

Review of Family Law System
Submission to ALRC on Discussion Paper 86

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November, 2018

Introduction

Please note that I have chosen to discuss only issues about which I believe I have the strongest contribution to make.

Proposal 3-1

I agree that the FLA needs to be simplified with clearer, plainer language and a more straight forward and logical structure. I fully support moving the provisions relating to the Courts and AIFS to separate legislation.

In respect of the parentage provisions I am less certain. They certainly require simplification, but these sections are likely to be directly relevant to cases which decide where children live, who they have contact with and who has legal rights and responsibilities in respect of those children. I think that they could be contained in a Part of a newly designed Act that specifically deals with those issues.

Wherever the provisions are positioned they should deal with all of the issues listed in paragraph 3.25. This will involve reform at state and federal levels in some instances. The critical matters are:

- Ensuring that there is a process for parentage orders to be made in cases involving Torres Strait Island traditional adoption. The Queensland government has recently announced that this issue is under consideration for legislative reform in that state. It will be important for any such reforms to be reflected in the FLA and for Torres Strait Islanders who reside in other states to be able to access relevant laws;¹ and
- Ensuring consistency in laws regarding parentage when artificial conception procedures have been used and ensuring that the intended social parents are able to obtain legal parentage.

However, some situations involve contested issues of moral, ethical and potentially religious complexity. At present two competing questions of public policy apply when Australian citizens seek parentage orders in cases where they have engaged in a commercial surrogacy arrangement – whether overseas or domestically. Such arrangements are illegal almost everywhere in Australia – but they do occur. So, on the one hand it might be said that the

¹ See: H Loban, K Van Doore and Z Rathus, ‘Parentage Not Parenthood: Ending Discriminatory Laws And Policies Regarding The Legal Recognition Of Torres Strait Islander Traditional Adoption’ (2018) 13 *Australian Journal of Family Law* 135

intended social parents should not be able to obtain a parentage order because that would be a reward for committing an offence. On the other hand, if the reality is that the child resides with those adults and they are acting in the role of parents, and no-one else is, the child is disadvantaged if those adults do not have legal parentage of the child and all the rights and responsibilities that flow with that. Perhaps parentage orders should be available in these situations, but only if the court also decides that an order is in the best interests of the child. In other words, there should be an understanding that 'parentage' is not simply about formalising an existing legal state of affairs, but is a discretionary order which allows appropriate 'families' to function as a legal family unit in the future.

It is my position that in all the above situations - TSI traditional adoption, artificial conception and surrogacy - there should be a clear regulatory and record keeping process that allows children to ascertain their true genetic and biological ancestry at the age of the 18 at the latest.

Proposal 3-3

I agree that the best interests of the child should remain the paramount consideration, consistent with our jurisprudential history and the general direction of parenting laws in comparable jurisdictions. I also appreciate the idea that "safety" should be elevated to be included in this principle, but as I suggested in my original submission, I believe that the word "safety" is not the best choice. Safety is all about looking into the future and, at a practical level, working out if the child might be in danger as result of spending time with someone.

This is actually quite a high bar to set, and asks the wrong question. I am concerned that this might unintentionally turn attention even more to questions about physical and sexual safety. Although physical and sexual safety are critical, I submit that it is the impact of having lived with a parent who abuses the other parent which is dealt with poorly in the current family law system – and that may not be captured in the idea of "safety". It is the legacy of living with family violence, not always what might happen in the future, that is a concern.

I suggest that wording around 'safety' could be:

ensuring the physical, psychological and emotional safety of the child taking into account any family violence or abuse which has been or may be experienced by the child or to which the child has been, or may be exposed.

I note that proposal 10-2 sets out the core competencies for professionals in the family law system and that one of them is 'an understanding of trauma informed practice'. There is an excellent description of trauma-informed practice in a paper which concludes a special edition of the *Journal of Social Welfare and Family Law* about contact arrangements for children where there has been domestic violence. This type of practice focuses on the impacts of 'trauma arising from interpersonal violence' and the need to 'protect the physical

and emotional safety of consumers/survivors'.² It requires awareness of both past and current experiences of abuse and 'involves looking not just at recent and imminent risks to a child's safety but at the cumulative impact of trauma on the child over time. Compounded experiences of multiple episodes of abuse diminish a child's sense of safety, stability and wellbeing and affect their development, and this needs to be understood and addressed.'³

Proposal 3-4

It is apparent that the current objects and principles have created some confusion given their similarities to and differences from s 60CC(2). It is my memory that, prior to 1995, there was no such section (or, if there was, it was not much relied on) and it was the introduction of the principles section in the *Family Law Reform Law 1995* that began to create conflicting messages in the parenting sections regarding the right of children to have and maintain relationships with both of their parents post separation (except where it was not in their best interests) and the requirement that parenting orders take into account any history of family violence experienced by a child. It was largely those principles which were considered to have brought about a 'pro-contact' culture,⁴ which still exists today.⁵

I am not completely sure why it is considered necessary to have a set of objects and principles as well as a section that sets out that the factors to be taken into account in determining the best interests of a child. Given the last two decades of the history of Part VII, I submit that such a section is redundant and likely to cause confusion.

If such a section is considered essential in modern drafting, I suggest that it be kept at a very high level and perhaps reference the international instruments to which we are a party, including the rights of children to maintain connection with culture. The more specificity with which these provisions are drafted, the more likely they are to cause confusion and conflict when read together with the operative sections regarding deciding best interests.

Proposal 3-5

I support the idea that there should not be two tiers of considerations and nor should there be presumption of equal shared parental responsibility (ESPR). There seems to be wide acknowledgement that the presumption of ESPR has not been helpful or protective, despite its exceptions. In terms of the matters suggested for BIC I make the following comments:

² R Hunter and S Choudhry, 'Conclusion: international best practices', (2018) 40(4) *Journal of Social Welfare and Family Law*, 548-562 at 549.

³ *ibid*, p 550.

⁴ H Rhoades, R Graycar, and M Harrison, *The Family Law Reform Act 1995: The First Three Years*, University of Sydney and the Family Court of Australia, 2000; J Dewar et al, *Parenting, Planning and Partnership: The Impact of the New Part VII of the FLA 1975*, Griffith University, Family Law Research Unit, Brisbane, March 1999; and K Rendell, Z Rathus and A Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family*, Women's Legal Service, Brisbane, 2002.

⁵ Rosemary Hunter, Adrienne Barnett & Felicity Kaganas, 'Introduction: contact and domestic abuse', 40(4) (2018) *Journal of Social Welfare and Family Law*, 401-425 at 402.

- Children’s views are very important and I will make more comment about children’s participation later;
- Although I have not found the discussion on this point – I think that using the terms ‘carer’ and ‘proposed carer’ is excellent. It removes the focus from biological parents and should be able to be used throughout Part VII;
- Again I would like to see reference to any history of family violence or abuse and the impact of this history as well as the reference to safety, in line with a trauma informed approach.

One matter currently included in s 60CC(3) is the nature of the relationship between the child and the proposed carer. This is a useful touchstone. It is different from parental capacity and requires consideration of the emotional bond and not just the ability to care. I suggest adding a factor in the shape of:

The nature of the relationship of the child with the proposed carer and other persons.

Benefit of Maintaining Relationships

I am dealing with this separately because of its importance. I have a concern about the phrase ‘benefit to a child of being able to maintain relationships ...’ being used in the BIC list. While that phrase reflects an important consideration in these cases, I think that those words are now imbued with a slightly artificial meaning that was carved out to avoid some of the consequences of the original drafting of Part VII and s 60CC(2)(a).⁶ The early decision of Bennett J in *G and C*, which determined that s 60CC(2)(a) was evaluative and not presumptive, was a critical moment in the interpretation of that section – and possibly was not an interpretation expected by the legislature. There is no guarantee how the jurisprudence created around these words would apply to the newly constructed section. Although the word ‘meaningful’ has been removed, that may simply confuse things more – and replacing it with ‘significant’ merely codifies cases like *Mazorski v Albright*.⁷

The research which I have been involved in regarding how family violence is dealt with in family reports revealed the extent to which the idea of ‘meaningful relationships’ was seen by lawyers and social service providers to be an avenue through which the relevance of family violence was minimised and the on-going relationship prioritised. As one social service provider said:

*I believe the child’s right to safety needs to override the right to know both parents or have a meaningful relationship with those parents. The safety of children really is often just overlooked. (Social Service Provider).*⁸

⁶ [2006] FamCA 994

⁷ [2007] FamCA 520

⁸ S Jeffries, R Field, H Menih and Z Ratus, ‘Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic Violence?: Understanding Family Report Writing Practice from the Perspective of Professionals Working in the Family Law System’ (2016) 39(4) *University of New South Wales Law Journal* 1355 at 1381.

A similar comment from a lawyer showed the breadth of this view:

It clearly says that they need to protect the child from physical or psychological harm, from being subjected to or exposed to abuse, neglect, or family violence. It's supposed to be given greater weight than the benefit to the child of having a meaningful relationship but they look for the meaningful relationship, and then they pay lip service to the domestic violence. [The meaningful relationship still seems to be the driver.] (Legal Practitioner).⁹

I recommend that a different phrase with quite different language be used to express the idea contained in dot point 5 of the list of factors relevant to BIC, such as:

‘that children be able to continue relationships that are important to them, provided that any history of family violence or abuse be taken into account in considering whether or not any relationships should be continued and the nature of how that on-going contact should occur.’

It is difficult to envisage precisely what legislative construct is most likely to lead to family violence and abuse being given appropriate consideration. Many professionals in the family law system and judicial officers take family violence very seriously and orders are made for no contact or very limited contact in some cases. However, many submissions pointed to a concern that this is not always so and that family violence is sometimes minimised or rendered largely irrelevant to the orders made.

How to Ensure Family Violence Is Prioritised

It seems that no matter what kind of legislative change is brought in, it is difficult to ensure that family violence is prioritised in family law systems where contact with no-resident parents is also a priority. In the special edition of the *Journal of Social Welfare and Family Law* discussed earlier, there is a suggestion that a presumption against residence or contact where there is family violence may have brought some improved outcomes in the USA, but a similar presumption was largely undermined in New Zealand and has been repealed. The authors point to the ‘gap between law in the books and law in action’ which seems to inevitably emerge in the practice of family law.¹⁰ The system has to operate holistically for the legislative changes to have effect in practice.

It is clear from the research and the innovative programs in place in Australia that legal representation, strong support services, integrated services, specialisation in the courts, training for professionals and other systems’ enhancements tend to contribute to better outcomes. The Review has made many proposals concerning these types of matters. It is also apparent that tools like presumptions against contact can have unintended consequences – violent male partners will seek domestic violence orders against their partners to trigger the presumption, wide definitions of domestic violence mean that a finding that family violence has occurred is not unusual, judges do not always respond well

⁹ Ibid, 1382 – The last part of the quote was not included in our article but is in the original transcript.

¹⁰ R Hunter, A Barnett & F Kaganas, ‘Introduction: contact and domestic abuse’, 40(4) (2018) *Journal of Social Welfare and Family Law*, 401-425 at 40419. See pp 413-419 for a discussion of presumptions against contact.

to restrictions on the exercise of their discretion and there can be a backlash from fathers' rights supporters and others who may argue that the presumption inflames conflict and encourages false allegations¹¹

However, strong legislative messages can be an important part of an effective system. They focus attention on specific matters and require reasons and explanations for departure to be given. I believe that something stronger needs to happen legislatively than including 'safety' as a paramount consideration – however expressed. The 2003 Inquiry recommended a presumption against ESPR where there was 'entrenched conflict, family violence', substance abuse or child abuse, rather than just rendering the presumption inapplicable.¹² That recommendation was not followed – and that weakened the protection.

I recommend a rebuttable presumption against joint parental decision-making and against equal or majority time with a proposed carer where that person is found to have committed family violence or child abuse.

Where there has been a finding that a proposed carer has committed family violence or abuse against another carer of the child, or the child, or has caused the child to be exposed to family violence or abuse, there should be a rebuttable presumption against orders for joint decision-making and against equal or majority time with that proposed carer.

Proposal 3-7

Although this proposal seems to eliminate the idea of 'equal shared parental responsibility' – something I think is essential – it does not spell out how shared decision-making will be described. Perhaps the term 'joint' should be considered because it gets away from 'equal', and that can be paired with 'decision-making responsibility'.

Chapter 5 – Dispute Resolution

In respect of this chapter I make some general comments related to my understandings from my own research, the literature and my general perceptions of the family law system:

- I support a greater use of FDR in property matters – particularly where there is a small property pool
 - Disclosure will be a key issue in property matters, particularly for women whose partners control the finances
 - FDRPs in this area need to be as well trained in family violence as those doing children's cases

¹¹ Ibid, 419

¹² House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of a Family Separation*, 2003.

- The impact of family violence may affect a woman’s confidence about financial matters generally and her ability to negotiate on the day
- Family violence may also impact on her future earning capacity
- In respect of s 60I certificates I have no firm view, but I was surprised by the statistic that over 45% of applications for final orders were made under an exemption (para 5.47). This suggests that getting an exemption very is common. There has perhaps been a lack of clarity about the exact role the certificates played. They are a ticket to court proceedings but each kind of certificate requires a judgment call by the person giving the certificate – and is a judgment on each of the parties. They can become influential in costs. They may contribute to a picture of one party as unco-operative, which is how some perpetrators of family violence try to present their former partners.

I support a review of this process.

- I support the development of legally assisted FDR. Although I am aware that there are challenges, all separated persons should have the option of accessing FDR to try to work out finances and / or children. Even where there is family violence the option should be available but support is required – and LADR process assists this.
- The following must be considered:
 - FDPs must be expert in working with couples who have experienced family violence and must be attuned to the tactics of perpetrators in negotiating situations
 - The programs need to be properly resourced, with appropriately trained lawyers and FDPs – with on-going professional development required.

Proposal 6-7 and Questions 6-1 and 6-2

In respect of the idea of a family violence pathway, I accept the position that it cannot happen for every case where there has been some family violence – so allocating a high risk group makes sense. The obvious problems with this will be the likelihood that physical violence will end up being the focus, and that some cases of serious family violence will not be identified and will be left in the other list where family violence might receive less attention. In the research I have been involved in regarding family reports and family violence,¹³ many of the women we interviewed described the ways in which they felt the family violence they had described was minimised or rendered largely irrelevant. There needs to be full acknowledgment in the ‘ordinary’ list that many of the cases will involve family violence – and obviously cases must be able to move from the ordinary list to the high risk list.

On the question of early fact-finding, I do not think this is the best way to proceed. It may create artificial boundaries around what evidence and information is relevant. Findings about family violence need to be made in context – so the high risk family law list needs to

¹³ See original submission for a summary of this research.

be resourced to be fast-tracked – with interim hearings occurring quickly, rather than a separate kind of fact-finding hearing.

Questions 6-3 and 6-4

I provided my submission to the PMHP Bill with my original submission. I was particularly concerned by the criteria that meant that the clients of the PMHP would be parents who had been unable to settle at FDR, who did not have lawyers and who may have issues of family violence, mental health, disability or other social stresses. This is certainly not the group to send off here. If this panel is about problem-solving – then there needs to be full acknowledgement of the complexity of the families who will be the clients – and the necessary resourcing. This may also be complicated by the idea of the high risk list – is this a different set of cases?

Perhaps the multi-disciplinary model should be one of choice – for families who want that approach – not something a family is told they have to do because they fit a particular check list. But legal representation should be a right – not by leave.

Proposal 7-1

I support this proposal.

Proposal 7-3

I support this proposal.

Proposal 7-4

I support the idea of increased participation of children in the family law system. It is clear from all the research conducted in Australia to date, including the work of AIFS on ICLs and on children's experiences of the family law system that children are dissatisfied with their current level of participation and the nature of it.¹⁴ I believe that affected children should be able to participate in FDR – but care must be taken about safety. Both the research literature and my own observations about children's increasing participation in the world around them lead me to the conclusion that the dangers of excluding children, and the hurt and frustration they feel outweigh general concerns about protecting children from the dispute and their conflicted parents – they are in it, like it or not. An example of children's

¹⁴ R Kaspiew, et al, Independent Children's Lawyers Study: Final Report, AIFS, 2014; R Carson et al *Children and young people in separated families: Family law system experiences and needs*. Melbourne: Australian Institute of Family Studies, 2018; J Cashmore & P Parkinson, 'Children's participation in family law disputes: The views of children, parents, lawyers and counsellors' (2009) 82 *Family Matters*, Canberra: Australian Institute of Family Studies.

agency, maturity and common sense can be seen in a very recent report, *This Place I Call Home*, released by the Queensland Family and Child Commission in November.¹⁵

However, where there are allegations of family violence and child abuse, there are risks to the children from stating their views. There are risks of physical and emotional reprisals from parents whose violence or abuse has been disclosed by the child and reported back to the parent. There are also process risks. In 2018 report of AIFS, one child told of being placed in a room with her abusive father while he was asked about each allegation she had made. This was in the context of a family report, but it demonstrates the high levels of expertise and training that will be required to equip all the various professionals in the family law system, including FRDPs, with the right skills.

My dad was trying to battle for custody of us and we saw a child psychologist who I - I remember - it was like one of the worst things I think a psychologist could ever do. So we were talking to her and my dad was like in a different room, and she was like, 'So, tell me about it ...' So I basically explained everything, like how like I witnessed him chase Mum through our house with a knife. How he used to pick me up by arm and throw me in my room. How he used to lock BROTHER's room and stuff. And basically, overall, how abusive he was and then she's like, 'Oh, okay,' and she's like, 'So, if I got him in here do you think we could talk about it?' ... So, like, I didn't really want to. I'm like, 'Ah.' And she's like, 'Okay, we'll get him in here.' I didn't exactly say no. Like, but I didn't really say yes either ... And she's like, 'Okay, CHILD told me,' and then says everything I said. And looks at me and is like, 'CHILD is that true?' And I'm like, 'Uh,' like I'm freaking out because I'm only like six or seven or something. Like, understandably, and then she's like, 'Oh, okay, so do you promise never to hurt the kids again if they go back up?' And my dad's like, 'Yeah.' And he - and she turns to me and she's like, 'CHILD do you feel safe with that answer?' (Alana, F, 12-14 years)¹⁶

Proposals 7-6 and 7-7

I support these proposals.

Proposal 7-8 – 7-10 and Questions 7-1 to 7-3

I am not convinced that the proposals for a 'children's advocate' who is a social science professional and a legal representative as described in proposal 7-10 are the best way to involve children more directly in legal proceedings. In respect of the children's advocate I am concerned that this position could combine all of the most problematic elements of a family report writer and an ICL. Both positions still appear to involve filtering and

¹⁵ Queensland Family and Child Commission, *This place I call home: The views of children and young people on growing up in Queensland*, State of Queensland, 2018 at <https://www.qfcc.qld.gov.au/kids/listening/growing-queensland>

¹⁶ R Carson et al *Children and young people in separated families: Family law system experiences and needs*. Melbourne: Australian Institute of Family Studies, 2018, pp 57-58.

interpretation of the children's views. It is unclear what the children's advocate should do if they disagree with the views of a child and do not consider those views to be in the child's best interests. This could create the same kinds of frustrations that children feel when family report writers and ICLs seemingly betray them by making recommendations which are inconsistent with the child's stated position.

Whilst I certainly think that the position of ICL could be improved by developing a role with closer contact with the child, as I understand the proposals the child advocate would operate in family law system which still has family report writers and a children's best interests lawyer. Given that, it seems to me that, to make a real difference, the child advocate model needs to be someone who does less filtering and interpreting and acts as a direct advocate for the child. I think this role should be fulfilled by a lawyer. Where that person believes that the documents filed by the parties to the dispute and the ICL do not adequately deal with issues critical to the child's case they could arrange for a social science report to be prepared to deal with those issues. This lawyer should also be able to lead evidence in chief from expert and other witnesses and cross-examine. I do not believe that the child should have to give evidence.

Proposal 7-11

Whilst I understand the reasons why Australian judges are reluctant to meet with children, I believe that training needs to be provided and that children should be supported to meet the decision-maker in cases where it is clear that this is a strong desire of a child. As the Commission will be aware, there is a strange illogicality about countries where judges frequently meet with children and those where they do not. Why do New Zealand and Scottish judges do it while Australians and Canadians do not?¹⁷ It was my observation at the *World Congress on Family Law and Children's Rights* in Dublin in 2017 that many judges commented on their positive interactions with children in a range of family law proceedings, including *Hague Convention* cases (not something which happens in Hague cases in Australia.) I think that a model needs to be developed, in collaboration with judges, whereby children can meet the judicial officer who is determining their case. There are clinicians and academics with expertise on this issue.

Proposal 7-13

I support this proposal.

Proposal 8-1

I support this proposal. However, as I stated in my original submission I believe that the current definition is problematic because the operative subsection requires that family violence either coerces or controls someone or causes them fear. As I have argued, these

¹⁷ M Fernando, 'Family law proceedings and the child's right to be heard in Australia, the United Kingdom, New Zealand, and Canada', (2014) 52(1) *Family Court Review*, 46-59.

can be difficult to prove and these factors do not always underlie all family violence. Further, these particular words invoke the typology literature and it is clear that some judges speak of 'separation violence' and 'situational violence', potentially seeing them as less serious, despite the well documented danger for women at the time of separation.¹⁸ I would prefer the definition to simply be a list of the behaviours – which list can include coercive and controlling conduct.

Perhaps the definition could read:

For the purposes of the Act, 'family violence' means violence to another member of that person's family and includes violence that is physical, sexual, psychological, emotional, social, financial and spiritual.

Examples of family violence include, but are not limited to:

The list would go here and would include coercive and controlling behaviour, litigation abuse and types of behaviour that may be specifically relevant to people in LGBTQ relationships, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds.

Proposal 12-7

I support this proposal.

Question 12-2

I support the establishment of a National Judicial Commission. The sense of vacuum that currently exists is unhealthy in our democracy. There are inevitable difficulties with this body – but some level of transparency – and a genuine avenue for complaint needs to be visible to the public. Through my various roles I understand that judicial bullying (ie bullying of lawyers and litigants) by certain judges occurs in the family courts in Brisbane and that at present there is no clear place to take this.

¹⁸ Z Rathus, 'Shifting Language & Meanings between Social Science and the Law: Defining Family Violence', (2013) 36(2) *University of NSW Law Journal* 359; J Wangmann, 'Different types of intimate partner violence: What do family law decisions reveal?' (2016) 30(2) *Australian Journal of Family Law* 77