



## Submission to:

# *ALRC Review of the Family Law System: Discussion Paper 2018*

The Centre for Excellence in Family Welfare ('the Centre') is the peak body for child and family services in Victoria. For over 100 years we have advocated for the rights of children and young people to be heard, to be safe, to access education and to remain connected to family, community and culture. We represent over 150 Community Service Organisations ('CSOs'), students and individuals throughout Victoria working across the spectrum of child and family services, from prevention and early intervention to the provision of out-of-home care.

The Centre believes in the right of all children to grow up in a safe and nurturing environment as a part of a family, and emphasises the importance of child-centered practice in decision making affecting children. This must be a focus on what is considered 'in the best interests' of the child.

We know from our members that a large proportion of children and families assisted by CSOs are involved, or have been involved, in family law proceedings. Families who seek the assistance of CSOs are often dealing with a range of complex issues. These could include mental health, family violence, drug and alcohol related issues, homelessness or housing stress. They may also be experiencing financial stress. Our experience indicates that family law proceedings are especially challenging to negotiate for families and children in these circumstances. As the Productivity Commission found in its Access to Justice Report in 2014;

*disadvantaged Australians are more susceptible to, and less equipped to deal with, legal disputes.<sup>1</sup>*

The Centre represents many child and family service providers who assist families at this point of crisis.

We refer to and attach our previous submission to the ALRC Review of the Family Law System, Issues Paper 2018.

## **Reforming the Family Law System- a public health approach**

The Centre supports in principle the ALRC's public health approach to reforming the family law system. This includes recommendations for:

- public awareness, education and information about the family law system;
- simpler and clearer legislation;
- community based families hubs to assist families to receive advice and support;
- strengthening alternative dispute resolution processes;
- reshaping the adjudication landscape with a strong focus on triage and case management;
- a workforce capability plan;
- Improved information sharing.

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<sup>1</sup> Australian Government Productivity Commission (2014) [Access to Justice Arrangements, Inquiry Report No. 72](#), p. 2.



The Centre supports adopting a model that assists families to reach a resolution of issues in dispute after separation without needing to access the formal court system. As the ALRC points out, *'most separating families work out their post separation parenting and property arrangements with little or no reliance on the family law system'*.<sup>2</sup> Easy to understand general resources, including up to date research about the impact on separation on children will be of great assistance to these families. However, not all families will be in this position, and the recommendations that address the secondary and tertiary levels response are of vital importance.

Central to these recommendations is the establishment of community based families hubs. The ALRC proposes that they will:

*...provide separating families with a visible contact point for accessing a range of advice and support services in one place. This initiative would bring together a team of on-site embedded workers from a range of local services, including legal assistance services, family relationships services, specialist family violence services, financial counselling and housing assistance services, and specialist services for children and young people.*<sup>3</sup>

In order for these family based hubs to be successful they must operate on a multidisciplinary model, with an integrated client -centered approach. The Centre has concerns about the current operation of Victoria's Orange Door family violence hubs. Feedback indicates that service delivery continues to be 'silo-ed' with minimal cross disciplinary coordination and cooperation. With the increasing number of families attending the hubs, there is bottleneck after referrals are made, with a subsequent delay for families to commence accessing the referred service.

Victoria has a more successful model operating in its Multidisciplinary Centres. They operate on a collaborative model that *'co-locate a range of agencies in the one building to provide a victim-centered, integrated and holistic response to victims of sexual crime and child abuse'*. The Centre suggests that the Multidisciplinary Centre model could be adopted by the proposed community based family hubs.

The ALRC recommends that the current Family Advocacy and Support Service be expanded to create a new case management model with specialist assistance from both men's and women's family violence services as well as legal assistance for both parties. The ALRC states:

*Together, the Families Hubs and the expansion of the FASS aim to reduce the risk of people 'falling through the gaps' between different services and sectors and not having their safety and support needs, or those of their children, met.*<sup>4</sup>

The FASS case management model should not be limited to family violence services, but also include assistance from child welfare specialists, such as Victoria's Child First.

The ALRC recommends a range of reforms at the tertiary level. Central to these are an expanded range of flexible dispute resolution options and a team based triage process within the courts to direct matters to the appropriate specialist lists.

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<sup>2</sup> Australian Law Reform Commission (2018) [Review of the Family Law System: Discussion Paper](#), p. 15.

<sup>3</sup> Ibid.

<sup>4</sup> Australian Law Reform Commission (2018) [Review of the Family Law System: Discussion Paper](#), p. 16.

The Centre supports the position that the adversarial nature of the court process does not meet the needs of children in families with complex needs. The Centre hopes that by applying a public health lens to the family law system, families will be able to access the appropriate supports and interventions at an early stage to minimize the need to commence formal family court proceedings.

## **Best Interests of the Child**

A key factor to the success of these reforms will be the primary focus on the best interests of the child at all stages of interaction with the family law system and at all decision making points. All children who find themselves having to navigate the family law system must be confident that their rights and welfare are continually being assessed, and that decisions are made in their best interests. This is particularly important for children who come from families with complex issues, as they may be experiencing significant trauma which can be exacerbated through interactions with the family law system.

### **The impact of trauma on children**

Trauma from experiences of abuse, including family violence, can have significant impact on children.

*Trauma is the emotional, psychological and physiological residue left over from heightened stress that accompanies experiences of threat, violence, and life-challenging events.*<sup>5</sup>

Early experiences affect the development of brain architecture. When children experience adversity during childhood, the stages of brain development are disrupted and foundational neural pathway connections are not made.<sup>6</sup> This can have lifelong consequences for social, emotional and physical health and development.<sup>7</sup>

The adversarial and stressful nature of family law proceedings can re-traumatise children who have already experienced trauma in their lives.

Given the impact of trauma on brain development, the potential impact of exposure to prolonged adversarial court proceedings on children could be significant.

The Centre recommends that a child focused trauma informed approach inform all levels of the reformed family law system. At all points of contact within the system, consideration of the best interests of the child, through a trauma informed framework will be essential.

### **The Best Interests Test**

The Centre strongly supports the ALRC recommendation to expand the principle of ‘best interests’ in section 60 CA of the Family Law Act to include ‘best interest and safety’ as the

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<sup>5</sup> Australian Childhood Foundation (2010) [Making space for learning: Trauma informed practice in schools](#), p.12.

<sup>6</sup> McLaughlin, K. A. Sheridan, M. A. Lambert, H. K. (2014) [Childhood adversity and neural development: Deprivation and threat as distinct dimensions of early experience](#), p. 579 in *Neuroscience & Bio-behavioral Reviews* 47, pp. 578-591.

<sup>7</sup> Center on the Developing Child (2016) [Applying the science of child development in child welfare systems](#), p. 6. Harvard University.

paramount consideration when making decisions about children. This will guide decision makers at all levels of the family law system to consider the safety needs of each individual child. The Centre stresses the importance of a rigorous risk analysis for each child, taking into account any safety issues which may not only arise in a domestic violence context, but across a range of child safety risk factors. These include, sexual abuse, emotional and physical abuse and neglect.<sup>8</sup> Of particular importance for Aboriginal children is the right to cultural safety. Cultural safety must be included when assessing the best interests safety needs of children. This is reflected in the ALRC's proposed changes to section 60B.

The Centre recommends that further consideration be given to the development of a risk assessment framework which can be used across all levels of the family law system, and which aligns with the state and territories child welfare frameworks. The Centre supports recommendation 7-6 which provides that:

*there should be an initial and ongoing assessment of risk to the child of participating in family law proceedings or family dispute resolution, and processes put in place to manage any identified risk.*<sup>9</sup>

In relation to the principles which govern the consideration of the child's best interests and safety needs, the Centre supports the proposed changes recommended by the ALRC. However, the Centre strongly recommends that the following proposal in section 60CC should be expanded to explicitly include siblings,

*the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents,[and siblings] where it is safe to do so.*<sup>10</sup>

A large number of vulnerable families who are accessing the family law system are blended or sole parent families, with siblings living with a different parent. Often children are cared for by a grandparent or other extended family member. This may be through informal arrangements, or following Child Protection intervention. For children in these situations, the importance of the sibling relationship is vital. Maintaining a strong sibling connection can be an important protective factor for vulnerable children. It is also important for children to maintain extended family relationships, particularly with grandparents, as in times of family crisis it is often the grandparents who are able to meet the safety needs of their grandchildren.

## Family Violence

Family violence is a significant issue that affects a large number of children. In 2016/17, Victoria Police attended 76,500 incidents of family violence and children were present at 23,857 (31%) of them.<sup>11</sup>

Children and young people are understood to be at an increased risk of exposure to family violence. Family violence is believed to have an especially serious impact on the health and wellbeing of this vulnerable group.

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<sup>8</sup> Australian Institute of Family Studies <https://aifs.gov.au/cfca/publications/what-child-abuse-and-neglect>

<sup>9</sup> Australian Law Reform Commission (2018) [Review of the Family Law System: Discussion Paper](#), p. xxiv.

<sup>10</sup> Australian Law Reform Commission (2018) [Review of the Family Law System: Discussion Paper](#), p. xiii.

<sup>11</sup> Victoria Police (2017) [Family Violence Data Portal – Data Tables](#), Table 15.



Section 4AB of the Family Law Act provides a non-exhaustive list of examples which may constitute family violence. The Centre recommends that Part VII be amended to require the court to consider the impact of family violence on the child as a victim in his or her own right, and not as a member of a family group, or as an extension to the primary victim (in most cases the mother). This will ensure the court considers the risks and protective factors as they apply to each child in a family group and make orders accordingly.

The Centre welcomes further reforms to the decision making framework in Part VII, and the proposed introduction of a family violence specialist list in all family courts.

## **Family Law System and children at risk**

Since the passing of the Family Law Act in 1976, Australia has undergone vast social, economic and technological change. This includes more variation in the structures and needs of Australia's families and households. As the Discussion paper highlights, those families who do end up before the family courts are experiencing an increasingly complex range of issues including exposure to family violence.

Some families may also be negotiating legal matters in several courts at the same time. These could include state courts such as the Magistrates' Court for Intervention Order applications or criminal matters, and the Children's Court for Child Protection or youth justice matters. In addition, some may have family law proceedings running concurrently, or which have been adjourned pending resolution of Child Protection proceedings.

The Centre supports the proposed measures which should facilitate coordination and cooperation between these various systems. In particular we support proposal 6-8 to co-locate family court and judicial registries in local court registries. We strongly support proposal 11-7 to co-locate child protection and family violence workers at each of the family court premises. We further recommend that a secondary level of family support service be co-located in the family courts, such as Child First in Victoria. This will provide an easy to access support service for families who do not meet the child protection threshold, but who may still benefit from assistance.

The Centre supports proposal 6-3 and the recommendation to establish a specialist family violence and indigenous list in the family courts. We strongly recommend that a child welfare list should also be established. This would be for matters involving children where there is a current state child protection open file, or the matter has been flagged through the risk assessment framework discussed above. This will allow for close and consistent judicial oversight over these complex matters.

The Centre supports the recommendations to implement a national information sharing framework. Victoria has recently introduced a child information sharing regime.<sup>12</sup> The scheme is currently in the initial rollout phase. A national information sharing regime, which explicitly includes all elements of the family law system, modelled either on the Victorian or NSW legislation would be of great benefit.

The Discussion paper makes a series of recommendations relating to workforce capabilities in the family law system. The Centre strongly recommends that all family court staff receive mandatory training on the impact of trauma on children, and implement a trauma informed and child centred service delivery model across all elements of the family law system.

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<sup>12</sup> <https://www.vic.gov.au/childinfosharing>

## Participation of Children

The Centre strongly supports the proposals to strengthen the voice of children in family law proceedings. The default position must be to enable a child's voice to be heard unless it is unsafe to do so. Recommendation 7-7 suggests that 'children should not be required to express any views in family law proceedings or family dispute resolution'.<sup>13</sup> However, we encourage the creation of a culture within the family law system that will promote the participation of children when making decisions which concern them, and which will have such a profound impact on their lives.

The Centre strongly supports recommendations 7-8 and 7-9, to appoint a child advocate to support children involved in family law proceedings. The child advocate will:

- explain to the child their options for making their views heard;
- support the child to understand their options and express their views;
- ensure that the child's views are communicated to the decision maker, and
- keep the child informed of the progress of a matter, and to explain any outcomes and decisions made in a developmentally appropriate way.<sup>14</sup>

Recommendation 7-8 suggests that when a child is not able to be supported to make their views known, the child advocate will 'advocate for the child's interests based on an assessment of what would best promote the child's safety and developmental needs'.<sup>15</sup> In exercising these dual roles, the child advocate will need to explain to the child the reasons why they have shifted from a direct instruction to a best interests approach.

For this proposal to function as intended, it must be adequately funded to enable the child advocate to allocate sufficient time to meet with the individual child and to form a clear understanding of their views. It may become apparent that the child would benefit from ongoing counselling, the child advocate should be able to make appropriate referrals.

The Centre supports recommendation 7-10 to shift the focus of the independent children's lawyer to more of an evidence gathering role.

The Centre supports the establishment of a Children and Young People's Advisory Board (recommendation 7-13). This could become a powerful way for children and young people to have direct input into the way the family law system can become more child-centered and child-inclusive.

In conclusion the Centre supports the public health approach taken by the ALRC in this Discussion paper. Australian children and their families are currently being let down by a family law system that is adversarial, costly and traumatic. It is time to reform the system so that is truly child centred and focused on the best interests of children.

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<sup>13</sup> Australian Law Reform Commission (2018) [Review of the Family Law System: Discussion Paper](#), p. xxiv.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.