

Congratulation on an extensive and far reaching review and for keeping it child focused. There are however three significant areas of oversight with respects to the Terms of Reference as set out by the Hon George Brandis which relate to the following matters:

1. *“Whether the adversarial court system offers the best way to support the safety of families and resolving matters in the best interest of children, and the opportunities for less adversarial resolution of parenting and property disputes”*
2. *“Rules of procedure, an rules of evidence, that would best support high quality decision-making in family disputes”*
3. *“Mechanisms for reviewing and appealing decisions”*

To address the first and second points: The current review has done an excellent job of addressing the process of approaching the courts and making recommendations to put in place systems and processes to avoid commencing litigation, however it has largely failed to address the method by which the courts operate once litigation has commenced. In answering Question 6-4: the current adversarial processes, whereby two parties are pitted against each other across a court room is fundamentally at odds with promoting an environment of reduced conflict in which the rights of children can be protected and promoted. It substantially elevates the level of conflict and emotional distress for both parties, often well beyond what they can reasonably be expected to manage, even with support. It is universally agreed that encouraging children to resolve conflict without resorting to fighting is ideal, to then apply a system which is centrally based on the concept of “fighting it out in court” is totally inappropriate and needs to change. The focus must be on ensuring that children’s rights are put first by looking for ways to resolve the conflict to improve the situation for the children, not by getting tied up in the battle between separating parties. The court process must have a deep understanding of the psychological motivations of the parties and focus solely on the actual risks (not the alleged or claimed risks) and the capacity of the parties to parent the children effectively. The onus of evidence in these situations must be moved away from the parties and instead be directed by the court and rely on trained and qualified professionals with current, research based knowledge and skills.

Sadly this aspect of the family law process has not been addressed by the review and, given the clear direction to do so in the Terms of Reference this is a major oversight that needs addressing before the final report is published.

The third matter relating to reviewing and appealing decisions: the current discussion paper has made some proposals in relation to reapplying to the court (Proposals 3-8, 8-4 & 8-5). But it has entirely failed to consider the potential abuses and the reality that courts do, on occasions, make decisions that are incorrect and/or inappropriate and need to be reviewed.

Childhood is a time of rapid change and develop, a year, let alone several, can have a huge impact on a child’s psychological growth and their future wellbeing. Under the current system once Final Orders are in place there is the very real risk that one party will actively prevent any changes in circumstances that would be in the best interests of the child/children in an attempt to avoid any further litigation. Children can potentially be prevented (using “the court said so” as a reason/excuse) from making contact that they might naturally attempt with the other party or be outright alienated from that party by the parent with custody. These forms of arising abuse are not considered in the current review.

The Court also needs to recognise both its potential fallibility and the fact that orders made now are not necessarily appropriate or in the best interest of the children in the near future. The current

appeal process and limitation on reapplying (*Rice v Asplund*) need to be reviewed in light of these issues. Again, given that the Terms of Reference clearly state that this topic is to be considered, this is a major oversight in the current review that needs addressing prior to finalising the report.

By addressing the first and second issue raised in this submission it is suggested that the third issue may be partially or fully resolved. When the court moves towards a less adversarial litigious approach whereby the onus of evidence is placed in the hands of trained professional operating on current, research based skill sets and at the direction of the Court the opportunity for mistakes becomes less likely. That said it is also appropriate that final orders should always have a maximum time frame associate with them that reflects the rapidly changing situation of the children (say 2 years?).

Another key aspect that has been totally overlooked in relation to reviewing and appealing decisions is the consideration of whether deliberately preventing a change of circumstances constitutes a change in circumstances in itself. The courts needs to expand its definition to include this as part of the decision making process around change of circumstances.

Additional comments on specific proposals and questions:

### Section 3 Simpler and Clearer Legislation

**Proposal 3-8** The *Family Law Act 1975* (Cth) should be amended to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is safe and in the best interests of the child for the order to be reconsidered

**Feedback:** As noted above the risk that parties will use court orders to actively prevent any changes in circumstances that would be in the best interests of the child/children in an attempt to avoid any further litigation. Children can potentially be prevented (using “the court said so” as a reason/excuse) from making contact that they might naturally attempt with the other party or be outright alienated from that party by the parent with custody. There must be provision to allow the courts to consider whether deliberately preventing a change of circumstances constitutes a change in circumstances in itself when an application is made.

### Section 6 – Reshaping the Adjudication Landscape

Proposal 6–7 The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:

- a lead judge with oversight of the list;
- a registrar with responsibility for triaging matters into the list and ongoing case management;
- family consultants to prepare short and long reports on families whose matters are heard in the list; and
- a cap on the number of matters listed in each daily hearing list.

**Feedback:** Each judicial officer is often well known for a particular bias, having a single lead judge with oversight of the proposed family violence list may lead to problems of bias. Decisions regarding

the list should not rest with a single entity, it should either be a team or a rotating position. In considering Question 6-1 and 6-2 the criterion for assessing eligibility must include assessment of the veracity of any claims of family violence and abuse. Whether there is any basis for the allegations needs to be assessed at a very early stage and should be based on an early psychological assessment of the parties and their individual capacities to parent the children. This avoids the risk of protracted legal processes and potentially significant damage to the relationship between the child/children and the other parent. It also removed the temptation for informed parties to misuse false or unsubstantiated claims as a way to bypass FDR.

**Question 6–4** What other ways of developing a less adversarial decision making process for children’s matters should be considered?

**Feedback:** As noted in the first section of this submission the Court needs to completely move away from an adversarial approach and instead apply a more inquisitorial approach which focuses solely on the best interests of the children. The onus of proof must be shifted into the hands of trained professional operating with current scientific research, operating at the direction of the court. Refer also to the initial comments in this submission.

## Section 7 - Children in the Family Law System

**Feedback:** Whilst including the voice of children in legal proceedings is vitally important and central to the whole concept of the Family Court, the risk of undue influence of children needs to be specifically addressed. Involvement of children needs to be done with the assistance of the most current scientific research and psychological understanding of both children’s and parents states and motivations. Young children are unquestioningly open to psychological manipulation and are often used as a weapons by one or both parties during and after separation. Making decisions based on statements by children who are potentially being manipulated is fundamentally problematic and certainly wouldn’t constitute high-quality decision making.

**Proposal 7–8** Children involved in family law proceedings should be supported by a ‘children’s advocate’: a social science professional with training and expertise in child development and working with children. The role of the children’s advocate should be to:

- 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

**Feedback:** The ‘children’s advocate’ also must have an understanding and be able to identify forms of potential psychological manipulation of children and how to guard against 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?

**Feedback:** Yes, these roles must be regulated by a body whose role it is to assess, appoint, train and regulate. These people must also be qualified and skilled in the most current scientific research on the topic of psychological manipulation.

**Proposal 7–11** Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including through:

- a report prepared by the children’s advocate;
- meeting with a decision maker, supported by a children’s advocate; or
- directly appearing, supported by a children’s advocate

**Feedback:** As noted in the first section of this submission, allowing children to directly appear in the current adversarial court system is fundamentally at odds with principle of teaching them effective conflict resolution tools. If children are to appear directly then the courts must move away from setting one party against the other and then making a child take a side! The risk of psychological manipulation of children must also be considered, especially if the children’s advocate is potentially going to be preparing reports for the court.

## Section 8 – Reducing Harm

**Question 8–2** Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

**Feedback:** Various forms of psychological/emotional abuse relating to manipulation and parental alienation that often arise during and post the legal process needs to be referred to in the definition of family violence must be included. The aspect of abuse arising as a consequence of the legal process has not been covered in the review or definition and this is a significant oversight.

**Proposal 8–3** The definition of family violence in the Family Law Act 1975 (Cth) should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by inserting a new subsection referring to the ‘use of systems or processes to cause harm, distress or financial loss’.

**Feedback:** The misuse of the system by making unsubstantiated and/or false claims of abuse and/or neglect needs to be included in this definition.

**Proposal 8–5** The *Family Law Act 1975* (Cth) should provide that, in considering whether to deem proceedings as unmeritorious, a court may have regard to evidence of a history of family violence and in children’s cases must consider the safety and best interests of the child and the impact of the proceedings on the other party when they are the main caregiver for the child.

**Feedback:** By including consideration of the impact of proceedings on the main caregiver into the assessment of whether to deem applications as unmeritorious there the risk of misuse to prevent reasonable applications. Claims of this nature must be supported by independent, professional evidence and must be balanced against the question of whether the application is in the best interest of the children, not the parent(s). If unreasonable or unsupported claims are made on this basis then consideration should be given instead to whether the party making the claim is fit to the primary caregiver.

## Section 10 – 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?

**Feedback:** Additional core competencies should include:

- An approach that is at its core about reducing conflict and working towards positive solutions for everyone.
- An understanding of the potential misuses of the legal system and how to identify them.

- An understanding of child abuse, including child sex abuse, emotional abuse and neglect.

Specifically in relation to solicitor and barrister there is the need for far better definition of their role and responsibilities in the context of conflict reduction. There needs to be very clear regulation (and penalties) for legal professionals who actively encourage conflict as opposed to attempting to reduce it.

**Question 10–4** What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

**Feedback:** The scientific research and knowledge in the area of childhood develop is advancing rapidly, any judicial officer seeking appointment to family law jurisdiction must demonstrate a current and ongoing knowledge of this area.

**Question 10–5** What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

**Feedback:** The age of many judges in the area of family law is significant problem, as noted above the domain of psychological research is advancing rapidly and knowledge that was considered current and appropriate not that long ago has in some cases been shown to be incorrect and inappropriate. Judicial officers who, with all due respect, fail to remain current or retain a historically inappropriate view (such as gender bias, etc) are not suitable to act in the capacity. The current upper limit on the age of a judge should be reduced to an age that takes into account the fast changing world that we now live in.