

# Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems

## Response to the Family Law Council Discussion Paper

### The work of Relationships Australia

This submission is written on behalf of Relationships Australia's eight member organisations. It complements the separate submission provided by Relationships Australia Northern Territory, providing the perspective of an organisation that delivers services to a high proportion of clients from Aboriginal and Torres Strait Islander backgrounds.

We are a federation of community-based, not-for-profit Australian organisations with no religious affiliation. 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 has provided a range of family support services to families for more than 60 years. These include counselling, dispute resolution, children's services, relationship and professional education, and specialist services targeted at reducing family violence. Relationships Australia State and Territory organisations, along with our consortium partners, operate around one third of the 65 Family Relationship Centres across the country. In addition, Relationships Australia Queensland is funded to operate the Family Relationships Advice Line.

We respect the rights of all people in all their diversity to live life fully within their families and communities with dignity and safety. We help people to achieve positive, healthy and respectful relationships with members of their families, whether or not the family is together, and with friends, colleagues, and the communities in which they live.

## Specific Responses to the Inquiry Terms of Reference

In preparing this response we have drawn upon:

- our direct service delivery experience across urban, regional, rural and remote locations;
- our experience in delivering programs in diverse communities, including culturally and linguistically diverse and Indigenous communities;
- evidence-based programs and research;
- our leadership and policy development experience;
- the voices of our practitioners; and
- the experiences and voices of our clients to bring attention to a range of issues affecting the adequacy of policy and community responses to the needs of families with complex lives.

### 1. How can the exchange of information between the family courts and family relationship services (such as family dispute resolution services, counselling services and parenting order programs) be improved and facilitated in a way that maintains the integrity of therapeutic service provision?

We believe that, in general, the present system is adequate to facilitate the transfer of necessary information. In our experience, where the issue of confidentiality in therapeutic service provision is raised as a barrier to the transfer of information to support decision-making, it generally reflects a lack of understanding of how the family law system operates. For example, the Discussion Paper refers to 'limited exceptions' to confidentiality in cases of child abuse. There are no limited exceptions when there are child safety concerns and the current provisions for mandatory reporting ensure that all child safety concerns are reported to the appropriate authorities. All our clients are informed at the assessment stage that reports will be made if safety concerns are identified. The problem in these cases is that the Family Court does not necessarily receive the information that exists in the system.

We do not support any reduction in the rules of admissibility currently applying to mediation and family counselling. Confidentiality in the therapeutic context is a cornerstone of service delivery and effective practice. In Family Dispute Resolution (FDR), confidentiality is also a pillar on which it is founded. Watering down of the confidentiality provisions applying to these services to allow for an exchange of information between family relationship services and the family courts is likely to negatively impact on the integrity of the therapeutic service provision. It will also negatively impact on the openness of discussions that are needed to facilitate the resolution of disputes for the vast majority of separated couples who access these services, but never proceed to court.

Our practitioners also advise that information revealed in session is of little value of value to the courts. Practitioner notes are made to assist a therapist in supporting clients and do not meet any

evidentiary criteria. They are simply hearsay and are not created as a result of any thorough investigation or interrogation, and we believe that the passing of these notes to a court would lead to unacceptable consequences for clients and practitioners. In an adversarial case these clients will invariably note in their affidavits to the courts any concerns they have about the other party in relation to the safety of the children. It seems much more relevant to gather this information from a primary source. This information would be better sourced from the client themselves or the agency to which a mandatory report or referral (eg. in the case of a crisis or health service) has been made. The exception is observational reports, such as those made by staff working in Children's Contact Services. These reports are objective and impartial and we support their continued use by the courts.

Similarly, Relationships Australia does not support providing information relating to safety and violence on a section 60I certificate. As both parties receive a copy of the certificate, we consider this represents an unacceptable risk to the victim. One idea that has been proposed that could allow for some passage of information is the inclusion of a simple administrative form supplied directly to the court, rather than clients, which could include a checkbox if the practitioner has safety concerns. However, the creation of an additional form seems superfluous as if there was a safety concern, a report would have already been made to the appropriate authority and the receiving agency/department/service would have the required information for the Family Court to directly source.

We support the Family Court having investigative powers to collect the information it needs to make better assessments. This could go some way in alleviating the (valid) criticism that perpetrators of family violence hide behind the confidentiality provisions applying to therapeutic services. Improvement could be made to the exchange of information between the Family Court and services such as domestic violence, mental health and drug/alcohol services and child protection departments. This would improve risk assessment and decrease the burden/trauma on (mostly) women and children. For example, there is a lack of focus on gaining available information from, and in regards to, the perpetrators of family violence, and an over reliance on and expectation of women and children as victims of violence to provide information and evidence of abuse, repeatedly and over long periods of time. This results in victims needing to tell and retell their experience of violence across many statutory, legal and community services. Women report this multiple retelling of abuse and the associated distress and trauma as "like reliving it all over again." As such, we urge the Family Law Council to consider the financial and emotional burden on victims when it considers changes to policy in this space.

We have found that often information regarding risk assessment and domestic violence history resides in silos within multiple domestic violence services. This occurs as a result of a fragmented domestic violence legal system and the loss of a formal case management coordination service to manage high risk cases. Thus, we support changes which allow the collection of evidence that already exists in these services, and not the creation of new information or additional burdensome processes.

Our current experience in supporting mothers and children who have experienced violence is demonstrative of the problems in the current system. For example, where victims of family violence access FDR and Family Court services they must often comply with custody decisions and visitation arrangements that are not made in the context of:

- Identifying and documenting the context and type of the domestic violence experienced and perpetrated in the past or present time.
- Recognising the impact of domestic violence on the mother and each individual child and on each mother/child relationship (as the perpetrator uses tactics of abuse to undermine and interfere with the mother-child bond and mothering).
- Decisions regarding custody/visitation being based on a comprehensive risk assessment to identify and assess the potential for future harm and ongoing risk to mother and child with the aim of preserving safety and appreciating the ongoing risk to mother and child.
- Understanding and acknowledging that violence perpetrated against a mother is actual abuse of the child (not just witnessed abuse) and is perpetrated in the context of poor fathering decisions.

In terms of sharing information about post separation violence, there is a naïve misunderstanding that persists in the family law system that when a woman separates from an abusive partner her domestic violence experience is over. Past and current research, and our own work in our Family Abuse Integrated Response (FAIR) domestic violence program, attests to the fact that separation represents a point of high risk to women and children. It is with great regularity that we see, post separation, the perpetrator's use of and lengthy involvement with the legal system as a forum to conduct ongoing violence, abuse and coercive control of women and children. We often see women struggling with financial deprivation as a result of long term costs of legal representation in family court matters.

## 2. What opportunities exist for ensuring the early assessment of risk to children in family law matters?

Relationships Australia generally supports the use of common assessment instruments and the development of a suite of evidenced-based assessment tools. We do not, however, support preferences for a particular or restricted set of tools. This is because, when thinking about assessment tools, we need to be aware that different parts of the system are assessing for different things. For example, while a Family Relationship Centre assesses for family and child safety, the assessment is primarily to determine the suitability of the process and for safety planning pre and post service. This is usually quite different from assessments conducted to determine long term safety risks that are required by courts and child protection authorities.

There are some opportunities to improve early assessment of risk to children in family law matters.

- There is a need for the development of evidenced-based, common risk assessment tools for children. These should be supplemented with practitioner assessments of risk designed to complement standardised risk assessment tools.
- The tools should incorporate the impact of domestic violence on each individual child and the mother-child relationship.
- Assessment could include compilation of family violence histories and statutory documents. For example, Violence Restraining Order (child protected on VRO) documentation, VRO breach documentation and Statements of Material Facts (criminal history) could be made available in a streamlined process from the District/Magistrates courts to the Family Court. While we acknowledge that this would require legislative change, we advocate for the sharing of information across courts to enable informed decisions to be made by the Family Court. It is worth noting that currently the onus is on victims to provide, seek and pay for copies of such documents in order to provide them to the Family Court.
- Family Dispute Resolution Practitioners (FDRPs) and Child Consultants often identify children at risk, and are mandated to report these concerns under state/territory child protection legislation. The local child protection authorities then may or may not investigate matters further. It would be more prudent therefore for information on children at risk to be sourced from child protection agencies to receive a forensic perspective rather than the word of mouth information given to FDRPs. Unfortunately the reports mentioned above are often provided to an already overloaded child protection system. More resource allocation and recognition of the needs of these agencies would benefit all those relying on their information.
- The Family Court should not rely on child protection agency thresholds. For example, we have found that it can be difficult for both us as family violence practitioners and for victims themselves to have child protection open a case when we/women report abuse of children. Where child protection authorities have not initiated an investigation (often due to resourcing issues), this is interpreted by the Family Court as no cause for concern as the abuse has not been investigated or substantiated (usually if the mother has been deemed to be a “protective mother”).

We also refer to our previous submission to the Human Rights Commission in June this year regarding the impact of domestic violence on children (attached).

### 3. How can services such as child protection departments, mental health, family violence and drug and alcohol services make relevant information available to the courts to support decision-making in cases where families have complex needs?

We support the greater sharing of information between child protection departments and services. We would consider it rare for the Family Court to be the first place child safety issues are identified. In the vast majority of cases the information needed to support court decision making is available in the child protection system (for those above the threshold) or the community sector (for those below the threshold) or both. In particular, we would like to draw to attention the importance of information from the police, as they often hold the most current record of reported family violence and child neglect. The Family Court should have investigative powers to access this information.

Risk assessment tools could be used to inform the courts of risk and the various risk assessments could be compared across contexts for the services involved, noting that risk assessments need to be compared across time and contexts in order to be used to make informed decisions about child contact/custody.

There also needs to be policy development around the prioritisation and weight of different types of evidence. Women and children and fathers with complex needs may access a number of services. These services may have a long relationship with the client and hold pertinent information related to risk, as opposed to information collected by an Independent Children's Lawyer who may see the child for a very limited time and in only one context. In our experience, when information has been shared the value of the ICL report is often privileged over information collected throughout a more substantial relationships with the client.

There is also potential to broaden and more strongly articulate and use the role of the separate child representatives within the court system. Child representatives could be used for advocacy and presentation of some of the important information that might assist a child's voice be heard in terms of the impact of issues such as substance abuse, mental health and family violence. If changes were implemented this could make the pathway clearer for FDRPs and Child Counsellors to share information with confidence around what is used and how it would be introduced to the court. This is an approach that has been used in other jurisdictions.

In July 2015, Kylie Beckhouse, on behalf of the Australian Institute for Family Studies prepared a presentation on Representing Children in Legal Proceedings – Learnings from the US, Canada and the UK<sup>1</sup>. There were a number of significant differences in approach between some of these nations and Australia, which were in part:

- A safety assessment very early in the life of a matter involving active evidence gathering for courts within 60 days of a matter coming to court.

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<sup>1</sup> A transcript of the presentation can be found at <https://aifs.gov.au/cfca/audio-transcript-representing-children-legal-proceedings>. A copy of the slide show can be found at [https://aifs.gov.au/cfca/sites/default/files/Representing\\_children\\_in\\_legal\\_proceedings.pdf](https://aifs.gov.au/cfca/sites/default/files/Representing_children_in_legal_proceedings.pdf)

- To team social workers with lawyers to address the educational, social and psychological issues that arise within a legal matter, and support the family through the process. This is a significantly different approach to Australia's method of utilising child representatives and family consultants.
- Having more professionals involved in the tasks of gathering evidence of a child's life, taking on the brokering role in case management, and ensuring the voice of the child is heard.

Information also needs to be shared from the courts and agencies back into the community sector. In our experience, information rarely flows back from child protection departments to the service. For example, after making a notification, we are rarely informed about what action has been taken. This has a serious impact on the adequacy of supports being provided to our client and how these clients are managed.

However again, it is important to highlight the practical safety aspect of information sharing and how information can be used inappropriately. For instance we are aware of clients attending child protection meetings and court hearings where the perpetrator has been present. On these occasions the person at risk (victim) has been left to manage the perpetrator's response to the information that has been shared in that forum after the meeting/hearing. It is important to in order to preserve women and children's confidentiality of the services that they have engaged with and ultimately, their safety.

We would also like to draw attention to other possible negative uses of information from other services. For example, a family violence victim's engagement with multiple services such as drug and alcohol, parenting support, and mental health system should be considered, appreciated and reported in the context of being related to the impact of and response to domestic violence, not as a deficit of her mothering/parenting capacity.

We also know of instances where a perpetrator has been able to access information about his partner's engagement with mental health services (accessed to seek support for trauma related to family violence) and use this information in court to position her as an unfit mother and psychologically unstable. Similarly, if women have accessed drug and alcohol services, this has also been used against her by the perpetrator to position her to the court as an unfit mother. The mother bears the burden of proving that she is a capable mother. We are also aware of perpetrators vexatious reporting of their ex-partners partner to child protection whilst engaged in family court processes.

#### 4. What services are needed to support families and children who use the family law system where child safety concerns are identified?

As stated above, we are concerned with reliance on, and reference to, child protection thresholds. We make notifications to child protection authorities where we identify risk and this isn't related to the administrative/regulatory/overburdened resource thresholds of the department. The family courts should similarly be concerned with risk, rather than child protection thresholds for investigation and substantiation.

Even when the notification threshold has been met, this does not mean that a child protection department will act on it. In our experience, practitioners do not know if their report has been acted on or whether any substantive intervention has taken place. The difficulty for those clients that do not meet the threshold is that we are powerless to provide services unless the parents are willing, able and can afford to attend programs that may benefit them and their children. In early intervention terms, courts and child protection departments often miss the opportunity to reconnect clients to FRC's who have a great deal of expertise in early intervention, service referral and delivery. For example, the court may order a parenting program where child neglect issues have been identified. However, the practitioner may recommend a drug and alcohol service before the parenting program would be beneficial for the client and child.

A range of services is also needed to support and advocate for families who enter the family law system, including police, child protection departments, mental health, family violence and drug and alcohol services. We see the elevated need for support and protection from these services once Family Court has been initiated or when decisions regarding child custody have been made, especially if the perpetrator is not in agreement with the outcome and in response uses this as an excuse to escalate family violence.

We find that children's voices in the family court and FDR processes are often ignored in terms of their experience of domestic violence, the impact on them and their concerns for their safety and the safety of their mother. Women report to us that they feel that the process and procedures of FDR and family court are privileged at the expense of the child's and the mother's voice. Women report and we see in our work, that not only the child's/mother's voice is ignored and silenced, but if the mother asserts herself, shows distress or anger either as a response to abuse or in frustration and fear of court decisions to allow custody to an abusive father, she is at risk of being deemed as an alienating parent. For this reason specialised family violence counselling programs such as our Family Abuse Integrated Response Program (FAIR) are vital as they have a nuanced understanding of the difficulties victims of violence face as they navigate the legal system.

Children's Contact Services are also vital to accommodate the rising demand for handovers and supervised visits of children where family violence has been perpetrated. Increased funding for these services may allow for increased periods of supervised visits with children at high risk, thus increasing safety.

There are also models that suggest increased training for magistrates and court staff could be beneficial in responding to families with complex needs. This could include training in conflict, family violence, mental health and the service system in their jurisdiction so they are able to make appropriate high quality referrals.

5. How can interaction between the family courts and relevant services, including child protection departments, family violence, mental health services, drug and alcohol services and support services for Aboriginal and Torres Strait Islander families be enhanced?

Co-ordination and case management is essential in cases where families have complex needs, particular when supporting families from Aboriginal and Torres Strait Islander backgrounds. Models such as those trialled in the Coordinated Family Dispute Resolution Pilot show promise in this area.

We support the listed mechanisms that can be used to promote enhanced interaction, integration and coordination between the Family Court and relevant services. In relation to the use of service referral kiosks in the Family Court we would caution that these kiosks should also offer private spaces to hold discussions with victims of family violence about referrals to services (as perpetrators also attend court at the same time as victims).

There is also a need for more Aboriginal and Torres Strait Islander workers in the court system and more opportunity for Judges and court staff to develop cultural competency. We also support the recommendations in the 2012 Family Law Council report 'Improving the Family Law System for Aboriginal and Torres Strait Islander Clients'.

In Western Australia, for example, there is a lack of a case management coordination service (as a formalised multi-agency structure) that services can present high risk cases to, share information about risk and seek support on behalf of clients. In terms of agencies that support Aboriginal and Torres Strait Islander families experiencing family violence, the lack of a case management service represents a gap in opportunities to network with services, provide holistic support for clients and manage risk from a multi-service perspective. There is often a presumption that the most pertinent family violence information resides in the statutory and legal services, however it is often the culturally sensitive ancillary support services that hold the closest relationships and current knowledge of the client's history and current circumstances and needs.

We would also call for greater acknowledgement, understanding and sensitivity to the issues and historical context of family violence (such as colonisation) that Aboriginal and Torres Strait Islander families contend with in daily life. Too often services are not culturally competent and in the development of specialised family violence services, consultation with Aboriginal and Torres Strait Islander people has been inadequate or absent.

6. What opportunities exist for developing integrated responses to families with complex needs who use the family law system?
7. How might a more coordinated legal system for families with complex needs be created?

These questions have some similarities and will be responded to jointly.

It can be argued families using the Family Court with identified complex needs are only a small proportion of families suffering the effects of violence, substance abuse and mental health issues. The family law system has an opportunity to support those who currently fall through the gaps.

We have system that touches-on or captures families before they are in the court system. We have a system of FRC's that can recognise family violence and safety issues and provide early intervention services yet they are powerless to do so. Instead we pass high end cases onto the court system (this is very often necessary), we work with high risk families and only hope that we can provide them with services that may prevent them for needing the court systems in the future. Yet we have no authority to provide services until they are ordered by the Court. When families are in high conflict in the Family Court, the abuse and violence is well matured and much damage has already been inflicted. Why are we not utilising our current (existing) systems to provide early intervention before significant harm has occurred and families are set on a long-term pathway of successive court interventions?

Case management approaches are essential in supporting families with complex needs. Our experience of Coordinated Family Dispute Resolution, a pilot program funded the Attorney-General's Department, was positive because there were dedicated resources that could respond in a timely way with appropriate advice. The success of the approach was not the service model or co-operation of services (this already happens), but the dedicated resource that came with the Pilot. Progress could be made quickly, resulting in real differences for clients.

We also support the Magellan program that could be expanded to include a broader range of risks. Other excellent models include the community elders sentencing circles, and restorative justice approaches such as family group conferencing that includes law officers, service providers, teachers and family members. However, while collaboration and coordination is widely recognised as essential, unless there are structures, mechanisms and systems to support these approaches, success will be limited.

We would like draw to attention a current example of evidence of the failure of integrated responses to a family with complex needs and the urgent need for integrated service responses. Please see attached article detailing family violence responses to Rosie and Luke Batty.

We would also like to provide research articles attached:

- Child welfare and domestic violence: Tackling the themes and thorny questions that stand in the way of collaboration and improvement of child welfare practice (David Mandel)

- Custody evaluators' beliefs about domestic violence in relation to custody outcomes (Daniel Saunders)
- Child Custody Evaluations and Domestic Violence: New Research and Implications for Practice [https://www.griffith.edu.au/\\_data/assets/pdf\\_file/0010/705574/D-Saunders-custody-evaluation-res-presentation-April-15-.pdf](https://www.griffith.edu.au/_data/assets/pdf_file/0010/705574/D-Saunders-custody-evaluation-res-presentation-April-15-.pdf)

Thank you for the opportunity to provide a submission to Family Law Council's Discussion Paper on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems.

Should you require any further clarification of any aspect of this submission or need information about the services Relationships Australia provides, please contact me or Paula Mance, National Policy Manager, Relationships Australia.

Yours sincerely,

**Alison Brook**  
**National Executive Officer**

**21 September 2015**

## **CASE STUDY**

**In the past, due to her partner's violence, the mother applied for a Violence Restraining Order. Child protection at this stage made an enquiry only and did not open the case for further action.**

**Mother and father have a 3 year old daughter.**

**The mother and father separated shortly after the birth of the child.**

**The father came to the mother's home and took the child at 6 months of age.**

**The mother applied for a recovery order and this initiated Family Court involvement.**

**The father had been physically violent and had a substance abuse history and as such the mother had serious concerns for the father's capacity to care for their daughter.**

**The mother took out a second Violence Restraining Order.**

**The mother attended Family Court and her experience of domestic violence was raised.**

**The father was ordered to a men's domestic violence program and urinalysis testing in relation to his substance abuse.**

**The father did not attend the men's program and did not comply with urinalysis testing yet there were no consequences for his non-compliance.**

**The Family Court awarded supervised visits for the father with the child and the father's mother was granted appointed as the supervisor.**

**The mother raised her concerns with the court that the appointment of the paternal grandmother as the supervisor was not appropriate. This was not changed.**

**An Independent Children's lawyer was appointed.**

**The mother requested that overnight visits of the child with the father should not proceed due to the age of the child and safety concerns.**

**When the child was 3 years of age the decision regarding overnight visits was reversed, at the father's request, and unsupervised overnight visits commenced despite the mother repeatedly highlighting her concerns in terms of risk to their child.**

**The father's requirement to attend urinalysis testing ceased.**

**The child told her mother that she had a "sore vagina"**

**The mother took her child to the doctor for assessment.**

**Child made repeated complaints of a sore vagina to her mother.**

**Mother asked child if anyone had touched her vagina.**

**Child responded "Daddy does at night when I am asleep" "I don't want to go back there".**

**Mother called police to report and seek advice. Police advised the mother to not handover the child to the father for visitation if she was concerned for the child's safety.**

**Police took child to children's hospital.**

**Child was examined at the hospital by doctor and the mother was not informed of outcome.**

**Mother called child protection for support and advice. Child protection respond by saying "this is a police matter"**

**At the request of the mother a service provider called child protection for support and advice. Child protection responded by saying "this is a police matter".**

**Mother was then deemed to be in breach of Family Court order.**

**Mother sought assistance from a Legal Aid lawyer.**

**The lawyer blamed mother for asking child if anyone touched her and the mother reported that she was treated with blame and suspicion.**

**To date the mother is still awaiting a response from the medical examination performed on her child and there is no open case with child protection.**

**The mother identified risk and as a protective parent repeatedly reported her concerns and risks to her child and is treated with suspicion as "she has no proof" of sexualised abuse.**