

# AUSTRALIAN LAW REFORM COMMISSION - REVIEW OF THE FAMILY LAW SYSTEM

## DISCUSSION PAPER RELEASED 2 October 2018 (DP 86)

### Submission from RELATIONSHIPS AUSTRALIA

#### 1. Introductory comments

##### 1.1 The work of Relationships Australia

This submission is written on behalf of Relationships Australia's eight member organisations. It complements submissions provided by Relationships Australia State and Territory organisations.

We are an Australian federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, cultural background or economic circumstances.

Relationships Australia provides a range of family services to Australian families, including counselling, dispute resolution, children's services, services for victims and perpetrators of family violence, and relationship and professional education. We aim to support all people in Australia to live with positive and respectful relationships, and believe that people have the capacity to change how they relate to others.

Relationships Australia has provided family relationships services for 70 years. Relationships Australia State and Territory organisations, along with our consortium partners, operate around one third of the 66 Family Relationship Centres (FRCs) across the country. In addition, Relationships Australia Queensland operates the national Family Relationships Advice Line and the Telephone Dispute Resolution Service. The core of our work is relationships – through our programs we work with people to enhance and improve relationships in the family, whether or not the family is together, with friends and colleagues, and within communities. Relationships Australia believes that violence, coercion, control and inequality are unacceptable.

We respect the rights of all people, in all their diversity, to live life fully within their families and communities with dignity and safety, and to enjoy healthy relationships. These principles underpin our work.

We work with those affected by violence in families, as well as those who use violence in their relationships. We firmly believe that children need support whenever there is family

violence, whether or not they are the intended recipients of the coercion, control or abuse, because there will always be consequences for them when family violence is present.

Relationships Australia supports integrated cross sector, multi-disciplinary responses to family and domestic violence which focus foremost on the safety of the victim. Freedom from violence in the family is a human right and Relationships Australia supports a legal framework to respond to inequality, coercion and control, and the use of violence in families.

Relationships Australia is committed to:

- Working in rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres.
- Collaboration. We work collectively with local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with elders, men, women, young people and children. We recognise that often a complex suite of supports (for example, drug and alcohol services, family support programs, mental health services, gambling services, and public housing) is needed by people affected by family violence and other complexities in relationships.
- Enriching family relationships, including providing support to parents, and encouraging good and respectful communication.
- Ensuring that social and financial disadvantage is not a barrier to accessing services.
- Contributing its practice evidence and skills to research projects, to the development of public policy and to the provision of effective supports to families.

This submission draws upon:

- our direct service delivery experience across urban, regional, rural and remote locations
- our experience in delivering programs in a range of communities, including culturally and linguistically diverse, Aboriginal and Torres Strait Islander people, and people who identify as part of the LGBTIQ community
- evidence-based programs and research
- our leadership and policy development experience
- the voices of our practitioners, and
- the experiences and voices of the people with whom we work to bring to attention to a range of issues affecting the policy and community actions aimed at supporting strong relationships.

Relationships Australia welcomes the Commission's proposals and questions in DP86, and thanks the Commission for the opportunity to provide a submission. We consider the Discussion Paper to be a thoughtful – and thought-provoking - contribution to reform in this area of social policy which has such a substantial impact on Australians in their most private and meaningful relationships. In developing this submission, Relationships Australia benefited from the observations and insights of many other submitters who provided responses to IP48.

Relationships Australia would also like to commend the attention of governments to this critical policy area. We welcome the recent quintet decision of Attorneys-General of Australia, New Zealand, Canada, the United Kingdom and the United States of America, to explore ways of better meeting the needs of separating families, including:

- alternatives to judicial proceedings
- multi-disciplinary approaches
- improved responses to family violence, and
- tailored approaches for Aboriginal and Torres Strait Islander and culturally diverse communities.<sup>1</sup>

## 1.2 Declaration

Dr Andrew Bickerdike, Chief Executive Officer of Relationships Australia Victoria, and Part-Time Commissioner to this Inquiry, was not involved in the development of this submission.

## 1.3 Language

The Discussion Paper frequently refers to ‘support services’. Relationships Australia assumes that this is a reference to services that are not provided by lawyers. The term ‘support services’ is, however, somewhat ambiguous and, in this submission, Relationships Australia will refer to supportive services or, where appropriate, therapeutic services. We would further add that, when used judiciously and appropriately, legal services are themselves supportive and can be therapeutic.

## 1.4 Themes

Relationships Australia is part of the broad consensus of submitters and other commentators supporting radical change to a more therapeutic response to families. We note the themes of responses presented in the Discussion Paper. This submission is underpinned by our view of:

- the nature of parenting matters (section 1.4.1)
- the place of law in supporting separating families (section 1.4.2)
- the nature of complexity in family separation (section 1.4.3)
- the suitability of using court-centric processes in parenting matters (section 1.4.4)
- the nature of inquiries into a child’s best interests – is it an exercise of judicial power? (section 1.4.5)
- if not a family *law* system, then what? (section 1.4.6)
- a Family Wellbeing System for the whole community (section 1.4.7), and
- potential (and existing limitations) of technology (section 1.4.8).

Each of these is expanded below. In summary, Relationships Australia is of the view that, in light of

- the paramountcy of children’s best interests
- the future focus and clinical orientation of an inquiry into how those best interests can be promoted

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<sup>1</sup> Quintet Meeting of Attorneys-General, *Official Communique*, 2018.

- the prevalence of psycho-social co-morbidities in the overwhelming number of families now presenting to family law courts
- the amply-documented harm to children arising from parental conflict, and
- the institutionalisation of that conflict through traditional processes,

the current system is innately and irretrievably unsuited to meet the needs and legitimate expectation of families. It must be replaced by a system that

- offers effective and supportive means of establishing the child's best interests
- prioritises safety and harm prevention in both parenting and property disputes
- makes it easy for families to get the kinds of help they need (ease relating to matters *including* cultural safety, geographical location and physical ease of access, safe and confidential access to clinical services, comprehensibility of information, and range and choice of services)
- helps families to build their capacity to have safe, loving and healthy relationships, and
- is sufficiently resourced to ensure that families do not languish for years, waiting for resolution of their disputes.

This would not be a 'family law system'. It would be a 'family wellbeing system'.

#### 1.4.1 The nature of parenting matters

There is a broad consensus that, in parenting matters, the primary inquiry is into the child's best interests and how these will most safely and effectively be met. It is worth considering whether, in fact, expressions such as 'parenting matters' or 'parenting orders' should be used at all, but be replaced with expressions such as 'children's matters' and 'children's orders'.<sup>2</sup>

These interests embrace all facets of child development, including attachment, emotional and physical safety, physical and mental health, education, and social development. It is an inquiry into a dynamic future, as children develop. It is thus sharply distinct from other litigation:

- it is an inquiry about a person who is not only not a party to the litigation but whose views and interests may not be put directly before the decision-maker at all<sup>3</sup>
- it is an inquiry about that person's future, from a developmental and *not* a legal perspective, and
- it is *not* an inquiry about the past and existing legal rights of parties to litigation.

Relationships Australia rejects, with respect, arguments that these inquiries are of a kind that must – and indeed can only – be answered through a process that receives and weighs evidence according to legal methodologies.<sup>4</sup>

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<sup>2</sup> A similar suggestion was made in the submission from Marrickville Legal Centre (submission 137).

<sup>3</sup> Noting the findings of a range of research into how a child's voice is heard in parenting matters (including Carson et al, 2018. This is extensively discussed in Chapter 7.

<sup>4</sup> As suggested by the Law Council of Australia the inquiry of the Senate Legal and Constitutional Affairs Committee into the Family Law Amendment (Parenting Management Hearings) Bill 2017, submission 20, p 5, paragraph 2. See also the Law Council's submission in response to IP48, submission 43, paragraphs 20–21, and the Australian Bar Association (submission 13), paragraphs 23, 31.

Relationships Australia argues that the best interests inquiry is more like a guardianship inquiry. Parents are valuable witnesses, but they should not be positioned, by the state, as contestants.

Finally, rules around admissibility and probative value have been developed for quite different purposes than understanding a child's needs and how to meet them. While the *Family Law Act 1975* (Cth) certainly allows for the modification of such rules, Relationships Australia considers that modification (even to the extent allowed, let alone actually used) does not overcome the serious harms done by casting parents as combatants and institutionalising parental conflict.<sup>5</sup>

Insisting on the virtues of the court-centric process currently in use for parenting matters is rather like insisting on the suitability of that process to develop responses to climate change or low rates of literacy.

#### **1.4.2 What should be the place of law in supporting separating families?**

Relationships Australia strongly supports the Commission's application of a public health model to conceptualise systems and processes concerned with family separation. We are nevertheless concerned that much of the Discussion Paper, at least implicitly, posits courts and legal processes as the forum offering the most authoritative answers to questions about children's wellbeing.

The majority of families do not use the court process, but either make their own arrangements or access supportive services (including legal services) to help them to do so. This creates a community imperative to properly care for and support these families with primary and sometimes secondary interventions, as well as adequately funding tertiary interventions. The law also plays an important role in primary and secondary interventions by providing families with information to equip them to negotiate safely and effectively 'in the shadow of the law'.

Further, if supportive and therapeutic services are adequately funded and delivered by capable professionals, families are less likely to need tertiary services (including courts). This is a key reason why a public health model is so apt.

Relationships Australia notes two particular sub-themes in relation to the place of the law in family separation.

First, reforms to other categories of civil litigation have not been applied to practice in family courts.<sup>6</sup> The past twenty years have involved transformational advances in processes and the role of lawyers and legal advisers in areas of law including torts and commercial litigation. These reforms have been intended to manage demand for a very expensive public resource (courts) and to deter and sanction poor behaviour by litigants and their professional advisors. Reforms with similar intent in the family law jurisdiction have been fiercely (and generally successfully) resisted by some (though not all) quarters of the legal profession. This has been on the basis of an assumption that family disputes demand a primarily legal service response. Families do not necessarily agree with this:

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<sup>5</sup> Other submitters have noted this. See, for example, Caxton Legal Centre, submission 51, paragraphs 121-124.

<sup>6</sup> See the submission from the Australian Bar Association, submission 13, 4; Parkinson and Knox, 2017.



I'm not I'm completely not interested in legal services. I don't believe that it is in the best interest of the kids at all. (*father, agreement still in place*)<sup>7</sup>

Second, legal issues are given disproportionate weight relative to other issues that may have contributed to legal issues, or co-exist with legal issues, diverting attention and resources away from more therapeutic responses and forward thinking about children's needs. The service responses required by families are often highly specialised. However, because family disputes involving parenting matters must be answered by reference to a child's best interests, what is most critically required is expertise in responding to factors such as child development and family violence.

### 1.4.3 The nature of complexity in family separation

As observed in section B.3.3 of Relationships Australia's submission in response to IP48, the primacy of a legal response to family separation has been premised on appeals to complexity.<sup>8</sup> This assertion, however, is not supported by empirical evidence, including research undertaken by Kaspiew et al, reported in 2015,<sup>9</sup> and is dissented from by services supporting families:

The dynamics involved in family conflict have complex emotional, cultural, social, health and economic underpinnings. *Characterisation of family conflict as a 'legal problem' does not assist, and frequently exacerbates, dispute.* Successful design and implementation of post-separation arrangements, for child issues particularly... requires the co-ordinated input of a range of expertise...<sup>10</sup> [emphasis added]

Relationships Australia considers it apt to reiterate its observations in submission 11 in response to IP48:

The concept of 'complex needs' should be considered here.... The 2012 Legal Australia-Wide Survey of unmet legal needs referred to 'a co-occurring range of *non-legal* support needs' (emphasis added).

Relationships Australia is concerned, however, that the notion of 'complex needs' in family law discourse often assumes that complexity arises from, or is intrinsically linked to, legal complexity and therefore must be dealt with in a legal framework. However, the kinds of co-occurring support needs highlighted in the 2012 survey were the needs informing the Family Law Council's report. They are not legal in origin, manifestation or (necessarily) remedy (such as, for example, mental health issues, homelessness, poverty, and substance misuse). Other issues that are seen as driving complexity, such as family violence or criminality more broadly, may attract a legal/justice system response, but that response tends to be seen by lawyers and judges as being the most central. Relationships Australia considers that funnelling families with these kinds of co-occurring psycho-social needs into the courts, without access to multi-disciplinary teams providing ongoing therapeutic responses, is a failure to properly respond to the family and hinders safe and healthy outcomes in the longer term. Rather, families with co-occurring needs of the kind described in the 2012 survey and considered by the Family Law Council

<sup>7</sup> Participant in the study of FDR outcomes being undertaken by Relationships Australia.

<sup>8</sup> Submission of the Law Council of Australia, submission 43, paragraph 9.

<sup>9</sup> Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments: Synthesis Report', *AIFS*, 2015, at 16

<sup>10</sup> Marrickville Legal Centre, submission 137, p 4.

should have access to an array of therapeutic services and decision-making pathways, of which legal services are a co-equal pillar, rather than a central axis.<sup>11</sup>

Legal services and remedies, however accessible and well-funded and however responsive to families' legal needs, will not repair or remedy other needs which, if not attended to, will result in recurrence of legal needs.

#### 1.4.4 Is a court-centric process fit for purpose in parenting matters?

Relationships Australia notes the Commission's observation that

Another strong theme in the submissions and consultations was a call for a greater focus on problem-solving and conflict reduction, and a move towards a greater use of non-adversarial approaches as much as possible.

Central to these calls was a view that adversarial processes tend to escalate conflict between separating parents, and concerns about the flow-on impact of this on children's well-being. More generally, many saw the use of an adversarial model as being poorly adapted for dealing with family conflict.<sup>12</sup>

Relationships Australia considers that it is, with respect, misleading to describe the unsuitability of adversarial processes in parenting matters as 'a view' held by 'many'. It is amply supported by social science and by the practical experience of clinical and legal practitioners. Relationships Australia further considers that the reliance on adversarial, court-centric processes constitutes institutional entrenchment of parental conflict, itself a predictor of poor wellbeing outcomes for children.

*What does science say about the impact of parental conflict on children?*

Ample evidence shows that an adversarial approach, put in place at a time when the future wellbeing of children was not at the forefront of the legislature's mind, is not fit for purpose. In its submission responding to IP48, the Australian Psychological Society comments that

In addition, the *adversarial nature of court processes is not supportive for most users* of the family system but in particular, those who have or are experiencing family violence, with some noting that this approach actually *mirrors the dynamic of an abusive relationship* and can re-traumatise those who have experienced family violence (Family and Relationship Services Australia, 2017). [emphasis added]<sup>13</sup>

The APS further notes that

...the factors predicting child wellbeing are the same for children in separated families and those in stable families. The *presence of inter-parent conflict and family violence reduces child wellbeing*, while responsive, warm, consistent and authoritative parenting is associated with improved outcomes for children (Sanson & McIntosh, 2018). Additionally, where there is high conflict and family violence, the capacity of parents to enact shared time increases the risk of exacerbating

<sup>11</sup> See also submission 53, Family and Relationships Services Australia, p 44, noting the findings of the AIFS evaluation of the 2012 amendments in relation to the kinds of complexities with which families present to the family law system.

<sup>12</sup> ALRC DP 86, paragraphs 1.41 1.42. Note that this was acknowledged by a range of legal practitioners and legal services. This is not a fringe view.

<sup>13</sup> Submission 55, p 27.

conflict and provides opportunities for those who use violence to continue to intimidate and cause fear to the other parent (Cashmore et al, 2010).<sup>14</sup> [emphasis added]

The effects of childhood exposure to family violence have been extensively researched:

The struggle that children have in a climate of domestic violence in just feeling safe is immense. There is physical safety... then there is psychological safety....The emotional climate and the child feeling fundamentally cared about and protected from uncertainty needs to be on a par with physical safety. There are very good data on that. *This is not something that is waiting to be demonstrated. It is very clear that this kind of conflict between parents affects children in a bad way.*<sup>15</sup> [emphasis added]

The preponderance of evidence from clinical practice with families clearly negates any view that adversarial processes are a safe or suitable means to answer the central question of a child's future best interests. The AIFS 2018 report on the needs and experiences of children and young people notes the importance of

...ensuring that children and young people are not re-traumatised by their participation, as a result, for example, of continuing exposure to parental conflict...from the multiple interviews effect, or by enabling parents to involve their children in the misuse of legal processes.<sup>16</sup>

AIFS findings, reported in Carson et al 2018, align with those of Mitcham-Smith and Henry from 2007, where it was observed that the adversarial nature of family courts can:

- entangle children in a state of perpetual turmoil within the family, as parents navigate their way through a complex, expensive, emotionally, generally unfamiliar and too-often prolonged process
- diminish the role of parents as legitimate protectors
- complicate the child's role identity
- teach ineffective conflict-resolution skills.
- embed shame and self-blame by children if ongoing parental conflict relates to parenting matters including contact arrangements and child support.

*What does science say about the impact of adversarial processes on parenting?*

It is also well-established that adversarial models lead to a 'winner/loser' solution which do not facilitate ongoing co-parenting relationships.<sup>17</sup> Just as adversarial processes can impair co-parenting, so it can impair the parenting capacity of each individual parent.<sup>18</sup> In 2001, Elrod commented that

The win/loss framework encourages parents to find fault with each other rather than to cooperate. In an attempt to be in the best position to argue for stability, a parent may try to take or maintain possession of the child.... *When an attorney increases hostility between parents, their parenting ability often decreases.* For example,

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<sup>14</sup> Submission 55, 23.

<sup>15</sup> Zeanah, in Lieberman et al, Attachment Perspectives on Domestic Violence and Family Law, 2011, 530-531.

<sup>16</sup> Carson et al, 2018, 34.

<sup>17</sup> Morris et al, 2016, 1 at 3, 14.

<sup>18</sup> See, also for example, Crockenberg and Langrock, 2001.



advising clients not to talk to the other spouse, filing for protective orders....[emphasis added]

In the experience of Relationships Australia, it is not so much the problem that ‘an attorney’ increases hostility between parents; this would be superfluous since the process inherently posits conflict between parents as parties to litigation, rather than as parties to the ongoing relationship of co-parenting.

Thus, if institutionalised conflict can be removed from how society deals with parental separation, then even while conflict may remain, parents are offered a better chance to be the best parents and co-parents they can be. Relationships Australia is struck by how many of the problems canvassed in Issues Paper 48 and Discussion Paper 86 could be avoided or reduced by a system that does *not* institutionalise (or worse, incentivise) parental conflict.

*What do families think about it?*

The 2012 AIFS survey of recently separated parents found that 44% of parents agreed that the family law system meets the needs of children and just under half of all parents agreed that the system protects the safety of children. Just over two-fifths of all parents agreed the system effectively helps parents find the best outcome for their children.

In the FDR Outcomes Study now being conducted by Relationships Australia, the views of parents have been sought about the impact of FDR on protecting relationships and reducing ongoing conflict.

**Facilitator:** And how would you say that mediation has affected your relationship with your [ex-partner]? **Participant:** Probably made it a lot better to be honest, because we hadn’t sat down and spoke about anything for you know, four or five months until we sat down in mediation.

**Facilitator:** Would you say that that the mediation that you did attend has affected your relationship with your ex-partner in any way? Has it changed some things for you? **Participant:** I think if we hadn’t gone there would’ve been maybe suspicion about why do we need to have this sort of agreement in place...Whereas having been through the mediation process we could see this was just about formalising it for clarity as opposed to using it as you know some way of getting back at each other or something like that. So I think that the process that we went through actually helped to de-escalate emotion that might have been linked to that process if that makes sense.

The Law Council of Australia might be confused about what is meant by ‘less adversarial’ and its benefits for children and their families,<sup>19</sup> but parents are not:

**Participant:** I did do one of those parenting hour sessions you know when you’ve got the whole group of people...my main take on [that] was the impact on children of separation. **Facilitator:** Did that sort of inform how you approached the mediation sessions at all? **Participant:** Yes...just that you know, how the more antagonistic it was the worse it was for kids.<sup>20</sup>

<sup>19</sup> Law Council of Australia, submission 43, paragraphs 17-18.

<sup>20</sup> From Relationships Australia FDR Outcomes research.

**Participant:** What I liked, [the mediators] kept...trying to get it back on track um and I know a couple of times [the other parent] just made some pointless comments, and [the mediators] said ‘how would that affect the kids?’ So I did like how they kept bringing it back to the children, so I think that was good.<sup>21</sup>

Neither, it would appear, are children confused:

Importantly, this theme was also expressed by children and young people who shared their experiences and views about the family law system, with one young person suggesting that the ‘winner/loser’ approach used in the courts ‘should be ditched’.<sup>22</sup>

A highly formal, technical, court-centric and adversarial legal process has proved to be a formidable barrier to hearing and giving due weight to the worries and hopes of children who, while not parties to the litigation, are its cardinal focus.

These user observations are not surprising. Nor are they new. In 1997, ALRC Report 84 identified in children a perception that adversarial processes were ‘dominated by legal strategizing by competing parties to maximise their chances of winning the case...The interests of the child often get lost between the warring parties.’<sup>23</sup> Regrettably, reforms to effectively address this have been repeatedly, and aggressively, resisted by those in favour of the *status quo* (which, notably, do not include parents or children or professionals with expertise in conflict, violence or mental health). The community at large knows that the current system – inherently characterised by making combatants, winners and losers of parents who are then expected to have a functional co-parenting relationship for decades – is not only not working, but is actively harming children and their parents.<sup>24</sup>

Frequently, governments offer up modifications in an attempt to ameliorate the situation; these are welcome, but can never overcome the egregious unsuitability of the broader structures to which those well-intentioned modifications are made.

*And what about the impact on high conflict families?*

In Bretherton et al, 2014, Seligman noted that:

Parents in high-conflict divorces are deficient in the crucial ability to discriminate what they need as individuals and what their children need, and also who their ex-spouses are to their children. *We need to do whatever we can do to help parents discriminate between their internal struggles and the outside world after a divorce.* They need help to make those discriminations.....<sup>25</sup> [emphasis added]

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<sup>21</sup> From Relationships Australia FDR Outcomes research.

<sup>22</sup> From ALRC DP 86, 1.43, citing South Australia Commissioner for Children and Young People, *What Children and Young People Think Should Happen When Families Separate* (Office of the Commissioner for Children and Young People, 2018) 15.

<sup>23</sup> ALRC report 84, *Seen and heard: priority for children in the legal process*, paragraph 4.25. See also Marrickville Legal Centre, submission 137, 3.

<sup>24</sup> The Law Council of Australia seems also to recognise this – see submission 43, paragraph 162 and paragraphs 381-382.

<sup>25</sup> Bretherton et al, 2011, 545.

Seligman further observed that

Unfortunately, sometimes a parent's core sense of self may become reliant on a variety of purposes and outcomes, which often do not serve the child's purposes. *Things like winning, being vindicated, illuminating the badness of the other, redeeming the past, assuaging of guilt, dealing with their own hurt at the hands of the other parent, real and imagined, and so on.* Sometimes these self-serving ends are mingled with real concerns about the child, but in high-conflict divorces there is a good likelihood that those kinds of things are obscured....

But, it would unrealistic to expect the adversarial law system to work this way....the legal order of things may well move things toward a kind of developmental risk that is not worth taking.<sup>26</sup> [emphasis added]

Savard observed that high conflict divorce 'roughly doubles the rate of emotional and behavioural problems in children', with children enmeshed in chronic high conflict families, experiencing 'chronic stress, insecurity and agitation; shame, self-blame and guilt', as well as fears for their own safety.<sup>27</sup>

*How do adversarial processes impair submission of relevant evidence?*

A further notable complication is highlighted by Rathus' paper on perceptions on the use of social science research in the family law system.<sup>28</sup> That is, despite the best efforts of judges and legal advisors,<sup>29</sup> they cannot be across vast research work that is undertaking in pertinent fields. Rathus cautions that

It also seems that social science information is so ubiquitous in family law that *lawyers* think of it as part of *their* tool set. While in some ways this is a genuine demonstration of interdisciplinarity, it also suggests that lawyers could benefit by being aware that they are dealing with a discipline likely to be outside their expertise or skill set.<sup>30</sup> [emphasis in original]

If legal advisors are not sufficiently across the social science, then there are real risks that social science findings are not put before judges in evidence (whether evidence-in-chief or through cross-examination), and there is ambiguity attending the extent to which judges can, in formulating their decisions, take judicial notice of social science that is not put

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<sup>26</sup> Bretherton et al, 2011, 547. Relationships Australia notes the observation made by the Australian Bar Association that 'If a [Family Consultant] explained age appropriate parenting arrangements [by reference to attachment theory and its application at different developmental stages], this may assist parties to shift away from a focus on whether they perceive are their adult parenting 'rights'...and to instead focus on the developmental needs of the children.' (submission 13, paragraph 23). In submission 83, the Mediator Standards Board noted that '...many parties can become so embroiled in the adversarial system that they become unwilling to attempt mediation, even when it might be in their best interests to do so.' (p 3)

<sup>27</sup> Savard, 'Through the eyes of a child: impact and measures to protect children in high-conflict family law litigation' (2010). See also Bing et al, 'Comparing the Effects of Amount of Conflict on Children's Adjustment Following Parental Divorce (2009), where the degree of conflict was measured by the level of court involvement; FMC submission 135, 9. See also Mitcham-Smith and Henry, *High-Conflict Divorce Solutions: Parenting Coordination as an Innovative Co-Parenting Intervention*, 2007, and Sroufe and McIntosh, 2011, 470.

<sup>28</sup> Zoe Rathus, '“The research says...”: Perceptions on the use of social science research in the family law system' (2018) 45(1) *Family Law Review* (forthcoming).

<sup>29</sup> Noting not only the severe time constraints on lawyers and judges, but also the barriers faced by many lawyers in accessing social science research: see, for example, Rathus, 2018, 12.

<sup>30</sup> Rathus, 2018, 31.

before them by the parties. In turn, judges can create deep unease (and potentially appellable error) if their judgments reference social science findings that the parties' lawyers have not had an opportunity to test during the hearing. Rathus observes that

On the one hand professionals in the family law system want informed judges who can make meaningful decisions in complex family law cases involving children, but they raise valid concerns about judges employing social science literature as a court room tool.<sup>31</sup>

She further observes that

...although most participants in our focus groups were comfortable about their *own* use [of social science], they were less comfortable with *judges'* use....this research suggests that care needs to be taken when judges turn to material that is beyond the evidence of the parties.<sup>32</sup>

Bretherton remarks that

...lawyers and parents tended to want you to say what they wanted to hear in order to obtain more time with the child or to score points against the other parent....One of the problems is that: expert witnesses are often hired by the parents or lawyers after they have been assessed to make sure they are going to support the arguments the lawyers/parents want to make. If expert witnesses were, instead, *retained by the court as providers of impartial information*, the situation would be entirely different. As it stands, how would the judge know to what extent the expert witness has been vetted to make sure he or she says 'the right thing' during court proceedings. This does not mean that the expert witness is lying, but this prior vetting may nevertheless bias what arguments he or she brings up in court. In one case in which I acted in the expert witness role, I was asked a few very pertinent questions by the judge that may have influenced her decision, but that were not raised by the lawyers or parents beforehand.....

*So if anything could be done, then it should be to make the legal aspects of the divorce process less adversarial. That would really help children a great deal.*<sup>33</sup>  
[emphasis added]

Social scientists who are called as expert witnesses, in their turn, often feel that the structure of adversarial hearings can impair their ability to put before the Court research findings<sup>34</sup> and expert opinions which they consider salient to the matter before the Court. An alternative approach, designed with elucidation of the child's best interests at its core, must ensure that decision-makers have access to the best social science evidence available to support their decisions.

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<sup>31</sup> Rathus, 2018, 15.

<sup>32</sup> Rathus, 2018, 30.

<sup>33</sup> Bretherton et al, "If I could tell the judge something about attachment..." Perspectives on Attachment Theory in the Family Law Courtroom', (2011) 49(3) *Family Court Review* 539, 539-540.

<sup>34</sup> Although Rathus observes that social scientists, when appearing as expert witnesses, can be reluctant to reference social science literature: Rathus, 2018, 26-29.

## Conclusion

The adversarial, court-centric process is an artefact of a time when the main objective was to provide a private and dignified process of legal separation. It was fit for purpose at a time when there was no expectation that separated spouses would have an ongoing co-parenting relationship.

With this review, Australia has a once-in-a-generation opportunity to identify and implement an approach that better reflects:

- community expectations about co-parenting
- the evolved understanding of how parental conflict and family violence affects children
- the focus on safety and the necessity for effective harm prevention, and
- the contemporary awareness of the agency of children and young people.

Australians should not have to wait another 21 years before the issue is re-examined, and the previous research of the preceding 60 years canvassed yet again.

### 1.4.5 Is deciding child's best interests an exercise of judicial power?

Once parenting matters were brought under the jurisdiction of a Chapter III court, the legal sequelae to family separation – including children's matters - had to fit within a mechanism presided over by Chapter III judges. It was not a comfortable fit. There is a largely unacknowledged tension between the paramountcy of the children's best interests and the concept that parenting matters are conceptualised and conducted as *inter partes* proceedings demanding procedural fairness and justice as between the adult parties.<sup>35</sup> This tension permeates the family law system. It leads to the distortion of inquiries into children's best interests so that they can be conducted in accordance with rules intended for disputes that are, as noted above, sharply distinct in their temporal focus and in making assumptions of equal power and influence, and lack of coercion and control, that are patently inapplicable in the bulk of the caseload.

The Family Court of Australia, at its inception, was intended to provide adult parties to a marriage a dignified and private ending to marriage. It was not designed or intended to function as an institution largely concerned with the safety, welfare and healthy development of children. Little (if any) thought was given to whether a Chapter III court could or should attempt to do so. Now, however, a different demographic is forced to court seeking different kinds of assistance that are not amenable to delivery through 'one-off' court decisions.

The question of whether parenting matters do, in fact, involve an exercise of judicial power at all, needs to be revisited, informed by contemporary understanding of the rights and agency of children, as recognised in domestic and public international law. In *M v M*, the High Court stated that, in parenting matters, the court's concern is:

...promot[ing] and protect[ing] the interests of the child', not enforcing a 'parental right'.<sup>36</sup>

<sup>35</sup> See submission 35, the Hon Diana Bryant AO QC: 'The focus of any legislation must be on the best interests of the child and not on perceptions of what may or may not be "fair" to parents.'

<sup>36</sup> *M v M* (1988) 166 CLR 69, joint judgment.



The Court emphasised the future orientation of parenting matters, and their distinctiveness from other litigation:

...the ultimate and paramount issue to be decided in proceedings for custody of, or access to, a child is whether the making of the order sought is in the interests of the welfare of the child.....

Proceedings for custody or access are *not disputes inter partes in the ordinary sense of that expression*: *Reynolds v Reynolds* (1973) 47 ALJR 499; 1 ALR 318; *McKee v McKee* (1951) AC 352, at pp 364-365. In proceedings of that kind the court is not enforcing a parental right of custody or right to access. The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child.<sup>37</sup> [emphasis added]

Their Honours further emphasised the distinctive character of parenting matters later in the judgment:

After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the *likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare*.<sup>38</sup> [emphasis added]

Some years before *M v M*, the High Court observed that, in parenting matters,

Reasons for judgement, necessarily in many cases, especially in a finely balanced case, are a *rationalisation of a largely intuitive judgement* based on an assessment of the personalities of the parties and the child.<sup>39</sup> [emphasis added]

Such intuitions are, we respectfully suggest, more likely to be sound when formed by professionals with expertise in psychology, child development and relational dynamics.<sup>40</sup>

#### 1.4.6 If not a family law system, then what?

On the basis of the preceding discussions, a family law system, positing parents as adversaries, is inescapably, inherently flawed because:

1. decision-making about parenting matters should not be characterised as the exercise of a judicial power
2. adversarial processes cannot elicit the kind of evidence needed to answer the fundamental questions in parenting matters, and
3. adversarial processes institutionalise parental conflict and, in doing so, harm parents' individual parenting, parents' capacity to co-parent, and – of course – harm children.

<sup>37</sup> *M v M* (1988) 166 CLR 69, joint judgment, paragraphs 19–20.

<sup>38</sup> *M v M* (1988) 166 CLR 69, joint judgment, paragraph 24.

<sup>39</sup> *Gronow v Gronow* (1979) 144 CLR 513, paragraph 6. See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

<sup>40</sup> The Law Council of Australia referred to the view of the New South Wales Law Society that '... if interim orders are drafted such that therapeutic intervention was linked to or required as a condition of time with or residency of a child, (that is to say, therapeutic jurisprudence) this practice may not be repugnant to the principle in *R v Kirby; Ex parte Boilermakers Society of Australia*'. [emphasis in Law Council submission]. See also Submission 23, p 11, paragraphs 41–42, Victorian Family Bar Association.

The Law Council of Australia referenced the following passage to support their arguments around making better use of technology (which Relationships Australia also supports). However, the passage also eloquently makes the case for embracing radical reform:

Every generation has updated or reformed the justice system to adapt to changing times. From the sealing of Magna Carta, to the protection of judicial independence in the 1701 Act of Settlement, to the creation of the Crown Court in the 1970s – *there has never been a moment of stagnation or complacency*. We have not inherited this remarkable justice system by accident but thanks to the foresight and the hard work of all those who came before us. Our times – with the advent of the internet and an explosion in new technology – *provide the opportunity for radical change. Traditional ways of working are being upended*, not just in justice but across the board. To secure and enhance the global reputation of our justice system, therefore, we *must respond to those changes radically and quickly* – and the rapidly evolving needs and expectations of everyone who uses our courts and tribunals. At their heart, these reforms are about meeting the needs of all those people – judges, magistrates, the legal professions, witnesses, victims, defendants, individual citizens and businesses of all sizes. In delivering a proportionate and effective justice system to them, *we should be competing not just with the best jurisdictions around the world, but with every modern consumer experience they have in their lives*, from skyping their family and friends, to online banking, to entering into contracts with businesses on the other side of the planet. In delivering a system that is just and accessible to everyone who needs it, we will be competing not just with modern practices around the world but respecting the practices of our own history. From experience, we know that first and foremost our courts and tribunals uphold the rule of law – maintaining the order and individual liberty that all of us enjoy. The rule of law is fundamental to every civilised society. Above all, these reforms will help to protect it.’ – The Lord Chancellor, the Lord Chief Justice of England and Wales, and the Senior President of Tribunals, ‘Transforming our justice system. (Joint Paper, the Ministry of Justice, September 2016), 16.  
[emphasis added]

The law and the courts administering it are vital. But, to extend the public health model proposed by the Commission, it should be children and their families, not public institutions, that occupy the centre of any system, with services arrayed around that centre.

If an alternative paradigm (ie wellbeing of children and their families) is adopted, and new systems built around it, then the legal perspective ceases to be the defining lens. It becomes, rather, an important – but not central – enabler that sits beside clinical and social services as a pillar to support separating families. Further, if child safety and healthy development is treated as the primary consideration, questions about justice as between adult parties, and provision of the necessary procedural accoutrements to provide that, lessen in significance relative to facilities and mechanisms to identify risks to children’s safety and healthy development, to respond to those risks, and to hear children’s voices.

This would give rise not to a family law system, but to a Family Wellbeing System.<sup>41</sup> In a Family Wellbeing System,

- the guiding principles would be therapeutic and restorative
- courts would be a co-equal pillar with supportive and therapeutic professional services and there would be robust bi-directional pathways for clients between each of these;<sup>42</sup>
- the multiple co-occurring needs previously identified by the Family Law Council could be dealt with in a therapeutic way focused on averting the need for legal systems and processes,<sup>43</sup> and
- it would be explicitly recognised that vulnerable families are better supported by an ongoing relationship with supportive services, for as long as they need it, rather than the 'one off' nature of court events.<sup>44</sup>

It is important to bear in mind, too, that the psycho-social complex needs noted by the Family Law Council are not marginal or fringe issues with which supportive services and courts must deal.

The families presenting with such issues are emphatically *not* part of a minority or fringe demographic. By way of illustration, Relationships Australia refers to an audit of data collected by Relationships Australia South Australia. The audit analysed over 3,200 files from 2013-2018, and found that clients reported mental health, violence and harm to children.

#### *Summary of audit findings*

DOOR 1 wording*	Clients saying 'Yes'	Sample size	Risk indicator
In the past 2 years, have you seen a doctor, psychologist or psychiatrist for a mental health problem or drug/alcohol problem?	33.9%	3232	Mental health problem
Have things in your life ever felt so bad that you have thought about hurting yourself, or even killing yourself?	18.8%	3189	Mental health
If yes, do you feel that way lately?	9.5%	599 (Yes only)	Suicide risk
In the past year, have you drunk alcohol and/or used drugs more than you meant to?	10.3%	3245	Alcohol or drug abuse

<sup>41</sup> Other submitters offered similar ideas; see, for example, the Australian Psychological Society, submission 55, recommendation 15. See also Marrickville Legal Centre, submission 137, 4.

<sup>42</sup> See also submission 7 from the Darebin Community Legal Centre and the Fitzroy Legal Service Inc, paragraph 7.

<sup>43</sup> See also submission 104, Dr Bruce Smyth, 3; Carson and Qu, 2017; Chisolm, 2009, and Kaspiew et al 2015. Rather, it is families with these kinds of needs that make up the vast majority of the caseloads of the Federal Circuit Court and the Family Court of Australia.

<sup>44</sup> As noted, for example, by the Marrickville Legal Centre: Submission 137, 5.

In the past year, have you felt you wanted or needed to cut down on your drinking and/or drug use?	9.4%	3177	Alcohol or drug abuse
Does your young child(ren) have any serious health or developmental problems?	10.5%	1452	Developmental risk (child <5 years)
In the past 6 months, has any professional (teacher, doctor, etc.) been concerned about how your young child(ren) was doing?	14.0%	1411	Developmental risk(child <5 years)
Does your child(ren) have any serious health or developmental problems?	20.6%	2107	Developmental risk(child >=5 years)
In the past 6 months, has any professional (teacher, doctor etc.) been concerned about how your child was doing?	33.7%	2028	Developmental risk (child >=5 years)
Have any child protection reports ever been made about your child(ren)?	13.1%	3095	Child abuse
As a result of the other parent's behaviour, have the police ever been called, a criminal charge been laid, or intervention/restraining order been made against him/her?	28.4%	3228	Family violence (victimisation)
Is there now an intervention/restraining order against other parent?	5.1%	3131	Family violence (victimisation)
As a result of your behaviour, have the police ever been called, a criminal charge been laid, or intervention/restraining order been made against you?	14.3%	3244	Family violence (perpetration)
Is there now an intervention/restraining order in place against you?	4.5%	3130	Family violence (perpetration)

\*DOOR 1 was developed by J E McIntosh

Modifications and amendments of the existing arrangements, however well-intentioned and even if fully funded without offsets, are unlikely to meet the community's needs and expectations. The system is already at crisis point; merely altering its parameters or providing long-overdue funding injections cannot fix that. A new paradigm is urgently needed, one with the wellbeing of children and their families at the centre.

#### 1.4.7 A Family Wellbeing System for the whole community

##### 1.4.7.1 Older members of the community

Throughout its submission responding to IP48 and throughout this submission, Relationships Australia strongly advocates the inclusion, in all communications, policy and

programme development, of older people. They, too, are affected by family separation, and elder abuse often takes place in a family setting as a continuation of poor and dysfunctional family dynamics in which violence has previously featured. We emphatically agree with the Law Council of Australia that

With an ageing population there are likely to be more users of the family law system who lack capacity to make decisions about their finances, including the division of assets upon breakdown of relationships. These cases become even more complex where there are adult children of a former relationships of one or both parties, who have a financial interest (by way of testamentary law) in the outcome of the family law property division. The potential for increased elder abuse in the family law context is likely.

The LCA supports more training for professionals in the family law system (lawyers, judges, psychologists) regarding issues of disability, capacity and elder abuse.<sup>45</sup>

It is therefore disappointing that, aside from some cursory observations,<sup>46</sup> the Discussion Paper does not explicitly contemplate the close engagement with older Australians in developing policy, programmes and communication/education resources. Any system concerned with families and the wellbeing of children needs to consider extended family, including grandparents, as a resource to supporting the safe and healthy development of children. The involvement of grandparents in, for example, kinship care is vital, and can facilitate safe and healthy re-unification of children with their parents.

Grandparents are more likely to be primary carers, given the increasing number of children in out of home care who live with kinship carers (in accordance with current policy objectives).<sup>47</sup> A system that cannot readily draw in extended family, including grandparents, misses an opportunity for these members to contribute positively to children's wellbeing. Also, engaging grandparents is the best way to facilitate future relationships between children and their parents, where a current relationship is not possible because of, for example, family violence, substance misuse or mental health problems.

We therefore will take every opportunity to advocate for inclusion of and engagement with older Australians at all phases of reform and implementation. Relationships Australia notes that other submitters responding to IP48 held similar views.<sup>48</sup>

#### 1.4.7.2 *Aboriginal and Torres Strait Islander families*

Throughout DP86, the Commission draws attention to specific issues in relation to which Aboriginal and Torres Strait Islander families, communities and other groups must be involved from the outset, as part of community co-design and user-testing. Aboriginal and Torres Strait Islander people encounter multiple complex barriers to accessing a legal

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<sup>45</sup> Submission 43, paragraphs 94-95. See also submission 85 from Seniors Rights Service, noting that 'Older persons may have property interests not only between themselves as a divorcing couple, but also in relation to property interests held by their divorcing children'. (at p 6).

<sup>46</sup> See, for example, ALRC DP 86, paragraph 1.37.

<sup>47</sup> In submission 63, the Family Violence Prevention and Legal Services Forum notes that 'family violence is a leading driver of child removals': at p 13.

<sup>48</sup> See, for example, Seniors' Rights Service, submission 85; Australian Association of Social Workers, submission 25.



system which they have, in any event, no reason to trust.<sup>49</sup> In addition to the comments made in response to specific proposals and questions put by the Commission in the Discussion Paper, Relationships Australia would also offer the following suggestions:

- that all entities in the Family Wellbeing System (including FRCs, Families Hubs, FASS facilities and courts) employ Aboriginal and Torres Strait Islander staff; as a condition precedent, the Workforce Capability Plan described in Chapter 10 should consider how best to attract, recruit, train and develop Aboriginal staff.<sup>50</sup>
- governments should fund appropriate training programmes (such as the Diploma of Counselling for Aboriginal and Torres Strait Islander Peoples, described in our response to Question 5 of IP48)
- training should present culturally sensitive and appropriate models of dispute resolution
- Aboriginal and Torres Strait Islander staff should have access to culturally relevant supervision
- flexible models of practice, including restorative practice models, should be available to Aboriginal and Torres Strait Islander clients
- FRCs, family courts, and Families Hubs as described in Chapter 4 should be funded to support Aboriginal liaison officers
- as noted in response to Chapter 6, every registry should offer an Indigenous list or at least schedule hearing days for matters involving Aboriginal and Torres Strait Islander families
- Family Law Pathways Networks should have a dedicated subcommittee to influence practice approaches in legal and community settings; the subcommittee should include legal practitioners working at Aboriginal legal services
- Aboriginal and Torres Strait Islander people should be offered culturally sensitive mechanisms by which to give feedback to service providers.

Relationships Australia South Australia reports that their service emphasis for Aboriginal and Torres Strait Islander families tends to be in the interactions that those families have with child protection courts, magistrates' courts, and Children's Contact Services, rather than the family courts. Relationships Australia South Australia notes that these services are often tailored to 'wrap around' an entire family or community, rather than the members of what might be considered to be a nuclear family. Beneficial service offerings tend to focus on dispute resolution and use a restorative practice lens that focuses on children's wellbeing.

#### **1.4.8 Potential (and limitations) of technology**

As stated in Relationships Australia's response to IP48, technology can be a great help. For example, the Family Relationships Advice Line service routinely offers, by telephone, support to clients before and after court events. Accessibility could be further improved by the expansion of technology options to complement face to face services.

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<sup>49</sup> Submission 53, FRSA, 23-26.

<sup>50</sup> See submission 18, 2. Relationships Australia supports the recommendation of the Royal Australian and New Zealand College of Psychiatrists that an 'Aboriginal and Torres Strait Islander workforce extend beyond a single worker in any given location considering the needs for workers to be able to take leave, for individuals to be able to engage with workers from the same gender, and for individuals to be able to engage with workers who are not from the same community'.

However, Relationships Australia is also mindful that, for many Australians, the digital divide is a reality. The Australian Digital Inclusion Index 2018 reports that

The gaps between digitally included and digitally excluded Australians are substantial and widening for some groups.<sup>51</sup>

The digital divide not always a function of technological skill or willingness to learn on the part of the user; many Australians simply do not yet have access to fast, reliable, safe and discreet internet access (and not only because they live in regional, rural or remote areas). Accordingly, service providers and governments must continue to offer information and services across a range of platforms.

In complex cases, the best therapeutic outcomes are often achieved by face to face services, where non-verbal communication can draw out nuance, and build therapeutic relationships, that may not be possible through some technological options. Relationships Australia Queensland offers a hybrid of a virtual service method and personal contact.

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<sup>51</sup> *Measuring Australia's Digital Divide*, 2018, 5. Groups most likely to be marginalised by the digital divide include people with disability, mobile-only users, Aboriginal and Torres Strait Islander people, people in low income households and people who did not complete secondary school: p 6. In submission 63, the Family Violence Prevention and Legal Services Forum cautions against treating technology as a complete solution: see p 16. See also submission 45 from Women's Legal Services Australia, 14.

## Chapter 2 Education, Awareness and Information

### **Proposal 2-1 The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system....**

Relationships Australia supports a rolling national education and awareness campaign, refreshed at regular intervals, and is broadly supportive of the proposals relating to education, awareness and training.

We suggest that the campaign, centred around a Family Wellbeing System should also be directed not only at people ‘when contemplating or experiencing separation’, but universally, to raise awareness that there are resources to call upon to assist with family conflict and parenting challenges, even in the absence of a prospect of separation. This would align with the primary intervention element of the public health approach adopted by the Commission. There is also a need to de-stigmatise and normalise seeking advice or help in family relationships, which could be accomplished through a national education and awareness campaign.

Relationships Australia welcomes the Commission’s view that the campaign should be very clear about the effect on children and young people of exposure to parental conflict, and should provide links back to the well-documented and broadly accepted evidence base. This is something that we have entrenched in our services, as we prepare people to undertake various pathways, including FDR.

The campaign must be refreshed and re-run every few years, to maintain solid public awareness (and reflecting that the sciences and law relating to families is dynamic, and that messaging may need modification over time).

More detailed information should also be made accessible for those who are interested, on matters such as:

- why no-fault divorce was introduced
- changes in terminology (eg shifts away from custody and access language)
- underlying principles of the Act
- how the Act sits in the context of treaty obligations to which Australia is subject (eg UNCRC)
- what the Commonwealth does and what the States and Territories do
- what are the roles of different courts people might encounter in the course of resolving family disputes, and
- how family law policy, programmes, lawyers and judges draw on research.<sup>52</sup>

### **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.**

Relationships Australia supports this proposal.

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<sup>52</sup> Itself a matter of some conjecture, as noted by Rathus, 2018.

We would recommend also consulting organisations advocating for the rights and interests of older people in our community. They, too, are affected by family separation (increasingly, as primary caregivers for grandchildren), and elder abuse often takes place in a family setting as a continuation of existing family dynamics. Older people have particular vulnerabilities and interests as do the other groups to which this proposal refers.

Further, and consistent with the Commission's other proposals to give children and young people a greater voice in, and better means of engagement with, the family law system, the national campaign should also include products and platforms tailored for children and young people. Relationships Australia notes, in this regard, the findings of AIFS' recent study of the needs and experiences of children and young people in the family law system, including that:

- half of the interviewees indicated that their views were not acknowledged by family consultants/report writers
- most of the interviewees described feeling negatively towards the court process, the family consultants/report writers and the ICLs
- a substantial proportion of the interviewees felt that 'the approaches adopted by service professionals with whom they interacted operated in a way that limited their practical impact or effectively marginalised their involvement in decision-making about parenting arrangements'
- several participants were distressed by perceived inaction by professionals, when they raised safety issues (for themselves, parents and siblings)
- most interviewees wanted parents to listen more to their views and for their views to be taken seriously by family law and related services
- interviewees indicated that they would like more information about various aspects of the legal process (including timeframes and outcomes).<sup>53</sup>

The campaign should include updating court websites to allow functionality in languages other than English.<sup>54</sup> This has been done for the Family Relationships Online site run by the Commonwealth Attorney-General's Department, which provides information in 15 languages other than English. Websites should be presented to make it quick and easy to see how to change languages on the site.<sup>55</sup>

All public-facing websites, portals and forms should be explicitly inclusive of gender-diverse people.

**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.**

Relationships Australia supports the proposal that the Commonwealth work with state and territory governments. This will have particular value in overcoming silos within and across governments, which inhibit the provision of seamless service delivery.

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<sup>53</sup> Carson et al, 2018, vi-ix. Carson et al further noted that 'Limited Australian research is available in relation to the practices of family consultants/family report writers and in relation to the conduct and quality of family reports/single expert reports in particular.' (at p 56; see also p 92).

<sup>54</sup> Supported also by, for example, Family Law Committee of NSW Young Lawyers, submission 108, 3.

<sup>55</sup> This has been done successfully, for example, with ATMs.

We agree with the desirability of working through universal services to promote the proposed campaign. We agree that universal services are potentially valuable sources of referral and offer a soft entry point. Soft entry points are particularly important for people suffering from trauma, especially those whose trauma might have come at the hands of an institution. Relationships Australia concurs that universal and targeted services do not exist in a relationship of dichotomy, but one of continuum.<sup>56</sup>

Subject to our comments in response to the proposals in Chapter 12, we agree that if a Family Law (or Wellbeing) Commission is established, it should be responsible for ongoing public education and awareness. In the absence of such a Commission, the Commonwealth Attorney-General's Department and the Department of Social Services should collaborate on this, working closely with consumer groups and service providers.

**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...from:**

- **universal services that work with children and families...; and**
- **first point of contact services for people who have experienced family violence...**

Relationships Australia supports this proposal.

**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 to:**

- **advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system; and**
- **review the information package on a regular basis to ensure that it remains up-to-date.**

Relationships Australia supports this proposal, noting the current difficulties that face people trying to find reliable up-to-date information about available services. Perhaps this could also be done by the Family Law (or Wellbeing) Commission.

**Proposal 2-6        The family law system information package should be tailored to take into account jurisdictional differences and should include information about:**

- **the legal framework for resolving parenting and property matters;**
- **the range of legal and support services available to help services available to help separating families and their children and how to access these services;**
- **the different forums and processes for resolving disputes.**

Relationships Australia supports this proposal.

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<sup>56</sup> Quoted at ALRC DP 86, paragraph 2.15, citing Daryl J Higgins, 'A Public Health Approach to Enhancing Safe and Supportive Family Environments for Children' (2015) 96 *Family Matters* 39.



**Proposal 2-7        The family law system information package should be accessible in a range of languages and formats....**

Relationships Australia supports this proposal.

**Proposal 2-8        The family law system information package should be:**

- **developed with reference to existing government and non-government information resources and services;**
- **developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse communities, LGBTIQ people and people with disability.**

Relationships Australia supports this proposal, subject to consultation also including individuals and groups representing the interests of older members of our community, and representatives of children and young people.

The 2018 AIFS report on the needs and experiences of children and young people found that children and young people want more information on:

- when and how they could have their say about post-separation arrangements
- to what extent their views would have influence
- whether they would be represented
- how could they get help to communicate their preferred living arrangements to their parents
- timeframes and nature of legal proceedings
- the identity and role of decision-makers
- steps associated with negotiating parenting arrangements
- how to get mental health support, access support groups, helplines and legal advice
- the potential outcomes and options for their living arrangements.

As one of the young interviewees observed,

Like, they [the parents] know what's going on and they're confused, how would the kids feel? (Scarlett, 15+ years)<sup>57</sup>

Relationships Australia Northern Territory also recommends that particular attention be given to the form of presentation of information to meet the needs of remote Aboriginal and Torres Strait Islander people who may not be literate or who have English as a second or subsequent language.

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<sup>57</sup> Carson et al, 2018, 31. The report concluded that 'Staying informed provided children and young people with a degree of comfort and assurance about the path ahead in the context of the uncertainty and upheaval associated with the separation': Carson et al, 2018, 42.

## Chapter 3 Simpler and Clearer Legislation

### **Proposal 3-1 The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability....**

Relationships Australia supports each element of this proposal and, more broadly, favours approaches to simplify the Act and clarify its decision-making pathways. We agree with the Law Council of Australia that

Community confidence in the family law system is dependent upon a clear understanding of the law, the process and a transparency of the method of determination.<sup>58</sup>

Relationships Australia Northern Territory cautions that, in relation to parentage, care must be taken when legislating to protect the right of children to know their mother and father. It is important for children to be able to develop and maintain ties with their culture and bloodline, regardless of the level of interaction with each parent. Those who were part of the Stolen Generation remind us that cultural and blood ties are significant.

### **Proposal 3-2 Family law court forms should be comprehensively reviewed to improve usability, including through....**

Relationships Australia supports each element of this proposal. We agree with the Law Council of Australia that there is a need for a 'single interface for the transmission/input of client data'.<sup>59</sup> Nevertheless, Relationships Australia is aware that significant numbers of people do not have access to secure, reliable and private online services for a range of reasons, and so we join with the Law Council in supporting the retention of paper forms.

### **Proposal 3-3 The principle (currently set out in s60CA 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'.**

Relationships Australia endorses the emphasis on children's safety.<sup>60</sup> We strongly concur with the Law Council of Australia that

The focus of any legislation must be on the best interests of the child and not on perceptions of what may or may not be 'fair' to parents, or to 'rights' parents consider they may have.<sup>61</sup>

In its 2018 study of the needs and experiences of children and young people, AIFS reported that 50% of parents interviewed expressed safety concerns for themselves and/or children as a result of ongoing contact with the other parent. Children and young people also reported instances where they felt unsafe with a parent with whom they were required to spend time.<sup>62</sup> See, for example, *Case Study 1: Daniel*, said

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<sup>58</sup> Law Council of Australia (submission 43), paragraph 33, note 11.

<sup>59</sup> Noting that the interface would need to be compatible with assistive technology.

<sup>60</sup> ALRC DP86, paragraph 3.41.

<sup>61</sup> Law Council of Australia, submission 43, paragraph 160. See also submission from the former Chief Justice of the Family Court of Australia, the Hon Diana Bryant AO QC (submission 35).

<sup>62</sup> Carson et al, 2018, 33, 40.

I didn't really get a say [in living arrangements] .....I think the family court's corrupt... 'cause we went to court and the judge said I had to go back with Dad that night.

Soon after the court event,

I said to my mum that he didn't pick me up. And my dad got really angry, he, um, and because of that he - that night he choked me for a solid minute...<sup>63</sup>

Relationships Australia is concerned that use of a compound term such as 'safety and best interests' might inadvertently create fresh confusion. A compound expression may be taken to suggest a hierarchy that is not consistent with public international law. Further, it is difficult to see how 'best interests' do not already encompass safety.<sup>64</sup>

Finally, experience suggests that family court judges do not often have the luxury of being asked to consider a binary in parenting matters: between one option that is safe for the child and one that is not safe. Too often, judges must identify the parenting arrangement that is *relatively* safer than other alternatives.<sup>65</sup> This conundrum emerges with particular starkness in families experiencing multiple psycho-social, health, economic, and other co-morbidities.<sup>66</sup>

**Proposal 3-4** The objects and principles underlying pt VII of the *Family Law Act 1975 (Cth)* set out in s60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows....

Relationships Australia supports this proposal.<sup>67</sup>

**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 (currently set out mainly in s60CC), should be simplified to....

Believe what the kid says, not the parents. The parents just want custody. (Hayley, 12-14 years)<sup>68</sup>

Relationships Australia supports this proposal, subject to it being expressed to also refer to safety from exposure to harmful levels of ongoing conflict, as noted in Proposal 3-4.

As noted in our submission responding to IP48, the provisions that judges must currently rely on are unnecessarily complex, repetitive, and generate needless costs, delays, and damage, with the potential for further exacerbating parental conflict. It would appear from other submissions that there is broad agreement that enactment of a simpler, clearer decision-making pathway is urgently needed.

**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

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<sup>63</sup> Carson et al, 2018, 34.

<sup>64</sup> The Commission appears to acknowledge this: ALRC DP86, paragraph 3.42.

<sup>65</sup> See also Bretherton et al, 2011, 541.

<sup>66</sup> Noting that the ability for judges to have easy access to supportive services (eg through co-location of services) would support their ability to link families 'on the spot' with services that could scaffold the safest options.

<sup>67</sup> We agree with the observations of the Law Council of Australia at paragraph 159 of its submission.

<sup>68</sup> Carson et al, 2018, 84.

**Aboriginal or Torres Strait Islander child, the maintenance of the child's connection to their family, community, culture and country must be considered.**

Relationships Australia supports this proposal, complemented by legislative reforms to better reflect Aboriginal and Torres Strait Islander concepts of family and family violence. The current concept of family that underpins the Act does not readily accommodate more fluid or expansive notions of family.<sup>69</sup> A cultural safety plan, as proposed by the Commission, and meaningful consultation with Aboriginal and Torres Strait Islander communities, is vital.<sup>70</sup>

Relationships Australia supports the recommendation of the Family Violence Prevention Legal Services Forum that parties file a notice that identifies that Aboriginal or Torres Strait Islanders are involved in the matter.<sup>71</sup>

In addition, Relationships Australia notes the observation made by Seniors Rights Service that

Older persons may be part of extended kinship networks that involve grandparents, great-aunts and great-uncles, and those who perform these roles without strict familial ties.<sup>72</sup>

**Proposal 3-7        The decision making framework for parenting arrangements in pt VII of the *Family Law Act 1975* (Cth) should be further clarified ...**

Relationships Australia agrees that the presumption of shared responsibility has been widely misunderstood as a presumption of equal shared time; this has been our consistent practice experience since the 2006 amendments. Relationships Australia would support reforms to clarify that provisions about shared responsibility or shared decision-making have no relation to shared time. We further support consolidating relevant provisions in the one place, to enhance accessibility and comprehensibility.

Relationships Australia joins with the Australian Psychological Society in recommending that longitudinal research be funded to better discern how shared parenting arrangements support children's attachment, developmental and other needs.<sup>73</sup>

Relationships Australia is attracted by the idea, presented by Marrickville Legal Centre, of changing the language from 'parenting orders' to 'child orders'.<sup>74</sup> This would, we consider, have a range of benefits, including explicit focus on the purpose of orders to promote a child's wellbeing and better accommodating the range of family formations and structures in Australian society.

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<sup>69</sup> The 2018 AIFS conference highlighted data from OECD countries showing that 'family' increasingly includes surrogate mothers, donor fathers, three adults co-parenting, grandparent-led households, gender diverse couples, as well as friends and neighbours who become carers.

<sup>70</sup> See also submission 63, the Family Violence Prevention and Legal Services Forum, 39, and Ross et al, *Model of Practice for Mediation with Aboriginal Families in Central Australia*, 2010.

<sup>71</sup> Submission 63, 38.

<sup>72</sup> Submission 85, 6. See also submission 55 of the Australian Psychological Society, p 10.

<sup>73</sup> See submission 55, p 22, noting also Sanson & McIntosh, 2018, and Smyth, McIntosh, Emery and Howarth 2016.

<sup>74</sup> See submission 137, 16.

### **Question 3-1      How would confusion about what matters require consultation between parents be resolved?**

Post-order and post-mediation services (canvassed in our response to Proposal 6-9) should be funded to provide assistance to parents in this regard. The Parenting Management Hearings envisaged by the Government could also be useful.<sup>75</sup>

For high conflict families, Relationships Australia recommends the Government consider piloting a service along the lines of Parenting Co-ordination, which is in use in parts of the United States of America and Canada, as well as in South Africa.<sup>76</sup> Relationships Australia Western Australia is currently running an unfunded pilot of Parenting Co-ordination. Essentially, a family with a court order, or a parenting agreement, can access a Parenting Co-ordinator for assistance in applying the order or agreement.<sup>77</sup> It provides a simpler, faster and less expensive response to families' needs for some assistance in giving effect to orders and agreements, and frees up court resources.

An important outcome achieved by Parenting Coordination where it is being used is a reduction of the demand on court services and more timely resolution of issues. It has been the experience of Relationships Australia Western Australia that high conflict families often have multiple court events. We provided detail on this service model in Relationships Australia's submission in response to IP48, which we summarise as follows.

Several definitions of Parenting Coordination have currency and flesh out the complex, hybrid nature of the model. It has been defined as 'a non-adversarial, quasi-legal, quasi-mental health process which combines assessment, education, case management, conflict resolution and decision-making',<sup>78</sup> and as

...a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a time manner, educating parents about children's needs and with prior approval of the parties and/or the court, making decisions within the scope of the court order or appointment contract.<sup>79</sup>

The Association of Family and Conciliation Courts (AFCC) has developed Guidelines for Parenting Coordination. A chapter of the AFCC exists in Australia. Other jurisdictions have adapted and developed additional guidelines suited to their own legislative contexts or disciplinary perspectives.<sup>80</sup>

Parenting Coordination differs from other comparable approaches in several important ways. It is a more intensive intervention than most others. Coordinators are usually

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<sup>75</sup> Relationships Australia also notes existing resources, such as that *Parenting orders: what you need to know*, published by the Australian Government.

<sup>76</sup> See also Co-parenting for situations of domestic violence, a treatment program based on parental consent and reporting back to the court. See Lieberman et al, 2011, 537. Lieberman notes that '...it is very time-consuming, and very expensive ... *But this is what it takes.*' [emphasis added]

<sup>77</sup> Eg resolving day to day conflicts about application of the order or agreement, or facilitating the variation of an order or agreement that may have become unworkable because of a change in circumstances.

<sup>78</sup> Parker & Wilson, 2013. It is not, however, a medium for therapy *per se*.

<sup>79</sup> Association of Family and Conciliation Courts, 2006.

<sup>80</sup> For example, British Columbia Parenting Coordinators Roster Society, American Psychological Society, Guidelines for Parenting Coordination in South Africa.



contracted to work with the family for a significant period of time (two years in some jurisdictions). A Coordinator works with both parties in the conflict. Processes vary, but usually include meeting individually with each parent and together, depending on the needs of the family. This allows the Coordinator to develop a thorough understanding of the nature of the relationships in the family they work with including the conflict styles of family members.

Most descriptions of Parenting Coordination stress the importance of the required skills of potential Coordinators. The positions require a combination of legal and mental health skills, or more specifically psychological and applied social science typical of psychologists or social workers. From a workforce development perspective, there are two options. One is upskilling candidates with a social science/allied health background with the requisite legal knowledge. An in depth understanding of domestic violence in theory and practice is also deemed essential. The other option is to work with the legal practitioners to develop their capacity to work in a Coordinator role.<sup>81</sup> There is currently a project underway at the University of Western Australia Law School to develop the capacity of legal practitioners to work with high conflict families<sup>82</sup>. Relationships Australia Western Australia is involved in this project.

One of the strongest advantages of Parenting Coordination is continuity of engagement with high conflict parents. This contrasts favourably with the episodic nature of most other interventions in the current family law system, with the exception of Family Law Counselling in some cases and the potentially ongoing relationship with one's legal counsel in certain cases.

The relatively continuous nature of Parenting Coordination is justifiable on the grounds that it should only ever be considered an option in cases identified as high conflict. The majority of families negotiate their own way through the family law system with relatively little problem. It is also quite likely, should the option of Parenting Coordination become more widely available, more victims of family violence will come forward, who currently may not disclose to anyone through the family law engagement, and likely suffer suboptimal outcomes as a result. Parenting Coordination by practitioners with expertise in domestic violence has the potential to deliver safer and more durable outcomes.

In relation to the Constitutional limitations on Australian courts adopting Parenting Coordination, Relationships Australia notes the submission to the Commission from the former Chief Justice of the Family Court of Australia, the Hon Diana Bryant AO QC:

A conceivable way around this constitutional hurdle, would be to design a parenting coordination model base on creating, rather than determining rights...that can be characterised as administrative rather than determinative, centred around consent and voluntariness amongst parents, so there is no improper delegation of decision-making powers, conflicting with Chapter III of the Constitution. To a large degree this is what is envisaged with the Government's proposal for Parenting Management Hearings. Something similar could be setup for Parenting Coordination.<sup>83</sup>

In this submission, Relationships Australia takes an alternative view: that parenting matters are not about determining or creating parental rights and not, therefore, subject to

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<sup>81</sup> Henry, Fieldstone, Thompson, & Treharne, 2011.

<sup>82</sup> Howieson & Priddis, 2011.

<sup>83</sup> Submission 35, Part Two.

exercise of judicial power. Nevertheless, we welcome consideration of all possible options to protect and promote children's well-being.

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

Relationships Australia supports this proposal, subject to its earlier comments about the merits of the proposed 'safe and in the best interests' formulation.

Repeated court applications and appearances damage the best interests of children and the well-being of separated families. Relationships Australia therefore also supports reforms that limit the scope for court proceedings being used as a means of harassment, coercion or control. We concur with the list, presented by the Law Council of Australia in its submission, of the difficulties faced by self-represented litigants.<sup>84</sup>

**Proposal 3-9        The Attorney-General's Department (Cth) should commission a body with relevant expertise, including in psychology, social science and family information resources to assist families in formulating care arrangements for children after separation that support children's wellbeing. This resource should be publicly available and easily accessible, and regularly updated.**

Relationships Australia agrees that the Australian Government should commission a body to develop the resources described in this proposal, to complement *Parenting orders: what you need to know*, published by the Australian Government. The commissioned body should have established expertise in psychology, social science and family matters, including parent-child attachment and child development. Relationships Australia respectfully suggests that it is also vital that the commissioned body should have access to insights and observations of practitioners. In any event, practitioners and user groups should be closely involved in developing the proposed resource. Like other information resources proposed by the Commission, this material should be presented in multi-media formats and promoted in places and at times to reach and engage a broad and diverse audience. To achieve those outcomes, resources must be written in Easy English, be available in different languages and accessible using assistive technology, and take into account cultural considerations.

**Proposal 3-10        The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.**

Relationships Australia supports this proposal. We agree with the Law Council of Australia that

The broad policy objective of a property adjustment system ought to [afford] the community a fair and known system, which promotes the resolution of issues without the need for an adjudicated determination.<sup>85</sup>

From time to time, proposals are made to move away from broad discretions in relation to property division, and instead adopt a more prescriptive approach, possibly including

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<sup>84</sup> Submission 43, paragraph 151.

<sup>85</sup> Law Council of Australia, submission 43, paragraph 206.

statutory presumptions.<sup>86</sup> These have been met with support for retention of the courts' wide discretions, to allow the specific circumstances of each family to be taken into account.<sup>87</sup> Relationships Australia notes research indicating that people are generally happy with the fairness of outcomes.<sup>88</sup>

Relationships Australia supports the suggestion of the Family Law Committee of NSW Young Lawyers that

If concepts such as...the frequently referred to "four-step process" in financial matters [is] retained, [it] ought to be specifically referred to in the legislation and the relevant sections should flow in a logical sequence, preferably without the need to cross-reference multiple and at times un-related sections in the Act.<sup>89</sup>

If the Government retains a discretionary approach, Relationships Australia also supports:

- redrafting the core provisions of Part VIII of the Act to more clearly set out the analytical steps in determining a property settlement<sup>90</sup>
- merging the financial relief provisions applying to married persons and those applying to people in de facto relationships,<sup>91</sup> and
- commissioning research to better inform a clarified legislative approach that could provide to system users improved certainty and transparency.

Finally, and as an overarching statement, Relationships Australia considers that, if parties with a property/finance matter have children, then Act should provide that the children's best interests are paramount not only in parenting disputes, but also in property and finance matters. This is because of the well-established link between poverty and poor outcomes for children. Existing research demonstrates clearly that family separation embeds poverty, most particularly with the primary caregiver of any child/ren. Poverty, in turn, is associated with poor outcomes for children.<sup>92</sup>

There is a strong negative association between poverty and children's developmental outcomes. The negative effects associated with low income and poverty carry a significant cost for individuals and families, as well as the broader community. There are also clear costs associated with children's development and wellbeing - the impacts of which are

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<sup>86</sup> See Productivity Commission, *Access to Justice Arrangements*, Report 72, 2014, volume 2, 874; ADRAC's submission to IP48, submission 12, 23;

<sup>87</sup> Cf Law Council of Australia, submission 43, paragraph 205.

<sup>88</sup> Kaspiew and Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(3) *Australian Journal of Family Law* 1.

<sup>89</sup> Family Law Committee of NSW Young Lawyers, submission 108, 4, referring to *Bevan v Bevan* [2013] FamCAFC 116. See also that submission at 7.

<sup>90</sup> The National Judicial College of Australia has invited the Commission to 'consider recommending the development of programs that specifically address the issues involved in decision-making under a discretionary framework' (submission 113, 4). Relationships Australia would support such a recommendation.

<sup>91</sup> Law Council of Australia, submission 43, paragraph 216(a).

<sup>92</sup> Cf Joan B. Kelly, 'Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research', 39 *J. A.M. ACAD.CHILD & ADOLESCENT PSYCHIATRY* 963 (2000). Relationships Australia notes that 84% of Australian single parent families are single mother families. In 50% of single parent families with dependants, the age of the youngest child is between 0-9 years of age: Australian Bureau of Statistics (2012), *Labour Force, Australia: Labour Force Status and Other Characteristics of Families*, Cat. No. 6224.0.55.001.

likely to be amplified later in life for the children who experienced poverty and also the wider society.<sup>93</sup>

Relationship breakdown can be both a cause and an effect of poverty and hardship. The stress of poverty can have a negative effect on relationship quality and stability, and cause greater risk of relationship breakdown. In turn, relationship breakdown can increase the risk of poverty for both children and adults, but it is resident mothers and children who are at greater risk of falling into persistent poverty.<sup>94</sup>

**Proposal 3-11      The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to provide that courts must:**

- in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and
- in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.

Relationships Australia concurs with the Commission's reasoning at paragraph 3.122, and welcomes proposals that family violence should be taken into account in property division. The practice experience of Relationships Australia supports the observation made by the Bar Association of Queensland that

...family violence permeates numerous other aspects of family law proceedings, beyond just parenting proceedings.<sup>95</sup>

Relationships Australia further considers that courts should have a discretion to take family violence into account in spousal maintenance matters.<sup>96</sup>

**Proposal 3-12      The Attorney-General's Department (Cth) should commission further research on property and financial matters after separation, including property adjustment after separation, spousal maintenance, and the economic wellbeing of former partners and their children after separation.**

Relationships Australia supports the proposal.

International literature suggests that financial outcomes and property settlements are not significantly different when reached through mediation as opposed to litigation, but that 'mediation enhances the perceived fairness and satisfaction of the parties',<sup>97</sup> increasing compliance with settlements and decreasing the likelihood of further litigation. Such findings seem to relate to degree of perceived control over outcomes.<sup>98</sup> Australian research is limited. However, the large Longitudinal Study of Separated Families conducted by AIFS pointed to limited use of FDR for property matters, but also showed

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<sup>93</sup> Warren, D, *Low Income and Poverty Dynamics – Implications for Child Outcomes*. Social Policy Research Paper Number 47 (2017). Available at <https://www.dss.gov.au/publications-articles/research-publications/social-policy-research-paper-series/social-policy-research-paper-number-47-low-income-and-poverty-dynamics-implications-for-child-outcomes>

<sup>94</sup> Stock, Corlyon et al, *Personal Relationships and Poverty: An Evidence and Policy Review*, a report prepared for the Joseph Rowntree Foundation by the Tavistock Institute of Human Relations, 2014.

<sup>95</sup> Submission 80, 2.1.1, p 5.

<sup>96</sup> See also submission 108 from the Family Law Committee of NSW Young Lawyers, at 8; submission 45, Women's Legal Services Australia, 29.

<sup>97</sup> Hahn and Kleist 2000, 167.

<sup>98</sup> Kelly 1989; Pearson 1991.

that participants were more likely to consider their property division ‘fair’ if they had used mediation than if they had used a lawyer or been to court.<sup>99</sup> Australian commentators consistently identify a ‘strong need’ for affordable assistance in financial matters, especially property disputes, and particularly low value property disputes.<sup>100</sup>

### *Relationships Australia study of FDR outcomes*

Relationships Australia is currently undertaking a national study aimed at measuring the outcomes of its FDR services in both parenting and property matters. That survey, of more than 1700 participants, completed a survey at intake appointments for FDR between May and November 2017, and again three months later. These surveys included questions about their dispute and measures of individual wellbeing, conflict (including violence) between separating parties, and children’s wellbeing. A twelve-month follow-up survey is currently underway. In addition to the quantitative data collected in these surveys, we are conducting interviews with a subsample of participants. The third round of surveys is still underway, along with the qualitative interviews. Preliminary data from the first and second surveys indicates the following.

### Prevalence of property disputes

Although the vast majority of participants in this study were doing FDR for parenting matters, 484 cited property and/or finance matters among the issues they wished to resolve at FDR intake. This represented over a quarter of participating FDR clients (28%). More specifically, 377 respondents (22%) reported wanting a property settlement. Three quarters of these ‘property clients’ were also hoping for a parenting agreement. Conversely, about a quarter (24%) of those reporting parenting issues also wanted to resolve property/ finance matters. Excluding those who reported having no shared property to divide, this proportion jumps to 49%.

*Conclusion: There is considerable overlap of parenting and property clientele, despite the distinction that is reinforced by compulsory attendance for parenting matters only.*<sup>101</sup>

### Value of shared property

The asset pools of property clients in the sample are greater than those of parenting clients, which is an expected selection effect when property clients (a) have some property to divide, and (b) have had to attend a fee-paying service. Nevertheless, the pools are far from high:

- a quarter (25%) are under \$200K (including 8% where the pool is comprised of debt)
- more than half (53%) are under \$500K, and
- more than ¾ (81%) are under \$1 million.

These values must be considered alongside the cost of going to court. One 2014 estimate is that a more straightforward family law case will cost parties \$20,000-\$40,000, while a

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<sup>99</sup> Qu et al. 2014.

<sup>100</sup> Fehlberg, Millward, and Campo 2010; Productivity Commission 2014; submission 137 from Marrickville Legal Centre.

<sup>101</sup> Relationships Australia concurs with the observation made by FMC concerning ‘the unrecognised impact upon children from parents in an elevated conflict state due to property dispute....a quicker response and process is required to reduce the detrimental effect of this conflict. This should be a prime consideration for resolving property disputes prior to a court process.’ (submission 135, 12).



complex case can cost in excess of \$200,000 to litigate.<sup>102</sup> For many of the clients in our sample, costs in this range would represent a prohibitive proportion of the total value of the shared assets. For some, the cost of going to court would be greater than the value of the shared property.

*Conclusion: Property FDR services help meet the identified need for assistance in low value property disputes.*<sup>103</sup>

### Outcomes

At this stage we can only assess agreement rates by Time 2 (approximately 3 months post-intake), when participants had not always completed their FDR process. Of those who had discussed property matters by Time 2, just over half (52%) had reached agreement on some or all of their property matters in FDR. Unsurprisingly, this was higher (57%) among those who attended non-FRC venues (property cannot be discussed in isolation at FRC venues). Among property-only clients (ie those with no concurrent parenting issues), 71% had reached agreement in some or all of their property matters.

*Conclusion: Three months after intake, rates of agreement range from 52%-71%, with 12-month follow-up data still to come. Agreement rates in property matters are higher where the FDR process offers space for these matters to be properly addressed, independently of parenting matters.*

### Satisfaction

Among those who had participated in FDR at the 3-month follow-up:

- 80% agreed that 'Overall, I am satisfied with the way my mediation was carried out'
- 63% agreed that 'Overall, I am satisfied with the outcome of my mediation'

Analysis shows that outcome satisfaction is related to whether or not an agreement was reached, as might be expected. However, clients' satisfaction with the process holds, independent of whether or not an agreement was reached.

*Conclusion: Preliminary data suggests high rates of satisfaction among Property FDR clients with the service they have received through RA.*

### Quotes from Property FDR clients

Over the next 3 months, the Relationships Australia researchers will conduct interviews with up to 100 property FDR clients. Here are some quotes from the first few interviews conducted so far:

**Participant:**...if you can work it out together and come out of it the other end without being thousands of dollars short, but also without fighting each other across the court room, you're a lot better off. For yourself, emotionally, and for your family.

**Participant:** I think that was one of the best things we both did – to decide to do mediation, together. I think it makes you think about your ex-partner, it makes you think about their wellbeing, it makes you think about their financial wellbeing.

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<sup>102</sup> Productivity Commission 2014, volume I, 853.

<sup>103</sup> Supported, also, by the Mediator Standards Board, submission 83, p 5.



## Conclusions

- Relationships Australia handles a large number of property matters in FDR, despite the emphasis on compulsory attendance in parenting matters only.
- Many FDR clients have both parenting and property matters to resolve, despite the distinction that is reinforced by compulsory attendance for parenting matters only on the one hand, and the exclusion of property matters from FRCs on the other.
- Agreement rates in property matters are higher where the FDR process allows for these matters to be properly addressed, independently of parenting matters.
- Our data suggests high rates of satisfaction among property FDR clients with the service they have received through Relationships Australia.
- Relationships Australia's property FDR services help meet the identified need for assistance in low value property disputes.

### **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.**

Relationships Australia supports proposals to ensure that survivors of family violence are not unfairly burdened by debts, particularly debts arising in the course of financial abuse. With the Commission, we acknowledge work done by some banks to address this concern, and support the proposal to encourage financial product providers to establish voluntary protocols.

Relationships Australia recommends that the proposed protocols use a similar, four-step framework that takes into account contributions of debt as well as assets when calculating the asset pool and deciding on a just and equitable distribution of any remaining assets. This would be of particular importance in situations of financial abuse where one party may have caused a strong deterioration of assets and the other party has not contributed to the deterioration.

From a service perspective, Relationships Australia considers that ready access to financial counsellors, at a range of service locations (including courts and FASS facilities and the Families Hubs proposed in Chapter 4 of DP86), is vital. Timely and accessible financial counselling support a range of system users.<sup>104</sup>

### **Proposal 3-14      If evaluation of action flowing from this Inquiry finds that voluntary industry action has not adequately assisted vulnerable parties, the Australian Government should consider relaxing the requirement that it not be foreseeable, at the time the order is made, that to make the order would result in the debt not being paid in full.**

Relationships Australia supports further consideration of the existing provisions if evaluation demonstrates that vulnerable individuals, particularly those affected by family violence, are unfairly carrying debt burdens from separating relationships.

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<sup>104</sup> For example, migrant women who may have additional barriers to understanding superannuation and may not, during their marriages, have had to make financial decisions.

**Proposal 3-15      The Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.**

Relationships Australia supports this proposal. The information resources mentioned in this proposal could usefully be included in the families' information kit described in Chapter 2 of the Discussion Paper.

Relationships Australia shares the concern of the Commission that the rarity of superannuation splits may spring from the complexity of provisions allowing for superannuation splitting, which can be overwhelming to parties already suffering the stress of family separation. As noted by the Commission, this tends to produce harsh outcomes for the economically weaker party to the relationship.<sup>105</sup>

**Proposal 3-16      The *Family Law Act 1975* (Cth) should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. These could include...**

Relationships Australia supports this proposal.

**Proposal 3-17      The Australian Government should develop tools to assist parties to create superannuation splitting orders. These could include....**

Relationships Australia supports this proposal in principle, noting the need for strong identity security safeguards if access is permitted to taxation records.

**Proposal 3-18      The considerations that are applicable to spousal maintenance (presently located in s75 of the *Family Law Act 1975* (Cth)) should be located in a separate section of family law legislation that is dedicated to spousal maintenance applications...**

Relationships Australia supports this proposal, and agrees with the Law Council of Australia that it would be desirable to merge provisions for married and de facto spousal maintenance.

Relationships Australia also agrees with the suggestion from the Law Council of Australia that there should be provision made to allow urgent interim spousal maintenance claims. This would be particularly important if administrative assessment of such claims is not implemented.

Relationships Australia agrees with submitters who recommended that family violence should be taken into account in assessing future needs of a party.

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<sup>105</sup> See David De Vaus et al, 'The Economic Consequences of Divorce in Australia' (2014) 28(1) *International Journal of Law, Policy and the Family* 26.

Finally, Relationships Australia concurs with the advocacy by the Law Council of Australia for

...a single-entry system with Registrar's [sic] triaging matters at the point of entry [to] allow urgent spouse maintenance matters to be listed quickly. There is often urgency and significant impacts on financially weaker spouses...<sup>106</sup>

**Proposal 3-19      The dedicated spousal maintenance considerations should include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.**

Relationships Australia supports this proposal.

**Question 3-4      What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:**

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

Relationships Australia preference is for administrative assessment of spousal maintenance, as offering what is likely to be the simplest and most accessible pathway for individuals in need of income support.<sup>107</sup> While acknowledging the Commission's reservations around lack of flexibility in standardised formulae that necessarily underpin administrative assessment, Relationships Australia considers that (particularly in migrant communities) the need for an accessible and expeditious mechanism outweighs those reservations.

If an administrative assessment mechanism is not considered suitable by Government, then Relationships Australia would urge a return by courts to making Registrars available to hear at least urgent interim spousal maintenance applications.

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<sup>106</sup> Law Council of Australia, submission 43, paragraph 235. Relationships Australia notes the agreement of the Australian Bar Association with the 'general proposition', expressed by Allsop CJ that 'Registrars or other court staff may provide the necessary form of supervision.' (submission 13, paragraph 17).

<sup>107</sup> See also submission 45, Women's Legal Services Australia, 29.

## Chapter 4 Getting advice and support

### **Proposal 4-1 The Australian Government should work with state and territory governments to establish community-based Families Hubs ....**

Relationships Australia supports community-based Families Hubs along the lines described by the Commission. The proposals put forward in DP86 align closely with the suggestions put forward in our response to Issues Paper 48 and which, for convenient reference, we have included at the end of our comments this Chapter.<sup>108</sup>

As observed in our previous submission, Relationships Australia is not prescriptive about the optimal form or structure of Hubs. What matters is that Hubs, physical or virtual, offer to families:

- a central, widely-publicised and safe entry into the full array of multi-disciplinary services that engage with families, including therapeutic services and courts
- a soft entry to primary, secondary and tertiary services
- the opportunity to tell their stories once, and for key information to follow them through their particular pathway, and
- where needed, pro-active case management and navigation assistance.

There are several options that Government could consider and employ in different ways to meet the needs of particular communities. These include expanding the scope of services at existing FRCs and CCSs, as well as the establishment of new facilities in areas with emergent needs that do not currently have the benefit of FRCs, CCSs and/or FLPNs to provide access to multidisciplinary services. Relationships Australia recommends that, given the substantial investment by Governments in the infrastructure of FRCs and CCSs, enhancing the range and depth of services provided by those facilities might be an efficient way to implement the proposed Families Hubs. The only absolute is that families have easy access to seamless services that meet their needs, in a place that works for them.

Relationships Australia welcomes the Commission's observations about the fragmentation and siloing of services, and the effect on users, which can range from inconvenience to life-threatening danger. This is borne out in Relationships Australia's practice experience. We note that commentary supporting the Commission's observations in this regard has come from multiple diffuse sources over a significant period of time. Resolution of these issues is a matter of pressing public concern, and of vital importance in addressing serious, recurrent and widespread safety concerns. In a further demonstration of the practical, client-generated need for easily accessible multi-disciplinary services, Relationships Australia notes that the recent AIFS report on children and young people in separated families reported that parents in their sample had accessed an average of eight services when finalising parenting matters. The main services accessed by parents included:

- lawyers (96%)
- counselling, FDR and/or mediation (94%)

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<sup>108</sup> Relationships Australia notes that several other submitters argued for various kinds of hubs, co-located services or other kinds of models that would facilitate multi-disciplinary wraparound services being made as broadly available as possible; see, for example, the Australian Psychological Society, submission 55, p 7, recommendation 2; p 28; the joint submission from Darebin Community Legal Centre and Fitzroy Legal Service Inc, submission 7, pp 6-7; submission 137 from Marrickville Legal Centre.

- court services (83%)
- family consultants/report writers (60%), and
- ICLs (36%).<sup>109</sup>

We agree with the Commission's observation at paragraph 4.14 that the proposed Hubs should incorporate features including:

- universal screening<sup>110</sup>
- risk assessment
- safety planning, as needed
- needs assessment (assuming suitability for programs unless screened out)
- navigation assistance, and
- coordination of service delivery.

Relationships Australia envisages that the Hubs would extrapolate from the original concept of FRCs as front doors,<sup>111</sup> and some of them could well be located in existing FRC sites, where infrastructure, community relationships and professional linkages and partnerships are established and have been evaluated as working effectively, having taken FRCs way beyond the initial 'front door' concept.<sup>112</sup> This will be particularly important in communities that have been affected by complex trauma, where significant time and effort has already been invested in developing relationships that can have therapeutic benefit. We note that the location of future sites should be informed by demographical data.

It is important to emphasise that Hubs, as conceptualised by Relationships Australia, would not necessarily require services to move into the Hubs, but would involve outposting staff in the Hubs,<sup>113</sup> as occurs at the Neighbourhood Justice Centre in Collingwood.<sup>114</sup>

However they are further developed, Families Hubs should:

- have a focus on safety and wellbeing of children and families (including through ensuring appropriate protection for users such as separate doors, dynamic security, safety rooms, conference rooms, and safe and appealing children's areas)
- emphasise collaborative and joined up service delivery
- offer resources to de-escalate family conflict
- be accessible, including for children and families, and
- build community trust.

#### **Proposal 4-2      The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment**

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<sup>109</sup> Carson et al, Children and young people in separated families: Family law system experiences and needs, 2018.

<sup>110</sup> Relationships Australia South Australia alone has used the various DOORS tools with more than 15,000 clients with effective results. It is now used in several other Australian relationship services and law firms, and is under pilot in at least three other countries (Norway, Sweden and Singapore) and several states in the USA: submission 62, 5. The fitness for purpose of FL-DOORS was recently re-confirmed using a sample of over 5,500 clients (Wells, Lee, Ti, Tan and McIntosh, in press).

<sup>111</sup> Originally intended as a 'front door', rather than a 'one stop shop', although many FRCs now have extensive service offerings well beyond simply a 'front door'.

<sup>112</sup> Depending on data as to need and existing service offerings; see DP 86, paragraph 4.35.

<sup>113</sup> See paragraphs 4.24 and 4.37 of DP86.

<sup>114</sup> Relationships Australia notes the recent 'Orange Door' services established in Victoria.

**of client needs, including their safety, support and advice needs, within the Families Hubs.**

Relationships Australia supports this proposal.

Telephony support services are operated nationally by Relationships Australia Queensland, as a complement to face to face services. Provision of support, information and advice, within a client-focussed and needs-based framework is presently included in the virtual services delivered by the Family Relationships Advice Line. The FRAL provides a suitable existing foundation for the expansion of technology-based services, within the proposed Families Hubs.<sup>115</sup> Through the operation of the FRAL (including the Telephone Dispute Resolution Service and the Legal Advice Service), Relationships Australia Queensland already occupies a unique virtual space where the expansion of existing FRAL services should be used as a base platform for the development of a Virtual Hub. This, of course, aligns with the Lord Chancellor's sentiment noted earlier in this submission, that

*In delivering a proportionate and effective justice system to them, we should be competing not just with the best jurisdictions around the world, but with every modern consumer experience they have in their lives, from skyping their family and friends, to online banking, to entering into contracts with businesses on the other side of the planet.*<sup>116</sup>

**Proposal 4-3 Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation. They should include on-site out-posted workers from a range of relevant services, including....**

Relationships Australia broadly supports this proposal, and offers some observations below about particular services that should be offered through Families Hubs.

*Children's Contact Services*

Children's Contact Services are critical facilities that can support the development of healthy relationships between children and both parents, in situations of high family fragility and volatility. They deserve greater focus by the Commission; in particular, in relation to how CCSs could reach their potential to build parents' and families' capacities to support skills and build healthy, loving families.

Crucially, Families Hubs should include Children's Contact Services that provide parenting education and capacity building. Relationships Australia notes that existing CCSs are desperately underfunded, causing unacceptable delays in accessing them and preventing them to realise their full potential as enablers of parenting excellence.<sup>117</sup> Even if the proposal to establish Families Hubs, incorporating CCSs, is not implemented, we would vigorously urge Governments, as a matter of urgency, to fund these services to move beyond providing supervised contact to services that support parenting excellence, with gradual reductions in services to families as their parenting capacity is supported and

<sup>115</sup> See Relationships Australia's national response (submission 11) to Question 28 of IP48 for more information on characteristics for successful online service delivery.

<sup>116</sup> The Lord Chancellor, the Lord Chief Justice of England and Wales, and the Senior President of Tribunals, 'Transforming our justice system. (Joint Paper, the Ministry of Justice, September 2016), 16. [emphasis added]

<sup>117</sup> Noted also by other participants in the services sector; see, for example, submission 135 (FMC), 13.



promoted by the CCSs. Relationships Australia is mindful that this would involve considerable expenditure; however, the current pattern of spending money on short-term supports for fragile families in crisis only guarantees an ongoing need for recurrent spend. It does not enable the community to reap the benefits of healthy families (separated or intact) or enjoy the downstream savings delivered by lower expenditure on health and intergenerational social welfare dependency.

Properly funded and re--conceptualised CCSs, whether as part of Hubs or post-order supportive services would:

- collaborate with other supportive services
- manage transitional arrangements for families, and
- offer long-term support for higher needs families with complex needs (something not addressed by current CCSs operating as standalone services).

#### *Services focused on meeting men's needs*

Services for men should include parenting services, as suggested by the Commission at paragraph 4.32. The Parenting Centre has recently reported on data about how fathers seek help and advice about parenting, with a view to developing parenting services targeted to fathers. This research brief noted that, in a survey of over 1000 fathers, 18% reported that they had experienced symptoms of depression and 19% reported symptoms of anxiety since becoming a parent.<sup>118</sup>

#### *Specialist services for high conflict families*

Relationships Australia recommends that ongoing training be provided to ensure that all staff have an understanding of the family wellbeing system and have skills in working with separated families who are experiencing high conflict.

#### *Specialist services for children and young people*

Families Hubs should offer accessible child care and family-friendly spaces extending to 'all age' children. It is the experience of Relationships Australia that lack of child care is often a barrier which prevents newly-separated and single parents from accessing supportive services. Youth workers and child-consultants must play key roles in the design and operation of the proposed Hubs.

Families Hubs have the potential to be of particular value to children and young people. In its recent study of the needs and experiences of children and young people, AIFS found that children and young people strongly valued tailored services that allowed them both to vent and to be coached in strategies of self-care amidst and beyond parental separation.<sup>119</sup> One respondent said that post-settlement counselling

...strengthened my relationships with my brothers and probably with our mum....I think it helped us to understand my dad's perspective more... (Phoebe, 15+)<sup>120</sup>

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<sup>118</sup> Parenting Research Centre, *Focus on Fathers: How are fathers faring and what affects their parenting?*

<sup>119</sup> See for example, Carson et al, 2018, 33, 44. At p 44, Carson et al noted that 'Counsellors were nominated by participating children and young people as a key means by which their views and experiences were acknowledged...'

<sup>120</sup> Carson et al, 2018, 49.

Peer support was also valued, and Hubs could offer facilities to accommodate that, both organically and in a structured way.<sup>121</sup>

#### *Specialist services for people with disability*

Premises must be fully accessible for people with disability, including hearing loops, Braille signage, appropriate anti-glare lighting, doors that are easy to open while using mobility aids, kitchenette facilities at appropriate heights for people of short stature and wheelchair users, easy-access entry ways and accessible parking bays.

#### **Proposal 4-4      Local service providers...should play a central role in the design of Families Hubs....**

Relationships Australia supports this proposal. Existing FRCs and Family Law Pathways Networks, as well as the community, should be involved in the co-design of Hubs that respond to community need. As in our response to IP48, Relationships Australia emphasises that, in some communities (particularly regional and remote communities), physical hubs will not be viable. Existing service centres could be expanded to provide Hub services, and technology may also assist (always recognising that there are communities in which safe, reliable and private access to technology is simply unavailable).

Providers of services for older members of the community must be included in designing Families Hubs.

The design of services and activities offered by the Families Hubs could help to reduce the stigma still around accessing supportive services. Stigma (or perceived stigma) can be a particular barrier to access for men and members of particular CALD communities, where accessing post-separation support services is very much taboo. Thus, like the Collingwood Neighbourhood Justice Centre, Hubs could offer community education classes and be a focus of other community activities.

Staff should include bi-cultural workers, Aboriginal and Torres Strait Islander workers and workers with lived experience of LGBTIQ+ and disability. It is important to emphasise that workers should not be recruited primarily on their 'cultural representation', but instead recruitment and induction processes should articulate and demonstrate a particular interest in attracting workers from diverse populations.

#### **Proposal 4-5      The Australian Government should (subject to positive evaluation) expand the Family Advocacy and Support Service (FASS) in each state and territory to include...**

Relationships Australia supports the expansion of FASS facilities to complement Families Hubs in communities. It may also prove useful for legal services providing FASS duty services at courts to also be funded to provide on-site legal assistance at the Hubs, to embed referral pathways between Courts and Hubs. Relationships Australia notes the observation, in the 2018 *Closing the Gap* report, that

Early feedback from legal aid commissions is that the service is meeting a crucial need and that their lawyers' enhanced ability to intervene early and liaise with social

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<sup>121</sup> Carson et al, 2018, 49.

workers is helping them to better identify clients' non-legal needs and support them to access other supports.<sup>122</sup>

Relationships Australia New South Wales currently manages the men's FASS in Sydney. This is proving to be very beneficial. However, current funding arrangements limit the presence of FASS staff in the Court to just one day per week and half a day in Wollongong. This simply is not sufficient, and we would hope that a rollout of FASS facilities would be funded to provide a significantly increased service level.

Examples of how Relationships Australia New South Wales involvement in the FASS pilot has benefited men include:<sup>123</sup>

### Richard

Richard was shouting and swearing at court staff. On speaking with the FASS Men's Support Worker, he said that he was angry with the advice he was given to attend mediation before court proceedings. He stated that he was not being supported fairly because he was a man and that there is no help for males.

The FASS Men's Support Worker sat with Richard and listened to his frustrations, responding non-judgementally and not providing affirmations or advice. The Men's Support Worker challenged his belief that males are not supported by explaining what the FASS men's service is and that he was here to support men.

Richard calmed down considerably upon his frustrations being heard. The resistance towards listening to the legal advice previously provided was defused as his belief of men not being supported was defused. An openness to family dispute resolution options became apparent when he asked 'What mediation options are there?'

The FASS Men's Support Worker provided family dispute resolution options and contacted these services to determine whether or not there would be a waitlist.

### Sam

Sam had issues with homelessness, unemployment, social isolation. His family lives overseas and he had no mobile/contact number. He was distressed with frequent tears and difficulty sitting still. Sam had recently separated from the other party whom he reported was domestically violent towards him. He was couch-surfing with a friend and had been referred by his lawyer who was helping him with parenting matters.

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<sup>122</sup> Closing the Gap, 2018, Department of the Prime Minister and Cabinet, 122. Relationships Australia notes that a range of submitters has identified the FASS pilot as being very beneficial to clients.

<sup>123</sup> Names attached to these case studies have been chosen at random and are not the names of the clients. Research indicates that well-designed men's behaviour change programs can change attitudes: cf eg Peacock and Barter, 2014. Peacock and Barker concluded that successful interventions include affirming language, allowing clients to reflect on hegemonic masculinity, are evidence-based, recognise diversity among clients, recognise the wide range of factors involved in family violence and use a range of social change strategies. Of crucial importance is engaging men as fathers, rather than as perpetrators. That being said, Relationships Australia recognises that these programs are under-evaluated and hard to evaluate: Westmarland, Kelly and Chalder-Hills, 2010.

The FASS Men's Support Worker connected him with accommodation services, including an appointment with a case manager. He referred Sam to Centrelink to claim benefits for Newstart and a crisis payment, to assist with his immediate financial difficulties. He was connected to counselling services through victim services, to get help in dealing with social isolation and distress on an ongoing basis.

Furthermore, it was suggested that he obtain a mobile phone and a pre-paid sim card. The outcome was that Sam became linked with accommodation services, and received case managed support. Centrelink benefits were being received and Sam had a mobile phone.

He presented with a positive attitude and stated 'he felt like everything was coming together' and he expressed confidence in positive change in his near future. He was able to prepare for accommodation that will be suitable for visits from his children. Furthermore, he was now able to receive ongoing emotional and psychological support through counselling services.

### Geoffrey

Geoffrey was referred to the FASS Men's Support Worker at court by the Legal Aid Duty Lawyer. He was self-represented and presented as being well-educated in his legal matter. Geoffrey's matter was approaching final hearing and he was seeking time with his children whom he had not seen for over a year. Geoffrey identified himself as a perpetrator of domestic violence in the relationship before separation. He was unemployed. Furthermore, Geoffrey stated he had chosen to be homeless because he wanted to save what money he had for his children.

The FASS Men's Support worker provided Geoffrey with information about supportive services and discussed the concerns raised by the Court in relation to safety concerns for the children. Geoffrey presented these as concerns about his domestically abusive behaviour, financial instability and lack of acceptable accommodation for the children. These were individually addressed with the Men's Support Worker by discussing services available and making appropriate referrals.

With the assistance of the Men's Support Worker, Geoffrey engaged in the Men's Behaviour Change program, *Taking Responsibility*, and acquired accommodation that would be appropriate for his children. Geoffrey was also now receiving additional financial support with Centrelink and food staples from services near his new accommodation.

The Court made orders allowing Geoffrey to have his children in his care four nights a fortnight, with an increase to 50/50 custody progressively over a two year period. On following up with Geoffrey, he told the FASS Men's Support Worker that he intends to engage in further supports including parenting programs to support his children.

### Bryan

Bryan presented as agitated, with difficulty sitting or standing still. He stated that the court is against him and he is not afraid to say it. Prior to this, Bryan's legal matter was adjourned to a later date due to his disruption in court. Bryan yelled out during his hearing and swore at court staff.

Bryan was on a mental health plan and regularly seeing a counsellor for his anxiety disorder. He further stated that when he is stressed, he loses control, swearing, yelling and breaking things. Bryan says he doesn't want to be this way, but he was brought up to stand up for himself and not be weak.

The FASS Men's Support Worker linked Bryan into anger management services to provide him with strategies and the capacity to manage his emotions whilst at court.

At his next court date, the Men's Support Worker was able to provide a safe space for Bryan to manage his emotions and give him confidence to practice the strategies learned in the anger management sessions. Bryan was able to successfully cope throughout the day, allowing his matter to progress.

### Henry

Henry presented as anxious and alert. He was self-represented and was awaiting a single expert report with recommendations involving parenting. Because Henry was self-represented, and there were concerns that the report could trigger significant distress, the Court ordered the report to be released to him by the FASS Men's Support Worker, so that appropriate support would be readily available.

The FASS Men's Support Worker sat with Bryan in the safe room for men and they read the report together. At regular intervals, reading was paused to debrief, process emotions and assist with coping. Tears were shed by Bryan on occasion and could be expressed due to the safety and privacy of the location within the court.

Upon completion of reading the report and expressing his feelings safely, Bryan felt calm and ready to move forward with his matter. The FASS Men's Support Worker provided him with a referral to counselling for ongoing support and organised for him to receive some legal advice from a legal aid duty lawyer at the court to assist with the next step in his legal matter.

Relationships Australia recommends that states and territories collaborate with the Australian Government to include FASS facilities at state and territory courts that exercise family violence and/or child protection jurisdictions.

We also agree with the Commission's views, set out at paragraph 4.44 of the Discussion Paper, that all FASS workers would need to have the core competencies appropriate to their roles, and that the expanded FASS model should provide duty legal services and supportive/therapeutic services.

Relationships Australia agrees that services should include those set out at paragraph 4.60 of the Discussion Paper.

If the FASS model is not rolled out, then perhaps the functions mentioned in Proposal 4-5 could be incorporated in the Families Hubs (although it would be preferable for FASS to be located in buildings housing courts).

**Proposal 4-6        The FASS support services should be expanded to provide case management where a client has complex needs and cannot be linked with an appropriate support service providing ongoing case management.**

Relationships Australia supports this proposal.

Relationships Australia agrees with the suggestion made by the Centre for Innovative Justice that ongoing case management be provided to people engaged in matters involving family violence.<sup>124</sup> We would also support the suggestion that courts make available navigators to provide ongoing support and referral.<sup>125</sup>

**Proposal 4-7        The level and duration of support provided by the FASS should be flexible depending on client need and vulnerability, as well as legal aid eligibility for ongoing legal services.**

Relationships Australia supports this proposal, and would support flexibility on level and duration of support, regardless of service model.

**Proposal 4-8        The Australian Government should, subject to positive evaluation, roll out the expanded FASS to a greater number of family court locations, including in rural, regional and remote locations.**

Relationships Australia supports this proposal.

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<sup>124</sup> Submission 109, 18.

<sup>125</sup> See submission 30 from Peninsula Community Legal Centre.



## **Families Hubs – extract from Submission 11, modified to take account of the Proposals in DP86**

Relationships Australia considers it useful to include here the hub model proposed in its response to IP48, with some modification to take account of evolving considerations. It aligns with the Commission's public health model.

Hubs would provide primary services in the forms of universal screening, education, information, advice and support. Secondary services would be provided by Families Hubs and FASS facilities, utilising case management where necessary. Tertiary services would take the form of offering a flexible suite of dispute resolution options, also embracing assessment, safety planning, navigation, case management, court triaging and streaming into specialised lists (see Chapter 6) and post-order/post-agreement services. Post-separation service frameworks do not currently offer cultural competence with working with same-gender parented families, so this is a significant gap. LGBTIQ+ workers at Families Hubs would provide an essential gap-filler while appropriate training and guidelines are developed.

Families affected by separation should have ready access to a system which supports:

- healthy whole of family relationships (including intergenerational and adult sibling relationships) throughout the life span<sup>126</sup>
- families to stay together or separate in a way that focuses primarily on the safety, development, and other needs of children, including the establishment of safe and healthy co-parenting relationships, with functional communication and conflict prevention/resolution skills
- financial and economic recovery and stability of separating adults (including ongoing social and economic participation as well as an appropriate division of resources and debt), and
- an appropriately trained and equipped professional workforce.

In our response to IP48, Relationships Australia expressed its support for the idea of overarching principles to guide reforms; in particular, Relationships Australia endorses:

- giving the widest possible protection and assistance to family relationships
- affording safety to those affected by family conflict and violence, and
- assisting families to resolve conflict and manage separation safely and in a way that preserves meaningful relationships.

In addition, Relationships Australia argues that a Family Wellbeing System should be designed according to the following principles:

- holistic and integrated design from and around the needs of families, not around existing legal, jurisprudential, administrative, funding or single-disciplinary structures, distinctions and hierarchies;<sup>127</sup>

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<sup>126</sup> Relationships Australia concurs with the observation of FMC that 'more attention needs to be paid to a systematic approach to define and fund a broader more "family eco-system" approach': submission 135, 7.

<sup>127</sup> Family and Relationship Services Australia argues for an approach that puts 'families first and foremost (a client upward approach) rather than taking a law downward approach. (Submission 53, 12).

- that services (including decision-making mechanisms) be therapeutic in their aim and effect, and accommodate and respond to the enduring, rather than ‘one off,’ nature of problematic family dynamics
- that services, especially decision-making mechanisms, be explicitly focused on children’s best interests (including safety, and recognising the dynamic nature of child development, which gives different content to ‘best interests’ as children grow mature)
- as a corollary of the preceding point, that families are supported before, during, and after separation
- ‘front-loading’ costs through prevention, early intervention, capacity-building within families, and follow up<sup>128</sup>
- offering pathways and services proportionate to families’ needs and resources (ie not a ‘one size fits all’ journey with court as the ultimate and most highly valued destination and vindication)
- that there be no wrong door and one door only and, as an enabler of this principle, that service integration and collaboration happen at the organisational level<sup>129</sup>
- that services be available on the basis of universal service and accessibility,<sup>130</sup> and
- above all, that the well-being and healthy development of children remains paramount (and, as a corollary, will prevail over the rights and interests of adults, in cases of conflict).

With these considerations in mind, Relationships Australia advocates radically different arrangements, in which therapeutic and decision-making services would stand as co-equal pillars to support families to stay together or to separate safely and healthily.

Therapeutic services would operate collaboratively across disciplines, and be integrated seamlessly and invisibly to the end users, who could be assisted by a continuum<sup>131</sup> of intervention from referrals and the provision of information to navigation assistance to full case management, depending on their needs and capacities. Child-inclusive practice would be assumed, and child safety and healthy development the prevailing consideration.

Relationships Australia supports the suggestion from FMC that

...consideration should be given to a specifically funded and obligatory therapeutic service for children whilst their parents’ legal action waits to be heard. This would

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<sup>128</sup> Relationships Australia notes the observation of Dr Bruce Smyth that, in recent years, there has been little appetite for policy development in early intervention and prevention. In particular, Dr Smyth suggests that ‘There has been a marked decline in couple relationship education on the one hand, and an expansion of parenting education on the other. (submission 104, 10). See also submission 53, Family and Relationships Services Australia, 12.

<sup>129</sup> See the Family Law Council’s recommendations in its 2016 report, especially recommendation 1. We note the observation by the Australian Association of Social Workers, that ‘Many social workers...report that the adversarial nature of court processes works against collaboration.’ (submission 25, 12).

<sup>130</sup> In this connection, the comments by Relationships Australia on the KPMG final report, see out at Appendix E, especially at page 9, noting that ‘...FL [Family Law] services have successfully provided services to clients with high rates of disadvantage within a universal framework....Without universal access, a proportion of higher income clients will end up in court, and many of these families will end up disadvantaged by the end of this process.’ This would undermine policies focused on encouraging timely decision-making.

<sup>131</sup> As per Daryl J Higgins, ‘A Public Health Approach to Enhancing Safe and Supportive Family Environments for Children’ (2015) 96 *Family Matters* 39.

acknowledge the impact of psychological and emotional abuse upon children and enable continuity of support...<sup>132</sup>

Families would be offered preventative, crisis and ongoing services, and providers would be expected to offer support and education to build families' capacities. In addition, users would be able to choose the medium by which they engage with services at different points of time: online, offline or a combination.

## **Families Hubs**

Families Hubs should be comprised of:

1. integrated, multi-disciplinary services, and
2. decision-making services (including existing decision-making pathways).

Families Hubs could be a place for knowledge and skills acquisition (eg to build parenting capacity), assessment feedback, skills training and coaching. The services offered at and through particular Hubs should reflect the needs of the surrounding community.

Hubs would be supported by legislative amendment, court reforms and a national, integrated funding model. The services would be multi-disciplinary, incorporating features of existing FRCs, health justice partnerships and domestic violence units and delivered through service delivery hubs. In this submission, the 'hub concept' of service is flexible and deliberately non-prescriptive - hubs must take a range of forms to meet the needs, circumstances and exigencies of the communities which they serve. They could be housed in bricks and mortar premises; they may be online; they may exist by virtue of robust and effective cross-professional collaboration, or they may combine any or all of these. The essential parameters of the 'hub', physical or virtual, are:

1. one door only/no wrong door
2. ease of access, physically, online, or in combination
3. universal screening
4. a continuum of navigation assistance, from simply providing information, through navigation to intensive case management, and
5. integration and collaboration between services dealing with the family in a way that is seamless for, and invisible to, the family.

### *Physical hubs*

Relationships Australia supports the notion of hubs as a family separation specific application of the concept of place-based services. Place-based services would, in some instances, include courts being located, or circuiting to, where families are, which is of particular importance where multiple court events are required.<sup>133</sup> Relationships Australia supports proposals to ensure the safety of people coming to family relationships services, and those who work in those services (including courts). We consider, however, that

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<sup>132</sup> Submission 135, 13.

<sup>133</sup> See PwC Report, 20-18, 33, which notes that litigation in the Family Court of Australia typically involves many more court events than litigation in the Federal Circuit Court. The Family Court does not have as many registries as the Federal Circuit Court, and thus the 'court event' burden for families appearing in that Court is more likely to involve costs and travel. The Australian Bar Association, in submission 13, also notes the effects on families of multiple court events, particularly when these do not add value by progressing the matter towards resolution: see paragraph 9.

dynamic security innovations can address these needs, subject to proper funding being provided.

The physical Hubs could incorporate space which could, on a visiting basis, host court hearings, along the lines of the Collingwood Neighbourhood Justice Centre. The Hubs could have the kinds of features suggested by Marrickville Legal Centre in submission 137. The court would be a service located in a therapeutic space. They could be totally or partially co-located with existing services, such as FRCs or CLCs, or be within or adjacent to places of social significance and ease of access, such as schools, hospitals and health centres, or shopping precincts. Like the Collingwood Neighbourhood Justice Centre,<sup>134</sup> physical Hubs could also offer space after hours for community activities, enhancing their utility and image as community resources.

### *Virtual hubs*

For some communities, a physical Hub may not be practical, resource-efficient or helpful to serve the community, and its purposes will be better achieved by virtual and online services, or other flexible means of collaboration. For example, in some smaller communities, people will often need a choice of services to counteract actual or perceived conflicts of interest and to offer appropriate assurance as to privacy and confidentiality. Recruitment of specialised professionals to live and work in particular areas can also pose significant challenges. To varying extents, these considerations are currently addressed through the ways in which various FRCs and FLPNs provide means for collaboration, joint training and service provision. Other models are also being explored,<sup>135</sup> and technology could support the establishment of Virtual Hubs.

Existing FRCs and FLPNs already provide highly-valued means of networking and collaborating, to the benefit of clients in smaller communities. Many smaller communities are already under-resourced for existing supportive services (eg family violence services, legal services and therapeutic services), which has stimulated the growth of trust and reputation between service providers. This already-existing asset provides valuable support to smaller communities, and should be preserved and enhanced.

### *What kinds of services could the Hubs deliver?*

The services offered at and through particular Hubs should reflect the needs of the people who live in the community. Potentially, they could include:

- universal risk screening, triage, warm referrals and safety planning
- children's advocacy centre (CAC) or Barnahus-type facilities for children who have been affected by violence or sexual abuse<sup>136</sup>

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<sup>134</sup> Or, in the context of multicultural services, Access Gateway in Queensland:

[https://www.accesscommunity.org.au/the\\_gateway](https://www.accesscommunity.org.au/the_gateway).

<sup>135</sup> See, for example, the recently-announced New South Wales trial in which family violence survivors will be housed in purpose-built units with access to on-site support where providers can come to them, as well as access to other social amenities: Anna Caldwell, 'Female domestic violence victims given two-bedroom units to live in', Daily Telegraph, 1 May 2018, quoting the New South Wales Minister for the Prevention of Domestic Violence, the Hon Pru Goward MP.

<sup>136</sup> For more information, go to: <http://www.dcac.org/>. Of particular note in the CAC model is (a) the one-time interview of children, which is witnessed and recorded from a secure site, and (b) the wraparound services. Potentially, this aspect could also have an investigative capacity, provided by co-located child protection workers. A common complaint about the family courts, from members of the public, is that they do not carry out investigations; however, Ch III courts are unable to carry out such functions. For more information on the Barnhus

- case-management for families with co-occurring needs
- Aboriginal and Torres Strait Islander workers
- CALD workers
- mental health services (including mental health services for children)
- legal practitioners to provide early advice and urgent legal/safety responses
- social workers
- child development professionals
- psychologists
- financial counsellors<sup>137</sup>
- gambling counselling
- addiction counselling
- behavioural change programmes
- housing assistance
- an embedded Centrelink presence
- existing FRC services (including FDRPs and FGC)
- police services
- space for supervised contact and parenting capacity building
- space for relationships and personal education programmes to be conducted
- space for circuiting courts – courts visiting the hubs should be in a position to exercise multiple jurisdictions, including: federal family law; State/Territory child protection and welfare law; drugs courts and criminal law, <sup>138</sup> children’s court jurisdictions and adult guardianship and mental health jurisdictions<sup>139</sup>
- space for circle courts
- facilities for service users to access, in safety and privacy, online information and online services (including online services).
- information-sharing databases for professionals, allowing them real time access to relevant information, especially about safety, from any Australian jurisdictions.

Virtual Families Hubs could be based on the existing FRAL service. Current service offerings give clients access to well-designed, case managed approaches which use multi-disciplinary services to overcome barriers to service access, including conflicts of interest or lack of specialist professionals in a particular area to provide face-to-face services.

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model, adapted from the US children’s advocacy models which developed from the 1980s, see for example <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Barnahus-Improving-the-response-to-child-sexual-abuse-in-England.pdf>; and <https://childcircle.eu/2018/02/27/launch-of-renewed-action-to-promote-the-barnahus-model-in-europe/>. See also submission 53 from the Family and Relationships Services Australia, p 20.

<sup>137</sup> In 2015, Women’s Legal Service Victoria completed a pilot in which financial counsellors were involved in the support of family violence survivors, from the initial contact with the service. The pilot, described in the ‘Stepping Stones’ report, demonstrated that early access to financial counselling can markedly improve the speed and degree by which survivors can recover, financially and psychologically, following separation from abusers.

<sup>138</sup> An example of a useful jurisdiction to exercise when making a personal protection order might be victims of crime compensation legislation, to provide a person leaving a violent situation with an amount of money to establish themselves (eg cover a rental bond). Other examples might be to deal with breaches of a personal protection order.

<sup>139</sup> All of these courts would still exist in their current forms. However, courts could visit physical hubs because that is where people with complex needs, only one subset of which is legal need, can go for their services. Where practicable for the community in question, this is an example of client-centred system design.

### *Ongoing rather than one-off service delivery*

Research increasingly identifies the need to use a multiple session approach with families who are participating in FDR. However, legal systems tend to be based around a single point in time service – the dispute is adjudicated on, remedies granted or denied, and the parties move on. This is not the case for family separation, particularly in the context of modern expectations of ongoing co-parenting. The services offered and the performance measures applied should be premised on models which allow engagement with services in non-linear ways, reflecting the non-linear emotional and psychological experience of family conflict. Examples of this kind of practice are already at work – in existing multiple session models, clients are given the opportunity to trial an agreement which may span only a few weeks, or a month, before attempting to extend the agreement beyond that timeframe. This, in turn, affords an opportunity to re-establish safe and respectful communication, and to acknowledge the important role that the other parent may play in their children's lives. Where possible, a multiple session approach also enhances opportunities for children to have a say in how they are managing the separation of their family. Some issues, too, will take time to resolve (20 weeks is now the minimum standard for men's behaviour change programmes).

### *Reform of the Act - a therapeutic/social services-centred paradigm*

Relationships Australia recommends the introduction and passage of a new Act of Parliament, not to be called the Family Law Act, but a Family Wellbeing and Services Act reflecting that legislation and judicial decisions are pillars of an overall network of support for families, separating and intact, and thus sit alongside an array of services and decision-making pathways.



## Chapter 5 Dispute Resolution

**Proposal 5-1** The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) should be relocated to the *Family Law Act 1975* (Cth).

Relationships Australia supports this proposal.

**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 when determining whether family dispute resolution is appropriate, the family dispute resolution provider should consider the parties' respective levels of knowledge of the matters in dispute, including an imbalance in knowledge of relevant financial arrangements.

Relationships Australia supports this proposal, noting that, if FDR for property and finance matters is mandated, FDRPs will need to be alert to issues of financial abuse (including online surveillance of finance and property arrangements and transactions by a coercive/controlling partner).

**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. There should be a limited range of exceptions to this requirement, including....

Relationships Australia supports this proposal. It is our experience that 'many families will need access to affordable mechanisms for settling property and financial arrangements after separation.'<sup>140</sup>

We caution that FDR is not a suitable approach for all families, while noting submissions from legal practitioners and legal practitioner representative bodies that support pre-filing family dispute resolution for property and financial matters.<sup>141</sup> Relationships Australia considers that:

- pre-filing FDR should occur in both parenting and property/financial matters
- the same exemptions should apply in all matters, and
- the section 60I process currently in use should be reviewed to improve its utility for parenting matters and to enable the process to be safe and effective in property and finance matters.

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<sup>140</sup> ALRC DP 86, paragraph 5.18. See also submission 53 from Family and Relationship Services Australia, pp 34ff and submission 137 from Marrickville Legal Centre. Relationships Australia concurs with the observations put forward by Dr Bruce Smyth and Family Relationship Services Australia in their submissions responding to IP48. See Submission 104, 5, referencing submission 13 to the House of Representatives Standing Committee on Social and Legal Affairs, *Parliamentary Inquiry into the Child Support Program*, authored by Dr Smyth and Bryan Rodgers; FRSA submission 53, 38-39, describing various approaches taken by FRSA member organisations.

<sup>141</sup> See also submission 83 from the Mediator Standards Board, p 4; Central Australian Women's Legal Service, submission 24; submission 137 from Marrickville Legal Centre, 18. The Law Council of Australia would appear to disagree (see paragraphs 222ff of submission 43), on the basis that FDR can be used as a vehicle for burning off a party that is financially or emotionally weaker and to take unfair advantage of such a party. It is the experience of Relationships Australia, however, that such issues arise also in parenting matters, in which FDR has been successful.

### *Property mediation conducted by Relationships Australia – scope and constraints*

Relationships Australia has offered mediation in property, as well as parenting, matters since 1984. It is estimated that, nationally, Relationships Australia handles between 2000-3000 cases each year involving property, of which around 600 are property-only.<sup>142</sup> With the 2006 reforms, the focus shifted to parenting matters and funding constraints have limited the offerings in property and finance mediation. The 2006 reforms precluded FRCs from offering property mediation in isolation from a parenting dispute. Accordingly, FRCs operated by Relationships Australia do not offer property mediation at all. Elsewhere, property mediations are offered by Relationships Australia as a fee-paying service under separate FDR funding. Clients pay a sliding hourly rate based on income and are advised to seek legal advice.

Relationships Australia Western Australia reports that FDR can be beneficial for families with large and complex asset pools. Typically, property mediations conducted by Relationships Australia Western Australia will include:

- assets held within Australia
- assets held overseas
- vehicles
- multiple bank accounts, including offshore accounts
- shares
- superannuation funds, including self-managed funds or defence force superfunds
- family trusts
- credit card debt, and
- personal loans with third parties, often linked to one of the properties.

### *Preferred approach to property mediation*

Relationships Australia considers that mediation on financial and property matters should centre around an interests-based approach, rather than a positional approach centring on relative percentages of the asset/debt pool. The model of FDR employed by Relationships Australia in property matters is generally described as facilitative, with a focus on problem-solving.

Relationships Australia strongly encourages clients to seek legal advice. Parties can, and should, seek legal advice as they participate in the mediation process and to have agreements reached at mediation prepared as a legally binding document.

Relationships Australia New South Wales considers it to be vital that lawyers provide clients with a percentage range, even if it is as broad as 'above/below' 50%. When lawyers suggest to clients a particular percentage, as sometimes occurs, that figure appears to be the only thing the client remembers, which can shut down productive discussion. Our experience is that if both parties have been given a particular percentage, this has a significant influence on a mediation.

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<sup>142</sup> Relationships Australia notes the observations of other submitters supporting mandatory FDR on property matters; see, for example, FMC, submission 135, 10.

### *Qualifications to conduct property mediation*

Relationships Australia considers that legal qualifications are not necessary to conduct mediation in finance/property matters.<sup>143</sup> A mediator is not a decision-maker and agreements reached through mediation are not, of their own force, legally binding. However, Relationships Australia does consider that, where family violence is present, and where there are imbalances in knowledge and power, for example, it is preferable to employ legally-assisted dispute resolution.

*If pre-filing mediation were mandated for property and finance disputes, should there be exemptions like those in section 60I?*

Relationships Australia agrees that there should be exemptions from a pre-filing requirement and that the exemptions should be consistent across both parenting and property/finance matters. However, as discussed below, we consider that s60I needs to be reviewed as a matter of urgency, because of the deficiencies in its current form.

**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. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.**

Relationships Australia supports this proposal.

**Proposal 5-5        The *Family Law Act 1975* (Cth) should include a requirement that family dispute resolution practitioners in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved. The certificate should indicate that....**

Relationships Australia supports this proposal. The benefit in requiring certificates for property matters is that, by encouraging parties to resolve their dispute through mediation, they are potentially avoiding lengthy, protracted and expensive court proceedings. In many instances, property and children matters run in tandem and, at times, it can be difficult for parents to separate the two discussions.

We welcome the Commission's formulation of the proposal to avoid problems that have arisen in relation to section 60I certificates.<sup>144</sup>

Relationships Australia Western Australia suggests that certificates should avoid subjective language such as 'genuine' or 'non-genuine', and use factual statements such as 'attended FDR with [practitioner] and no agreement was reached.'

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<sup>143</sup> For a different view, see, for example, Family Law Committee of NSW Young Lawyers, submission 108, 9. Relationships Australia notes the opposition of the Law Council of Australia to 'any extension of the s60I process to financial matters', on the basis that such a requirement would exacerbate delays, increase costs and provide an additional weapon by which to perpetuate abuse: see submission 43, paragraphs 222ff, 267, 276. The Law Council's disquiet may be alleviated by modification of the current process, following the review proposed by the Commission.

<sup>144</sup> See, for example, the observations of the Bar Association of Queensland, submission 80, p 12ff.

**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?**

Relationships Australia considers that, if the preceding proposals are implemented, it would be useful to extend these periods, to allow families the time they need to be safe and emotionally prepared to undertake family dispute resolution in relation to property and financial arrangements.

**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. For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to....**

Relationships Australia supports this proposal. It is our experience (and we note that is the experience of various other submitters responding to the Issues Paper) that non-disclosure, or tactical protracted non-disclosure, are associated with financial abuse and misuse of systems and processes.

Relationships Australia further supports locating disclosure duties in the Act, as suggested by other submitters.<sup>145</sup>

**Proposal 5-7**        **The provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may....**

Relationships Australia supports this proposal, subject to its response to Question 5-2.

**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. Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that....**

Relationships Australia supports this proposal in principle, subject to the comments made in response to Question 5-2. Relationships Australia South Australia provides, on intake, an information pack including matters produced by the Commonwealth Attorney-General's Department. That pack refers to disclosure obligations.

Consideration should be given to imposing obligations on advisers to take all reasonable steps to ensure that parties comply with disclosure duties. Relationships Australia Queensland considers that there should be consequences for FDRPs and lawyers who knowingly facilitate a non-disclosure; noting that non-disclosure can be a form of financial abuse. However, any framework to impose consequences would need to take into

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<sup>145</sup> Noting in particular the comments by the Law Council of Australia at paragraph 221 of submission 43, and those of the Family Law Committee of NSW Young Lawyers, submission 108, 7. That Committee noted its members' experiences that 'vulnerable parties are often forced to initiate court proceedings due to a spouse who consistently hinders settlement by refusing to provide financial disclosure' and that such behaviour rarely has consequences for the recalcitrant spouse.

account that FDRPs have a neutral and non-investigative role, which limits their capacity to ‘ensure’ parties disclose).

**Question 5-3      Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matter?**

Relationships Australia supports a review, noting our experience that the existing certificates create confusion. Relationships Australia further considers that any pre-filing processes for parenting orders and for property and financial matters should be aligned, to simplify processes for families.

Relationships Australia Western Australia reports that the current categories appearing on the certificate are problematic; they can be seen as subjective and are often challenged by parties. The current format of s60I certificates gives scope to parties to ‘shop around’ until they are issued with their preferred category of certificate (or to harass their former partner).<sup>146</sup> As noted by the Bar Association of Queensland, the section 60I process can cause unreasonable delay, driven by waiting times to access FDR.<sup>147</sup> Clients have expressed concern that the certificate will influence how they are perceived by the Court, and have a fear that the consequence of this can be adverse costs orders. Also, the current format does not enable differentiation between a matter not suitable for FDR at a particular point of time and a matter that will always be unsuitable for FDR. It is the experience of Relationships Australia that certificates can be viewed as a tool with which to threaten the other person.<sup>148</sup>

Relationships Australia Queensland also identifies the current administrative complications surrounding s60I certificates. The risk of replicating these provisions in relation to property and finance matters is real, and a review of the s60I certificate process should aim to avert it. Such a review offers the opportunity to minimise the complexities encountered by clients and FDRPs in interpreting the language used in s60I certificates. Relationships Australia Queensland suggests that the certificate could be simplified to have two options only, demonstrating that:

- an attempt at FDR was made; or
- FDR is inappropriate.

Further, Relationships Australia Queensland suggests that current requirements for obtaining an exemption, which can include an affidavit particularising the alleged violence, can be a barrier for family violence victims. Such a process is not only an administrative (and cost) burden imposed on the victim, but can also re-traumatise victims, particularly ones with intersecting vulnerabilities (eg victims from CALD communities, Aboriginal and Torres Strait Islander victims, or victims with disability).

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<sup>146</sup> Relationships Australia notes the observation by Dr Bruce Smyth that ‘...little empirical research into the process of issuing s 60I certificates has been conducted.’ (submission 104, 8). The submission notes the Commonwealth-funded study in 2016, and suggests future research (at page 9).

<sup>147</sup> Submission 80, 4.2.3, p 11.

<sup>148</sup> Relationships Australia notes the proposal of the Bar Association of Queensland to implement a compulsory FDR processes which would include two stages of certification by a mediator and draft directions between those two stages. See submission 80, pp 14-17.



In these circumstances, a simplified process, along the ‘two options’ line, would improve access. Relationships Australia Queensland acknowledges that changes to the s60I certificate process would need to be accompanied by a rolling education and awareness campaign, and would need to be implemented in close partnership with the courts, so that intake processes in the courts can be appropriately modified.

Finally, Relationships Australia concurs with the view of the Mediator Standards Board that families should

...view mediation not only as a preliminary step in resolving family law disputes but as an ongoing option.<sup>149</sup>

**Proposal 5-9        The Australian Government should work with [service providers] to support the further development of culturally appropriate and safe models of family dispute resolution for property and financial matters. This should include....**

Relationships Australia supports further work to be done to enable families, who might otherwise be screened out of FDR, to access low cost resolution mechanisms. In our experience, there are very few low cost services available to help low income families who present with multiple co-occurring needs.<sup>150</sup> We note the observation, made in the joint submission from Darebin Community Legal Centre and Fitzroy Legal Service that

At present, lack of availability of counselling and mediation services means that for impecunious clients, going to court is often the only option.<sup>151</sup>

This is a perverse outcome.

Additional funding for legally-assisted FDR within the community sector would significantly benefit to ‘at risk’ families, and could be of value in addressing asymmetries of knowledge and power.

We also agree with the Commission’s observation at paragraph 5.72 that ‘...a systematic examination of existing constraints on the ability ... to provide these services, either on a means tested, cost recovery, or fee for service basis, is warranted.’

Relationships Australia would add that Proposal 5-9 should be revised to include providers of services to older people in the further development of culturally appropriate and safe models of FDR for parenting, property and financial matters. Consistent with broader initiatives relating to age discrimination, ageism and aged care, the Australian Government should take care to include, in its design of programmes, consideration of inter-generational conflicts, for the reasons set out in our submission responding to the Issues Paper. In this respect, the matters canvassed by the Commission at paragraph 5.75 should, we submit, be expanded to acknowledge the particular vulnerabilities and service needs that may affect older members of the community (including where these intersect with the matters that are listed; for example, grandparents as carers of grandchildren).

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<sup>149</sup> Submission 83, p 2. See also submission 80 from the Bar Association of Queensland, noting that ‘ADR can occur at any point in time during the life of a family law dispute.’ (4.2, p 7).

<sup>150</sup> See also submission 137, Marrickville Legal Centre, 17, which describes this situation as a ‘huge gap in service provision.’

<sup>151</sup> Submission 7, paragraph 9.



Relationships Australia notes that making available more complex interventions would require appropriate staff and resourcing to be successful.

**Proposal 5-10      The Australian Government should work with [service providers and organisations] to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters.**

**These guidelines should include....**

Relationships Australia agrees that national practice guidelines for the delivery of LADR would be useful, and provide a solid foundation for expanding the provision of LADR in suitable matters, while addressing concerns raised by a number of stakeholders. Such guidelines might usefully be developed by the proposed Family Law (or Family Wellbeing) Commission (see Chapter 12).

We again note the need to include in the development of the proposed guidelines providers of services to older members of the community, to ensure that the proposed framework accommodates and responds to their particular needs, vulnerabilities and interests.

Relationships Australia considers that the suggested guidelines should be developed by a multi-disciplinary panel including a family court judge, legal services providers and members of Family Law Pathways Networks.

Further, consideration must be given to funding of the legal assistance component, to ensure equity for clients. Legally-assisted FDR will be a very useful service, particularly in areas where there are limited options for low cost legal services. It would provide families with enhanced continuity of service provision in the same location (which is highly valued by clients), who will be less likely to ‘fall through the cracks’ in moving between services. In the experience of Relationships Australia, clients benefit significantly from having a meeting with their lawyers before and after FDR sessions.

The Commission has highlighted the need for case management for families with complex needs. Relationships Australia would urge the Commission to recommend that funding to services make allowance for case management as a discrete service. Currently, there is no allowance in Government funding for case management; case management hours are not reported or counted unless the client is actually present for it.

Relationships Australia also wishes to draw attention to the difficulties faced by families involved in re-location disputes. These can cost around \$30,000-40,000 to litigate. The outcomes, too, can carry significant ongoing costs – for example, airfares, which can be particularly expensive where members of separated families live in regional or remote areas and where children are too young to fly unaccompanied. Relationships Australia suggests the expansion of subsidised LADR services to provide to families two LADR sessions of two hours each for re-location matters. Services should also be funded to offer child-inclusive practice. The presence of lawyers is essential in these matters, because of the complexity of the legal issues, and also because they can provide parties with a ‘reality check’. There are also differences in how the primacy of the children’s best interests operates with the consideration of parental wellbeing, if the desired re-location is not approved, being taken into account by the court. Issues such as parents’ employment opportunities and social networks are, in our experience, considered in these matters, because of the bi-directional nature of parental and child wellbeing and adjustment. LADR

in re-location cases should be explicitly child inclusive in its approach, to ease some of the pressure that can be placed on children to articulate to each parent a view as to the proposed re-location (and the older the child, the more likely s/he is to be asked for views).

It is the expectation of Relationships Australia that re-location disputes between Aboriginal people are likely to come to the attention of family courts more often in the future. Issues can involve, for example, whether a child is to be brought up in town or on country and whether, when a child is old enough for secondary school, he or she should be sent to boarding school. Communities to which parents belong can be situated thousands of kilometres apart, with road travel the only option. This can be complicated if road travel is unexpectedly impossible, such as when roads are closed for community business or because of weather considerations.

**Proposal 5-11      These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.**

Relationships Australia agrees that any guidelines for LADR should be regularly reviewed. Any review should take into account that service providers may use their own guidelines to support good practice (for example, those used by Relationships Australia South Australia). Resources should be made available to support regular review as proposed. Potentially, the Family Law (or Family Wellbeing) Commission proposed at Chapter 12 of DP86 could undertake this role.

## Chapter 6 Reshaping the Adjudication Landscape

As foreshadowed in Chapter 1, and set out more fully in the Relationships Australia submission responding to IP48, deficiencies of the current adjudication landscape include:

- institutionalised (and inadvertently rewarded) parental conflict (ie by inherently setting up contests of ‘who can make their former partner look worse relative to them’?)
- decision-makers being, of necessity in the adversarial system, reliant on evidence put before them by parents, who may be self-represented and otherwise ill-equipped to gather probative evidence and present it in a cogent form
- the Constitutional limitations on the capacity of Chapter III courts to undertake investigation
- lengthy delays which entrench conflict over time, and produce multiple court events (interim and post-final order), in turn producing poor outcomes for children<sup>152</sup>
- numerous court events that parties need to attend (and may need travel long distances to do so – sometimes only for their matter not to be reached that day because of excessive and unrealistic listing)
- need for legal representation, particularly for vulnerable users and where there is a disabling imbalance of power between the parties; this need manifests itself many ways, including complex and technical information, forms and processes
- court processes (and physical facilities) that enable perpetuation of family violence.

Traditional judicial processes are uniquely suited to deal with matters involving complex (or novel) questions of law, as to resolve disputes involving complex asset structures and arrangements, cross-jurisdictional issues or where there is no imperative for an ongoing relationship between parties. However, such cases should not drive the process and conceptual framework that is intended to meet the needs of the overwhelming majority of the caseload.

In addition to the extensive material and arguments provided by diverse submitters to illustrate the unsuitability of current arrangements, the voices of parents cannot be dismissed. Parents interviewed for the ongoing Family Dispute Resolution Outcomes Study being conducted by Relationships Australia made their views very clear:

**Participant:** I have a fear that the court system isn’t really looking at the best interest of the child, it seems very heavily geared to be equal between parents.

**Participant:** I’m not I’m completely not interested in legal services. I don’t believe that it is in the best interest of the kids at all. So yeah and you know [Name of ex-Partner] said that [ex-Partner] would get a lawyer if I didn’t agree to the you know, the outcome and so I didn’t feel like I had any choice in the matter either

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<sup>152</sup> See submission 80 from the Bar Association of Queensland, which observes that ‘...we speak of the horrible and long-term impacts on children where mum and dad cannot agree on a thing; where children pick up on the mega-messages of each parent....children can be negatively affected *even when the proceedings only involve property proceedings*.’ (4.1, p 7; emphasis added) See also ALRC DP paragraph 6.51, noting submissions 142 (R Hainwsorth), 40 (Women’s Law Centre of WA), 23 (Domestic Violence Victoria), 7 (Fitzroy Legal Service and Darebin Community Legal Centre), 129 (Relationships Australia Victoria), 126 (Interrelate), 118 (For Kids Sake), 55 (Australian Psychological Society). See also PwC report, 2018, 28.

because you know I'm not willing to take it to court. So I firmly believe that it's not in the kids' best interest to go drag them through court. So yeah I'd rather let [ex-Partner] do [their] thing and then you know, like I'll just do what I can and when you know the kids are old enough to decide for themselves you know we can cross that bridge when we come to it but I'm not going to go to court about it.

**Facilitator:** Can you tell me a bit about how mediation has affected your relationship with the other parent, if it has? **Participant:** It was very, very rocky there for a while, but I think after listening to what was said and that, I eventually came round to well, I just do my thing and [ex-Partner] does [their] thing, and we just worry about the kids. And we are actually talking more at the moment which is surprising....So we do communicate, it's all for the benefit of the two little rugrats.

When parenting matters are recognised – not only by parents, but by the community and the government - as inquiries about children's safety and best interests, and less about continuing differences between parents, the incongruity of adjudication between adult parties, as to their 'rights and responsibilities', is stark. This opens up the option of decision-making structures that could resolve parenting matters, absent parental agreement, by a multi-disciplinary tribunal akin to a guardianship tribunal.

Harm prevention is particularly critical for children. We consider that, fundamental to achieving this aim, is implementation of therapeutic and problem-solving mechanisms that do not entrench conflict or oppositional behaviour between co-parents. This is a singular failure of the current court-centric system, and of assuming that the consideration of a child's best interests, and formulating arrangements to advance these interests, is best resolved by exercising judicial powers. If it is not so characterised, then a range of therapeutic and restorative options becomes possible.

### *Potential options*

As stated throughout this submission, Relationships Australia supports a family-centred, problem-solving approach to an understanding of what is meant by 'less adversarial' decision making processes.<sup>153</sup> We note the Commission's reference to other specialist jurisdictions using such approaches 'where behavioural problems complicate the resolution of legal disputes.'<sup>154</sup> The Commission remarks that

The benefits of a problem-solving adjudication process include the capacity to address behaviours that *underlie and complicate* the legal issues, with a view to reducing the level of risk to others and the potential for ongoing litigation. Such processes are particularly indicated where an *ongoing relationship between the parties needs to be preserved*, such as is the case in most disputes about the care of children....A problem-solving court process harnesses the authority of the court to effect behavioural change (and reduce risk) in two ways. The first is by empowering judges to connect litigants with relevant services....The second mechanism involves judicial oversight of the person's engagement and progress in making behavioural change, typically via the use of part-heard proceedings. Underpinning each of these components is the use of a therapeutic justice court

<sup>153</sup> See ALRC DP paragraphs 6.61-6.62.

<sup>154</sup> See ALRC DP paragraph 6.62.

craft, which seeks to minimise the potential adverse mental health impacts of legal processes on those who use the courts.<sup>155</sup> [emphasis added]

The situation for many children, enmeshed in their parents' disputes, is dire and in too many instances its effects will echo throughout their lives, bleeding into their relationships with their partners and their own children. It is imperative for governments to find a way through. An advanced society should not be paralysed and unable to protect its children because of blind insistence, in the face of all evidence, on a model that institutionalises and rewards parental conflict. Australia needs the same kind of co-ordinated effort, energy and attention to this as is dedicated to national security and counter-terrorism. Threats to children's wellbeing are existential threats.

At the end of this chapter, Relationships Australia sets out an alternative model, and notes some potential reforms to family courts.

**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.**

Relationships Australia supports this proposal. We concur with the observation of the Law Council of Australia that

The current family law litigation process imposes the same pathway on each litigated matter, regardless of the complexities of each case.<sup>156</sup>

This is unhelpful, unnecessary and inefficient, and acts as a considerable driver of demands on the courts.

The first 'gatekeeper' in a reformed family wellbeing system should be the Families Hubs, which should conduct universal screening, risk assessment and safety planning, and initial triaging (with strong referral pathways into the courts for specialist lists as proposed later in this Chapter). Risk assessment could then travel through the system with the family, obviating the need to re-tell the story multiple times. The courts themselves could also benefit from implementing a robust and nationally consistent triaging 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.**

Relationships Australia supports a triage process supported by a team-based approach.<sup>157</sup> Relationships Australia South Australia has established the merits of universal risk screening which is ongoing and covers a range of potential risks, not just those relating to family violence. This is vital because of the co-occurrence of risk factors in the population using court services. Relationships Australia recommends that a consistent screening tool

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<sup>155</sup> ALRC DP paragraphs 6.63-6.65, references omitted.

<sup>156</sup> Law Council of Australia, submission 43, paragraph 132.

<sup>157</sup> We concur with the observations offered by the NSW Young Lawyers Family Law Committee, referred to at paragraph 6.4 of the Discussion Paper.

(such as DOORS) be used across services and that the tool also screen for possible mental health problems, substance abuse, parenting distress and other co-morbidities.<sup>158</sup>

**Proposal 6-3 Specialist court pathways should include:**

- a simplified small property claims process;
- a specialised family violence list; and
- the Indigenous List.

Relationships Australia supports the proposed specialised lists, with the caveat that judicial officers hearing matters in any of these should, as a prerequisite of having such matters listed before them, undergo relevant specialist training (eg in family violence, cultural safety and trauma-informed practice).

We note the success of the Indigenous List in Sydney and support its practices which we understand to include:

- a case management model
- short breaks between court events, to support swift resolution
- a closed court
- allocated time to hear the list, and
- the attendance, outside the court room, of relevant service providers who can then be called upon by the judge to come into the court room so that referrals can be arranged on the spot.

The Alice Springs office of Relationships Australia Northern Territory is currently participating in the early stages of a pilot list around the Northern Territory. The pilot will establish an Indigenous Court List for when the Federal Court Judge is sitting in Alice Springs. This project draws on the expertise and support of the policy advisor/analyst based in the Federal Circuit Court, who has been assisting with similar projects in South Australia and New South Wales. A key feature of this model is to have Aboriginal Liaison staff based within the court registry to provide a culturally safe and responsive service, including the provision of information and ongoing support to families, as well as referrals to appropriate support services

Relationships Australia also notes that, previously, family court registries were often staffed by Aboriginal and Torres Strait Islander people, but this resource was removed for budgetary reasons. Government should restore the necessary funding.

Relationships Australia Northern Territory sees a great need for advisors to work closely with communities and Aboriginal organisations to educate and make explicit the differences between family law and other law as it pertains to child protection and domestic violence. There is very little understanding of the differences of jurisprudence between types of courts and great suspicion towards the law being involved with families. That suspicion has been entrenched for centuries, following colonisation.

**Proposal 6-4 The *Family Law Act 1975* (Cth) should provide for a simplified court process for matters involving smaller property pools. The provisions should allow for....**

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<sup>158</sup> To the knowledge of Relationships Australia South Australia, at least 15,000 DOORS have been completed across Australia before the launch of the DOORS app in October 2017.



Relationships Australia supports the proposal. It complements the proposal to extend pre-filing FDR requirements to property and finance matters. Conciliation and arbitration should be given more prominence as potential pathways.<sup>159</sup>

Relationships Australia would again refer the Commission to the potential of Interdisciplinary Collaborative Practices as another less adversarial approach, which also makes spaces to hear children's voices.<sup>160</sup>

**Proposal 6-5        In considering whether the simplified court procedure should be applied in a particular matter, the court should have regard to....**

A fast-tracked option would greatly help families affected by financial abuse and for family members who are at risk of homelessness in the absence of an urgent disposition of property and finance matters.<sup>161</sup>

The proposal is unclear, however, whether a finding of family violence might be taken to exclude that relatively large cohort from the simplified pathway. This would be problematic because a streamlined pathway could benefit those suffering from family violence by minimising their exposure to the system. As acknowledged by the Commission, court processes can be misused to perpetuate abuse and, as noted by other submitters,<sup>162</sup> delays are a significant driver of further conflict and costs.

The net result of this kind of reform should not be that vulnerable people of limited means are excluded from less expensive, faster and simpler mechanisms. There is precedent for this occurring, which was the catalyst for the Co-ordinated FDR trials some years ago, when it had been realised that one effect of the s60I exemptions had been to exclude from FDR people who actually wanted it and could benefit from it. This led to family violence survivors refraining from disclosing and seeking support. Relationships Australia concurs with the observation by the Bar Association of Queensland that

The existence of family violence allegations or family violence orders (whilst a serious issue) should not be seen or presumed to be an automatic impediment to ADR as an appropriately skilled FDRP (mediator) commonly will arrange for FDR/ADR in a manner, keeping the parties separate and which avoids exposing a party to family violence or otherwise accommodates a vulnerable party by creating a level playing field for negotiations.<sup>163</sup>

**Case study – FDR and the Family Safety Model in Relationships Australia Victoria**

Family relationship services support significant numbers of families who are affected by family violence and have multiple and complex needs (Kaspiew et al. 2015). RAV's Family Safety Model (FSM) has been designed to support FDR clients who are affected by family violence.

The FSM aims at ensuring family safety and the wellbeing of children affected by family violence throughout their interactions with the family law system. The Family

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<sup>159</sup> See submission 43, paragraphs 286–290. We agree with the comments of the Law Council of Australia about the need for certainty of the effect of arbitral awards and the need for timely access to arbitration.

<sup>160</sup> See submission 11 to IP48, p 60, paragraph 26.1.

<sup>161</sup> Consideration of the current FASS being piloted in the Family Court of Western Australia would be of value.

<sup>162</sup> For example, the Law Council of Australia, submission 43.

<sup>163</sup> Submission 80, p 12. See also the Australian Psychological Society, submission 55, 29.

Safety Program assigns practitioners with a specific focus on effectively assessing and responding to presenting family violence issues and/or other complex needs. The Program allows families to participate to a greater extent in FDR, and achieve better outcomes.

The Program has been piloted in two FRCs operated by Relationships Australia Victoria – at Melbourne FRC since January 2017, and at Sunshine FRC since February 2018. Since commencement, Family Safety Practitioners have been involved in 248 cases. In keeping with the aims of the Program, family violence is the most common presenting need (62%), followed by child wellbeing (52%). Other common presenting needs were:

- support through mediation (25%)
- referrals to therapeutic services (20%)
- information about intervention orders (17%), and
- legal advice (15%).

The majority of clients (63%) referred to the Family Safety Program (62%) had proceeded from assessment to joint mediation, and 38% of these were assessed as having made a genuine effort to resolve their disputes. A parenting plan had been reached in 43% of the cases handled by the Program, and an informal or other written agreement had been reached in a further 16% of cases. These data suggest that the Program succeeds in supporting families affected by family violence through a dispute resolution process in cases where FDR might otherwise prove impossible.

Ten clients who have participated in RAV's Family Safety Program have now been interviewed to provide more insight into how the Program has assisted them. All clients interviewed praised the Program, and said that they felt safer and better supported as a result of their participation. All felt that their safety concerns had been heard and addressed, and valued the understanding and support provided by the Family Safety Practitioner (FSP), mentioning forms of support ranging from referrals to practical help with organizing items such as security cameras and screen doors. The skills and expertise of the FSP emerge as a strong theme:

Having someone to guide you and organize referrals, it's a program that's just immeasurable [in value].

[The best thing about the Program is] support from people who know what to do.

A lot has to do with [FSP] and her knowledge.

**Conclusion:** In an environment of increasing case complexity, the Family Safety Model can effectively assist people progressing through FDR, and is also of great assistance to those transitioning through the Family Law System. The current trial of the Model at our Melbourne and Sunshine FRCs demonstrates an opportunity to enhance the existing FDR model and to prioritise the safety of families presenting for FDR. The Program run by Relationships Australia Victoria provides a continuous, case navigation service that enables greater participation in FDR, and supports women and children, in particular, to transition to the Courts safely. We

contend that this is the most effective and safest option for separating families that are affected by family violence.

We also suggest that LADR would be suitable to support the simplified list and alleviate some concerns about the use of FDR for property and finance matters. LADR would enable FDR to be more useful for families of limited means, to support families affected by risk factors such as family violence and asymmetries of knowledge and power.

Relationships Australia proposes the use of objective criteria to determine eligibility for the proposed list. For the small claims list, for example, a value cap could be prescribed in the regulations, supported by a statutory presumption that, if the asset pool or value of debt is under the cap, then a matter should be diverted to the small claims list (particularly if exclusion from the simplified list would see the parties increase existing levels of debt). It could be complemented by a discretion to displace the presumption in the event that the amount exceeds the cap, but the asset/debt structure is straightforward, or the amount is under the cap, but involves complex structures.<sup>164</sup>

Relationships Australia notes that the proposal should explicitly refer to family violence as including financial abuse, and there should be mechanisms available to limit the use of simplified procedures where there have been multiple applications by one or both parties. Further, we recommend that the complexity of the asset/debt profile should include contributions of debts.

We would also recommend an additional criterion to be taken into account: ‘current parent living arrangements’, which would facilitate consideration of interpersonal dynamics that might be at play.

**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, including provision for....**

Relationships Australia supports this proposal.

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

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

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

Relationships Australia supports this proposal, subject to our comments below and in response to Question 6-1, and would add requirements for expertise in trauma-informed practice and child-inclusive practice.

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<sup>164</sup> Relationships Australia considers that such an approach would address the opposition of, for example, the Bar Association of Queensland, to monetary limits: see submission 80, p 18.

Family violence is rarely present in isolation from other psycho-social/health complexities such as substance abuse, mental health problems or personality disorders.<sup>165</sup>

Relationships Australia Western Australia reports that families presenting with co-morbidities are prevalent in the Family Court of Western Australia. This Court has been proactive in providing annual family violence training to judicial officers and family consultants. In addition, staff from the Department of Communities are co-located in the Court to assist in managing cases with these complexities. Relationships Australia Western Australia considers that co-locating, in courts, professionals from different disciplines would be preferable to establishing a specialist list for what is, in reality, the Court's core demographic.

**Question 6-1      What criteria should be used to establish eligibility for the family violence list?**

A general high risk (ie all risks, not just family violence) list would be better, supported by universal risk screening. Eligibility would be determined by reference to a combination high risk and low protective factors and through a multi-disciplinary lens. The factors that should be taken into account in determining eligibility for this list could include:

- the existence of AVOs and non-contract orders (or situations when such orders cannot be served)
- if the family has been assessed as not appropriate for FDR
- when only supervised contact is allowed with children
- the presence of financial abuse
- whether child protection authorities have been engaged with the family
- whether there have been suicide threats, and
- whether mental health problems or personality disorders are known to exist in the family.

Families presenting with a combination of high risk/low protective factors will need accelerated access to legal assistance and judicial resolution of issues. They will often include the presence of high intensity family violence, substance abuse and/or mental health issues, and family members will need to be offered trauma-informed services.

Relationships Australia emphasises that the presence of family violence, and other co-morbidities, does not *per se* render FDR an unsuitable option. People who have experienced family violence, and who generally report not feeling safe with their partners, may prefer FDR to litigation. Set out below are comments from the FDR Outcomes Study being conducted by Relationships Australia:

**Participant:** ...they were really supportive in that you know, if either of us wanted to call time out or if we weren't feeling safe just to let [the mediator] know, and I felt like that support was there for both of us. They weren't more inclined to give the support to the boys' mum, they weren't more inclined to give support to me. It was a very neutral, but very supportive process, yes.

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<sup>165</sup> See, for example, the submission of Relationships Australia South Australia in response to IP48 (submission 62), 4.

**Participant:** I can't talk to my ex-husband, because he would scream at me. So I've got a situational anxiety based on him and his behaviours, which our mediator was aware of and...[the mediator] was very diplomatic and there was no bias or anything like that. He was just aware of any triggers and escalation from dad's side and smoothed things over really well....

**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 risk?**

Relationships Australia notes the power conferred by s69ZR, and the Commission's observation that it is seldom used. We consider that, on balance, early fact finding hearings would be beneficial. Of primary importance, they could support early prioritisation of safety issues.<sup>166</sup> Further, such hearings could assist in avoiding the situation where lengthy or serial interim orders are made on the basis of unfounded allegations, and persist for lengthy periods, often entrenching interparental conflict and harming children.<sup>167</sup> Such hearings might also assist in narrowing issues to enable a more rapid and confined disposition of matters.

A further benefit of early fact finding hearings would be the creation of additional opportunities to direct families to access supportive or therapeutic services; for example, children's contact services, or parenting order programs. Access to a CCS could enable safe ongoing contact between children and both parents while waiting for a hearing. Parenting Orders Programs can facilitate communication about the children and help parents to separate their emotions and focus on the needs of their children.

Families whose matters go to an early fact finding hearing should be given (in a format appropriate for their needs) information assuring them that, regardless of findings in an early hearing, they can still access the full suite of supportive services. For example, even if an early hearing has not found family violence to the requisite standard of proof, family members can still access family violence services.

Relationships Australia further notes that risks can morph when there is a change of circumstances after the early fact finding has been completed. Accordingly, as previously noted, risk assessment should be dynamic so that complacency does not set in where service providers rely on early fact findings.

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

There appears to be broad agreement among stakeholders about the urgency of the problem of physical fragmentation (as well as jurisdictional and other forms of fragmentation),<sup>168</sup> and the burdens it places on vulnerable, fraught families. Relationships Australia supports co-location of family law registries and judicial officers in local court

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<sup>166</sup> See submission 55, the Australian Psychological Society, 25.

<sup>167</sup> Noting too the observations in the PwC report, 2018, that interim orders are a proxy for final orders and, to a considerable extent, drive court workloads. If early fact finding hearings can reduce the number and operation of interim orders, then this may be beneficial to families and courts. See also submission 25, Australian Association of Social Workers, p 7.

<sup>168</sup> See also submission 55, The Australian Psychological Society, 32.



registries (including those in rural, regional and remote locations).<sup>169</sup> There is ample literature demonstrating both the urgent need and the benefits of co-located services for the many Australians who are engaged, simultaneously or consecutively, with multiple court systems. Certainly, any approach to developing a system with child safety at its heart needs to be prepared to address co-location, through embedded staff, as a key way in which to prevent children and their families from falling through the cracks.

There needs to be a place-based approach, centring on going to where the people are, rather than insisting that people need to come into the major population centres to access judicial services. The need to do so raises substantial practical barriers, including availability and cost of transport (public or private), parking, and child care, with all the costs that attend purchase of these services in CBDs. Technology should be part of this solution, through virtual courtrooms and other like services, but is not a complete solution.

Relationships Australia agrees wholeheartedly with the Law Council's statement that technology offers

*...an opportunity to refocus the family law system from being court-centred to 'being seen more as a service rather than a physical venue', to widen access to justice, and to have 'its primary focus on informing and assisting the public in containing and resolving...disputes...with less intervention by a judge.'* [emphasis in original]<sup>170</sup>

Relationships Australia also supports the recommendations of the Family Law Council in its 2016 report and welcomes the recent amendments effected by the Family Law (Family Violence and Other Measures) Bill 2018. Relationships Australia commends, too, the ongoing work being done under the auspices of the Council of Attorneys-General to tackle fragmentation of services. We would also urge the Federal Government to provide the necessary funding to support State and Territory judges to exercise the family law jurisdictions conferred upon them. Relationships Australia notes the observation by the National Judicial College of Australia that

The complexity of the provisions in Division 11 of Part VII which enable judicial officers from courts of summary jurisdiction to vary parenting orders when making family violence orders, has probably contributed to them being used less than that might otherwise be the case.<sup>171</sup>

We support the suggestion of the Law Council that courts be funded to undertake more frequent and more dispersed circuits.<sup>172</sup> This will become increasingly pressing if the Commonwealth continues to pursue policies promoting population growth in rural and regional areas. Relationships Australia strongly encourages facilities being made

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<sup>169</sup> Relationships Australia notes with interest the recommendation of the Australian Psychological Society, to develop a 'rural model for the family law system that better incorporates the use of technology and mobile panels.' (submission 55, recommendation 8).

<sup>170</sup> Submission 43, paragraph 292, referring to Graham Ross, 'The Online Court – Misunderstandings and Misconceptions when Delivering a Vision for the Future of Justice' (2015) 1 *International Journal of Online Dispute Resolution*.

<sup>171</sup> Submission 113, 6. The NJCA has recently developed a Commonwealth-funded program to support judicial officers from courts of summary jurisdiction in exercising family law jurisdiction – Applying Family Law to Parenting and Property. The NJCA invites the Commission to consider recommending ongoing funding for such training. See also, in this connection, Recommendation 60 of the Royal Commission into Family Violence, Report and Recommendations, 2016.

<sup>172</sup> Submission 43, paragraph 112.



available that promote safety for families, court staff, practitioners and others who attend premises (for example, having two entrances and separate waiting areas).

**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?**

Relationships Australia notes broad support from ‘diverse stakeholders’ for approaches that involve multi-disciplinary panel to consider children’s best interests. Parenting matters should more closely resemble child protection hearings or guardianship matters. This is possible if children’s matters are understood as a future-oriented inquiry into children’s development and wellbeing.

If the Family Law Amendment (Parenting Management Hearings) Bill were to proceed in the current adjudicative landscape, Relationships Australia would support the changes recommended by Women’s Legal Services Australia in its submission to the inquiry of the Senate Legal and Constitutional Affairs Committee.<sup>173</sup>

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

The most effective way to promote the paramountcy of children’s best interests, would be to entrust children’s matters to a body empowered – and adequately resourced – to:

- inquire directly into children’s wellbeing and needs, including by gathering evidence from relevant people including teachers, doctors, and other adults with whom children have meaningful relationships, as well as from courts and other authorities (eg police and child protection agencies) about the family (including through instructing a family consultant to undertake inquiries on behalf of the body)
- require parents to undertake parenting and other therapeutic programmes (eg drug and alcohol counselling), supported by warm referrals from the body – or co-located therapeutic services; these could be monitored by a Parenting Coordinator as described previously in this submission
- engage with children in developmentally appropriate ways, using child-inclusive and child-focused practice, as required
- resolve disputes about implementation of orders and agreements; this could be the function of a Parenting Coordinator as described previously in this submission
- require parents to trial temporary arrangements, where appropriate
- where necessary, provide ongoing monitoring and support while parental capacity is being developed
- use a range of problem-solving modalities, and
- employ appropriate staff including accredited Family Consultants, Aboriginal and Torres Strait Islander staff, and staff with expertise working with culturally and linguistically diverse communities.

Relationships Australia concurs with the submission from Caxton Legal Centre that

The fact that there is a workforce already in place, including tenured judicial positions...cannot define the response to a need for radical change to the current

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<sup>173</sup> Submission 17, pp 12-13.

adversarial system. This system is untenable and the role of a judge and court in resolving parenting issues is questionable.<sup>174</sup>

Relationships Australia is mindful that some responses and public commentary on the Discussion Paper argue that proposals to transform the existing structures would be too costly, and that better outcomes could be gained simply by giving those structures more funding. That would soften the loud clamour of those seeking to retain the *status quo*. Temporarily. And it would not help children and their families to access necessary supports. It is, in the view of Relationships Australia, unconscionable to continue propping up a system that institutionalises parental conflict.

**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 relationships by providing services including:**

- **education about child development and conflict management;**
- **dispute resolution; and**
- **decision making in relation to implementation of parenting orders.**

Relationships Australia strongly supports this proposal and would advocate for its extension to include a post-mediation service to uphold and, where necessary, update mediation agreements. Our practice experience is that parents benefit significantly from participation in existing post-order support programmes, and that successful participation in post-order programmes can minimise repeated court events for matters such as alleged breaches of orders. Even where parents are able to reach agreement through mediation, it is still often difficult to manage implementation (particularly where there is a history of conflict and poor communication). At the point of reaching agreement through mediation, parents are still processing their emotions, and they can benefit greatly from support before, during and after court orders or mediation agreements.

Further proceedings (eg to address alleged breaches) are expensive for litigants and the courts, and further inflame parental conflict. However, participation in post-order and post-agreement programmes can make a significant difference to building and maintaining successful co-parenting relationships. Participants in the Family Dispute Resolution Outcomes Study being conducted by Relationships Australia were interviewed about their experiences. They offered the following observations.

**Facilitator:** Did you follow up on any of those services, or information that you were given?

**Participant:** I did that's how I got involved in the Communication Post-separation Course I...and it was absolutely wonderful it was really good...I think it might have been five or six sessions and that was a group workshop quite interesting being the only bloke in that scenario.

**Facilitator:** Can you talk a bit more about that?

**Participant:** Being the only guy well, once again handled absolutely wonderfully and in such a way that it was great because I was able to get an appreciation and an understanding and I think it was handled in such a way that they were able then

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<sup>174</sup> Submission 51, paragraph 98.

in turn to get it from a male as well you know. Gender's only got X amount to do with something but it is kind of interesting and I especially, I guess when a lot of us in the situation are feeling aggrieved with the situation and the predicament that we're in, so that I must admit was nice and balancing...and as horrible the situation was, it helped me to realise that things just simply were. I wasn't an aberration, because obviously me and my sense of self-worth had obviously diminished incredibly you know, after a seventeen year relationship had folded like that. And so that was really quite valuable in that respect but lots of those tips and I still actually apply a number of them now believe it or not, I mean that's how effective it was.

Relationships Australia agrees with the Commission that non-court options to reduce post-order conflict will benefit children and provide downstream savings, noting the high rate of families returning to court after final orders.<sup>175</sup> We note a study of court files published by AIFS in 2015 '...showed a high rate of repeat litigation in children's matters, with nearly four in ten judicially determined cases having previously been before the courts.'<sup>176</sup>

The expansion of current post-order services, and the initiation of post-mediation services, would also better respond to how families actually experience conflict leading to litigation. Marrickville Legal Centre describe this requiring:

...reorientation of the temporal focus of family court process from a build-up to a single, large decision-making event, toward the constitution of a family law matter as a series of decision events.<sup>177</sup>

Such services could usefully be located in Families Hubs.

Specialist family violence services would need to be closely involved in developing intake assessment, accreditation and continuing professional development requirements.

**Proposal 6-10      The Australian Government should work with relevant stakeholders...to develop intake assessment processes for the post-order parenting support services.**

Relationships Australia supports this proposal in principle, but considers that this work would be more effectively undertaken by service providers. Quality control could be done through service agreements between funders and providers.

**Proposal 6-11      The proposed Family Law Commission (Proposal 12-1) should develop accreditation and training requirements for professionals working the post-order parenting support service.**

Relationships Australia supports this proposal.

**Proposal 6-12      The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are**

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<sup>175</sup> See DP86, paragraphs 6.71, 6.80ff.

<sup>176</sup> Rae Kaspiew et al, 'Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)' (Australian Institute of Family Studies, 2015) 49. See also Family Law Council, *Interim Report: Penalties and Enforcements* (March 1998) and *Final Report, Child Contact Orders* (June 1998).

<sup>177</sup> Submission 137 to DP86, p 5.

**used for family law matters, are safe for attendees, including ensuring the availability and suitability of...**

Relationships Australia supports this proposal, and agrees with suggestions noted at paragraphs 6.97-6.99.

## **Suggested reforms to the family courts**

Relationships Australia would add its voice to others calling for governments to ensure that adequate and ongoing resourcing of all components of the system (whether it is a family law system or a family wellbeing system). Courts, in combination with therapeutic and supportive services, have an integral role in society's response to family conflict. Concerns about underfunding the family courts are by no means new. In 1991, Brennan J remarked that

It seems the pressures on the Family Court are such that there is no time to pay more than lip service to the lofty rhetoric of s. 43 of the act....It is a matter of public notoriety that the Family Court has frequently been embarrassed by a failure of government to provide the resources needed to perform the vast functions expected of the Court under the Act.<sup>178</sup>

We share the concerns of the Law Council of Australia about delays in obtaining interim hearings,<sup>179</sup> delays in obtaining family consultant reports (because of lack of availability of family consultants), and lack of registrars.<sup>180</sup> The workforce capability plan, proposed in Chapter 10, needs to address these issues. Relationships Australia agrees that the situation in which families find themselves could be significantly improved by boosted funding to provide more court services (including timely replacement of judges, funding for more judges, and funding for more services ancillary to the courts). However, Relationships Australia maintains that:

- increasing court funding – while effective to a significant degree - can never be a complete answer to the question of how best to support separating families
- a court-centred process – will never be the best option through which to work through the relationship issues emerging from family separation (although, in some instances, it will be the only option), and
- well-funded supportive services, sitting alongside courts, offer a more complete, helpful and durable response to the range of needs presented by families.

*Budget rules and how they impair effective and efficient service delivery by relationship services, legal services and courts*

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<sup>178</sup> *Harris v Caladine* (1991) 172 CLR 84, 112.

<sup>179</sup> Noting the observation in the PwC report that, in both the Family Court of Australia (FCoA) and the Federal Circuit Court (FCC), interim orders are the second largest category of applications. The largest category in the FCoA is comprised of consent orders; the largest category in the FCC is comprised of consent orders. (page 28). PwC noted, at p 30, of its report, that interim orders 'are a proxy for cases requiring judicial direction but which are backlogged....use of multiple interim orders indicates a lack of resolution among the parties pending finalisation.' Further, the use of interim orders has increased over the past five years, particularly in FCoA Canberra, Newcastle, Parramatta, Sydney, Townsville and Cairns: p 104. The Australian Bar Association notes circumstances in which seeking of interim orders can contribute to uncertainty which, in the ABA's view, can incur unnecessary costs (see submission 13, paragraph 10).

<sup>180</sup> See, for example, submissions to the Issues Paper: Law Council of Australia (submission 43), paragraph 12 and paragraphs 138-143.

Relationships Australia is dismayed at the short-term nature of many funding packages for family relationship and legal assistance services. Relationships Australia acknowledges that funding packages must reflect the nature of our election cycles of three to four years, and that budget processes and rules flow from that. However, short-term pilots and trials, while necessary, should be used more sparingly, to prevent waste and inefficiency deriving from their short term nature:

- their funding is fleeting
- relationships with communities – vital to therapeutic efficacy - cannot be built
- appropriately qualified and experienced staff are difficult to recruit for short terms (especially for regional and remote areas)
- the cost of infrastructure for short periods, borne by service providers, can be prohibitively expensive, and
- evaluation is inescapably confined to a relatively brief period of operation, which substantially diminishes the potential for good data to be collected and evaluated to establish whether the piloted service was, or could with more time or modifications or both be, effective. We note, too, that evaluation is often unfunded, and the cost of it must be absorbed by the service provider.

Australian governments must develop processes that enable funding of trials and pilots that run for a sensible amount of time (to allow for adjustments as data emerges) and the funding of services over longer periods of time (up to 10 years). It really should not be beyond the ingenuity of governments to facilitate this, and also to facilitate the taking into account of downstream savings from investment in primary and secondary interventions.

### *Simplified court processes*

There is a range of provisions already in the Family Law Act which equip judges to modify usual court procedures to meet the needs of families, including using less adversarial approaches and case management strategies.<sup>181</sup> It is unclear why these are not used more extensively.<sup>182</sup> Relationships Australia suggests that there may be a connection between judges' unwillingness to deploy these to their full potential and the excessive workload of judges. Here, adequate judicial resourcing could make an immediate positive impact.

Other reforms which could have an effect on simplifying and streamlining court processes and events include, for example:

- simplification of Part VII of the Act (see responses to Proposals 3-4 and 3-7)
- a single point of entry into the family court system and a single first instance court
- providing for risk assessments to travel with families (see the response to Question 3-3)
- a single set of rules of court (noting that this may occur in the context of the Government's proposed court merger)<sup>183</sup>

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<sup>181</sup> See, for example, the measures identified by the Law Council at paragraph 26ff of submission 43, and comments at paragraph 147 of that submission.

<sup>182</sup> Relationships Australia supports the suggestion by Marrickville Legal Centre that a root cause investigation be undertaken as to why the Less Adversarial Trial approach has not received greater take up (submission 137).

<sup>183</sup> See Federal Circuit Court and Family Court of Australia Bill 2018:

[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6167](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6167).

Harmonisation of court rules was suggested in the PwC report, 2018, 59; see also pages 73-74, 80. Streamlining



- registry practices that are nationally consistent<sup>184</sup>
- a single set of court forms
- a single interface through which to transmit and enter user data
- use of Easy English throughout the system and its publications, including the information package and public awareness campaign described in Chapter 2 of the Discussion Paper, and
- revision and re-numbering of the Act as a whole.<sup>185</sup>

### *Specialist tribunals for parenting matters*

Relationships Australia considers that:

- as a matter of law, Australia is subject to international obligations to protect and promote children's safety and wellbeing
- Australia's domestic law and community standards reinforce these obligations; indeed, the paramountcy of children's best interests is a rare point of consensus across all users of the system and in the broader community
- practice experience of social scientists and lawyers over the past four decades demonstrates that there is a range of services that must be offered to support separating families
- a Chapter III court cannot, as a matter of law, deliver these
- it is another rare point of consensus that current arrangements, criss-crossing multiple Acts, jurisdictions and courts, are not supportive of Australia meeting its obligations to children, and
- Commonwealth, State and Territory governments must work together to establish whatever body or combination of bodies is necessary to perform these functions.

Even with the most lavish funding, courts could never fully meet the needs of the demographic which most needs support in conflict and in separation, because so many of these needs are simply not susceptible to a judicial response. As previously stated, they are psycho-social, health and relational issues. Unless users with such issues receive appropriate therapeutic responses, legal issues are likely to become entrenched and recur, inflicting further burden on the already over-stretched courts.

The idea of establishing a multi-disciplinary tribunal to provide a more comprehensive and holistic response in parenting matters is hardly new. It was a key recommendation of the 2003 report, *Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation*.<sup>186</sup>

Relationships Australia envisages that a tribunal, which would not be exercising judicial power, would be established to answer what we described in section 1.4.1 of this submission as the primary inquiry in parenting matters. That is, it would ask 'what are the

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the court system was supported by Family Law Committee of NSW Young Lawyers, submission 108, 3. See also submission 35, the Hon Diana Bryant AO QC.

<sup>184</sup> See Family Law Committee of NSW Young Lawyers, submission 108, pages 4-5 noting that variant registry practices cause 'confusion and the risk of inconsistency of experience and outcome in the court system.'

<sup>185</sup> This and the preceding dot points were identified in the submission made by the Law Council of Australia, submission 43, paragraph 145. See also the Law Council's response to Question 19 of Issues Paper 48: paragraphs 236ff.

<sup>186</sup> House of Representatives Standing Committee on Family and Community Affairs (2003). Rathus, 2018, notes that 'Family law is inevitably, irrevocably and appropriately interdisciplinary.' (at 10) See also the submissions from Caxton Legal Centre, submission 51, 19 and the Hon Diana Bryant AO QC, submission 35, Part 2.



child's best interests and how these will best be met?' It would be more akin to a coronial, guardianship or child protection inquiry, and parents/caregivers would be witnesses, not adversaries.

The tribunal members should be drawn from a range of specialisations, including family violence, child development and social work.<sup>187</sup> The tribunal should be given access to information about court orders and existing agreements, as well as expert reports, including medical reports and family reports.

There would still be a need for a children's advocate of the kind contemplated by the Commission. The role would include acting as a liaison between the child and counsel assisting, and explaining to the child the decisions that are made.

As noted by the Law Council of Australia, 'In child protection FDRs, the participants usually have a common goal, even if families are hostile and parents are estranged'. We would also suggest that an explicitly non-judicial tribunal would be, as the Law Council puts it, 'the power in the room...who will take the group's ideas and decisions into account but not necessarily implement them.'<sup>188</sup>

A counsel assisting would manage the processes, including (with the assistance of Family Consultants) gathering evidence, and would examine witnesses. The strong opposition by the Law Council of Australia to a counsel assisting role seems to be predicated on the difficulties - which would be considerable – in importing that model into adversarial litigation.

The hurdles that are now faced by self-representing litigants would readily be addressed by a counsel assisting approach (including cross-examination of or by vulnerable individuals). This approach would better support ongoing co-parenting than locking parents in a win/lose dynamic, as has been amply demonstrated in this and numerous other submissions (notably excepting the Law Council of Australia).<sup>189</sup> This is not a matter of speculation. Our practice experience, over several decades, has demonstrated that skilful clinical practitioners can, even in high conflict families, work with parents to support them in shifting to a child-centred lens.

Relationships Australia would also observe that a more therapeutic forum along these lines would mitigate the concerns expressed by submitters about the potential risks of facilitating more extensive participation by children.

Relationships Australia acknowledges that:

- it is not necessarily the case that an inquiry model for parenting matters would be less expensive to Government; this is not a 'cheap option'.

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<sup>187</sup> See also the Australian Psychological Society, submission 55, recommendations 16, 18; p 24.

<sup>188</sup> Law Council of Australia (submission 43), paragraph 308.

<sup>189</sup> Law Council of Australia (submission 43), paragraph 148. The Law Council's opposition to a counsel assisting role seems to be predicated on the difficulties- which would be considerable – in importing that model into adversarial litigation. Relationships Australia proposes that parenting matters not be subject to a traditionally adversarial litigation approach, or an exercise of federal judicial power, but be dealt with in an inquiry like proceeding before which parents or caregivers would be witnesses, not parties, and in which counsel assisting plays a valuable non-partisan role as between parents and caregivers, in assisting the decision-maker by finding and presenting evidence about the nature of the best interests of the child/ren and how they can best be promoted.

- a counsel assisting, employed or engaged by the Court, would reduce legal costs to parents but would be paid for by government (although there might well be an argument for cost recovery or contribution measures to apply on a means-tested basis), and
- in family violence matters, it should not be for other parent/family member/caregiver to challenge allegations of, for example, family violence, but for the state – because, as governments in Australia have increasingly recognised, family violence is a matter of public concern, not a private matter.

The Government has the following options:

- do nothing. This is indefensible when so many are dying by family violence or by their own hand because of stresses associated with family separation, and others driven into poverty.
- spend significant amounts of money, as suggested in 2014 by the Productivity Commission, to fix the current arrangements. This would provide temporary relief, but require taxpayers to invest heavily in a system that is inherently unable to do what taxpayers now expect of it. This option would be akin to banning handwashing in hospitals, then spending vast amounts of money on antibiotics and hospital beds to cure the inevitable infections
- spend significant amounts of money and exercise policy leadership by transforming a court-centric and highly siloed edifice to a wraparound family-focused service that would make proper inquiry into children's development needs and provide ongoing support to children and their families to build capacity and address the psycho-social and relational needs at the heart of family separation.

## Chapter 7 Children in the Family Law System

Recent years have seen mounting research and commentary favouring the participation of children and young people, and noting the increasingly-articulated desire of children and young people to have a voice in decision making that affects them. The Commission comments that

This tension between protection and participation is sometimes framed as a contest between competing principles or rights.....The Committee on the Rights of the Child has suggested that there is no tension between children's welfare or best interests (art 3) and their right to participation (art 12). Instead, they are complementary...[at para 7.18]<sup>190</sup>

Research has also found that:

- only 44% of mothers and fathers agreed that the family law system meets the needs of children, just under half of all parents agreed that the system effectively protects the safety of children, and just over two-fifths of all parents agreed the system effectively helps parents find the best outcome for their children (AIFS, 2012), and
- high conflict roughly doubles the rate of emotional and behavioural adjustment problems in children (Savard & Zaouche, 2014).

Relationships Australia considers that it is now well-established that:

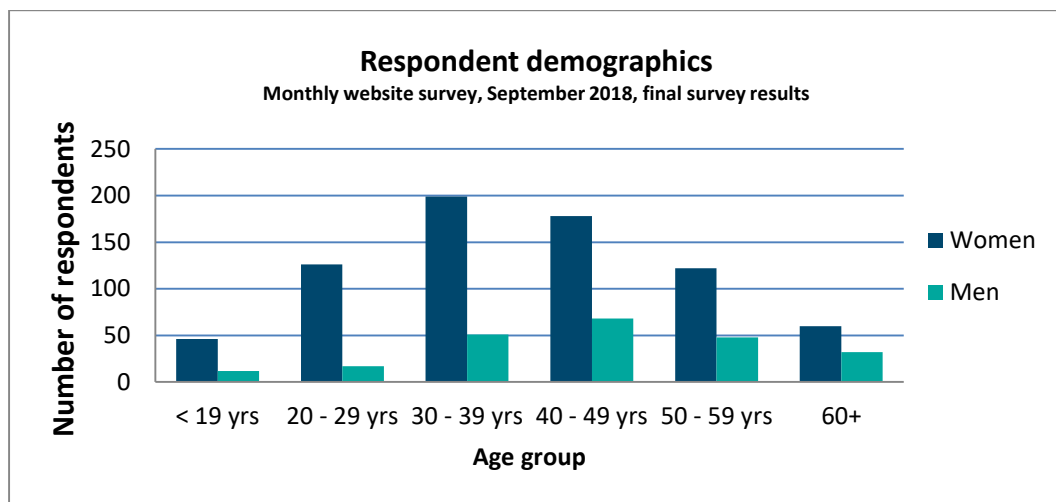
- children and young people should be facilitated in expressing their views, where they wish to do so, in family court proceedings and FDR, and
- there is scope to enhance how that participation is facilitated.<sup>191</sup>

In September 2018, Relationships Australia conducted an online survey of more than 900 people to elicit views about how that might be achieved.<sup>192</sup> More than three-quarters (76%) of respondents identified as female, with more female than male respondents in every age group (see Figure 1 below). Just under 85% of respondents were aged between 20-59 years, and more than half (52%) comprised women aged 20-49 years. As for previous surveys undertaken as part of the Relationships Australia monthly survey series, the demographic profile of survey respondents remains consistent with our experience of the groups of people that would be accessing the Relationships Australia website.

<sup>190</sup> See also the Australian Human Rights Commission, *Children's Rights Report*, 2015.

<sup>191</sup> See, for example, Kaspiew et al, 2014.

<sup>192</sup> Relationships Australia, Survey results, September 2018: *Hearing the voices of children in the Family Court*. See also The Australian Psychological Society, submission 55, pp 6, 8 (recommendation 12).



A substantial majority of survey respondents reported that they (92% of women; 88% of men) believed children should have a right to express their own views and opinions in family disputes.

A smaller, but substantial majority of men (86%) and women (89%) reported that they considered children should directly participate in family law court proceedings. Just under one-quarter of survey respondents reported that children should be given the chance to directly participate in Family Law Court proceedings regardless of age or maturity (Figure 3). Men were more likely than women to agree that children should participate directly if they were a certain age or maturity (36% of men; 28% of women), while women were more likely than men to report that children should only participate indirectly; for example, through a report from a child psychologist or youth worker (29% of men; 38% of women).

The recent AIFS report on the needs and experiences of young people noted internationally consistent research

...which establishes the importance for children and young people having an opportunity for their views to be heard and considered in decision-making affecting them. In particular, research has highlighted the importance of facilitating these opportunities to be heard, both in relation to matters relevant to deciding the post-separation care and regarding the more general effects of their parents' separation.<sup>193</sup>

Before responding to the proposals and questions put by the Commission, Relationships Australia considers it useful to explain our conception of child-inclusive practice, which is mentioned extensively in this submission, and its difference from child-focussed practice.

Child-inclusive practice is where a child who is deemed to be developmentally able (generally, over six years of age) meets with a child consultant. The consultant explores what the family situation looks like through the child's eyes, their experiences of the separation, and how this affects the child. Children are not asked any questions about things that parents need to decide.

This is to be contrasted with child-focussed practice, which is used where the child is too young to meet with the child consultant (generally this applies to children under 6 years of

<sup>193</sup> Carson et al, 2018, 30.

age). The child consultant meets with the parents to obtain information about the child and provides the parents with information about the likely developmental needs of the child.

In both processes, the child consultant attends the joint FDR session to support the parents to understand and respond to their child's needs and experiences.<sup>194</sup>

**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.**

Relationships Australia supports this proposal. Children and young people are key – in fact, central – stakeholders in the family law (or family wellbeing) system. Sources of information currently available are diffuse and difficult to comprehend as a whole. Relationships Australia notes that the availability of tailored information sources for children and young people is referred to in the 2017 Operational Framework for Family Relationships Centres.

Carson et al found, in AIFS' study of the needs and experiences of children and young people, that the majority of young participants 'did not necessarily want to know everything...particularly regarding their parents' potentially strong feelings of hatred, anger or frustration at the other parent.'<sup>195</sup> Further findings by Carson et al were that children and young people want more information on:

- when and how they could have their say about post-separation arrangements
- to what extent their views would have influence
- whether they would be represented
- how could they get help to communicate their preferred living arrangements to their parents
- timeframes and nature of legal proceedings, the identity and role of decision-makers
- steps associated with negotiating parenting arrangements
- how to get mental health support, access support groups, helplines and legal advice, and
- the potential outcomes and options for their living arrangements.

The report concluded that

Staying informed provided children and young people with a degree of comfort and assurance about the path ahead in the context of the uncertainty and upheaval associated with the separation.<sup>196</sup>

**Proposal 7-2 The proposed Families Hubs... should include out-posted workers from specialised services for children and young people, such as counselling services and peer support programs.**

Relationships Australia supports this proposal, and considers that it would be optimal to out-post specialist workers not only in the proposed Families Hubs, but also in courts (especially in FASS facilities, where available).

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<sup>194</sup> See Carson et al, 2018, 56. Relationships Australia agrees with Birnbaum (2017) that reports from family consultants/single experts are not a substitute for child-inclusive and child-focused practice.

<sup>195</sup> Carson et al, 2018, 31.

<sup>196</sup> Carson et al, 2018, 42.

Youth workers and child-consultants must play key roles in the design and operation of the proposed Hubs. Families Hubs have the potential to be of particular value to children and young people. In its recent study of the needs and experiences of children and young people, AIFS found that this group strongly values services that allow them both to vent and also to be coached in strategies of self-care amidst and beyond parental separation.<sup>197</sup> One respondent said that post-settlement counselling

...strengthened my relationships with my brothers and probably with our mum....I think it helped us to understand my dad's perspective more... (Phoebe, 15+)<sup>198</sup>

Peer support was also valued.<sup>199</sup>

**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.**

Relationships Australia supports this proposal. Decision-makers should be obliged to ensure that children have an opportunity to express their views, should they wish to do so (emphasising that children should not be compelled to express a view or otherwise participate in proceedings or in FDR processes, or be cast in a role as decision-maker). The obligation should apply to as broad a range of proceedings as possible, if the outcome of the proceedings will affect a child. The findings from the 2018 AIFS report on the needs and experiences of children and young people concluded that children and young people do not feel sufficiently heard or supported by the adults engaged in the separation process. This includes their parents, parents' lawyers, ICLs, counsellors, teachers, family consultants/report writers, and court personnel.

Relationships Australia notes that the Law Council of Australia considers that the involvement of family consultants is sufficient to comply with international and domestic obligations, as well as with community expectations.<sup>200</sup> The Law Council states that

The risks of involving children in decision-making are well known....

Courts regularly hear evidence from Family Consultants and others about the effect of intra-family conflict upon children....it is well known that exposure to conflict will inhibit children's ability to focus on developmentally-appropriate learning....If children are involved in inappropriate or insensitive ways in decision-making, these pre-existing issues can be exacerbated, to a child's great detriment.<sup>201</sup>

Relationships Australia is unaware of suggestions that children should be involved in decision-making. Children themselves are generally clear that this is not what they want.<sup>202</sup> We welcome the Law Council's recognition of the harm done to children by exposure to parental conflict. Sadly, however, children would rarely have their first exposure to parental conflict in the form of having their views sought about legal

<sup>197</sup> See for example, Carson et al, 2018, 33, 44. At p 44, Carson et al noted that 'Counsellors were nominated by participating children and young people as a key means by which their views and experiences were acknowledged...'.  
<sup>198</sup> Carson et al, 2018, 49.  
<sup>199</sup> Carson et al, 2018, 49.

<sup>200</sup> Law Council of Australia, submission 43, paragraphs 386-387.

<sup>201</sup> Law Council of Australia, submission 43, paragraphs 381-382.

<sup>202</sup> See, for example, the comments of interviewees in Carson et al, 2018, 85.



proceedings between their parents. They will have already been exposed to that conflict and, all too frequently, to family violence. As respondents to the AIFS study remarked:

...when a kid goes through a divorce a lot of the time the parents become very immature so the children grow up a lot quicker....[and should not be spoken to as] someone who didn't have any idea what was going on and didn't have any idea of the situation. (Phoebe, 15+ years)<sup>203</sup>

I was exposed to everything. I knew what was going on, I knew all the bad things and if my parents had, maybe, like kept that private and tried to, I don't know, maybe cover it up, it would've like helped me in the long run. Because it was just, it was just like violence, in front of my eyes. And it was just horrible to experience. (Rose, 15+ years)<sup>204</sup>

Carson et al noted the observations of interviewees who 'saw their views being diminished or marginalised via their engagement with family consultants',<sup>205</sup> or the artificiality of how information was gathered:

And then he [family consultant] - he put me in this glass room ... And through this - the glass that you can - you can't see them, they can see you. It was like, they actually have one of those in one of the, in SUBURB. It was the worst thing. Like, they - they full locked me in the room. And then they, they didn't talk to me, I don't think. They just, they like sent in my mum or my dad ... And they wanted to see how I would react with them. And connect with them. And I'm like, it doesn't make sense because I know you're there. Like, it's kind of freaky trying to talk to someone when you know like, yeah, behind that glass ... this guy's just staring at you ... The room. Probably not - the room's not his idea but just ... yeah, I hated it. It was, I felt like I was a - what was that thing I said to my mum? I felt like I was in a cage or something. Like, it felt weird. Just knowing that I was like locked - not, I wasn't - I was actually locked in that room. And then this guy just staring at you is really weird ... it's the whole, you know, fake thing, it just put me off. (Harry, 12-14 years)

And he was writing down notes and then they were full recording me and stuff and it was - yeah, and then my dad came in and that's what annoyed me. He acted like we were best friends ... It felt weird, like I've never seen that type of like, my dad. And then my mum was acting normal ... Because that's, that, that was the main idea, just to act like, you know, normal and then they, they won. Then they didn't win but like, I didn't get what I wanted because it looked like I lied. Because I said I don't - I don't have a good connection with my dad and then he came in like, 'CHILD'. And then it kind of looked like I was lying ... Yeah, it was very fake. (Harry, 12-14 years)

I think it would be better if we had, like, a few separate meetings just to sort of get to know what was actually happening but we didn't really - it wasn't really, like - so if I said something in that conversation and I don't know if I could change my mind after

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<sup>203</sup> Carson et al, 2018, 42.

<sup>204</sup> Carson et al, 2018, 64.

<sup>205</sup> Carson et al, 2018, 54.

that because we didn't really have any - we didn't really talk to him again. (Dominic, 12-14 years)

Carson et al concluded, in light of that and other similar statements:

While acknowledging concerns regarding the involvement of children in their parents' conflict, these concerns must be considered in light of circumstances where these children are, or have already been, exposed to their parents' conflict or violent and abusive behaviour. As such, affording them the opportunity to participate in the decision-making process relating to their future parenting arrangements emerges as crucial. Hearing the voices of children and young people has been identified as particularly critical in these circumstances, not only because this participation is central to meeting obligations pursuant to the UNCRC but also because it is important from an evidentiary perspective and is consistent with the expressed views of the relevant children and young people in cases characterised by family violence or conflict.<sup>206</sup>

The study further concluded that

This Australian and international research is consistent in identifying the importance of: (1) providing children and young people with the opportunity to be heard in the decision-making process; and (2) having the professionals that interact with them invest the time in getting to know them, to listen to their views and experiences, to keep them informed of the progress of their family's matter and to advocate for them in the decision-making process. *The data analysis suggests that the goals of protection and participation can be met with the application of trauma-informed, child-inclusive approaches to participation in the family law context.*<sup>207</sup>

Carson et al observed that children in high-risk circumstances had a particular need and wish 'to be heard and taken seriously.'<sup>208</sup>

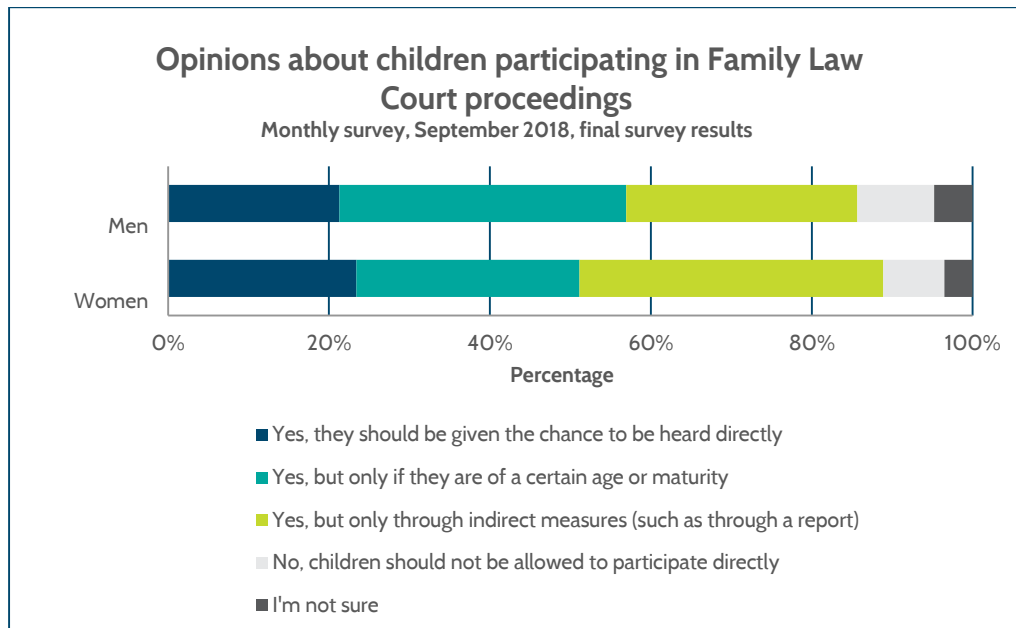
The September 2018 survey by Relationships Australia found that a substantial majority of men (86%) and women (89%) reported that they considered children should directly participate in Family Law Court proceedings. Just under one-quarter of survey respondents reported that children should be given the chance to directly participate in Family Law Court proceedings regardless of age or maturity. Men were more likely than women to agree that children should participate directly if they were a certain age or maturity (36% men; 28% women), while women were more likely than men to report that children should only participate indirectly such as through a report from a child psychologist or youth worker (29% men; 38% women).

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<sup>206</sup> Carson et al, 2018, 35.

<sup>207</sup> Carson et al, 2018, 50.

<sup>208</sup> Carson et al, 2018, 42.



**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.**

Relationships Australia supports this proposal. Research indicates that mediation, relative to litigation, ‘leads to increased rates of mutually acceptable parenting and property agreements between partners, decreases litigation following divorce, increases father satisfaction with the agreement, and increases father involvement with their children.’<sup>209</sup>

The Royal Australian and New Zealand College of Psychiatrists has expressed support for facilitation of children’s participation in FDR. The College notes that

...the participation of children can improve outcomes relating to their care while also providing a potentially protective factor for their mental health.<sup>210</sup>

Relationships Australia suggests, however, that further research be undertaken to ensure that child-inclusive practice in FDR is underpinned by a robust evidence base, and notes the issues identified by the Commission at paragraph 7.45. In particular, Relationships Australia recommends future research that:

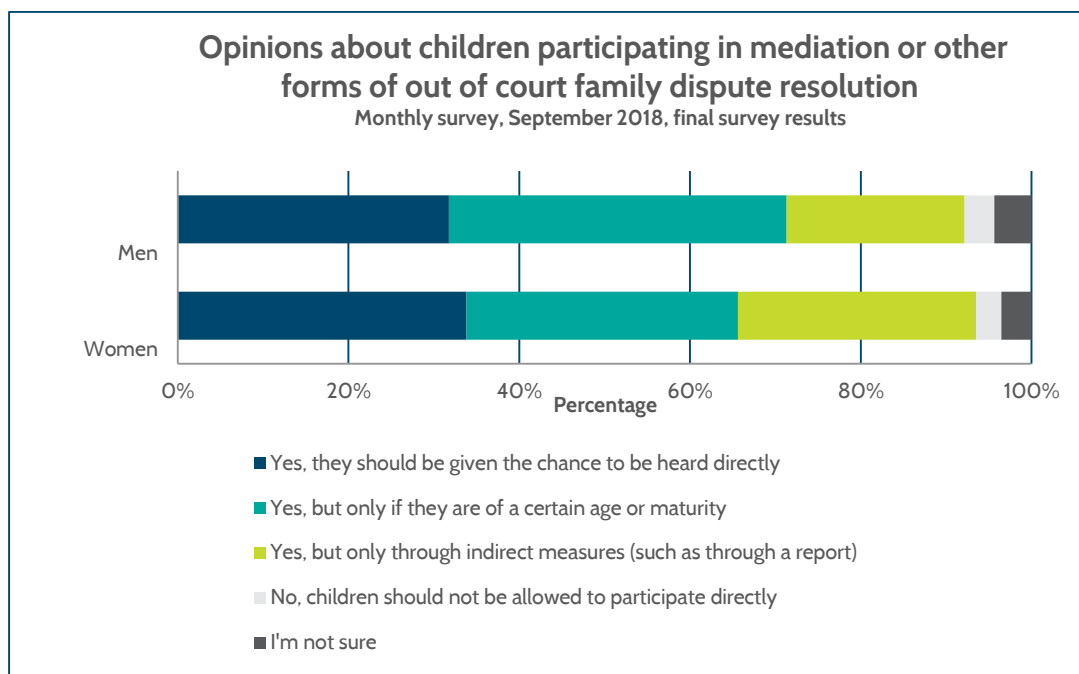
- uses rigorous methodological designs (including RCTs to investigate the efficacy of child-inclusive mediation relative to mediation as usual)
- uses larger sample sizes - studies to date have sample sizes of 50 or fewer (with the exception of McIntosh, who had 181 families in the study). The small sample sizes limit ability to investigate predictors of family outcome
- includes outcome measures which are standardised, valid and reliable measures of child and parent functioning, parent–child relationships, post-separation parenting

<sup>209</sup> Petch et al, 2014, 28 at 34

<sup>210</sup> Submission 18, 7.

- alliance, children's perception of parental conflict, and children's perception of parental availability and alliance, and
- includes longer term follow-up studies to explore outcomes beyond just immediately post-mediation.

In the September monthly survey, Relationships Australia found that a substantial majority of men (92%) and women (94%) considered that children should directly participate in mediation and other forms of out-of-court family dispute resolution. One third of male and female survey respondents reported that children should directly participate in mediation or other forms of out-of-court family disputes without the need to consider age or maturity. Men were more likely than women to agree that children should directly participate if they were a certain age or maturity (40% men; 32% women), while women were more likely than men to report that children should only participate indirectly such as through a report from a child psychologist or youth worker (28% of men and 21% of women).



Relationships Australia Northern Territory has expressed the view that children should not be directly involved in the FDR process, but that child-inclusive practice continue to be used and funded for FDR matters. The focus of child-inclusive practice is to avoid children being placed in the middle of a dispute and being required (or feeling that they are required) to make a decision between their parents.

**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.**

Relationships Australia supports the proposal to develop guidance, subject to it being sufficiently flexible to accommodate service innovation.

Relationships Australia Queensland has expressed its support for the development of *new* practice guidance that builds on *Child inclusion as a principle and as evidence-based*

*practice: Applications to family law services and related sectors.*<sup>211</sup> New guidelines would usefully be informed by the significant body of research that clearly evidences the benefits for children to participate in FDR and have a voice in matters that concern them.

In particular, extension of the guidelines where FDR is assessed as inappropriate is required and overdue. The UN Convention on the Rights of the Child Article 12, combined with the principles of Child Aware Approaches, guides innovative service development currently underway among Child Practitioners in Australia. AIFS, in collaboration with practice leaders, academia, and family relationship service providers, would be well-equipped to lead the development of new guidelines.

Currently, Relationships Australia Queensland is further exploring the development of its practice guidelines for Child Practitioners where FDR is assessed as inappropriate through its pilot of *Legally Assisted and Culturally Appropriate Family Dispute Resolution for Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse Families who are separated and experiencing Domestic and Family Violence*. The pilot works with high risk, intensive needs families to deliver a safe, strength based, collaborative and culturally competent experience for its child clients. In several cases, where mediation has been assessed as not suitable, the family has still transitioned through and experienced the Consolidated Support Model for Legally Assisted and Culturally Aware FDR used by Relationships Australia Queensland. A range of child feedback mechanisms have been adopted, aimed at improving family relationships, and ensuring children feel respected, understood, unburdened and heard. Importantly, the objective is to ensure positive service experience for children, helping them to develop a secure emotional base for post-separation.

### **Case study – a family assessed as not suitable for mediation**

An Indian-Fijian, devout Christian, separated family had two sons, aged 17 and 12, who resided with their mother. Limited, supervised access was being provided by the Pastor of the Church. The family was assessed as at continued high risk of family violence. Parent B was assessed as having limited capacity to engage in mediation and also as being at risk of self-harm. Parent B was further assessed as posing a potential risk to practitioners and assessed as ‘phone call only’ contact. A child safety notification was made. Relationships Australia Queensland provided a customised delivery of the Consolidated Support Model for Legal Aid Queensland. It included intensive case management, extensive safety planning, referrals, and strategised Child Feedback was delivered. Due to continued capacity concerns and safety risks, a mediation was not conducted.

Relationships Australia notes the statement by the Law Council of Australia that ‘there is little research available to suggest that children may benefit from being involved in FDR’, but also notes that this appears to be based on the Commission’s report on its 1997 inquiry (*Seen and heard: priority for children in the legal process*). The Law Council does not appear to acknowledge pertinent research undertaken in the past 20 years and, with respect, fails to give due weight to advances in understanding about children’s development and agency in the intervening decades and to Australia’s obligations under the UNCRC. A list of references to the research body supporting child-inclusive mediation is set out at the end of this Chapter, for convenient reference.

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<sup>211</sup> AIFS, 2006.

Government should fund the development of practice guidelines for family relationship services that offer child-inclusive services. This is particularly critical in light of the growing body of research showing children's desires to be heard and to be involved in the separation process where that affects them.<sup>212</sup> As mentioned elsewhere in this Chapter, children's participation in the process does not mean that children seek to be the decision-makers. Evidence shows that children still prefer that the parents make the final decisions.<sup>213</sup>

Relationships Australia agrees with the Law Council that, if children are involved in FDR, then participation *must* be supported by appropriately skilled professionals and be structured according to the needs, abilities and preferences of individual children.<sup>214</sup>

**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.**

Relationships Australia supports this proposal, and acknowledges the validity of questions raised by some submitters.<sup>215</sup> However, we share the views expressed by Caxton Legal Centre, the Australian Human Rights Commission, the Australian Institute of Family Studies, as well as other researchers and commentators that support children's participation in proceedings and family dispute resolution. Systems dealing with children in separating or separated families 'must continue to develop mechanisms to allow for the safe participation of children.'<sup>216</sup>

Of course, ongoing assessment of safety will be critical, as will dynamic assessment of the suitability of the means of facilitating participation.

It is of critical importance for children and young people to be heard and not dismissed when they express concerns about their safety and the safety of family members. In the 2018 AIFS report on the needs and experiences of children and young people, Ashley (12-14 years) reported that

When I talked to the police, for them to listen...instead of just going, oh, he's your father and, you know, your blood, and... 'Cause they just kept saying...there's, like, no physical reports he, that there was any abuse, so we can't believe you.

Isabelle, 12-14 years, reported that

Mmm, they [police] didn't protect SISTER. They thought it was okay to leave her in his custody when they know that stuff was happening in his house, alone...Mum, like, reported everything, but all of them got turned down. [Interviewer: And this was to police or child protection?] Everything.

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<sup>212</sup> In addition to the recent AIFS report, Carson et al 2018, see, for example, Campbell, 2004; Graham & Fitzgerald, 2010a; James & Prout, 1997; Mayall, 1994; McIntosh, 2003; McIntosh, Well & Long, 2007; Parkinson & Cashmore, 2008; Smart, Neale & Wade, 2001; Smith, Taylor, & Tapp, 2003). Listening to children's voices is important – for both children and adults; see Fitzgerald & Graham, 2011a; Goldson, 2006; Lodge & Alexander, 2010; McIntosh, 2000, 2003; McIntosh, Wells, Smyth, & Long, 2008; Moloney & McIntosh, 2004.

<sup>213</sup> See, for example, Banham, Allan, Bergman & Jau, 2017; Parkinson and Cashmore, 2008.

<sup>214</sup> Law Council of Australia, submission 43, paragraphs 378, 394. See also submission 53 from Family and Relationship Services Australia, pp 14-20.

<sup>215</sup> See, for example, Law Council of Australia, submission 43, at paragraphs 336-342.

<sup>216</sup> ALRC DP 86, paragraph 7.50.



Alana, 12-14 years, reported that

My dad was trying to battle for custody of us and we saw a child psychologist who I - remember - it was like one of the worst things I think a psychologist could ever do. So we were talking to her and my dad was like in a different room, and she was like, 'So, tell me about it ...' So I basically explained everything, like how like I witnessed him chase Mum through our house with a knife. How he used to pick me up by arm and throw me in my room. How he used to lock BROTHER's room and stuff. And basically, overall, how abusive he was and then she's like, 'Oh, okay,' and she's like, 'So, if I got him in here do you think we could talk about it?' And like, I'm - I'm one of those people who doesn't know when to say no. So, like, I didn't really want to. I'm like, 'Ah.' And she's like, 'Okay, we'll get him in here.' I didn't exactly say no. Like, but I didn't really say yes either. And she's just like, 'Okay, we'll bring him in here.' And she's like, 'Okay, CHILD told me,' and then says everything I said. And [he] looks at me and is like, 'CHILD is that true?' And I'm like, 'Uh,' like I'm freaking out because I'm only like six or seven or something. Like, understandably, and then she's like, 'Oh, okay, so do you promise never to hurt the kids again if they go back up?' And my dad's like, 'Yeah.' And he - and she turns to me and she's like, 'CHILD do you feel safe with that answer?'

Carson et al related the concerns of one interviewee who contrasted the court processes used to assess the best interests of his sister, with the resolution of his own parenting arrangements outside of the court process (to which he attributed arrangements that enabled him to safely maintain a relationship with both parents):

You need to let children speak up. And be in the, with, have a bit more of a random conversation, rather than planned. Because in my sister's - my sister's case, she was doing a talk with a counsellor, but her dad was there and he's pretty scary. He, um, when my mum were together, he was hitting her. And so my sister's scared of her, him. And at the time, she thought that if she had said that she doesn't want to stay there, he could have hurt her. But, so it's better if it, when she was there, if someone came over randomly and just talked to SISTER. When she hadn't been prepared ... they (father and his family) were also bribing SISTER a bit. They were saying, 'If you come live with us, we'll give you a dog and a big house and a big room,' and all sorts ... And it wasn't fair, because SISTER was young. It's been two or three years and she didn't understand. And now it's crazy because SISTER wants to come home now and she doesn't want to go there and she's not getting another chance ... I don't think my sister's safe at all ... Because I think he's crazy and I don't know what he's capable of, because he's said some really bad things to my mum ... And he has physically assaulted her and I don't think it's safe for my sister to be around him. (Andrew, 12-14 years)<sup>217</sup>

These interviews took place against a background of numerous inquiries in Australia about child protection and family violence, and against a background of a Royal Commission that heard extensive and heartbreaking evidence of children who, when they reported harm and threats to their safety, were disbelieved, dismissed, even punished for speaking; their suffering minimised and camouflaged by sustained institutional denial. The adults those children became bear forever the wounds not only of their abuse, but those wounds inflicted by the shameful inaction of those charged to protect them.

Silencing children does not protect them.

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<sup>217</sup> Carson et al, 2018, 51, 81-82.

**Proposal 7-7 Children should not be required to express any views in family law proceedings or family dispute resolution.**

Relationships Australia supports the proposal to preserve the position currently provided for in section 60CE of the Family Law Act. Further, incorporation of good child-inclusive practice should never lead to an expectation or implication that children are to be decision-makers.

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

The role of Independent Children’s Lawyers has not provided an effective mechanism for children’s participation, noting the findings presented in the 2014 evaluation by AIFS and the findings presented in a report from a more recent study.<sup>218</sup> This is not a reflection on the capacity, effort and commitment that so many ICLs bring to their work. Rather, it is an inevitable consequence of unreasonable expectations.

Accordingly, Relationships Australia supports the Commission’s proposal to make a children’s advocate available to children, to facilitate their participation. We acknowledge that the cumulative burden of unreasonable expectations has, in all likelihood, substantially diminished the capacity of ICLs to engage directly with children. AIFS’ 2018 report on the needs and experiences of children and young people noted previous research findings that

...a substantial proportion of ICLs indicat[ing] that they view direct consultation [with children] for the purpose of eliciting views to be beyond their role and expertise (Kaspiew et al, 2014)<sup>219</sup>

Respondents to the New South Wales survey emphasised ‘their appreciation of the opportunity to express their views’, knowing that it was a vehicle by which to have their views put to the court. A 15 year old said ‘You get to put your thoughts in as well; it’s not just your parents’ lawyers.’<sup>220</sup> Continuity in relationship was important to the respondents.<sup>221</sup>

Carson et al, however, spoke to a number of young people who did not feel the appointment of an ICL facilitated their experiences, views and feelings being heard:

Um, like he wasn't listening, like, at all. Um, but yeah, like - what I mean by like just doing his job is like, you know, I felt like he wasn't listening, he was just like waiting for like the phone call to end, you know, and just like, you know, kind of just waiting for the day to go by, like, he wasn't actually genuine. (Eliza, 12-14 years)

<sup>218</sup> Anderson, Graham, Cashmore, Bell, Beckhouse and Alex, *Independent Children’s Lawyers: Views of Children and Young People*, 2016. The survey was conducted by the Centre for Children and Young People at Southern Cross University, in partnership with Legal Aid NSW. The findings of this survey, together with a comprehensive literature review (Bell, 2015) informed development of a *Family Law: Working with Children Good Practice Guide*, Graham et al, 2016.

<sup>219</sup> Cited Carson et al, 2018, 3.

<sup>220</sup> Anderson et al, 2016, 20.

<sup>221</sup> Anderson et al, 2016, 21.

Um, I suppose it - they seemed kind of detached from the situation but in their line of work they also can't, they can't, like, get involved with it personally and, like, actually let it become something to them. Um, but it really kind of made it difficult to want to talk to him about all the questions he was asking me when he seemed really detached ... it wasn't that I had any difficulty sharing anything with him, um, it's just the fact that what I was sharing with him I feel like it - you know, it made no difference to him and his preference of what happened, he was just writing notes that he would then share later on. Um, which in some cases I'm sure is good and some cases I'm sure is bad. (Hamish, 15+ years)<sup>222</sup>

Advocates should have training and expertise in child development and working with children. They must also be culturally competent and, where appropriate, have expertise in supporting LGBTIQ+ children.

Carson et al noted that some children involved in their study felt marginalised by family consultants. For example:

She didn't listen to anything I said and interrupted everything that I had to say ... And was trying to force me to go with FATHER. (Tahlia, 12-14 years)

Not - not good 'cause, I don't know, she just didn't listen. So, I was like what's the point of telling her if she's not going to listen. She spoke like down to me, like 'cause I was a child my views didn't matter. And she had this tone in her voice like she didn't believe anything that I was saying ... Yeah, no, she didn't ask many questions. She kind of said her opinions and yeah, she just yeah, she didn't listen very well at all. Yeah, she - like I said she didn't even write anything down that I said, she didn't listen to what I had to say. She'd already basically picked who she thought was right. And what would happen - what should happen ... I don't know, she just spoke in this really horrible way to me and just - she also didn't listen to my mum but that was 'cause my mum was supporting what I wanted ... she didn't ask many questions, just, 'What would you like?' and then, 'Why don't you spend time with your dad?' and like not in a way like why don't you but you should, kind of. And then yeah stuff like that. It's more statements about, like, you should. (Lily, 12-14 years).

Um, I wouldn't have a clue. Um, obviously always good to have someone to have a bit of a chinwag to but, um, other than that I wouldn't know ... It's not, like, I feel as though it's not necessarily their fault that they were unhelpful. (Connor, 15+ years)

Well, I didn't think we had much say because like, when we were talking to [family consultant] um ... he was basically like the guy that we talked to ... um, he'd write down notes [crying] ... It's just he wasn't a nice man and ... yeah. He just, he didn't do it, he didn't say like, I wish, um at the time and he just ... he didn't really - he kind of just said it straightforward ... And at the time I didn't know and ... he just ... So he

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<sup>222</sup> Carson et al, 2018, 52.

was just - he would, he, like, he just wasn't a nice man ... at the time, I was really young and I didn't really understand ... And he kind of just threw it at me ... And um, I was a bit scared of like - because I didn't want to say anything ... I didn't want to hurt my parents' feelings ... And I didn't really - it didn't really - I wasn't really listened to - I needed to learn - it was kind of just like, well this is just the children, they don't really have a say in - we understood that it was ... no one really listened to you, you're 12 years old ... But we just didn't get it because SIBLING hasn't got a good relationship with Dad and they just wouldn't - they wouldn't just ... And they just, and I was just, I didn't want to say anything that would - that would hurt another, another person there ... Because, as a person, I love to keep everyone else that I love ... I love, I love everyone to be happy ... And I just - it's, it's, it's hard when you just - you don't want to say anything that will hurt anyone - anyone's other feelings ... And then you, and then you, if you don't say then they won't get - it won't get through to them. (Ellie, 10-11 years)

Relationships Australia agrees with the Law Council of Australia that the current arrangements for keeping children informed is 'haphazard' and 'is thus not in their best interests.' We agree that this deficiency could be remedied by the judge giving specific directions.<sup>223</sup> We further agree with the Law Council that 'It is important to ensure that children's views do not get lost or altered within the system.'<sup>224</sup>

Overall, Relationships Australia considers that the separation of functions proposed by the Commission, between a children's advocate and a legal representative, will better facilitate the participation of children in matters affecting them, to a degree and in ways that are safe and developmentally appropriate. We would suggest that children's advocates be embedded in Hubs and in courts, with strong referral pathways to children's separate legal representatives.

Relationships Australia notes the use of child consultants in FRCs and mediation. These professionals play a crucial role in facilitating children express their views. Relationships Australia New South Wales suggests child consultants should be recognised in legislation, funded, and subject to accreditation processes, following completion of prescribed training. The statutory arrangements for confidentiality and admissibility in relation to FDR need also to apply to the work of child consultants.

**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; and**
- **advocate for the child's interests based on an assessment of what would best promote the child's safety and developmental needs.**

Relationships Australia supports the proposal, noting its alignment with increased recognition of the human rights imperative for supported, rather than substituted, decision-making.

**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**

<sup>223</sup> Submission 43, paragraph 346; see also paragraph 353.

<sup>224</sup> Submission 43, paragraph 356.

**proceedings (a ‘separate legal representative’) in appropriate circumstances, whose role is to:**

- **gather evidence that is relevant to an assessment of a child’s safety and best interests; and**
- **assist in managing litigation, including acting as an ‘honest broker’ in litigation.**

Relationships Australia supports the appointment of a legal representative for children. The functions of that role should be:

- engaging directly with children where the child’s advocate advises that this is developmentally appropriate, and
- gathering evidence that is relevant to an assessment of a child’s best interests.

The role of assisting in managing litigation, including acting as an ‘honest broker’ in litigation, should be allocated elsewhere, to prevent (or at least minimise) accretion of unreasonable demands and expectations as has been the case with ICLs. The focus of children’s legal representatives should be the child only.

Judges value the litigation management function of ICLs. This is a function (particularly given the prevalence of self-representation) that meets a pressing, important need. Relationships Australia notes that a transition to alternative models, for which we have argued elsewhere in this submission,<sup>225</sup> would facilitate the performance of this role, and would permit the appointment of an individual to act akin to a counsel assisting.

A survey report published in 2016,<sup>226</sup> which canvassed the views of 54 children and young people aged between 7-16 indicated that:

- they generally had a good understanding of why they were seeing the ICL
- many felt anxious about the prospect of talking with the judge but trusted their lawyers to represent their views in Court
- improvement was needed in explaining various parts of the court process
- they were generally not worried that someone in their family might know what they said to their lawyer, and
- most thought access to a lawyer was beneficial.<sup>227</sup>

The report noted that the ‘first and most frequent theme related to the lawyer sharing information about the legal process.’<sup>228</sup> Another strong theme emerging from this study was the high level of trust that the respondents had in the professional role of the lawyer and obligations of confidentiality.<sup>229</sup> A nine year old respondent said ‘You can tell them how you feel without being judged’ and another older respondent remarked that ‘you can

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<sup>225</sup> See, for example, the response to Question 6-4 and the section on specialist tribunals at the end of Chapter 6 of this submission.

<sup>226</sup> Anderson, Graham, Cashmore, Bell, Beckhouse and Alex, *Independent Children’s Lawyers: Views of Children and Young People*, 2016. The survey was conducted by the Centre for Children and Young People at Southern Cross University, in partnership with Legal Aid NSW. The findings of this survey, together with a comprehensive literature review (Bell, 2015) informed development of a *Family Law: Working with Children Good Practice Guide*, Graham et al, 2016.

<sup>227</sup> Anderson et al, 2016, 1.

<sup>228</sup> Anderson et al, 2016, 9.

<sup>229</sup> Anderson et al, 2016, 16.



talk about really private stuff.’<sup>230</sup> Some respondents, though, believed that their ICL had not listened to them.<sup>231</sup>

**Question 7-1 In what circumstances should a separate legal representative for a child be appointed in addition to a children’s advocate?**

If current decision-making structures are retained, Relationships Australia considers that a separate legal representative could be appointed in any of the following circumstances:

- there is high conflict between the parents
- there are particular vulnerabilities affecting the parents, preventing them from presenting cogent evidence about arrangements for the child/ren
- where both parents are self-represented
- where there are legal issues needing to be addressed on the child/ren’s behalf, and
- any case where the court forms the view that appointment of a separate legal representative is necessary to ensure that evidence is presented to the court to enable it to make an informed decision.

**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?**

Relationships Australia considers that appointment, management and co-ordination of children’s advocates should be undertaken by the Families Hubs, and that Legal Aid Commissions could perform these functions in relation to separate legal representatives (Hubs and LACs should be funded accordingly).

Accreditation, training, supervision and complaints functions for both advocates and separate legal representatives should be functions of the proposed Family Law (or Family Wellbeing) Commission.

**Question 7-3 What approach should be taken to forensic issues relating to the role of the children’s advocate, including:**

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

Some children are involved in proceedings in both the family law courts and children’s courts. Relationships Australia Western Australia suggests that if a children’s advocate could work with those children across both jurisdictions, then there could be significant benefit to the children in the advocate being able to be a witness. A children’s advocate will have the capacity to engage with the children for a longer period of time than a family consultant can, and therefore may be in a position to better explain the children’s needs to the court.

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

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<sup>230</sup> Anderson et al, 2016 19.

<sup>231</sup> Anderson et al, 2016, 17.



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

Relationships Australia supports a flexible approach being taken to allow children to choose how to engage in FDR processes and court proceedings. The options in Proposal 7-11 have merit. Other options could also be considered, including allowing decision-makers to write to children, directly or through advocates, seeking their views, as well as reports like the ‘Voice of the Child Reports’ in Ontario, referred to at paragraph 7.94 of the Discussion Paper.

Relationships Australia considers that, in view of the obligations imposed by UNCRC, judges should be encouraged to meet with children directly, where children seek this, and that judges should be supported to develop the skills and attributes necessary to engage directly with children.

**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.**

Relationships Australia supports this proposal, and suggests that the National Judicial College of Australia could collaborate with social science professionals to develop this guidance.

**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.**

Relationships Australia supports this proposal, and that the Board be integrated with other governance processes (see paragraph 7.102 of the Discussion Paper). We note the success of similar mechanisms such as headspace’s Youth National Reference Group, and agree with the potential functions of the Board as suggested by the Youth Affairs Council of South Australia in its submission.<sup>232</sup>

## **Child-inclusive mediation – some references to supporting research body**

Bill Hewlett (2007) ‘Accessing the parental mind through the heart: A case study in child-inclusive mediation’, *Journal of Family Studies*, 13:1, 94-103, DOI: [10.5172/jfs.327.13.1.94](https://doi.org/10.5172/jfs.327.13.1.94)

Ballard, R. H., Holtzworth-Munroe, A., Applegate, A. G., D’Onofrio, B. M., & Bates, J. E. (2013) ‘A randomized controlled trial of child-informed mediation’ *Psychology, Public Policy, and Law*, 19(3), 271-281. doi:10.1037/a0033274

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<sup>232</sup> See submission 5.

Holtzworth-Munroe, A., Applegate, A., D'Onofrio, B., & Bates, J. (2010) 'Child Informed Mediation Study (Cims): Incorporating the Children's Perspective into Divorce Mediation in an American Pilot Study' *Journal of Family Studies*, 16(2), 116-129. doi: 10.5172/jfs.16.2.116

Holtzworth-Munroe, A., Applegate, A. G., & D'Onofrio, B. i. (2009) 'Family Dispute Resolution: Charting a Course for the Future' *Family Court Review*, 47(3), 493-505. doi: 10.1111/j.1744-1617.2009.01269.x

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McIntosh, J. E. (2003) 'Enduring conflict in parental separation: Pathways of impact on child development' *Journal of Family Studies* 9(1), 63–80.

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Parkinson, P., & Cashmore, J. (2008) *The voice of a child in family law disputes* Oxford: Oxford University

Smart, C., Neale, B., & Wade, A. (2001) *The changing experience of childhood: Families and divorce* Cambridge, MA: Polity Press

Smith, A., Taylor, N. & Tapp, P. (2003) 'Rethinking children's involvement in decision making after parental separation' *Childhood* 10(2), 201–206.

## Chapter 8 Reducing Harm

### **Proposal 8-1      The definition of family violence in the *Family Law Act 1975* (Cth) should be amended to:**

- **clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8-3)) including emotional and psychological abuse and technology facilitated abuse; and**
- **include an explicit cross-reference between the definitions of family violence and abuse to ensure that it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.**

Relationships Australia supports both elements of this proposal. We note the diverse views on the scope of the existing definition. We support the definition being kept under review (perhaps by the proposed Family Law (Family Wellbeing) Commission) to ensure that it continues to reflect evolving insight into family violence and its effects.

Relationships Australia notes the Commission's observations about variations in understanding of the definition across professional groups involved in the family law system. As a federated organisation with national reach, we are also mindful of jurisdictional variances in defining 'family violence'. We support national and cross-disciplinary professional education to promote shared understandings about family violence and other concepts, principles and mechanisms that flow through families' experiences.

Relationships Australia urges governments to seek the views of Aboriginal and Torres Strait Islander people within their jurisdiction on the adequacy, or otherwise, of definitions of family violence.<sup>233</sup>

### **Question 8-1      What are the strengths and limitations of the present format of the family violence definition?**

Relationships Australia concurs with the Commission's view, at paragraph 8.29 of the Discussion Paper that, even against a background of overall simplification of the legislation, there is considerable educative value in retaining a list of specific behaviours. Our experience is consistent with the described research findings that there is relatively low awareness and recognition of some forms of family violence.

In response to specific suggestions made by the Commission in Chapter 8, Relationships Australia supports:

- replacing 'assault' with 'an act that causes physical harm or causes fear of physical harm'
- replacing 'repeated derogatory taunts' with 'emotional or psychological harm'
- adding 'including requiring the family member to transfer or hand over control of assets, or forcing the family member to sign a document such as a loan or guarantee' to paragraph 4AB(2)(g)

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<sup>233</sup> See also Family and Relationships Services Australia, submission 53, pp 25 (referring to Blagg et al, 2017 and submission 121 by the Alice Springs Women's Shelter to the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into a Better Family Law System*) and p 40.

- adding ‘including unreasonably withholding information about financial and other resources’ to paragraph 4AB(2)(h)
- adding reproductive coercion to section 4AB
- adding ‘community or religion’ to subparagraph 4AB(2)(i)
- adding to the definition in section 4AB two new examples:
  - using electronic or other means to distribute words or images that cause harm or distress; and
  - non-consensual surveillance of a family member by electronic or other means.

Relationships Australia would also propose to add ‘fear’ to ‘cause harm or distress’ to the first of the preceding examples for technology-facilitated abuse, and to add ‘(including, but not limited to, remotely operated aircraft)’ to the second of these.

Relationships Australia supports the suggestion, made by the Royal Australian and New Zealand College of Psychiatrists, to include ‘medical neglect’ within the definition of family violence. The College gives the example of

...obstructing access to medical or psychological care for the child or refusing to attend appointments when the child is in their care.<sup>234</sup>

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

See the response to Proposal 8-1.

As foreshadowed in our response to the Issues Paper,<sup>235</sup> we support the inclusion of technology facilitated abuse as an example of family violence. We would further support explicit provisions relating to the use of surveillance devices such as drones/remotely piloted aircraft.

Relationships Australia supports expanding the definition of ‘family violence’ in the Family Law Act to include dowry and forced marriage, as Victoria has done in its *Family Violence Protection Act 2008*.<sup>236</sup> Relationships Australia supports the proposal set out below that the Commonwealth commission research projects about the operation of the family violence definition for people from culturally and linguistically diverse backgrounds, but considers that the need for such an amendment is sufficiently established to include an amendment pending the findings from future research.

We concur with the suggestions of the Law Council of Australia that the definition of family violence should include examples of conduct that have a particular impact on the LGBTIQ+ community.<sup>237</sup>

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<sup>234</sup> Submission 18, 4.

<sup>235</sup> See Appendix B.

<sup>236</sup> Relationships Australia notes support for inclusion of ‘dowry-related extortion’ by the Royal Australian and New Zealand College of Psychiatrists: submission 18, 4.

<sup>237</sup> Submission 43, paragraph 97.

**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 (Cth)* in relation to the experiences of:**

- **Aboriginal and Torres Strait Islander people;**
- **People from culturally and linguistically diverse backgrounds; and**
- **LGBTIQ people.**

Relationships Australia supports this proposal. We would also suggest the commissioning research in relation to the following cohorts:

- people with disability who are affected by family violence
- homeless people and their experience of family violence
- older people affected by family violence, and
- children and young people affected by family violence.

Relationships Australia supports the recommendation made by the Law Council of Australia that government should consider reforms, including to migration legislation, to would protect and support people on temporary spousal visas who are affected by family violence.<sup>238</sup>

**Proposal 8-3        The definition of family violence in the *Family Law Act 1975 (Cth)* should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s4AB(2) by inserting a new subsection referring to the ‘use of systems or processes to cause harm, distress or financial loss.’**

Relationships Australia supports this proposal. Relationships Australia would encourage further consultation in developing provisions to identify and respond to such misuse. In particular, we support the Commission’s approach, set out at paragraph 8.52, of framing the proposed amendment more broadly than language used in relation to court action in similar contexts.

Relationships Australia agrees that not all misuse of processes and systems constitutes family violence.<sup>239</sup> However, we disagree that existing court powers to manage unmeritorious or abusive use of the *court* system are sufficient, as has been suggested by the Law Council of Australia (submission 43, paragraphs 277-284).<sup>240</sup> The current provisions are confined in their operation to conduct in relation to court or tribunal proceedings. Powers to identify and respond to abuse of systems and processes need to recognise the multiplicity of systems and processes that can be used, in concert or in succession, to perpetuate abuse, control, intimidation and coercion. The fragmentation of the family law system allows significant scope to someone who wish to engage in this form of behaviour. Responses to misuse of systems and processes cannot be confined to

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<sup>238</sup> See submission 43, paragraph 75.

<sup>239</sup> See submission 51, Caxton Legal Centre.

<sup>240</sup> In its submission to the inquiry of the Senate Legal and Constitutional Affairs Committee into the Family Law Amendment (Parenting Management Hearings) Bill 2017, the Law Council of Australia noted that ‘It is widely acknowledged that the AAT child support jurisdiction has come to be used by perpetrators of family violence as a means of committing further family violence by exploiting the opportunity to take legal proceedings against the victim.’ (Submission 20, p 18, paragraph 51). This, in the respectful view of Relationships Australia, underscores the need to legislate to recognise that systems misuse, by parties to family dispute, can be achieved by a number of routes outside the family law courts.



consideration what happens in legal proceedings before the court, but must also encompass conduct outside the court, but that is connected to the dispute. Relationships Australia considers that the characteristics described by the High Court in *Rogers v R*<sup>241</sup> would remain relevant.

**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.**

Relationships Australia supports this proposal, and agrees with the Commission’s suggestion at paragraph 8.74.

**Proposal 8-5**      **The *Family Law Act 1975* (Cth) should provide that, in considering whether to deem proceedings an 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.**

Relationships Australia supports this proposal, which is consistent with trauma-informed practice and with the primacy accorded to children’s wellbeing.

Adversarial process seems to be a great friend to litigants seeking to stay connected with a former partner through hate-driven conflict and/or coercive control.<sup>242</sup>

We agree with the suggested new considerations to be taken into account:

- the safety and best interests of the child/ren,<sup>243</sup> and
- the impact of proceedings on the other party where they are the main caregiver for the children involved.<sup>244</sup>

**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.**

Relationships Australia supports substituting ‘repeated’ for ‘frequent’, as the focus of the inquiry should be whether there is a pattern of behaviour, rather than a focus on what has happened within a particular or arbitrary timeframe. There is ample evidence of disputants who persist with misuse of systems over a very long period of time.

**Proposal 8-6**      **The *Family Law Act 1975* (Cth) should provide that courts have the power to exclude evidence of ‘protected confidences’: that is communications made by a person in confidence to another person acting in a professional capacity to have an express or implied duty of confidence. The Act should provide that:**

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<sup>241</sup> *Rogers v R* [1994] 181 CLR 509.

<sup>242</sup> Dr Bruce Smyth, submission 104, 7.

<sup>243</sup> Subject to our preceding reservations about the use of a compound expression.

<sup>244</sup> ALRC DP paragraph 8.86.

- **Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.** Relationships Australia supports this proposal. We share concerns about the use of subpoenas to ‘weaponise’ medical confidences, as expressed by the Royal Australian and New Zealand College of Psychiatrists; the College emphasises that this is ‘exacerbated by the adversarial legal system in which there is an incentive to “win” rather than to resolve conflict’<sup>245</sup>
- **The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm should be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).** Relationships Australia supports this proposal
- **In exercising this power, the court should consider the probative value and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider.** Relationships Australia supports this proposal.
- **In family law proceedings concerning children, the safety and best interests of the child should be the paramount consideration when deciding whether to exclude evidence of protected confidences. Such evidence should be excluded where a court is satisfied that admitting it would not promote the safety and best interests of the child.** Relationships Australia supports this proposal.
- **The protected confider may consent to the evidence being admitted.** Relationships Australia supports this proposal.
- **The court should have the power to disallow such evidence on its own motion or by application of the protected confider or the confidant. Where a child is the protected confider, a representative of the child may make the claim for protection on behalf of the child.** Relationships Australia supports this proposal
- **The court is obliged to give reasons for its decisions.** Relationships Australia supports this proposal, but suggests that such reasons could be given orally.

Relationships Australia shares, with the Royal Australian and New Zealand College of Psychiatrists, the concern that disclosure, without consent, can irretrievably thwart any chance of successful therapy’.<sup>246</sup> The College expresses its view that

When compared to other common law countries, Australian law offers less protection for patients against access to their clinical records and the protection that does exist varies greatly across the federal, state and territory jurisdictions.<sup>247</sup>

Relationships Australia supports the suggestions made by the Commission at paragraphs 8.109-8.110 and 8.112 of the Discussion Paper.

**Proposal 8-7        The Attorney-General’s Department (Cth) should convene a working group comprised of [the family courts, various peak bodies of service providers and clinicians] to develop guidelines in relation to the use of sensitive records in family law proceedings. These guidelines should identify....**

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<sup>245</sup> Submission 18, 5.

<sup>246</sup> Submission 18, 5, 6.

<sup>247</sup> Submission 18, 5.

Relationships Australia supports this proposal, and considers that membership of the working group should also include:

- state and territory governments, which are responsible for regulating the use of important categories of sensitive records within contemplation of this proposal
- other Commonwealth departments and agencies with responsibilities for collecting, storing and disclosing sensitive information, and which may be in a position to offer valuable insights and observations.

Relationships Australia considers it to be critical that any working group include professionals with expertise in trauma-informed practice and family violence dynamics. This is particularly necessary given that the Commission has noted, at paragraph 8.115, ‘divergent views’ between legal practitioners and therapeutic practitioners in relation to the use of sensitive records.

## Chapter 9 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. The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*:**

- **Recommendations 3-1 to 3-4 on National Decision Making Principles and Guidelines; and**
- **Recommendations 4-3 to 4-5 on the appointment, recognition, functions and duties of a ‘supporter’.**

Relationships Australia supports the inclusion in the Act of a supported decision-making framework which is consistent with the recommendations in ALRC Report 124, noting in particular the National Decision Making Principles set out in that Report.

Relationships Australia agrees that the framework would need to provide for the matters described at paragraph 9.36.

Supported decision-making is central to a human rights compliant family law (or family wellbeing) system. Accordingly, the framework should be included in primary legislation, rather than in rules of court or by other instrument. The Act should also be explicit that, where a supporter is chosen, ultimate decision making authority remains with the person who requires support.<sup>248</sup>

Relationships Australia Tasmania has suggested that a person who is charged with supporting the decision-making of another needs to remain separate from the proceedings and have no interest in the outcome of the proceedings. This may exclude other family members from taking that role.

Relationships Australia acknowledges the need for more rigorous evaluation of programs to facilitate supported decision-making.

### Case study

Parents (Mr and Mrs H) of two young children engaged in FDR to resolve their financial and property matters. Mrs H had sustained a brain injury, had physical limitations and limited capacity to always accurately recall information and make rational decisions. FDR provided scope for the parents to both be part of the discussion, with the attorney present through the discussions to support Mrs H’s participation and contribution towards the decision making process.

A challenge in FDR where another person is present in a ‘support person role’ is the support person’s conscious or unconscious alignment to the party whom they represent/support. In this case, the holder of the power of attorney is also the father of Mrs H. There was potential for the session to be emotive, with Mr and Mrs H staying entrenched in the conflict and continuing the pattern of behaviours around decision making. The FDRP sought agreement from Mr H and Mrs H to include Mr B as a client rather than a support person. This meant Mr B was in a position to

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<sup>248</sup> ALRC DP 86, paragraph 9.33.

contribute to the discussions, hear Mr H's worries and concerns for Mrs H, and actively participate in the exploration of options and reality testing of ideas.

The FDRP conducted the session using a trauma-informed practice approach. The parties spent some of the sessions together. At other times, each client had separate sessions with the FDRP to assist in managing the impact the injury had on each of their lives, dreams, hopes, aspirations and the financial hardship and uncertainty they have experienced.

Each party felt heard, respected and found common ground. The FDRP's approach removed a sense of burden placed on Mr B to make the best decision possible for Mrs H's financial future. For Mr H, his sense of being dismissed and overshadowed by Mr B was removed. Mrs H felt valued.

Agreements reached were based on a shared understanding of the current situation and future needs of both parents and their children.

In their recent study of the needs of children and young people in the family law system, Carson et al drew attention to the need for structures to be in place to support children with disability to participate in the process.<sup>249</sup>

**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.**

Relationships Australia supports the proposal that the Australian Government make publicly available information and guidance for people who:

- need support for decision-making, describing their right to be supported to make decisions that reflect their preferences and choices, and how they can access those supports, and
- provide support for decision-making, setting out their functions and responsibilities in relation to the person whose decisions are to be supported.

**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. The Act should set out the circumstances for a person to have a litigation representative and the functions of the litigation representative. These provisions should be in a form consistent with recommendations 7-3 to 7-4 of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.**

Relationships Australia supports this proposal. In some instances, supported decision making is not possible. Relationships Australia concurs with the Commission's suggestion that the role and duties of litigation representatives be re-conceptualised,<sup>250</sup> and the legislative arrangements to implement this include the elements described at paragraph 9.59.

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<sup>249</sup> Carson et al, 2018, 81, Case Study 2: Hamish and Colleen.

<sup>250</sup> ALRC DP 86 paragraph 9.50.

We share with other submitters deep concern about the difficulties being encountered in arranging, in a timely manner, the appointment of suitable litigation guardians.<sup>251</sup> We are aware of cases being delayed for considerable periods of time, to the detriment of parties, because willing guardians cannot be found.

Relationships Australia would urge the Commonwealth to make funding available to state and territory public guardians to undertake this work. We welcome Parliament's support for limitations on the courts' powers to order costs against a litigation guardian, as this may remove some of the barriers which are deterring potential guardians from accepting an appointment.

Relationships Australia welcomes the amendment to prohibit the court from making an order under ss117(2), unless the court is satisfied that the guardian's conduct has been unreasonable or has unreasonably delayed the proceedings.<sup>252</sup>

**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.**

Relationships Australia supports this proposal. Alternatively, the proposed Family Law (Family Wellbeing) Commission could develop guidance in collaboration with the courts.

**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.**

Relationships Australia supports this proposal, with reference to the difficulties encountered in securing litigation guardians, noted in response to Proposal 9-3.

**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, and how the National Disability Insurance Scheme (NDIS) could be used to fund appropriate supports for eligible people with disability to....**

Relationships Australia supports this proposal, which is consistent with our philosophy favouring strengths-based, rather than deficits-based, approaches to support parents. We acknowledge, however, the limitations on the extent to which NDIS will support engagement in the family law (or family wellbeing) system by people with disability (as noted by the Commission at paragraphs 9.80-9.82).

**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.**

Relationships Australia supports this proposal. Probably the most effective action that the Australian Government could take in this regard is to ensure that the family wellbeing system is sufficiently well-resourced to attract and retain suitable professionals. This would be supported by effective workforce planning as described in Chapter 10.

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<sup>251</sup> For example, Caxton Legal Centre, submission 51, paragraphs 15-19; Law Council of Australia, submission 43, paragraph 80.

<sup>252</sup> See *Civil Law and Justice Legislation Amendment Act 2018*.



Our practice experience bears out concerns expressed by submitters about the limited availability of supports currently available to parents with disability.

**Question 9-1            In relation to the welfare jurisdiction:**

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

*Sterilisation*

Children should not be sterilised in the absence of authorisation from an independent body. Relationships Australia considers that the purpose of by requiring authorisation could more accessibly (and possibly more meaningfully) be met by a guardianship or other specialist tribunal with expertise in matters affecting persons who lack capacity to make decisions about medical treatment. Deane J, in *Re Marion*, noted that a requirement for judicial authorisation would burden families with the ‘costs, delays and emotional strain’.<sup>253</sup> Those concerns remain as valid in 2018 as they were in 1992.

Relationships Australia concurs with the view expressed by the Royal Australian and New Zealand College of Psychiatrists that

family courts have *focussed on disability rather than capacity* when considering forced sterilisation. In the RANZCP’s view, the forced sterilisation of a young person on the grounds of their disability alone constitutes discrimination and is a breach of human rights.<sup>254</sup> [emphasis added]

*Infants and children with variations of sex characteristics*

In relation to medical interventions in response to variations of sex characteristics, Relationships Australia recommends that the ALRC be guided by the findings of the Australian Human Rights Commission, which is currently undertaking a project to consider how best to protect the human rights of people born with variations in sex characteristics, in the specific context of non-consensual medical interventions. More information about the Project can be found at <https://www.humanrights.gov.au/our-work/sexual-orientation-gender-identity-intersex-status/projects/protecting-human-rights-people-0>.

<sup>253</sup> See *Department of Health and Community Services v JWB and SMB (Re Marion)* (1992) 175 CLR 218, per Deane J, paragraphs 1, 20. See also McHugh J at paragraphs 16, 24.

<sup>254</sup> See submission 18, 3.

**Proposal 9-8        The definition of family member in s4(1AB) of the *Family Law Act 1975* (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.**

Relationships Australia supports this proposal and, more broadly, supports ongoing consideration of how well relevant legislation reflects existing and emergent variations in family formation and composition across the community.

Relationships Australia agrees with the Australian Psychological Society that the current legislation principally assumes biological parents rather than more expansive concepts of family.<sup>255</sup>

Relationships Australia supports recommendation 23 of the National Family Violence Prevention Legal Services Forum that the Act recognises that ‘parent’ may include ‘...a person who is regarded as a parent of a child under Aboriginal Tradition or Torres Strait Islander custom.’<sup>256</sup>

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<sup>255</sup> Submission 55, pp 10, 23. See also the APS’ observations about the importance of understanding that a range of cultural groups have more expansive definitions of family and place greater emphasis on roles played by members of extended families in relation to children.

<sup>256</sup> Submission 63, pp 6, 36.

## Chapter 10 A Skilled and Supported Workforce

Relationships Australia supports development of a workforce capability plan to achieve a national, systematic and disciplined approach to meeting current and future needs.

**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.**

Relationships Australia supports this proposal, subject to state and territory governments also being involved, given the many and close connections between Commonwealth and state and territory functions in this area. Relationships Australia concurs with other submitters who identified the following as core competencies:

- family violence
- understanding of a broad range of risks, including suicide risk
- trauma-informed practice<sup>257</sup>
- understanding of the impact on children of conflict and family violence
- vicarious trauma
- an understanding of child abuse, including child sexual abuse and neglect
- cultural competence in relation to Aboriginal and Torres Strait Islander people, LGBTIQ+ families and culturally and linguistically diverse communities
- disability awareness, and
- intersectional disadvantage and discrimination.

We would add:

- elder abuse and intergenerational conflict
- lateral violence
- substance abuse and mental health issues (including as these affect children and young people, and how they affect older people)
- problem gambling
- child-inclusive and child-focused practice, and
- child development<sup>258</sup> and parent-child attachment,<sup>259</sup> and how attachment needs evolve<sup>260</sup> as children develop.

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<sup>257</sup> See Fallot and Harris, 2006, for the five principles of trauma-informed practice: safety, transparency and trustworthiness, choice, collaboration and mutuality, and empowerment.

<sup>258</sup> In Lieberman et al, 2011, Zeanah notes (at 535): 'It is peculiar, the lack of developmental thinking in the legal system, and it is a huge problem for children. The fact that it's completely, by its nature, un-developmental. So we see the same arrangements ordered for 15-year-olds and 15-month olds. And that is just on its base crazy.'

<sup>259</sup> In Bretherton et al, 2011, Crowell observes that 'Attachment speaks to the logistics of development, not emotional touchy-feely matters. I think that is where people get mixed up in attachment, and the law does too. Attachment theory if anything encourages us to think on a more practical and organizational level.' (at 546)

<sup>260</sup> Noting the observation by Seligman that 'As clinicians, we have to actively move family law professionals away from thinking of attachment as if it were acquired at a certain time, or as if one parent-child relationship ticks the box and the other does not. Patterns of early contact are important, but there is a wide variation between being a parent who is not the primary attachment figure in the beginning, and being someone who is marginalised.' (See Bretherton et al, 2011, 543-544). Relationships Australia notes that various submitters drew attention to what they regarded as misapplication of attachment theory, to the detriment of children; see, for example, Family and Relationship Services Australia, submission 53, p 21.

**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.

Relationships Australia supports this proposal, subject to the plan considering whether existing complaints, disciplinary and other accountability mechanisms are adequate.

Relationships Australia considers that FDRPs should be required to undergo capability assessments.

**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....**

Relationships Australia supports this proposal, noting our preceding comments.

Relationships Australia notes the views expressed by survey respondents to its online survey, *The voices of children in the family court*.<sup>261</sup> More than 50% of survey respondents thought that people working with children during family disputes should be a psychologist or social worker with experience and skills in working with children. More than 13% thought the minimum requirement should be a three-year psychology or social work degree and a further 10% reported that people working with children during family disputes should have a minimum of five years' experience in working with children. Only 6% of survey respondents considered a legal or dispute resolution qualification was sufficient.

**Reports on the desired qualifications and skills of people working with children in family disputes.**

<b>Qualifications and skills of workers</b>	<b>%*</b>
Working with vulnerable people police check	6
At least 2 years' experience working with children	9
At least 5 years' experience working with children	10
Psychology or social work diploma (2 years)	8
Psychology or social work degree (3 years)	13
Legal or dispute resolution qualification	6
Psychologist or social worker with experience and skills in working with children	51
Other	6

\*Respondents may have chosen more than one qualification/skill

Relationships Australia Queensland reports that CCSs operating as standalone services do not deliver the necessary long-term support for vulnerable families with multiple psycho-social morbidities. Services that simply offer supervised contact, with nothing more, do not offer families a pathway out of their difficulties, and represent significant

<sup>261</sup> Conducted in September 2018.

missed opportunities to build parenting capacity and strengthen parent-child relationships. If these opportunities could be pursued, Relationships Australia predicts that it would facilitate earlier and more transitions to unsupervised contact and, in any case, alleviate to some degree the need for intensive (and expensive) supports. Families' needs would be better met, for example, by CCSs being required to deliver services such as parent coaching, by appropriately-skilled and experienced staff. This, of course, would require a holistic approach – and support from a judiciary that is aware of what services offer.

**Proposal 10-4      The Family Law Commission...should oversee the implementation of the workforce capability plan through training – including cross-disciplinary training – and accreditation of family law system professionals.**

Relationships Australia supports this proposal, and would particularly encourage the delivery of cross-disciplinary training, which we regard as being highly effective in supporting collaboration among service providers. For example, we are aware of very positive feedback from members of FLPNs who have the opportunity to attend seminars on family law and court processes delivered by judicial officers.

**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. This should include consideration of existing training and accreditation requirements.**

Relationships Australia supports this proposal. We concur with FMC (now Better Place) that, if pre-filing FDR is mandated for property and financial matters, there will be considerable demand for courses tailored to develop skills in these areas.<sup>262</sup>

**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 matters?**

There is currently highly-developed training and a registration process for FDRPs to offer services relating to property and finance matters. It is a direct pathway for registration as an FDRP through the Attorney-General's Department. The CHC81115 Graduate Diploma of Family Dispute Resolution is a nationally accredited training located at level 8 of the Australian Qualifications Framework. This qualification is designed and accredited to enable graduates to demonstrate their knowledge and skills, and their application of knowledge and skills, to work as an FDRP. This is equivalent to a Bachelor Honours degree. Prerequisites for enrolment are:

- undergraduate degree or high qualification in Psychology, Social Work, Law, Conflict Management, Dispute Resolution, Family Law Mediation or equivalent
- accreditation under the National Mediation Accreditation System
- the mediation skill set from the Community Services Training Package, or
- documented evidence of previous experience in a dispute resolution environment in a role that involved self-directed application of knowledge with substantial depth in some areas, exercise of independent judgement and decision-making, and a range of technical and other skills.

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<sup>262</sup> See FMC, submission 135, 18.

Graduates of CHC81115 have an advanced level of knowledge and skills for the highly skilled work of FDR. This practice-based qualification is design for professionals in the law and/or social science sectors who wish to work within the community-based family law arena.

Practice frameworks for detecting risks during separation, such as family violence, parenting stress, mental health concerns and child harm, are central to the course. Child-focused practice and an introduction to child inclusive mediation are embedded within the course. The course also includes competencies in financial and property dispute resolution. It would be possible to further expand the components on child inclusive mediation. Standard procedures and/or obligations could be incorporated into legislation, along with procedures for interviewing children as currently done by ICLs and Family Consultants.

As previously stated in our response to Proposal 5-3, Relationships Australia does not consider legal qualifications to be a prerequisite to undertake mediation in relation to property or finance matters. This is because of the nature of the mediator's role: the mediator is not the decision-maker, and neither is the outcome legally binding on the parties. There are, however, strong reasons to encourage legally assisted FDR in property and finance matters, and matters where one or both party has a particular vulnerability.

FDRPs aspiring to offer services in finance and property matters should undergo basic training to understand, for example:

- contemporary legislation and jurisprudence. and
- the balance between presenting practical options for property division and not providing advice as to the adequacy of the proposed property division (just as the FDRP is not a legal adviser, neither is the FDRP a financial adviser).

Current training for FDRPs includes a component in relation to property and finance matters. Training includes work placements. However, current training may not be sufficient to deal with the array of matters that would come to them if pre-filing FDR were mandated, and time and money will be necessary to 'skill up' significant numbers of FDRPs. Government could also consider limiting FDR in finance and property matters to matters that would fall within the 'small property claims' proposal (Proposal 6-5).

Relationships Australia South Australia currently offers training in property mediation to FDRPs, through the Australian Institute of Social Relations. Relationships Australia notes the comments by the Mediator Standards Board on competencies required by mediators, conciliators, arbitrators and facilitators.<sup>263</sup>

Relationships Australia Western Australia has provided FDR for property and financial matters for more than 20 years; its FDRPs do not all hold legal qualifications. As with any qualification, ongoing professional development increases knowledge and skills to be applied within a mediation framework and in accordance with the Family Law Act. It is recommended that FDRPs need to demonstrate that they undertake ongoing professional development specific to property and financial matters to maintain their accredited status.

Relationships Australia New South Wales suggests that training be required to ensure that FDRPs who work with property and finance matters understand, among other things:

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<sup>263</sup> See submission 83, p 7.



- the concepts of full disclosure, ‘just and equitable’, ‘clean break’
- the provisions applying to de facto couples, and
- valuations.

**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.**

Relationships Australia supports this proposal, in light of the prevalence of family violence (including allegations of family violence) in family disputes, and the extent to which (as noted by the Commission at paragraph 10.44) it can pervade a range of legal matters.

**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.**

Relationships Australia supports this proposal. We are deeply concerned by waiting times for CCS appointments, which can exacerbate the difficulties of already fragile and vulnerable families.<sup>264</sup> We know that these waiting lists have led to the establishment of private facilities offering these services, and are aware that such facilities are under no obligation to comply with good practice or safety requirements.

Relationships Australia considers accreditation and WWCC requirements to be important safeguards for children coming to CCSs.

Relationships Australia further considers that, regardless of funding sources, all facilities that operate as a CCS must be required to meet certain regulatory standards, to support the safety of children and their families. We refer, in this regard, to our comments in response to Proposal 4-3 about the current and potential function of the CCS network in supporting the development of parenting skills.

**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?**

Relationships Australia strongly supports the imposition of high – and uniform – standards for these services, which work with some of the most fragile and complex families.

Relationships Australia New South Wales advises that, given the current and likely emerging complexity of this work, requirements to satisfy standards such as a Certificate IV in Community Services are sound practice.

It supports that staff at such CCSs should hold a minimum qualification (Certificate IV or equivalent) and be positioned to provide referrals to other specialist services.

In commenting on Proposal 10-3, Relationships Australia Queensland noted the lack of capacity of ‘standalone’ CCSs to deliver tailored services to clients who are presenting with increasingly complex needs and vulnerabilities. It considers that staff at such CCSs should be required to have a minimum qualification (Certificate IV or the equivalent), and

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<sup>264</sup> See also FMC, submission 135, 13.

be positioned to provide referrals to other specialist services. These would include, for example, services offering parent training, relationship enhancement between parent and child, and training to manage co-parenting and parallel parenting. This approach would, of course, rely on parents committing to attending multiple services.

If, however, Government were minded to enhance the capability of CCSs (as we have suggested in response to Proposal 4-3), then Government should consider requiring qualifications above the Certificate IV level, so that staff would have the necessary knowledge and skills to provide a fuller array of services in-house. This would ease the burden on fraught parents to access multiple services, and reduce the risk of some families ‘falling through the cracks’ in moving between services. It would, however, require investment of funding to attract staff with the higher qualifications.

Relationships Australia further considers that there should be a mechanism by which to recognise prior experience for existing CCS staff – or additional funding provided to cover the costs of staff who must complete training to continue their employment. If existing staff do need to complete training, new requirements should be implemented in such a way as to not exacerbate existing wait times to access these crucial services.

Relationships Australia Northern Territory suggests that professionals also have:

- training in child development and child development needs, particularly the key risks and considerations for children 0-4 years of age. This is not intended to enable all professionals to act as experts, but to equip them to be mindful of potential and require further input from, and collaboration with, a social science professional such as a ‘children’s advocate’; and
- the ability to identify and respond to appropriately to risk should also include mental health and depression.

Finally, CCSs – already desperately underfunded – will need additional funding to attract staff with appropriate qualifications and training.

**Proposal 10-9      The Australian Government should task the Family Law Commission...with the development of a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.**

Relationships Australia supports this proposal, and would more broadly recommend greater oversight and accountability of report writers whose work is to be relied on in court.<sup>265</sup> We concur with the Law Council of Australia that family reports can significantly assist decision-makers in proceedings relating to children.<sup>266</sup> We are aware of concerns about the quality of private reports in children’s matters, and consider greater oversight and accountability to be essential. Relationships Australia agrees with the imperatives of greater transparency and enhanced consumer choice underpinning Proposals 10-9 and 10-10.

Relationships Australia notes waiting periods for family reports, which have an adverse effect on the progress of proceedings. This is particularly acute for families in rural, regional and remote areas. These waiting periods derive at least partly from a workforce

<sup>265</sup> Relationships Australia notes the current Professional Standards of Practice for Family Assessments and Reporting (2015).

<sup>266</sup> Submission 43, paragraph 405.

of limited size, and we hope that a workforce capability plan, as proposed by the Commission, would address these issues.

**Proposal 10-10** The Family Law Commission...should maintain a publicly available list of accredited private family law report writers with information about their qualifications and experience as part of the Accreditation Register.

Relationships Australia supports this proposal.

**Proposal 10-11** When requesting the preparation of a report under s62G 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.

Relationships Australia supports this proposal, to ensure that reports provided to the courts address salient issues and contain sufficient specificity.

**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.

Relationships Australia supports this proposal, noting that the power to appoint an assessor already exists.

**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...

Relationships Australia supports this Proposal, which reinforces the need for greater disability awareness. We agree with the observations made by the Australian Psychological Society that

Separation and divorce are emotionally challenging for most families, and people coming into contact with the family court and related services may well present as more distressed and confused than they would under normal circumstances. Many parents and families may also be subject to or recovering from family violence and abuse. They may be very anxious, unhappy, irritable or disorganised. This does not mean the parents are mentally unstable, and it does not mean that they are not a caring and effective parent.<sup>267</sup>

**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, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained.

Relationships Australia supports this proposal, noting that the proposed workforce capability plan will need to include planning around the development of a workforce that is culturally safe and that includes people who are in a position to prepare cultural reports and cultural plans, and advise a court, or another professional who is working with the child and the child's family.

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<sup>267</sup> Submission 55, p 17.

Implementation of this proposal would support other proposals put forward in the Discussion Paper to enhance the cultural safety of the family law system and the cultural competency of the professionals who engage with it. Relationships Australia notes precedents in other jurisdictions and that this would implement recommendations made by the Family Law Council in 2016, as well as recommendations of the House of Representatives Social Policy and Legal Affairs Committee in its 2017 report on *A Better Family Law System to Support and Protect Those Affected by Family Violence*.

**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.**

Relationships Australia supports this proposal, and endorses the value of professional/clinical supervision, debriefing, confidential counselling and vicarious trauma training. Its organisations have in place wellbeing programs.

Relationships Australia acknowledges excessive workloads as a very strong risk factor affecting professionals' wellbeing. We strongly agree with other submitters that 'it is critical that judicial officers are supported in terms of their own mental health.'<sup>268</sup>

Relationships Australia notes the Law Council's observations about the lack of empirical research about lawyers' well-being and their vulnerability to vicarious trauma, and would support targeted research on this.

Relationships Australia supports provision of resilience training to all professionals involved in the system.<sup>269</sup>

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<sup>268</sup> See, for example, submission 43 of the Law Council of Australia, paragraph 430.

<sup>269</sup> See submission 43, paragraphs 441-443. Relationships Australia notes programs currently offered by the National Judicial College of Australia, intended to promote self-care to 'manage stress, build resilience, and improve "on the job" function.' (submission 113, 5, 13)

## Chapter 11 Information Sharing

Relationships Australia supports reforms to minimise the impact that fragmented services have on families. Relationships Australia acknowledges the work being done by the Council of Attorneys-General Family Violence Working Group to ameliorate the situation, and the Commonwealth's in-principle agreement to the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>270</sup> We support reforms to prevent families and children 'falling through the cracks' and to facilitate timely sharing of safety-critical information. We agree that it is crucial to develop a robust information-sharing framework for children and their families who are at high risk, supported by universal screening.

Relationships Australia also notes the risk that is created when arrangements to share information or otherwise collaborate are dependent on the personalities and personal relationships between individuals in institutions and agencies. A key challenge to consistent information sharing is to ensure that institutions and agencies have durable and resilient infrastructures and cultures that encourage and reward effective collaboration.

None of the preceding comments should be taken to diminish the commitment of Relationships Australia to strong confidentiality and admissibility protections, which are prerequisites of effective therapeutic relationships. Confidentiality has always underpinned FDR, and strengthened the capacity of FDR to encourage early and free disclosure by clients and enable effective therapeutic interventions.

**Proposal 11-1 State and territory child protection, family violence and other relevant legislation should be amended to....**

**The relevant agencies can be identified through the proposed information sharing framework (Proposals 11-2 and 11-3).**

Relationships Australia supports this proposal.

Previously in this submission, Relationships Australia has emphasised the particular needs of vulnerable older people in the Family Wellbeing System. In view of that, legislation should also be amended, as necessary, to support investigation of allegations of elder abuse.

**Question 11-1 What other information should be shared or sought about persons involved in family law proceedings?**

Relationships Australia considers that information should be shared and sought in the circumstances mentioned in the first three dot points under this Question. Relationships Australia further considers that the Act should confer the discretion and the immunity suggested in the fourth dot point under this Question. We consider each of these to be a proportionate and sensible response to a well-documented safety issue for families.

**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**

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<sup>270</sup> As noted at paragraph 11.12 of DP86.

**and children between the family law, family violence and child protection systems. The framework should include....**

Relationships Australia supports this proposal, and would urge all governments to act with expedition and urgency in collaborating to implement it. We would further encourage all governments to consult with service providers involved in collecting, storing and disclosing information.

Relationships Australia agrees with the Commission that s121 of the Act should be amended to clarify that it does not preclude or restrict information sharing by the family courts with regulators, government agencies, family relationships services, service providers for children or specialist family violence services.<sup>271</sup>

**Proposal 11-3      The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about....**

Relationships Australia supports this proposal and would welcome being involved in the development of the legal framework.

**Question 11-2      Should the information sharing framework include health records? If so, what health records should be shared?**

Relationships Australia Queensland suggests that any framework needs to be clear as to what is in, and what is outside, scope of sharing.

More broadly, Relationships Australia suggests that consideration should be given to the proposals of the Women's Legal Service New South Wales, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*.

**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?**

Relationships Australia agrees that information sharing potentially helps clients to receive integrated services. However, record sharing needs to be subject to clear guidelines on what can be shared, and the reason for sharing (eg safety concerns or to address particular needs).

**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.**

Relationships Australia supports this proposal, and would urge all governments to act with expedition and urgency in implementing it.

We concur with the view of Women's Legal Services Australia that issues of timeliness and accuracy will need to be considered.<sup>272</sup>

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<sup>271</sup> See ALRC DP 86, paragraph 11.26 and Proposal 12-11.

<sup>272</sup> See ALRC DP 86, paragraph 11.45, note 45.



**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.**

Relationships Australia supports this proposal. We would also support separate legal representatives for child and children's advocates proposed by the Commission in Chapter 7 of its Discussion Paper being permitted to access Commonwealth, State and Territory child protection and family violence records, as suggested by Uniting (submission 162).

**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.**

Relationships Australia supports this proposal. We also would also support including in the NDVOS family violence orders made by Commonwealth and State and Territory courts.<sup>273</sup>

**Proposal 11-7 The Australian Government should work with state and territory governments to co-locate child protection and family violence support workers at each of the family law court premises.**

Relationships Australia supports this proposal, and would add that child protection and family violence support workers should also be co-located at the proposed Families Hubs. Co-location has proved a successful mechanism to improve collaboration and information sharing between systems. As indicated by National Legal Aid:

The experience of co-location has been transformative. It has enabled improved sharing of information, and a better understanding of perspectives and roles which addresses some of the potential barriers to collaboration occurring.<sup>274</sup>

We also acknowledge the limitations and opportunities for improvement in currently operating co-location models, noted by the Commission at paragraph 11.54.

**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.**

Relationships Australia supports this proposal, and with the Commission's suggestions about the necessary supports for effective information sharing agreements at paragraph 11.65.

**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.**

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<sup>273</sup> See ALRC DP 86, paragraph 11.44.

<sup>274</sup> Submission 163.

Relationships Australia supports this proposal. To maximise its utility, the template should be in use nationally.<sup>275</sup>

**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 [to] the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the child?

Relationships Australia considers that child protection agencies should, in these circumstances, offer to the court the agency's recommendations, as well as information they have about the nature and degree of risk. Relationships Australia notes with interest Judge Harman's comments about the value of the 'Person History' that can be provided under New South Wales child protection legislation (see paragraph 11.71).

We concur with the Commission's views about the kind of information that would be required from police, and with the observation that the potential safety benefits for families outweigh the imposition of police being susceptible to being subpoenaed. Relationships Australia would also expect that providing early information to courts could minimise the time and resources spent responding to later subpoenas or s69ZW orders.

**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.

Relationships Australia supports this proposal, and suggest its implementation on a national level through the CAG Family Violence Working Group.

**Proposal 11-11** The *Family Law Act 1975* (Cth) should support the sharing of relevant information between entities within the family law system. The information sharing scheme should include such matters as....

Relationships Australia supports this proposal, and would encourage monitoring the efficacy of information-sharing schemes recently established in Victoria following the Victorian Royal Commission inquiring into family violence.

**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.

Relationships Australia supports this proposal.

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<sup>275</sup> See references in notes 77 and 78 to paragraph 11.72.

**Question 11-5      What information should be shared between the Families Hubs ...and the family courts, and what safeguards should be put in place to protect privacy? For example....**

Relationships Australia would encourage sharing of the following:

- universal screening (FL-DOORS)<sup>276</sup> if a self-reporting tool is used, and subject to client consent
- dates of attendance
- certificates of exemption from FDR, if applicable
- any signed parenting plans, and
- any signed property/finance agreements.

The specific content discussed should remain confidential, as is currently the case, to encourage help-seeking behaviours, with appropriate exceptions for child abuse and risks to safety.

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<sup>276</sup> In 2017, Relationships Australia South Australia released a DOORS app. Based on data to 6 November 2018, 117 organisations have registered to use the DOORS app. There are 67 unique locations currently using the DOORS app, though some locations are allowing multiple users to share the same login in some locations (including RASA). As of 6 November 2018, there have been 7,768 DOORS completed since the October 2017 launch of the DOORS App. DOORS are currently being completed at a rate of 61 per day.

## Chapter 12 System Oversight and Reform Evaluation

Relationships Australia supports evaluations of the impact of legislative reforms and of the efficacy of programmes and services. System-wide oversight is currently lacking, and its implementation would offer the community quality assurance in relation to entry-level training, accreditation, registration, complaints, continuing training and development, supervision requirements and other processes and mechanisms.

Relationships Australia agrees with the need for more consistent and transparent approaches to mechanisms for performance monitoring and improvement, accreditation, and complaints handling. Improvements to each of these is vital to improving public confidence in the system, and to ensuring that the confidence is justified. Relationships Australia supports the concept of an over-arching framework for accreditation and complaints. We further support the establishment of accreditation rules based on the workforce capability plan described in Chapter 10, and the establishment of an independent body to undertake accreditation and complaints functions. Consistent with our previous comments, we consider that this should be a Family Wellbeing and Services Commission, rather than a Family Law Commission.

**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. The responsibilities of the Family Law Commission should be to:**

- **monitor performance of the system;** Relationships Australia supports this element
- **manage accreditation of professionals and agencies across the system, including oversight of training requirements;** Relationships Australia supports this element
- **issue guidelines to family law professionals and service providers to assist them to understand their legislative duties;** Relationships Australia supports this element
- **resolve complaints about professionals and services within the family law system, including through the use of enforcement powers;** Relationships Australia supports this element<sup>277</sup>
- **improve the functioning of the family law system through inquiries, either of its own motion or at the request of government;** Relationships Australia supports this element, subject to the reservations set out below
- **be informed by the work of the Children and Young People's Advisory Board...** Relationships Australia supports this element
- **raise public awareness about the roles and responsibilities of professionals and service providers within the family law system;** Relationships Australia supports this element and
- **make recommendations about research and law reform proposals to improve the system.** Relationships Australia supports this element, subject to the comments below.

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<sup>277</sup> For the value of an 'independent, accountable and effective complaint system', see, for example, Family Law Committee of NSW Young Lawyers, submission 108, 14.

**Proposal 12-2      The Family Law Commission should have responsibility for accreditation and oversight of professionals working across the system. In discharging its function to accredit and oversee family law system professionals, the Family Law Commission should:**

- **develop Accreditation Rules;** Relationships Australia supports this element, subject to clear identification of the professionals to be subject to the scheme
- **administer the Accreditation Rules including the establishment and maintenance of an Accreditation Register;** Relationships Australia supports this element
- **establish standards and other obligations that accredited persons must continue to meet to remain accredited, including oversight of training requirements;** Relationships Australia supports this element
- **establish and administer processes for the suspension or cancellation of accreditation;** Relationships Australia supports this element and
- **establish and administer a process for receiving and resolving complaints against practitioners accredited under the Accreditation Rules.** Relationships Australia supports this element.

Relationships Australia agrees with the suggestions made at paragraphs 12.30-12.32. We would support the Family Law (or Family Wellbeing and Services) Commission also including a national death review mechanism.<sup>278</sup>

**Proposal 12-3      The Family Law Commission should have the power to:**

- **conduct own motion inquiries into issues relevant to the performance of any aspect of the family law system; and**
- **make recommendations to improve the performance of an aspect of the family law system as a result of an inquiry.**

Relationships Australia can see the value of enabling the proposed entity to initiate inquiry without needed a specific complaint to trigger an inquiry, and supports own motion inquiries being set up to focus on systemic issues affecting a number of organisations (or a class of users of the system). However, we suggest that legislation to establish it should set parameters and thresholds required to trigger an own motion inquiry. Relevant parameters could include the matters set out at paragraph 12.35.

**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.**

Relationships Australia supports this proposal.

**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.**

Relationships Australia supports this proposal.

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<sup>278</sup> See Australian Human Rights Commission, *A National System for Domestic and Family Violence Death Review*, 2016. This also appears to have the support of Women's Legal Services Australia, submission 45, 45.

**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.**

The proper role of the proposed Commission in this respect should be to make recommendations to the Ministers responsible for family law and family relationships services. Ministers should be responsible for determining research priorities for projects to be funded by Government.

Relationships Australia agrees that the proposed Commission would have a key role in promoting public awareness and education about the family law (or family wellbeing) system, as well as being integral as an accountability body with a public interest focus.

Relationships Australia supports the Commission's suggestion of

...a regular collation of data based on administrative sources to assess patterns in family court filings and patterns in services usage of the family law services that are funded by the Australian Government...to enable transparent and regular reporting of court, Commission and service use that would be available to stakeholders across the system...<sup>279</sup>

We strongly urge the publication of as much data as possible, to support community awareness and understanding of how the system is serving the community, and where there are areas for improvement.

**Proposal 12-7      The Australian Government should build into its reform implementation plan a rigorous evaluation program to be conducted by an appropriate organisation.**

Relationships Australia supports this proposal, recognising the great value of evaluation and research that has been funded by the Government in the past decade, and the pivotal role that robust research and evaluation should play in the development and implementation of responsive and effective law reform and service programmes.

We would argue that funding for evaluation of pilots should be built into contracts from the outset (frequently, service providers must absorb the costs of evaluation, and divert resources from service delivery to do so). We would also argue that evaluation should be timely – that is, not too soon after the commencement of a reform or the start of a pilot or other program. Reforms and programmes need to be given time to operate and to make adjustments in response to emergent issues before evaluation can offer reliable insights.

Relationships Australia agrees with the Commission's suggestions at paragraph 12.50.

**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 to ensure they support the cultural safety and responsiveness of the family law system for client families and their children. The framework should be developed in consultation with relevant**

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<sup>279</sup> ALRC DP 86, paragraph 12.44.



**organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations.**

Relationships Australia supports this proposal, subject to also including organisations representing older and younger members of these cohorts, as well as organisations with a focus on experience of migrants (in addition to organisations more broadly representing culturally and linguistically diverse communities). We concur with the Commission's proposal of a community-informed co-design model for the development of the framework.

**Proposal 12-9      The cultural safety framework should address:**

- **the provision of community education about the family law system;**
- **the development of a culturally diverse and culturally competent workforce;**
- **the provision of, and access to, culturally safe and responsive legal and support services; and**
- **the provision of, and access to, culturally safe and responsive dispute resolution and adjudication processes.**

The development and implementation of a cultural safety framework within the family wellbeing system could be overseen by the re-introduction of Aboriginal and Torres Strait Islander advisors within the family law courts (see the response to Proposal 6-3).

**Proposal 12-10      Family law service providers should be required to provide services that are compliant with relevant parts of the cultural safety framework.**

Relationships Australia supports this proposal.

**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....**

Relationships Australia supports each element of this proposal.

Relationships Australia recognises the value of section 121 of the Act in protecting the privacy and safety of families – especially children – and would not wish to see that protection in any way diminished. We concur with the observation of the Bar Association of Queensland that

The privacy of children involved in family law proceedings (whether it be property or parenting) is of the utmost importance..... Family law proceedings are deeply personal and intimate; there is rarely if ever public interest in airing such matters. This is all the more so when the parties have children....

Most of all, whether the proceedings are property or parenting – it hurts the children.<sup>280</sup>

Relationships Australia is also aware of perceptions that s121 operates (even if it is not intended) to prevent public scrutiny of and debate about family law decision making, deficiencies of the family law system, and to silence survivors of family violence. We encounter members of the public who quite sincerely believe that family courts do not

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<sup>280</sup> See submission 80, p 21. See also submission 55, the Australian Psychological Society, p 36.

publish any decisions or judgments at all. Alarming, we also encounter family service professionals who also hold such beliefs.

Accordingly, Relationships Australia agrees that there is a need to clarify the intent and effect of s 121 as proposed by the Commission, and to legislate to require anonymised reports of judgments (which currently occurs, in any event).

Having regard to the crucial role that good research plays in the development of effective law reform and programmes, Relationships Australia considers that the proposed avoidance of doubt provision should explicitly refer to researchers, as well as ‘government agencies, family law services, or other service providers’.<sup>281</sup>

**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?**

Yes.

**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)*?**

Yes.

**If so, what should the functions of the Commission be?**

To receive, investigate, examine, hear and decide on the merits of complaints and to impose appropriate sanctions having regard to the limitations imposed by Chapter III of the Constitution.

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<sup>281</sup> See ALRC DP 86, paragraph 12.76.

## Concluding remarks

Thank you again for the opportunity to respond to Discussion Paper 86, *Review of the Family Law System*. Should you require any clarification of any aspect of this submission, or need information on the services that Relationships Australia provides, please contact me or Dr Susan Cochrane, National Policy Manager, Family Law, Relationships Australia.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'ABL', with a stylized flourish at the end.

Alison Brook  
National Executive Officer

13 November

2018