 

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

In response to the Review of the Family Law System Discussion Paper

Professor Cathy Humphreys, Dr Georgia Ovenden, Dr Tatiana Corrales Department of Social Work, University of Melbourne

Associate Professor Lesley Laing and Dr Susan Heward-Belle, Sydney School of Education and Social Work, University of Sydney

**Introduction**

We are a group of academics representing our respective research teams at University of Melbourne and Sydney University. We have many decades of research and practice in the area of domestic violence where we have specialised in the issues associated with the impact on children who are living with or have lived with domestic violence. We have between us made many submissions about concerning issues in relation to the Family Law arena and particularly in relation to survivors of domestic violence and their children.

We are responding to the Review of the Family Law System Discussion Paper. We are not responding to the many proposals and questions raised in the Discussion Paper. We have widespread support for many of the recommendations that are being made throughout the lengthy Discussion Paper. We are raising four areas where we would like to raise significant concern and have these considered. These four areas are: a) our concern for issues of infants and perinatal rights; b) the poor alignment of current family law as a civil dispute when there are issues of violence and child abuse; c) the problems with turning to statutory child protection for evidence when most children will not be in the child protection system when they have a protective parent; and d) the reinforcement of the issues raised in relation to children’s participation. We have addressed each of the four issues individually attending to a description of our positions in respect of (a-d) and the supporting evidence base; proposals we endorse from the Discussion Paper and highlighting remaining areas of concern. A reference list is provided at the end of this document.

**A.) Infants and perinatal rights**

While there was considerable discussion in the Family Law System Discussion Paper about the need for specialised services to cater for family violence cases, and the need to ensure the best interests of children are protected, there was an absence of discussion surrounding the complexities evident in cases involving perinatal mothers.

Research in Australia and internationally suggests that women are at a greater risk of family violence during pregnancy and postpartum. Specifically, of all women who have experienced physical or sexual violence since the age of 15, 22% have experienced violence during pregnancy from their current partner. One in four of these women also indicated that violence was first perpetrated by their partners when they were pregnant. In addition, both younger women and Indigenous women are at a greater risk of experiencing domestic and family violence during pregnancy (Taft, Watson, & Lee, 2004). Having a young child under 4 years also represents an additional risk of violence for a mother, with a recent Australian study suggesting that as many as 29% of first time mothers experienced intimate partner violence (Gartland et al.2014).

Numerous theoretical accounts have addressed the possible factors, which may lead to women’s increased vulnerability to family violence during pregnancy. Large population studies have consistently shown that perpetrators are more likely to 1) exhibit traditional gender roles and, 2) have violent-supportive attitudes. These feelings may be exacerbated in response to a women’s increasing autonomy during pregnancy, when women are more emotionally and physically focused on the needs of their baby (Mercedes, 2015; Pallitto et al., 2005). What has emerged from the research in this area is that, while most men respond to their partner’s added vulnerability during pregnancy with protection and care, there is a subset of men who respond with aggression and violence. Alarmingly, the longitudinal data suggests that these men continue to be violent in the years following the birth of the child, and the risk of homicide increases for women after the perinatal period (Campbell, Garcia-Moreno, & Sharps, 2004; Macy, Martin, Kupper, Casanueva, & Guo, 2007).

Chapter 8 of the Discussion Paper focussed specifically on proposals that aim to reduce harm to victims/survivors of family violence in the family law system, including through amendments to current definitions of family violence that are more consistent with extant knowledge and practice; a more explicit recognition of family violence as child abuse and a concomitant amendment to the *Family Law Act* to reflect contemporary understandings of family violence as a form of child abuse; and a range of measures to limit the potential for perpetrators of family violence to use the family law system and its processes to further control, intimidate, harass and threaten victim/survivors and their children.

While these proposals are welcome, there is no mention of the specific issues affecting perinatal women. Legislative amendments that position family violence as a form of child abuse may have the unintended consequence of further blaming victim/survivors for *failing to protect* their children. In this context, there is a need for any reforms to the family law system to more fully recognise that leaving a violent relationship and seeking a no-contact motion against the perpetrating partner represent significant protective behaviour by the victim/survivor. This is a significant issue, as in other statutory systems (particularly Child Protection) a woman’s reluctance or inability to leave a violent relationship is seen as evidence of a *lack* of protective behaviour and therefore as evidence of risk. Research demonstrates that exposure to family violence is among the strongest predictors of unborn/ prenatal reports and recurrent child removals (Broadhurst et al., 2017; Hinton, 2018; Taplin, 2017), and the removal of infants into state care (Ward, Brown & Westlake, 2012). In light of this, it is imperative that reforms to the family law system include provisions to support perinatal women in their efforts to protect their unborn and newborn infants.

**Violence during the perinatal period: The impact on women and babies**

As noted throughout the Discussion Paper, there is wide acknowledgment and academic, practice and policy consensus on the detrimental impacts for child development and wellbeing associated with exposure to, and experience of family violence. While we acknowledge the ALRC’s position that the primary focus of the family law system is to ensure the best interests and rights of the child in family disputes, we caution that in family violence situations the rights of the victim/survivor (typically a woman) must also be prioritised. This is especially important during the perinatal period, where in most instances, the best interests of the child are to a large extent dependant on its mother.

There is growing evidence that experiencing violence while pregnant can have a range of negative impacts on foetal development and growth (Ferraro et al., 2017; Hooker, Kaspiew & Taft, 2015). While the specific mechanisms that lead to poor foetal and newborn outcomes have not been fully explicated, research shows that heightened exposure to stress hormones in utero can affect neurological and physical development (Mercedes, 2015). Further, there is emerging evidence that these effects can have long-term impacts on neurological, emotional and psychosocial development (Miller, 2015). Specifically, children who have been exposed to violence in utero may have an increased tendency towards emotional and behavioural dysregulation throughout childhood and into adolescence (Miller, 2015). This in turn has been linked to a greater risk of a broad range of negative outcomes, including mental health difficulties, aggression, poor academic engagement and performance (de Zulueta, 2009; Masten, 2011; Miller, 2015). It is important to note, however, that the causal links between in utero exposure to family violence and distal outcomes has not been established. Instead, extant research points to the increased risk associated with the experience of violence to the mother and the foetus.

In a review of research into the effects of family violence during pregnancy, Mercedes (2015) identified that pregnant women and newborn babies, were at an increased risk of obstetric and birth complications, mental health difficulties, poor birth outcomes including pre-term births and neonatal deaths, and an increased risk of newborns with high levels of cortisol in their system.

Similarly, Miller (2015) reviewed research on threat detection, or the ability of children and adolescents to attend to, encode and interpret threat signals in their environment. The review found that infants as young as three months old demonstrate the ability to attend to differentially attend to threats in their environment, particularly angry faces. Research further indicates that by seven months of age infants show hypervigilance to threatening cues. There is some evidence that in the absence of protective factors, this hypervigilance can affect emotional and behavioural development into later stages of childhood (Miller, 2015).

**Family violence and attachment**

Family violence experienced during the perinatal stage can also have a detrimental impact on the mother-infant attachment process. Attachment is widely considered a core protective factor in infant development. Theoretical and empirical research has posited that positive attachment experiences promote emotional and social wellbeing through the lifespan, can ameliorate the impact of trauma or adverse events, and is associated with better child and adult adjustment (refs).

Attachment theory describes a complex relational process that underpins the development of infants’ ability to regulate their emotions, cognitions and behaviours (Ainsworth, 1969; de Zulueta, 2009; Keyfitz, Lumley, Henning & Dozois, 2013; Sroufe, 2005). The attachment process is fundamentally dependent on the early interactions between infants and their primary care-givers, particularly the primary attachment figure which is typically the mother. In the presence of threats to survival or safety (real or perceived) a child will turn to his/her caregiver for safety and comfort. If a caregiver is accessible and responsive to the child’s signals of fear and insecurity, a secure attachment system is more likely to develop. This attachment system is predicated on the primary caregiver being emotionally attuned to the needs of the child. The child in turn, begins to adapt his/her behaviour to the physical and emotional responses of the primary caregiver (Ainsworth, Blehar, Waters & Wall, 1977; Riggs, 2010).

Attachment occurs within a broader environment that can either facilitate or hinder a caregiver’s ability to provide stable, consistent and predictable care. Some scholars have contested the focus on attachment, specifically in the context of family violence (Buchanan, 2018), arguing that the emphasis on the mother’s responsibility to provide safe and predictable environments minimises the role of violent partners and the hostile environments that these women and their children inhabit. These arguments notwithstanding, there is considerable research pointing to the damaging effects of family violence on attachment and parenting more broadly (see Campo, 2015 and Hooker et al., 2015 for recent reviews). Research indicates that hostile and chaotic environments marked by violence can impact on attachment through a range of mechanisms, including women’s fear for their and their children’s physical safety, compromised emotional and psychological resources, and limited access to sources of social and familial support. As such, their capacity to be attuned to the needs of their infants and to respond to infant cues with sensitivity, consistency and predictability can be depleted, leading to disrupted patterns of attachment.

Violent, chaotic and hostile environments can further disrupt the attachment process by creating an irreconcilable conflict for the infant, whereby the source of fear and distress is also the source of protection and security. Put another way, in the presence of stressful events, behaviours or environments infants will seek comfort and reassurance from primary caregivers, but will also experience fear and confusion when those same caregivers fail to provide safety and security. Research indicates that when attachment figures respond to infant cues with frightening or frightened responses, attachment can become disorganised. Disorganised attachment can lead to the development of significant psychopathology (see Granqvist et al., 2017).

In light of these issues, women’s decision to leave violent relationships during the perinatal period represents the most overt example of protective behaviour.

**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 over 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.
* All of the professionals in these roles should have specialist family violence knowledge and expertise.

Point 6.28 (pg. 133) indicates that the specialist family violence list should have the ability to make a range of orders, including in relation to recovery of children and contravention. *This* is an important point during the perinatal period, particularly for women who are seeking no contact between the perpetrator and the unborn/newborn child

In light of the research discussed above, we argue that in addition to Proposal 6-7 there is a need to ensure that the family law system acknowledges the vulnerability and risk associated with pregnancy and the postnatal period, and that processes are implemented to protect women’s right to request no-contact motions against the perpetrator of violence.

Protective maternal behaviours – contradictory standards

**Proposal 6-8** The Australian Government should work with state and territory governments to develop and implement models for co-location of family law registries and judicial officers in local court registries. This should include local courts in rural, regional and remote locations.

Submissions informing Proposal 6-8 emphasise the complexity of family law disputes particularly for cases involving family violence. As is widely acknowledge, family violence often co-occurs with other difficulties, including mental ill-health, substance use/abuse, and financial hardship. Where children are involved, there may also be protective concerns investigated by Child Protection.

Pregnant women and women with newborns, infants and very young children who are engaged with the family law system therefore require additional protections. We support the proposal to co-locate family law registries and judicial officers in local court registries, but urge the ALRC to more explicitly recognise the particular vulnerabilities associated with the perinatal period. We further urge the ALRC to consider the potentially contradictory and harmful messages that the family law system and the criminal justice system may send pregnant women and women with very small children who are leaving violent relationships. Specifically, the act of leaving a violent relationship during a physically, emotionally and socially vulnerable period of a woman’s life (pregnancy and post-birth) should be recognised as evidence of a woman’s explicit protective behaviour towards her unborn and/or newborn child. Such recognition should extend to supporting women’s right to no-contact arrangements with the perpetrating partner.

Our recommendation is supported by submissions relating to post-order conflict and enforcement proceedings, where the heightened potential for conflict to escalate during court proceedings (section 6.73, pg. 145) was noted.

**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’.

Women may be receiving contradictory messages from various statutory systems, particularly family law and child protection. From a child protection perspective failure to leave a violent relationship, particularly during pregnancy or when young children are involved is seen as evidence of risk; namely, the absence of protective behaviours. In the family law system, protective behaviours do not appear to be explicitly acknowledged and therefore may not be fully supported. This can be exacerbated when perpetrators ‘weaponise’ the system and its processes to further control, intimidate and threaten victim/survivors. We therefore urge the ALRC to pay particular attention to the needs and rights of perinatal women, particularly their right to seek no-contact motions against perpetrators of violence.

There also needs to be greater consistency between the family law, criminal law and child protection systems particularly in situations where women have taken actions to protect themselves and their unborn/newborn children from harm.

Ensuring that women are afforded the option of having limited/no contact with the perpetrating partner should not be seen as inconsistent with the aim of ensuring that the FLS becomes more child-centred or child-inclusive. Instead, it is a recognition of the developmental needs of infants and very young children, of the protective behaviours of pregnant women and mothers of very young children, and is consistent with the family law’s emphasis on ensuring the *best interests of the child*

**B.) The poor alignment of current family law as a civil dispute when there are issues of violence and child abuse**

As acknowledged in the Discussion Paper, addressing the safety of children exposed to domestic violence is a core responsibility of the family law system, and it is expressed in the strongly endorsed proposal **3–3:** ‘The principle (currently set out in s 60CA of the Family Law Act 1975 (Cth)) that the child’s best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to ‘safety and best interests’.

This elevation of children’s safety acknowledges, as argued by Brown and Alexander (2007) that the prevalence of child abuse and domestic violence during and following parental separation makes the family law system an important, albeit often unrecognised and poorly integrated part of the child protection system. It has also been characterized as a dual-track child protection system with traditional statutory child protection services at the state/territory level of government and the family law system, at federal level. Each has a distinct focus: ‘In the children’s courts, the focus is on determining whether or not the state should intervene to protect the child. In FLA proceedings, the focus is on determining a private dispute between adults (usually parents) in relation to the care of a child.’ (Fehlberg, Kaspiew, Millbank, Kelly, & Behrens, 2015, p. 63)

Many reports and inquiries over more than a quarter century have identified and attempted to address the issues arising from this jurisdictional state/territory-federal “gap” (Higgins & Kaspiew, 2008), but the consequences for children’s safety remain serious and urgent. Most recently the Family Law Council (2015) articulated the core issue of the difficulties in making child safety decisions in a system designed to resolve parenting disputes where there is a reliance on the parents adducing evidence:

The family courts have no capacity to compel a child protection department to intervene in a family law case or to investigate the family court’s concerns, and the family law system has no independent investigative body akin to a child protection department that can provide the courts with a forensic assessment of child risk issues. These limitations mean that the risk of harm to children in family law cases is managed by judicial officers within a framework designed for ‘private’ disputes about the child’s care time with each parent, rather than a child protection framework. (Family Law Council, 2015, p. 96)

This is very different to statutory child protection systems which undertake a forensic assessment of allegations of harm to children by an independent investigator, funded by the State. In the family law system, the extent of possible actions to protect children from abuse and exposure to domestic violence is affected by the resources of a parent with concerns about their child’s safety. Women survivors of domestic violence may have depleted resources - financial, social and emotional – as a result of the violence and this may affect their capacity to participate in the family law system to seek safe post-separation parenting arrangements. In addition, women may be further disadvantaged in the private family law system due to the economic inequality experienced by women in relation to men, through the gender pay gap and savings gap due to time out of the workforce for mothering, exacerbated at the time of separation, with the feminization of post-separation poverty (Easteal, Young, & Carline, 2018). Some of the proposals in the Discussion Paper address the need for additional support for domestic violence survivors facing these challenges (**Proposal 4–5** – **4-8,** expansion the Family Advocacy and Support Service (FASS); and **Proposal 6-2** Safety of court premises).

Another issue arising from the dual public/private systems of child protection is the important one of evidence, which is discussed in more detail in the following section of this submission, so noted only briefly here. As noted earlier by the Family Law Council (2002), the family courts have no investigative capacity, yet many cases do not meet the statutory threshold for child protection intervention, especially if the domestic violence survivor is judged to be “protective”. Once involved in the family law system, women report being advised by child protection services to seek solutions in the family court, even when domestic violence continues to occur and harm children in the context of contact and parenting arrangements (Laing, 2010). The reluctance of child protection workers to become involved in cases in the family law system, commonly reported by survivors, was also reported by child protection workers, who tend to regard allegations in the context of separation with scepticism (Laing, Heward-Belle, & Toivonen, 2018). Proposal **11-7 regarding** co-location of child protection and family violence support workers at each of the family law court premises could assist in bridging the knowledge gap between these systems.

One approach to the problem of evidence was recommended in the *Family Violence Report* by the Australian and NSW Law Reform Commissions (2010), which focussed on the interrelationship of state and federal laws It recommended that, to support a protective parent’s ability to achieve safe parenting orders in the family law system:

[C]hild protection agencies should provide greater support for parents with child protection concerns that litigate in the family courts … where an agency has located a viable and protective carer in a child abuse investigation, the agency should provide written information to the family court about the advice and the reasons for it. Alternatively, the agency should provide reports and other appropriate evidence to the family court, or intervene in proceedings. (Peel & Croucher, 2011, p. 27)

One of the proposals in this Discussion paper takes up this suggestion - **Proposal 11–9 ‘**The Australian Government and state and territory governments should work together to develop a template document to support the provision of a brief summary of child protection department or police involvement with a child and family to family courts.’

In response to the accompanying 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? Some elements could be:

* any recommendations they may have in relation to the care arrangements of the children, and the evidentiary basis for this
* any advice provided to the parent, and the basis for this
* any limitations in the information held by the agency
* clarification of meaning of specialist terminology (e.g. unsubstantiated allegations)

Finally, shifting allegations of exposure to domestic violence from statutory child protection services to the family law system moves the focus from child protection to a ‘parenting dispute’ and mutualises responsibility rather than holding a perpetrator of domestic violence accountable. Child protection matters require an approach where there is a focus on safety, as opposed to a focus on promoting the child’s relationship with both parents; a focus on risk assessment rather than mediating differences about the past; and assessments that attend to the nature and effects of violence (Sudermann & Jaffe, 1999). This is a very different approach than one which frames the problem as one of conflict to be resolved through mediation and assumes equality in the relationship. In order to implement a safety focussed decision-making process, Proposal **6-7 specialist family violence list** is strongly endorsed. However, adequate resourcing by government will be required for such an intensive system to live up to its promise to protect the most vulnerable children.

**C) Problems with evidence of risk of harm to children where there is domestic violence and child abuse**

The Discussion Paper rightly refers to the problems of evidence gathering where there are issues of domestic violence and child abuse.

In response to 6-2 in the Discussion Paper in relation to ‘Finding of Fact’ we hold firm views. Professor Cathy Humphreys originally worked with a reference group to the Lord Chancellor’s Department when it was agreed by experts in the committee (including committed and interested judges) that ‘a finding of fact’ would be an important first step where there were contested issues of domestic violence and child abuse. The implementation of this process was nothing short of dismal. The research into the implementation of ‘finding of fact’ showed that very few judges and magistrates used this power to order a ‘finding of fact’ and when they did it did not necessarily assist women and children who had been living with domestic violence (Aris & Harrison, 2007). We therefore concur with the Discussion Paper that ‘a finding of fact’ is not necessarily a helpful way forward.

However, we are equally sceptical about reliance on statutory child protection for evidence. The first issue is that only a minority of children living with domestic violence reach the threshold for a statutory child protection investigation particularly in states which have actively instituted a differential response to ensure that not all children living with domestic violence are referred to statutory child protection, only to find that they do not reach the threshold for investigation and no further action beyond referral is taken. Three jurisdictions have established differential response systems in legislation (NSW, Tasmania and Victoria) with others experimenting with alternative pathways through policy change (Matthews, Bromfield, Walsh & Vimpani, 2015). A differential response in NSW provides an example of the impact of legislative and policy change.

In NSW, Matthews and colleagues found that over the nine years from 2004/05, Exposure to DV (EDV) reports accounted for the highest proportion of reports (29% of all reports), with police responsible for the largest proportion of reports (Matthews et al, 2015 p.17). Legislative change in 2010 clarified the mandatory reporting requirements to report only cases of significant harm, removed the statutory penalty for failing to report, and enabled cases of less serious harm, particularly in relation to DV to be referred to community-based Child Well Being Units (Matthews et al, 2015 p.17). The legislative change had a major impact on the numbers of reports, which dropped dramatically, from 51,630 in 2008/09 to 14,390 in 2010/11 (Matthews et al, 2015 p.17).

A pilot project in Victoria saw a similar drop in children referred to child protection when a multi-agency triage process was introduced. Only 14% of children who were referred to the triage following a police report from a domestic violence incident reached the threshold for a child protection referral which would result in an investigation (Humphreys et al, 2018a). Many children have protective factors in place, particularly a protective parent (usually mother) which means that the harm to children from domestic violence will not be investigated. Separation is conflated with safety and the availability of a protective parent (usually mother) ensures that the child does not reach the threshold for investigation. This does mean however that there is no evidence from child protection of the harm to the child from having lived with or having contact with a parent (usually father) who uses violence. The lack of a child protection investigation may therefore not be an indicator that the harm to the child is not severe, rather that there is a protective parent available to the child.

A second issues lies in the difficulty of garnering a response to the investigation of child abuse and domestic violence once separation has occurred, including when referred for investigation by the Family Court. In the over-extended child protection system, separation is generally conflated with safety, and it is recognised that there is a parent (usually mother) acting protectively. While child protection workers often coerce women into leaving situations of domestic violence to protect the children from a violent man (Douglas and Walsh, 2010), the follow through that the danger to children is over when separation occurs, fails to take account of the on-going contact that usually continues for children with their fathers (Thiara & Humphreys, 2015; Humphreys et al, 2018b) and the fact that 40% of police family violence incident reports are post-separation (Victorian Police Database, 2017). Assumptions have been made that: a) the violence children are exposed to ceases at separation; b) that the only source of harm is the violence towards the man’s intimate partner.

Evidence is now emerging that men who use violence against their partners are poor fathers. The indirect nature of the harm may obfuscate the responsibility of fathers for harming their children through undermining the child’s mother (physically and emotionally), through comprising the functioning of the family, and creating an atmosphere of fear in which children are unable to thrive (Lourenco et al, 2013).

The association of domestic violence with the direct abuse of children has also been explored (Herrenkhol et al, 2008). Studies suggest between 30% and 66% of children who suffer physical abuse are also living with domestic abuse. The wide variation is largely dependent upon research site and methodology (Kimball, 2016). The severity of violence is also relevant, with the US study by Ross (1996), finding almost a 100% correlation between the most severe abuse of women and the men’s physical abuse of children. Other studies confirm this trend (Hartley, 2004; Kimball, 2016).

There has been less attention paid to the parenting practices of men who use violence against their partners. It is an emerging area of research raising significant cause for concern (Stover & Margos, 2013). Qualitative research studies identify a group of men who have poor parenting skills resulting from their sense of entitlement, self-centred attitudes and over-controlling behaviour (Scott & Crooks, 2007), and who over- use physical forms of discipline (smacking) when compared with other fathers (Fox & Benson, 2004). They may have a poor understanding of child development and the tactics of abuse used against partners often extend to children (Katz, 2016; Heward-Belle, 2016). These tactics include undermining of the child’s mother and her parenting (Thompson-Walsh et al, 2018).

**Further Strong Endorsements**

As stated already, we endorse the majority of proposals put forward in the Discussion Paper. Included in these are:

* We strongly endorse Proposal 7-8 that children require a children’s advocate who is a social science professional with training and expertise in child development and working with children who is able to support the child and the gathering of evidence for the court. Alongside the proposal for a children’s advocate is the very important point that if children are to be supported to give evidence then in line with Proposal 8-6, children’s confidences need to be protected by the Court if the breaching of this confidence will possibly lead to harm to the child.
* **Proposal 3–3** The principle (currently set out in s 60CA of the Family Law Act 1975 (Cth)) that the child’s best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to ‘safety and best interests’.
* **Proposal 3–4** The objects and principles underlying pt VII of the Family Law Act 1975 (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements.
* **Proposal 3–6** The Family Law Act 1975 (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of the child’s connection to their family, community, culture and country must be considered.
* **Proposal 6–7** The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. This high risk list should be determined through the triage process and a standard domestic violence risk assessment process.
* **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.
* **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

**Remaining concerns**

1. The source of evidence of child abuse and domestic violence should not be restricted to statutory child protection. Many other services within the formal system of response have access to evidence of harm and abuse of both women and children. In the past, the evidence from these services has been dismissed as biased or not based on the clinical professional judgement of a psychologist (many of whom have no training in child abuse or domestic violence) or a child protection investigation. Specialist family violence services, children’s counsellors, family service workers may all have in depth knowledge of the children, women and men in the family built, sometimes over many interviews. These workers may be a far more reliable source of evidence that that based on short interviews where relationships of trust may not have been established – an issue where there are significant levels of trauma and fear.
2. Attention is required to the fathering practices of men where there are allegations or charges in relation to domestic violence and child abuse. The notion that separation brings safety is not born out by the evidence in this area. This is an issue of not only evidence, but of a cultural change in recognising that the harm to children from men who use domestic violence will often continue. Children, like their mothers also need to be able to separate from violence.

**D.) Children’s and young people’s experiences of the family law system**

Numerous inquiries, government reports and empirical studies conclude that the family law system is not meeting the needs of many women, children and young people who experience family and domestic violence (see Review of the Family Law System Discussion Paper, p.18). Criticisms of the current system include that it is not sufficiently child-centred (Carson et al, 2018); domestic violence informed (Humphreys & Healey, 2017); it fails to adequately address child protection concerns (State of Victoria, 2016); it constructs children as unreliable and incompetent witnesses (Roche, 1999), is underfunded (ABC, 2017), fragmented and difficult to navigate (Laing, 2017); does not make decisions in a timely fashion and fails to meet the needs of Aboriginal and Torres Strait Islander children and young people experiencing domestic violence, as well as, other children from under-serviced communities (Productivity Commission, 2014; Family Law Council, 2012). Moreover, as previously discussed we contend that the adversarial nature of proceedings in the family law system are at odds with the aim of ensuring that children’s best interests are served. These findings directly impact children’s and young people’s experiences and ability to participate in decision-making processes that affect their futures as well as their ability to heal. Indeed in reviewing the corpus of data highlighting the failings of the family law system, we are reminded of the words of Professor Judith Herman:

"The legal system is designed to protect men from the superior power of the state but not to protect women or children from the superior power of men. It therefore provides strong guarantees for the rights of the accused but essentially no guarantees for the rights of the victim. If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law." (1992, p.##).

Many of the issues that contribute to the secondary victimization of women, children and young people directly hamper their ability to participate in the family law system and have been canvassed in the Australian Law Reform Council’s Discussion Paper (October, 2018). It is not our intention to repeat these findings as they are well documented, rather we wish to reinforce the following four themes, which are consistently reported in the scholarship pertaining to children’s and young people’s experiences of the family law system.

1. **Not child-centred, not child inclusive**

The current system is embedded in an adult-centric, socio-legal paradigm that supports the marginalization of children (Shea-Hart, 2004). Children and young people identify that they want a child-centred, child inclusive family law system that provides them with the opportunity to meaningfully contribute to the decision making process (Carson et al, 2018).

1. **Not seen, not heard**

Children and young people report feeling that they are rendered invisible and are excluded from decision-making processes that directly impact their lives (Carson et al, 2018). Listening to children’s and young people’s experiences and perspectives is central to developing a child-centred and child inclusive family law system.

1. **Not well represented**

Children and young people report that they do not feel well represented, nor supported to bring their views to the decision making process. (Carson et al, 2018). We endorse the elements of professional practice developed by children and young people who had been involved in the family law system, which are contained on page 26 of the AIFS submission to this Review (2018).

1. **Not safe, not domestic violence nor trauma informed**

Women and children survivors of domestic violence consistently report having to comply with orders that decrease the safety of women and children. (Laing, 2010). Many women and children survivors report extensive delays and unsatisfactory judgments, which preclude their ability to move forward in their lives and to heal from male violence. The trauma of domestic violence is compounded by inadequate legal and social service system responses that do not effectively address women’s and children’s safety and wellbeing needs in a timely fashion (Heward-Belle et al, 2018).

**Further strong endorsements**

* We endorse many of the proposals put forward in the Discussion Paper, which aim to create a child-centred, child inclusive family law system, including the creation of a Children and Young People’s Advisory Board. We agree with the proposed functions specified in 7.105.
* We reinforce the centrality of the paramount consideration principle, or the ‘best interests’ of the child, in creating a child-centred, child inclusive system. However, we contend that the paramount consideration principle must extend beyond being a philosophical commitment.
* Whilst we endorse the establishment of the role of Children’s Advocates & Separate Representatives, we contend that professionals must not only have expertise in child development and working with children (Proposal 7-8) but they must also have expertise in the dynamics of family and domestic violence including: the gendered nature of domestic violence, knowledge of coercive control (Stark, 2007) and perpetrator tactics – including grooming of professionals, the impact of male violence and control on women and children, compensatory mothering practices, the fathering practices of men who use violence and control, safety planning, secondary victimization, post separation violence and control, and how to partner effectively with women and children survivors.
* **Proposals 7–9 & 7-10** – We wish to reiterate our view that the important role that the Children’s advocate should play in ensuring that infants, very young children, and children who have communication challenges are supported to participate in the family law system.
* In order to increase the support and representation of children, increase interagency collaboration and reduce siloing, we support the creation of multi-disciplinary team approach proposed by the Youth Affairs Council of South Australia. Such an approach has the potential to harness necessary expertise from many disciplines, provide holistic support to children and young people, reduce secondary victimization and address the complex, intersecting family issues that many children and young people experience including domestic violence, parental substance misuse and mental ill-health.
* We endorse all efforts to increase children’s participation in Family Dispute Resolution given the abundance of research that demonstrates the developmental and therapeutic benefits of participation for children and young people.

**Remaining Concerns**

We remain concerned with the limited attention given to the following considerations:

* Reorienting the family law system towards a more inquisitorial, rather than adversarial approach. Whilst we endorse many of the mechanisms nominated to increase children’s and young people’s participation we remain concerned that without a radical overhaul of the adversarial system itself, these mechanism are but window dressing and the views of children and young people will remain marginalized.
* There is insufficient attention paid to delineating what special mechanisms may be brought to bear to increase the participation of particular groups of children and young people. We remain concerned about the lack of participation from Indigenous families, children and young people in the family law system. This concern extends to other under-serviced groups in the community including but not limited to children from CALD communities, children from socio-economically disadvantaged communities, and children with disabilities.
* There is insufficient attention paid to ensuring that professionals are domestic violence informed.
* Inaccurate language usage remains problematic. Specifically, there are numerous references to ‘family conflict’ when ‘domestic violence’ would be a more accurate term. Conflating domestic violence with family or relationship conflict is a significant barrier to achieving safety and justice for women, children and young people.
* Children and young people should be given the opportunity to meet with the magistrate or decision maker if they wish to directly express their views to her/him. This is in line with practices in other OECD countries. We support all opportunities for judicial officers to improve their communication skills with children and young people, should they identify this as a gap in their skillset.
* Participatory rights of children do not apply to infants and very young children. While increasing meaningful participation for children is an important area for reform, it is also imperative that the rights and interests of infants and very young children are explicitly acknowledged and addressed. This is particularly pertinent in situations where family violence is a concern and where the non-offending parent (typically the mother) has demonstrated protective behaviours. In light of this concern, we offer the following response to **Question 7-1:** If the purpose of the children’s advocate is to support children’s meaningful participation in litigation proceedings, a separate legal representative for a child should be appointed *in addition to* a children’s advocate where a child is developmentally incapable of representing their interests or views. A specific example would include infants and very young children, particularly in situations where family violence has been identified as a concern. This would enable for an independent assessment of the risk posed to the child, as well as an assessment of the protective behaviours the mother has taken to limit the child/ren’s exposure to harm.

**References**

ABC News. (2017). Family Court underfunded, letting people down, chief justice says. Retrieved from <http://www.abc.net.au/news/2017-04-30/family-court-letting-families-down-chief-justice-says/8483858>.

Ainsworth, M.D.S. (1969). Object relations, dependency, and attachment: A theoretical review of the infant-mother relationship. *Child Development, 40*(4), 969-1025.

Ainsworth, M., Blehar, M., Waters, E., & Wall, S. (1977). *Patterns of attachment: Observations in the strange situation and at home.* Hillsdale, New Jersey: Erlbaum.

Aris, R and Harrison, C (2007) *Domestic violence and the supplemental information form*' London, Ministry of Justice.

Australian Institute of Family Studies, (2018). Review of the family law system: Submission.

Australian Law Reform Commission. (2018). *Review of the Family Law System: Discussion Paper No 86*. Canberra: Commonwealth of Australia Retrieved from <https://www.alrc.gov.au/sites/default/files/pdfs/publications/issues_paer_48_19_march_2018_.pdf>.

Australian Law Reform Commission and NSW Law Reform Commission. (2010). Family Violence-A National Legal Response, Final Report. *ALRC Report 114.* Retrieved from <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf>.

Broadhurst, K., Mason, C., Bedston, S., Alrouh, B., Morriss, L., McQuarrie, T., Palmer, M.,… & Kershaw, S. (2017). *Vulnerable birth mothers and recurrent care proceedings. Final main report.* UK: Centre for Child and Family Justice Research, Lancaster University. Retrieved from: <https://www.nuffieldfoundation.org/sites/default/files/files/rc-final-summary-report-v1_6.pdf>.

Brown, T., & Alexander, R. (2007). *Child abuse and family law: understanding the issues facing human service and legal professionals*. Crows Nest, NSW: Allen and Unwin.

Buchanan, F. (2018). Mothering babies in domestic violence: Beyond attachment theory. Oxon, London: Routledge.

Campbell, J., Garcia-Moreno, C., & Sharps, P. (2004). Abuse during pregnancy in industrialized and developing countries. Violence against women, 10(7), 770-789.

Campo, M. (2015). *Domestic and family violence during pregnancy and early parenthood. Overview and emerging interventions.* Melbourne, Victoria: Australian Institute of Family Studies. Retrieved from: <https://aifs.gov.au/cfca/publications/domestic-and-family-violence-pregnancy-and-early-parenthood>.

Carson, R., Dunstan, E., Dunstan, J., & Roopani, D. (2018). Children and young people in separated families: Family law system experiences and needs. Melbourne: Australian Institute of Family Studies.

de Zulueta, F. (2009). Attachment research and the origins of violence: A story of damaged brains and damaged minds. In M. Blyth & E. Solomon (Eds.), *Prevention and youth crime: Is early intervention working?* (pp. 69-88). Bristol, UK: The Policy Press.

Douglas, H. & Walsh, T. (2010). ‘Mothers, domestic Violence, and Child Protection: Toward collaboration and engagement’. *Violence Against Women*, 16 (5), 537-542.

Easteal, P., Young, L., & Carline, A. (2018). Domestic Violence, Property and Family Law in Australia. *International Journal of Law, Policy and the Family, 32*(2), 204-229. doi:10.1093/lawfam/eby005

Family Law Council. (2002). *Family law and child protection: Final report*. Retrieved from <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family%20law%20and%20child%20protection.pdf>

Family Law Council. (2015). Family Law Council Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (Terms 1 and 2). Retrieved from <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>

Fehlberg, B., Kaspiew, R., Millbank, J., Kelly, F., & Behrens, J. (2015). *Australian Family Law: The contemporary context* (2nd ed.). South Melbourne, Victoria: Oxford University Press.

Ferraro, A.A., Rohde, L.A., Polanczyk, G.V., Argue, A., Miguel, E.C., Grisi, S.J.F.E., & Fleitlich-Bilyk, B. (2017). The specific and combined role of domestic violence and mental health disorders during pregnancy on new-born health. *BMC Pregnancy and Childbirth, 17*, 1-10. doi: 10.1186/s12884-017-1438-x.

Fox, G., & Benson, M. (2004) Violent men, bad dads? Fathering profiles of men involved in intimate partner violence. (eds) R. Day & M. Lamb (Eds.), *Conceptualizing and measuring father involvement*. New Jersey, Lawrence Erlbaum Publishers.

Gartland, D., Woolhouse, H., Mensah, F. K., Hegarty, K., Hiscock, H., & Brown, S. J. (2014). The case for early intervention to reduce the impact of intimate partner abuse on child outcomes: results of an Australian cohort of first‐time mothers. Birth, 41(4), 374-383.

Granqvist, P., Sroufe, L.A., Dozier, M., Hesse, E., Steele, M., van Ijzendoorn, M., Solomon, J.,…&Duschinksy, R. (2017). Disorganized attachment in infancy: A review of the phenomenon and its implications for clinicians and policy-makers. *Attachment & Human Development, 19*(6), 534-558. doi: 10.1080/14616734.2017.1354040.

Herman, J. (1997). *Trauma and Recovery*, New York: Basic Books.

Hartley, C. (2004) Severe domestic violence and child maltreatment: considering child physical abuse, neglect and failure to protect*. Children and Youth Services Review*, 26, 373–392.

Heward-Belle, S. (2016) The Diverse Fathering Practices of Men Who Perpetrate Domestic Violence. *Australian Social Work*. 32, 374-389.

Heward-Belle, S., Laing, L., Humphreys, C. & Toivonen, C. (2018). Intervening with Children Living with Domestic Violence: Is the System Safe?, *Australian Social Work*, 71:2, 135-147.

Higgins, D. J., & Kaspiew, R. (2008). ‘Mind the Gap . . .’: Protecting children in family law cases. *Australian Journal of Family Law, 22*(3), 235-258.

Humphreys, C., Diemer, K., Bornemisza, A., Spiteri-Staines, A., Kaspiew, R. & Horsfall, B. (accepted 2018b) More present than absent: men who use domestic violence and their fathering. *Child & Family Social Work.*

Humphreys, C., Healey, L., Nicholson, D. & Kirkwood, D. (2018a) Making the case for a differential child protection response for children living with domestic and family violence. *Australian Social Work*, 71, 162–174 <http://dx.doi.org/10.1080/0312407X.2017.1415366>.

Hinton, T. (2018). *Breaking the cycle: Supporting Tasmanian parents to prevent recurrent child removals.* Hobart, Tasmania: Social Action Research Centre, Anglicare Tasmania.

Hooker, L., Kaspiew, R., &Taft, A. (2015). Domestic and family violence and parenting: Mixed methods insights into impact and support needs. State of knowledge paper. Sydney: ANROWS.

Humphreys, C., & Healey, L. (2017).*PAThways and Research Into Collaborative Inter-Agency practice: Collaborative work across the child protection and specialist domestic and family violence interface: Final report* (ANROWS Horizons 03/2017). Sydney: ANROWS.

Katz, E. (2016) Beyond the physical incident Model: How children living with domestic violence are harmed by and resist regimes of coercive control. *Child Abuse Review*, 25, 46–59.

Keyfitz, L., Lumley, M.N., Hennig, K.H., & Dozois, D.J.A. (2013). The role of positive schemas in child psychopathology and resilience. *Cognitive Therapy and Research, 37*, 97-108. doi: 10.1007/s10608-012-9455-6.

Laing, L. (2010). *No Way to Live - Women’s experiences of negotiating the family law system in the context of domestic violence*. Retrieved from <http://hdl.handle.net/2123/6255>.

Laing, L. (2016). Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System. *Violence Against Women, 23*(11), 1314-1335. doi:10.1177/1077801216659942.

Laing, L., Heward-Belle, S., & Toivonen, C. (2018). Practitioner Perspectives on Collaboration across Domestic Violence, Child Protection, and Family Law: Who's Minding the Gap? *Australian Social Work, 71*(2), 215-227. doi:10.1080/0312407x.2017.1422528

Lourenço, L. M., Baptista, M. N., Senra, L. X., Almeida, A. A., Basílio, C., & Bhona, F. M. C. (2013) Consequences of exposure to domestic violence for children: a systematic review of the literature. Paideia, 23, 263-271.

Macy, R. J., Martin, S. L., Kupper, L. L., Casanueva, C., & Guo, S. (2007). Partner violence among women before, during, and after pregnancy: multiple opportunities for intervention. Women's Health Issues, 17(5), 290-299.

Masten, A.S. (2011). Resilience in children threatened by extreme adversity: Frameworks for research, practice, and translational synergy. *Development and Psychopathology, 23*, 493-506. doi: 10.1017/S0954579411000198.

Mathews, B. P., Bromfield, L., Walsh, K. M., & Vimpani, G. (2015). *Child Abuse and Neglect: A Socio-legal Study of Mandatory Reporting in Australia*-Report for the South Australian Government: Commonwealth of Australia.

Mercedes, M. (2015). Intimate partner violence against women during pregnancy: A critical reading from a gender perspective. *Revista Colombiana de Enfermeria, 10*, 64-77. Retrieved from: <http://m.uelbosque.edu.co/sites/default/files/publicaciones/revistas/revista_colombiana_enfermeria/volumen10/008_articulo-6-Vol10%20A10.pdf>.

Miller, L.E. (2015). Perceived threat in childhood: A review of research and implications for children living in violent households. *Trauma, Violence & Abuse, 16*(2), 153-168. doi: 10.1177/1524838013517563.

Pallitto, C. C., Campbell, J. C., & O’Campo, P. (2005). Is intimate partner violence associated with unintended pregnancy? A review of the literature. Trauma, Violence, & Abuse, 6(3), 217-235.

Peel, S., & Croucher, R. F. (2011). Mind(ing) the gap: Law reform recommendations responding to child protection in a federal system. *Family Matters*(89), 21-30.

Productivity Commission. (2014). Access to Justice Arrangements, Inquiry Report No. 72 Retrieved from <https://www.pc.gov.au/inquiries/completed/access-justice/report>.

Ralph, S. (2012). Indigenous Australians and Family Law Litigation: Indigenous Perspectives on Access to Justice Retrieved from <http://www.familycourt.gov.au/wps/wcm/connect/03eec3e6-63e4-4060-a874-3cfb3dc125f7/IndigenousAustraliansFamilyLaw.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-03eec3e6-63e4-4060-a874-3cfb3dc125f7-lh-m9FQ>.

Riggs, S.A. (2010). Childhood emotional abuse and the attachment system across the life cycle: What theory and research tell us. *Journal of Aggression, Maltreatment & Trauma, 19*(1), 5-51. doi: 10.1080/10926770903475968.

Ross, S. (1996) Risk of physical abuse to children of spouse abusing parents. *Child Abuse and Neglect*, 20, 589–598.

Scott, K., and Crooks, C. (2007). Preliminary evaluation of an intervention program for maltreating fathers. *Brief Treatment and Crisis Intervention*, *7*, 224–238.

Shea Hart, A. (2004). Children exposed to domestic violence: Undifferentiated needs in Australian family law. *Australian Journal of Family Law, 18*(2), 170-192.

Smith, J. & Humphreys, C. (2018) Child protection and fathering where there is domestic violence: contradictions and consequences. *Child and Family Social Work* doi/10.1111/cfs.12598.

Sroufe, L.A. (2005). Attachment and development: A prospective, longitudinal study from birth to adulthood. *Attachment & Human Development, 7*(4), 349-367. doi: 10.1080/14616730500365928.

Stark, E. (2007). *Coercive Control: How Men Entrap Women in Personal Life*. New York: Oxford University Press.

State of Victoria, (2016). Royal Commission into Family Violence: Summary and Recommendations, Parl. Paper No 132 (2014-2016). Melbourne.

Stover, C., & Margos, D. (2013) Fatherhood and intimate partner violence: Bringing the parenting role into intervention strategies. *Professional Psychology: Research and Practice*, 44, 247.

Sudermann, M., & Jaffe, P. (1999). A Handbook for Health and Social Service Providers and Educators on Children Exposed to Women Abuse/Family Violence. Retrieved from <http://publications.gc.ca/collections/Collection/H72-21-163-1998E.pdf>

Taft, A. J., Watson, L. F., & Lee, C. (2004). Violence against young Australian women and association with reproductive events: a cross‐sectional analysis of a national population sample. Australian and New Zealand Journal of Public Health, 28(4), 324-329.

Taplin, S. (2017). Prenatal reporting to child protection: Characteristics and service responses in one Australian jurisdiction. *Child Abuse & Neglect, 65,* 68-76. doi: 10.1016/j.chiabu.2017.01.007.

Thiara, R.K. and Humphreys, C. (2017) Absent presence: the on-going impact of men’s violence on the mother-child relationship. *Child and Family Social Work Social Work*, 22, 137-145 DOI: 10.1111/cfs.12210.

Thompson-Walsh, C., Scott, K., Dyson, A. & Lishank, V. (2018) Are we in this together? Post-separation co-parenting of fathers with and without a history of domestic violence. *Child Abuse Review*. DOI: 10.1002.

Ward, H., Brown, R., & Westlake, D. (2012). *Safeguarding babies and very young children from abuse and neglect.* London, UK: Jessica Kingsley Publishers.