

Australian Law Reform  
Commission  
Review of the Family Law  
System  
– Discussion Paper (DP86)  
APS Response  
**November 2018**

Jacinta Connor  
Policy Officer  
[j.connor@psychology.org.au](mailto:j.connor@psychology.org.au)

Emma Sampson  
Policy Officer  
[e.sampson@psychology.org.au](mailto:e.sampson@psychology.org.au)

Dr Louise Roufeil  
Chief Policy Officer  
[l.roufeil@psychology.org.au](mailto:l.roufeil@psychology.org.au)

## 1. Background

The Australian Psychological Society (APS) welcomes the comprehensive review of the Family Law System and commends the Australian Law Reform Commission (ALRC) for their efforts to synthesise a large volume of stakeholder submissions. The APS support many of the proposals formulated by the ALRC and outlined in the [Discussion Paper 86](#).

The APS is the largest professional organisation for psychologists in Australia representing approximately 24,000 members. Psychologists are experts in human behaviour including the processes determining how people think, feel, behave and react, and they apply their expertise using reliable and scientifically supported methods. The APS appreciated the opportunity to contribute to the original consultation by the ALRC and responded to the *Review of the Family Law System Issues Paper* (see [APS response](#)). As highlighted in this initial submission, the APS strongly support reform designed to craft a modern Family Law System that provides Australian families with an accessible, safe, inclusive, affordable and timely resolution of disputes. The APS is encouraged by the inclusion of psychological and social science knowledge and expertise to enhance outcomes for individuals, families and professionals within the Family Law System.

The APS are pleased that the ALRC have recognised the need to strengthen psychological responsiveness throughout the Family Law System. We welcome the recommendations that the APS work collaboratively with the Australian Government and other disciplines to enhance the Family Law System, particularly with regard to parenting support, and the development of evidence-based information resources and guidelines on the use of sensitive records in family law proceedings (proposals 6-10, 3-9 and 8-9). We have outlined our support for many of the proposals below. The APS look forward to working with the Government on these initiatives and helping to build a fit for purpose system.

The APS is aware that the consultation process led by the ALRC is occurring at the same time as the government is forging ahead with implementing changes to the Family Law System. For example, a number of reforms have already been implemented: the amalgamation of the family law courts, the introduction of the inquisitorial approach to family law with parent management hearings, e-filing enhancements to streamline processes for practitioners and self-represented litigants, and the *Family Law Amendment (2018 Measures No. 1) Rules 2018*. It is important that the overall approach to the reforms is driven by a coherent strategy and vision to achieve the desired improvements for individuals, families and professionals within the Family Law System.

The discussion paper released for consultation in October 2018 contains a detailed analysis of a wide range of issues, many of which raise complex issues that require in-depth analysis and expert input. Some of these issues and questions will need to be addressed by expert working groups. Given the limited time frame for the consultation and the complexity of many of the issues, the APS response to the ALRC Discussion Paper is principle-based according to the overarching aim of the reform to craft a Family Law System that is responsive to the needs of individuals and families. Our response is targeted at aspects of the proposed reforms that can be informed by psychological science and where psychologists can assist with enhancing the Family Law System.

The Family Law System involves managing human behavior. Responsiveness within the Family Law System could be enhanced through the targeted use of psychological knowledge and psychologists to advance the objectives of the reforms and the operation and evaluation of the Family Law System. For example, psychological knowledge must inform the development of systems (e.g., triage processes, family violence frameworks), strategies for meeting the needs of children (e.g., developmental framework, interviewing children, conflict reduction), decision making (e.g., forensic assessments, incorporating evaluative feedback), and the provision of psychological therapy and support (e.g., users, staff, children).

## **2. Comments on proposed reforms**

The APS supports the ALRC's proposals with regard to improving education, awareness and information for users, simplifying the legislation to improve clarity, and enhancing services for users to get advice and support as they navigate the Family Law System.

In relation to the proposals regarding dispute resolution, the APS supports many of the suggestions made, however, in light of the concerns outlined below, some aspects of this section, particularly in relation to harm and family violence, require further analysis of the issues, which we suggest could be provided by establishing expert advisory groups.

The focus on children in the Family Law System in the ALRC's Discussion Paper is pleasing given the impact on children as a result of family law conflicts. The APS supports many of the proposals by the ALRC in this regard and suggests that further analysis of issues and reform impacting on children are overseen by an expert advisory group to ensure that the implementation of reforms protects and enhances the interests of children.

The APS agrees with expanding the definition of family violence and aspects of the Discussion Paper that aim to reduce harm. In particular, we welcome the ALRC's proposal to develop a multidisciplinary working group that includes the APS in developing appropriate guidelines for the use of sensitive records. The APS has some concerns and recommendations for the implementation of harm reduction and these are outlined below.

In relation to additional legislative issues, the APS agrees with the proposals relevant to enhancing the psychological wellbeing of users. We also agree with many of the proposals to improve the skills and wellbeing of professionals working within the Family Law System and can provide further psychological knowledge and support in the development of these reforms.

The APS supports many of the proposed reforms regarding information sharing. However, we are concerned about aspects of the reform intending to simplify a complex matter that may have unintended consequences, such as eroding the privacy and confidentiality of users through the sharing of sensitive information outside the court system. These concerns and recommendations are discussed further below.

The APS strongly supports many of the reforms proposed for system oversight and reform evaluation. Below we elaborate on the importance of prioritising early intervention as part of the reforms and highlight the need to measure psychosocial outcomes as part of the evaluation of the performance of the Family Law System.

### **Prioritise early intervention**

The APS supports the ALRC's recommendations for a public health approach to the design of the Family Law System. A public health approach aims to prevent or reduce a particular social problem, such as child harm, by identifying risk indicators and developing mechanisms for responding to them. Embedded in the public health approach are early intervention strategies such as prevention, targeted resource allocation for people at risk, and determining the appropriate intervention to prevent recurrence of problems. When embedded within and across the system, early intervention can promote a strengths-based, inquisitorial approach and more sustainable therapeutic justice outcomes for families with complex needs accessing family law servicing and support. The impact psychology can have within an early intervention framework can enhance wellbeing and justice outcomes in the short, medium, and longer term. For example, the earlier use of family consultants in Parent Management Hearings can support a non-adversarial approach to conflict, improve the timeliness of family law matters, facilitate early decision making,

reduce the burden on court resources, improve wellbeing for all parties and especially children, and reduce the extent of harm such as that caused by conflict and family violence. Consequently, early intervention strategies involving partnerships between the justice system and psychological science can shift the risk profile to improve the wellbeing and longitudinal functioning of families in Australia.

### **Include psychosocial outcomes in evaluations**

Inherent to the development of any responsive system is the ability to adapt and improve within a changing landscape. Ultimately, the role of the Family Law System is not limited to resolving legal conflicts but by its nature involves improving the psychosocial outcomes for all individuals and families. The grounding in human behaviour combined with critical thinking, analytical skills, and research and evaluation training of psychologists can be better applied to the Family Law System so it can meet its overarching aims. It is important that the focus on improvements in the System is not limited to justice outcomes but is also informed and directed by social science research that includes monitoring, evaluation, and feedback functions. For example, the System can be enhanced by evaluative research to measure outcomes related to the child's best interests, harm reduction (e.g., conflict, family violence, safety), health impacts on staff and users, operationalising the public health approach, effectiveness of frameworks, and improving the risk profile across multiple areas of concern.

As argued in our original submission, psychology and social science more generally can inform high-quality research and the evaluation of issues relevant to the Family Law System. In particular, longitudinal research or follow-up is required of families post contact with the Family Law System to assess the psychosocial outcomes for all involved and to learn from their experiences. There is a need for the Family Law System to be monitored, evaluated, and benchmarked and for more investment in research, especially longitudinal research. These measures will facilitate a reliable feedback system to which policies and legislation can respond.

### **3. Areas of concern regarding the ALRC's proposals**

The APS is aware of longstanding concerns regarding several areas for reform canvassed in the Discussion Paper. Some of the issues raised are extremely complex and require further information and discussion by relevant experts. There are risks associated with over-simplifying a complex system and some of the challenges proposed in the Discussion Paper may undermine the aims of reform. We draw the ALRC's attention to the following issues.

#### **a) Devolving the Family Law System**

As presented in the Discussion Paper, one of the aims for this reform is to "devolve" the Family Law System. Devolving the broader Family Law System can provide more flexible, adaptive, and effective service to users by providing local solutions to family law problems. However, this must be balanced with equitable service delivery and outcomes. For example, such as discussed by the NSW Bar Association in their response to the issues paper, devolving can undermine the aim of providing a "one-stop-shop" for family law in Australia. The devolving of legal systems has strengths and limitations that must be addressed appropriately to effectively devolve some facets of the Family Law System, as evidenced by attempts to devolve criminal justice in the United Kingdom, United States of America, and New Zealand and discussed in Australia (For example, see the Senate Inquiry [final report into the Value of a justice reinvestment approach to criminal justice in Australia](#) produced by the Legal and Constitutional Affairs References Committee in 2013). Evaluations and

commentary on these reforms highlight the centrality of implementing sufficient performance oversight and benchmarking to ensure that the effective stratification of services and decision-making produces equitable outcomes for children and their families.

#### b) Information sharing

In principle, the APS supports the need for sharing information for the purpose of expediting family law matters and for protecting families and children from violence, such as information sharing in relation to gun licensing. However, the details about what is considered appropriate information sharing in specific circumstances is often nuanced and requires further analysis as reforms are implemented. The current discourse about information sharing in Australia (e.g., My Health Record, information sharing reforms in Victoria) highlights the level of public and professional concerns about the sharing of sensitive information. In relation to the Family Law System, the APS is concerned about the sharing of sensitive information such as health information and family assessment reports outside the court system where the court has little control over how the information is used. While information sharing can be helpful to ensure the safety and wellbeing of families, there are risks to the privacy, confidentiality, and security of sensitive information associated with the ALRC's proposal 11-2. Our concerns related to how, what, and to whom information is shared and in what circumstances. These issues have the potential to impact on the wellbeing of users and the trust that Australians have in the Family Law System and we welcome the establishment of an information sharing framework.

#### c) Harm reduction

In principle, the APS supports and applauds the ALRC's recommendations outlined in the reducing harm section of the Discussion Paper. We note, however, that there are several contentious issues pertaining to harm reduction within the Family Law System that require more thorough analysis before some aspects of the reform can be implemented. For example, while we strongly support broadening the definition of family violence, there are issues regarding measuring the presence and extent of harm in the context of a new and broader definition. Additionally, various understandings about what constitutes family violence (physical, psychological, emotional, process misuse and abuse, high conflict etc.), the nature of family violence (e.g., the dynamic factors and contributors), and what constitutes harmful levels of conflict are not yet universally defined across the Family Law System. Further, although there are established risk screening protocols, these vary between jurisdictions and evidence of the reliability and validity of formal family violence risk assessment tools is still being established. These measurement problems mean that thresholds for making assessments of risk and harm are not well established in the literature. Without a more thorough understanding of how harm is defined, measured, and thresholds determined, there is a risk of high variability in the application of family law. For example, property adjustments based on the extent of harm from family violence will be variable if harm is not measured equally across all Australian jurisdictions. The APS has concerns about the significant ramifications if reforms include punitive measures such as apportioning property as a result of family violence before appropriate definitions and measurement instruments have been appropriately validated.

d) Best interests and safety of children

As identified in the Discussion Paper, there is currently no clear understanding about what constitutes a 'child's best interests' particularly when the best interests and safety of children are often based on the individual circumstances of the child. The Family Law System is guided by these principles, yet in practice, there is considerable variation in what constitutes a particular child's best interests. Even when both parents are able to ensure safety and 'good enough' parenting, there can be value conflicts in what each parent considers the best interests of their child. For example, religiosity, schooling, health decisions etc. There is a need for further research and expert guidance on this issue.

e) The definition of family and family members

The definition of family and family members is not well defined in a way that captures the diversity of family structures (for example, the definition of family among Aboriginal and Torres Strait Islander peoples or within LGBTQI+ families). Given the diversity of modern family structures in Australia, there is considerable variation in how family and family members are defined. There is a need to listen to the voices of these groups in order to achieve a working definition that can be included in the legislation.

f) The involvement of children in Family Law Matters

The APS supports the ALRC's recommendations for a developmental framework for better understanding children's matters and also to scaffold the extent of children's involvement in the Family Law System. As foregrounded in the APS's response to the Issues Paper, the involvement of children in family law matters is a sensitive issue involving an appropriate balance between the rights of children to be heard, and their right to be protected from harm, including harm stemming from exposure to high levels of parental conflict. The APS strongly supports the proposal for the appointment of child advocates with a social science background, however, there needs to be further examination of the advocates role, including the limitations of the role, how the admissibility of communications is managed, and whether the child advocate may become a witness in the matter. It is important that children develop and maintain confidence in the value of health professionals more broadly. The APS suggests that these issues are considered by the Children and Young People's Advisory Board proposed by the ALRC.

g) Regulation and oversight across various professions

The APS supports increased regulatory oversight of professionals within the broader Family Law System. However, there is a need to ensure that the regulation of professionals is not duplicated given the multidisciplinary nature of the workforce and the existing professional regulatory bodies (e.g., Australian Health Practitioners Regulation Agency). The mechanism and role of a regulatory body, including sharing information between these bodies, requires further consultation to ensure the issues for each profession are thoroughly assayed. This will minimise unnecessary regulatory burden.

#### 4. Proposed Recommendations for implementation

The APS welcomes the ALRC's recognition of the potential contribution that psychological science can make to families involved in the Family Law System. In light of the general principles and areas of concern outlined above, the APS make the following recommendations:

1. **Instigate a stepped approach to the implementation of reforms that integrates the monitoring and evaluation of outcomes, including psychological outcomes.** The evaluation should be guided by the overarching aims of the reform to improve outcomes for users and professionals within the broader system, such as reduced conflict levels, timeliness, increased accessibility, improved user experience, long term outcomes for children etc. A stepped implementation of a public health approach can also assist with operationalising reforms and informing outcome measures for all users and user groups, and in particular, the psychosocial consequences of the reforms.
2. **Develop and integrate frameworks to improve user understanding, assist decision makers, and offer user and professional guidance.** The APS recommends that the following frameworks be developed:
  - i. *Information security and sharing framework* that includes information about the management of and access to sensitive records, considers privacy and confidentiality concerns, addresses the sharing of information for the purpose of improving safety, considers highly sensitive concerns about the appropriate sharing of health information, and about informed consent for information sharing and other relevant issues. The ALRC has recommended that an information sharing framework be implemented and we suggest this includes the security of information held by the broader Family Law System.
  - ii. *Child development framework* that informs the Family Law System and facilitates understanding across the system, including parents, about the needs of children at various developmental stages. This could also include the impact of conflict and violence and how parents can protect children during conflict and from exposure to violence. In addition to facilitating understanding of the emotional, psychological, and physical needs of children as they are developing, this framework could be used to guide discussions with children about family law matters and assist with making decisions about a child's best interests. The APS has recently developed a Position Statement along with a suite of resources on children's wellbeing following parental separation that could be adapted for specific family law contexts.
  - iii. *A national family violence framework* based on psychological evidence about the dynamics and range of behavioural patterns that constitute family violence, and how these patterns are identified and thresholds determined in the context of a family law matter. Currently, family violence frameworks exist outside the court system and are linked to state/territory-based approaches and legislation. In light of the expanded definition and the aim to simplify the Family Law System, the APS recommends that a national framework is developed for the Family Law System based on the broadened definition of family violence. This is important to ensure the Family Law System is responsive to patterns of violence and abuse, including emotional, psychological, and misuse and abuse of processes.
  - iv. *An expanded national safety framework* to include all aspects of safety in addition to family violence that addresses issues such as conflict, cultural safety, and trauma.

3. **Establish expert and multidisciplinary advisory groups designed to more thoroughly analyse specific issues that have broad impacts across the Family Law System.** These groups could serve functions such as guiding the development of relevant frameworks, policies, and consumer documents, providing a feedback mechanism about issues requiring refinement, and synthesising practice and research to enhance outcomes. The issues identified by the ALRC that could benefit from expert advisory groups that incorporate psychological science are:
- i. *Information security and sharing*, such as managing access and sharing of sensitive information (e.g., health records).
  - ii. *Family violence*, such as defining the various forms of family violence and reviewing the evidence base to inform the Family Law System on family violence and parenting as they relate to the System. This could also include targeting: conflict reduction by informing the design of dispute resolution services that are fit for purpose, parental decision making, problem-solving, informing parents about children’s best interests within the developmental framework, understanding safety, clarifying processes for resolving conflict in longer term matters where parents disagree on the right decision for their child, and informing the development of guidance documents for parenting matters.
  - iii. *Child issues*. As suggested by the ALRC, this advisory group could consist of a multidisciplinary panel who provide expert advice and recommendations about how to address the needs of children across the family law system. For example, the group could advise on the establishment of a developmental framework; the appropriate involvement of children in family court matters; policies for interviewing children; working with complex family systems; the role of child advocates; and other policy issues about matters that impact on the wellbeing and safety of children.
  - iv. *Workforce capability and accreditation standards* including accreditation of social science practitioners, skills required for interviewing children, family violence screening and assessment, trauma-informed practice, the dynamics of stress, cultural safety, and self-care strategies for workers in the Family Law System.
  - v. *Monitoring and evaluation of psychological outcomes* for people who have contact with the family court system (e.g., psychosocial impacts of reform, services provided, and dispute resolutions).
  - vi. *Enhancing safety* across the family court system, including but not limited to issues such as triage processes, trauma-informed practice, and cultural safety.