

Childhood Matters II:

Towards an evidence-based approach to family law &
healthier, safer ways of addressing risks, harm and trauma to children
from family separation and family violence

**Response to Australian Law Reform Commission
Discussion Paper DP86**



Protecting Children - Beyond Family Separation

forkidssake.org.au

A ROYAL COMMISSION?

"In my view, if legislation and the ALRC report do not assuage public concerns about the family law system, it must surely be time to consider a Royal Commission into family law.

Continual tinkering with the system ... in my opinion adds to complexity, uncertainty and cost, and often we don't tackle the really big issues ..."

**Chief Justice John Pascoe, Family Court of Australia
October 2018**

"Based on its discussion papers to date, the ALRC's current review will not assuage public concerns about the family law system. Nor, tragically, will it best protect children from harm.

Despite its stated intention of 'a public health approach', this review appears largely to be proposing further 'tinkering with the system' - and, worse still, threatens the introduction of some measures likely to increase harm to children - instead of advocating the fresh approach and holistic changes that our children and families so desperately need.

It appears that the ALRC has been unable to escape the ideological shackles of over 40 years of family law policy-making and the presumption that a system based on family law is appropriate for addressing either family separation or family violence safely, humanely or effectively. The prospect of an evidence-based and outcome-focused approach to family separation and family violence seems as distant as ever.

In our opinion, Chief Justice Pascoe's criteria for triggering a Royal Commission will sadly, but inevitably, be met."

**Dr David Curl, For Kids Sake
November 2018**

SUMMARY

What's good

In its review of the Family Law System, Discussion Paper DP86, the Australian Law Reform Commission has made a number of significant, positive proposals, recognising some of the key flaws in the current system. Each of these mirrors one element of our own 6-point plan¹:

1. EDUCATION & SUPPORT
2. ALTERNATIVES TO COURT (primarily community-based Families Hubs)
3. SIMPLIFICATION OF THE FAMILY LAW ACT
4. TRAINING, ACCREDITATION & ACCOUNTABILITY

What's missing

If we want what's best for children, some fundamental considerations are missing from this review. Adequate consideration, for instance, of: world's best practices; family law without lawyers; the private sector; and even science itself, which surely provides many of the keys to understanding and predicting children's wellbeing, as well as to better policy. Missing too is the widely accepted concept that family courts should be "a last resort".

Though numerous, the current suite of proposals falls well short of what is needed, and still lags behind examples of better practice already in place in other countries, in many areas of legislation, practice and culture including use of: rapid judicial decision-making, arbitration, enhanced mediation, coaching, health interventions and community support. Above all, there appears to be no recognition of the urgent need for a paradigm shift: to treat family separation as a child health issue and major social issue rather than a legal issue.

What's dangerous

1. BELIEVING LAW OFFERS THE BEST OR SAFEST SOLUTIONS
There is insufficient recognition of the limitations of family law in minimising the risks to children and families associated either with family separation or family violence. Law offers neither prevention nor cure; worse still, it can actually exacerbate such risks.
2. INVOLVING CHILDREN MORE
A primary conclusion of this review should be to involve children less, not more, in family law proceedings. Exposing children even more than at present to the hostile, adversarial environment of family law will add greatly to the risks of harm, abuse and trauma.
3. MAINTAINING SECRECY
Section 121 prevents essential scrutiny of the family law system. It thereby results in great harm to children that far outweighs any unproven and unsubstantiated benefits.
4. ABSENCE OF AN EVIDENCE-BASED APPROACH
Instead of identifying and giving highest weight to proposals backed by scientifically valid evidence, the ALRC appears to have adopted an academic/legal approach, justifying proposals through advocacy, supportive citations and, in places, even ideological presumption. Children will continue to be put avoidably in harm's way as a consequence.

¹ For Kids Sake (2018). Childhood Matters. Submission #118 to ALRC Review, May 2018

CONTENTS

A Royal Commission?	2
Summary	3
Contents & Key to Response	4
Introduction	5
What Children Say	6
What We Say	7
What Judges Say	8
What's good	9
Education: the best, most cost-effective early intervention	9
Families Hub: triage when it counts	9
Simpler family law: fair legislation that does no harm	10
Training, Accreditation & Accountability: you can't have too much	10
What's missing	14
World's best practices	14
Family law without a lawyer	16
Science	17
Psychological abuse	18
Separation of financial and children's matters	19
A simple statement	20
The private sector	20
A last resort?	21
What's dangerous	22
Believing law offers the best or safest solutions	22
Maintaining secrecy	23
Involving children more	25
Absence of an evidence-based approach	32
Analysis of ALRC proposals	33
Conclusion	65
Appendix	66

Key to this response



We broadly support this proposal



We support elements of this proposal but advocate some changes that we regard as essential for the wellbeing of children and their families



This proposal represents a danger to children and, if implemented as proposed, will add to (or fail to diminish) the risks and dangers to children posed by the family law system

INTRODUCTION

There is a reason why public concerns about Australia's family system are so widespread and strongly felt – and why they have not been assuaged by “continual tinkering with the system, which we've seen over the past 40 years”.² It is because many of the problems that are self-evident today are inherent in, even integral to, the system we've been attempting to “fix”; it is because, for half a century, we've been asking the wrong question.

Instead of “How can we reform the family law system to better protect children and their families?” we should have been asking “How can we best protect children and their families from the serious risks associated with family separation and family violence?”

When we ask the right question, we come up with radically different, but inescapably obvious, answers. Answers that offer prevention, solutions and cures where the current family law system, in principle as well as practice, offers none of these.

The solutions include key measures outlined in the *For Kids Sake* 6-point plan³ and detailed in our policy documents. It is indeed imperative to dramatically simplify Australia's Family Law Act and ensure that our family law system genuinely becomes a last resort – one that models the best, not worst, of how family separations should be conducted. But, if we truly believe courts should be a last resort, they should not be the primary focus of any review that aspires to the labels “major” or “comprehensive”. Not when children's lives are at stake.

Instead of focusing on the sledgehammer that is our family law system, we need to prioritise a more nuanced, multi-layered approach that integrates a range of accessible, affordable private sector and government initiatives. These should be marketed such that they become better-known and more mainstream than the court system they need to pre-empt:

1. An ongoing education, awareness and marketing campaign – much broader in nature, and more child- and health-focused, than that proposed by this review;
2. Greater support and availability of early, health-focused interventions for all children and families;
3. Integrated coaching, conciliation and better-quality mediation for families; and
4. Formal arbitration: “It's a no-brainer”⁴ for both children's and financial matters.

Specialised training, accreditation & effective, transparent oversight is essential too (though currently lacking) for all professionals involved – from social workers to judges. And by addressing the needs of most families without them entering the court system, the relatively few, well-qualified specialists will be freed up to contribute where they're truly needed.

Above all, we believe this review should more clearly recognise that family separation is a time of great vulnerability for parents and high risk for children. And it must not fail the community by missing this important opportunity to promote the cultural paradigm shift that the ALRC's useful “public health approach” demands: towards treating family separation as a health and social issue, not primarily as a legal issue.

² Chief Justice Pascoe (2018). National Family Law Conference, Brisbane, Australia

³ For Kids Sake (2018). Childhood Matters, Submission #118 to ALRC Review, May 2018

⁴ Sir Paul Coleridge, former UK High Court judge (2017)

What Children Say

- On courts *"I don't want any other kid to go through what I did."*
[multiple respondents, 2017-18; pseudonyms used below as necessary]
"For me, a complete stranger [a judge] told me I had to choose one parent over the other. That was a choice a 16-year-old could not make, so I ran."
[Frank, then 16]
"There's no way I'm going back to that bloody court. Ever." [Sylvia]
"The Family Court completely failed us." [Amelia, 17]
"No child should be given the responsibility of having to choose between their parents." [Emily, then 12]
- On court experts *"I felt like everyone who spoke to me had an agenda."* [Amelia, then 8-12]
"We must have been interviewed by more than a dozen of those so-called experts when we were kids. It went on for years. That can't be right."
[James, then 8-14]
"The court psychologist asked all sorts of questions about things that would make my dad look bad but didn't ask the same questions about mum. I felt forced to say bad things about my dad." [Emily, then 9]
- On what children say about court proceedings *"No-one listened to me. No-one."* [Samantha, then 12]
"I lied to my lawyer all the time. Dad had told us what to say."
[John, then 11]
"How on earth did the court believe everything I said back then? Didn't they know I was just 10? Wasn't it obvious that I just saying what I thought I they wanted to hear?" [Jack, then 10]
"It's very hard to get to trust again." [Christine, then 8]
- On solutions *"Get rid of any kind of adversarial nature the court has."* [Gabrielle, 15]
"We should go easier on parents. Because it's very difficult being a parent. And for a divorced parent, it's particularly difficult." [Adam 15]
"The number one thing that helped me was the fact that I was plugged into a church community ... because every single week I would see trusted adults ... I'm a massive advocate of mentoring for young people."
[Gabrielle, 15]
"A judgment needs to be made by someone who knows the situation well."
[Mark, 15]
"It comes back to having people who are well-trained." [Amanda, 15]
"Families, even when they seem OK, should have back-up within their community so when something happens they have professionals who know the family and can make decisions ... We need to get rid of the stigma that counselling is for broken families." [James, 15]
"The focus should be on helping parents before anything happens."
[Tom, 16]

What We Say

On the family
law system

"High-stakes, adversarial litigation is no way to resolve family separation. It's inhumane, ineffective and harmful to all involved.

In years to come, we will look back in horror at the harm we caused to our children through our family court system - much as we have done with other institutions subject to recent Royal Commissions."

Dr David Curl, Director, For Kids Sake

On involving
children

"This review will have done great harm to Australia, for another generation, if it results in children becoming even more involved in family court proceedings when its primary goal should have been to involve them less."

Karen Clarke, Ambassador, For Kids Sake

On family court
"privacy" (s121)

"It is not the children but the system that's protected by the current secrecy of the family law system.

Those whose opinions matter to children will already know what's going on. But when our national media are prohibited – or merely inhibited – from openly reporting what is in the national interest, telling identifiable stories of lived-experience survivors of the court system, or naming family law or health professionals investigated for misconduct, then we have truly placed the system so far above normal levels of scrutiny as to have allowed it to become a law unto itself."

Karen Clarke, Ambassador, For Kids Sake

On adversarial
law:

"It is in the very nature of human beings placed in high-stakes, adversarial litigation that almost everyone will take sides - from friends and family to psychologists, lawyers and even judges.

The problem is that the side they choose is almost never based on scientific evidence of what's best for any children involved; it's based on what emotional connection they've made with the participants. And that will inevitably be derived from their own experiences and prejudices rather than from the more reliable conclusions of seemingly distant science.

Law is the antithesis of science; it ignores inconvenient evidence in the interests of advocacy. That's no way to decide the future of a child."

Dr David Curl, Director, For Kids Sake

On conflict:

"Conflict, like cooperation, is part of life and something we all need to learn to deal with. Using it as a criterion for removing children from their families is profoundly dangerous. Among other things, this greatly incentivises and even causes its escalation."

Karen Clarke, Ambassador, For Kids Sake

What Judges (& the Courts) Say

AUSTRALIA	<i>"If legislation and the ALRC report do not assuage public concerns about the family law system, it must surely be time to consider a royal commission into family law."</i> Chief Justice Pascoe, 2018
CANADA	Divorce/separation is <i>"a public health crisis that doesn't belong in the court"</i> . Judge Harvey Brownstone, Ontario family court & criminal court judge, 2016
AUSTRALIA	The current system is <i>"bad for children ... [and] bad for parents"</i> . Diana Bryant, then Chief Justice of the Family Court of Australia. ABC Radio, 2016
USA	<i>"There is something bad happening to our children in family courts today that is causing them more harm than drugs, more harm than crime and even more harm than child molestation."</i> Judge Watson L. White, Superior Court Judge, Georgia, USA
AUSTRALIA	<i>"In terms of whether it's a positive or negative outcome ... [judges] would probably never know."</i> Richard Foster, then CEO Family Court of Australia, Senate Estimates, 2016
USA	<i>"There is no system ever devised by mankind that is guaranteed to rip husband and wife or father, mother and child apart so bitterly than our present Family Court System."</i> Judge Brian Lindsay, Retired Supreme Court Judge, New York, USA
AUSTRALIA	<i>"We can't continue to pour money into a system that doesn't necessarily meet its core objectives or standards."</i> Richard Foster, former CEO Family Court of Australia, 2016
UK	<i>"We have some way to go in recognising that children are indeed real human beings."</i> Baroness Hale, President of the Supreme Court of the UK, 2017
AUSTRALIA	False abuse allegations are <i>"a horrible weapon"</i> . David Collier, former Family Court judge, 2013
UK	<i>"Arbitration is a no-brainer."</i> Sir Paul Coleridge, former UK High Court judge, 2017
AUSTRALIA	<i>"It could legitimately be argued that the way the family court itself acts meets the definition of family violence."</i> Australian Federal Circuit Court Judge, 2017

WHAT'S GOOD

EDUCATION: the best, most cost-effective, early intervention

Providing advice and education about the family law system – and doing so in ways suitable to people of all backgrounds, ages and cultures – is essential for everyone who may become involved in the system. Our vision, however, is much broader: we don't want to advertise the family law system, we want to advertise how best to avoid it.

Proposal 01: The Australian Government, under the auspices of the Minister for Health, should initiate and fund an education campaign – using TV, video and other modern technology as well as traditional brochures and websites – aimed at reaching all Australians with key messages about how to manage relationships and separation better and how to protect children from the various risks associated with family separation and family violence.

FAMILIES HUB: triage when it counts

We believe that the concept of Families Hubs is good. It is particularly important for people to have access to integrated services within their community, including healthcare, relationships advice and support for all aspects of family life, including family separation and family violence.

We differ, perhaps, from the ALRC's model in that we believe that such Hubs should be:

- Health- and wellbeing-focused, rather than having an emphasis on legal options;
- Private sector enterprises incentivised by government support, rather than necessarily government agencies.

Our vision is to establish a number of economically viable pathways to the creation of community hubs in either the government or private sector. The increasing number of existing Integrated Healthcare Centres around Australia, for instance, should be financially incentivised to add life/divorce coaches, family dispute resolution practitioners, well-trained mediators and possibly private arbitrators or community financial advisors to the services they provide, as well as access to family lawyers trained in collaborative legal procedures. Bookings would ideally be managed centrally and with minimal wait times.

Proposal 02: The Australian Government, under the auspices of the Minister for Health, should provide financial incentives for health or community centres to provide integrated services that include services helpful to children and families undergoing separation/divorce (including coaching, enhanced mediation and/or family dispute resolution) and to market those services actively.

At present, such centres – if they cater for relationships counselling at all – usually send families away, the moment they've decided to separate, to a Relationships Centre miles away, often with long wait times, or to a lawyer even further away in the city. The opportunities of early intervention and immediate triage are simply thrown away.

SIMPLER FAMILY LAW: fair legislation that does no harm

We strongly support the re-writing of the Family Law Act in good, plain English.

We agree that it should have the most important components, such as what's currently buried in Section 60CC or scattered in others such as Section 65, at the very front of the document, thus drawing immediate attention to the primary purpose of the Act and the way in which decisions are made.

The new Act should be substantially shorter and should explicitly incorporate key international conventions such as the Convention on the Rights of the Child and relevant articles of the Universal Declaration of Human Rights.

TRAINING, ACCREDITATION & ACCOUNTABILITY: you can't have too much

The ALRC makes a number of proposals in respect of training, accreditation and accountability, many of which represent a significant step in the right direction. This is an essential component of this review and of any future reforms and one that we support. It is also essential if the public is to develop any trust in the family law system.

ACCOUNTABILITY

We support the idea of a single, independent body with oversight of all family law professionals (given that their work encompasses a diverse range of disciplines, from law to psychology, and are not readily covered by existing entities). It is essential that all participants in the family law system, including staff and litigants, have simple access to this body; that measures are put in place to ensure that the making of an application or complaint to this body does not prejudice a complainant's job or family law case; and that all complaints are addressed in a timely manner (with initial findings on a timescale that does not hamper ongoing litigation).

At present, the family law system is arguably uniquely unaccountable; it has, at the same time, failed at self-regulation and at introducing even quite basic levels of scrutiny, feedback and assessment. This has played a significant role in the public's views of a system that administers the law yet appears to allow itself to be placed above it:

- Judges, and even barristers and expert witnesses, are essentially immune from prosecution, irrespective of their conduct;
- Litigants have no clear or safe avenue of complaint against professionals within the family law system, or to question their decisions:
 - There is no clear or publicised pathway to complain about the conduct a judge, and litigants are fearful of doing so in the belief that this would likely prejudice their case;
 - Appealing a decision not only requires making an application to the judge against whom an appeal is being made, but is only allowed in a very narrow range of circumstances. It involves arcane, complex, unaffordable and onerous procedures as well as highly specialised knowledge and experience;
 - Litigants are not permitted by the court to lodge complaints about expert witnesses, such as psychologists or report writers, while a case is ongoing and, even after the conclusion of a case, must apply to the court to seek leave to lodge such a complaint or to provide court documents to a third party;
 - The Australian Health Practitioner Regulation Agency has proven itself slow

and ineffective in pursuing complaints (notifications) and does not represent all family law health-related professionals, such as social workers, anyway;⁵

- There are no constraints upon lawyers' fees such that extreme and unreasonable costs are regularly charged. Almost always, this has a significant economic impact on children's futures; it is categorically not in children's best interests;
- Expert witnesses can essentially charge whatever they like, the court does nothing to control or monitor these fees, and litigants have no available avenue for questioning or avoiding extreme and unreasonable fees for fear of prejudicing their case;
- While litigants are prohibited from talking about their own court case in public, some judges – from a lofty position of immunity – are happy to publicly defend their courts, comment on named litigants, and dismiss critics as “disgruntled litigants” or even “blatant liars”⁶ in a manner reminiscent of a certain leader of the free world;
- In suggesting that attacking the courts “is to attack the rule of law”,⁷ outgoing AG, Senator Brandis, even appeared to make criticism of family courts and of the family law system akin to heresy. It surely has protection at the highest level.

We believe that self-regulation has demonstrably failed in each profession associated with the family law system and that it will never provide the protection that our children and families deserve. It is essential that the proposed Family Law Commission, or equivalent, oversee all professionals involved in the family law system and that it be truly independent of the judiciary, legal practitioners and health practitioners. Scrutiny and accountability must be built into every part of the system and carried out in a timely manner.

For years, for instance, the Family Court – with the acquiescence of the Australian Health Practitioner Regulation Agency – has prevented investigation of its expert witnesses while proceedings are on foot. This has led to a situation where more than six years may pass between the date of an initial complaint and when a practitioner is brought before a State Administrative Tribunal for professional misconduct. In the interim, the practitioner may continue unrestricted practice that may put more children at risk (and, conversely, the work of that practitioner may be unjustly compromised for an extreme and unreasonable period).

Proposal 03: The Family Law Act 1975 (Cth) should require that:

- a new, independent regulatory body be established with oversight of all professionals in the family law system (e.g. The Family Law Commission);
- simple access to this body be made available and promoted to all staff and litigants;
- measures be put in place to ensure that applications/complaints to this body do not prejudice the applicant; and
- all complaints be addressed in a timely manner (with initial findings on a timescale that does not hamper ongoing litigation). For the purpose of clarity, applications against judicial officers or agents of the court may be made during ongoing litigation.

⁵ We have been advised that the Health and Disabilities Complaints Office (HaDSCO) may currently be producing a National Code, on behalf of the COAG Health Council, to be adopted by all States and Territories and that would enable it to investigate and take action with respect to health professionals, including social workers.

⁶ Chief Justice Thackray (2015-18), Sunday Times WA & written judgments

⁷ Senator George Brandis (2018). In Hansard, 7 February 2018, Australian Senate

The ALRC's current proposals do not go far enough to accomplish the ultimate and most important component of accountability: Are decisions made by the family court ultimately in the best interests of the children involved? This can only be established if routine follow-up and feedback on decisions and subsequent outcomes for children and families becomes enshrined in the system and in everyday practices.

Proposal 04: The Family Law Act 1975 (Cth) should require that every judicial decision-maker publish and provide to the Family Law Commission (or equivalent), at the time of the release of each decision, a short summary of the case – for the purposes of research, feedback and quality control – including key data such as whether the case involved: allegations of any form of violence or abuse and whether against a partner, child or other person; findings of any form of violence or abuse; an outcome of single parenting, co-parenting (>35% with each parent), or other; evidence of court orders being adhered to or ignored; timescales of proceedings and of judicial decision-making etc.

Proposal 05: The Family Law Act 1975 (Cth) should require that every judicial decision-maker be required to publish a judgment no more than 90 days after the conclusion of any final hearing.

Proposal 06: The Family Law Act 1975 (Cth) should require that all litigants and children be contacted at least once per year for a period of five years from the date of a judgment being published, or until the youngest child becomes 18, to ascertain the ultimate outcome of the family law system's intervention and to provide feedback into the system.

TRAINING & ACCREDITATION

With respect to training, we are concerned that the ALRC's focus on the important issue of family violence to the exclusion of so much else renders many of its proposals ineffective, if not dangerous: judges who know everything there is to know about family violence, but have no experience or understanding of child development, child psychology, forensic examination or the value and power of science, for instance, should not be sitting on any judicial bench. And if every family law case is viewed solely or primarily through the prism of family violence,⁸ great harm will be done to many children. Our vision is a more inclusive one and one that aims for the highest possible standards for the sake of our children.

Proposal 07: The Family Law Act 1975 (Cth) should require that every professional involved in family law proceedings (from social workers and those at child support centres, to psychologists and psychiatrists, to lawyers and judges) should – in addition to observing any professional standards of their own discipline – have high levels of skills, experience and knowledge in a wide range of disciplines including, but not limited to, those listed below and as determined by the proposed Family Law Commission.

⁸ (a term that generally appears to be being used not in a child-focused way – reflecting the most prevalent forms of violence and abuse to which children are exposed – but as a synonym for violence/abuse by men against female partners)

“FAMILY LAW PROFESSIONAL ACCREDITATION” (FLPA): QUALIFICATIONS & SKILLSET

- Highly developed personal skills for interacting with children of all ages, abilities, dispositions and cultures;⁹
- A current Working with Children check/registration and Police Clearance (as required by Departments of Education);
- Highly developed personal skills for interacting with vulnerable adults suffering extreme stress, grief or other emotions and generally in need of great compassion and understanding;
- High-level understanding of, or (for psychologists/psychiatrists) specialist training in, child development, psychology and behaviour;
- High-level understanding of, or (for psychologists/psychiatrists) specialist training in, adult psychology and behaviour;
- High-level understanding of the nature, impact and specific manifestations of all forms of abuse within the family, including:
 - violence, psychological abuse and financial abuse; as well as additional forms of abuse more specific to children, including:
 - neglect, sexual abuse and all forms of psychological abuse (including not receiving emotional support and care; child grooming; psychological manipulation into showing unwarranted hostility, fear or animosity towards a parent and/or others; and indirect exposure to acts of violence or psychological abuse within the family;
- An awareness of the risks of their own conduct being abusive or coercive, given the great power-imbalance in their interactions with children and/or other family members; a recognition that with great power comes great responsibility;
- Specialist training in objective observation and reporting;
- Specialist training in forensic skills, especially when dealing with children. It is essential that all professionals come to each task with an open mind and do not pre-judge any individual. Adopting, in advance, any specific approach – including, for instance, trauma-informed care and practice if this requires making up-front assumptions about an individual’s prior exposure to trauma – can be highly detrimental to children;
- Specialist training in child suggestibility, in methods of appropriate, open questioning and in avoiding leading or suggestive approaches;
- Specialist training in court procedures, and a thorough understanding of an adversarial family law system;
- Specialist training in report-writing for courts, including:
 - avoiding jargon and writing in plain English;
 - understanding how an adversarial system may exploit careless words;
 - not over-stepping the limits of one’s knowledge or role;
- High-level knowledge and understanding of the latest scientific and medical research on all relevant issues including, but not limited to:
 - factors that affect the long-term wellbeing of children;
 - the lifelong impacts of childhood trauma, physical and psychological abuse, and loss of close family members;

⁹ Additional specialisation/skills/experience may be required, e.g. when working with Aboriginal and Torres Strait Islander families or special needs individuals.

- the relative wellbeing of children in intact, single-parent and co-parenting environments;
- the impact of family conflict on best outcomes for children;
- the importance for children's development of not being exposed to violence, abuse or neglect and of maintaining and developing pre-existing relationships with all family members who are fit to do so.

The skills required to interview children are considerable, especially during the course of adversarial proceedings where the risk of deliberate or accidental psychological manipulation – whether through leading/inexperienced questioning or parental coercion, for instance – are exceptional (especially by comparison with its prevalence in a psychologist's normal, clinical practice).

It is essential for the protection of children and their families that, should it be determined that a child be interviewed or questioned:

- Any professional interacting with a child during family law proceedings must have accreditation based on the above criteria;
- A child should be interviewed as few times as possible, without coercion of any form and in a child-friendly environment;
- Any such interview must be recorded with clear, transcribable audio of the entire interaction and, other than in exceptional circumstances, with reasonable-quality video.

WHAT'S MISSING

Much is missing from this “comprehensive” review. While acknowledging the amount of work that has been carried out and constraints imposed by timescale and the Terms of Reference, it appears that the broad issues addressed by family law are being viewed through some very specific prisms. Some of the most important aspects that are missing are:

WORLD'S BEST PRACTICES

There is strong evidence from around the world of better practices and yet this review has not taken a comprehensive look around the globe for examples of world's best practice that might have informed its recommendations. The “Consensus Model” from Europe is just one such example.

How is it, for instance, that a sizeable region in Belgium has been able to implement a system whereby parenting decisions are made not one or three years after an initial application but, in many instances, fifteen days after such an application. Not only that but, without any modifications to their national legislation, their judges have implemented the practice of establishing clear ground-rules and boundaries at the very start of proceedings – such as that the court has zero tolerance for family violence or for parents who attempt to fracture loving relationships between a child and another parent. The same judge will also be responsible for any future applications to the court by a family until all children turn 18.

The “Consensus Model” Dinant, Belgium

- This region of Belgium has, since April 2012, employed a family law model known as the "Consensus Model", originally formulated in Cochem, Germany, around 1995;
- No change to national legislation was required, merely a change in court procedures/practice and the attitudes of judges and lawyers involved;
- One or both parents, with or without lawyers, may apply to the Belgian family court for a decision regarding children's and financial matters;
- The first hearing must take place within 15 days (though recently this timescale has become extended); verbal communication with the judge is generally preferred to formal, written documents;
- Many parents reach a parenting agreement at this very first hearing, with the court's assistance; otherwise, the court encourages parents to participate in mediation and the judge can order mediation even when only one parent requests it;
- The judge may speak with children, if they are 12 or over, prior to this hearing. Importantly, all judges have considerable knowledge of the risks inherent in this (particularly that of children having been coerced or manipulated to make statements that don't represent their real views);
- Allegations of a potentially criminal nature, including family violence, are heard in a criminal court and the family court is informed of any findings of fact;
- Most judges lay down the rules and boundaries clearly to both applicants and lawyers present, some stating, for instance, that there will be 'zero tolerance' for anyone attempting to fracture the relationship between a child and the other parent or loved relatives of the child;
- After this first hearing, the same judge will be attached to any future hearings for that family until all children reach the age of 18. However, parents are encouraged to see their mediator rather than return to court to resolve issues that may arise over time.

One example of world's best practice with respect to judicial proceedings. Far from being “comprehensive”, this review has not adequately considered other, international models or practices.

Surely no comprehensive review should be content merely to tinker with a system such that it will still allow children to languish in a family law system for months or even years when practices elsewhere have demonstrated success in making immediate decisions?

Surely the best use of time is to monitor and support the successful re-structuring of a family, as in the “Consensus Model” for instance, rather than to spend years indirectly monitoring the destruction of a family, before finally jettisoning the family with a sudden decision, no further support and no evidence that its decisions are ever in the children's best interests?

FAMILY LAW WITHOUT A LAWYER

Missing from this review are proposals that genuinely open up family law to self-represented litigants, or litigants-in-person, or that recognise the difficulties faced by “self-reps”.

The ALRC’s proposals to provide advice and educational materials about the family system will certainly help in this regard, as will the proposed simplification of the Family Law Act, some simplification of forms and processes and, potentially, Parent Management Hearings, if and where they take place. But no consideration has been given, for instance, to truly modernising and simplifying the whole system: short online video applications, with verbal answers to key questions, would provide substantial benefits over current procedures reliant upon archaic affidavits and arcane applications that more often obfuscate than clarify a family’s situation. And, as is common knowledge in other contexts, putting anything in writing, instead of talking about it, is one of the best ways to escalate far lesser conflicts.

Nothing, though, can prepare anyone who is not a lawyer and not familiar with courtrooms for the experience of self-representation in a family court, especially those that go to trial. Lawyers often suggest that self-reps are given considerable leeway by judicial officers. Sometimes, this is true. However, we are aware of many instances where the treatment of self-reps by judicial officers has been unprofessional, coercive and even abusive. None dare complain, knowing that any such action would be likely to harm their case.

It is a feature of hearings involving self-reps that judicial officers:

- do not explain procedures and processes or the rights of self-reps;
- ask questions they would never ask of a represented litigant and demand responses likely to prejudice a case without advising a litigant of such consequences; and
- fail to distinguish a litigant’s role as a self-rep from his/her role as a parent. Thus, a self-rep is denied the usual tools of a barrister – a bit of pushing or coercive questioning here, a touch of sarcasm there – because judges almost universally will judge a self-rep’s parenting on the basis of such behaviours observed in the courtroom.

Self-reps are not permitted to share court documents with others in order to get advice or support – they truly are on their own at probably the worst moment in their lives; they are sometimes denied the possibility even of having an assistant – a “McKenzie friend” – in court with them; in some jurisdictions, they cannot even have a supporter taking notes for them in the courtroom as this is prohibited by the court.

As for the notion of appealing a decision, this is almost impossible logistically, financially and emotionally for any self-rep. The process is so complex and the requirements for obtaining transcripts, creating appeal books, presenting Papers for the Judge and much else so archaic, arcane, onerous and expensive – all quite unnecessarily so – that few self-reps can even contemplate it however legitimate such an appeal might be.

Although the Discussion Paper rightly seeks to make sure that people who identify as Aboriginal and Torres Strait Islander, disabled, or LGBTIQ are not disadvantaged, it does little to inclusively address a much broader group: those who do not have the skills or education – for whatever reason – to represent themselves in a family law matter and/or those that can’t afford lawyers and can’t get Legal Aid.

Unrepresented litigants face serious disadvantages and prejudice in our family law system. It is a fundamental issue of morality and human rights that, given that legal fees not-uncommonly reach \$100,000 in family law proceedings, we have created a system where people cannot afford to legitimately try to protect their children and their most important relationships.

Legal Aid will never be sufficient to cover the costs for the majority of family law litigants – and yet, for the majority, family law is financially beyond their reach. As a matter of human rights, morality and simple logic, a completely different approach is surely required.

Proposal 08: The Family Law Act (Cth) should allow all litigants, without the requirement for an application, to have a “Lay Representative” to assist them with proceedings and to speak, where necessary, at hearings or trial. Different individuals should be permitted to perform this role for the same litigant over time. The litigant shall be at liberty to share and discuss all court documents with a lay representative.

Proposal 09: The Family Law Act (Cth) must enshrine fair and equal access to the family law system for all litigants of all backgrounds, ethnicities, genders, abilities and financial means.

Proposal 10: The Family Law Act (Cth) should, under specified circumstances, allow parties to submit applications and affidavits by video, via an online portal.

SCIENCE

The absence of science from this review – and of any discussion as to how it should be brought into consideration in family law legislation or proceedings – is striking.

There is now a large body of scientific and medical research readily available on the impact on children (and adults) of childhood trauma, family separation, exposure to violence or abuse, and loss of a parent or close relative. There is scientific evidence too, with substantial sample sizes, that children do much worse in single-parent families than in intact families or families with co-parenting after separation.¹⁰

Far from being accepted as common knowledge that contributes to every judicial decision, such science can only be brought into the courtroom if it is explicitly referred to by the chosen court expert. Remarkably, there is even case-law that prevents a judge from doing her own research and taking into consideration the latest, best research.¹¹

It is extremely inefficient, and deeply harmful to children, that the wheel must be re-invented with every single family law case and that judicial idiosyncrasy is preferred over objective science to such an extent that there is no right of appeal based on the view that a different judge would have reached a different conclusion from the same evidence in court.

¹⁰ see e.g. Kruk, E. (2018). Arguments against presumptive shared parenting as the foundation of family law: a critical review. *Journal of Divorce and Remarriage*, 59 (5), 388-400

¹¹ McGregor & McGregor [2012] FamCAFC 69 (28 May 2012)

Proposals that judicial officers should have access to scientific publications have been made before. Bryant (2012), then Chief Justice of the Family Court, notes:

From time to time there have been suggestions, particularly from the Australian Institute of Family Studies, that a body of uncontroversial social science propositions and their research based genesis should be compiled for use by judicial officers in deciding family law child related cases.¹²

Bryant suggests this hasn't happened because of lack of scientific consensus. We suggest that, despite the fact that clarity and consensus can be harder to find within social science than in some other scientific disciplines, there is nonetheless strong consensus (and, in some instances, there are comprehensive meta-analyses) on key issues. The problem, we suggest, may have more to do with a lack of understanding of such consensus, and of the relative merits and stature of different publications, among legal professionals who lack the necessary training in scientific disciplines. Many Australian judges probably ended their education in science when at school (possibly as far back as the 1970s), perhaps before even learning fully about the merits of the scientific method as both a fact-determining and a predictive tool.

In other jurisdictions, it has certainly proved possible to produce substantive documents. The American Bar Association, for instance, produced its second edition of *"A Judge's Guide: Making Child-Centered Decisions in Custody Cases"* back in 2008¹³ which attempts to include a primer on what every judge should know about child development and psychology.

We do not believe that this review has addressed the role and value of science, scientific and medical research, or a scientific approach to evidence and family law.

Proposal 11: The Family Law Act (Cth) should incorporate a statement that all judicial officers be required to be familiar with the latest, most relevant peer-reviewed scientific research on what's best for children during and after family separation and that they be entitled and expected to make use of this in judicial determinations irrespective of whether or not it has been presenting during proceedings.

Proposal 12: The Family Law Act (Cth) should require that a summary of new, relevant, peer-reviewed publications, with abstracts and digital links, be distributed at least once a year (in or about January) to all judicial officers as a supplement to a guidebook that should address key issues such as child development, psychology and wellbeing.

PSYCHOLOGICAL ABUSE

The liberal use of the term "family violence" throughout the Discussion Paper, especially without explicit definition, risks dramatically underplaying the most prevalent category of abuse, namely psychological. There are over 160 references to "violence" (including

¹² Bryant, D (2012). The use of extrinsic materials – with particular reference to social science and family law decision making. Judicial Conference of Australia colloquium. October, 2012

¹³ American Bar Association. (2008). *A Judge's Guide: Making Child-Centered Decisions in Custody Cases*. 2nd ed. American Bar Association, USA

citations); there are just a couple of references to psychological or emotional abuse. It is not just the prevalence, though, but the impact of psychological abuse that we ignore at our peril. As Tomison and Tucci (1997) suggest:

The perceived lesser severity of emotional abuse or neglect may be used by some workers to minimise child abuse, and hence the level of protective intervention required.¹⁴

Similarly, Oates (1996) highlights that:

Emotional abuse does not leave physical injuries and its ongoing nature usually means there is no crisis which would precipitate its identification by the health, welfare or criminal justice systems.¹⁵

We believe that the use of the term “family violence” diminishes an important focus on psychological abuse; does not accurately represent the variety of forms of abuse that it purports to; and fails to give due weight to the forms of violence and abuse experienced predominantly by children. In fact, it appears to be increasingly used as a piece of jargon – a term with distinct meaning, often undefined yet implicitly synonymous with “intimate-partner-violence by a man against a woman”. It is certainly not child-focused.

We believe that “abuse” (or “family/partner/child abuse”) is the best, all-encompassing term and that this should include the categories of: violence, sexual abuse, psychological abuse and financial abuse. Child abuse includes some additional categories. We have proposed further clarification elsewhere in this paper (e.g. page 53).

SEPARATION OF FINANCIAL AND CHILDREN’S MATTERS

The Discussion Paper appears silent on the crucial issue of decoupling financial and children’s matters. If financial matters delay parenting decisions by so much as a day, children are being unnecessarily harmed. The fact that financial disputes are allowed to prolong children’s matters by months or even years is unconscionable. For a child, every single day counts. To be left with an abusive parent, or equally to be removed from a good parent, for months or even years with fact-finding postponed and prolonged proceedings in respect of financial matters is unacceptable.

Proposal 13: The Family Law Act (Cth) should require that each family law case be allocated to one judicial officer and that a preliminary decision in children’s matters be made within 30 days of initial application. The outcome of this decision must be monitored and the decision may be varied in consideration of new evidence. There must be a finding of fact as to why a parent, or other party, is unfit to be with a child in the event that orders are made that do not ensure that a child maintains and continues to develop a relationship with that person. The Court should be required to ensure that financial matters do not delay decisions in children’s matters.

¹⁴ Tomison, A.M. & Tucci, J. (1997). Emotional abuse: The hidden form of maltreatment. Retrieved from: <https://aifs.gov.au/cfca/publications/emotional-abuse-hidden-form-maltreatment>

¹⁵ Oates, R.K. (1996), *The Spectrum of Child Abuse: Assessment, Treatment, and Prevention*, Brunner/Mazel Inc., New York

A SIMPLE STATEMENT

The ALRC has proposed significant simplification of the Family Law Act and that some of the most important information should be at or nearer the front of the document. We suggest that the first page of a revised Family Law Act should, much like an Executive Summary, provide a statement, in clear and simple English, as to the primary purpose of the Act and how this will be implemented, including a clear statement of the decision-making process (currently buried in Section 60CC and beyond) that all judges will follow. Our proposal is that:

In making any decision involving children, every judicial officer must explicitly consider, in order of priority:

1. **The paramount principle of the long-term welfare of the child;**
2. **How the child will best be protected from violence, psychological abuse and adverse physical and mental health;**
[Or, in longer form: How the child will best be protected from short- and long-term harm, including physical and/or psychological harm; exposure to any form of abuse, neglect or violence; and risks of self-harm, suicide and adverse mental and physical health.]
3. **How a child will maintain and develop each of his/her pre-existing, significant and beneficial relationships;**
[This terminology encompasses, and goes beyond, relationships with biological parents, siblings and other relatives and, for the first time, attempts to frame the legislation from the perspective of the child and on the basis of what scientific evidence has proven is best for children.]
4. **The rights of the child as stipulated in the UN Convention on the Rights of the Child and the rights of all parties as set out in the Universal Declaration of Human Rights.**
[All relevant Articles of these two documents should be explicitly incorporated into this part of the legislation and should include, for all children, “The child’s right to maintain and develop the child’s cultural identity”.]

THE PRIVATE SECTOR

Just as this review has placed great reliance upon the family law system to address family separation and family violence, so too it has placed great reliance upon government: to create new bodies; to fund initiatives or agencies; to provide education, advice and support, and so forth. The private sector, we believe, is unnecessarily absent.

Australian governments do not have a particularly good track record when it comes to parenting issues, least of all in adopting evidence-based and outcome-focused practices. We believe that many of the recommendations of this review could be accomplished most successfully and cost-effectively through providing financial incentives for the private sector – especially with respect to providing coaching, counselling, mediation and even arbitration.

A LAST RESORT?

The Discussion Paper fails to promote the idea that family courts are a last resort. And yet this is a widely held goal or belief by many within and beyond the system.

So long as our family courts continue to deal with 200,000 adults a year,¹⁶ family courts can never be considered merely a last resort. So long as our family courts continue to hold prolonged proceedings for 20,000 families a year, they are not a last resort. And, so long as we continue to describe better processes for addressing family separation and family violence as “alternatives” to family courts, we are failing to treat family courts as a last resort.



Coaching, counselling, enhanced mediation and arbitration will NEVER become the mainstream solutions and preventative measures they should be – and family courts will NEVER simply be a last resort – while even our Government’s primary help-line describes them as “alternatives” and so long as an Attorney General, rather than a Minister for Children or Minister for Health, holds the purse-strings. Our family courts will remain the primary and most influential intervention, and one that sets the tone for separations across the country.

“Only when we stop thinking of these processes - arbitration, mediation, family dispute resolution, coaching, counselling, health interventions, education and support – as “alternatives”, will we begin having a real chance of making them the mainstream solutions our children so desperately need.”

¹⁶ Data provided by then-CEO, Richard Foster, Senate Estimates, Feb 2016

WHAT'S DANGEROUS

In our view, some elements of the current proposals are dangerous and, if implemented, will cause greater harm to children for many years to come. These include:

1. Continuing to treat family separation as a legal issue rather than recognising it as a health and social issue that needs a very different style of intervention;
2. Maintaining the secrecy of family court proceedings, the primary effect of which is not to protect children but to prevent essential scrutiny of the family law system;
3. Involving children even more in family court proceedings instead of prioritising keeping children away from court proceedings;
4. Failing to adopt an evidence-based approach or to ascertain world's best practices, especially with respect to what's best for children's long-term welfare and including the scientifically demonstrated benefits of ensuring that children maintain and develop their relationships with those significant to them.

BELIEVING LAW OFFERS THE BEST OR SAFEST SOLUTIONS

Family law offers neither cure nor prevention of the risks to children and their families associated with either family separation or violence/abuse within a family. Given the ALRC's clear and primary focus on the issue of family violence, it is surprising that this incongruence has not been noted or addressed in a more holistic manner: if we want to deal with family violence, we should not be looking to family law for the solution.

Similarly, the ALRC has not taken the necessary step back to ask "What's the best we can do for children when their families separate?", instead focusing on further modifications of the existing system (where the Terms of Reference, we believe, did allow for broader considerations).

For Kids Sake's starting point, instead, is scientific and medical evidence¹⁷ that shows:

- The childhood trauma resulting from exposure to family separation/divorce in general, and family courts in particular;
- The adverse, lifelong, physical and mental health impacts of exposure to such childhood trauma;
- The increased risks of teenage self-harming behaviours and even suicide;
- The increased risks of exposure to sometimes-extreme family violence once adversarial law becomes involved;
- The mental, physical and economic impacts on a child's parents, and other family members, of exposure to family law proceedings.

Family law was never designed for children. As Relationships Australia puts it:¹⁸

Children—their voices, fears, questions and interests—were largely absent from the debate on the Family Law Bill in the 1970s. Argument was very

¹⁷ summarised e.g. in: Jackson Nakazawa, D (2015). *Childhood Disrupted: How your biography becomes your biology and how you can heal*. Simon and Schuster, New York, USA

¹⁸ Relationships Australia (2018). Submission #11 to ALRC Review. May 2018

much centred around the process of divorce, and how it was experienced by the adult parties to the marriage, in isolation from their roles as parents. ... This means that the Act has been ‘retrofitted’, in an ad hoc way, to attempt to bring real substance to protection of children’s views and interests in separation and family dispute resolution, as well as to recognise child protection/welfare concerns.

Associate Professor Smyth goes further in describing changes to the Family Law Act since 1975 as being both *ad hoc* and not evidence-based.¹⁹ The reality is that we cannot “retrofit” a legal system now that our concerns have, quite rightly, progressed to prioritising the safety and wellbeing of children, which is primarily an issue of health and one to which the results of scientific and medical research, not legal advocacy, should be the primary contributor.

“Family law was never designed for children”

The intrinsic characteristics of family courts – being slow, unaffordable, frightening and adversarial – are, in fact, fundamentally incompatible with the best interests of children and their families. Family courts are the wrong tool for the job. Always were. Always will be.

MAINTAINING SECRECY

The purported benefits of the Section 121 “privacy provisions” are not evidence-based and, we suggest, largely illusory. They do not, and could never, prevent parents and others talking in front of the children and they do not prevent all those whose opinions matter to children from finding out about the family law proceedings. Schoolyard gossip will take place irrespective of Section 121 and, if anything, this so-called privacy provision can actually contribute to preventing inaccurate stories from being legitimately countered.

By contrast, there are clear principles, and ample evidence, as to how the current privacy provisions can cause harm. To provide just a few illustrations:

- Parents can do nothing to clear their names when false characterisations are spread either privately or publicly;
- Adults, already under extreme pressure from prolonged family court proceedings, feel inhibited from sharing information – and are prohibited from sharing court documents pivotal to their lives – leading to mounting, extreme and sometimes unmanageable pressure;
- Keeping family court proceedings essentially secret contributes directly to the stigma still associated with family separation and divorce. Discussing these matters more openly would help change the paradigm of how we view separation and divorce;
- Mainstream media outlets feel unable to publish the names of family law professionals brought before professional panels for misconduct, even long after any family law proceedings have ended;
- Even after reaching the age of 18, young adults are, or feel, prohibited from discussing their own case openly.

¹⁹ Assoc. Prof. B. Smyth (2018). Submission #104 to ALRC Review. May 2018

What do children say?

It is not often that children comment specifically on this issue. But recently, one of the so-called “Italian sisters” – whose name we won’t include simply because the ALRC has advised (as if to illustrate our point) that it won’t publish submissions with named subjects even if they’re publicly known – stated clearly that she wasn’t concerned about the fact their family dispute had become so public:

“It doesn’t bother me, and not at the time it happened.”²⁰

Even more significant, her view was that talking openly about experiences could be valuable for others.

“There are other children who live through this experience ... maybe other kids will see, maybe through this interview, they will understand that things will get better and there is a solution.”

These stories will not be told – and the stigma still surrounding family separation and divorce will not be removed – so long as people, using their own names and their own, personal stories, are not free to share them in this manner.

We believe strongly that the current privacy provisions should NOT be maintained. They do little to protect children in individual cases, but greatly harm children and families by preventing levels of scrutiny that are essential in any institution – especially so in one where its participants have special immunity from prosecution and so are insulated from other forms of scrutiny. It is our view that these provisions even breach the rights of children, litigants and other family members.

Media should be permitted to reasonably report on family law proceedings using a national interest criterion. (They are already fully aware of libel and defamation legislation should they publish material that’s not accurate.) This should include, for instance, the ability to name professionals subject to disciplinary action. Furthermore, it is wrong that a child on turning 18 should not be free to discuss his/her family law matter publicly and without anonymity, providing only that no individuals are likely to be put in harm’s way as a result of such discussion.

Proposal 14: The privacy provisions (s 121) of the Family Law Act (Cth) should be replaced with an explicit statement near the front of the Act that, unless the court makes an order to the contrary:

- participants may discuss proceedings in private;
- participants may discuss and share court documents in private for the purpose of receiving advice and support;
- participants may discuss proceedings on social media and should be aware that any such discussions may be used in evidence;
- media outlets may publish details relating to family law proceedings that are in the national interest including some non-anonymised information as specified in Media Guidelines that should be published and updated annually or as necessary.

²⁰ Courier-Mail (2018). Happy ending for [Italian] sisters. 2 November 2018

INVOLVING CHILDREN MORE

We believe that a primary conclusion of this review should be that we need to do much more to keep children out of family courts, not that we need to involve them even more! This is such a pivotal issue, that we have taken considerable time in this paper to discuss it.

The ALRC is proposing that children should be more involved in family court proceedings and that the ‘views of children’ (which, concerningly and consistently, is being conflated with ‘what children say’) should be given greater weight. The ALRC suggests that this perspective is supported by a number of submissions, though not by all.²¹ However, it fails to note that many submissions supporting greater involvement of children²² are organisations operating in the safe space of counselling, mediation or conciliatory law rather than adversarial, family law.

*“Children should be involved less,
not more, in adversarial court proceedings”*

We should not gloss over the profound differences between involving children in a collaborative, conciliatory, problem-solving and child-friendly environment and involving them – often for unconscionably long periods of time – in the hostile, adversarial and torturous environment of the family court. There is a world of difference between empowering children and allowing their voices to be heard in a safe and conciliatory environment and allowing them to participate, even indirectly, in adversarial litigation.

The adversarial process tends to promote unhealthy and potentially abusive parent-child interactions. This is not simply the opinion of our organisation, or of some radical, activist group, but is based on objective evidence (not to mention, common knowledge) and is stated unambiguously, for instance, in the American Bar Association’s own Judge’s Guide:²³

Another unhealthy parent-child interaction that may occur after a divorce is when one parent attempts to control a rather suggestible child’s feelings toward the other parent. Again, the adversarial process tends to promote this kind of manipulation of the parent-child relationship.

This “turning a child against a parent”, as we commonly know it, is not just some minor inconvenience that happens to make a judge’s decision-making a bit harder. It’s actually one of the most sinister and widespread forms of abuse to which children in separating families are exposed – particularly by virtue of the involvement, or mere presence, of adversarial family law.²⁴ It not only frequently results in a child’s relationships with a loving parent and half a family being severed, sometimes for life (with all the grief and trauma that this entails) but, at the same time, leaves that same child in the constant care of a parent who’s responsible for carrying out the usually-undiagnosed psychological child abuse.²⁵

²¹ ALRC (2018). Discussion Paper DP86, 2 October 2018

²² e.g. Relationships Australia (2018). Submission to ALRC Review, May 2018

²³ American Bar Association (2008). A Judge’s Guide: Making Child-Centered Decisions in Custody Cases. 2nd ed. American Bar Association, USA

²⁴ Bernet, W. *et. al.* (2016). Child affected by parental relationship distress. *Journal of the American Academy of Child and Adolescent Psychiatry*, 55 (7), 571-579

²⁵ Warshak, R.A. (2015). Ten Parental Alienation Fallacies That Compromise Decisions in Court and in Therapy. *Professional Psychology: Research and Practice*, Vol. 46, No. 4, 235–249

It is hard to conceive of a more pernicious form of family violence and child abuse (and one that clearly meets current definitions) and yet, though widespread, is this at the forefront of the ALRC's (or anyone's) thoughts each time "family violence" is mentioned?

In our opinion, recognition that the adversarial process itself tends to promote harmful relationships should not merely give pause for thought; it should give cause for radical reconsideration of what we're doing to our kids. Were a medical procedure found to be causing harm, it would be stopped immediately. If the ALRC genuinely wishes to adopt a public health approach, which we wholeheartedly endorse, then it needs to embrace a far broader view of the sorts of changes needed to the current system.

"If a medical procedure were found to be harming children, it would be stopped immediately. As soon as any treatment in a scientific research project is found to be causing harm, it must be stopped on ethical grounds. There is incontrovertible evidence that our adversarial family law system is causing harm to children and their families. Why are we effectively turning a blind eye?"

What do children say?

The ALRC posits that "research has suggested that some children want to directly participate in proceedings", a view echoed by the National Children's Commissioner,²⁶ and "considers that there should be no bar to this in appropriate cases".²⁷

However, closer examination of what children say paints a somewhat different picture, not least because different desires about "involvement" are being conflated. From our analysis, the predominant themes of children's comments may be summarised as follows:

1. SEPARATION
 - a. Children don't want their family to separate at all;
 - b. If their family has to separate, children want to spend as much time as possible with both parents (and with other family members and pre-existing friends);
2. FAMILY COURTS
 - a. Children do not like the family law system;
 - b. They don't want any other children to go through what they did;
3. INVOLVEMENT
 - a. Children want to understand much more about what's going on;
 - b. Children want to have a say and feel they're being listened to;
4. MANIPULATION
 - a. Children commonly report feeling manipulated by family law professionals ("everyone had an agenda");
 - b. Children commonly report feeling pressured, manipulated or told what to say by parents, relatives or friends.

²⁶ Australian Human Rights Commission (2018). Submission #217 to ALRC Review, May 2018

²⁷ ALRC (2018). Discussion Paper DP86, 2 October 2018

It would be wrong to suggest that having their views given more weight in family courts is the predominant desire or concern of children. Children far more commonly and strongly express the wish to keep their family together and the desire to have nothing to do with courts. Should we not respect this latter desire too? When children, and young adults who've been through the family law system, do talk about their involvement in courts, their sense of powerlessness appears to derive from the facts that:

1. Their parents were pre-occupied with court stuff and, often quite suddenly, no longer had time for them; and
2. They had nobody helping them understand what was going on and, often for the first time in their lives, were getting limited but conflicting versions from those they trusted most.

Children expressed a concern about being manipulated when engaging with court processes as often as they expressed the desire to have more weight given to what they said. Anecdotal evidence suggests too that, were rigorous research to be done, there would be a strong correlation between those children asking most strenuously to speak with a judge and those most strongly and abusively influenced by a parent and briefed in detail about the proceedings. There is a genuine risk that the children who most want to participate are precisely those who shouldn't.

If, nonetheless, we accept that some children say they want to have a say in family court proceedings, should we listen? What do we do in other contexts?

What does society say?

What children can/can't do	
Age you can vote for PM	18
Age you can purchase alcohol	18
Age you can purchase cigarettes	18
Age of consent	16/17
Age you can choose a parent (in a family court)	12 ± 5



There is a striking mismatch between what the ALRC is proposing in the family court and what our society appears to believe acceptable in other aspects of life. If we don't think a child or teenager is 'mature enough' to be able to choose between PMs, or for their views to be given weight, should we be accepting that their views on something as profoundly important as choosing between parents should be given significant weight?

There are major differences between adult and younger brains²⁸ and there are reasons why Australia, like other nations, places restrictions on what children can do or decide, whether it's buying fireworks, solvents or cigarettes, or voting for a prime minister. We want to protect children from health risks to which they're more vulnerable either due to their lesser level of awareness or to the stage of development of their bodies and brains, and we believe there are some decisions children should not be making, both for their own good and for that of others.

²⁸ Blakemore, Sarah-Jayne (2018). *Inventing Ourselves: The Secret Life of the Teenage Brain* Doubleday, New York City, NY, USA

Just as age-of-consent laws are designed to protect children and young people from sexual exploitation and abuse,²⁹ so too we need our laws to protect children from the high risks of psychological abuse and trauma to which adversarial litigation exposes them. The harm done to children by forcing them to play a role in choosing between two fit and loving parents, for instance, lasts a lifetime.

Should we be doing more, though – and are we perhaps obliged as a matter of human rights – to treat children more like adults? After all, as President of the UK Supreme Court, Baroness Hale, has said: “We have some way to go in recognising that children are indeed real human beings”.³⁰

What do International Conventions say?

At first glance, the ALRC’s position that children’s views should be heard and given more weight in family law proceedings may appear entirely in line with Article 12 of the Convention on the Rights of the Child – a Convention that *For Kids Sake* believes should be incorporated explicitly into Australia’s Family Law Act (within what is currently Section 60CC). Article 12 provides that:

“1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

In part because of the risk of naïve interpretation of this Article, the United Nations, in 2009, issued a clarification of its intentions with respect to Article 12.³¹ In particular – and crucially with respect to the ALRC’s proposals – the UN Committee stated:

The child has the right “to express those views freely”. “Freely” means that the child can express her or his views without pressure and ... must not be manipulated or subjected to undue influence or pressure. “Freely” is further intrinsically related to the child’s “own” perspective: the child has the right to express her or his own views and not the views of others. The Committee emphasizes that a child should not be interviewed more often than necessary ... the “hearing” of a child is a difficult process that can have a traumatic impact ... **The Committee ... emphasizes that adult manipulation of children, placing children in situations where they are told what they can say, or exposing children to risk of harm through participation are not ethical practices and cannot be understood as implementing article 12.**

²⁹ Age of consent. Retrieve from: <https://aifs.gov.au/cfca/publications/age-consent-laws>

³⁰ Baroness Hale (2017). World Congress on Family Law and Children’s Rights

³¹ UN Committee on the Rights of the Child. General Comment No. 12 (2009) The right of the child to be heard. Fifty-first session Geneva, 25 May-12 June 2009

We see no way, within the current, adversarial legal system and given the extreme scarcity of highly qualified and experienced specialists, in which the interviewing of children as part of Australian family law proceedings does not represent a practice that would be regarded by the UN as unethical.

The European Court of Human Rights raises an even more fundamental issue, challenging the supremacy increasingly given to children's interests (let alone "children's views") as "an ignorance of the need to interpret this notion harmoniously with other fundamental rights."³²

What does evidence show?

The arguments against greater involvement of children in adversarial proceedings include:

- **CHILDREN SHOULD NOT BE GIVEN HEAVY BURDENS OF RESPONSIBILITY**
Children should be allowed to be children. Making them feel that they are responsible for major decisions, such as choosing one parent over another, is a form of abuse in its own right. This is the evidence-based view of the leading, international experts in child psychology;³³
- **THE NATURE OF CHILDREN'S STATEMENTS**
Although the mantra that "children don't lie" is still promoted by some ideological warriors to this day, there is now a substantial body of scientific literature about the nature of what children say. It is clear that children's statements:
 - Are highly subject to influence, e.g. from: suggestive questions/comments, non-verbal cues, deliberate manipulation or a desire not to disappoint (especially where parents or trusted authority figures are involved);
 - Should not be taken at face-value;³⁴
 - May not be accurate: "Research has demonstrated children can speak sincerely and emotionally about events that never occurred" and "even professionals cannot differentiate between false and accurate reports";³⁵
 - Are a poor proxy for, and are not synonymous with, a child's views;
 - Vary with context or mood and fluctuate considerably over time; and
 - Even when authentic, not influenced by others, and consistent, do not always represent what society believes to be best for them (refusal to go to school or eat green vegetables are familiar examples);
- **COURT PROFESSIONALS DO NOT HAVE THE NECESSARY COMPETENCIES**
A majority of professionals within the court system (whether social workers, psychologists, lawyers or judges) do not have the prerequisite, specialist skills to assess children in an adversarial, litigious setting. It is a highly specialist skill to

³² In: Soares de Melo v Portugal (2016) Retrieved from: <https://hudoc.echr.coe.int/eng?i=001-160938#%7B%22itemid%22%3A%5B%22001-160938%22%5D%7D>

³³ e.g. Warshak, R.A. (2003). Payoffs and pitfalls of listening to children. *Family Relations*, 52, 373–384

³⁴ American Bar Association. (2008). *A Judge's Guide: Making Child-Centered Decisions in Custody Cases*. 2nd ed. American Bar Association, USA

³⁵ Amelia Courtney Hritz, Caisa Elizabeth Royer, Rebecca K. Helm, Kayla A. Burd, Karen Ojeda, Stephen J. Ceci (2015). Children's suggestibility research: Things to know before interviewing a child. *Anuario de Psicología Jurídica*, 25, 3–12. [sciencedirect.com/science/article/pii/S1133074015000124](https://www.sciencedirect.com/science/article/pii/S1133074015000124)

interview children and to assess what they say (which, as indicated above, is a very unreliable proxy for their authentic views, especially in an adversarial setting).

Many court professionals are not, for instance, sufficiently experienced or qualified to reliably distinguish between a child physically abused by one parent or psychologically abused and manipulated by the other. Nor do they have the pre-requisite qualifications and experience to assess a child's "maturity" or the weight that should be given to an individual child's views (being far too easily swayed by a child's eloquence, apparent conviction, or elaborate narratives, for instance).

Most do not even have the skills to ask open and non-leading questions and many consequently themselves contribute to the psychological abuse of children by asking highly inappropriate questions.³⁶ This, again, is the evidence-based view of the world's leading experts in the fields of child psychology and child suggestibility; see e.g. Hritz *et al.* (2015)³⁷ for summary of issues involved in interviewing children;

- **COURTS EVEN LACK COMPETENCE TO ASSESS THE EXPERTISE OF THEIR EXPERTS**
Even the process by which courts choose their experts is unsafe and unsound. Experts are chosen on the basis of legal argument between advocates, not on the basis of specialist qualifications or accreditation. One UK study, in a comparable jurisdiction, rated 65% of expert reports as being between poor and very poor; 30% of the "experts" had no experience of mental health problems; and 20% of experts were unqualified;³⁸
- **GREATER INVOLVEMENT OF CHILDREN INCENTIVISES GREATER ABUSE**
If children's statements are given greater weight in courts, this dramatically incentivises, and can cause, their abusive manipulation by parents and other relatives, many of whom may be unaware of the coercion and psychological abuse for which they're responsible;³⁹
- **THE VIEWS OF OLDER LIVED-EXPERIENCE CHILDREN/ADULTS WARN AGAINST INVOLVING CHILDREN MORE**
Although it is a not-uncommonly stated view of children that they do not feel listened to in family court proceedings or wish to have more of a say, it is an equally commonly stated view of older children and young adults who have experienced the system that they should never have been given the responsibilities forced upon them.

Many talk of having felt manipulated by court professionals, or of feeling that such 'professionals' all had an agenda (see above); many talk of suffering life-long guilt as a consequence; and some express disbelief that the court should have placed such

³⁶ Hritz *et al. op. cit.*

³⁷ Hritz *et al. op. cit.*

³⁸ Ireland, J.L. (2012). Evaluating Expert Witness Psychological Reports: Exploring Quality. University of Central Lancashire, UK.

³⁹ Warshak, R.A. (2015). Ten Parental Alienation Fallacies That Compromise Decisions in Court and in Therapy. *Professional Psychology: Research and Practice*, Vol. 46, No. 4, 235–249.

high weight on statements that they made (which may have been transient or consequent to undue influence) when they were just young children.

Involving Children: Conclusion

So, how do we reconcile an evidence-based approach to children's involvement with the ALRC's position that children should be allowed to participate in family law proceedings and that their statements should be given more weight?

In a nutshell, by using a system other than a family court.

Children can be fully and relatively safely engaged in conciliatory processes; they can be kept fully informed of the processes if provided with a nominated friend or representative; and they can avoid the high risks of abuse associated with adversarial proceedings (and we use that term consistently with both perceived meanings) by doing so in a child-friendly, non-court environment. Children's rights are upheld. Their safety assured as best possible.

To the extent that family law remains involved, our proposals provide for a child:

- To have a nominated "Children's Friend" to support them and keep them informed;
- For this individual or another to become a "Children's Representative" in court proceedings.

We largely do not see a role for – and see great dangers in appointing – a Children's Lawyer in many cases. If that lawyer is to represent "the best interests" of a child rather than the apparent wishes of that child (an important distinction that not all children's lawyers successfully recognise), then that becomes synonymous with the role of the court itself and of the presiding judicial officer.

As such, we believe it is generally more appropriate for a single judicial officer to be appointed for each family/case and for that judicial officer to ensure strict case-management and to conduct hearings with an inquisitorial, problem-solving and urgent approach.

Proposal 15: The Family Law Act (Cth.) should ensure that all children have a nominated "Children's Friend" to keep them informed, in a child-appropriate manner, of proceedings and to provide personal advice and support.

Wherever possible this Friend should be chosen at the earliest possible time by mutual agreement from a short-list of family friends provided by both adults. In the event that a mutually acceptable Friend cannot be found, the Court should appoint a suitably qualified professional.

Proposal 16: The Family Law Act (Cth.) should allow all children, without the requirement for an application, to have a "Children's Representative" involved in proceedings, and with access to all court documents. This Representative may also be the Children's Friend or, where that is not possible, will be an appointee of the court with full Family Law Professional Accreditation.

Proposal 17: The Family Law Act 1975 (Cth) should require that, in the event that it is determined that a family law professional will interact with a child:

- Any professional who interacts with a child during family law proceedings must have full Family Law Professional Accreditation (see above for proposed criteria);
- A child should be interviewed as few times as possible, without coercion and in a child-friendly environment;
- Any such interview must be recorded with clear, transcribable audio of the entire interaction and, unless an exception is granted, with reasonable-quality video.

ABSENCE OF AN EVIDENCE-BASED APPROACH

To date, this review appears not to have deviated sufficiently from Australia's history of family law reforms that have been *ad hoc* and not evidence-based.⁴⁰ It is not by weight of submission – the popular poll approach – but by the strength of scientifically valid evidence that essential progress will be made.

We have suggested above that science is largely missing from this review. But, a scientific approach is also needed in the weighing up of any proposals for change and in determining the strength of evidence that supports “joint physical custody”⁴¹ or co-parenting legislation,⁴² for instance, or that helps us better eliminate family violence.

The ALRC has a strong focus on the important issue of family violence. Everyone must surely agree that we must do as much as possible to prevent and address family violence in all its forms. However, if there is indeed a correlation between family violence and families who attend family courts, it is essential – if we're to create the best and most effective policies – that the strength and nature of that correlation be properly understood.

There is, for instance, no good quality data looking at causality – an essential component of any scientific or evidence-based approach. For some families, violence leads to court; for others, evidence shows, court leads to violence (sometimes extreme violence where none existed previously in lifetimes spanning decades). We need to understand this. For the sake of children's welfare and that of their families, we need more, top quality research, based on data that goes well beyond self-reporting, that fully examines the prevalence of family violence in all its forms and its multi-faceted relationship with family law proceedings.

We have argued that any family abuse or violence that's potentially criminal should be heard urgently and in a local court accustomed to dealing with criminal matters, not in a family court where evidentiary standards and timescales are unacceptable. We believe that we should also acknowledge that since family law itself offers neither cure for, nor prevention of, family violence, we would be unwise to put too many of our eggs in the family law basket, especially if this leads us, in any way, to neglect much better ways of addressing it.

⁴⁰ Assoc Prof Bruce Smyth (2018). Submission to ALRC Review #105. May, 2018

⁴¹ Nielsen, L. (2018). Journal of Divorce & Remarriage, 59 (4)

⁴² Kruk, E. (2018). Arguments against presumptive shared parenting as the foundation of family law: a critical review. Journal of Divorce and Remarriage, 59 (5), 388-400

ANALYSIS OF ALRC PROPOSALS

		Education, Awareness and Information
		Greater education, awareness and availability of information is essential. But the precise nature of any educational and awareness campaign is critical.
		<p>The primary focus of an educational and awareness campaign should NOT be about what the family law system has to offer but, instead, about the particular and high risks to children and families associated with family separation such that families are much more aware and better-prepared to proactively look after the needs of their children. It should be an educational and awareness campaign based on the health of children and wellbeing of families, not on law.</p> <p>The ALRC's discussion paper (October 2018) cites For Kids Sake's original Childhood Matters (May 2018) submission:</p> <p style="padding-left: 40px;">Investment should be made in education and early, comprehensive support for families. This should include a national educational campaign on better managing relationships and separation, including raising awareness of the potentially harmful consequences to children of family breakdown and the extreme risks, consequences and prevalence of some forms of psychological child abuse and family violence. The availability and benefits of coaching, conciliation, family-friendly resolution services, and comprehensive, online resources for separating parents and their children should also be promoted nationally as mainstream, healthier alternatives to family court proceedings.</p> <p>However, it appears to miss the most important point and emphasis. Namely, that education (and support) is needed long before families consider engaging with the family law system.</p>
		Proposal 2–1 The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system.
		<p>There should be a major, national educational campaign.</p> <p>However, its primary focus should NOT be on the family law system. Its focus should be how to protect children from the risks associated with family separation. It should also address how to develop and maintain stronger families and relationships.</p>

		Proposal 2–2 The national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.
		Yes, and it should, even more so, be developed in consultation with groups representing the largest and most important group of stakeholders of all: children.
		Proposal 2–3 The Australian Government should work with state and territory governments to facilitate the promotion of the national education and awareness campaign through the health and education systems and any other relevant agencies or bodies.
		Yes.
		Proposal 2–4 The Australian Government should work with state and territory governments to support the development of referral relationships to family law services, including the proposed Families Hubs
		Yes. But the principal referrals should be NOT to family law services but to health-focused services including GPs, coaches/counsellors, enhanced mediation and arbitration. There should be a diverse range of private sector and government initiatives outside the family law system that are promoted through any education campaign.
		Proposal 2–5 The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory
		Any such working group should include the most important stakeholders: those who have experienced the system, especially as children, or those who might be exposed to it.
		Proposal 2–6 The family law system information package should be tailored to take into account jurisdictional differences and should include information about ...
		Yes. But the focus must be on healthier, safer interventions than family law.
		Proposal 2–7 The family law system information package should be accessible in a range of languages and formats, including ...
		Yes. Educational materials should be available in multiple languages and should use modern technology and video formats.
		Proposal 2–8 The family law system information package should be ...
		Yes.

		Simpler and Clearer Legislation
		This is essential.
		Proposal 3–1 The <i>Family Law Act 1975</i> (Cth) and its subordinate legislation should be comprehensively redrafted ...
		Yes.
		Proposal 3–2 Family law court forms should be comprehensively reviewed to improve usability ...
		Yes. But this does not go far enough. Even with these improvements, the family law system would still remain inaccessible and impenetrable for the majority of self-represented litigants. Much greater emphasis should be placed on verbal communication and interactions, right from the very start of any proceedings.
		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 proposal highlights a legitimate dissatisfaction with the term “best interests” – but does not go far enough to address the core problem which, in essence, is a complete lack of scientific rigour and evidence-based decision-making (using the term “evidence”, it should be noted, in the scientific rather than legal sense). The term “best interests” remains undefined, amorphous and, in essence, part of a circular argument to justify whatever conclusion the family court reaches. As one famous US family lawyer put it: “Best interests operates as an empty vessel into which adult perceptions and prejudices are poured.” ⁴³ Furthermore, as the European Court of Human Rights has highlighted, significant dangers follow from attempting to consider a child’s best interests in isolation. In translation: “The unilateral and absolutist understanding of the concept of the supremacy of a child’s interests represents an ignorance of the need to interpret this notion harmoniously with other fundamental rights.” ⁴⁴

⁴³ Rodham, Hillary (1973). Children Under the Law, 43 Harv. Ed. Rev. 487, 513

⁴⁴ In: Soares de Melo v Portugal (2016) Retrieved from: <https://hudoc.echr.coe.int/eng?i=001-160938#%22itemid%22:%22001-160938%22>} For outline in English, see: <http://www.familylawweek.co.uk/site.aspx?i=ed160026>

		<p>The phrase “safety and best interests” does not resolve these issues, though does highlight the importance of a child’s safety, which would need further definition.</p> <p>We believe that the term “best interests of the child” has outlived any usefulness it may have had.</p> <p>We recommend the replacement of the vague term “best interests” with the term “long-term welfare”.</p> <p>This has a number of advantages including: focusing attention on the health of the child; incorporating other factors such as financial welfare; and, importantly, creating a requirement to consider long-term outcomes – which, by implication, should be monitored – rather than short-term expediency, such as trying to prevent the matter returning to court (which is currently one of the criteria considered in judgments).</p> <p>More broadly, this highlights one of the most fundamental issues with family law. We are attempting to give law, with its archaic and arcane practices, a role in which it should have no part. One that belongs instead in the modern realms of science and medicine: predicting the future and determining what’s best for children.</p>
		<p>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 as follows:</p>
		<p>The wellbeing of children should be paramount. However, the language of this proposal, as it stands, is dangerous and would result in greater harm to children, particularly in respect of its elevation of conflict to the same status as violence and abuse. This is not supported by the latest and best scientific evidence.⁴⁵⁻⁴⁶</p> <p>Prominently, and at the start of a revised Family Law Act, the legislation should stipulate, in simple English, the key considerations of family law that every judge is required to consider explicitly. Namely, in order of priority:</p> <ol style="list-style-type: none"> 1. The paramount principle of the long-term welfare of the child; 2. How a child will best be protected from violence, psychological abuse, and adverse physical and mental health; [Or in longer form: How the child will be best protected from short- and long-term harm, including physical and/or

⁴⁵ Nielsen, L. (2018). Journal of Divorce & Remarriage, 59 (4)

<https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1455303?src=recsys>

⁴⁶ Childhood Matters (2018). For Kids Sake Submission #118 to ALRC Review, May 2018

		<p>psychological harm; exposure to any form of abuse, neglect or family violence; and risks of self-harm, suicide and adverse mental and physical health.]</p> <ol style="list-style-type: none"> 3. How a child will maintain and develop each of his/her pre-existing, significant and beneficial relationships; [This terminology encompasses, and goes beyond, relationships with parents and relatives and, for the first time, attempts to frame the legislation from the perspective of the child and on the basis of what scientific evidence has proven is best for children.] 4. The rights of the child as stipulated in the UN Convention on the Rights of the Child and relevant articles of the Universal Declaration of Human Rights (which should be explicitly incorporated into the legislation). “The child’s right to maintain and develop the child’s cultural identity”, as specified by the ALRC, should not be confined to children of Aboriginal or Torres Strait Islander descent. This right should be universal.
		<p>Proposal 3–5 The guidance in the Family Law Act 1975 (Cth) for determining the arrangements that best promote the child’s safety and best interests ...</p>
		<p>This proposal, as it is currently worded, is dangerous, not least in that it appears to elevate the views expressed by a child to being a primary consideration. Our arguments on this critical issue have been put at the front of this paper: the risks involved in eliciting statements from children in the context of adversarial litigation are extreme, especially given the extreme scarcity of experts with the highly specialised skills needed to perform this task.</p> <p>Our proposals for the wording of what is currently Section 60CC have been included above, in response to Proposal 3-4, and include the factors that a judge should be required to consider explicitly, and in order:</p> <ol style="list-style-type: none"> 1. The paramount principle of the long-term welfare of the child; 2. How the child will best be protected from violence, psychological abuse and adverse physical and mental health; 3. How the child will maintain and develop each of her/his pre-existing, significant and beneficial relationships; 4. The rights of the child as stated in the UN Convention on the Rights of the Child and the rights of all family members as stated in the Universal Declaration of Human Rights. <p>However, we must ask and stress:</p> <p style="text-align: center;">Where are the experts to assess these factors?</p>

		The expertise and training of lawyers and judges does not give them the highly specialised knowledge and experience to be able to make evidence-based judgments on these issues. Even a majority of psychologists, the profession upon which family law currently relies, are far from adequately qualified.
		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.
		This proposal is unnecessarily discriminatory in its language. This should apply to EVERY child.
		Proposal 3–7 The decision making framework for parenting arrangements in pt VII of the Family Law Act 1975 (Cth) should be further clarified ...
		<p>The term ‘parental responsibility’ could be replaced with a term such as ‘decision making responsibility’, as suggested.</p> <p>This proposal otherwise wrongly elevates the idiosyncrasies of a judge’s determination of an individual case to the exclusion of scientific evidence that proves what’s best for children’s long-term welfare.</p> <p>We would not expect a judge to determine that a particular child should be allowed to smoke cigarettes based on their particular family background. We should not expect judges to elevate their personal judgment above the findings of science when it comes to the long-term welfare of families either.</p>
		Question 3–1 How should confusion about what matters require consultation between parents be resolved?
		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 ...
		This proposal is flawed. A completely fresh approach is required to ongoing monitoring of families who have engaged with the family law system (see e.g. The Consensus Model above).
		Proposal 3–9 The Attorney-General’s Department (Cth) should commission a body with relevant expertise ...
		Evidence of this nature is already available internationally. This may not be the most cost-effective use of resources but, in all events, any such body should prioritise input from lived-experience young adults and from medical and health research and science.
		Proposal 3–10 The provisions for property division in the Family Law Act 1975 (Cth) should be amended ...

		<p>Yes. But the division of property can be determined far more cost-effectively through non-court processes including enhanced mediation and arbitration.</p> <p>There is evidence of a gross disparity in efficiency between equivalent property determinations made, for instance, via the Administrative Appeals Tribunal and those made through our family court system.</p>
		<p>Proposal 3–11 The provisions for property division in the Family Law Act 1975 (Cth) should be amended to ... take into account the effect of family violence ...</p>
		<p>Our focus should be on preventing all forms of family violence – and this review (unlike <i>For Kids Sake’s</i> proposals, we believe) offers little prospect of that.</p> <p>This proposal, if enacted, would add a further massive incentive that would lead to prolonged proceedings and would exacerbate conflict. Any children involved in such proceedings would be likely to be harmed further.</p>
		<p>Proposal 3–12 The Attorney-General’s Department (Cth) should commission further research on property and financial matters after separation ...</p>
		<p>Research should be commissioned on ALL aspects of life after separation, including the financial, physical and psychological wellbeing of children and their families.</p> <p>This, however, should be under the auspices of a Minister for Children and/or a Minister for Health.</p>
		<p>Proposal 3–13 The Australian Government should work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence.</p>
		<p>Yes.</p> <p>It should be recognised, however, that the majority of individuals exposed to family separation are “vulnerable”, not only victims of violence.</p>
		<p>Proposal 3–14 If evaluation of action flowing from this Inquiry finds that voluntary industry action has not adequately assisted vulnerable parties ...</p>
		<p>Proposal 3–15 The Australian Government should develop information resources for separating couples to assist them to understand superannuation ...</p>
		<p>Yes. But this should be phrased “The Australian Government should provide incentives for the private sector to develop information resources ...”</p>

		Proposal 3–16 The Family Law Act 1975 (Cth) should require superannuation trustees to develop standard superannuation splitting orders on common scenarios ...
		Yes. Simpler, more prescriptive financial settlements help minimise the time spent in court and decrease the likelihood that financial matters will harmfully prolong children’s matters.
		Proposal 3–17 The Australian Government should develop tools to assist parties to create superannuation splitting orders ...
		Yes. But, again, this should be phrased: “The Australian Government should provide incentives for the private sector to develop information tools ...” Only in the absence of a timely marketplace solution should the government be intervening.
		Question 3–2 Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? ...
		Separation/divorce is often financially crippling, especially where the family law system has become involved. An extension of existing provisions for early release of superannuation would be useful.
		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) ...
		Proposal 3–18 The considerations that are applicable to spousal maintenance ... should be located in a separate section of family law legislation ...
		Proposal 3–19 The dedicated spousal maintenance considerations should include a requirement that the court consider the impact of any family violence ...
		The impact of family violence should be considered in conjunction with all other factors.
		Question 3–4 What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? ...
		Getting Advice and Support
		A strong emphasis should be placed on providing advice and support to both children and families, starting long before a family considers separation. As reiterated and determined by the European Court of

		Human Rights, the best way to protect children is to support their parents. ⁴⁷
		Proposal 4–1 The Australian Government should work with state and territory governments to establish community-based Families Hubs
		<p>We support the principle of community-based Families Hubs, or whatever we choose to call them. However, we advocate the adoption of a much broader approach:</p> <ol style="list-style-type: none"> 1. There should be no presumption about the format, structure or ownership of any such “hubs”. The development of community-based hubs would occur most cost-effectively by incentivising the private sector to establish initiatives and expand services, rather than by necessarily establishing any new, heavy-weight government organisation. The greater the variety of such hubs, the more opportunities for gathering evidence of the most successful formats; 2. Community-based hubs should be focused on health and education not law. Rather than creating new infrastructure with a legal focus, for instance, existing “integrated healthcare centres” could be given incentives to house and diary-manage family dispute resolution practitioners, mediators and/or divorce coaches as well as a community/family lawyer. Legal support should be secondary to health support and education. 3. We need to change the rhetoric. The history of Australia’s Relationship Centres demonstrates that, for these to become the primary, mainstream route for addressing family separation, they must not be called or framed as “alternatives” to the family court; 4. We need to change the funding model. So long as funding for initiatives such as Families Hubs is overseen by the Attorney-General’s Department (even if it were to be administered by the Department of Social Services), Family Courts will not become the last resort they need to be. With the AG holding the purse-strings, family courts will always be the 600-pound gorilla in the zoo and the niche will not be created for smaller, healthier initiatives to thrive, receive sufficient promotion and demonstrate their far superior outcomes. <p>These initiatives should be funded via a Minister for Children or Minister for Health, not via the AG.</p>
		Proposal 4–2 The Australian Government should work with state and territory governments to explore the use of digital technologies ...

⁴⁷ In: Soares de Melo v Portugal (2016) Retrieved from [https://hudoc.echr.coe.int/eng?i=001-160938#%22itemid%22:\[%22001-160938%22\]](https://hudoc.echr.coe.int/eng?i=001-160938#%22itemid%22:[%22001-160938%22])

See <http://www.familylawweek.co.uk/site.aspx?i=ed160026> for outline in English.

		<p>Yes. We are strongly in favour of greater use of modern technology. We believe that the use of parenting and self-help applications should be encouraged and have proposed, for instance, that affidavits and applications should, in future, be made by video via an online portal.</p> <p>The ALRC's emphasis on Government interventions could perhaps be adjusted. Private sector initiatives should be encouraged and financially incentivised. The Government has repeatedly proved itself ineffective, if not harmful, when it comes to parenting.</p>
		Proposal 4–3 Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation ...
		<p>Yes. Although, once again, the primary focus should be on health and safety rather than on family law.</p> <p>It is important to recognise that all children exposed to family separation are potentially at risk and nearly all separating parents, not just those who may have been exposed to violence, are vulnerable, whether mentally, physically and/or economically.</p> <p>The ALRC's suggestion that parenting programs might focus on fathers is concerning as it suggests that the ALRC has a sadly and inappropriately gendered approach to this issue. The research and science is clear: neither mums nor dads have a monopoly on mental illness, drug abuse, or even violence. Hubs set up on the basis of ideological positions will not succeed.</p>
		Proposal 4–4 Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations ... should play a central role in the design of Families Hubs ...
		Yes. But, more inclusively, so should all of the real stakeholders: children and parents from all backgrounds who have had experience of the current system and can offer advice on the future.
		Proposal 4–5 The Australian Government should, subject to positive evaluation, expand the Family Advocacy and Support Service (FASS) in each state and territory ...
		<p>Based on the ALRC's proposals, we believe that this service could be more effectively provided via a model such as the Families Hubs which would cater for children and adults vulnerable to any and all types of risk.</p> <p>These community hubs would also be in a much better position to address any risks of violence or psychological abuse as an earlier intervention than courts – potentially preventing its onset or occurrence.</p>
		Proposal 4–6 The FASS support services should be expanded to provide case management where a client has complex needs ...

		Again, this appears to be an unnecessary and not cost-effective duplication of services.
		Proposal 4–7 The level and duration of support provided by the FASS should be flexible depending on client need and vulnerability ...
		See above.
		Proposal 4–8 The Australian Government should, subject to positive evaluation, roll out the expanded FASS to a greater number of family court locations ...
		See above.
		Dispute Resolution
		<p>It is essential to keep both financial and parenting matters out of court wherever possible. A range of non-adversarial options – including education, health-focused interventions, coaching, enhanced mediation, arbitration and new technology – should be mandatory for both financial and parenting matters.</p> <p>We should not necessarily characterise this, however, as “dispute resolution”. Of course, it looks like dispute resolution the moment that courts and lawyers become involved. However, up until that point, it may often be better characterised as two parties simply not knowing what to do, or knowing what’s right, fair or best, or being highly distressed and vulnerable.</p> <p>It is surprising that most of the ALRC’s proposals in this regard are confined to property settlement where many of the issues raised could apply equally to parenting arrangements.</p>
		Proposal 5–1 The guidance as to assessment of suitability for family dispute resolution ... should be relocated to the Family Law Act 1975.
		Proposal 5–2 The new legislative provision proposed in Proposal 5–1 should provide that, in addition to the existing matters that a family dispute resolution provider must consider ...
		Proposal 5–3 The Family Law Act 1975 (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters ...
		<p>We agree that the Family Law Act should require parties to attempt resolutions of all matters by non-court methods prior to being allowed to lodge court applications.</p> <p>These methods should include some or all of the following elements: personal coaching, enhanced mediation, family dispute resolution and arbitration.</p>

		We suggest that parties should be also required to attend arbitration for financial matters (such as is already carried out under the Administrative Appeals Tribunal processes) prior to being allowed to lodge a court application.
		Proposal 5–4 The Family Law Act 1975 (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application ...
		Ensuring that financial matters are resolved as quickly and cost-effectively as possible is likely to be best for any children involved and will help ensure that financial matters do not adversely affect the duration of children’s matters, as they do at present.
		Proposal 5–5 The Family Law Act 1975 (Cth) should include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate ...
		Yes. See above (formal arbitration should be a further step in this process prior to court).
		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?
		Proposal 5–6 The Family Law Act 1975 (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case ...
		Yes, providing that this does not allow one party to undertake systems abuse through making an application that will place onerous requirements on the other party.
		Proposal 5–7 The provisions in the Family Law Act 1975 (Cth) setting out disclosure duties should ...
		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?
		If such penalties were to be introduced, they should be introduced not only for financial matters. Non-disclosure, or false disclosures, play an even more significant part in children’s matters and the absence of any disincentives for such conduct represents a major flaw in the operation of our family law system.
		Proposal 5–8 The Family Law Act 1975 (Cth) should set out advisers’ obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters ...

		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? ...
		Proposal 5–9 The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters ...
		Proposal 5–10 The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters ...
		Proposal 5–11 These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.
		Reshaping the Adjudication Landscape
		<p>These proposals are not adequately proposing a “reshaping” of the adjudication landscape.</p> <p>Genuine re-shaping would require mandatory arbitration (either within the private sector or through a government-administered Tribunal or Family Commission) following enhanced and genuinely mandatory mediation.</p> <p>Triaging cases can be accomplished much more safely, effectively, humanely and cost-effectively prior to entering the hostile, adversarial environment of a family court.</p>
		Proposal 6–1 The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.
		Yes, but this can be done much better – and with much less harm to children – BEFORE a family enters the court process. Why wait until a family is within an unaffordable, frightening, adversarial system?
		Proposal 6–2 The triage process should involve a team-based approach combining the expertise of the court’s registrars and family consultants to ensure initial and ongoing risk and needs assessment

		and case management of the matter, continuing, if required, until final decision.
		Again, yes, but this should be done PRIOR to court by experts better-qualified than those within a judicial system.
		Proposal 6–3 Specialist court pathways should include: · a simplified small property claims process; · a specialist family violence list; and · the Indigenous List.
		Small property claims can better be accomplished in a non-court environment. It is generally unhelpful to have specialist lists. Appropriate specialists should always be allocated to appropriate cases.
		Proposal 6–4 The Family Law Act 1975 (Cth) should provide for a simplified court process for matters involving smaller property pools ...
		Proposal 6–5 In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to ...
		Proposal 6–6 The family courts should consider developing case management protocols to support implementation of the simplified process for matters with smaller property pools ...
		Matters such as those referred to in proposal 6-4, 6-5 and 6-6 should all be resolved by arbitration, if not mediation, without entering the court system.
		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 appears to put the cart before the horse. Without a finding of fact, there are great risks associated with putting a case on a list of high risk family violence.
		Question 6–1 What criteria should be used to establish eligibility for the family violence list?
		One cannot assign cases to such a list based on presumptions. There should be at least a preliminary finding of fact in respect of violence or abuse, otherwise there will be extreme prejudice to one party's case and potentially great harm done to a child. We again question the suitability of the qualifications of family court professionals to make any such assessments.
		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?

		Early fact-finding is essential wherever a decision is to be made (whether by action or inaction) that affects a child and her/his pre-existing relationships.
		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 ...
		Yes.
		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?
		Our family law system does not have a problem-solving approach, despite the desires of some senior family court judges here and overseas, not least retired UK President of the Family Division Sir James Munby, that they should. Why, though, confine a problem-solving approach to Parenting Management Hearings. Should this not be the aim of all interventions into family life?
		Question 6–4 What other ways of developing a less adversarial decision making process for children’s matters should be considered?
		<p>This should not be a minor question in this review. It goes to the core of the operation of the family law system and should have led to multiple, major proposals within this review.</p> <p>Courts in Australia are adversarial. Attempts to make them less so (such as the so-called Less Adversarial Trial system) have demonstrated that this is not possible or effective; they are inevitably adversarial in nature.</p> <p>Adversarial systems are the opposite of what children and their families need. They are, quite simply, harmful.</p> <p>The way to develop less adversarial decision-making processes for children’s matters is to do much more than this review proposes to keep children OUT of courts and to help their families re-form relationships after separation in a non-court environment.</p> <p>This should include, but not be limited to, mandatory coaching, enhanced mediation and arbitration.</p>
		Proposal 6–9 The Australian Government should develop a post-order parenting support service to assist parties to parenting orders to implement the orders and manage their co-parenting relationship ...
		Yes, but this comes far too late.

		Monitoring of families post-order should be a routine part of any such process. The idea that one can make a life-changing decision about the life of the child and have no responsibility to monitor that child thereafter is unconscionable.
		Proposal 6–10 The Australian Government should work with relevant Stakeholders ... to develop intake assessment processes for the post-order parenting support service ...
		Children and their families are the primary stakeholders!
		Proposal 6–11 The proposed Family Law Commission (Proposal 12–1) should develop accreditation and training requirements for professionals working in the post order parenting support service.
		All professionals involved in the family law system should be required to have the appropriate, high-level accreditation and specialised training.
		Proposal 6–12 The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees ...
		Children in the Family Law System
		Children should not be involved in the family law system, wherever possible. Children whose families go through family courts are likely to be harmed for life by the process. Every effort should be made to help children and their families before they become involved with this system.
		Proposal 7–1 Information about family law processes and legal and support services should be available to children in a range of age-appropriate and culturally appropriate forms.
		Yes. But, more importantly, child-focused information about the experiences of family separation should be made available using media and formats most readily accessible to the intended audience.
		Proposal 7–2 The proposed Families Hubs (Proposals 4–1 to 4–4) should include out-posted workers from specialised services for children and young people, such as counselling services and peer support programs.
		Yes. Children should have the support of a non-legal, but well-qualified professional – as well as access to peer support – from the earliest possible stage. We have proposed a “Children’s Friend” who could be a relative or friend mutually acceptable to both parents.

		Proposal 7–3 The Family Law Act 1975 (Cth) should provide that, in proceedings concerning a child, an affected child must be given an opportunity (so far as practicable) to express their views.
		This proposal is naïve, simplistic and dangerous in its current form. Involving children in adversarial proceedings (especially where professionals with the highly specialised qualifications needed are extremely scarce) adds greatly to the risk of harm. See comments above (“What’s Dangerous”).
		Proposal 7–4 The Family Law Act 1975 (Cth) should provide that, in any family dispute resolution process concerning arrangements for a child, the affected child must be given an opportunity (so far as practicable) to express any views about those arrangements.
		See comments above.
		Proposal 7–5 The Attorney-General’s Department (Cth) should work with the family relationship services sector to develop best practice guidance on child-inclusive family dispute resolution, including in relation to participation support where child inclusive family dispute resolution is not appropriate.
		The (Assistant) Minister for Children and the Minister for Health should work with the family relationship services sector to create an evidence-based model of world’s best practice with respect to interacting with children exposed to family separation and/or family violence.
		Proposal 7–6 There should be an initial and ongoing assessment of risk to the child of participating in family law proceedings or family dispute resolution, and processes put in place to manage any identified risk.
		The family law system does not have the competence or expertise to assess risks to children from participating in family law proceedings.
		Proposal 7–7 Children should not be required to express any views in family law proceedings or family dispute resolution.
		Yes.
		Proposal 7–8 Children involved in family law proceedings should be supported by a ‘children’s advocate’ ...
		As soon as possible after a child is exposed to family separation/divorce (and ideally before), a child should be formally allocated a “Children’s Friend” with whom they can communicate regularly. One of the most commonly voiced concerns of children is simply not knowing what’s going on, and being worried by this. Ideally, this would not be a social worker or court officer, but a family friend or relative whom both litigants agree on. In the absence of such agreement an independent “Children’s Friend” should be appointed -

		not a legal advocate, but a highly qualified professional with strong experience of working with children within an adversarial system.
		Proposal 7–9 Where a child is not able to be supported to express a view, the children’s advocate should support the child’s participation to the greatest extent possible ...
		A Children’s Friend or advocate is unlikely to have the prerequisite skills to operate within the family law system without risk to the child. Furthermore, children should not participate in hostile, adversarial proceedings “to the greatest extent possible”; they should have as little involvement as possible. Given the current system, however, we have proposed that a Children’s Friend (providing support at a critical time and keeping a child informed) may sometimes become a “Children’s Representative” in court proceedings. Alternatively, a Children’s Representative may be an appropriate appointee of the court.
		Proposal 7–10 The Family Law Act 1975 (Cth) should make provision for the appointment of a legal representative for children involved in family law proceedings ...
		There is already provision for a child to have an Independent Children’s Lawyer, or equivalent. We have argued above that, given a more inquisitorial, problem-solving approach by a judicial officer, along with efficient and active case-management, the role of an Independent Children’s Lawyer may be redundant, and can potentially serve to prolong or complicate proceedings.
		Question 7–1 In what circumstances should a separate legal representative for a child be appointed in addition to a children’s advocate?
		The more people involved, the more complex the matter becomes and the greater the risk to children. We would suggest that a separate legal representative should only be appointed in the event that there has been a finding of fact in respect of violence or abuse.
		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?
		We need to make this system simpler, not more complex.
		Question 7–3 What approach should be taken to forensic issues relating to the role of the children’s advocate ...
		A Children’s Friend should not, where possible, become party to legal proceedings. However, it is almost inevitable – should this role be created – that this will happen.

		Proposal 7–11 Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways ...
		<p>This proposal is dangerous. Within an adversarial system, the risks of involving children outweigh the potential benefits.</p> <p>If unavoidable, a child should be interviewed once (or as few times as possible) as early as possible in any proceedings and by a highly qualified specialist (likely to be a psychiatrist or psychologist with a specialisation in working with children and in forensic analysis, i.e. not merely a clinical psychologist).</p> <p>Any such interview should be video-recorded with good quality audio. (In exceptional circumstances, audio recording alone may be acceptable.)</p>
		Proposal 7–12 Guidance should be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. This guidance should cover matters including how views expressed by children in any such meeting should be communicated to other parties to the proceeding.
		<p>Judicial officers do not have anything like the appropriate training to be involved in interviewing children and it would potentially be unethical and abusive for them to do so.</p> <p>This proposal also conflates the “views of a child” with the “statements made by a child”. The two are not synonymous, especially when obtained in an adversarial context.</p>
		Proposal 7–13 There should be a Children and Young People’s Advisory Board for the family law system. The Advisory Board should provide advice about children’s experiences of the family law system to inform policy and practice development in the system.
		Yes. Children and, even more so, young people who’ve experienced the system, should play a significant role in helping change the current system.
		Reducing Harm
		Every effort should be made to reduce exposure of children and adults, within and outside the family law system, to harm.
		Proposal 8–1 The definition of family violence in the Family Law Act 1975 (Cth) should be amended ...
		<p>Yes, the definition could be improved along the lines proposed.</p> <p>However, we believe greater improvements can be made. See below for further comments.</p>
		Question 8–1 What are the strengths and limitations of the present format of the family violence definition?

		<p>The strengths of the current definition are that it is relatively broad and encompasses a fairly wide range of types of abuse and violence.</p> <p>Its weaknesses include:</p> <ul style="list-style-type: none"> - the entire definition appears focused on adults. It has not been written with the predominant forms of child abuse in mind; - insufficient weight is given to emotional or psychological abuse, in all its forms; - the use of the word violence is so different to common usage that it will never be widely understood or accepted. It is essentially being used as a piece of “jargon” without widespread understanding of that. <p>We have advocated, above, the use of the term “Abuse” (or Family/Partner/Child Abuse) as the overarching term, with distinct sub-categories of violence, psychological and financial abuse etc.</p>
		<p>Question 8–2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?</p>
		<p>Child abuse, in all its forms, should be included. One of the most widespread forms of abuse experienced by children within the family law system, for instance, is extreme psychological manipulation. Although this meets the current definition of family violence, it is rarely considered in this this context and should be explicitly added.</p>
		<p>Proposal 8–2 The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the Family Law Act 1975 ...</p>
		<p>If research is to be commissioned it should best be inclusive of all cultures, genders and backgrounds.</p>
		<p>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 ...</p>
		<p>This proposal raises some concerns.</p> <p>Misuse of legal and other systems can amount to abuse, though we would suggest that the legal fraternity might want to take a rather deeper look at the system it’s created for people to use if it is then going to label it abuse when they use that system!</p> <p>The family law system is designed and operates in such a way that systems abuse is almost endemic; it’s often impossible to distinguish normal use of the system by a genuine litigant from use designed to harm the other party.</p> <p>The increasing inclusion of examples that don’t involve physical violence make the term “family violence” increasingly inappropriate.</p>

		<p>As above, we suggest that a better overarching term is “Family Abuse”, “Partner Abuse” or simply “Abuse”, which should include three main categories:</p> <ul style="list-style-type: none"> • Violence (or the threat of violence) This form of abuse is physical (including sexual) in nature and potentially criminal; • Psychological abuse This leaves no immediate, physical signs but can be at least as harmful. It includes ongoing psychological manipulation, gaslighting, denying access to other family members or friends; systems abuse, rejecting, ignoring, terrorizing, neglect etc.; and • Financial abuse This includes such activities as consistently withholding financial resources or access; financially manipulating or coercing a family member; using bureaucracies/systems to inflict financial harm. <p>“Child Abuse” should be defined to include all the above, plus some additional categories/examples unique to children:</p> <ul style="list-style-type: none"> • Psychological abuse: not receiving emotional support and care; child grooming; psychological manipulation into showing unwarranted hostility, fear or animosity towards a parent and/or others; indirect exposure to (seeing/hearing) acts of violence or psychological abuse within the family; • Sexual abuse: any sexual activity between a child and an adult, including exposure to pornography; • Neglect: failure to receive a child’s basic needs, including not enough food, shelter, clothing, supervision, medical attention etc.
		<p>Proposal 8–4 The existing provisions in the Family Law Act 1975 (Cth) concerning dismissal of proceedings that are frivolous, vexatious, an abuse of process or have no reasonable prospect of success (‘unmeritorious proceedings’) should be rationalised.</p>
		<p>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.</p>
		<p>The issue of family violence is extremely important issue. Nonetheless, it is one of many factors that must be taken into consideration.</p> <p>It is also concerning to see somewhat archaic language that is not truly child-focused such as ‘primary’ or ‘main caregiver’. This is not how children view those they’re attached to.</p>

		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?
		‘Repeated’ might well be a suitable replacement for ‘frequently’. But wouldn’t it be much better to recognise these inherent flaws in the system and adopt a completely fresh approach as <i>For Kids Sake</i> is proposing?
		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)?
		Family courts rarely appear to award costs, which is one of the reasons they are so open to systems abuse.
		Proposal 8–6 The Family Law Act 1975 (Cth) should provide that courts have the power to exclude evidence of ‘protected confidences’ ...
		Proposal 8–7 The Attorney-General’s Department (Cth) should convene a working group ... to develop guidelines in relation to the use of sensitive records in family law proceedings ...
		Additional Legislative Issues
		Proposal 9–1 The Family Law Act 1975 (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves ...
		Proposal 9–2 The Australian Government should ensure that people who require decision making support in family law matters, and their supporters, are provided with information and guidance to enable them to understand their functions and duties.
		All litigants and their supporters should have much greater access to information and guidance with respect to the family law system. This information should be user-friendly and available in formats and languages that all can access and understand.
		Proposal 9–3 The Family Law Act 1975 (Cth) should include provisions for the appointment of a litigation representative where a person with disability, who is involved in family law proceedings, is unable to be supported to make their own decisions ...
		Yes, but once again, this proposal should be far more inclusive and look through a wider lens. We believe that all litigants should have access to a ‘litigation representative’ (or ‘lay representative’ as in Scotland) should they so wish. It is not just those with disabilities who are disadvantaged in a family court context.

		Proposal 9–4 Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.
		Proposal 9–5 The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation representatives in family law proceedings.
		Proposal 9–6 The Australian Government should work with the National Disability Insurance Agency (NDIA) to consider how referrals can be made to the NDIA by family law professionals ...
		Proposal 9–7 The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.
		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? ...
		Proposal 9–8 The definition of family member in s 4(1AB) of the Family Law Act 1975 (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.
		Yes, but this is still not inclusive enough or child-focused. If framed from a child’s perspective, such definitions should consider anyone with a special relationship with the child; it might be that a child’s closest relationship is with someone not part of his/her biological family either.
		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?
		See response to Proposal 9-8 above: the wording should ideally be inclusive of the nature of relationships between people of all cultures and backgrounds.
		A Skilled and Supported Workforce
		Proposal 10–1 The Australian Government should work with relevant non-government organisations and key professional bodies to develop a workforce capability plan for the family law system.
		Proposal 10–2 The workforce capability plan for the family law system should identify: · the different professional groups working in the family law system; · the core competencies that particular professional groups need; and · the training and accreditation needed for different professional groups.

		Yes, it is essential that all professionals involved in the family law system are highly qualified in the necessary specialisations.
		<p>Proposal 10–3 The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:</p> <ul style="list-style-type: none"> · an understanding of family violence; · an understanding of child abuse, including child sexual abuse and neglect; · an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children; · an ability to identify and respond to risk, including the risk of suicide; · an understanding of the impact on children of exposure to ongoing conflict; · cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people; · disability awareness; and · an understanding of the family violence and child protection systems and their intersections with the family law system.
		This is neither a comprehensive, nor inclusive set of core competencies. Different professionals will have different specialisations. We respectfully refer the ALRC to our prior submission with detailed lists of core competencies for different professions ⁴⁸ and to our proposed list of qualifications and skills for “Family Law Professional Accreditation” listed above.
		Question 10–1 Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?
		Yes. Please see above and our prior submission - added here as an appendix. ⁴⁹
		Proposal 10–4 The Family Law Commission proposed in Proposal 12–1 should oversee the implementation of the workforce capability plan through training — including cross-disciplinary training—and accreditation of family law system professionals.
		Proposal 10–5 In developing the workforce capability plan, the capacity for family dispute resolution practitioners to conduct family dispute resolution in property and financial matters should be considered ...
		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?

⁴⁸ Childhood Matters (2018). For Kids Sake submission, May 2018

⁴⁹ *op. cit.*

		Proposal 10–6 State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This training should be in addition to any other core competencies required for legal practitioners under the workforce capability plan.
		<p>There are many training requirements that professionals engaged in the family law system should be required to undertake annually. Family violence, when properly defined, is one of them. It is wrong and potentially dangerous, though, to single this out – especially with such vague, undefined terminology. Professionals today currently lack many equally essential, core competencies and all must be addressed if children are to be protected from harm.</p> <p>This proposal is dangerous as it implies that professionals who undertake “one unit of family violence training annually” might somehow be anywhere close to properly qualified. They will not be.</p>
		Proposal 10–7 The Family Law Act 1975 (Cth) should provide for the accreditation of Children’s Contact Service workers and impose a requirement that these workers hold a valid Working with Children Check.
		All professionals involved in the family law system should be highly trained and fully accredited in the core competencies of their particular role. See our list above for “Family Law Professional Accreditation” (pp. 12-13).
		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?
		People who work at Children’s Contact Services sometimes play pivotal roles in family law proceedings. They should be highly experienced and qualified in multiple areas, including but not limited to: objective observation and reporting skills; report writing for court usage; and child psychological development. See above.
		Proposal 10–8 All future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person’s knowledge, experience and aptitude in relation to family violence.
		Yes. But this is but one of many core competencies necessary. It is wrong to single this factor out in this way and, by elevating this issue to a status all its own, risks that appointees will lack other equally critical skills, such as an understanding of child development or forensic analysis or even a basic understanding of science that’s critical to understanding research on what’s best for children and their long-term health.

		Question 10–4 What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?
		Question 10–5 What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?
		Proposal 10–9 The Australian Government should task the Family Law Commission (Proposal 12–1) with the development a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.
		Proposal 10–10 The Family Law Commission (Proposal 12–1) should maintain a publicly available list of accredited private family report writers with information about their qualifications and experience as part of the Accreditation Register.
		This is certainly a possible role for any such Commission.
		Proposal 10–11 When requesting the preparation of a report under s 62G of the Family Law Act 1975 (Cth), the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.
		Proposal 10–12 In appropriate matters involving the care, welfare and development of a child, judges should consider appointing an assessor with expert knowledge in relation to the child’s particular needs to assist in the hearing and determination of the matter.
		It is unclear what this proposal intends. “Experts” are already routinely appointed to assess children. Most of them are inadequately qualified.
		Proposal 10–13 The Family Law Act 1975 (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should prepare a report for the court about the person’s parenting ability ...
		Proposals like this should use more inclusive language. It should be the aim of any process dealing with separating families to problem-solve – and, in this instance, to determine how a parent can be helped to overcome whatever difficulties they may have with respect to parenting – whether physical, mental or behavioural.
		Proposal 10–14 The Family Law Act 1975 (Cth) should be amended to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared ...
		Once again, more inclusive and less discriminatory language should be used. Every child has the right to maintain these connections with her culture. This should be enshrined in the legislation for all children.

		Question 10–6 Should cultural reports be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child?
		All reports should be written by highly qualified specialists and should routinely address all issues of importance and relevance to every child.
		Proposal 10–15 The Australian Government should, as a condition of its funding agreements, require that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.
		Information Sharing
		In the absence of a single, unified federal system, information sharing between agencies and jurisdictions should be facilitated and expedited, especially wherever there is potentially an issue of child safety and welfare.
		Proposal 11–1 State and territory child protection, family violence and other relevant legislation should be amended to remove any provisions that prevent state and territory agencies from disclosing relevant information, including experts' reports, to courts, bodies and agencies in the family law system in appropriate circumstances ...
		Information sharing between agencies and jurisdictions is important.
		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? ...
		Comment: the fact that the ALRC is asking this question suggests a recognition that there may be a connection or correlation between ongoing family law proceedings and acts of violence. The fact that ongoing family law proceedings are indeed one of the common denominators in some of Australia's worst child murders should lead everyone to question not just ownership of guns at the vulnerable moment of family separation, but the appropriateness of family law proceedings at all.
		Proposal 11–2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare and wellbeing of families and children between the family law, family violence and child protection systems ...
		Proposal 11–3 The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about ...

		Question 11–2 Should the information sharing framework include health records? If so, what health records should be shared?
		Potentially.
		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?
		No, unless so determined by a court.
		Proposal 11–4 The Australian Government and state and territory governments should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders issued under state and territory child protection legislation.
		Proposal 11–5 State and territory governments should consider providing access for family courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.
		Proposal 11–6 The family courts should provide relevant professionals in the family violence and child protection systems with access to the Commonwealth Courts Portal to enable them to have reliable and timely access to relevant information about existing family court orders and pending proceedings.
		Proposal 11–7 The Australian Government should work with states and territory governments to co-locate child protection and family violence support workers at each of the family law court premises.
		Proposal 11–8 The Australian Government and state and territory governments should work together to facilitate relevant entities, including courts and agencies in the family law, family violence and child protection systems, entering into information sharing agreements for the sharing of relevant information about families and children.
		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.
		If necessary beyond existing protocols.
		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?

		Proposal 11–10 The Australian Government should develop and implement an information sharing scheme to guide the sharing of relevant information about families and children between courts, bodies, agencies and services within the family law system.
		Proposal 11–11 The Family Law Act 1975 (Cth) should support the sharing of relevant information between entities within the family law system ...
		Proposal 11–12 The Australian Government should work with states and territories to ensure that the family relationships services they fund are captured by, and comply with, the information sharing scheme.
		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? ...
		System Oversight and Reform Evaluation
		High standards of professional training for all family law professionals, accreditation and high levels of accountability have all been lacking from the family law system. They are an essential part of these reforms.
		Proposal 12–1 The Australian Government should establish a new independent statutory body, the Family Law Commission, to oversee the family law system. The aims of the Family Law Commission should be to ensure that the family law system operates effectively in accordance with the objectives of the Family Law Act 1975 (Cth) and to promote public confidence in the family law system ...
		Yes. As a priority, this body should ensure that every child exposed to a decision of the family law system is monitored thereafter for a period of at least 5 years, or until they are 18, to ensure their safety and wellbeing and to provide essential feedback to the system.
		Proposal 12–2 The Family Law Commission should have responsibility for accreditation and oversight of professionals working across the system ...
		Proposal 12–3 The Family Law Commission should have power to ... conduct inquiries ...
		Proposal 12–4 The Family Law Commission should have responsibility for raising public awareness about the family law system and the roles and responsibilities of professionals and services within the system.
		Proposal 12–5 The Family Law Commission should have responsibility for providing information and education to family law professionals and service providers about their legislative duties and functions.

		Proposal 12–6 The Family Law Commission should identify research priorities that will help inform whether the family law system is meeting both its legislative requirements and its public health goals.
		Proposal 12–7 The Australian Government should build into its reform implementation plan a rigorous evaluation program to be conducted by an appropriate organisation.
		Proposal 12–8 The Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review ...
		Consultation with groups representing children’s rights and wellbeing should also be a priority.
		Proposal 12–9 The cultural safety framework should address the provision of community education about the family law system ...
		Proposal 12–10 Family law service providers should be required to provide services that are compliant with relevant parts of the cultural safety framework.
		Proposal 12–11 Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the Family Law Act 1975 (Cth) should be maintained, with the following amendments:
		<p>The current privacy provisions should NOT be maintained (see “What’s Dangerous” section above). They do little to protect children in individual cases, but greatly harm children and families by preventing levels of scrutiny that are essential in any institution.</p> <p>The fact that judges and, in large measure, barristers and expert witnesses enjoy undeserved immunity from prosecution (where, for instance, paediatric heart surgeons and other professionals do not) makes the removal of these “privacy provisions” all the more important.</p> <p>It is our view that these provisions result in breaches of the rights of children, litigants and other family members too.</p> <p>Media should be permitted to reasonably report on family law proceedings using a national interest criterion. It is wrong, for instance, that a child on turning 18 should not be free to discuss their family law matter publicly.</p> <p>There should be a presumption that secrecy provisions do not apply in a matter until and unless imposed unilaterally, or upon application, by the court.</p>

		· s 121 should be redrafted to make the obligations it imposes easier to understand;
		Yes. It is essential that this clause be clearly written and unambiguous and that changes to this clause are widely disseminated.
		· an explicit exemption to the restriction on publication or dissemination of accounts of proceedings should be provided for providing accounts of family law proceedings to professional regulators, and for use of accounts by professional regulators in connection with their regulatory functions;
		Yes. It is unacceptable that, as at present, a litigant must apply to the court itself for permission to share court documents for the purposes of scrutiny of that court and/or its agents.
		· an avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the 'public' for the purposes of the provision;
		Any such provisions must not breach the rights of any litigants involved.
		· the offence of publication or dissemination of accounts of proceedings should only apply to public communications, and legislative provisions should clarify that the offence does not apply to private communications;
		Any such provision would have to define and clarify "public communications". It is essential that litigants should be able to discuss their proceedings freely with the constraint only that they do not allow any children to be involved in, or to hear, such discussions.
		· to ensure public confidence in family law decision making, an obligation should be placed on any courts exercising family law jurisdiction, other than courts of summary jurisdiction, to publish anonymised reports of reasons for decision for final orders.
		<p>Current anonymisation is inadequate and is but a token gesture towards openness. It is also too easy to identify litigants based on current practices of anonymisation.</p> <p>A more important way of trying to ensure public confidence in family law decision making, is to require that every judicial decision-maker should publish and provide to the Family Law Commission a short summary of the case, for the purposes of research, feedback and improvement, including key data such as whether the case involved:</p> <ul style="list-style-type: none"> - allegations of any form of violence or abuse and whether against a partner, child or other person; - findings of any form of violence or abuse; - an outcome of single parenting, co-parenting (>35% with each parent), or other; - timescales of proceedings, judgements etc.

		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?
		Attempts at restrictions on individuals discussing the most emotional and stressful moments in their lives are neither realistic nor humane. They add to the pressure-cooker environment of the family law system for average Australians and risk extreme, harmful outcomes.
		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?

CONCLUSION

Every year, some 60,000 children in Australia are exposed to family separation or divorce – a process that makes many of their parents highly vulnerable and potentially exposes every one of those children to a variety of risks. Though the majority of those families do not themselves have prolonged proceedings in family courts, the conduct and outcomes of today's family court proceedings nonetheless set the tone for every one of them.

At present, this best-known of government interventions, our family court system, demonstrably fails the test of “do no harm” while modelling the worst – separations that:

- take years;
- become increasingly acrimonious;
- are unaffordable and frightening;
- are financially and emotionally destructive;
- leave parents much worse off emotionally and financially;
- leave parents much less able to parent effectively;
- solve no problems and provide no cures;
- do nothing to resolve issues of inter-personal animosity, mental health, family violence etc.

And yet, this is nearly 2019!

Many of the ALRC's proposals would be positive. But they don't go anywhere near far enough towards changing the system and changing the way we view and deal with family separation. The ALRC has adopted what they call a public health approach. This, in our view, is entirely the right approach; after all, as one Canadian family court judge put it, separation and divorce are “a public health crisis”.⁵⁰ However, a public health approach needs much more than tacking the phrase “family violence” onto a few dozen proposals that might adjust the existing system. A public health approach means recognising that most family law cases do not belong in a family court at all.

Cases involving potentially criminal acts of violence belong in a local, criminal court. They need to be dealt with as matters of the highest urgency. Cases involving mental health issues or addictions require professional, social or medical interventions. Family separations or divorces need great amounts of support and compassion, not lawyers and courts that create a life-threatening cocktail of insurmountable pressure and irresistible incentives. We can continue to blame parents for bad behaviour or we can start understanding the inescapable nature of human interactions when relationships break down and start showing the same compassion as we have done for years with other distinctly human failings, like addiction.

Above all, when there is evidence of the adverse, lifelong health impacts of childhood trauma associated with family separation and of the family law system doing significant harm to children and their families, we need to do more than tinker with the system. Much more. In our two submissions to the ALRC, *For Kids Sake* has outlined a way forward – a fresh approach. We hope that the ALRC and the Australian Government will give serious consideration to our 6-point plan and proposals. #ForKidsSake

⁵⁰ Judge Harvey Brownstone, Ontario family court & criminal court judge (2016)

APPENDIX



Protecting Children - Beyond Family Separation

forkidssake.org.au

Childhood Matters:

Towards an evidence-based approach to addressing risks, harm & trauma to children from family separation and family violence



Protecting Children - Beyond Family Separation

forkidssake.org.au

CONTENTS

Contents	2
Introduction	3
About Us	5
Executive Summary: Family Separation/Divorce	6
Executive Summary: Family Violence	8
Some key changes to legislation	10
Responses to questions	12
Some questions we should be asking	36
Conclusion	37

“There can be no keener revelation of a society’s soul
than the way in which it treats its children”

“Our children are the rock on which our future will be built,
our greatest asset as a nation”

Nelson Mandela

Introduction

There are few issues to which more people bring more deeply held views than family separation, family violence and family law. Often these views were forged in their own childhood experiences or trauma, or from their own experiences of relationships as adults. As a consequence, because so many view this issue through their own lenses, anecdotal experiences or ideology, an inclusive, evidence-based approach to this subject has proved elusive. And, partly because this issue provokes such strong sentiments, no Australian government has yet been brave enough to propose the major changes that are necessary.

Australia can be proud that it has introduced some progressive reforms in family law. But, with no-fault divorce in 1975 we also got an entire family law system that, by its very nature, was based on finding fault. And, though our relationship centres now cater for thousands, they (and other alternatives to our family courts) have not been adequately marketed or viewed as the mainstream, healthier alternatives they needed to be.

The family court system remains centre-stage for separating families throughout Australia, and for some 60,000 children exposed to separation each year. For all that we may be told that most separating families manage to avoid courts, we should not underestimate their influence: our family courts set the tone for family separations throughout the country.

“Even though only a small percentage of parents end up in court to resolve their custody issues, custody laws affect all separating parents by establishing norms about what their state or their country believes is in children’s best interests.” ¹

There are reasons why our family courts have often, over several decades, been described as the most hated institution in Australia. They can intervene in what is, for most of us, the most important aspect of our lives: our relationship with our children. Their decisions, activities and personnel are protected, to a highly unusual degree, from scrutiny, review, or further legal action, through a combination of legislation, case law, and inaccessible and narrow appeal processes – creating a profound and widespread sense of injustice. And, they essentially remain the only court in the land that can still take a life – of a child from a parent, and of a parent from a child.

¹ Nielsen, L. 2018. Journal of Divorce & Remarriage.
<https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1455303?src=recsys>

We believe the current Family Law Review by the Australian Law Reform Commission is of great importance. It has certainly been billed as the most substantial in over forty years. So, we hope that what needs to be the broadest and most open possible investigation of issues surrounding family separation will not be unnecessarily circumscribed – either by this review’s Terms of Reference (which do explicitly allow for consideration of any related matters) or by the Issues Paper and questions posed. In this spirit, we have taken the liberty of proposing some additional questions (“Some questions we should be asking”, page 36) that we believe to be of great importance to the long-term welfare of children.

We believe that the appropriateness of our family court system for dealing with family separation or family violence should be more strongly questioned and that alternatives to adversarial court systems should be a primary focus of any review. We do not believe there should be any presumption that the solutions to the issues at hand (whether exposure to family violence, or to childhood trauma from prolonged family separations) somehow lie within family law or that family law is the appropriate way to address them.

If our family courts can decide that they will no longer intervene in cases where children with gender dysphoria have the permission of their parents and treating doctors to undergo surgery², shouldn’t they similarly consider bowing out if they recognise that greater expertise in looking after children exposed to separation lies outside their mantle? Ours are certainly not the inquisitorial, “problem-solving courts” of which Sir James Munby, President of the Family Division of the UK’s High Court, dreams.

We also think it would be of great value to have scientific and medical researchers, leading social scientists, and/or medical practitioners on any committee established to work out, in essence, what’s best for children. We hope that, notwithstanding the existence of a broader advisory panel, the absence of such experts on the current ALRC Committee will not make a broader, more holistic and inter-disciplinary review any less achievable or diminish the chance of bringing valuable evidence and diverse expertise to the table.

Family separation is, most importantly, a child health issue, not a legal issue. This review provides an opportunity we can’t afford to miss to truly reform family law – by recognising its limitations and inherent characteristics that make it ill-suited to looking after anyone’s best interests, and by focusing on alternative, healthier initiatives.

We hope that, in the spirit of the 2003 *Every Picture Tells a Story* report that came before it, the Government will give high priority to alternatives to family courts and consider the many examples of better practices from around the globe. We thank the Government and the Australian Law Reform Commission for the opportunity of contributing to a comprehensive review of our family law system and, prior to answering specific questions posed by the ALRC, we have addressed what we see as some key issues in this field.

² <http://www.abc.net.au/news/2018-03-16/children-wanting-surgical-gender-change-no-longer-need-court/9557444>

About Us

For Kids Sake is a health education, not-for-profit organisation dedicated to protecting children and their families from one of the most widespread, yet least-recognised, health risks they are likely to face: family separation.

Our mission is to:

- protect children from the mental & physical health risks associated with family separation, including all forms of harm, violence and psychological abuse;
- ensure that children's rights and needs are widely understood, protected and observed, in accordance with the UN Convention on the Rights of the Child;
- develop and promote a fresh approach to family separation that is evidence-based and outcome-focused, and that better prioritises the long-term wellbeing of children.



[View policy launch: 19 October 2017, Parliament House, Canberra](#)

Our vision is to create a major shift in how we think about family separation in order to create the safest, healthiest and best long-term outcomes for the tens of thousands of Australian children exposed to it each year.

We urge the federal Government, and all political parties and State/Territory Governments, to adopt and implement the following, six-point National Action Plan. And we ask the Australian Family Law Reform Commission to give consideration to these recommendations.

Executive Summary: Family Separation/Divorce

The **for kids sake** 6-point Plan³

Recommendation 1:

RECOGNISE family separation as a child health issue

Family separation needs to be considered first and foremost a child health & welfare issue, not a legal issue. The latest and best scientific and medical evidence should play a key role in determining what is best for children's long-term welfare.

Family separation is a major social issue best-suited to a Health, Family, or Children's portfolio, and we recommend that this critical issue should be addressed holistically and pro-actively under a dedicated Minister for Children & Young People. Continuing to view family separation primarily as a legal issue, managed by the Department of the Attorney-General, will result in ongoing, serious and avoidable harm to our children and future generations.

Recommendation 2:

EDUCATE & SUPPORT families better – especially during separation

Investment should be made in education and early, comprehensive support for families. This should include a national educational campaign on better managing relationships and separation, including raising awareness of the potentially harmful consequences to children of family breakdown and the extreme risks, consequences and prevalence of some forms of psychological child abuse and family violence. The availability and benefits of coaching, conciliation, family-friendly resolution services, and comprehensive, online resources for separating parents and their children should also be promoted nationally as mainstream, healthier alternatives to family court proceedings.

Recommendation 3:

INTRODUCE specialised training, accreditation & high levels of accountability for all professionals involved

All professionals involved in making decisions that profoundly affect the lives of children must be properly qualified in this specialisation. An accreditation system for the necessary skills should be implemented, new training courses developed, and a database of qualified specialists made publicly available. This should include, but not be limited to: social workers, counsellors, psychologists, family dispute resolution practitioners, family court report writers, lawyers and judges.

New standards of accountability should be introduced, guaranteeing routine and more open analysis of performance, conduct and outcomes – replacing the current culture where scrutiny is inhibited (even by legislation). When the lives of children are at stake, no health or legal professional should be immune from legitimate scrutiny and independent and transparent review.

³ For more detailed recommendations, see pages 40-49 of our full policy document (available on request)

Recommendation 4:**INVEST in healthier, modern alternatives to legal procedures**

Investing in our children is one of the most cost-effective investments of all. The government should prioritise investment in a diverse range of government and private sector initiatives that are less harmful and more cost-effective than family court proceedings. These should include programs such as: earlier education and health-focused support; high-quality coaching and counselling for parents and children; better conciliation, mediation and family dispute resolution services; Medicare-supported health/family care plans; the development of comprehensive, practical, family-friendly online resources; and online/smartphone apps that facilitate parental cooperation and provide ready-access to educational resources for families who need help and support more than they need lawyers and courts.

Recommendation 5:**PRIORITISE non-adversarial conciliation & arbitration**

When governments do intervene in matters that affect children, such interventions should be urgent, expertly managed, evidence-based and outcome-focused. Above all, they should “do no harm”. Family courts are slow, unaffordable, frightening and adversarial – and they neither monitor, nor obtain feedback from, the outcomes of their decisions. They are not fit-for-purpose and cannot ensure that the best interests of children are achieved.

For most family separations (where there is no history of family violence, abuse or neglect), a streamlined, more cost-effective, healthier government intervention should be introduced nationally – and private sector equivalents supported – based on the most effective, existing models of conciliation and arbitration. Attendance at this new Tribunal or Commission should be a pre-requisite for accessing the family court system.

Preliminary decisions about parental care arrangements should be made on an urgent basis and pro-actively and professionally monitored thereafter. Failures by parents to adhere to arbitration decisions should be referred automatically to local courts for expedited rulings and enforcement. Appeals against arbitration decisions should be heard in the appropriate court. Non-adversarial arbitration should be funded, promoted and marketed as a mainstream alternative to family courts.

Recommendation 6:**MAKE family law – and its implementation – simpler, fair and focused on the long-term welfare and rights of children**

The Family Law Act – originally framed in the context of parental disputes, rather than children’s welfare – should be comprehensively revised, simplified, shortened, and based on the core principles of:

- i) the paramountcy of the long-term welfare of children (as distinct from “best interests”);
- ii) prevention of exposure of children to all forms of physical and psychological harm;
- iii) the maintenance of a child’s relationships with fit and willing parents, and other family members, central to the child’s long-term wellbeing;
- iv) natural justice and gender equality; and
- v) the Universal Declaration of Human Rights and the United Nations Convention on the Rights of the Child.

Executive Summary: Family Violence

1. **UNIFORM, NATIONAL POLICY**

Uniform national legislation, definitions and treatment of family violence should be adopted;

2. **SEAMLESS, INTERSTATE INTEGRATION**

Pathways to ensure seamless information-sharing between Federal, State and Territory agencies addressing family violence should be introduced or reinforced;

3. **EARLIER INTERVENTION**

Earlier interventions than family law can offer should be considered a high priority to prevent the onset of family violence, including educational programs and stronger, earlier and ongoing support for children and families through existing educational, medical, health and social networks;

4. **LOCAL COURTS SHOULD ASSESS FAMILY VIOLENCE**

The safety of children and adults who may be affected by family violence is best served by State-based child protection agencies, courts and police systems, acting urgently, rather than by our current family court system;

5. **(EX-)PARTNERS SHOULD NOT CROSS-EXAMINE ONE ANOTHER**

Nobody should be cross-examined by a partner or ex-partner. This is an inappropriate process not only for victims of intimate partner violence;

6. **A NON-ADVERSARIAL APPROACH**

For family separations with no history of family violence, the creation and promotion of non-adversarial approaches is essential for the long-term wellbeing of any children involved; this will also help prevent the onset of family violence - especially towards children - that is associated directly with prolonged, adversarial court proceedings. More broadly, a more inquisitorial approach should be considered for all investigations of family violence;

7. **INTERVENTIONS MUST PROVE THEIR WORTH**

Courts and alternative interventions to address family violence must demonstrate accountability, success and an outcome-based approach if they are to receive support and financial investment from government;

8. **SPECIALISED PROFESSIONAL TRAINING**

All professionals involved in interviewing or assessing children in the context of family violence (or family separation) must have appropriate accreditation in this specialty;

9. ACCOUNTABILITY

A new system of accountability, and associated accreditation, should be introduced for all professionals and this should be open to public scrutiny;

10. A SINGLE REGULATORY BODY

A new, single agency should be given regulatory oversight over all social workers, counsellors, psychologists and other such professionals working in the field of family law;

11. A BETTER, EARLIER CHILD ADVOCATE

In any family law proceedings, children should have early and ongoing access to a suitably qualified professional upon whom they can rely. Even earlier intervention is highly preferable, and lessons should be learned from international practices such as the Scottish “Get It Right For Every Child” model where every child has an assigned, welfare-focused contact person or advocate (of a very different nature) from birth;

12. COMPENSATION

Victims of family violence should be financially compensated where this is found to be due, wholly or in part, to institutional failings. However, linking financial distribution of family assets to other, independent issues – including the occurrence of family violence or the percentage of parental care – risks creating incentives and complexity that may ultimately not be in the best interests of children;

13. A NEW, NATIONAL “NO CONTACT ORDER”

Consideration should be given to a new form of no-fault protection order – a “No Contact Order” – that truly prioritises safety by being able to be issued administratively – swiftly and automatically – yet neither implies blame or criminal conduct by one party (which may take longer to assess or require higher standards of evidence), nor risks the major trauma to children of potentially wrongful, sudden separation from a loving parent;

14. A HOLISTIC, CHILD-FOCUSED APPROACH TO REFORM

There should be an evidence-based, child-focused and holistic approach to family law reform; making changes based purely on any one issue, however expedient or popular, may compromise fundamental aims of the family law system as well as the long-term welfare of children subject to it.

Some key changes to legislation (and family law rules & practices)

1. The Family Law Act should be significantly shortened, simplified and largely re-written, using plain English;
2. The principles of the Universal Declaration of Human Rights, the United Nations Convention on the Rights of the Child, of natural justice, and of gender equality should be explicitly incorporated into the legislation;
3. The paramount principle of the Act should be the long-term welfare of children. How to achieve that, based on the best medical and scientific evidence, should be made more explicit in legislation. This should include, but not be limited to:
 - a. a requirement to make determinations on an urgent basis, within a specified time-frame, wherever children's health, safety or maintenance of significant relationships are at stake;
 - b. recognition of the life-long and intergenerational impact of childhood trauma as a consequence of aspects of family separation such that the following are avoided:
 - i. a child's exposure to all forms of abuse and violence (clearly and better defined to include both physical and psychological forms); and
 - ii. loss of any of a child's significant, pre-existing and positive relationships with parents and extended family members;
4. Where scientific knowledge cannot be explicitly incorporated into legislation, family law should explicitly permit all litigants, whether legally or self-represented, to present relevant, peer-reviewed scientific evidence to the court. At present, case law largely precludes the presentation of such evidence, except by a recognised expert involved with the case;
5. Usage of the current phrase "the best interests of the child" should be reconsidered. It is too vague, poorly defined and inconsistently interpreted. It is not being applied consistently and objectively;
6. Legislation should require that applications to the family law system in matters of abuse or violence should be directed urgently to local, State-based courts, where seamless integration with State-based child protection and other agencies should be prioritised;
7. Applications in matters relating to family separation should be accepted only where applicants can demonstrate such endeavours as having:
 - a. attended pre-requisite counselling and coaching (e.g. 'Mums and Dads Forever' courses) and read/viewed prescribed materials about children's welfare during separation, and alternative resolution methods;
 - b. made genuine and significant attempts at mediation, conciliation and family dispute resolution with accredited professionals on multiple occasions;

- c. engaged in using readily available aids to parental collaboration, such as online or smartphone apps that facilitate and document parental communication and engender greater collaboration;
 - d. attended a session with a court official explaining the consequences and procedures of entering the family law system.
8. Once an Application has been accepted, it should be a requirement that all parties attend a preliminary, substantial hearing at which major issues should be ventilated and potential solutions explored;
9. The Act should stipulate the qualifications and accreditation required of any expert witnesses or other professionals it appoints. Such qualifications should explicitly include highly specialised training in working with children;
10. All judicial officers should be required, by legislation, to have highly specialised skills not only in understanding family law rules and legislation, but in understanding children's development, behaviour and welfare. Minimum levels of ongoing, annual training should be stipulated;
11. Legislation should stipulate what level of knowledge is expected of a judicial officer and what should be regarded as common knowledge that can be brought to bear on any judicial decisions, instead of leaving this to case law to establish;
12. The amount of any financial settlement (whether distribution of assets or future income) must be decoupled from the amount of parental care. At present, the direct and ongoing linkage between the two both prolongs harmful parental interactions and is a key factor inhibiting otherwise swift decisions about children's care arrangements;
13. It should be a requirement that courts ensure that all children are appropriately monitored and followed up after judicial decisions and that the courts obtain feedback on the short- and long-term outcomes of their decisions;
14. Self-represented litigants should be permitted to have assistance, including at the bar table, from a friend or colleague, whatever the qualifications of either. At present, some self-represented litigants are unfairly denied the opportunity of having such assistance, commonly referred to as "a McKenzie friend";
15. Family courts should not be permitted to inhibit or interfere with independent investigation of any professional involved in family law proceedings by the appropriate regulatory body, and a new regulatory body overseeing all such professionals should be established;
16. s121 should be replaced with wording that opens up the family law system to scrutiny and permits the open discussion of family law matters, subject only to it being in the national interest. The current clause protects the system, not the children;
17. Family law should adopt an inquisitorial, rather than adversarial, approach to resolving family matters, recognising the otherwise extreme risks to children and their families.

Responses to questions

Objectives and principles

Question 1: What should be the role and objectives of the modern family law system?

1. To help ensure and contribute to the long-term welfare of families, and especially children, and secure social justice for them, based on:
 - i) the principles of international conventions on human rights and the rights of children; and
 - ii) evidence from the best scientific and medical research.
2. To model, for society as a whole, processes and outcomes of family separation that are fair for all family members and proven, through research, evidence and feedback, to be best for children's long-term welfare.

While it may be true that a majority of families avoid prolonged court proceedings, our family law system nonetheless sets the tone for separations throughout the country:

“Even though only a small percentage of parents end up in court to resolve their custody issues, custody laws affect all separating parents by establishing norms about what their state or their country believes is in children's best interests.” ⁴

3. To become an intervention of last resort – for both children's and financial matters – not to presume it can contribute positively or effectively to the lives of children and their families given its inherent characteristics of being slow, unaffordable, adversarial and frightening to most who encounter it.

Once it is recognised that every child in a separating family is at risk, and that our family law system inevitably adds to those risks, the system should be required to pro-actively seek to minimise its intrusion into the lives of children.

Once it is recognised that adults in separating families generally need great support, compassion and understanding, and that the family law system is well-suited to provide none of these, it should seek to ensure that these adults are directed to more appropriate services prior to entering the system.

Once it is recognised that systems other than family law can resolve the majority of financial settlements in ways that are better, more cost-effective and, importantly, more enduring, the system should be required to take measures to minimise the involvement of family law in financial as well as children's matters.

⁴ Nielsen, L (2018) [cited above]

Question 2: What principles should guide any redevelopment of the family law system?

1. **DO NO HARM**

This should be a fundamental principle at the core of any family law system. If and when a government agency chooses to intervene – or not to intervene – in the lives of children and families, it must ensure that it does not contribute to the risks, harm or trauma to which people, especially children, may be exposed;

2. **CHILDHOOD MATTERS**

Every day in the family law system puts, or keeps, a child at risk – yet, many spend months or even years there. All matters involving children must be dealt with urgently;

3. **CHILDREN'S RIGHTS & NEEDS**

Children deserve to be protected from all forms of harm. The Family Law Act already explicitly recognises this but fails to give proper consideration or weight to one of the most widespread forms of harm experienced by children: loss of a relationship with a parent, extended family members or long-time friends. Our family law system should more explicitly recognise children's rights and needs to have those who've played a central role in their lives – whether biological or other parents, grandparents, or close friends – continuing to do so after separation, providing they are fit and willing;

4. **EVERY CHILD IS VULNERABLE**

A recognition that every child in a separating family is at risk and that family law does not offer effective prevention or cure for the harm or childhood trauma to which children may be exposed;

5. **COMPASSION**

Parents in separating families should be treated with respect, empathy and compassion, as we would with adults experiencing other difficult times or social issues, and other human frailties;

6. **RECOGNISE THE LIMITS OF FAMILY LAW**

A recognition that family law offers neither cure for, nor prevention of, family violence; solutions require a fresh, broader approach including earlier interventions & education;

7. **FEEDBACK AND ASSESSMENT**

Assessment, monitoring and feedback are essential components of most systems, but largely absent from our family law system. If family courts cannot follow up on the welfare of children after decisions, another mechanism must be put in place to ensure the ongoing welfare of children and routine feedback to judicial officers to improve their decision-making;

8. **THE REAL STAKEHOLDERS**

Children and their families – not judges, lawyers or social workers – should be considered the primary stakeholders of any family law system (and of any review of it). Their long-term welfare should be paramount.

Access and engagement

Question 3: In what ways could access to information about family law and family law related services, including family violence services, be improved?

1. Better national coordination and consistency;
2. Simplified, readily accessible and more comprehensive online content.

However, a diverse range of alternative government and private sector initiatives would be better-placed to address family violence and family separation issues more cost-effectively.

Question 4: How might people with family law related needs be assisted to navigate the family law system?

1. By providing strong, clear direction on how to access healthier, alternative methods of dealing with 'family law related needs';
2. By providing face-to-face access to a court officer, for all parties, prior to lodgement of any Applications;
3. By creating comprehensive, online resources using plain English, and online forms that are simple to use for those without legal training or with limited computer or English skills;
4. By completely reconsidering the use of Applications, Affidavits and the current processes of family law. It is a widespread and legitimate view that much better outcomes could be achieved largely by talking openly and directly with participants at the very start of proceedings, rather than allowing prolonged processes, based on written words, to obfuscate and make complex what could have been much simpler.

Question 5: How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

This question highlights the inappropriate nature of family law proceedings for a majority of those involved in them, not just Aboriginal and Torres Strait Islander people. Our organisation has extensive experience in aboriginal communities and is fully aware of how foreign and daunting, if not impossible, any court proceedings are.

As for all Australians, the opportunity at the very start, prior even to the initiation of any legal proceedings wherever possible, for people to sit down and talk about the issues and solutions – with real people who understand any cultural issues involved – is critical.

Question 6: How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

As above, the current system is foreign and unnavigable even to well-educated, fluent English-speakers. Creating a system focussed on people actually talking directly to people who understand, would be an invaluable, if radical, shift from today's highly technical, and sometimes archaic and arcane, written-English approach.

Question 7: How can the accessibility of the family law system be improved for people with disability?

Most courtrooms by now are hopefully equipped for people with a wide range of abilities. A substantial shift to online procedures, accessible to people with limited and varied skills, would be of significant benefit to all.

Question 8: How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

Question 9: How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?

The changes we propose would greatly benefit all people, from all cultures and parts of Australia, and of all genders and backgrounds. A substantial shift away from court proceedings to human interactions with counsellors, coaches, mediators or conciliators who can readily be based in rural Australia, operate online, or specialise with respect to culture, LGBTIQ people, and other aspects of human diversity, offers improvements for all Australian families.

Question 10: What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

1. The family law system should, prior to entry, strongly facilitate (and require demonstrated attempts to use) other quicker, healthier mechanisms for resolving family issues;
2. It is profoundly wrong that decisions affecting the lives of children can be determined by the relative wealth of litigants. An adversarial legal system, staffed by lawyers charging high fees, will nearly always create, rather than diminish, inequity between the parties. There should be financial incentives to settle, not to continue with, litigation;
3. Consideration should be given to standardising or capping the costs of reports (and legal services) which vary widely in cost and cannot effectively be challenged and scrutinised by litigants, given the sensitive nature of their involvement in proceedings;

“There should be financial incentives to settle, not to prolong, litigation”

Question 11: What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

1. The current system is difficult for almost any unrepresented litigant to manage, even those with high-level qualifications in other fields;
2. Again, a shift from court- and paper-based procedures to up-front face-to-face contact, including resolution, coaching or the provision of advice and educational materials, as well as to online methods, will assist in this area;

3. Family courts should each have one or more staff members dedicated to liaising with, and readily accessible to, self-represented litigants;
4. A further shift from adversarial litigation to a range of alternatives is essential, including a renewed focus on coaching and education, enhanced mediation, and arbitration as a readily available, well-marketed supplementary alternative to court procedures. To quote former UK family court judge, Sir Paul Coleridge, “arbitration is a no-brainer”;
5. In some family courts in Australia, judges deny self-represented litigants the opportunity of having assistance at the bar, or a “McKenzie friend”. This further and greatly disadvantages self-represented litigants and contributes to denying them natural justice;
6. Appeal processes need to be substantially changed and simplified. At present, it is all-but-impossible for the majority of self-represented litigants to mount a successful appeal, however valid it may be. The costs are prohibitive; the bureaucratic requirements of the court arbitrary and onerous; and the manner in which prior judgments can be questioned so narrow and technical that few individuals can access natural justice and, potentially, protect their children from harm due to poor or unsafe decisions.

Question 12: What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Family Courts are, in our view, no place for unrepresented litigants. They are frightening and highly specialised arenas where only lawyers and judicial officers are at home.

Much greater efforts are needed to keep all potential litigants, and especially those without legal representation, out of court and away from legal proceedings where they are likely to be out of their depth, and their children are likely to suffer as a consequence.

Question 13: What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

Australian family courts are largely designed to be imposing and, in effect, frightening. We can see no reasonable argument in favour of adding to the stress of people involved in family law proceedings in this way. Resolving family issues should take place in family-friendly environments, not courtrooms where a judge sits, literally, on high and treats the venue as his/her own.

Alternative, family friendly locations can readily cater for having multiple entrances and multiple rooms to address any safety concerns.

Legal principles in relation to parenting and property

Question 14: What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?

1. At present, despite its enormous length, the Family Law Act is both highly prescriptive and extremely vague (often in just the places where, respectively, more inclusive or more precise wording is needed). This results, among other things, in the law's failure to give sufficient direction to judges to base their determinations on the best, scientifically valid evidence and risks allowing judges, instead, to make idiosyncratic decisions informed by personal prejudices rather than medical research or objective and repeatable science;
2. Notwithstanding the clearly articulated position of the Chair of the ALRC Review with respect to parental conflict and its apparent omission from Part VII⁵, and the reference to conflict in the last major review of Australian family law⁶, we urge great caution and a wholly evidence-based approach to the key issue of parental conflict. Conflict, even serious conflict, does not necessarily preclude co-parenting (or shared parenting).

In our considered opinion, it would be harmful to many children were the view that “high conflict” or even “destructive parental conflict” is incompatible with co-parenting to be reflected in legislation because, *inter alia*:

- a. Such a position is not supported by the most recent and thorough science and the latest, comprehensive meta-analysis of studies on this specific subject⁷;
- b. Co-parenting can actually contribute positively to a reduction in parental conflict, as parents re-establish how to cooperate, whereas limiting access to children for one parent can significantly increase conflict, sometimes with extreme, adverse outcomes;
- c. Determining what level of conflict crosses any supposed threshold would, in practice, be impossible to accomplish objectively or consistently; and
- d. This would establish a profoundly dangerous incentive whereby parents who create more conflict, or at least the appearance of it, are rewarded with more care of children and more money, and children would be harmed as a consequence.

“The view that parental conflict and co-parenting are incompatible is not supported by the best evidence and, were it to be enshrined in legislation, would create a powerful incentive for the escalation of conflict and cause greater harm to many children.”

⁵ e.g. Rhoades, H. (2014). Families, policy and the law. AIFS. <https://aifs.gov.au/sites/default/files/fpl17.pdf>

⁶ “Every picture tells a story” (2003). House of Representatives Standing Committee Report.

⁷ Nielsen, L (2018). Journal of Divorce & Remarriage.

<https://www.tandfonline.com/doi/full/10.1080/10502556.2018.1455303?src=recsys>

3. Current legislation does not adequately reflect the diverse nature of families in 2018 nor, most importantly, does it provide an understanding of either the science of what's best for children or of children's views of who is important to them. Such factors should be explicitly incorporated into revised legislation;
4. We believe that, notwithstanding its mantra of the best interests of the child, the Family Law Act had its origins in, and was developed in the context of, determining parental disputes; it needs to be substantially reframed from the perspective of children if we are genuinely putting them first;
5. Truly child-focused legislation should require that judicial officers explicitly consider all individuals with whom a child has had a close connection or bond and, if they are fit and willing to maintain that connection, determine how each of those significant relationships will be maintained after separation;

“Revised legislation should require judicial officers to explicitly consider how a child will maintain relationships, after separation, with all individuals with whom s/he had prior, significant and positive relationships.”

6. Further, given that precedent has made it difficult (especially for self-represented litigants) to introduce scientific evidence into court proceedings, and that judicial officers may not have sufficient knowledge of the best and most recent scientific research, we strongly advocate that changes to the legislation clearly guide judicial officers by reflecting the best medical and scientific research, especially with respect to the impacts of childhood trauma and physical and psychological harm, and the emotional (and financial) benefits of ensuring that all of a child's important and healthy relationships are fully maintained after separation;
7. Adversarial law is, in many ways, the antithesis of science. And choosing to rely upon legal arguments based on advocacy to determine children's futures, rather than scientific evidence, does harm and injustice to children. Science is repeatable and consistent; by contrast, the idiosyncrasy of judicial decisions is even anticipated in legislation that expressly precludes appeals on the basis that a different judge might have made a different decision.

Science is the best way we know to predict future events: the arrival of a comet, the risks and likely outcomes of smoking, and how children will best thrive after separation. Family law is being asked to do something that intrinsically it cannot do; unlike other aspects of law where judgments are based largely on past events, family law is, in addition, attempting to predict what's best for the future of children. Yet, it does so without primary reliance on available science and its repeatable analyses of large sample sizes, preferring instead to insist that every family is different and that an individual judge knows best.

“Revised legislation should place greater weight on scientific evidence and less reliance on legal advocacy in order to reduce harm to children exposed to the family law system.”

To produce the best outcomes for children (which, in our view, cannot be accomplished within a family law system), revised legislation should reflect the latest scientific evidence; permit the presentation of scientific evidence in the courtroom (notwithstanding existing case law); and monitor, and obtain feedback on, all decisions made at least on an annual basis until children reach the age of 18.

Question 15: What changes could be made to the definition of family violence, or other provisions regarding family violence, in the *Family Law Act* to better support decision making about the safety of children and their families?

1. Decisions concerning children exposed, or potentially exposed, to family violence are of the utmost urgency. We believe that violence is a criminal matter and should therefore be dealt with, urgently, in local courts;
2. The issue of family violence and abuse of all forms towards children should be given much greater prominence. As should a recognition that science has documented how the psychological components of abuse and violence, whether or not physical violence is involved, are the most pernicious and enduring; at present, insufficient weight is given to psychological abuse/violence in general;
3. The definition of family violence should, more explicitly, cover the forms of violence to which children are most commonly exposed. In addition to referring to sexual/physical abuse, it should, more explicitly address psychological abuse and violence, the harm from which can be lifelong rather than immediately visible. *Inter alia*, this should explicitly include the extreme and abusive psychological manipulation (commonly referred to as “poisoning a child’s mind” or “turning a child against a parent”) to which many children are exposed during family separations, especially those involved in protracted family law proceedings.

Question 16: What changes could be made to Part VII of the *Family Law Act* to enable it to apply consistently to all children irrespective of their family structure?

As above, instead of being focused in effect on which of two parents gets the kids, genuinely child-focused legislation should require judicial officers to give explicit consideration to all people with whom a child has had a significant connection or bond and to determine how each of those significant relationships (unless proven harmful to the child) will be genuinely and substantively maintained after separation.

The findings of scientific and medical research, which prove both the harm done to children when excluded from loving family members and the benefits of children having both parents playing central roles in their future lives (instances of family violence or abuse excepted), should strongly inform how the legislation is framed.

“Judicial officers should be required to give explicit consideration to all people with whom a child has had a significant connection ... and to determine how each of those significant relationships will be genuinely and substantively maintained after separation.”

Question 17: What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Question 18: What changes could be made to the provisions in the *Family Law Act* governing spousal maintenance to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

Question 19: What changes could be made to the provisions in the *Family Law Act* governing binding financial agreements to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

It is important to keep financial matters as separate as possible from children’s matters. The nexus between financial settlement (both assets and income) and percentage parental care creates a powerful incentive for outcomes that are not best for children’s long-term welfare and greatly prolongs and inhibits more rapid settlement of children’s matters in many cases.

The law should, as a baseline, routinely consider the assets of parties at the start and end of their relationship, and the net change. A simpler, more formulaic approach to finances could also be applied, unlike the often-arbitrary approaches in many judicial decisions.

“Although introduced for understandable reasons, the nexus between the percentage of any financial settlement and the percentage of parental care results in great harm to many children. This direct connection needs to be dismantled.”

Resolution and adjudication processes

Question 20: What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

A high proportion of cases could be resolved far quicker and far more cheaply by holding a more substantial first hearing, before an experienced judge or an experienced family consultant, where all issues are ventilated and considered, other family members and those with knowledge of the children could participate, and litigants are permitted to talk openly rather than hide behind the obscure language of affidavits and lawyers acting in their individual interests rather than the broader interests of the children and family as a whole.

Family court cases become more complex the longer they are within the system. For many, children's matters can be resolved relatively swiftly, especially if kept largely separate from financial matters.

"Family courts create complexity"

Even more importantly, courts should ensure that all avenues of coaching, education, mediation, conciliation and arbitration have been exhausted before costly and harmful court proceedings are allowed to begin.

Question 21: Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

Yes. In fact, as above, courts should require that, other than in demonstrably exceptional cases, all alternative services and processes have been exhausted prior to accepting an Initiating Application.

"Alternative, non-court methods of dealing with family separation should be a primary focus of this review."

These alternative processes – including coaching, enhanced mediation, conciliation and arbitration for both financial and children's matters – should be a primary focus of this Family Law Review.

Question 22: How can current dispute resolution processes be modified to provide effective low-cost options for resolving small property matters?

Financial matters should consistently be diverted to high quality mediation and arbitration (as can occur under the AAT). The family law system should be obliged to ensure that all such avenues, whether through the private sector or government, have been exhausted prior to accepting Applications.

Question 23: How can parties who have experienced family violence or abuse be better supported at court?

1. See Executive Summary: Family Violence (above);
2. Parties who have experienced family violence or abuse should be treated with the utmost understanding and compassion. The family court environment is not well-suited to do this. Such individuals need appropriately qualified support workers and health professionals, rather than lawyers;
3. Such individuals should not be required to encounter those who have committed the violence or abuse, and should certainly never be cross-examined by them. It is our view, more broadly, that cross-examination is an entirely inappropriate and inhumane

procedure for partners or ex-partners under all circumstances;

4. Parties seeking to prove potentially criminal matters such as family violence or abuse should do so through local courts, not family courts, where adversarial cross-examination by professionals may be appropriate. Adversarial cross-examination is not appropriate for the majority of separating families, especially where children are involved and their parents need help to work together for the sake of their children, not a system that pulls them significantly further apart.

Question 24: Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

1. Assessing violence/abuse:

As above, where parties are seeking to prove family violence or abuse, the expertise of local courts should be urgently employed;

2. Helping victims/perpetrators:

Given that family law offers no prevention, cure or solution to family violence or abuse, other processes should certainly be prioritised. Both perpetrators and victims are likely to need help, coaching, counselling and/or education and support. Courts are not the appropriate venue for this and courts do not have the necessary expertise in-house to determine the most appropriate remedies;

Question 25: How should the family law system address misuse of process as a form of abuse in family law matters?

Misuse of process is, in our view, not merely commonplace, but an almost inevitable part of the current family law system and one of the many reasons why it will never be fit-for-purpose. The best way to address this is to keep families away from such a system.

As it stands, our family law system empowers and rewards individuals who are unreasonable, coercive or manipulative at the expense of individuals who are reasonable or genuinely focused on what's best for any children involved.

Furthermore, the very existence of this system, and community understanding of how it operates and can be abused, contributes to settlements that are not best for children in many families who avoid court. The implicit threat of going to court is sufficient to coerce a reasonable parent into an unfavourable settlement, both for themselves and their children, because they realise the damage of court proceedings will be even greater.

For families allowed to enter such a system, it is imperative, among other things, that:

- Orders are consistently and reliably enforced;
- Judicial officers are supported in making brave decisions that disincentivise misuse of process; and
- Parents are not rewarded for improper conduct, including the withholding of children from fit and loving parents without good reason or court order.

Question 26: In what ways could non-adjudicative dispute resolution processes, such as family dispute resolution and conciliation, be developed or expanded to better support families to resolve disputes in a timely and cost-effective way?

1. See Executive Summary: Family Separation/Divorce (above);
2. A diverse range of private sector and government alternatives to family courts must, as a high priority, be created, incentivised and encouraged;
3. Unlike the family court system, where scrutiny and feedback is almost entirely absent, these fresh, alternative approaches should be subject to ongoing review such that evidence is created of the relative success of different methods;
4. Such alternatives must be properly and widely marketed as mainstream alternatives to courts and, given the long-standing presence (or market-advantage) of the family courts, the government should facilitate and, to some extent, fund this promotion;
5. Alternative processes include: high quality apps for smartphones or computer usage that can address all issues ranging from communication between parents to educational coaching; high quality personal coaching, as much as counselling, for parents; enhanced mediation and conciliation, where parents may be prepared (as in some parts of New Zealand) with pre-emptive coaching and mediators/conciliators are highly trained;
6. It is imperative that such alternatives are somehow mandatory and that the family law system ensures that all such options have been exhausted before allowing families access to our much more expensive, less cost-effective, and less effective family courts. Especially where children are involved, it must never be acceptable to say some parents simply can't mediate and must therefore be allowed to go to court. Our greatest responsibility must be to those children;
7. The onus must be placed on the family law system to protect children from entering a family court process that will inevitably cause further harm to them.

Question 27: Is there scope to increase the use of arbitration in family disputes? How could this be done?

Arbitration, whether through a government agency such as a new Tribunal or Commission or through equivalent private sector initiatives, should be mandatory prior to acceptance of applications by family courts – both for children's and financial matters.

Courts should only become involved in a minority of cases – where, for instance:

- i) a party wishes to prove family violence or abuse (in which case it should be local, not family courts);
- ii) a party wishes to appeal otherwise-binding arbitration; or

- iii) a party can demonstrate that they have genuinely attempted to engage in the use of online/ smartphone apps; coaching/counselling; mediation/conciliation; and arbitration, but the other party has refused to do so.

Question 28: Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?

Yes, online dispute resolution processes should be part of a diverse range of government and private sector initiatives that provide more cost-effective and healthier alternatives to courts.

Such processes can best be supported by making them mainstream through marketing and education and by ensuring that family courts do not allow access to those who have not attempted to use such alternatives.

Like the family court processes themselves, all interactions between family members via any such process are subject to abuses. Many new approaches, however, including smartphone apps, allow monitoring by a third party, whether a lawyer, mediator or counsellor. Such measures can minimise risks much better than the court system.

Question 29: Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?

Yes, but why do this within the family court system when it can be done so much more effectively without?

We also believe that the phrases “complex needs” and “complex cases” are often misused. Much of the complexity of family law proceedings arises from the proceedings themselves: the excessive duration, with ever-changing circumstances; the prevalence of psychological child abuse as a consequence of this; the use of legal advocates to exaggerate, minimise or hide the human frailties of those involved. The evidence of what is going on in a family is often much easier to elicit at the start of proceedings – or, better still, before they have even begun.

Question 30: Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?

We're unclear as to the meaning of, or anticipated answers to, this question. At every stage, families should be given the best possible tools to resolve matters without putting them in the hand of a government agency such as the family court. Australia's government agencies do not have a good track record of being good parents, and our family courts are no exception.

Integration and collaboration

Question 31: How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

See above.

Question 32: What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?

Safety concerns for children come in several categories. Some need to be dealt with urgently by the appropriate authority. Many can be best addressed without accessing any court at all.

“The safety of children and adults who may be affected by family violence is best served by State-based child protection agencies, courts & police systems, providing all professionals involved have specialised training and performance and outcomes are independently monitored.”

1. Where there are concerns for the safety of children that amount to potential criminal activity, including violence or abuse, an individual should be able to access a local/criminal court on an urgent basis;
2. Where those concerns may not be about behaviour amounting to criminal activity, an individual should have ready access to State-based child protection services, as at present;
3. It is very common in family court proceedings, for instance, for both parents to express safety concerns for their children when with the other parent. Where concerns are minor or about parenting differences, or where it has been not been found that children’s safety is at risk, it is imperative for the long-term safety and welfare of children that such concerns are not allowed to be used to manipulate decisions about a child’s parental care or access to parents and extended family members.

Question 33: How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?

Uniform national policies, and seamless integration between agencies, are important. But far more substantial changes to the current system are required (see above) if children are genuinely to be better protected from harm.

Children's experiences and perspectives

Question 34 How can children's experiences of participation in court processes be improved?

"The family court completely failed us." Amelia C, WA

These were the words of a teenager whose mother had killed herself, after murdering her two other daughters, and who could clearly see the impact that court processes had on her mother and family.

"My overall experience of the Family Court has been one of immense negativity, distress and trauma. The social workers, counsellors, and psychologists who interviewed me throughout my childhood caused me to develop a deep mistrust of mental health care workers, a mistrust that lasted until I was well past 14 years of age."

The biggest issue here is not children's experiences of court processes, though these are bad enough, but their experiences of the outcomes: being left with abusive or mentally unwell parents; being removed suddenly from loving parents; losing significant relationships with multiple family members; becoming depressed or suicidal; and being exposed to life-threatening family situations.

Family separation, where family courts have been involved, is a common denominator in the tragic deaths of many Australian children.

Firstly, and most importantly, we need to keep as many children and their families as possible away from court systems entirely – with much earlier interventions, education programs etc. (see above). Involvement in court proceedings adds significant risk of harm to many children.

Once involved, however, a child should have automatic and ongoing access to a single, highly qualified professional. This person should have highly specialised skills as a child psychologist/psychiatrist, well-trained in working with children, forensic analysis and fully aware of the susceptibility of children to repeated, leading or suggestive questioning and to psychological manipulation and abuse.

Neither independent children's lawyers, nor judges, have the prerequisite training for this specialised task and ICL's, trained to represent the wishes of their client, often fail to distinguish the subtle, but significant, difference between representing the statements of a child and representing the best interests of that child.

"My young children were interviewed by sixteen different people from the family court and child protection during our three years in court. That's psychological abuse in my view, but I was powerless to stop it."
Lorraine M, VIC

It is imperative that children are not interviewed multiple times by multiple people. They should be interviewed once by a highly qualified specialist and this interview should be recorded so that the conduct and conclusions of that specialist are open to scrutiny.

Question 35: What changes are needed to ensure children are informed about the outcome of court processes that affect them?

This question illustrates further how the current system is wrong. Children should have someone they can trust to talk to at all times before, during and after the process – not just someone who comes and tells them “the outcome”.

Children should be able to talk to long-trusted individuals – grandparents, godparents, school counsellors etc. – at all times. And, lessons should be taken from international schemes such as Scotland’s ‘Get it Right for Every Child’ (GIRFEC) where children might have an assigned representative long before involvement in any family law proceedings.

Question 36: What mechanisms are best adapted to ensure children’s views are heard in court proceedings?

Much more must be done to prioritise systems that keep children out of court proceedings entirely.

Judges, lawyers and most court professionals do not have the specialist skills to listen to, and correctly interpret, what children say. As above, children should be given the opportunity, early on in proceedings, to speak with a highly skilled professional.

Long-time family friends and extended family members are generally better placed to provide children’s views to a court than an expert who sees a child for an hour or two and may not be able to tell the difference between a child who has been physically abused by one parent, or psychologically abused and manipulated by the other.

It is imperative that people who have known a child for a long time, and are trusted, are involved.

Question 37: How can children be supported to participate in family dispute resolution processes?

See above.

1. Individuals who know the children well, and who have known them for some time – extended family members, school counsellors etc. – should be given the opportunity to provide evidence. This evidence should be given significant weight, especially in consideration of the fact that court experts usually only meet a child for an hour or two;
2. Where necessary, children should speak with a single, highly trained professional who can share their views with the court. At present, there is a great shortage of professionals with the necessary experience of working with children, forensic analysis and understanding of court processes.

Question 38: Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

There are enormous risks in involving children in decision-making processes. The clear consensus of international experts is that children should NOT be involved in decision-making. Allowing them to think they have to choose between their parents is generally recognised as a form of psychological abuse.

“There is a world of difference between empowering children and making them feel responsible. One is good. The other can harm them for life.”

A strong distinction must be drawn between empowering children – not leaving them in the dark for months about what’s happening to their family and allowing them to have a voice – and making them feel responsible, which can be deeply harmful.

Involving children also creates the most powerful of incentives for one parent or another to influence their stated views – and this “turning a child against a parent” or “poisoning a child’s mind” is now so commonplace in family law proceedings, and causes such profound, lifelong, psychological harm to children, that many family court judges and lawyers have described it as one of the most difficult problems of all to deal with.

Children are, of course, enormously susceptible to the views and behaviour of their parents. In most circumstances, this is good; it’s what parenting is all about. But, in the context of family separation, where most parents are not functioning at their best, children become exceptionally vulnerable to inappropriate, extreme or undue influence.

“No slave was ever so much the property of his master as the child is of his parent” Maria Montessori

Question 39: What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

This question again highlights one of the great dangers of involving children in court proceedings at all.

No child should be left in the dark about what is happening to their family; they are all, by definition, involved or participating in their family’s separation, whether or not courts are involved. In our model of family separation, children would always be able to participate through trusted family members and friends, and through a single, well-qualified expert.

However, when a child expresses an explicit wish to participate in “family law system processes”, this should be approached with great care (see above). The younger the child, the more likely that the child requesting this has been subject to undue influence, and the more likely that the views and “wishes” they put forward are not genuinely their own.

Question 40: How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

1. By thoroughly analysing the existing literature, and academic papers, on children's lived experiences;
2. By liaising with organisations like *For Kids Sake* who speak with many children who have experience of family law processes;
3. By producing an objective meta-analysis of all such data;
4. By conducting large-scale surveys of young people's experiences (as some Children's Commissioners, for instance, have already begun to do);
5. Most importantly, by routinely following up on all children whose lives have been affected by a government decision (whether in a family court or through a child protection or other department).

"Imagine if a hospital never followed-up on major, life-changing procedures it did on children, and never got feedback to improve its decisions and operations. It would be a national scandal and front-page news. Yet, every year, our family courts make profoundly life-changing decisions for thousands of children – with no routine follow-up or feedback."

"In terms of whether it's a positive or negative outcome, [judges] would probably never know." Former Family Court CEO, Richard Foster, 2016 Senate Estimates.

Professional skills and wellbeing

Question 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Core competencies:

1. Highly developed personal skills for interacting with children of all ages, abilities, dispositions and cultures;
2. Highly developed personal skills for interacting with adults under extreme stress who are often in need of great compassion and understanding;
3. High-level understanding of child psychology and behaviour;
4. High-level understanding of adult psychology and behaviour;
5. Specialist training in child psychology and psychiatry and in objective observation and reporting;
6. Specialist training in forensic skills, especially when dealing with children. It is essential that all professionals come to each task with an open mind and do not pre-judge any individual. Adopting, in advance, any specific approach – including, for

instance, Trauma-Informed Care and Practice that makes an up-front assumption that an individual has been harmed – can be highly detrimental to children;

7. Specialist training in child suggestibility, in the susceptibility of children to influence, and in methods of appropriate, open questioning and of avoiding leading or suggestive approaches;
8. Specialist training in court procedures, and a thorough understanding of an adversarial family law system;
9. Specialist training in report-writing for courts, including:
 - a. avoiding jargon and writing in plain English;
 - b. understanding how an adversarial system may readily use careless words; and
 - c. not over-stepping the limits of their knowledge or role.

Required measures:

1. A new, national accreditation system for professionals able to demonstrate each of these core competencies, without which professionals should not be able to practice on children or within the family law system;
2. A requirement for ongoing, annual training in each of these core competencies and in the latest scientific and academic research;
3. A new, independent, national regulatory body to monitor the conduct and performance of all professionals involved in this field, including but not limited to social workers, counsellors, psychologists, psychiatrists, lawyers and ICLs, and potentially even judges.

AHPRA does not have the core competencies to do this work; is not transparent in its review processes; is not responsible for all professionals, such as social workers; and is not able to function wholly independently of the family court system, which currently prohibits its investigation of professionals during proceedings and must give its permission for any investigation to occur and for any court documents to be used.

“All professionals who make life-changing decisions about children should be subject to transparent and objective scrutiny. Such scrutiny must be carried out in a timely manner.”

4. An independent, publicly available, online database of professionals showing their accreditation to be involved in children’s and family law matters, and showing any reviews of their work by the regulatory body and, in particular, any positive or adverse findings.

Question 42: What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

Core competencies:

1. Highly developed personal skills for interacting with adults under extreme stress and, often, in need of great compassion and understanding;
2. An awareness of the risks of their own conduct being coercive, given the great power-imbalance in 'their' courtrooms; a recognition that with great power comes great responsibility;
3. High-level understanding of adult psychology and behaviour;
4. Specialist training in objective observation and assessment of evidence, and in avoiding confirmation and other biases;
5. Specialist training in child suggestibility, in the susceptibility of children to influence, and in methods of appropriate, open questioning and of avoiding leading or suggestive approaches;
6. High-level knowledge and understanding of the latest scientific and medical research on all relevant issues, including but not limited to: factors that affect the long-term wellbeing of children; the lifelong impacts of childhood trauma, physical and psychological abuse, or the loss of close family members; the relative success of children in intact, single-parent and co-parenting environments; the impact of family conflict on best outcomes for children; the importance for children's development of not being exposed to violence, abuse or neglect and of maintaining pre-existing relationships with all family members who are fit to do so.

Required measures:

1. A requirement for ongoing, annual training in each of these core competencies and in the latest scientific and academic research;
2. An independent, publicly available, online database of judicial officers showing evidence of their core competencies and of further, ongoing training, as well as any reviews of their work on appeal, or by the proposed, new regulatory body;
3. Despite their life-changing decisions, judicial officers receive little or no feedback about their work or the outcomes of any of their decisions. Senior judicial officers cannot be sued for improper conduct, and their findings can only be questioned, via appeal, under a narrow range of circumstances, and often only with the permission of the judicial officer in question. This profound lack of transparency and scrutiny is not acceptable. Not when children's lives are at stake.

All judicial officers should be subject to investigation and monitoring by a new, independent, national regulatory body that should be established to routinely monitor and assess the conduct and performance of all professionals involved in this field, including but not limited to social workers, counsellors, psychologists, psychiatrists, lawyers and ICLs, and even magistrates and judges.

Question 43: How should concerns about professional practices that exacerbate conflict be addressed?

Australian family law is adversarial; finding fault and creating conflict is an inherent part of the system. The idea that one can make it less so, for instance by introducing a Less Adversarial Trial system, is flawed.

The best way to address these concerns is with a paradigm shift: separating families should be kept away from an adversarial, conflict-generating system and helped in healthier, more child-focused environments.

Many aspects of the current family law system exacerbate conflict:

1. The stress of meeting lawyers and entering a frightening court building and process;
2. The high stakes created by the current system – of one's future, financial security and one's access to children;
3. The fact that lawyers are paid by the hour, rather than incentivised to settle;
4. Some lawyers encourage their clients to show greater hostility towards, or conflict with, their (ex-)partners;
5. Lawyers rarely communicate with self-represented litigants in a humane or compassionate manner and rarely recognise their obligations as officers of the court which, notwithstanding what they want for their client, should still put children's best interests first;
6. Lawyers frequently file documents late, at hearings, or contrary to orders, and appear to use this as a means to disadvantage other parties, especially self-represented litigants;
7. Legal and judicial conduct prolongs rather than minimises negative interactions between parents.

Each of these, and many other such examples, could be individually addressed. But only with a more holistic approach to dealing with family separation, treating it as child health issue rather than as a legal issue, will such concerns be properly addressed.

Question 44: What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

Working within the family law system can be highly stressful; everyone knows that the stakes are high, and workloads can be extreme.

The most important approach would be to dramatically reduce workloads by keeping a major proportion of potential family law cases out of courts, in healthier, alternative systems, and by creating systems that help resolve them well before they reach court.

The culture of coercive conduct and bullying that appears to pervade the judiciary, at least in some jurisdictions, must also be addressed as a high priority.

Governance and accountability

Question 45: Should s 121 of the *Family Law Act* be amended to allow parties to family law proceedings to publish information about their experiences of the proceedings? If so, what safeguards should be included to protect the privacy of families and children?

1. s121 should be substantially amended. In our view, it currently serves primarily to prevent scrutiny of the system, rather than to protect children. It is not in the best interests of children, or society as a whole;
2. For a start, s121 does not successfully safeguard the privacy of families and children; it purports to shut a stable door when that particular horse has bolted. What matters most to children is what their family, friends and school know, and what's said at home, at school and on social media used by family and friends. None of this is effectively prevented by s121; in fact, this potentially provides a further example of systems abuse as reasonable individuals are likely to observe its provisions strictly, while unreasonable parties are rewarded (and rarely, if ever, penalised) for making their stories public and defying this piece of legislation;
3. Anyone should be allowed to make notes in courtrooms (a right currently and routinely denied at least in courtrooms in the Family Court of WA); parties should be allowed to discuss their proceedings publicly; and media, subject to normal codes of conduct, should be allowed to publish information about any cases that are in the national interest;
4. The fact that a major national newspaper⁸ feels unable, in 2018, to publish the name of a court-appointed expert in family law proceedings whose behaviour was so egregious that he has been sent to a State Administrative Tribunal for professional misconduct, illustrates the far-reaching consequences of s121 as it stands.

Media should be encouraged to report responsibly on family law proceedings, not inhibited by draconian legislation.

5. Importantly, like the family law system in general, s121 sets the tone for all separations across the country and contributes to the perpetuation of the stigma associated with family separation and divorce: that it should not be talked about in public. This is harmful to society as a whole, and children in particular; we need to accept that family separation is part of life and facilitate it being talked about in a normal manner.

⁸ *The Australian*, May, 2018

Question 46: What other changes should be made to enhance the transparency of the family law system?

1. See above;
2. It is imperative that all professionals involved in family law procedures, whether social workers or judges, be subject to scrutiny, review, monitoring and fair and transparent complaints processes;
3. The establishment of a new, independent regulatory body should be a high priority;
4. The establishment of a transparent, publically accessible accreditation system for all professionals is essential;
5. The fact that even note-taking is still prohibited in courtrooms, such as in the Family Court of WA, is an illustration of how far we have to go to make our family courts transparent and to override the culture of secrecy (under the false pretext of protecting children) that pervades the entire system and contributes to maintaining an unhealthy model for how family separations may best occur.

Question 47: What changes should be made to the family law system's governance and regulatory processes to improve public confidence in the family law system?

1. See above;
2. There should be one, uniform, national system of family law, with a single administration that minimises expenditure on bureaucracy and complexities of procedures;
3. Salaries, allowances and benefits for judicial officers should be regularly reviewed, performance-based and readily available to the public;
4. All judicial officers and officers of the court should be subject to routine and transparent assessment, scrutiny and performance analysis;
5. One reason for the lack of public confidence is that the system appears to be a law unto itself. Few professionals are more immune to scrutiny, complaint or prosecution, for instance, than family court judges.

By legislation and case law, it is not possible to take legal action against a judge, even if their conduct has been highly and demonstrably unprofessional; even heart surgeons do not enjoy such immunity. There is no clear pathway for a litigant even to make a complaint against a judicial officer, and few self-represented litigants or legal professionals would dare do so during litigation anyway. The appeal process, furthermore, provides only a highly complex, unaffordable, and narrow avenue for disputing the decision of a judge; it does not address other aspects of their conduct.

To many, this gives rise to a strong sense of injustice; for some, it gives rise to an appearance even of corruption. If greater public confidence is sought, family court judges, and all judicial officers, should not have privileged status or immunity relative to other professionals. And, nor should barristers or expert witnesses. Legislation should be revised to reflect this;

6. The establishment of a new, independent body with regulatory oversight over all professionals involved in family law matters would go a significant way to improving the current situation. The stakes are far too high – the welfare of thousands of children – to leave oversight to any in-house Legal Practitioners' Complaints Committee, or to AHPRA, which rarely investigates allegations of professional misconduct in a timely manner or at all, and is not responsible for all professionals working in family law, such as social workers;
7. Australia's family law system, however, has too many fundamental and inherent flaws to warrant great public confidence or for confidence to be greatly improved. Though this was one of the primary, publicly stated goals of the last Chief Justice of the Family Court, it proved impossible; there is simply too widespread a view that our family courts are the wrong tool for the job for most families and not fit-for-purpose.

Some questions we should be asking

A much broader Inquiry into Family Breakdown/Separation is urgently needed. Terms of reference should not be focused primarily on family law, but on much more holistic and health-focused approaches. These are the questions we should be asking in the inquiry that we believe is needed: Protecting Children Beyond Family Separation.

We request that the Australian Federal Government inquire and report into the adequacy and ability of current policies, procedures, services and legislation to provide the best long-term outcomes from family breakdown/separation for children, with a focus on:

1. the long-term mental and physical health of children and their families exposed to family separation in general, and family court proceedings in particular;
2. the adequacy and appropriateness of evidence used in imposing outcomes on children and, in particular, the extent to which the best scientific research on what's important and best for children is, or should be, used as a foundation for decisions about their future;
3. the adequacy of any measures of accountability or outcome-based assessment of professionals, agencies and institutions involved (including the Family Court of Australia, the Federal Circuit Court and the Family Court of WA) and the extent to which each of these monitors, assesses and obtains feedback from the results of their interventions;
4. the appropriateness of the qualifications and experience of professionals involved in assessing children and their families, the adequacy of their training, and the appropriateness of the methods by which they are engaged;
5. whether current agencies involved in mediation, relationship counselling, and family dispute resolution are adequately qualified to do so and whether their approaches are sufficiently evidence-based and outcome-focused;
6. the extent to which family court proceedings increase the conflict and complexity of cases and to which modern alternatives – including expertly managed conciliation or arbitration in non-court environments – might minimise such factors;
7. the adequacy, availability and accessibility to families, prior to and during separation, of educational resources and support regarding emotional, health and legal aspects of the process of separation and of its specific, extreme health risks to children;
8. the adequacy of promotion, marketing and cultural awareness of the healthiest and most cost- effective routes to family separation;
9. the financial costs of family separation to the Australian economy, including: budgets of family courts, legal aid and family relationship centres; costs of legal services to families; loss of family earnings; lifetime consequences for children due to diminished finances in critical years; consequent medical and financial costs due to diminished mental and physical health, self-harm, disability or the death of children and/or members of their families.

Conclusion

Major changes to our family law system, and to the Family Law Act, are urgently needed. But, we must recognise that family law will never prevent, let alone cure, family violence. And it will neither prevent nor cure the childhood trauma to which family separation can expose children. In fact, it can exacerbate both.

A paradigm shift is needed in how we view and address family separation. We must recognise that, most importantly, this is a child health issue, not a legal issue. As one Canadian family court judge recently put it, family separation and divorce are a “public health crisis that doesn’t belong in the courts”.⁹

The current family law review will be of great benefit to children if it recognises the limits of family law and strongly advocates the benefits of alternative ways of dealing with family separation. Family courts must be absolutely a last resort; the number of court proceedings each year demonstrates that this is not currently the case. Our courts must also model, for the whole of society, procedures and outcomes that are demonstrably best for children.

Some of the most progressive and necessary measures may seem counter-intuitive or, at least, contrary to the direction in which policy changes appear to be heading. But, if a rigorous, evidence-based approach is adopted, rather than any resort to anecdote or ideology, the appropriate policies become clear:

1. Yes, children should not be left in the dark about decisions that may transform their lives. And they should have a voice. But, in seeking to empower children we must, at all costs, avoid forcing them to bear responsibilities that children should never have to bear. And, even more importantly, we have a responsibility not to facilitate their abuse by incentivising parents to exert coercive, undue influence on them;
2. Yes, children do better when conflict is minimised – in intact as well as separating families. But, children suffer far more through losing parents and other loved family members than through being exposed to some levels of conflict;
3. Yes, there are many ways in which family separation and family violence intersect. But, they are also distinct phenomena. It is important that we do not produce bad policy for the majority of children by conflating the two;
4. Yes, parents need additional financial support after separation, especially if their working careers have been sacrificed to bring up children. But, linking the percentage of financial settlements directly to the percentage of parental care – however sensible this may seem – results in great harm to many children. There are much better ways to address this that don’t result in long delays in resolving children’s matters and don’t prolong conflict between ex-partners to the financial and emotional detriment of their children.

We hope the Government, with the help of the Australian Law Reform Commission, will implement necessary and major changes as a matter of urgency.

⁹ <http://www.cbc.ca/radio/outintheopen/conquering-divide-1.4249833/a-family-court-judge-calls-divorce-a-public-health-crisis-that-doesn-t-belong-in-the-courts-1.4250087>