

TRAINING, ACCREDITATION AND ACCOUNTABILITY OF FAMILY LAW PROFESSIONALS



Few professionals are as immune from scrutiny or prosecution as family court judges. There are no readily available avenues of complaint against their conduct; they're effectively immune from civil action, even if their conduct has been egregious; their decisions can only be questioned through an arcane appeals process that's inaccessible in practice to most people; and they can only be dismissed, under extreme circumstances, by the Attorney General.

Barristers and court-appointed experts enjoy not-dissimilar levels of immunity from scrutiny and prosecution. And, as one recent, prominently reported, Australian case has highlighted, court procedures actually protect them further.

The legal profession argues that such immunity or protection is warranted if people are to sign up to so stressful and important a role. But, compare this to any other profession – a paediatric heart surgeon, for instance, responsible for life-changing surgery on children. Such a surgeon would be routinely monitored, subject to complaint, and open to prosecution in the event of misconduct.

“It is impossible to justify the immunity from scrutiny and prosecution enjoyed by members of the family law system. And, it is not in the best interests of children.”

The ALRC, in 2019, made a number of proposals in respect of training, accreditation and accountability, many of which represent a significant step in the right direction. This should be an essential

component of this review and of any future reforms and one that we support. It is also essential if the public is to develop any trust in the family law system.

ACCOUNTABILITY

Not only is the family law system uniquely unaccountable, it has, at the same time, failed at self-regulation and at introducing even quite basic levels of scrutiny, feedback and assessment. This has played a significant role in the public's views of a system that administers the law yet appears to allow itself to be placed above it:

- Judges, and even barristers and expert witnesses, are essentially immune from prosecution, irrespective of their conduct;
- Litigants have no clear or safe avenue of complaint against professionals within the family law system, or to question their decisions:
 - There is no clear or publicised pathway to complain about the conduct a judge, and litigants are fearful of doing so in the belief that this would likely prejudice their case;
 - Appealing a decision not only requires making an application to the judge against whom an appeal is being made, but is only allowed in a very narrow range of circumstances. It involves arcane, complex, unaffordable and onerous procedures as well as highly specialised knowledge and experience;
 - Litigants are not permitted by the court to lodge

complaints about expert witnesses, such as psychologists or report writers, while a case is ongoing and, even after the conclusion of a case, must apply to the court to seek leave to lodge such a complaint or to provide court documents to a third party;

- The Australian Health Practitioner Regulation Agency has proven itself slow and ineffective in pursuing complaints (notifications) and does not represent all family law health-related professionals, such as social workers, anyway;¹
- There are no constraints upon lawyers' fees such that extreme and unreasonable costs are regularly charged. Almost always, this has a significant economic impact on children's futures; it is categorically not in children's best interests;
- Expert witnesses can essentially charge whatever they like, the court does nothing to control or monitor these fees, and litigants have no available avenue for questioning or avoiding extreme and unreasonable fees for fear of prejudicing their case;
- While litigants are prohibited from talking about their own court case in public, some judges – from a lofty position of immunity – are happy to publicly defend their courts, comment on named litigants, and even dismiss critics (who have no right of reply) as being “disgruntled litigants” or telling “blatant lies”²;
- In his final speech as AG, Senator Brandis, as quoted above, even appeared to make it akin to heresy to criticise family courts or the family law system akin.³ Our family courts surely have protection at the highest level.

¹ We have been advised that the Health and Disabilities Complaints Office (HaDSCO) may currently be producing a National Code, on behalf of the COAG Health Council, to be adopted by all States and Territories and that would enable it to investigate and take action with respect to health

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

For years, the Family Court – with the acquiescence of the Australian Health Practitioner Regulation Agency – has prevented investigation of its expert witnesses while proceedings are on foot. This has led to a situation where, as happened in 2019, more than seven years had passed between the date of an initial complaint and when a practitioner was brought before a State Administrative Tribunal to be found guilty of professional misconduct. In this and other instances, practitioners may, for years, continue unrestricted practice that may put more children at risk. (Conversely, in some instances, the work of a practitioner may be unjustly compromised for an extreme and unreasonable period).

The ALRC's 2019 proposals do not go far enough to accomplish the ultimate and most important component of accountability: Are decisions made by the family court ultimately in the best interests of the children involved? This can only be established if routine follow-up and feedback on decisions and subsequent outcomes for children and families becomes enshrined in the system and in everyday practices.

professionals, including social workers.

² Chief Justice Thackray (2015-18), *Sunday Times WA* and written judgments

³ Senator George Brandis (2018). *Hansard*, 7 February 2018, Australian Senate

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There are many key improvements that must be made:

1. **KEEP FAMILIES OUT OF COURTS**

We must do much more to keep families out of family courts. Once in the court system, issues inevitably become much more complex, difficult to interpret and require a much higher and more specialised skillset to resolve. Few professionals have sufficient skills or qualifications;

2. **ESTABLISH A NEW, INDEPENDENT REGULATORY AUTHORITY**

The government must create a new, statutory body, independent of courts – a Families Commission – responsible for:

- 2.1. oversight of all professionals in the family law system;
- 2.2. defining requirements and standards for specialised training;
- 2.3. establishing and overseeing accreditation criteria and standards for all professionals involved in addressing family breakdown, including social workers; healthcare, medical and family law professionals; mediators, conciliators and arbitrators; and all judicial officers;
- 2.4. issuing accreditation and endorsement to professionals;
- 2.5. appointing suitably qualified and accredited Commissioners throughout Australia to act as arbitrators where families have been unable to reach agreement on financial and/or children’s matters;

- 2.6. ensuring that simple access to this body be made available and promoted to all staff, litigants and others who interact with the family law system;
- 2.7. establishing measures comparable to those in ‘whistleblower legislation’ to ensure that applications/complaints to this body do not prejudice the applicant;
- 2.8. ensuring that all complaints be addressed in a timely manner (with initial findings on a timescale that does not hamper ongoing litigation). Unlike at present, it should be possible for applications against judicial officers or agents of the court to be made and investigated during ongoing litigation;
- 2.9. pro-actively monitoring practices and conduct, and addressing complaints against any professionals in a timely, effective manner.

“Our current family law system lacks even basic levels of scrutiny, feedback and an evidence-based approach.”

3. **TRAINING AND ACCREDITATION**

The skills and training required to participate in family law proceedings are considerable and wide-ranging. We have, below, outlined what we regard as some of the key attributes necessary for an accredited professional in this field.

It is important to note that the required skills and training reach well beyond the narrow focus that the ALRC and some other groups place on the important issue of family violence. It is essential for practitioners to have good training not only about all forms of family violence (particularly those to which children may be subjected and

those associated most with family separation) but in child development, child psychology, forensic examination and the value and power of science. If every family law case is viewed solely or primarily through the prism of family violence, great harm will be done to many children. Our vision is a more inclusive one and one that aims for the highest possible standards for the sake of our children.

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

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

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

4. **PRO-ACTIVE MONITORING AND TRANSPARENT SCRUTINY**

The new, independent regulator should not merely await complaints, it should undertake routine, pro-active monitoring of all family law professionals and procedures. Furthermore, its work should, itself, be transparent and open to public scrutiny.

5. **PENALTIES**

Prescribed penalties for professional misconduct should be introduced. At present, in practice, few if any sanctions can be placed on judges, barristers, other lawyers, healthcare professionals or social workers who operate within the family law system, even when they are found to have committed acts of egregious misconduct

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

- Highly developed personal skills for interacting with children of all ages, abilities, dispositions and cultures;⁴
- A current Working with Children check/registration and Police Clearance (as required by Departments of Education);
- Highly developed personal skills for interacting with vulnerable adults suffering extreme stress, grief or other emotions and generally in need of great compassion and understanding;
- High-level understanding of, or (for psychologists/psychiatrists) specialist training in, child development, psychology and behaviour;
- High-level understanding of, or (for psychologists/psychiatrists) specialist training in, adult psychology and behaviour;
- High-level understanding of the nature, impact and specific manifestations of all forms of abuse within the family, including:
 - violence, psychological abuse and financial abuse; as well as additional forms of abuse more specific to children, including:
 - neglect, sexual abuse and all forms of psychological abuse (including not receiving emotional support and care; child grooming; psychological manipulation into showing unwarranted hostility, fear or animosity towards a parent or others; and indirect exposure to acts of violence or psychological abuse within the family;
- An awareness of the risks of their own conduct being abusive or coercive, given the great power-imbalance in their interactions with children and/or other family members; a recognition that with great power comes great responsibility;
- Specialist training in objective observation and reporting;
- Specialist training in forensic skills, especially when dealing with children. It is essential that all professionals come to each task with an open mind and do not pre-judge any individual. Adopting, in advance, any specific approach – including, for instance, trauma-informed care and practice if this requires making up-front assumptions about an individual’s prior exposure to trauma – can be highly detrimental to children;
- Specialist training in child suggestibility, in methods of appropriate, open questioning and in avoiding leading or suggestive approaches;
- Specialist training in court procedures, and a thorough understanding of an adversarial family law system;
- Specialist training in report-writing for courts, including:
 - avoiding jargon and writing in plain English;
 - understanding how an adversarial system may exploit careless words;
 - practising within the boundaries of one’s professional competence and those of the prescribed role;
- High-level knowledge and understanding of the latest scientific and medical research on all relevant issues including, but not limited to:
 - factors that affect the long-term wellbeing of children;
 - the lifelong impacts of childhood trauma, physical and psychological abuse, and loss of close family members;
 - the relative wellbeing of children in intact, single-parent and co-parenting environments;
 - the impact of family conflict on best outcomes for children;
 - the importance for children’s development of not being exposed to violence, abuse or neglect and of maintaining and developing pre-existing relationships with all family members who are fit to do so.

⁴ Additional specialisation/skills/experience may be required, e.g. when working with Aboriginal and Torres Strait Islander families or special needs individuals.