

**SUBMISSION**

18 December 2019

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# **FRSA SUBMISSION TO THE JOINT SELECT COMMITTEE ON AUSTRALIA'S FAMILY LAW SYSTEM**

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## **ABOUT FRSA**

As the national peak body for family and relationship services, FRSA has a critical leadership role in representing our extensive network of Member Organisations to support their interests and the children, families and communities they serve across Australia. FRSA plays a significant national role in building and analysing the knowledge and evidence base relating to child and family wellbeing, safety and resilience. We undertake research and work with government and non-government stakeholders to inform policy and shape systemic change.

### **About our members**

FRSA has 165 members. This includes all 66 Commonwealth-funded Family Law Service providers. The range of services provided includes:

- Family Relationship Centres
- Children's Contact Services
- Family Law Counselling
- Family Relationship Advice
- Family Dispute Resolution (FDR) and Regional FDR
- Parenting Orders Program
- Supporting Children after Separation Program
- Family and Relationship Services

### **Our vision**

The wellbeing of all children, families and communities in Australia is supported and protected.



## INTRODUCTION

Our submission is informed by:

- The experience and wisdom of our members, many of which have been providing services to Australian children and families for over 60 years.
- A consultation workshop held on 19 November 2019 with 42 participants (managers and practitioners) from FRSA Member Organisations.
- Members' views and experiences represented in our two submissions to the recent Australian Law Reform Commission Inquiry – *Review of the Family Law System* (ALRC review).
- Prior written submissions to a range of inquiries and review processes about family law matters.

### **Best interests of children**

The focus of our submission is the wellbeing and best interests of children in the context of increasingly complex issues and needs of families. We propose that the family law system adopt a more child-focused and child inclusive approach. This is discussed in term of reference k. below.

The wellbeing and best interests of the child should be central to any discussion of the family law system and at the forefront of any decision making. The absence of explicit reference to the 'best interests of the child' in this inquiry's terms of reference is concerning.

### **The rights of children**

The Australian Human Rights Commission's submission to the ALRC review emphasised a child's right to express her or his views freely on all matters affecting them including in any judicial and administrative proceedings affecting the child, as expressed in the UN Convention on the Rights of the Child, article 12.1. To this end, an FRSA member asked, "how do children speak into the inquiry?"<sup>2</sup> We invite the Committee to give this question early consideration.

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<sup>1</sup> *Australian Human Rights Commission Submission to the Australian Law Reform Commission Inquiry – Review of the Family Law System Issues Paper*, 15 May 2018 ([Submission No. 217](#)), p.11.

<sup>2</sup> *FRSA Family Law Workshop*, Hunter Valley, 19 November 2019.



## RESPONSE TO TERMS OF REFERENCE

Our submission responds to terms of reference a., d., e. to h. and k.

- 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;**

Information sharing between the federal family courts and state and territory child protection systems and family and domestic violence jurisdictions faces several challenges. These include:

- the plethora of agencies, courts and stakeholders across the system involved in information sharing,
- limits (or perceived limits) of privacy and confidentiality provisions to information sharing,
- differences in laws and legal frameworks across the various jurisdictions, and
- a poor understanding by some professionals about the different legal frameworks and the obligations they place on professionals in those systems.<sup>3</sup>

This unwieldy system presents difficulties for the children and families who must access it. They may need to navigate multiple legal and support services and systems all at once or over a period of time. Delays in identifying and responding to family violence risks is of particular concern.

These challenges and their impacts on children and families – and on family law and family relationship professionals – have been comprehensively considered in past inquiries, including the 2015-16 Family Law Council inquiry<sup>4</sup> and the ALRC Review of the Family Law System. Recommendations to improve information sharing have been proposed including, most recently, the ALRC's recommendation that:

*The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare*

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<sup>3</sup> ALRC (March 2019). *An Inquiry into the Family Law System: Final Report*. Commonwealth of Australia, pp 143-144.

<sup>4</sup> [\*Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems\*](#)





*and wellbeing of families and children between the family law, family violence, and child protection systems. ...*<sup>5</sup>

FRSA supports the principle of improving information sharing between the family law, family violence and family protection systems in order to prioritise the safety and wellbeing of children and families at risk. We note the Government's announcement on 5 March 2019 of an allocation of \$11 million over three years to improving information sharing between the family law system and the state and territory child protection and family violence systems.<sup>6</sup>

Our support for these recommendations and initiatives comes with the proviso that where confidentiality is paramount, it remains protected. As elaborated in our response to the Family Law Council's 2015-16 inquiry and our submission to the ALRC review,<sup>7</sup> getting the balance right between client confidentiality and the courts' need to have relevant information is critical.

FRSA members have emphasised the importance of maintaining the integrity of family relationship interventions by adhering to confidentiality in family relationship counselling. Similarly, the confidential nature of the mediation process is respected by Family Dispute Resolution Practitioners.<sup>8</sup> The exception to this is, importantly, where safety is at stake. In this circumstance, disclosure should override confidentiality.

It is imperative that information-sharing protocols and associated procedures are supported by comprehensive guidelines and training. Information sharing practice, and related implications, must be approached with caution.

The following sensitivities must be considered in any initiatives to strengthen information sharing arrangements:

- How will assurances of confidentiality hold up in an information-sharing environment? What safeguards will be put in place?
- Who/what will determine where information is to be held and who should have access to an Information Sharing Framework, and what that specifically entails (e.g. court documents, police records, child protection reports, expert reports. What is sharable and what should remain contained?)
- Should Family and Dispute Resolution intake and assessment information be confidential and non-sharable, or not?
- What role does the client or child's advocate/separate legal representative have in assenting or objecting to information being shared?

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<sup>5</sup> ALRC (March 2019). *An Inquiry into the Family Law System: Final Report*. Commonwealth of Australia, p. 146. See also, recommendation 3, p. 152.

<sup>6</sup> Attorney-General for Australia (5 March 2019), '[Strengthening Family Safety by Enhancing Communication between Family Law Courts and States and Territories](#)', media release.

<sup>7</sup> FRSA Submission to the Family Law Council regarding information sharing, drawing on information obtained through a member survey (September, 2015)

<sup>8</sup> FRSA member feedback, *FRSA Family Law Workshop*, Hunter Valley, 19 November 2019.



FRSA notes further issues as captured in the ALRC report that need to be considered:

- Ensuring procedural fairness,
- Potential exposure of family victims to further harm if information is shared inappropriately, and
- Sufficient funding to ensure integrity, security and functional effectiveness of information sharing processes.<sup>9</sup>

FRSA recommends that the process of reaching effective sharing agreements be developed in careful consultation with all stakeholders.

**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;**

As outlined in the Productivity Commission's 2014 inquiry report, *Access to Justice Arrangements*, the costs of resolving a family law matter through the courts can be prohibitive.<sup>10</sup> We focus our response here on property and financial matters, noting that parents are more likely to resort to costly mechanisms to resolve financial matters than they are for parenting arrangements.<sup>11</sup>

Property matters consume a significant proportion of legal services accessed by families. Of 3,728 cases observed in 2014, the main issues lawyers helped with were: property settlement (59.2%), parenting arrangements (52.2%), court proceedings (22.3%), child support matters (18.6%), Family Dispute Resolution Services (12.8%), protection orders (9.6%), other divorce/separation matters (27.4%), none of these (6.1%). Of 794 parents' court cases observed in 2014, property disputes were also prominent. Children's care arrangements accounted for 66.8%, safety issues (41%), division of property/finance (32.5%), child support/financial support for children (10.5%), and other things (8.7%).<sup>12</sup>

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<sup>9</sup> ALRC (March 2019). *An Inquiry into the Family Law System: Final Report*. Commonwealth of Australia, p. 149.

<sup>10</sup> Productivity Commission (2014). *Access to Justice Arrangements – Inquiry report*. No. 72, Vol 2. P. 853.

<sup>11</sup> ALRC (March 2019). *An Inquiry into the Family Law System: Final Report*. Commonwealth of Australia, p. 248.

<sup>12</sup> Kaspiew, R., Maloney, L., Dunstan, J., De Maio, J., Moore, S., Molony, L., Smart, D., Qu, L., Coulson, M. & Tayton, S. (2015), *AIFS Experiences of Separated Parents Study*. Melbourne: Australian Institute of Family Studies.



In 2014, the Productivity Commission argued that the resolution of less complex family law matters would be best achieved through expanded availability of low-cost family dispute resolution. Increased use of family dispute resolution would reduce the expense involved in litigating in the family courts when resolving a dispute. The Commission proposed expanding the availability of low-cost resolution mechanisms such as FDR to property and financial matters.<sup>13</sup>

We note that recent government initiatives go some way to supporting greater access to FDR and Legally Assisted Dispute Resolution. In November 2018, the Australian Government announced the Women's Economic Security Package, which provided \$50.4 million in new funding for family law property mediation services.<sup>14</sup> However, the scale of the issue requires system-wide change.

Earlier this year, the ALRC put forward a recommendation in its review report to support greater use of non-court processes for resolution of property and financial matters. The recommendation places 'genuine steps obligations' on parties to try and negotiate a resolution through FDR, LADR, mediation and lawyer-led negotiation.<sup>15</sup>

In 2014, the Productivity Commission recommended that the requirement in s 60I of the Family Law Act that parties attempt FDR prior to lodging an application for children's orders (discussed in Term of Reference e. below) be extended to financial matters.<sup>16</sup>

FRSA supports the idea of mandatory FDR prior to using the courts to resolve property and financial matters, noting that FDR provides a more affordable and less adversarial option. FDR is a particularly compelling option for matters involving small asset pools, offering a simpler and less costly resolution process, and helping parties to consider the needs of children in relation to property and financial decisions.

With solid experience in providing FDR for parenting arrangements and some services already delivering FDR for property and financial matters, the family and relationship services sector is well-placed to expand its FDR services. FRSA recognises, however, that actively supporting FDR practitioners to develop their skills in property and financial mediation would be integral to delivering good outcomes for families. Skills development and/or different models of service delivery should be given consideration – for example, pairing an FDR practitioner with a financial counsellor – to build sector capability in this critical area.

FRSA's support for mandatory FDR and other non-court-based avenues comes with the caveat that non-court-based options may only be appropriate for cases involving family violence if sufficient safeguards are in place to manage safety risks

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<sup>13</sup> Productivity Commission (2014). *Access to Justice Arrangements – Inquiry report*. No. 72, Vol 2., pp 877-878.

<sup>14</sup> ALRC (March 2019). *An Inquiry into the Family Law System: Final Report*. Commonwealth of Australia, p. 255.

<sup>15</sup> ALRC (March 2019). *An Inquiry into the Family Law System: Final Report*. Commonwealth of Australia, pp 257-263.

<sup>16</sup> Productivity Commission (2014). *Access to Justice Arrangements – Inquiry report*. No. 72, Vol 2.





and power imbalances – for example, using shuttle mediation (where the parties are in different rooms).<sup>17</sup>

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

In 2006, the Australian Government introduced changes to the family law system to encourage a less adversarial approach to the management of parental separation and a stronger focus on the best interests of the child. The *Family Law Act 1975 (Cth)* was changed through the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. Changes to the family relationship services system were introduced including the establishment of 66 Family Relationship Centres (FRCs) across Australia, the Family Relationship Advice Line (FRAL) and Family Relationships Online (FRO), and increased funding directed to new and existing relationship services.<sup>18</sup>

Further initiatives to encourage the early resolution of parenting arrangements included the requirement that all separating parents attempt family dispute resolution (FDR) – a non-judicial process that seeks resolution between parents – before seeking parenting orders from a court. A section 60I certificate from an accredited FDR practitioner, which confirms the party has made genuine attempts to resolve their dispute, is required before applying to the court for a parenting order. There are, of course, necessary exceptions to the requirement for an s 60I – the risk of family violence or child abuse for example – and trends around s 60I certificate lodgements suggest more could be done to encourage the use of non-judicial pathways.<sup>19</sup> Notwithstanding this, the requirement that, when appropriate, separating parents seek to negotiate parenting arrangements in the spirit of cooperative parenting brings the best interests of the child to the forefront.

Following the 2006 reforms, the increase in the use of FDR rose, resulting in a 25% drop in court filings in parenting matters.<sup>20</sup> Most parents that separate resolve their parenting arrangements outside of the family law system. A 2015 report by the Australian Institute of Family Studies shows that the main pathways used by parents who had settled their parenting arrangements in 2014 was: 'discussions with other parent' (68.9%); 'nothing specific, just happened' (10.4%); 'counselling / mediation / Family Dispute Resolution services' (9.9%); 'a lawyer' (5.7%); 'the courts' (2.9%); and 'something else' (2.1%).<sup>21</sup> Family Law Services delivered by FRSA are frequented at a

<sup>17</sup> ALRC (March 2019). *An Inquiry into the Family Law System: Final Report*. Commonwealth of Australia, p. 253.

<sup>18</sup> Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., & the Family Law Evaluation Team (2009). *Evaluation of the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies, p. E1.

<sup>19</sup> ALRC (March 2019). *Family Law for the Future – An Inquiry into the Family Law System*, ALRC Report 135. Commonwealth of Australia. P. 249.

<sup>20</sup> ALRC (March 2019). *Family Law for the Future – An Inquiry into the Family Law System*, ALRC Report 135. Commonwealth of Australia. P. 249.

<sup>21</sup> Kaspiew, R., Maloney, L., Dunstan, J., De Maio, J., Moore, S., Molony, L., Smart, D., Qu, L., Coulson, M. & Tayton, S. (2015), *AIFS Experiences of Separated Parents Study*. Melbourne: Australian Institute of Family Studies, p. xvii.



rate almost double to that of any other provider in the Family Law System. In short, more people access our services than any other service in the System.

Approximately 40% of parents sort out the division of property through discussion and, as discussed under term of reference d., there is potential to encourage further use of non-adversarial Family Law Services for financial and property resolution for those separating parents requiring support to achieve a fair outcome.<sup>22</sup>

A brief description of family law services/programs is as follows:<sup>23</sup>

- **Family Relationship Centres** are a highly visible entry point or gateway to the whole family support service system. Family Relationship Centres play an important role in improving family relationships by providing information, support and referral services to all families, as well as family dispute resolution and access to some legal assistance for separating or separated families.
- **Children's Contact Services** enable children of separated parents to have safe contact with the parent who they do not live with in circumstances where parents are unable to manage their own contact arrangements.
- **Family Law Counselling services** help people with relationship difficulties better manage their personal or interpersonal issues to do with children and family during marriage, separation and divorce.
- **Family Relationship Advice Line** (the Advice Line) is a national telephone service to assist families affected by relationship or separation issues. The Advice Line is available on 1800 050 321 from 8am–8pm (local time) Monday to Friday and 10am–4pm (local time) on Saturdays.
- **Family Dispute Resolution services** assist families to reach agreement and to resolve their disputes related to family law issues about child and property related matters, outside of the court system.
- **Regional Family Dispute Resolution services** assists families in rural and remote communities.
- **Parenting Orders Program - Post Separation Co-operative Parenting services** help separated or divorced families who are in high conflict to work out parenting arrangements in a way that encourages consideration of what is in a child's best interests in establishing or maintaining relationships, while at the same time ensuring the safety of all parties.

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<sup>22</sup> ALRC (March 2019). *Family Law for the Future – An Inquiry into the Family Law System*, ALRC Report 135. Commonwealth of Australia. P. 79.

<sup>23</sup> Courtesy of the Australian Government Department of Social Services website, retrieved from: <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/family-support-program/family-law-services>



- **Supporting Children after Separation Program** aims to support the wellbeing of children under the age of 18 from separated or separating families who are experiencing issues with difficult family relationships.

These services focus on the best interests of children and families and aim to minimise use of the more adversarial parts of the family law system.

The benefits of post separation services, and accessing them early, have been demonstrated in a number of evaluations, reviews and longitudinal studies. For example, a 2013 evaluation of post-separation service clients found that over half reported a positive impact on understanding children's needs, that services helped their children experience less conflict and that they helped parents reach outcomes that were in their child's best interests. Over 50% of clients reported that their parenting arrangements were workable and that they were equipped with the skills for future resolution of issues.<sup>24</sup>

### **Increasing our effectiveness: Strengthening prevention and early intervention services**

It is FRSA's position that a prevention and early intervention approach should be taken in the Family Law System and delivery of Family Law Services. The Family Law System focuses predominantly on resolving conflicts between couples in the process of separating, and not on strengthening families earlier on.

Many of the health and social problems Australia currently faces are preventable. Research undertaken by Deakin University and FRSA in 2017 identified eight priority health and social problems for Australia that family and relationship services could offer a preventative focus:<sup>25</sup>

- Substance abuse (costing at least \$55 billion annually in Australia)
- Antisocial behavior (including violence and crime, costing \$36 billion annually)
- Obesity (\$21 billion)
- Mental illness (8.5 billion in 2014-15)
- developmental injury
- chronic illness
- school failure (including leaving school and not participating in further education)
- social exclusion.

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<sup>24</sup> The Allen Consulting Group (May 2013). *Research on Family Support Program Family Law Services: Final Report to Attorney-General's Department*, p. x.

<sup>25</sup> Toumbourou, J., Hartman, D., Field, K., Jeffery, R., Brady, J., Heaton, A., Ghayour-Minaie, M., & Heerde, J. (2017). *Strengthening prevention and early intervention services for families into the future*. Deakin University and FRSA.





As outlined in the 2017 research, many of these problems arise from common modifiable risk factors in families and child development. The families and relationship services sector is able to address many of these risk factors and to integrate prevention and early intervention responses across the health, community and education service sectors.

Strengths of the families and relationship services sector include:

- Well-developed expertise and resources for working with a range of families,
- National coverage and extensive community links,
- Developing expertise in the delivery and evaluation of evidence-based family programs and evidence-informed practices,
- A national service footprint,
- Engagement with families across key transitions in the family life course, and
- Non-stigmatised services relative to tertiary services (such as child protection and corrections).

FRSA concurs with the ALRC's conclusion that a public health approach should frame changes to the family law system. The ALRC writes that:

*A public health approach aims to prevent or reduce a particular social problem, such as child harm, by identifying risk indicators and developing mechanisms for responding to them. This approach aims to prevent programs from occurring in the first place, to quickly respond to problems if they do occur, to minimize any long-term effects, and prevent reoccurrence.<sup>26</sup>*

We believe that a more holistic and coordinated public health approach is needed, offering both universal and targeted services. Currently, tertiary services such as mental health, child protection, substance abuse and corrections operate within separate funding silos, while the family and relationship services sector offers programs and supports families in both universal and targeted services addressing major health and social problems.<sup>27</sup>

Through an enhanced focus on prevention and early intervention, family and relationship services could play a much stronger role in addressing the eight priority health and social problems outlined above, and reducing the risks to children and families in family conflict and family separation situations. Our sector is well-placed to help prevent family crises and separations, and support healthy and respectful separations when they do occur.

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<sup>26</sup> ALRC (March 2019). *Family Law for the Future – An Inquiry into the Family Law System*, ALRC Report 135. Commonwealth of Australia. P. 60.

<sup>27</sup> Toumbourou, J., Hartman, D., Field, K., Jeffery, R., Brady, J., Heaton, A., Ghayour-Minaie, M., & Heerde, J. (2017). *Strengthening prevention and early intervention services for families into the future*. Deakin University and FRSA, p. 4.



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

In a system that should be primarily concerned with the best interests of the child and the health, safety and wellbeing of children and families, FRSA identifies a number of issues that impact negatively on children and families in family law proceedings:

- The adversarial nature of court proceedings can amplify family conflict and family distress,
- Court costs for families can be prohibitive,<sup>28</sup> either placing families under financial stress or resulting in unfair outcomes for those who cannot afford legal representation (particularly so for cases that involve family violence),<sup>29</sup>
- The fragmentation of the system (as discussed under term of reference a.) can:
  - be difficult for families to navigate, notably in complex disputes involving family violence and child safety issues. In turn, this can result in “unsafe and traumatic situations” for children and for parents.
  - result in multiple proceedings, and orders that are inconsistent across jurisdictions.<sup>30</sup>

We note that there are several barriers to families accessing the family law system in the first place and that this yields its own impacts on the health, safety and wellbeing of children and families. As set out in our submissions to the ALRC Review of the Family Law System issues paper and discussion paper, we consider that much could be done to improve access to, and engagement with, the Family Law System. In summary, this includes:

- better information for families about family law proceedings, processes and services, including information catering to people with literacy barriers and people for whom English is not their first language.
- Improving access and engagement for Aboriginal and Torres Strait Islander peoples by, for example, the development and delivery of Family Law System responses by, or in conjunction with, Aboriginal and Torres Strait Islander communities.<sup>31</sup>
- Improving access and engagement for people of cultural and linguistically diverse backgrounds, for example by ensuring cultural competency in the family law system.<sup>32</sup>

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<sup>28</sup> For an approximate breakdown of court costs see Productivity Commission (2014). *Access to Justice Arrangements – Inquiry report*. No. 72, Vol 2., p. 854.

<sup>29</sup> Productivity Commission (2014). *Access to Justice Arrangements – Inquiry report*. No. 72, Vol 2., pp 862-863.

<sup>30</sup> Productivity Commission (2014). *Access to Justice Arrangements – Inquiry report*. No. 72, Vol 2., pp 865-868.

<sup>31</sup> For further examples see FRSA (11 May 2018), *FRSA Submission to the Australian Law Reform Commission Inquiry – Review of the family Law System Issues Paper*, pp 23-26.

<sup>32</sup> For further examples see FRSA (11 May 2018), *FRSA Submission to the Australian Law Reform Commission Inquiry – Review of the family Law System Issues Paper*, pp 27-28.





- Improving access and engagement for people living in rural, regional and remote areas, for example by greater uptake of technology to deliver services, including for court appearances and conferencing.<sup>33</sup>
- Improving access and engagement for people with a disability, for example by ensuring resources are available to people with disabilities, including access to a disability advocate.<sup>34</sup>
- Improving access and engagement for people who identify as LGBTIQ, for example by increasing practitioner knowledge across the sector in supporting LGBTIQ clients in appropriate ways.<sup>35</sup>
- Improving access and engagement for people on low incomes, for example by, reducing costs of accessing Family Law Services.<sup>36</sup>

**g. any issues arising for grandparent carers in family law matters and family law court proceedings;**

At 30 June 2016, there were 46,448 children aged birth -17 years who were in out of home care. Of these, 49% were in relative/kinship care, including the care of grandparents.<sup>37</sup>

FRSA member organisations' experience working daily with families and children across Australia echoes research that shows grandparents are increasingly playing a primary care role in the lives of their grandchildren, '...kinship care arrangements are a fast-growing family form in Australia ... a phenomenon that is increasingly visible in the family courts'.<sup>38</sup>

For a range of reasons, parents are sometimes unable to care for their children. When this happens, extended family, often grandparents, may take over the care of one or more children in kinship care arrangements. Kinship care may be a voluntary and short-term solution to meet a particular family's need. It can also be more complex, for example a 'last resort' that is either a long term arrangement or for an uncertain period. Illness, injury, disability, death, imprisonment, family violence, mental health problems or drug and alcohol abuse are some of the circumstances that lead grandparents to make this choice.

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<sup>33</sup> For further examples see FRSA (11 May 2018), *FRSA Submission to the Australian Law Reform Commission Inquiry – Review of the family Law System Issues Paper*, p. 28.

<sup>34</sup> For further examples see FRSA (11 May 2018), *FRSA Submission to the Australian Law Reform Commission Inquiry – Review of the family Law System Issues Paper*, pp 30-32.

<sup>35</sup> For further examples see FRSA (11 May 2018), *FRSA Submission to the Australian Law Reform Commission Inquiry – Review of the family Law System Issues Paper*, pp 32-34.

<sup>36</sup> For further examples see FRSA (11 May 2018), *FRSA Submission to the Australian Law Reform Commission Inquiry – Review of the family Law System Issues Paper*, pp 34-36.

<sup>37</sup> AIHW (2017) cited in Qu, L., Lahausse, J., Carson, R. (2018), *Working Together to Care for Kids: A survey of foster and relative/kinship carers*. (Research Report). Melbourne: Australian Institute of Family Studies, p. 1.

<sup>38</sup> Rhoades, H. (2014). 'Children, families and the law: A view of the past with an eye to the future', in Hayes, A., Higgins, D. (Eds.), *Families, policy and the law: Selected essays on contemporary issue for Australia*. Melbourne: Australian Institute of Family Studies, p. 172.



Grandparents become the primary carers of their grandchildren formally or informally:

- formally, following a parenting order made by the Family Court or Federal Circuit Court,
- via a state or territory government application to the Children's court for a child to live with her or his grandparents, or
- by informal arrangements (sometimes involving state child protection authorities).<sup>39</sup>

The nature of the care arrangement in turn impacts the financial and other supports grandparent carers are entitled to:

*The amounts and types of allowances for kinship carers vary depending on whether a state or federal order has been issued, or if the order was for guardianship. Where children have been living informally with a kinship carer, the process to formalise the arrangement can be costly.*<sup>40</sup>

As well as lack of financial support for informal grandparent carers there are daily practical challenges arising from their inability to make decisions around a child's education or health. For example, being unable to apply for a medicare card or enrol a child at school in the absence of a birth certificate.<sup>41</sup>

### **Aboriginal and Torres Strait Islander grandparent carers**

Aboriginal and Torres Strait Islander Children are overrepresented in out-of-home care and numbers are growing. In 2018, Aboriginal and Torres Strait Islander children were 10.2 times more likely to be living in out-of-home care than non-Indigenous Children.<sup>42</sup> Aboriginal and Torres Strait Islander children in out-of-home care experience a mix of kinship and foster care arrangements. Grandparents play a significant role in kinship care.

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<sup>39</sup> Brennan, D., Cass, B. (2014). 'Grandparents as primary carers of their grandchildren: Policy and practice insights from research', in Hayes, A., Higgins, D. (Eds.), *Families, policy and the law: Selected essays on contemporary issue for Australia*. Melbourne: Australian Institute of Family Studies, p. 109.

<sup>40</sup> Pearson, J., Spitzkowsky, M. (2019). 'Kinship Carers Support, For the Children in Their Care, Through the First Thousand Days'. P. 26., in FRSA, *Peer Reviewed Papers from the FRSA National Conference – New Horizons: Building the Future, Paving the Way*.

<sup>41</sup> Pearson, J., Spitzkowsky, M. (2019). 'Kinship Carers Support, For the Children in Their Care, Through the First Thousand Days'. P. 26., in FRSA, *Peer Reviewed Papers From the FRSA National Conference – New Horizons: Building the Future, Paving the Way, and FRSA Submission to Inquiry Into Grandparents Who Take Primary Responsibility For Raising Their Grandchildren (Submission No. 81)*, 12 March 2014, p. 2.

<sup>42</sup> Lewis, N., Weston, R., Burton, J., Young, J., Jayakody, N., Mastroianni, A., Tan, W., Parolini, A., Shlonsky, A., Tilbury, C. (2019) *The Family Matters Report 2019: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Australia*, SNAICC, p. 5.



### **The role of family and relationship services**

Family and relationship services can play an integral role in supporting grandparents as primary carers through support programs. Research shows that the placement of a child with a kinship carer, including grandparents, often provides better outcomes for the child creating a stronger sense of family identity and connectedness, including with culture.<sup>43</sup>

#### **Case Study: Samaritans Foundation<sup>44</sup>**

"A grandmother in her late sixties had a call from a FACS worker informing her that she has a 6-month-old grandson and her daughter wanted her to take on the full-time caring role for him. The grandmother did not know she had a grandson until this phone call. The baby boy had been placed in temporary foster care since birth. Once she agreed to take on this role FACS ceased involvement as it was now a family arrangement. The grandmother receives no support - financially, emotionally or with basic items like a cot, pram, highchair or car seat. There were no medical or health records; the grandmother was informed the baby may have been premature with a difficult delivery and he had some physical and possibly intellectual delays with ongoing therapy required. The child's birth had not been registered so there was no birth certificate, no Medicare card and no Centrelink Customer Reference Number (CRN). This created a great deal of stress for the grandmother.

Samaritans project worker first met this grandmother whilst visiting a group and passed on the referral to the case manager. The case manager's initial phone call to the grandmother was to have 'a listening ear' while she told her story. The grandmother acknowledged she was in shock, overwhelmed and in desperate need of support on how to parent a baby after nearly 40 years. The case manager let her know first and foremost her role was to support her through this journey, to ensure her own health and wellbeing would be not compromised or forgotten along the way. Case management would be able to help her make referrals to relevant services, obtain resources and advocate for her.

Together they identified the immediate needs and set up appointments with Samaritans outreach services, Centrelink, emergency relief and legal aid and in got in touch with Samaritans kinship care support group. The Case manager advocated with Centrelink social worker, Medicare, medical professionals and therapists. She met the grandmother in the community, doctors and therapist waiting rooms, hospital, Centrelink and local coffee shops. The role enabled her to be flexible to meet the demanding and varied needs of the grandmother. It has been a long slow journey. Though her grandson still has no birth certificate, his birth is now registered resulting in him obtaining a Medicare card, a CRN card and he is now able to attend family day-care.

Nearly one year later grandmother is working through the process for guardianship to ensure the best outcomes for her grandson. Grandmother is very proud as her grandson is now walking and saying his first words."

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<sup>43</sup> Pearson, J., Spitzkowsky, M. (2019). 'Kinship Carers support, for the children in their care, through the first 1000 days'. Samaritans Foundation. In FRSA, *Peer Reviewed papers from the FRSA 2019 National Conference – New Horizons: Building the future, Paving the Way*, p. 27.

<sup>44</sup> Direct extract from Pearson, J., Spitzkowsky, M. (2019). 'Kinship Carers support, for the children in their care, through the first 1000 days'. Samaritans Foundation. In FRSA, *Peer Reviewed papers from the FRSA 2019 National Conference – New Horizons: Building the future, Paving the Way*, p. 29.





FRSA recommends that the Committee consider practical ways of supporting grandparent carers to navigate a complex and daunting system. This includes accessing benefits to which they are entitled, respite care and assistance with practical matters such as support or legal information. Particular attention must be given to grandparents – and other kinship carers – in informal care roles.

**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;**

As outlined in our submission<sup>45</sup> to the ALRC Review of the Family Law System Issues Paper, FRSA notes that recent reports have identified significant concerns about the skills and knowledge of Family Law System professionals in a number of areas. These include deficiencies and gaps in relation to:

- understanding the nature and dynamics of family violence and child sexual abuse and their impact on children, including knowledge of the ways in which perpetrators of family violence can use the Family Law System to continue abuse,
- understanding the impacts of trauma on clients and an ability to practice in a trauma-informed way,
- the capacity to identify risk, including the risk of family violence and risk of suicide,
- cultural competency, including an understanding of Aboriginal and Torres Strait Islander kinship systems and child rearing practices and the particular experiences of family violence of Aboriginal and Torres Strait Islander peoples, and an understanding of the experiences and access to justice barriers affecting clients from culturally and linguistically diverse backgrounds, parents and children with disability, and LGBTIQ clients and families, and
- knowledge of the intersections of the family law, child protection and family violence systems.

**Core competencies of professionals working in the Family Law System**

We identify a number of core competencies that we perceive are integral for professionals working in the Family Law System under the larger themes:

**Family violence:** an understanding of family violence and its impact on each family member; family violence screening, assessment and safety planning; capacity to identify family violence, support victims and avoid supporting perpetrators to use legal processes to abuse; a know-how of what constitutes family violence and the

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<sup>45</sup> FRSA (11 May 2018). *FRSA Submission to the Australian Law Reform Commission Inquiry – Review of the Family Law System issues paper*. Submission no. 53, pp 49-54.



subtle nuances and control mechanisms of the perpetrator and the impact for victims.

**Child protection / development:** knowledge and application of Child Centred Approaches; training and understanding of child development stages (physically, emotionally, psychologically); training in child protection and what is harm to children; understanding the impact of parental conflict on children; child safety screening and assessment; strong understanding of children's needs in separation; to engage with parents with a child focused approach; ways of working with children safely and therapeutically.

**Social-emotional:** compassion, empathy and relational skills; a capacity to see themselves as a part of a service system and ability to work well with others in that system; an ability to form and maintain a non-judgmental working relationship with family members who enter the system; cultural awareness and minority group sensitivity (Culturally and linguistically diverse families, Aboriginal and Torres Strait Islander peoples, LGBTIQ etc.); understanding and appropriately responding to grief and loss; development of parenting skills / communication and conflict resolution.

**Other general competencies:** a thorough knowledge and understanding of the system, mandatory reporting; family law pathways and the Family Law Act; a tertiary understanding of the dynamics of family functioning; Knowledge and understanding of complex family structures, including LGBTIQ families and cultural awareness of additional competencies required by practitioners and those managing cases; conflict resolution/de-escalation skills including: collaborative practice to reduce adversarial approaches for identification and management of high conflict behaviours; A knowledge and understanding of not only the Family Law Act but the Child Protection Act and the Family & Domestic Violence Act; a basic training in counselling; and training on all the resources and funding available.

If we are to seriously consider a stronger prevention and early intervention model of service delivery (as discussed above), specialist expertise and skills will also require development for intake screening and assessment processes, to ensure risk assessments are conducted with rigour and services are tailored to the needs of clients.

### ***Building and maintaining competencies across the Family Law System***

FRSA concurs with the ALRC that:

- legislation should provide for “consistent criteria requiring family law and family violence expertise for the appointment of judicial officers, and that any legal practitioner undertaking family law work should be required to complete regular family violence training”, and
- Mandatory accreditation for private family report writers and Children's Contact Services should be introduced.<sup>46</sup>

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<sup>46</sup> ALRC (March 2019). *Family Law for the Future – An Inquiry into the Family Law System*, ALRC Report 135. Commonwealth of Australia. P. 385.





We further see improved training for Independent Children's Lawyers to enhance skills to work with children as a priority.

### ***Supporting the wellbeing of family law professionals***

It is also imperative that the wellbeing of family law professionals and practitioners is supported. Family Law Services providers in the FRSA network identify a number of ways this is best done (in no particular order of importance):

- ensure clinical supervision of all professionals in this system, including lawyers,
- Reduce caseloads,
- reduce pressure to get matters through the system, or increase staff,
- provide support and training around vicarious trauma,
- provide supervision with a focus on debriefing following cases of family violence in which practitioners might experience vicarious trauma,
- provide sector monitoring and reporting on the rate of practitioner distress, and provide needed assist and resources as a response,
- develop and maintain (refresh regularly) a common set of core competencies,
- diversify work in recognition of levels of complexity,
- increase access to professional development and training peer support networks,
- make available confidential mentoring/feedback sessions with other professionals working in the jurisdiction.

### **K. any related matters.**

#### ***Best interests of children***

As foreshadowed in the introduction to this submission, FRSA considers the wellbeing and best interests of the child as the focal point of the family law system. FRSA's position is that the family law system must adopt more child-focused approaches (incorporating the practitioner's knowledge of the research literature on children's development into the negotiation process)<sup>47</sup> and child-inclusive approaches (incorporating the views of the particular child who is subject to the process through the involvement of a specialist child consultant).<sup>48</sup> This currently occurs, albeit in a non-systemic way, in the services provided by FRSA members.

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<sup>47</sup> Webb, W & Moloney, L. 'Child-Focused Development Programs for Family Dispute Professionals: Recent Steps in the Evolution of Family Dispute Resolution Strategies in Australia' (2003) 9(1) Journal of Family Studies, p. 23.

<sup>48</sup> Moloney, L. & McIntosh, J. 'Child-Responsive Practices in Australian Family Law: Past Problems and Future Directions' (2004) 10(1) Journal of Family Studies, p. 71.



In the latter approach, the consultant speaks to the child about their experiences and views and feeds this information back to the parents during the dispute resolution process, with the aim of this information being the focus in negotiations.<sup>49</sup>

FRSA appreciates that the Family Law Act (1975, Cth s 60CC [3]) recognises the rights accorded to children and young people under the Convention on the Rights of Child, which include participation rights and freedom of expression (Article 13), access to information (Article 17), and to make their views known and participate in processes relevant to their care (Articles 9 and 12).

In the present family law system there are several ways the courts may receive information about the child's views (as articulated in the:

- through the appointment of an Independent Children's Lawyer who has the role of representing the child's best interests and ensure any views expressed by the child are put before the court,
- the preparation of a report for the court by a Family Consultant or external report writer, who are required to ascertain the child's views and include these views in the report, and
- the judicial officer meeting directly with the child (albeit this approach being rarely used).<sup>50</sup>

However, as reported by the Australian Institute of Family Studies (AIFS) in 2015, it is not uncommon for the court to not receive any independent information about the views of the child or young person in cases where an application for final orders is filed requiring resolution by judicial determination or consent (before or during trial).<sup>51</sup>

In a different study, AIFS found that children and young people report wanting to be listened to more – by their parents and by family law professionals.<sup>52</sup> Yet a poll conducted by the National Children's Commissioner in partnership with the University of Melbourne and the ABC's 'Behind the News' with 22,700 children aged 6-17 years revealed that the children's rights least likely to be met are "access to accurate information, being treated fairly, and *being able to participate in decisions that affect them*" (emphasis added).<sup>53</sup>

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<sup>49</sup> McIntosh J., 'Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors' (AFRC Issues Paper No 1, Australian Family Relationships Clearinghouse, 2007).

<sup>50</sup> Family Law Council (2016). *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems— Final Report*.

<sup>51</sup> Kaspiw, R. et al, 2015, 'Court Outcomes Project: Evaluation of the 2012 family violence Amendments' (Australian Institute of Family Studies 26–9).

<sup>52</sup> Carson, R., Dunstan, E., Dunstan, J., & Roopani, D. (2018). *Children and young people in separated families: Family law system experiences and needs*. Melbourne: Australian Institute of Family Studies. Pp vii-ix.

<sup>53</sup> Australian Human Rights Commission (1 November 2018). *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict: Submission to the Committee on the Rights of the Child*. P.18.



FRSA takes the position that it is vital for Family Law System professionals to take into consideration the experiences and perspectives of children by ensuring their participation—as well as their safety.

FRSA concurs with the findings in the Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems—Final Report (Family Law Council, 2016) that this occur outside as well as inside a court room—with judges endorsing the recommendation made by the Family Law Council in 2016 for judicial officers to more regularly meet directly with the child.

Often an Independent Children's Lawyer will present evidence on behalf of the child, and is often the only representative for the child in the room. However, the Independent Children's Lawyer is regularly criticised for not adequately representing the views of the child. Many children and young people reported negative or counterproductive experiences with Independent Children's Lawyers representing them,<sup>54</sup> including the need for more interaction with the Independent Children's Lawyer representing their interests in order to have court outcomes and how their views are fed into the court's decision-making process explained to them.<sup>55</sup> It is clear that there is serious misunderstanding about the current function and purpose of the ICL and as such, the role either requires a name change and/or a re-scoping of function and purpose.

The ALRC's final report attempts to remedy some of these issues, particularly in relation to court and legal processes. As previously noted, the specialist field of child inclusive practice (referred to in the ALRC issues and discussion papers as child inclusive mediation) should be more strongly supported and resourced in the out-of-court environment. This would improve outcomes for children and families in Australia.

## **CONCLUSION**

FRSA would welcome the opportunity to discuss any of the matters raised in our submission with the Committee.

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<sup>54</sup> Parkinson, P. & Cashmore, J. 'The Voice of a Child in Family Law Disputes' (Oxford University Press, 2008).

<sup>55</sup> Kaspiew, R. et al, 'Independent Children's Lawyers Study', n 330, p. 165–7.