



Review of the Family Law System: Discussion Paper 86 (DP86) October 2018
Response from Mallee Family Care (November 2018)

Introduction

Mallee Family Care (MFC) welcomes the opportunity to comment on the Australian Law reform Commission's Discussion Paper on the review of the family law system.

Mallee Family Care is a non-Government, not for profit agency managing more than sixty funded programs supporting vulnerable community members in the Northern and Southern Mallee region of Victoria and south western New South Wales. Among these programs is the Murray Mallee Community Legal Service, which provides advice and support to individuals regarding family violence, separation, divorce, parenting arrangements and property settlement, together with an extensive program of community legal education. We also offer a suite of family relationship services, through our Family Relationship Centre and Regional Family Dispute Resolution programs, Post Separation Co-operative Parenting and Child Contact services which support individuals, couples and families who are accessing the Australian family law system. We have previously welcomed the opportunity to contribute our experiences and suggestions to the ALRC Issues Paper of March 2018, and are now pleased to submit our further contribution regarding the more comprehensive Discussion Paper.

Mallee Family Care is also a member of Partnerships Victoria, the representative body of Victorian Family Relationship Centres, and as such has also contributed to and supports the separate submission provided to the ALRC by that body.

Of particular importance to Mallee Family Care is the access to and delivery of family law services in regional and remote locations, where the number of Federal Circuit Court sittings is limited (3 times per year in Mildura) and where limited access to services and resources have already led to local co-operation and collaboration among service providers.

We are pleased to note that many of the key principles raised by ourselves and others in relation to the Issues Paper have been taken up and addressed in the Discussion Paper, in particular in relation to the paramount importance of the needs of children, and the need to make the system more accessible to and affordable for all Australians who need to use it.



Our comments below are drawn from both our legal and non-legal staff experiences supporting clients through the complexities and exigencies of the family law system.

Part 2 – Education. Awareness and Information

The Murray Mallee Community Legal Service (MMCLS) currently employs a full time Community Legal Educator who in the last year, together with the legal team, delivered 113 education sessions across the ten local government areas of the MFC catchment, including 16 *Your Family Law Options* sessions delivered to clients of the MFC Family Relationship Centre. Further, our Family Relationship Centre (FRC) provides regular workshops for separating parents on *Post-Separation Co-operative Parenting* and *Connecting for Your Kids*.

We agree with the proposals regarding the need for provision of community education and awareness regarding the family law system, believing that knowledge and awareness underpin issues of access. We have observed that many of our clients have little knowledge of the family law system, other than what they have heard from friends or relatives, or from what they see on the television, which is often not related to Australian law. If basic information was easily accessible this would also reduce the current burden on both lawyers and Court staff, freeing up their time for more complex matters, and reducing the overall cost.

While we support **Proposal 2.3** for the federal and state governments to work together regarding the dissemination of information, we caution that the federal government should be responsible for the content and quality of the information provided in order to ensure consistency, and should have a monitoring role over state government distribution.

Mallee Family Care also supports the proposals to ensure that marginalized and disadvantaged groups can also access accurate and reliable information, including in a range of languages and across a range of media (**Proposals 2.7-2.8**).

However, we suggest that the preparation of information and awareness packages for children be sensitive to the need to protect children from any sense of responsibility for the decisions and processes their parents are engaged in and be developmentally, age and stage appropriate.

Further while broadly supporting the proposal in **Part 4** for Family Support Hubs, and suggesting that FRCs could well form the basis of such a hub, it should be noted (and is further addressed under **Part 4** below) that Victoria has already introduced a trial program of service hubs – the Orange Door – providing triaging of clients relating to family violence services, and including in the Mallee region direction of clients to the Murray Mallee Community Legal Centre and/or the FRC. Any new Hub proposal should therefore take into account existing service structures and models, particularly in regional and remote centres, where collaboration and co-ordination occurs and

where establishment of new and similar facilities would be superfluous and would likely strain the already limited resources available.

Mallee Family Care would welcome the opportunity to support the Australian Government with the development of the proposed information packages as outlined in **Proposals 2.5 – 2.8**, as well as the concept design and implementation of the Family Support Hubs.

Section 4: Getting Advice and Support

Section 4 makes the case for the development of Family Services Hubs in local communities, in order to provide streamlined access to services for separating families. While MFC broadly agrees with the co-ordination of services and collaboration of service providers with a client-centric focus, and we agree that the FRCs could form the basis of an effective hub, we have some concerns relating to the need for flexibility and a place-based approach. Further, the proposed expansion and roll-out of the Family Advocacy and Support Service (FASS) (**Proposals 4.5 to 4.8**) raises similar concerns:

- The proposal is premised on a significant level of co-operation between the States and the Commonwealth relating to services that cross both Federal and State responsibilities (such as divorce vs family violence or homelessness issues), which might present issues of consistency of service accessibility;
- The expansion and roll-out of FASS to regional and remote Family Court locations would need to be adjusted for the limited number of sittings per year (3 in Mildura for example) and may not be feasible;
- Complexity of need in and of itself is not necessarily the purview of the family law system, and attempts to have the family law system address the range of possible complexities could well be expensive and detract from the primary focus to simplify the system and make it more accessible;
- While the recognition in the Discussion Paper of the impact of family violence on Australian families is laudable, there are nevertheless significant numbers of Australian families seeking access to the family law suite of services who do not have complex problems such as family violence, homelessness or financial crisis, and for whom such a service would be excessive or not necessary.
- As mentioned above, the state of Victoria has introduced the Orange Door service Hubs, one of which is operating in Mildura (with a satellite in Swan Hill) which is already providing a one stop triage service for individuals affected by family violence, with warm referral capacity for housing and homelessness services, financial counselling, health, mental health, legal and family law related services. Mallee Family Care's Family Relationship Centre receives warm referrals from as well as warmly referring to the Orange Door, and other services.

There are advantages for the co-location of family dispute resolution, relationship counselling, parenting support, child contact and family law and family violence related legal services within the FRC “Hub”, as has been the experience at Mallee Family Care. This could be an efficient and effective approach to the delivery of wrap-around family law support to separating and separated families. In addition, we endorse a collaborative approach which provides warm referrals to other essential services for families with complex needs.

Section 5: Dispute Resolution

Mallee Family Care broadly agrees with the proposals to promote and extend the use of Dispute Resolution as a means for separating couples to resolve disputes about their children and property and to further reduce the number of matters needing to go to Court.

Proposal 5.2 – we agree that FDR providers should consider the imbalance of knowledge between the parties about relationship property, however FDR should remain an option following independent legal advice about a fair and equitable division of the relationship property if both parties are satisfied that there has been a full and frank disclosure of the property pool.

However, **Proposal 5.3** to require parties to attempt FDR prior to lodging a Court application for property and financial matters would significantly increase the need for FDR practitioners, with possible increases to the cost and delays in provision of service, at least in the short term until the increased number of practitioners was trained and recruited. Currently, the Mallee Family Care FRC attends to children’s matters, such that an assessment for suitability and safety has already been completed. If property dispute resolution becomes compulsory, then there could be significant numbers of couples without children seeking a service, and therefore no existing screening. There would also need to be capacity for charging a fee for this service.

Proposal 5.4 provides that if a party has not made a genuine effort to resolve a property matter in good faith, or has not provided full disclosure or adequate engagement in the FDR process, then this may be taken into account by the Court when apportioning the property pool. This may compel one or both parties to fully disclose at the FDR stage. However this also appears to contradict the no-fault position that the Court adopts in divorce proceedings, and to some extent, parenting and property orders where family violence has occurred.

We support **Proposal 5.5**. If one party does not engage in the process or does not disclose relevant information, and costs are awarded against them, then a certificate of attempted FDR should be used as evidence. If the dispute is partially resolved then the outstanding issues can be identified quickly for legal practitioners to further attempt to resolve out of Court or in Court proceedings.

We support **Proposal 5.6**. The Family Law Act should set out the duties of the parties involved in FDR if there are to be cost consequences of not fulfilling their duties during FDR.

Similarly, we support **Proposal 5.8**. If costs are to be awarded against a non-compliant or non-disclosing party then there needs to be a clear process about how and when the FDR duties are made known to the parties.

Further, we support **Proposal 5.9** in respect of improving overall access to FDR through the introduction of a means tested fee for service, proportionate to small property matters, as well as an increase in the number of qualified and experienced mediators available, particularly in regional areas. The training and recruitment of additional FDR practitioners will require a renewed investment of time and resources, which the Federal Government will need to support.

Section 6: Reshaping the Adjudication Landscape

We broadly support the proposal to reduce the burden on the Family Court, together with the cost to all parties via the introduction of a triage process to limit the number of cases, and in particular, small claims which can come before the Court. In particular, we support **Proposal 6.4**. The Family Law Act should provide for a simplified Court process for matters involving smaller property pools. Where there is only a limited property pool, if the parties are required to engage legal representation, any equity they may have had would soon be depleted. Furthermore, grants for legal aid for property settlements are extremely limited.

Proposal 6.9 relates to the development of a post-order parenting support service, which we believe to be similar to the existing Post Order Parenting and Post Separation Co-operative Parenting programs already in place. We believe these programs are beneficial for parents to learn to co-operate with each other in relation to their children, and therefore serve a purpose in reducing the need for matters to return to Court for revision as children's age and developmental needs change. We therefore suggest a strengthening of these existing programs, with the option to negotiate and endorse amendments to orders, which would both extend the mediation process for parents and reduce the need for follow-up Court proceedings.

Section 7: Children in the Family Law System

Mallee Family Care applauds the Law Reform Commission's significant attention to placing the needs and the voices of children at the centre of the family law system. We concur with **Proposal 7.1** to provide children with age appropriate information about family law processes, and with **Proposals 7.2 to 7.5** to ensure that children have an opportunity for their views to be heard in family law proceedings. Further, we concur with **Proposals 7.6 and 7.7** regarding children's safe participation in the

process, and with not requiring children to express their views when it would not be in their interests or within their capacity to do so.

We remain concerned that provisions to hear the views of children should not place an additional burden on children who are most likely already negatively impacted and which could further exacerbate conflict between parents. Children should not be further psychologically harmed by feeling responsible for choosing or making decisions of which they are not developmentally or emotionally capable and for which they should not be responsible.

We also raise the question of the role of the Independent Children's Lawyer (ICL), who has a similar role to that of the proposed children's advocate. We concur with the proposal for children's advocates who are accessible to children in the mediation or dispute resolution process, rather than at the "pointy end" of litigation in the Court. While the ICL could have a role in legally assisted mediation processes, a children's advocate who is trained and skilled in child development and children's counselling may be better placed to assess the needs of children affected by parental separation.

The capacity to support the voice of children through family law proceedings should however be weighed against the impact on children of long and protracted delays in the resolution of family law matters, such that matters should only be referred to a children's advocate where there are specific concerns, with the expectation that FRC counsellors and mediators are also skilled in child-related counselling, and can incorporate the views of children into the existing mediation processes.

In any event, unless there are exceptional circumstances, we do not believe that children should participate in Court proceedings or be required to make statements directly to the Court (**Proposal 7.11**).

Mallee Family Care would be keen to work with the Attorney General's Department to further develop child – inclusive best practice in relation to family dispute resolution (**Proposal 7.5**) and would seek membership of the proposed Children and Young People's Advisory Board (**Proposal 7.13**), in particular as a means of representing the needs of regional and remote children and young people.

Section 8: Reducing Harm

Mallee Family Care applauds the Australian Law Reform Commission's acknowledgement of the significance of family violence in Australia and the need for recognition of this within the family law system. We support **Proposal 8.1** to expand the definition of family violence to include forms of violence other than physical, including psychological and financial abuse and the misuse of systems.

We concur with **Proposal 8.6** in relation to the power to exclude evidence of protected confidences, and would add that protective confidences should not be subpoenaed by a litigant or respondent however may be subpoenaed by the Court officer and

information contained therein only be made available to the Court in order to add further information or clarity for the Court's decisions.

Section 9: Additional Legislative Issues

While we support the inclusion of provisions to ensure people with disabilities have access to the family law system, we do not support **Proposal 9.6** which suggests a role for the NDIA in providing what would otherwise be supports provided by the family law system. It is not the role of the NDIA to financially support the family law system.

Section 10: A Skilled and Supported Workforce

Many of the proposals contained within the Discussion Paper are premised on an available and sufficiently skilled workforce of legal and counselling professionals. This will have particular significance for regional and remote areas, which more often than not already face workforce shortages and therefore gaps in available services. The proposed changes to the system will require a lead-time to train and recruit professional staff, and will add to the cost of the provision of family law services.

In principle we agree with the requirement for family law practitioners to be familiar with the complexities of family violence and their impact on adult and child victims, as well as the need for expansion of family violence services available to perpetrators. We further suggest that the core competencies for the family law system workforce (**Proposal 10-3**) include an understanding of child development at different ages and stages.

We support **Proposal 10.6** requiring at least one CPD unit per year in family violence for family law practitioners. It is suggested that family violence training be mandatory for community legal centre practitioners and legal aid commission solicitors. Further, it is suggested that if the Family Law Commission is required to accredit legal practitioners before they can practice in family law, this accreditation be the measure of whether a practitioner must engage in compulsory family violence training for CPD purposes. It would otherwise be very difficult to identify generalist private practitioners who conduct family law work whilst also quarantining practitioners where family law does not form a part of their practice.

We agree with **Proposals 10.9 and 10.10** in relation to the qualifications of family report writers, supporting the need for transparency and consistency in the nature and quality of reports prepared for the family Court. However we are also concerned about the already significant delays in regional and remote areas because of the lack of services available, the need for families to travel long distances and the small number of Court sittings during the year. Increased qualification requirements are likely to increase delays, in the short term at least.

Section 12: System Oversight and Reform Evaluation

While we agree with the need to monitor the implementation of changes to the family law system and have oversight of system functioning, we are concerned that the creation of a new oversight body should not, via the introduction of additional levels of bureaucracy, detract resources and attention from the primary task of simplifying the family law system and making it more accessible and effective for the individuals and families it is set up to serve.

We agree in principle that accreditation of family law professionals by a centralised body would make disputes over compliance transparent and easier to measure over time. However there are real risks that the Commission would be limited in scope to address practical disputes between users and professionals. In relation to compliance, for example, it is likely that many family law system practitioners will be subject to pre-existing regulatory requirements under existing professional standards, such as those for legal practitioners under the relevant state legal services commissions. It is possible then that the proposed Family Law Commission will only have jurisdiction to handle complaints that are a breach of accreditation requirements that it proposes to make. It is possible then that complainants will experience additional frustration by complaining to a centralised body, only to be referred back to the service provider or regulator for want of jurisdiction.

It is unlikely then that the proposed Family Law Commission will be able to be a one-stop shop for complaints or oversight. While we agree in principle with the establishment of the Commission, there is a risk that additional red-tape and bureaucracy may be added to the system without necessarily improving outcomes for families and the service system overall.