UnitingCare

ALRC

Review of Family Law System

UnitingCare (Queensland) Response

November 2018

UnitingCare

Review of the Family Law System

Introduction

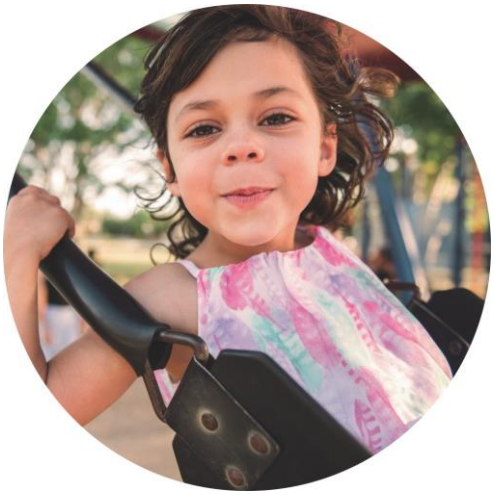
UnitingCare welcomes the opportunity to provide comment on the ALRC's Review of the Family Law System Discussion Paper.

We engage with people from all walks of life and deliver skilled, evidence-based interventions for those facing adversity. We are leaders in crisis response, the protection of vulnerable children, financial resilience, and family wellbeing.

Through our Child and Family Services, we deliver a range of services that support families involved in the family law system. These include family relationship centres, parenting orders programs, supporting children after separation, family relationship counselling and specialised family violence services. We are also one of the largest not-for-profit providers of men's behaviour change programs in Queensland.

Our family law services support women, children and men as they are going through the often difficult process of separation.

The following submission responds to the questions set out in the Discussion Paper. Our response focusses on the principles and approaches we believe will contribute to the safety and wellbeing of children and young people and safety and fairness for victims and survivors of domestic and family violence.



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Response to Discussion Paper Questions

Section Three: Simpler and Clearer Legislation

Question 3–1

How should confusion about what matters require consultation between parents be resolved?

UnitingCare is of the view that 'equal shared parenting responsibility' is generally understood as a concept but clarifying the legislation around daily decision making and major decision making would help parents understand and reach agreement on when joint consultation is required. Clearer legislation and guidelines should provide a framework for negotiation of decision making guidelines in parenting plans, tighten provisions for the role of family advisors, and support alternative dispute resolution process.

Clarification should be achieved through the use of plain English in both the legislation and in orders from the court, and by ensuring that the content and language contained in orders is consistent with the verbal description of the order provided in court. A list of generalised, practical examples of both daily vs major decisions, highlighting the difference between the two, and an associated information/education campaign for parents and mediators would help to reduce confusion. These should be developed as accompanying documentation, rather than be prescribed in the legislation.

Question 3–2

Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?

UnitingCare believes that provision for early release of superannuation should be extended in cases of financial hardship as a direct result of separation.

We recommend arrangements for early release of superannuation are:

- determined on a case-by-case basis, with consideration of the long-term impact of its early release;
- based on a thorough assessment of the property pool, including a financial review or audit, and advice from qualified financial consultant; and
- capped at 50% and dispersed in increments.

In situations where one party has accessed their own superannuation due to financial hardship as a result of separation, provision should be made and

agreed by both parties regarding restoration of accessed funds following resolution of family court matters.

We recommend that restoration of any pre-released superannuation funds should be considered in superannuation splitting arrangements. This would help address longer-term concerns around early release of superannuation contributing to financial hardship and poverty in retirement.

Question 3–3

Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the Family Law Act 1975 (Cth):

- *amendments to increase certainty about when financial agreements are binding;*
- *amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;*
- *replacing existing provisions about financial agreements with an ability to make court-approved agreements; or*
- *removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?*

UnitingCare supports both increased certainty about when financial agreements are binding as well as the ability to set aside an agreement where it would be unjust to enforce it, allowing for flexibility in special circumstances.

Question 3–4

What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:

- *greater use of registrars to consider urgent applications for interim spousal maintenance;*
- *administrative assessment of spousal maintenance; or*
- *another option?*

UnitingCare supports the use of registrars and expedited administrative processes to consider urgent and complex applications for interim or amended spousal maintenance arrangements. Any changes to spousal maintenance arrangements should align with child support provisions.

Changes to spousal maintenance should also consider shorter review timeframes in cases where there is a sudden and genuine change of financial circumstances (e.g. job loss) and any interim spousal maintenance arrangements should be reviewed in light of further changes (e.g. re-entering the workforce).

Ongoing spousal maintenance arrangements and reviews should be based on a thorough assessment of the property pool, including a financial review or audit, and advice from qualified financial consultant (*see response to question 3-2*). UnitingCare believes that legislation should promote principles of equity and enhanced ability to support oneself, rather than maintenance of preferred or previous lifestyle.

Section Five: Dispute Resolution

Question 5–1

Should the requirement in the Family Law Act 1975 (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

UnitingCare believes that the current time frames should be clarified and clearly explained to reflect their consistency and avoid confusion between requirements for divorce or separation from a de facto relationship.

UnitingCare believes legislation should allow for extensions based on the capacity of the applicant to make an application within the timeframe or not having access to information about their rights and obligations. This may include situations where a party has fled a violent relationship and has been in hiding or too traumatised to come forward, or situations where one party has not had access to information in their own language.

We recommend examples of barriers due to domestic and family violence and accessibility be added to the current list of suitable reasons for extension.

Question 5–2

Should the provisions in the Family Law Act 1975 (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

UnitingCare supports the Commission's finding that non-disclosure or omissions of assets and income can be associated with financial abuse and misuse of systems and processes. We believe this action is fraudulent and disclosure duties should be set out in the *Family Law Act.* Without this

transparency the consequences for non-disclosure are unclear, as are the current mechanisms for penalty. Any disclosure duties incorporated into the Act should be supported by civil and criminal penalties.

Both legislation and civil or criminal remedies need to consider the psychological and financial impact of non-disclosure, including inaccurate financial agreements leading to financial distress and psychological harm.

Question 5–3

Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

UnitingCare recommends revising, strengthening and clarifying all processes related to satisfying the legal requirement to attempt family dispute resolution prior to parenting order applications. The focus on strengthening this process should include improving consistency of interpretation and application of listed exemptions, and requiring Solicitors to clearly and accurately explain the reasons for exemptions. The reviewed process should also limit the opportunity for Solicitors to bypass the exemption process in favour of certificates, for example, where Domestic Violence Orders are in place.

UnitingCare believes that this process should be aligned with the proposed process for property and financial matters, particularly where there are children under the age of 18 involved.

Section Six: Reshaping the Adjudication Landscape

Question 6–1

What criteria should be used to establish eligibility for the family violence list?

UnitingCare agrees that a specialist list should be reserved for 'high risk' cases where family violence is a key factor. We support the list of matters to identify risk outlined in section 6.32 of the discussion paper (p134).

In addition to these, **we recommend** including assessment of the recency and types of violence, such as separation instigated violence or situational violence, and the use of evidence based, clinical tools for assessing severity of risk, such as the DOORS (Detection Of Overall Risk Screen) which has been specifically developed for the family law system providers.

All screening and assessment should be undertaken by suitably qualified and experienced social science professional who are acknowledged domestic and family violence specialists.

Where children are involved, **we recommend** using supportive processes focused on outcomes that support their safety, wellbeing and maintaining meaningful relationships with both parents where it is safe to do so.

Question 6–2

What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?

UnitingCare supports the establishment of early fact finding processes to support early confirmation of issues in dispute, including the presence of violence in the relationship where there is no other opportunity to confirm the issues. Early fact finding processes may have the potential to increase costs and increase risk of harm.

If Early fact finding processes are introduced there should be strict practice guidance and processes including safety considerations for people alleging domestic and family violence and opportunities to provide evidence via videolink.

These risks may be mitigated by establishing processes that are informal and inquisitorial, rather than adversarial, in nature. We recommend that these processes should be thorough and involve a panel of specialist professionals.

Question 6–3

What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children's matters? Are other changes needed to this model?

UnitingCare sees value in the application of a problem-solving approach, facilitated through multidisciplinary Parenting Management Hearing Panels. In response to the concerns noted in the discussion paper, we recommend that:

- Parenting Management Hearings only be used following agreement by both parties and a thorough ongoing risk assessment to ensure safety of all parties including children and avoid power imbalance between parties. Consideration should be given to the appropriate participation of children in the hearing, with attention given to their safety and developmental stage.

- Parenting Management Hearings should support an inquisitorial design rather than adversarial. Where legal representation is required there should be clear practice directions and guidelines that lawyers are to practice collaboratively. Clear processes; however, should be developed to guide the panel's communication with mediators, legal representatives, ICLs, and magistrates.

- All Panel Members and staff conducting risk assessments should be culturally competent with respect to working with Aboriginal and Torres Strait Islander families, culturally and linguistically diverse families and LGBTIQ+ families. The panel should include multidisciplinary expertise, underpinned by a child centred, trauma-informed practice framework with knowledge of family violence and working with vulnerable and hard to engage clients.

Question 6–4

What other ways of developing a less adversarial decision making process for children's matters should be considered?

UnitingCare welcomes a stronger focus on less adversarial decision making processes, and the promotion of alternatives to court proceedings.

In addition to the Parenting Management Hearing Panels (Question 6 – 4), UnitingCare recommends enhanced role for Family Dispute Resolution Practitioners and Family Relationship Centres to engage with families and link them to support services and programs prior commencing court applications.

Family Relationship Centres can play a larger, more supportive and dynamic role in reducing acrimony and working with families to repair relationships and achieve agreement and shared problem solving. We would welcome the inclusion of Family Group Conferencing, as a standard model in the family law process, particularly for Aboriginal and Torres Strait Islander, Pacific Islander and culturally and linguistically diverse communities.

In developing less adversarial decision making process for children's matters, UnitingCare believes that the voice of the child is critical. Panel processes, Family Dispute Resolution and Family Group Conferencing should include children through safe and developmentally appropriate approaches to their participation (such as 'sealed advice' for Panels, or through the involvement of a children's advocate). Decision making processes should also include a review of the child's experience of post-separation parenting at the conclusion of an interim order.

Section Seven: Children and the Family Law System

Question 7–1

In what circumstances should a separate legal representative for a child be appointed in addition to a children's advocate?

UnitingCare has identified the following circumstances where it would be appropriate to appoint a separate legal representative for a child:

- Where neither parent has the capacity to advocate in the best interest of the child
- When there are active child protection orders or investigations
- Where a child or young person has decision-making capacity
- A child or young person has a complex disability or no capacity to communicate
- In cases where there is high parental acrimony
- Where there have been allegations of domestic and family violence

We agree with the Commission's finding that, in most circumstances, a child would benefit most from having an appointed children's advocate, rather than a legal representative. In Queensland it is rare for the legal representative to meet with the children in a case, where it would be a requirement of a children's advocate to establish a relationship with the child. Children have indicated in recent AIFS Research[1] that they have benefitted when a professional has taken a genuine interest in their views and story and help them to have a voice in court proceedings where decisions are being mad that will affect them.

Question 7–2

How should the appointment, management and coordination of children's advocates and separate legal representatives be overseen? For example, should a new body be created to undertake this task?

In relation to the appointment, management and coordination of children's advocates, this role could be undertaken by Family Relationship Centres or the State/Territory Children's Commission. The benefit of placing children's advocates within FRCs would be their links with family dispute resolution and support services for children, however clear practice standards and consistent expectation around qualifications and training would be required. Due to their role as children's advocates, it would also make sense for them

[1] Carson, Dr Rachel - Give children a bigger voice, more of the time': Findings from the Children and Young People in Separated Families project . https://aifs.gov.au/cfca/2018/10/18/give-children-bigger-voice-more-time-findings-children-and-young-people-separated

to have links with State/Territory Children's Commissions; however, this could be an information sharing and consultative function.

Question 7–3

What approach should be taken to forensic issues relating to the role of the children's advocate, including:

- *admissibility of communications between the children's advocate and a child; and*
- *whether the children's advocate may become a witness in a matter?*

The admissibility of communications between the children's advocate and a child, and their participation as a witness in a matter, would need to be informed by

- relevant State/Territory legislation regarding information sharing and privacy, including Child Protection Acts;
- the expressed wishes of the child.

Consideration needs to be given to ability to provide sealed information or testimony to judges in matters where risk of harm to the child, a parent or other family member is an issue – i.e. disclosure to the judge but not the parents. In addition to this, State and Territory legislation regarding mandatory reporting of child protection matters, and consideration of duty of care/risk of harm, would also need to be considered and clarified in relation to the child advocates' role.

Section Eight: Reducing Harm

Question 8–1

What are the strengths and limitations of the present format of the family violence definition?

The present family violence definition, while comprehensive, is not inclusive of technology based violence; does not explain correlation with definitions of family violence in State/Territory Domestic and Family Violence Acts; does not encompass systems abuse, and fails to address different cultural views on what constitutes family.

We welcome the proposed inclusion of systems abuse and technology facilitated abuse in the definition of family violence and to the non-exhaustive list of examples; as well as the proposed research into definitions of family

violence in relation to Aboriginal and Torres Strait Islander people; people from culturally and linguistically diverse backgrounds; and LGBTIQ people.

We recommend providing interpretive guidelines and education to support managing the links or inconsistencies between the Family Law Act's definition of family violence and those definitions embedded in State/Territory acts, particularly in relation to elements of control, domination and fear.

Question 8–2

Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

UnitingCare welcomes the inclusion of 'unreasonably withholding information about financial and other resources' into the non-exhaustive list of examples.

Question 8–3

Should the requirement for proceedings to have been instituted 'frequently' be removed from provisions in the Family Law Act 1975 (Cth) setting out courts powers to address vexatious litigation? Should another term, such as 'repeated' be substituted?

UnitingCare believes that inclusion of the word 'repeated', along with a suitable definition, would provide more certainty for judicial decision making on vexatious litigation. We recommend consideration of a parties repeated use of a range of family dispute resolution, courts and tribunals (including Family Court, District Court, Supreme Court) in making determinations.

Question 8–4

What, if any, changes should be made to the courts' powers to apportion costs in s 117 of the Family Law Act 1975 (Cth)?

UnitingCare acknowledges that the primary mechanism for addressing unmeritorious proceedings should be explicit statutory powers; we recommend the use of costs orders as an additional disincentive to litigation being pursued in illegitimate circumstances. We believe that the current powers given to courts is sufficient but that more frequent use of cost orders should be encouraged and take into account the financial impact and misuse of court proceedings.

Section Nine: Additional Legislative Issues

Question 9–1

In relation to the welfare jurisdiction:

- *Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?*
- *In what circumstances should it be possible for this body to authorise sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?*
- *What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?*

Decisions relating to these procedures should lay with a tribunal specifically set up to manage such procedures. The tribunal should include members from the legal and medical professions, in addition to relevant social sciences.

The tribunal should be informed by the parents and the child through an independently appointed child advocate.

Question 9–2

How should a provision be worded to ensure the definition of family member covers Aboriginal and Torres Strait Islander concepts of family?

UnitingCare recommends the development of a culturally inclusive definition of family, in consultation with Aboriginal and Torres Strait Islander Elders, community members and community-controlled legal services.

Section Ten: A Skilled and Supported Workforce

Question 10–1

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

In addition to those competencies listed in the discussion paper (sections 10.18 to 10.28) UnitingCare recommends the inclusion of an understanding of/competency in therapeutic interventions and working with vulnerable people and families.

Question 10–2

What qualifications and training should be required for family dispute resolution practitioners in relation to family law disputes involving property and financial issues?

UnitingCare recommends that the Graduate Diploma in Family Dispute Resolution be enhanced to include property and financial issues as part of its core competency. Additionally, annual compulsory professional development specific to property and financial matters should be required, in line with current professional development requirements.

Question 10–3

Should people who work at Children's Contact Services be required to hold other qualifications, such as a Certificate IV in Community Services or a Diploma of Community Services?

UnitingCare recommends that all staff working directly with children and parents in a Contact Service should hold a minimum [Certificate IV/Diploma in Community Services], with a focus on understanding the impact of trauma and attachment theory, family conflict, and post-separation parenting. In addition to this, we recommend that supervising staff in Child Contact Centres should hold a degree qualification as minimum.

Question 10–4

What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

In addition to knowledge, experience and aptitude in relation to family violence (outlined in sections 10.56 to 10.63 of the discussion paper), UnitingCare would recommend inclusion of cultural awareness (especially in relation to family violence) and LGBTIQ awareness; and a broad understanding of the range of social issues impacting on families; to the list of core competencies. Judicial officers need to the ability to understand and consult with specialists across the social and human sciences.

Question 10–5

What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

UnitingCare recommends consultation with key bodies, such Aboriginal and Torres Strait Islander peak bodies and domestic and family violence peaks as part of the appointment process.

Question 10–6

Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?

UnitingCare recommends consultation with Aboriginal and Torres Strait Islander peoples and organisations on this matter and would encourage these reports, if made mandatory, be aligned with cultural safety plans.

Section Eleven: Information Sharing

Question 11–1

What other information should be shared or sought about persons involved in family law proceedings? For example, should:

- *State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?*
- *State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?*
- *The Family Law Act 1975 (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?*
- *The Family Law Act 1975 (Cth) give family law professionals discretion to notify police if they fear for a person's safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?*

UnitingCare encourages any requirements that supports state and territory police and family courts working together to ensure that safety and wellbeing of those involved in family law proceedings

We believe that family law professionals have responsibility to notify in certain circumstances and should have immunity provided the notification was made on reasonable grounds.

Question 11–2

Should the information sharing framework include health records? If so, what health records should be shared?

Inclusion of health records in the information sharing framework should be determined on a case by case basis, in situations where a child has significant health issues or health issues as a result of child abuse and neglect. Inclusion of health records should be guided by the principle of ensuring the safety and wellbeing of the child, and should take into account the views of the child when they are developmentally able to express any objection or opinion regarding the sharing of their health records.

Question 11–3

Should records be shared with family relationships services such as family dispute resolution services, Children's Contact Services, and parenting order program services?

UnitingCare is of the view that information sharing across the sector could assist with client engagement, problem-solving and decision making with families. The framework would need to ensure safeguards around protection of privacy and appropriate use of information.

Question 11–4

If a child protection agency has referred a parent to the family courts to obtain parenting orders, what, if any, evidence should they provide the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the children?

UnitingCare is of the view that tertiary child protection agencies should provide information and recommendations to the Family Law Courts to allow for informed decision making around child needs and concerns regarding abuse. They agency should provide all information they currently have in relation to the child, in addition to other siblings who may not be the subject of the family law application. This information should include evidence about existing and potential risk to the child/children and recommendations related

to their ongoing care arrangements. The courts would need mechanisms to test the probity and rigour of the evidence provided.

Question 11–5

What information should be shared between the Families Hubs (Proposals 4–1 to 4–4) and the family courts, and what safeguards should be put in place to protect privacy? For example:

- *Should all the information about services within the Families Hubs that were accessed by parties be able to be shared freely with the family courts?*
- *What information should the family courts receive (ie services accessed, number of times accessed, or more detailed information about treatment plans etc)?*
- *Should client consent be needed to share this information?*
- *Who would have access to the information at the family courts?*
- *Would the other party get access to any information provided by the Families Hubs services to the family courts?*
- *Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the family courts?*

UnitingCare recommends caution about information sharing related to the types of services accessed and the number of times accessed and is concerned about the impact of openly sharing information with the courts without the consent of the parties involved. There is potential that clients will not engage with Families Hubs if they believe that information will be shared that will be detrimental to later proceedings.

We believe that any detailed information about treatment plans and outcomes should be shared only by court order or by consent of the parties involved.

Section Twelve: System Oversight and Reform Evaluation

Question 12–1

Should privacy provisions in the Family Law Act 1975 (Cth) be amended explicitly to apply to parties who disseminate identifying information about family law proceedings on social media or other internet-based media?

UnitingCare supports this proposal.

Question 12–2

Should a Judicial Commission be established to cover at least Commonwealth judicial officers exercising jurisdiction under the Family Law Act 1975 (Cth)? If so, what should the functions of the Commission be?

UnitingCare supports the establishment of a National Judicial Commission to provide greater transparency and independence around consideration of and response to complaints against judicial officers, with respect to the principles of judicial independence. We believe that such a Commission should have the powers to investigate and address significant patterns of complaint from those in the family law systems and to ensure that federal judicial officers maintain core competencies mention in preceding sections (section 10).

An example of the importance of such a function is in cases where people in a particular regional are being advised not to report family violence because of a negative expected outcome from a particular judicial officer.

END