Submission to the Joint Select Committee on Australia's Family Law System

January 2020

for kids sake

Protecting children – beyond family separation

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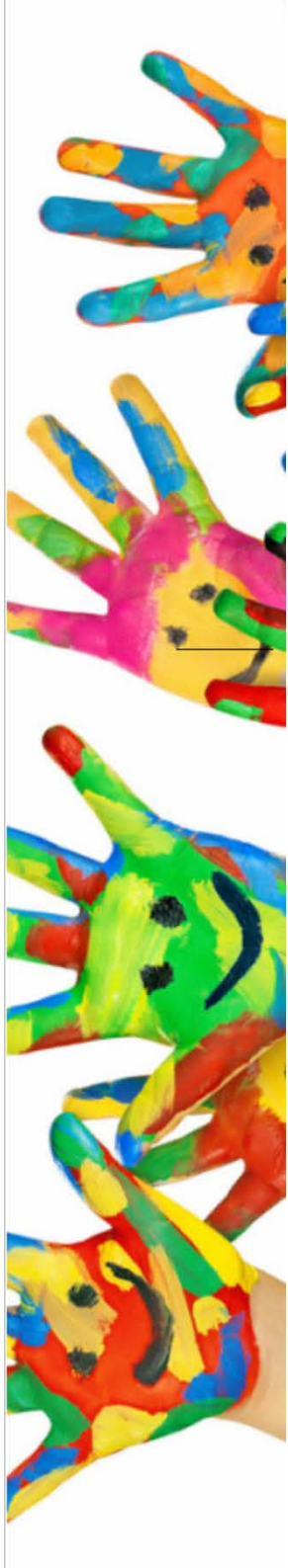


"The Family Court completely failed us." [Amelia, 17]

"I felt like everyone who spoke to me had an agenda." [Amy, then 10]

"There's no way I'm going back to that bloody court. Ever." [Sylvia, then 11]

"For me, a complete stranger told me I had to choose one parent over the other. That was a choice a 16-year-old could not make, so I ran." [Frank, then 16]

"We must have been interviewed by more than a dozen of those so-called experts when we were kids. It went on for years. That can't be right." [James, then 8-14]

"I don't want any other kid to go through what I did." [multiple respondents, 10-18]

"No child should be given the responsibility of having to choose between their parents." [Emily, then 12]

"No-one listened to me. No-one." [Samantha, then 12]

"The court psychologist asked all sorts of questions about things that would make my dad look bad but didn't ask the same questions about mum. I felt forced to say bad things about my dad." [Emily, then 9]

"It's very hard to get to trust again." [Christine, then 8]

"I lied to my lawyer all the time. Dad had told us what to say." [John, then 11]

"Get rid of any kind of adversarial nature the court has." [Gabrielle, 15]

"A judgment needs to be made by someone who knows the situation well." [Mark, 15]

"The number one thing that helped me was the fact that I was plugged into a church community ... because every single week I would see trusted adults ... I'm a massive advocate of mentoring for young people." [Gabrielle, 15]

"We should go easier on parents. Because it's very difficult being a parent. And for a divorced parent, it's particularly difficult." [Adam 15]

"It comes back to having people who are well-trained." [Amanda, 15]

"The focus should be on helping parents before anything happens." [Tom, 16]

"Families, even when they seem OK, should have back-up within their community so when something happens they have professionals who know the family and can make decisions ... We need to get rid of the stigma that counselling is for broken families." [James, 15]

Contents

About Us

For Kids Sake is a non-profit organisation[1] dedicated to creating a fresh approach to divorce and family separation – one of Australia's least-recognised, yet greatest, public health crises.

When separating, families are vulnerable and children are at increased risk; they need compassion and health-focused support, not family courts that are slow, unaffordable, adversarial and frightening and that increase the health risks to children and other family members.

This recently published opinion piece (right) outlines some of *For Kids Sake's* views on why we need a safer, healthier approach to this major social issue. Our submission below outlines our vision of how this could be implemented in Australia.

[1] *For Kids Sake* has no political, religious or professional affiliations and receives no financial benefit or reward for any policies it advocates.

Separation is painful but Australia's adversarial legal system makes it harder

DAVID CURL

For many parents throughout Australia, not only those affected by our catastrophic bushfires, it won't be a happy New Year. Their New Year's resolution has not been to join the local gym, adopt a low-carb diet or take that long-awaited holiday in the South Pacific. It's been to split up or get divorced.

Between opening Christmas presents with the kids and watching reviews of 2019, mums and dads around the country have been finding time to Google "divorce", "separation", "family law" and other such search terms that always show a significant spike in January. On Monday, the first phone call some parents make will be to a family law firm that stands to make tens of thousands — or, sometimes, hundreds of thousands — of dollars from each of its desperate clients. It may be the nearest these parents have ever come to a lawyer – or to writing a blank cheque – in their lives.

Family separation or divorce is one of the most stressful times in the lives of all who experience it. Apart from often extreme feelings of grief, anger or confusion, the most important things in a parent's life are now at risk: financial security and their relationship with their kids. It's a moment of enormous vulnerability for parents. It's also a moment of greatly increased risk for kids who will often find themselves, suddenly and for months or years to come, without the two functioning parents they've relied upon.

For other such moments of human frailty and vulnerability, our society has put in place scaffolding and systems of support: there's well-promoted guidance for gamblers, well-known peer-support groups for alcoholics, and injecting rooms that recognise that drug addiction can better be addressed as a health issue than as a legal or criminal one. Society too has learnt to be less judgmental and more compassionate about these widespread social issues.

Not so with divorce. Whether because it's normal, if not de rigueur, for everyone to take sides — usually based on gender or family allegiances — or perhaps even because the rest of us know how hard keeping a family together can be and wonder if those who've failed are perhaps not worthy of support (they must simply be bad or "warring" parents), we have few support mechanisms in place.

There is no well-known road map for healthy family separation; no road signs to help us navigate dangerous crossroads or behaviours; no orange flags to warn us of unfamiliar or unexpectedly high risks to children on the road ahead.

Instead, anxious mums and dads turn to their best friends, who recount horror stories about other disastrous separations, warn that whoever acts first will have the upper hand, and tell them to "go get a lawyer" — today. Instead of the support that every separating parent and child needs, the best-known, often easiest, pathway is into an adversarial court system that turns every family separation into a terrifying, quasi-criminal affair.

It's true that a majority of family separations don't end up with an actual trial, or even years-long court proceedings. But family courts set the tone for divorce and separation throughout Australia — anything else is officially described, to this day, as "an alternative" — and the model that courts promulgate is of prolonged, acrimonious, unaffordable separations where the escalation of potentially life-threatening conflict is inevitable, and even incentivised. With their draconian secrecy rules, they go even further:

> Divorce is a health and social issue — one of Australia's greatest public health crises

they prevent healthy debate about the issue and proper scrutiny and improvement of the system, and they entrench the stigma about divorce that still lingers.

Don't presume, either, that those who avoid such dangerous proceedings are settling amicably, let alone managing to agree on what's best for their children; many are simply avoiding a court system they know they can't afford, won't give a favourable outcome, or will damage their kids for life. Photos of new stepmums and stepdads enjoying New Year celebrations with their former partners and kids, or wearing the same family T-shirt to a footy match to support a child whose upbringing they all share, wouldn't go viral if truly amicable separations were the norm.

This year brings with it the latest in a long line of reviews of Australia's family law system, controversially co-chaired by lower house MP Kevin Andrews and senator Pauline Hanson, while recommendations from many previous reviews remain unaddressed. Each of these, however, has tragically failed, and other reviews will keep failing, because we continue to ask the wrong questions — and because our federal parliament is too paralysed and polarised, along entrenched gender and political faultlines, to reach consensus about even minor reforms. Like many of us, they've failed to recognise that divorce or separation is a health and social issue — one of Australia's greatest public health crises, in fact. It simply doesn't belong in a court of law.

Family separations, especially where family courts have been involved, contribute to childhood trauma, with lifelong health consequences; they're a significant contributor to teenage mental health problems and suicide, as well as those same consequences in adults; and they're even linked to many of Australia's most horrific family murders.

The solutions are not rocket science. But they require all of us to stop taking sides. This isn't a men's rights issue, though all men, women and children have and deserve rights. Nor is it primarily a women's safety issue, though we must do everything we can to keep women, men and especially children safe from all forms of harm.

This is a public health crisis that can be addressed by investing in earlier, safer and more cost-effective measures than any family law system: measures such as well-targeted education of children, parents and society at large; earlier health interventions and support for families; clever apps and online tools that help kids and parents navigate separation and foster healthy relationships during and after separation; quality conciliation; and, where necessary, an arbitration process instead of hostile court proceedings. Measures that give families a chance of reinventing themselves, rather than guaranteeing their destruction.

Together, these and other measures drawn from examples of world's best practices, can create the fresh approach to family separation that our children and families so desperately need and deserve. Wouldn't putting that in place before the end of another decade be a great resolution to make for the New Year?

Dr David Curl is CEO of For Kids Sake (forkidssake.org.au).

Key Recommendations

Recommendation 1: MINISTER FOR CHILDREN

Give the Minister for Children and Families direct and primary oversight of the budget for addressing the causes and consequences of family breakdown – including education, research, health-focused interventions and relationship, coaching and mediation services – with a focus on the long-term wellbeing of children. *Family breakdown should be treated as a major health and social issue, not primarily as a legal issue.*

Recommendation 2: MAJOR, NATIONAL CAMPAIGN

Invest $10 million over 3 years[2] into marketing and promotion of the safest, healthiest ways to address family breakdown and family conflict, such that parents will know how to seek early and effective support from those they trust and those who can provide the safest, healthiest solutions. The campaign should use TV, video and other modern technology as well as websites and traditional brochures for doctors' surgeries, with the aim of reaching all Australians with key messages about support available to manage relationships and separation better and how to protect children from the various risks associated with family separation.

Recommendation 3: CHILDREN'S PROGRAM

Invest $15 million over 3 years into well-designed and targeted Schools Programs that will, among other outcomes, equip children better to develop resilience, positive relationships, critical thinking, conflict resolution skills and self-management of behaviour and emotions.

Promote the development of peer-support for children in schools and in their local communities and ensure every child has an adult, mentor or peer they can turn to in times of need. *The earliest interventions are the most cost-effective.*

Recommendation 4: PARENTAL EDUCATION

Invest $10 million over 3 years into well-designed and targeted Parental Educational Programs for the whole Australian population, delivered via TV ads/programs, online and peer-group courses and personalised coaching. *Parents well-educated in the risks to children and themselves associated with family breakdown will be better equipped to handle and avoid them.*

Recommendation 5: HEALTHIER INTERVENTIONS

Create financial incentives for medical and healthcare centres to provide integrated, coordinated services for families in potential crisis, including access to counsellors, coaches, mediators and conciliators. *Separating families need support, not courts.*

Recommendation 6: MEDICARE FOR FAMILY HEALTH

Invest $25 million p.a. into a new Medicare-funded Family Care Plan, administered by GPs and Integrated Healthcare Centres, to create a new, early intervention to triage stressed families and provide cost-effective access to an integrated package of multi-disciplinary support. *Earlier, health-focused interventions will save lives – and money.*

Recommendation 7: INNOVATIVE SOLUTIONS

Invest $6 million over 3 years into the development of innovative, modern solutions that offer self-help, early intervention and harm prevention, and that address issues of child safety, long-term wellbeing of children and risks associated with family breakdown.

[2] For more detailed budget information and estimates of cost savings, see *For Kids Sake*'s paper "*Childhood Matters: Beyond 2020".*

The online environment, smartphone apps and AI can already contribute to simpler, cost-effective solutions for many.

Recommendation 8: PRE-EMPT COURTS

Require families to pursue all safer, healthier approaches to family breakdown before family courts can accept their applications, including participation in: coaching/counselling and education courses; accessing support for children; use of modern collaboration aids such as smartphone apps; genuinely mandatory and enhanced mediation/conciliation services; and mandatory arbitration. Promote and market these approaches as mainstream, not as alternatives to courts. *Less familiar solutions must be made mainstream.*

Recommendation 9: NEW, INDEPENDENT REGULATOR

Establish a new, independent regulatory body ("the Families Commission") with the responsibilities of:

a) oversight of all professionals in the family law system;
b) defining requirements and standards for specialised training;
c) 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;
d) issuing accreditation and endorsement to professionals;
e) 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;
f) ensuring that simple access to this body be made available and promoted to all staff and litigants within the family law system;
g) establishing measures comparable to those in 'whistleblower legislation' to ensure that applications/complaints to this body do not prejudice the applicant;
h) 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 family law professionals or appointees to be made and investigated during ongoing litigation;
i) 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.

Recommendation 10: INTRODUCE ARBITRATION

Introduce a new system of arbitration for both children's and financial matters. This is an essential, currently missing, component to help families finalise separation without recourse to a court of law. One option is for such arbitration to be overseen by a new Family Division of the Australian Administrative Tribunal and for accredited Family Commissioners to be appointed as arbitrators throughout Australia, not just in major cities.

Recommendation 11: FAMILY VIOLENCE

Recognise family violence as violence, and potentially criminal, and ensure that it is investigated urgently and addressed in local/magistrates' courts using standards of evidence appropriate to behaviour that may be criminal.

Recommendation 12: NO-CONTACT ORDERS

Introduce a new category of "No-Contact Orders" – readily issued, reciprocal orders that provide immediate safety and protection for an applicant while avoiding potentially harmful side-effects inherent in current restraining orders, such as untested attribution of guilt or unwarranted termination of parent-child relationships, until an evidentiary hearing has taken place.

Recommendation 13: CREATE A NEW ACT

Create a new Act, the Australian *Children and Families Act 2023*, to replace the *Family Law Act 1975 (Cth)*. This Act should be written succinctly in plain English, with key clauses and explanations up-front, and should, ideally, be drafted concurrently with a Royal Commission such that the Commissioners may provide explicit feedback into the redrafting process and contribute to the final version of the new Act. Consideration should be given to the detailed recommendations for changes to the current legislation contained below and in *For Kids Sake's "Childhood Matters: Beyond 2020"* paper. In particular, the need to:

a) Adopt a rigorous, evidence-based approach as to what's best for children and ensure that institutional responses 'do no harm';
b) Prioritise keeping children and their families out of adversarial, court proceedings, and not involving them more;
c) Open up legal and court proceedings to much greater scrutiny and accountability.

Recommendation 14: ESTABLISH A ROYAL COMMISSION

Establish a Royal Commission into family breakdown with particular reference to institutional responses, evidence-based approaches and children's long-term wellbeing.

Numerous unsuccessful reviews under numerous governments have demonstrated the need for a broad, independent Commission and for cross-party consensus if changes are to be successful and sustainable. Australia also needs the exposure and catharsis of a profound, nationwide review of the impact of our institutions on children and families over many decades.

Family Law Recommendations

Recommendation 15: DATA COLLECTION

The *Children and Families Act* should require the routine collection of data. Every judicial decision-maker should, for instance, publish and provide to the new Families Commission (or equivalent), at the time of release of each decision, a short summary of the case – for the purposes of research, feedback and quality control – including key data such as whether the case involved: allegations of any form of violence or abuse and whether against a partner, child or other person; findings of any form of violence or abuse; an outcome of single parenting, co-parenting (>35% with each parent), or other; evidence of court orders being adhered to or ignored; timescales of proceedings and of judicial decision-making etc. Feedback from litigants should also be routinely sought.

Recommendation 16: ESSENTIAL FEEDBACK

The *Children and Families Act* should require that all litigants and children be contacted at least once per year for a period of five years from the date of a judgment being published, or until the youngest child becomes 18 (whichever is the longer), to ascertain the ultimate outcome of the family law system's intervention and to provide feedback into the system.

Recommendation 17: TIMELY JUDGMENT

The *Children and Families Act* should require that every judicial decision-maker be required to publish a judgment no later than 28 (or, in exceptional circumstances, 45) days after the conclusion of any final hearing.

Recommendation 18: ONGOING TRAINING OF JUDGES

The *Children and Families Act* should require that a summary of new, relevant, peer-reviewed publications, with abstracts and digital links, be distributed at least once a year to all judicial officers as a supplement to a published guidebook, or benchbook, that should address key issues such as child development, psychology and wellbeing.

Recommendation 19: A SCIENTIFIC APPROACH

The *Children and Families Act* should incorporate a statement that all judicial officers be required to be familiar with the latest, most relevant peer-reviewed scientific research on what's best for children during and after family separation and that they be entitled and expected to make use of this in judicial determinations irrespective of whether or not such evidence has been presenting during proceedings. At present, case law inhibits consideration of scientific evidence unless expressly presented by a court expert.

Recommendation 20: LEGISLATED EXPERTISE

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

Recommendation 21: TRANSFORMING A MONOPOLY

The *Children and Families Act* should allow all litigants, without the requirement for an application, to have a "Lay Representative" to assist them with proceedings and to speak, where necessary, at hearings or trial. Different individuals should be permitted to perform this role for the same litigant over time. The litigant should be at liberty to share and discuss all court documents with a lay representative.

Recommendation 22: RESPONSIBILITIES FOR LAWYERS

Every family lawyer should be required to:

a) Undertake additional, specialist training, particularly with respect to their distinct responsibilities as officers of the court, first and foremost, and to the best interests of children before the interests of their clients;
b) Provide up-front costs estimates that must be seen, signed and accepted by any client;
c) Complete proceedings to a high, professional standard for no more than the maximum cost estimated; and
d) Sign an acknowledgement that their client was fit and competent to sign any such costs agreement.

Recommendation 23: MODERNISATION

The *Children and Families Act* should, under specified circumstances, allow parties to submit applications and affidavits by video and via an online portal. Current procedures, based on written affidavits and applications, are arcane and archaic; exacerbate and create conflict; and inhibit access to justice for many. Modern procedures, making appropriate use of technology, should be adopted wherever possible.

Recommendation 24: EQUALITY

The *Children and Families Act* must enshrine fair and equal access to the family law system for all litigants of all backgrounds, ethnicities, genders, abilities and financial means. Measures must be put in place that demonstrate adherence to this fundamental principle.

Recommendation 25: ENHANCED PROCEDURES

The *Children and Families Act* should require that each family law case be allocated to one judicial officer and that a preliminary decision in children's matters be made no later than 28 days after initial application. The outcome of this decision must be monitored and the decision may be varied in consideration of new evidence. In the event that orders are made that do not ensure that a child maintains and develops a relationship with a pre-existing carer, the court must make a finding of fact as to why such a parent or carer is unfit to be with a child. The court

should be required to ensure that financial matters do not delay decisions in children's matters.

Recommendation 26: TRANSPARENCY, NOT SECRECY

The privacy provisions (s 121) of the current *Family Law Act (1975) (Cth)* should be replaced with an explicit statement near the front of the new Act that, unless the court makes an order to the contrary:

a) participants may discuss proceedings in private;
b) participants may discuss and share court documents in private for the purpose of receiving advice and support;
c) in the event that participants discuss non-anonymised proceedings on social media or elsewhere, they should be aware that any such discussions may be used in evidence and adversely affect their case;
d) media outlets may publish details relating to family law proceedings that are in the national interest including some non-anonymised information, such as the names of court experts and family law professionals, as specified in *Media Guidelines* that should be published and updated annually.

Recommendation 27: CHILDREN'S FRIEND

The *Children and Families Act* should ensure that all children have a nominated "Children's Friend" to keep them informed, in an individually appropriate manner, of proceedings and to provide personal advice and support. Wherever possible this Friend should be chosen at the earliest possible time by mutual agreement from a short-list of family friends provided by both parents. In the event that a mutually acceptable Friend cannot be found, the Court should appoint a suitably qualified professional.

Recommendation 28: CHILDREN'S REPRESENTATIVE

The *Children and Families Act* should ensure that all children, without the requirement for an application, have a "Children's Representative" involved in proceedings, and with access to all court documents. This Representative could, under some circumstances, also be the Children's Friend but is likely to be an appointee of the court with full Family Law Professional Accreditation (see below) including appropriate qualifications in child psychology. This position would replace the current, problematic role of Independent Children's Lawyer, given that personal rapport with the child and qualifications different from, and beyond, those of a lawyer are essential.

Recommendation 29: VIDEO RECORDING OF EVIDENCE

The *Children and Families Act* should require that, in the event that it is determined that a family law professional will interact with a child:

a) Any professional must have Family Law Professional Accreditation;
b) A child should be interviewed as few times as possible, without coercion and in a child-friendly environment;
c) Any such interview must be recorded with clear, transcribable audio of the entire interaction and, unless an exception is granted, with good-quality video.

Recommendation 30: CHILD SUPPORT

The Child Support Agency should not be permitted to ignore court orders in the calculation of payments, as at present. It should also be staffed by highly qualified personnel, specially trained to deal with vulnerable clients under stress; this is not currently the case.

More broadly, the current system intrinsically prolongs acrimonious interactions between parents and creates dangerous, financial incentives for parents to act in ways that are not in a child's best interests, such as withholding children from another parent or carer. Consideration should be given to alternative models that, for instance: encourage parental collaboration, instead of prolonging conflict; prescribe the amount of financial support needed by a child; and do not reward behaviours that may be harmful to children.

The for kids sake 6-point plan

A safer, healthier, cost-effective approach to family breakdown

1. **TREAT** family breakdown as as a child health and social issue
2. **EDUCATE & SUPPORT** families better, especially around separation
3. **PROMOTE & INVEST** in healthier, earlier, evidence-based approaches that prevent harm
4. **REQUIRE** non-adversarial approaches when children are involved
5. **INTRODUCE** specialised training, accreditation and accountability for all professionals involved
6. **SIMPLIFY** family law and make the long-term wellbeing of children paramount

1

TREAT family breakdown as a child health and social issue

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

Family separation and divorce are a major social issue best suited to a Health, Family, or Children's portfolio. We need to recognise that family breakdown is a time of high risk for children and vulnerability for parents. It requires a health-focused, pro-active approach – as with other social issues – rather than a passive approach that too readily allows children and families to drift towards, or be affected by, harmful court interventions. We recommend that this issue be addressed holistically and pro-actively by a Minister for Children and Families. Continuing to view family separation primarily as a legal issue, managed by the Department of the Attorney-General, will result in ongoing, serious and avoidable harm to our children and future generations.

2

EDUCATE and SUPPORT families better, especially around separation

Investment should be made in education and early, comprehensive support for families. This should include, among other components:

- a well-targeted Schools Program to equip children better to develop resilience, positive relationships, critical thinking, conflict resolution skills and self-management of behaviour and emotions;
- a national educational campaign to help parents better manage relationships and separation; to raise awareness of the potentially harmful consequences to children of family breakdown including the extreme risks, consequences and prevalence of some forms of psychological child abuse and family violence; to promote the safest, healthiest approaches to family breakdown – including counselling, coaching, mediation and health-focused support – as mainstream solutions, not as "alternative dispute resolution" or as "alternatives" to the family court;
- integrated, health-focused interventions, mediated by medical and healthcare centres; and
- promotion and development of innovative solutions that offer self-help, early intervention and reduce risks associated with family breakdown.

3

PROMOTE and INVEST in healthier, evidence-based approaches that prevent harm

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

When governments do intervene in matters that affect children, such interventions should be urgent, expertly managed, evidence-based and outcome-focused. Above all, they must demonstrate that they "do no harm".

4

REQUIRE non-adversarial approaches when children are involved

Family courts are harmful to children. Intrinsically slow, unaffordable, frightening and adversarial – and neither monitoring, nor obtaining feedback from, the outcomes of their decisions – they are not fit for the purpose of looking after the best interests of children or families.

For most family separations (where there is no history of family violence, abuse or neglect), a streamlined, more cost-effective, healthier government intervention should be introduced nationally – and private sector equivalents supported – based on the most effective, existing models of conciliation and arbitration. The government should ensure the availability of local private or government sector arbitrators, providing financial incentives where necessary for the establishment of such services. Attendance at arbitration should be a pre-requisite for accessing the family court system. Non-adversarial arbitration, not family courts, should be funded, promoted and marketed as the primary intervention when healthier approaches have been exhausted.

5

INTRODUCE specialised training, accreditation and accountability for all professionals involved

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

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

These measures should be overseen by a new independent body, which should be given the authority to monitor the performance of all professionals and to address complaints in a professional, timely manner.

6

SIMPLIFY family law and make the long-term wellbeing of children paramount

Family law is not designed for children. It never was and never will be. Retrofitting the Family Law Act – originally framed in the context of parental disputes and property settlement, rather than children's welfare – will not make it fit-for-purpose or capable of facilitating decisions that are best for children. Nonetheless, family law sets the tone for separations throughout the country and must model the safest, healthiest outcomes.

The *Family Law Act 1975 (Cth)* should be comprehensively revised, simplified, shortened, and based on the core principles of:

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

Divorce and separation re-imagined

Family Courts

Arbitration

Conciliation

Private Resolution

Early health/family interventions

Parental Education

Children's Programs

6 steps for safer, healthier children and families

Divorce and separation re-imagined

	Children's programs	Parental education	Early health/family interventions	Private resolution	Conciliation	Arbitration	Family courts
Content	Building resilience Self-management of behaviour/ emotions/conflict Critical thinking Relationship building	What separation means for kids Children's welfare, childhood trauma and its consequences Management of emotions/behaviour	Children's and family wellbeing before, during and after separation Management of emotions/behaviour	Coaching, counselling and collaborative legal advice Arrangements for ongoing communication	Negotiated agreements for financial and children's matters Enhanced intake procedures, incl. integrated coaching	Binding third-party decision on financial and children's matters	Final, third-party ruling on financial and children's matters
Delivery	Teacher training courses (via Education Departments) Online courses Peer support for kids in schools and communities	Online courses Peer-group courses Personal coaching Printed materials at GPs/healthcare centres TV ads/programs	Healthcare specialists New, Medicare-funded Family Care Plan, via GP/Integrated Healthcare Centres, providing access to psychologists, coaches and divorce specialists	Online platforms, apps and access to professional services Local divorce coaches, mediators and collaborative lawyers	Professional, accredited coaches and mediators/ conciliators Widespread, local availability	Accredited, private-sector arbitrators Proposed Families Commission/ Tribunal with Commissioners widely available	Family court hearings/trial/ judgment Limited locations Limited online functionality
Timescale	⏳⏳	⏳⏳	⏳⏳	⏳⏳	⏳⏳	⏳	⏳⏳⏳⏳⏳
Personal cost		💲	💲	💲💲	💲💲	💲💲	💲💲💲💲💲
Taxpayer cost	💲💲	💲💲	💲💲💲	💲💲	💲💲💲	💲💲💲	💲💲💲💲💲
Effective-ness	💚💚💚💚💚	💚💚💚💚	💚💚💚	💚💚💚	💚💚💚	💚💚	
Harm						💔	💔💔💔💔💔

PROPOSED SOLUTIONS TO SPECIFIC TERMS OF REFERENCE

Terms of Reference: a)

Ongoing issues and further improvements relating to the interaction and information sharing between the family law system and State and Territory child protection systems, and family and domestic violence jurisdictions, including:

i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and

ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings.

FAMILY VIOLENCE SHOULD BE ADDRESSED URGENTLY BY LOCAL, STATE COURTS – NOT BY FAMILY COURTS

Family violence matters should be addressed entirely by State/Territory-based local courts, not by family courts. Although a uniform, federal system would be preferable, given that matters relating to child protection and restraining orders are already addressed by State/Territory institutions, it is the best, safest and most logical option for all matters relating to family violence to be heard by an institution within the same jurisdiction.

Benefits:

1. This minimises risks associated with poor information sharing between State and federal jurisdictions;
2. It better enables matters of violence to be assessed locally, with local knowledge, and on an urgent basis;
3. It diminishes the likelihood of the same matter being heard in multiple jurisdictions; and
4. It diminishes the likelihood of parents 'shopping' between institutions and professionals until they get the outcome they desire.

VIOLENCE ORDERS ARE ESSENTIAL, BUT THEIR SIDE-EFFECTS CAN CAUSE HARM AS GREAT AS THEIR BENEFITS

All people, and especially children, have the need and right to be kept safe from harm. Restraining orders are currently a key tool in helping keep people safe. But there are significant problems with them, some of which are highlighted by this Committee's focus on required standards of proof and their use in family law proceedings:

Current problems:

1. The very term "restraining" order carries with it an automatic and unacceptable presumption of guilt that runs contrary to the primary tenet of English common law, and Article 11 of the UN's Universal Declaration of Human Rights, that a person is innocent until proven guilty. Its ongoing usage needs careful re-evaluation;
2. With different names, acronyms and legislation around Australia, the lack of uniformity and certainty in the administration of restraining orders is a significant problem;
3. Some adults report difficulties in obtaining restraining orders when they are urgently needed;

4. As currently administered in most Australian jurisdictions, the issuing of restraining orders not only provides a measure of enforceable safety for an applicant but automatically creates other consequences that may be unintended, inappropriate or even harmful. These include, but are not limited to:
    4.1. Sudden loss of access to property for one or more parties;
    4.2. Sudden loss of a child's relationship with a parent or other carers;
    4.3. Creation of extreme power-imbalance and inequity in further legal proceedings.
5. In the distinct context of family court proceedings, these "incidental consequences" of restraining orders provide an almost-unassailable advantage to an applicant and an insurmountable obstacle for the subject of the restraining order. As a result, the incentive for misuse of such orders (especially given the absence of penalties) is overpowering for parents already exposed to the extreme stress of a family separation.

Solutions:

1. Enact one piece of federal legislation, re-enacted in each State if required, that determines the use of all forms of restraining orders throughout Australia;
2. Carefully reconsider and reframe the federal definitions of family violence and abuse to better reflect community values and understanding and to give appropriate weight to the most widespread, long-lasting yet least visible component of abuse: psychological abuse;
3. Recognise the importance of providing safety measures on an urgent basis for those in need, while separating out other, undesirable or potentially harmful consequences;
4. Create a new "No-Contact Order" that can be issued automatically, immediately and administratively, and that is reciprocal (applying equally to all parties named) but which carries no attendant presumption of blame, guilt or misconduct;
5. In the event that an applicant wishes, in addition to a personal No-Contact Order, to ensure that a parent or other individual has no, or limited, contact with children:
    5.1. a specific application to this effect must be made;
    5.2. a hearing should be scheduled in the local court within 14 days to make a finding of fact in respect of evidence presented by all affected parties;
    5.3. in the interim, measures should be put in place, simultaneously, to ensure that any children maintain pre-existing relationships with any parent and other carers that might be adversely affected by the No-Contact Order.
6. Where the granting of a No-Contact Order has other consequences, such as loss of access of one party to property, measures should be put in place to ensure immediate access to property such that an affected party may mitigate the impact of such a loss;
7. Explicit, prescribed penalties should be imposed where an application is found to have been frivolous, vexatious or malicious and awarding of costs considered in favour of a party who has experienced consequent losses.

Terms of Reference: b)

The appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders.

PERJURY SHOULD BE AN OFFENCE IN ALL COURTS – EVEN IF FAMILY COURTS ARE UNLIKELY TO PURSUE IT

The fact that we are here discussing truthfulness in the context of family separation demonstrates, in yet another way, the inappropriateness of family courts for hearing cases of family separation and divorce.

It is the most natural of human behaviours to create one's own narrative about a family break-up and it is completely unrealistic, absurd even, to expect that everything people say about their own break-up will be 'the truth, the whole truth and nothing but the truth' – especially when what's at stake is nothing less than what, for most people, are the most important things in their lives: their financial future and access to their children.

It's also the case that one of the key purposes of court proceedings is the 'finding of facts'. This itself is a recognition that, in every case, evidence is presented that may be misleading, inaccurate, incomplete or false.

Perjury should be made an offence in family courts, as in other courts, with clear instructions to judicial officers as to the bar above which instances of perjury should be referred for prosecution, e.g. statements about abuse found to be knowingly false. Currently, the incentives for making false statements in family courts are almost irresistible, especially given that there are likely to be no penalties.

Our overriding view, however, remains that separating parents should be treated with much greater compassion and not put in a situation in the first place that's so stressful that they may be unable to think straight and may be more likely to make inaccurate, or even false, statements.

Why making perjury a crime won't help much:

1. Inaccurate statements are par-for-the-course in family separations. It will be onerous for judges to determine the bar above which any such inaccuracies should be deemed perjury and prosecuted as such;
2. Courts will always be reluctant to issue fines, prison sentences or other penalties to anyone found guilty of perjury in the context of a family separation, especially if they are a principal caregiver, given the likely, adverse impact on any children involved;
3. In the event that perjury were formally to be re-introduced into a revised Family Law Act and cases routinely prosecuted, judges would find themselves routinely having to consider arguments that the alleged offender was not deliberately making false statements, but had diminished mental capacity arising from the complexity or stress of proceedings.

We believe that the common argument, however, that the presence of perjury in the *Family Law Act* might inhibit genuine victims from coming forward is not sufficient to justify the exclusion of family courts from otherwise-standard rules regarding perjury.

The conclusion, once again, is that an institution that requires people to swear oaths, and that may or may not find them guilty of perjury, is entirely ill-suited to deal with vulnerable families that need compassion, understanding and much greater levels of support.

FAMILY COURTS ROUTINELY FAIL EVEN AT THEIR PRIMARY TASK: MAKING ORDERS THAT ARE ENFORCED

Making orders is, arguably, the primary purpose of our family courts. Yet, even in what should be their greatest strength – the ability to make binding orders that compel outcomes – they often fail spectacularly.

Family court orders are routinely flouted – and without consequence. There is, as with all matters to do with our family law system, no data as to the prevalence of this; family courts merely point to the numbers of contravention orders made, or the percentage of families that return to court, but these figures are wholly inadequate in providing any accurate indication of the proportion of family court orders that are respected, observed or broken.

By not making swift, enforced decisions, it is the family court itself that has created the rod for its own back; it has made itself almost powerless to enforce its own orders because it routinely rewards, and fails to punish, those who flout its orders.

This is especially the case when children are involved. It has become commonplace in family court proceedings – though, once again, no data on prevalence is available – for parents to ignore court orders about childcare arrangements by co-opting their own children – and by psychologically manipulating them into saying that they do not want to see the other parent. Family courts are, almost universally, unwilling then to enforce orders that go against the statements, and supposed wishes, of children.

So, by not pro-actively, automatically and swiftly enforcing their own orders, family courts have incentivised one of the most pernicious and damaging forms of child abuse: the turning of a child against a parent.

"By not making swift judgments, and by not enforcing their own orders, family courts have incentivised (and increased the prevalence of) one of the most pernicious and damaging forms of child abuse: the psychological manipulation or 'turning' of a child against a parent."

Terms of Reference: c)

Beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court.

A SINGLE COURT, AS LAST RESORT, FOR ALL AUSTRALIANS

The most sensible, safest option for children and families is to have uniform federal legislation and a single, national court system to administer – as a last resort – cases of family separation or divorce that have not been resolved by other, safer and more cost-effective methods.

In our safer, healthier and more cost-effective approach to issues of family violence and to the even-larger, often-conflated, issue of family separation and divorce:

1. Family violence issues will have been determined, on an urgent basis, by local, State-based courts;
2. The majority of family separations will have been addressed through measures such as greatly improved, earlier education; earlier, health-focused interventions; enhanced conciliation procedures; and, where strictly necessary, swift and effective arbitration;
3. The role of the Family Court of Australia, ideally within the federal court system rather than as a stand-alone court, could then primarily be that of an appellate court, revisiting the minority of cases that have not been resolved through the above methods.

The proposed merger of courts may provide some administrative streamlining and prevent matters being passed between two separate courts. It is imperative that, in all events, appeals be heard by a different set of judges than those potentially involved in the original proceedings. The public will rightly not have faith in a system where colleagues are responsible for reassessing each other's cases.

Terms of Reference: d)

The financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:

i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and
ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings.

Australia is failing profoundly in providing access-to-justice, and healthy outcomes for children, when families separate. Many parents pay tens of thousands of dollars in order to participate in family law proceedings; some pay >$100,000; and, on occasions, the legal costs alone of family separation exceed $1 million for a single parent. Most of these parents and, importantly, their children will suffer the financial consequences of these extreme costs for a lifetime (if, indeed, they survive the stress – as many, tragically, don't).

The welfare of children and families should not be compromised, and families should not be placed under even more extreme pressure, by such extreme financial considerations. It is immoral for us to have put in place a system that makes family separation unaffordable – or that forces families into outcomes that are not best for children as a consequence of the cost of engaging with the systems we have put in place.

"The opportunity for self-regulation within the family law system has passed."

The legal profession, and the family law system in its entirety, has proven itself incapable of self-regulation for more than four decades:

it has failed to implement appropriate schedules of fees, or caps for services; it has failed to introduce appropriate, high standards of training for legal professionals involved in interviewing or interacting with children and adults under extreme stress; and it has failed to implement effective and transparent systems of scrutiny of, or complaint against, its practitioners.

The same applies to the healthcare professions, and in particular to psychologists, who are free to charge what they will in order to provide life-changing reports on children and families: fees for the same service, of providing a court report and attending court, may vary from $5000 to $25,000. And parents have no option other than to pay such fees without question – or risk adverse reporting by the practitioner in question.

The opportunity for self-regulation within the family law system has passed. The government should:

1. Introduce a schedule of reasonable and prescribed fees for services;
2. Require that all family law professionals provide an accurate up-front estimate of minimum and maximum fees for (and anticipated nature and duration of) the entire proceedings that is seen, signed and accepted by any parent or other adult engaging those services; and
3. Require that, where the estimate of maximum costs exceeds $10,000, the family law professional must sign a declaration that the recipient of those services is fully competent to agree to such fees.

The resolution of financial matters between separating parties is commonly both the cause of enormous stress and resentment and a contributor to extreme delays in the resolution of childcare arrangements. It is unacceptable that children should be placed at greater risk because of the delayed resolution of financial matters, or effectively used to hold one party to ransom in such settlements. This, however, is commonplace.

"It is unacceptable for children to be harmed further, through childcare arrangements not being finalised, simply because financial settlements have not been reached swiftly."

The division of financial assets should be determined in the following order:

1. In the first instance, by mutual agreement between the parties;
2. Where necessary, with the assistance of (subsidised/incentivised) agents, legal practitioners, online programs or other private sector options;
3. Through mandatory, formal, high-quality conciliation;
4. Through mandatory arbitration; and
5. Only when all these have failed should access to the slow, expensive family law system be permitted.

Arbitration is, to quote one former UK High Court judge, a "no-brainer" for financial (as well as children's) matters.

Prescriptive settlements of finances, based on agreed formulae and principles, should make financial settlements almost instantaneous – provided full and accurate disclosure has been made by all parties. Indeed, well-developed, online models such as *adieu* (*www.adieu.ai*) already provide settlements at fixed cost, based on simple prescriptive rules and the range of typical outcomes should a matter proceed to court.

Terms of Reference: e)

The effectiveness of the delivery of family law support services and family dispute resolution processes.

"Support" cannot be delivered effectively within a family law context; the very fact that a family has engaged with a frightening, adversarial legal system makes it too late to engage with the most effective support from which a family could earlier have benefitted. Once a family is in the family court, it's too late for the most effective "triaging" which involves education and health interventions and avoids adversarial law entirely.

Viewing separation as a health issue provides a radically different perspective. The primary support is from healthcare professionals, coaches, counsellors, and psychologists, where necessary, well away from any adversarial, legal system.

We need to change the way we think about family separation and divorce. And we need to change the words we use. Family separations should not be thought of as "disputes": they are usually times of great stress, emotion, worry, fear or anger. They are more likely to become "disputes" because of the legal system we've place at the frontline of "resolving" them. In most instances, parents simply don't know what to do or how they are supposed to deal with either financial or childcare issues; they're often not "in dispute" until they engage with a legal system that's adversarial or based on coercive negotiation.

The implementation of the *For Kids Sake* 6-step process, which keeps children away from harmful court procedures, provides for much more effective support for families, and much safer, healthier outcomes for children.

Terms of Reference: f)

The impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings.

Childhood trauma, diminished lifetime mental and physical health, actual or attempted suicide, and murder by a close family member: these are all documented impacts of family law proceedings on children and families. This should be front-page news – and, sadly, it sometimes is. Yet the often-clear connection with family law proceedings is rarely made. Why?

It comes down to a combination of draconian secrecy laws about reporting on family court cases, a system that protects itself at all costs, and public expectations about court systems. People don't like to criticise our system of law and order in general; we need to presume it's doing the best it can under the circumstances. This reticence is reinforced by the statements of politicians who, notwithstanding the separation of powers, are not shy about protecting the court system. The scathing words of departing AG Senator George Brandis when suggesting that a challenge to the courts "is to attack the rule of law" were particularly striking.

Lawyers and judges also protect their system: they will often try to tell you that these adverse health consequences are the result of the family break-up or of the type of family involved, not of the courts' involvement – even when there is clear evidence, in many cases, to

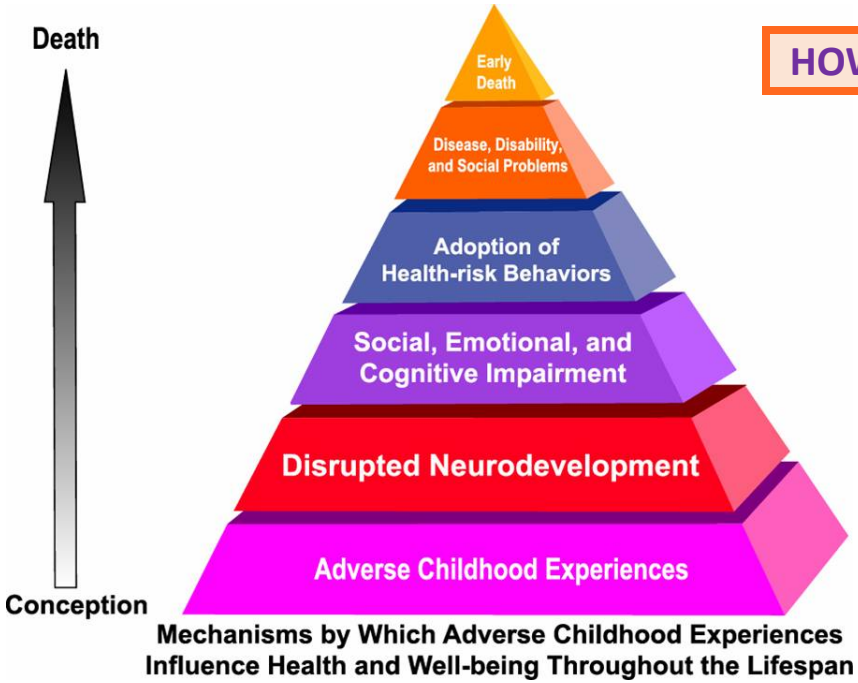
the contrary. As for the media, they have largely been cowed into not reporting on family court cases for fear of section 121 of the *Family Law Act 1975 (Cth)* that might see them put in jail.

"We like to believe that 'What doesn't kill you makes you stronger'. But science proves this isn't true. Extreme, adverse experiences as a child, such as being involved in family court proceedings for months, can harm a child for life."

Numerous international studies have now demonstrated the link between adverse childhood experiences or trauma and a lifetime of diminished physical and mental health. Many have also shown family separation, particularly where this is the subject of dispute, to be one of the leading factors contributing to such trauma. The science of stress is equally clear and unambiguous. Putting families in the extreme-stress environment of family court proceedings for a period that may last not just for a few hours or days, but often for many years, transforms both the developing brains of children and the brains and behaviours of adults.

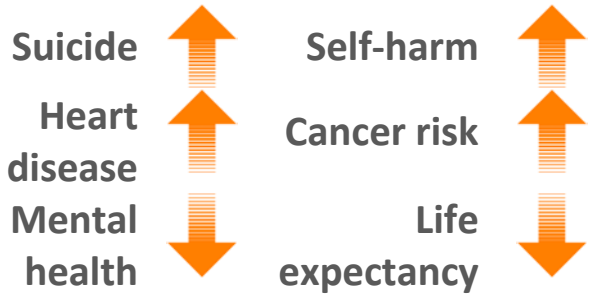
Whether the consequences are labelled "complex trauma", "PTSD" or some other mental health condition, the jury is no longer out: family court proceedings contribute directly to adverse mental health in many, if not most, individuals who are exposed to them. So, the question has to be asked:

"Why would we allow this to happen?
And on a scale that affects tens of thousands of Australian children and adults each and every year?"



Mechanisms by Which Adverse Childhood Experiences Influence Health and Well-being Throughout the Lifespan

HOW CHILDREN SUFFER



Impacts of traumatic family separation on children
ACE study, 1995-2018, and other international studies

"Every two weeks, a child is killed by a parent or close family member. Family court proceedings are a leading common denominator."

Terms of Reference: g)

Any issues arising for grandparent carers in family law matters and family law court proceedings.

Ask any grandparent what's the worst thing that could possibly happen to them and, for most, it's not being financially exploited by their family, or even being diagnosed with a terminal illness, it's being denied access to their grandchildren.

This is one of the worst forms of elder abuse, yet rarely features in any reviews of the subject, including the recent government inquiry into Elder Abuse.

The same is true of other relatives and carers for children who, all too often, get left out completely and forgotten about when family court proceedings are underway.

"Current judicial practice ignores the importance of a village, and of a grandparent, in raising a child."

One of the key problems lies in the fact that nowhere in the Family Law Act (1975) (Cth) or, more importantly, in the typical deliberations of family court judges, are the rights of grandparents and other carers to care for children they love enshrined, with sufficient weight, in legislation. Nor is the need of those children to maintain such pre-existing relationships after separation properly considered, despite it being fundamental to the long-term wellbeing (or "best interests") of those children.

Once again, science and common sense tells us how important a consideration this is – grandparents and other carers often play pivotal roles in the lives of children, especially in more traditional or indigenous communities. But, judicial wisdom and practice routinely ignores the importance of a grandparent, and of a village, in raising a child.

In our redrafting of Section 60CC of the Family Law Act (see below in "Re-writing the Law") we explicitly overcome these problems. We require that, as a high priority, any judicial officer must explicitly consider how a child will maintain and develop relationships with ALL who care for them, not only parents.

We also require that any judicial officer expressly considers the UN Convention of Rights of the Child and the UN Declaration of Human Rights, which includes the Article "Right to Family Life" – an Article that the United Nations has already found Australia's family courts to have breached – a breach that Australia, to date, has yet to acknowledge or remedy.

Terms of Reference: h)

Any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners.

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 is 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;[3]
- 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"[4];
- 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. [5] Our family courts surely have protection at the highest level.

We believe that self-regulation has demonstrably failed in each profession associated with the family law system and that it will never provide the protection that our children and families deserve. It is essential that 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.

"Routine follow-up and feedback on decisions and subsequent outcomes for children and families must become enshrined in the system and in everyday practices."

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

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

[5] Senator George Brandis (2018). *Hansard*, 7 February 2018, Australian Senate

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.

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

- Highly developed personal skills for interacting with children of all ages, abilities, dispositions and cultures;[6]
- 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.

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

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.

Terms of Reference: i)

Any improvements to the interaction between the family law system and the child support system.

FUNDAMENTAL, SYSTEMIC PROBLEMS

Like the family law system, the child support system has a fundamental problem: it is set up in a way that prolongs negative interactions between former spouses. It also rewards behaviour that is harmful to children.

These are such fundamental flaws that we believe both systems are unfit-for-purpose: they risk increasing harm to children, not minimising it. We advocate a different way of ensuring that children, after separation, have the necessary financial means and that harmful interactions and behaviours are not encouraged or incentivised.

We advocate a simpler, more prescriptive allocation of financial resources after separation – one that expressly distinguishes often-conflated components:

1. Financial needs of a child;
2. Alimony/spousal maintenance/compensation for child-caring years;
3. Government's need to fund childcare, post separation.

By explicitly separating out these components, it becomes possible to minimise the direct link between percentage childcare and income, thereby reducing one of the harmful incentives intrinsic to the current system.

EXTREME POWERS

As currently set up, the child support agency has extreme powers that it wields with little compassion or understanding. In contrast to the family court system that fails to enforce orders even when it has made them, the child support system enforces its assessments – often in dramatic or punitive fashion – even when these contradict explicit, current court orders and even when the CSA's assessment is based only on information provided verbally without independent evidence.

The child support agency has become such a law unto itself that many parents find their dealings with the agency to be extremely damaging to their personal mental health. In at least one case documented by a coroner, there was a clear link between a parent's suicide and recent, previous interactions with the CSA. Surely, this should be a red flag that demands a change to the current system?

Terms of Reference: j)

The potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes.

Pre-nuptial agreements may sometimes be of value in reducing the difficulties of property settlement on separation. Certainly, having clear, agreed statements of assets and net worth at the start of a relationship could be particularly useful. However, like wills, pre-nuptial agreements, are likely to provoke legal disputes in many cases.

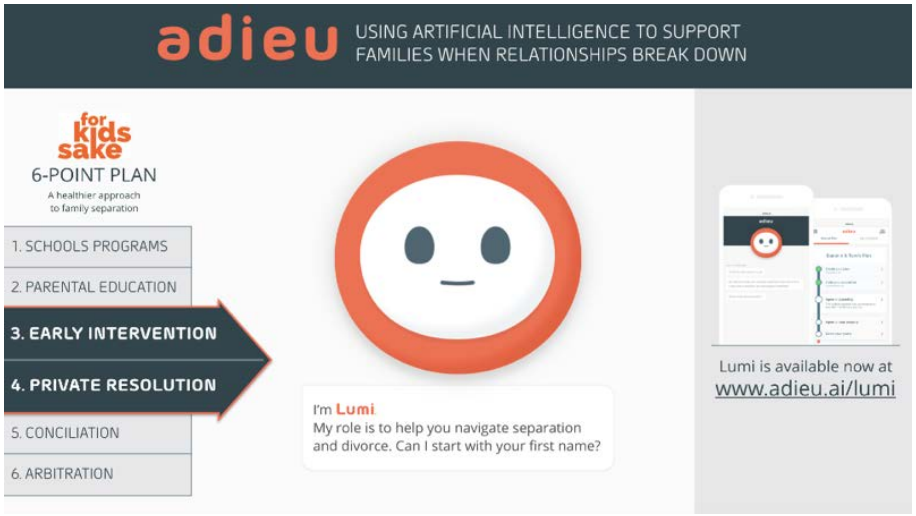
A better and more universal method of minimising future property disputes would be to introduce more formulaic, prescriptive financial settlements. How readily this can be accomplished can be seen by online, artificial-intelligence-based systems such as adieu.ai. It's

COUNTER-PRODUCTIVE

In addition to binding ex-partners together financially for a prolonged period, the child support system effectively:

1. Discourages parents from earning more;
2. Incentivises not declaring income;
3. Represents an additional tax burden of about 23% on additional income above an arbitrary threshold, even for those who earn under $30,000;
4. Can disincentivise re-partnering and other routes out of poverty for single parents.

There are much better, more cost-effective methods – ones that do not increase risks to children – for ensuring that parents have the necessary financial means to look after children.



simple – and available today. This is an innovative Australian online platform that enables financial settlements to be accomplished for a fixed fee, or even for free, once financial data has been provided.

Terms of Reference: k)

Any related matters.

"Family separation and divorce is a health and social issue, not a legal issue. We need a fresh approach."

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

LESS SECRECY, MORE TRANSPARENCY

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

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

- Parents can do nothing to clear their names when false characterisations are spread either privately or publicly;
- Adults, already under extreme pressure from prolonged family court proceedings, feel inhibited from sharing information – and are prohibited from sharing court documents pivotal to their lives – leading to mounting, extreme and sometimes unmanageable pressure;
- Keeping family court proceedings essentially secret contributes directly to the stigma still associated with family separation and divorce. Discussing these matters more openly would help change the paradigm of how we view separation and divorce;

- Mainstream media outlets feel unable to publish the names of family law professionals brought before professional panels for misconduct, even long after any family law proceedings have ended;
- Even after reaching the age of 18, young adults are, or feel, prohibited from discussing their own case openly.

What do children say?

It is not often that children comment specifically on this issue. But recently, one of the so-called "Italian sisters" stated clearly that she wasn't concerned about the fact their family dispute had become so public:

"It doesn't bother me, and not at the time it happened." [7]

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

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

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

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

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

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

INVOLVING CHILDREN?

This is such a pivotal issue, dominated by anecdote and ideology rather than evidence and logic, that we have taken considerable time here to discuss it. The conclusion is simple:

"Children should be involved less,
not more, in adversarial court proceedings."

We believe that it should be a primary recommendation of this inquiry that we need to do much more to keep children out of family courts, not that we need to involve them even more!

In its recent review, the ALRC suggested that children should be more involved in family court proceedings and that the 'views of children' (which, concerningly and consistently, it conflated with 'what children say') should be given greater weight. The ALRC suggested that this perspective was supported by a number of submissions, though not by all.[8] However, it failed to note that many submissions supporting greater involvement of children[9] are organisations operating in the safe space of counselling, mediation or conciliatory law rather than adversarial, family law.

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

The adversarial process tends to promote unhealthy and potentially abusive parent-child interactions. This is not simply the opinion of our organisation, or of some radical, activist group, but is based on objective evidence (not to mention, common knowledge) and is stated unambiguously, for instance, in the American Bar Association's own *Judge's Guide*[10]:

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

This "turning a child against a parent", as we commonly know it, is not just some minor inconvenience that happens to make a judge's decision-making a bit harder. It's actually one of the most sinister and widespread forms of abuse to which children in separating families are exposed – particularly by virtue of the involvement, or mere presence, of adversarial family law.[11] It not only frequently results in a child's relationships with a

[8] ALRC (2018). *Discussion Paper DP86*, 2 October 2018
[9] e.g. Relationships Australia (2018). *Submission to ALRC Review*, May 2018
[10] American Bar Association (2008). *A Judge's Guide: Making Child-Centered Decisions in Custody Cases*. 2nd ed. American Bar Association, USA

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

loving parent and half a family being severed, sometimes for life (with all the grief and trauma that this entails) but, at the same time, leaves that same child in the constant care of a parent who's responsible for carrying out the usually-undiagnosed psychological child abuse.[12]

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

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

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

What do children say?

The ALRC posits that "research has suggested that some children want to directly participate in proceedings", a view echoed by the National Children's Commissioner,[13] and "considers that there should be no bar to this in appropriate cases". [14]

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

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

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

[13] Australian Human Rights Commission (2018). *Submission #217 to ALRC Review*, May 2018

[14] ALRC (2018). *Discussion Paper DP86*, 2 October 2018

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

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

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

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

What does society say?

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

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

There are major differences between adult and younger brains[15] and there are reasons why Australia, like other nations, places restrictions on what children can do or decide, whether it's buying fireworks, solvents or cigarettes, or voting for a prime minister. We want to protect children from health risks to which they're more vulnerable either due to their lesser level of awareness or to the stage of development of their bodies and brains, and we believe there are some decisions children should not be making, both for their own good and for that of others.

Just as age-of-consent laws are designed to protect children and young people from sexual exploitation and abuse,[16] so too we need our laws to protect children from the high risks of psychological abuse and trauma to

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

[16] Age of consent. Retrieved from: https://aifs.gov.au/cfca/publications/age-consent-laws

which adversarial litigation exposes them. The harm done to children by forcing them to play a role in choosing between two fit and loving parents, for instance, lasts a lifetime.

Should we be doing more, though – and are we perhaps obliged as a matter of human rights – to treat children more like adults? After all, as President of the UK Supreme Court, Baroness Hale, has said: "We have some way to go in recognising that children are indeed real human beings".[17]

What do International Conventions say?

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

Article 12 provides that:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In part because of the risk of naïve interpretation of this Article, the United Nations, in 2009, issued a clarification of its intentions with respect to Article 12.[18] In particular – and crucially with respect to the ALRC's proposals – the UN Committee stated:

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

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

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

[17] Baroness Hale. World Congress on Family Law and Children's Rights, Dublin, 2016

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

this notion harmoniously with other fundamental rights."[19]

What does evidence show?

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

- **CHILDREN SHOULD NOT BE GIVEN HEAVY BURDENS OF RESPONSIBILITY**
  Children should be allowed to be children. Making them feel that they are responsible for major decisions, such as choosing one parent over another, is a form of abuse in its own right. This is the evidence-based view of the leading, international experts in child psychology;[20]

- **THE NATURE OF CHILDREN'S STATEMENTS**
  Although the mantra that "children don't lie" is still promoted by some ideological warriors to this day, there is now a substantial body of scientific literature about the nature of what children say. It is clear that children's statements:
  - Are highly subject to influence, e.g. from: suggestive questions/comments, non-verbal cues, deliberate manipulation or a desire not to disappoint (especially where parents or trusted authority figures are involved);
  - Should not be taken at face-value;[21]
  - May not be accurate: "Research has demonstrated children can speak sincerely and emotionally about events that never occurred" and "even professionals cannot differentiate between false and accurate reports";[22]
  - Are a poor proxy for, and are not synonymous with, a child's views;
  - Vary with context or mood and fluctuate considerably over time; and
  - Even when authentic, not influenced by others, and consistent, do not always represent what society believes to be best for them (refusal to go to school or eat green vegetables are familiar examples);

- **CHILDREN'S STATEMENTS ABOUT ABUSE ARE OFTEN HIGHLY COUNTER-INTUITIVE**
  It is a question that has often been asked in the academic literature, and in the popular press: Why does a person in a psychologically abusive relationship stay? Scientific research shows us that one of the most extraordinary and counter-intuitive aspects of ongoing psychological abuse is that its victims (and sometimes even its perpetrators) often do not know that abuse is occurring – and they are almost powerless to escape it. Whether in the remarkable instances of so-called Stockholm Syndrome, or within intimate partner relationships, victims actually develop a particular, unhealthy bond with, and dependence upon, their abuser.

  This is particularly the case for children who are, more so than adults, dependent upon their parents and thus more prone to becoming

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

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

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

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

victims of psychological abuse. Contrary to popular expectation that such abused children might volunteer information about the abuse, or make negative statements about their abuser, such children, if asked, usually defend their abuser – sometimes passionately. In the context of family separation, children are especially vulnerable to one particular form psychologically abusive behaviour by their parents whereby parents may, either wilfully or unknowingly, seek to influence a child's views against the other parent. Such children consistently defend the parent who has abused them psychologically while, at the same time, attacking the parent they've been told, wrongly, is bad.

The behaviour of children subject to these various forms of psychological abuse may manifest itself in such a counter-intuitive fashion that it takes a questioner of enormous experience and with considerable specialisation to correctly interpret what an abused child says.

- **COURT PROFESSIONALS DO NOT HAVE THE NECESSARY COMPETENCIES**
  A majority of professionals within the court system (whether social workers, psychologists, lawyers or judges) do not have the prerequisite, specialist skills to assess children in an adversarial, litigious setting. It is a highly specialist skill to interview children and to assess what they say (which, as indicated above, is a very unreliable proxy for their authentic views, especially in an adversarial setting).

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

  Most do not even have the skills to ask open and non-leading questions and many consequently themselves contribute to the psychological abuse of children by asking highly inappropriate questions.[23] This, again, is the evidence-based view of the world's leading experts in the fields of child psychology and child suggestibility; see e.g. Hritz *et al.* (2015)[24] for summary of issues involved in interviewing children;

- **COURTS EVEN LACK COMPETENCE TO ASSESS THE EXPERTISE OF THEIR EXPERTS**
  Even the process by which courts choose their experts is unsafe and unsound. Experts are chosen on the basis of legal argument between advocates, not on the basis of specialist qualifications or accreditation. One UK study, in a comparable jurisdiction, rated 65% of expert reports as being between poor and very poor; 30% of the "experts" had no experience of mental health problems; and 20% of experts were unqualified;[25]

- **GREATER INVOLVEMENT OF CHILDREN INCENTIVISES GREATER ABUSE**
  If children's statements are given greater weight in courts, this dramatically incentivises, and can cause, their abusive manipulation by parents and other relatives, many of whom may be unaware of the coercion and psychological abuse for which they're responsible;[26]

[23] Hritz *et al. op. cit.*
[24] Hritz *et al. op. cit.*
[25] Ireland, J.L. (2012). *Evaluating Expert Witness Psychological Reports: Exploring Quality*. University of Central Lancashire, UK.
[26] Warshak, R.A. (2015). Ten Parental Alienation Fallacies That Compromise Decisions in Court and in Therapy. *Professional Psychology: Research and Practice*, Vol. 46, No. 4, 235–249.

- **THE VIEWS OF OLDER LIVED-EXPERIENCE CHILDREN/ADULTS WARN AGAINST INVOLVING CHILDREN MORE**
  Although it is a not-uncommonly stated view of children that they do not feel listened to in family court proceedings or wish to have more of a say, it is an equally commonly stated view of older children and young adults who have experienced the system that they should never have been given the responsibilities forced upon them.

  Many talk of having felt manipulated by court professionals, or of feeling that such 'professionals' all had an agenda (see above); many talk of suffering life-long guilt as a consequence; and some express disbelief that the court should have placed such high weight on statements that they made (which may have been transient or consequent to undue influence) when they were just young children.

Involving Children: Conclusion

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

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

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

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

- To have a nominated "Children's Friend" to support them and keep them informed;
- To have a "Children's Representative" in court proceedings who has a personal connection with that child or has high-level professional experience in child psychology (i.e. importantly, not a lawyer with merely legal qualifications).

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

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

RE-WRITING THE LAW

The key changes advocated by *For Kids Sake* go well beyond re-writing the Family Law Act; they require a different, health-focused approach to the entire issue.

Nonetheless, the *Family Law Act (1975) (Cth)* does need to be comprehensively re-written. It should be revised, simplified, shortened, and based on the core principles of:

1) the paramountcy of the long-term wellbeing of children (as distinct from "best interests");
2) prevention of exposure of children to all forms of physical and psychological harm;
3) the maintenance of a child's relationships with all fit and willing parents and other family members central to the child's long-term wellbeing;
4) natural justice and gender equality; and
5) the *Universal Declaration of Human Rights* and the *United Nations Convention on the Rights of the Child*.

As one illustration, the key clause in the current legislation is not on page one but buried, deep in about 800 pages, in section 60CC. Its language is complex, obscure and illogical. It's not written from the perspective of a child, with outdated language about "custody" still implicit in how it's framed; and it maintains the use of term "best interests" which, in our view, is a term that has outlived its usefulness. The new Act should make a clear statement, up-front, about how judicial decisions are made.

We attach here a draft of how this one section could be re-written.

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

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

CONCLUSION

Every year, about 65,000 children in Australia are exposed to family separation or divorce – a process that makes many of their parents highly vulnerable and potentially exposes every one of those children to a variety of risks. Though the majority of those families do not themselves have prolonged proceedings in family courts, the conduct and outcomes of today's family court proceedings nonetheless set the tone, and lay the ground-rules, for every one of them.

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

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

And yet, this is 2020!

Many proposals from previous reviews, including the most recent by the ALRC, would be positive. But they don't go anywhere near far enough towards changing the system and changing the way we view and deal with family separation. The ALRC was right, we believe, to explicitly adopt "a public health approach"; after all, family separation and divorce is, from any reasonable perspective, a public health crisis. However, a public health approach needs much more than simply tacking the phrase "family violence" onto a few dozen proposals to adjust the existing legally focused system. A public health approach means recognising that most family law cases do not belong in a family court at all. Family courts offer no cures – and they certainly don't offer prevention.

Cases involving potentially criminal acts of violence belong in a local, criminal court. They need to be dealt with as matters of the highest urgency. Cases involving mental health issues or addictions require professional, social or medical interventions. Family separations or divorces need great amounts of support and compassion, not lawyers and courts that create a life-threatening cocktail of insurmountable pressure and irresistible incentives.

We can continue to blame parents for bad behaviour or we can start understanding the inescapable nature of human interactions when relationships break down and start showing the same compassion as we have done for years with other distinctly human failings, like addiction.

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