence-based treatments to support a person in their journey of recovery.

Introduction

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) welcomes the opportunity to provide further feedback to the Australian Law Reform Commission's review of the family law system (the review). In the RANZCP's views, many of the proposals contained within the discussion paper are well-designed to improve the family law system and better support the complex needs of families, children and individuals, including their mental health needs. Specific proposals which the RANZCP believes will improve the mental health of families, children and individuals and listed below. Where relevant, we have also provided responses to the questions posed in the discussion paper.

Proposals with the RANZCP's support

The RANZCP supports many other proposals outlined in the discussion paper, many of which reflect or build upon our own suggestions, including:

- improved service integration with a workforce dedicated to guiding families and individuals through the system (Proposal 4–1) with case managers provided where required (Proposal 4–6)
- needs screenings and family violence risk assessments integrated into processes for all families and children (Proposals 4–1 and 4–5)
- provision of on-site support to families and children, including mental health, gambling help and specialist family violence services (Proposal 4-3)
- development of guidelines to assist in the screening, assessment, referral and management of mental health, family violence, substance use and child safety concerns (Proposal 5–10)
- specialist pathways for people experiencing family violence and Aboriginal and Torres Strait Islander people (Proposal 6–3)
- improved safety mechanisms within family court premises (Proposal 6–12)
- provisions allowing for the improved participation of children in proceedings and dispute resolution processes where appropriate, including through the services of a children's advocate, with the developmental needs and any relevant risks of the child properly taken into account (especially Proposals 7 and associated proposals)
- expansion of the definition of family violence to include psychological abuse and indirect exposure to family violence (Proposal 8–1) as well as misuse of the family law system (Proposal 8–3)

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- further exploration of the suitability of the definition of family violence for particular population groups, including Aboriginal and Torres Strait Islander peoples, and LGBTIQ+ people (Proposal 8–2)
- clarification and modernisation of court powers to dismiss applications without merit (Proposals 8–4 and 8–5)
- inclusion of a supported decision-making framework for people with disabilities in the *Family Law Act 1975* (Proposal 9–1)
- core competencies for relevant professionals including trauma-informed practice, cultural competency, disability awareness, family violence, child abuse, risk management, and the impact of ongoing conflict on children (Proposal 10–3)
- wellbeing programs for staff (Proposal 10–15) – in the RANZCP’s view, these programs should include training on:
 - how to identify and manage vicarious trauma
 - effective supervision and caseload management
 - safe workplaces including supportive workplace cultures
- reforms to improve information sharing between courts, child protection and family violence systems (Proposals 11)
- maintenance of strong restrictions against the publication of family law proceedings (Proposal 12–11)
- reforms to ensure cultural safety within the family law system, including through processes that facilitate genuine and meaningful collaboration with Aboriginal and Torres Strait Islander peoples (Proposals 2–2, 2–8, 3–4, 3–6, 4–4, 5–9, 5–10, 9–8, 10–3, 10–4, 12–1)
- reforms to improve the accessibility of the family law system for LGBTIQ people, and people from culturally and linguistically diverse communities including through consultation processes (Proposals 2–2, 2–8, 4–4, 5–9, 5–10, 10–3, 12–1).

Further comments on Proposal 8–6

The RANZCP strongly supports the discussion paper’s recognition of the need for strong protections for ‘protected confidences’ including communications between an individual and their psychiatrist or other mental health clinician. For further information on the RANZCP’s position, please see [Position Statement 89: Patient–psychiatrist confidentiality: the issue of subpoenas](#).

However, the RANZCP is concerned that the suggested factors which a court should consider when making decisions about whether protected confidences should be excluded do not go far enough. The RANZCP suggests that these court deliberations should also take into account:

- alternative avenues to the giving of evidence, such as oral testimony or medico-legal reports – such avenues may allow the relevant medical practitioner to play a role in the selection of information, ensuring that the desirability of disclosure may be considered for each individual piece of information, avoiding the wholesale disclosure of all information contained within a person’s medical record on the court’s finding that the benefits of complete disclosure would outweigh the harms
- the potential for disclosures to undermine the therapeutic relationship between an individual and their clinician – while this may not directly constitute ‘emotional or psychological harm’, such disclosures

may nevertheless impede an individual's capacity to improve their emotional or psychological wellbeing in the future through continued therapy, and this should be a relevant consideration.

RANZCP response to family hubs

The RANZCP welcomes the creation of family hubs to ensure all families and children have access to relevant services to meet their needs. It may be advantageous to use these hubs to provide cultural case workers for Aboriginal and Torres Strait Islander families and children to ensure that their cultural needs are met throughout their interaction with the family law system.

Further responses to questions

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

The RANZCP notes its continuing concern that medical neglect may not fall within the definition of family violence as proposed. We also note that it may be useful to clarify that the abuse need not occur within Australia to be relevant, in light of the facts that such abuse may occur from families overseas in some culturally and linguistically diverse communities, particularly those from part of the south-east of Asia.

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 power to address vexatious litigations? Should another term, such as 'repeated' be substituted?

The RANZCP would support this change in terminology.

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?

The RANZCP recommends that all proposed intersex medical interventions for children without the capacity to consent require authorisation from a civil and administrative tribunal or the Family Court, considering the potential later-life implications that an involuntary procedure may have on an individual's mental health.

Where sterilisation of children with disability or intersex medical procedures are being considered for children who lack the capacity to consent, families should be supported to make their decisions by expert multidisciplinary management teams. Ultimately, decisions should be reviewed where the individual lacks capacity to consent, and the RANZCP would support the establishment of an expert tribunal to perform this function. The tribunal should be comprised of people with professional expertise across relevant disciplines as well as people with lived experience. Tribunal members should be provided with a framework of support, including relevant training and education addressing issues such as advances in paediatric surgery and psychosocial implications of involuntary treatment. Requiring participation in this training would be advantageous as a core governance feature.

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?

The RANZCP is concerned at reports that family courts have focussed on disability rather than capacity when considering forced sterilisation. In the RANZCP's view, the forced sterilisation of a young person on the grounds of their disability alone constitutes discrimination and is a breach of human rights. At a minimum, such procedures should only ever be approved on an involuntary basis when the person lacks the capacity to make valid decisions about their healthcare, and is unlikely to (re)gain that capacity in the future, and where it is medically necessary.

Similarly, the RANZCP supports the deferral of intersex medical procedures which have irreversible consequences until the person can provide informed consent, except in cases of medical necessity. The RANZCP therefore supports a cautious approach to decision-making where there is no physical necessity for intervention. In such cases, decisions should be made taking into account the paramountcy of informed consent and the importance of leaving options open for the future, particularly regarding an individual's choices with regard to gender identity, fertility and sexual relations which may each prove critical to a person's life and therefore mental health.

Where treatment is being considered, families must have access to information from a range of perspectives, including from mental health specialists and people with lived experience, to ensure access to a balanced array of perspectives. Otherwise, there is a significant risk that decisions will be made within an overly narrow frame. The RANZCP is particularly concerned here about the use of psychosocial rationales to justify intervention. There is little evidence for intersex medical procedures leading to positive or negative mental health outcomes; accordingly, claims that such procedures are 'necessary' or 'therapeutic' are dubious. In the absence of such evidence, decisions should be made with the understanding that the patient's wishes are absolutely paramount. The family's beliefs regarding the psychosocial impacts of intervention or non-intervention are unlikely to be based on medical evidence and therefore reliance on such beliefs may result in inappropriate decisions being made for individuals whose wishes may ultimately prove counter to their family's. In such cases, enforced intersex medical procedures may well produce more harm than good. *Primum non nocere* – do no harm – is central to medical ethics and carries with it powerful and longitudinal meaning for this group.

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?

The RANZCP reiterates its support for the recommendations made by the Senate Community Affairs References Committee regarding the involuntary or coerced sterilisation of people with disability and people born with intersex variations, as outlined in the discussion paper.

Considering the long-term implications of decisions to undertake or not undertake intersex medical procedures, the RANZCP strongly supports a framework wherein all intersex children have access to long-term support and management from a multidisciplinary team, including psychological support from psychiatrists or other mental health professionals, complemented by suitable peer support. The RANZCP also notes its commitment to protecting patient privacy and support for all efforts which ensure that intersex people are never subject to unwanted medical photography.

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

The RANZCP suggests core competencies for relevant professionals should specifically encompass the mental health effects of family breakdown in its various manifestations, as well as the developmental needs of children, including the natural variations between children, to ensure that each child's specific needs can be met.

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

The RANZCP reiterates the need for robust safeguards to mitigate the serious risk that expanded information-sharing processes may be misused by family violence perpetrators, particularly with regard to medical records including those contained within the My Health Record system.