

Possible Directions in Response to Recent Family Law System Reports

Purpose

FRSA has prepared this brief for member organisations to provide an initial response to the key findings common to three reports commissioned by the Attorney-General which may result in future changes to the delivery of family relationship service within the Family Law System.

This brief aims to assist FRSA member organisations to engage in the development of possible recommendations that respond to these reports by further strengthening and enhancing the delivery of services to separating and separated families.

The three major reports on the family law system released in January 2010 by the Attorney-General the Hon. Robert McClelland MP were:

- 1) The 'AIFS Evaluation' - *Evaluation of the 2006 Family Law Reforms* (December 2009)
- 2) The 'Chisholm Review' - *Family Courts Violence Review* (November, 2009) by Professor Richard Chisholm.
- 3) The 'FLC Family Violence Report' - *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (December, 2009), by the Family Law Council.

The Attorney-General's press release at the Launch indicated that the key findings and recommendations of each of these reports are now being considered by the Australian Government. FRSA and its member organisations seek to work in partnership with the Government to further strengthen the Family Law System.

The appendix to this brief contains a very short summary of the main findings of each Report as they relate to the provision of family relationship services. The following points present some considerations in policy and program delivery, based on the common findings.

Common findings - Common responses?

A common theme across all reports is the need to further enhance the safety and well being of all family members but particularly children across the Family Law System. It is important that strategies be developed with input from experts and practitioners from across the professional disciplines to ensure that alternatives are fully explored and unintended consequences identified before changes to legislation, policy and practices are enacted.

The development of these strategies requires enhanced, coordinated and ongoing collaboration between all those working in the Family Law System. Possible strategies relevant to the delivery of family relationship services are listed under three broad headings.

Closer collaboration between all jurisdictions

- The Family Law Council report proposes the establishment of an overarching cross-sector 'Practice Collective' coordinated by AIFS to maintain up-to-date information for reference by Judicial Officers, Family Lawyers, Family Consultants, Family Dispute Resolution Practitioners, Family Counselors and other professionals working with separated or separating families. This would contain information on international best practice models, patterns of shared parenting, child development considerations, research on child wellbeing and procedures for handling matters involving allegations of family violence or child abuse across the entire family law and child protection systems.
- All reports touch in some way on the issue of screening and assessment for violence and other risk factors. This has been taken up in a number of forums since the release of these reports with a focus on sharing information across the system, particularly between Family Dispute Resolution services and the Family Court. One of the proposals that has been put

forward is to remove confidentiality provisions that currently apply to Family Dispute Resolution. FRSA believes there are alternative mechanisms for improving information sharing where it is relevant to safety without wholesale removal of confidentiality. We are developing a more detailed statement on this and will be consulting with members on this issue.

- The potential to increase connections across jurisdictions, particularly the Family Court and state based child protection agencies is another clear strategy for increasing the safety of children in separating families. We suggest the inclusion of practical steps to achieve such connections in the 'National Framework for Protecting Australia's Children'.
- The benefits and achievements of the Family Pathways Networks are recognized in a number of reports with support for the further expansion of these networks and the inter-disciplinary opportunities they provide.

Need for legislative clarification / change

- All three Reports indicate a significant misconception in the community of the existing term 'equal'. One option is to replace the term 'equal' Shared Parental Responsibility with 'joint' Shared Parental Responsibility throughout the Act and define the term clearly. This action and the resulting publicity help correct that misunderstanding and reduce the time family law system practitioners spend on explaining the meaning of the law.
- Express the 'Best interests of the child' as an absolute without primary and secondary considerations being spelled out. Removing these cumbersome and 'contradictory' primary and secondary considerations would leave parents and the Judiciary with one question, i.e. Taking into account all the issues in each matter, what is in the best interests of this child / these children in this family?
- Amend the 'unfriendly parent' clause (including provision for separate costs orders) so as to acknowledge that in some cases parents need to take action to protect a child from risk rather than discourage such notification and investigation of cases potentially involving violence.
- Remove or alter the requirement to use a Form 4 to nominate Family Violence when filing parenting cases with the Court. This procedure is not being utilised by clients despite the evidence from all three reports that family violence is present in over half of all parenting disputes in the courts.
- Alter or remove the Section 60I Certificate requiring judgments by FDR Practitioners about 'Genuine Effort' in attendance at FDR and simply provide 'yes, no and unsuitable' options to attendance at FDR.

Professional Training / Community Education

- Joint training for legal service professionals (including court officials) and community services sector to facilitate a common understanding of and approach to best practice in family violence screening, assessment and appropriate referral & case management.
- A national education campaign promoting the normality of relationship challenges and encouraging families to seek help early and support their children's developmental needs.

Influencing the Next Steps

- FRSA will continue to consult with Members about the potential benefits and implications of these and other possible responses.
- Through our position on the Family Law System Reference Group, FRSA will participate in ongoing discussions about any potential responses and,
- FRSA will meet with and write to the Attorney General advocating for consideration of a range of changes that better respond to the complex needs of separating families.

Appendix

The 'AIFS Evaluation'

The comprehensive AIFS Evaluation findings will be subject to a range of interpretations in the community and across the family law system. The specific conclusions reported in this brief are those with significant potential to impact on family relationship service providers.

Key findings include just over 60% of separated parents saying they are in friendly or cooperative relationships up to 15 months after separation with just over 70% of parents saying they've sorted out their care arrangements. Of these 39% used family dispute resolution (FDR) to reach an agreement while many more say they simply worked it out in discussion with the other parent over time.

Over three quarters of Family Relationship Centre staff and FDR practitioners say that FDR is inappropriate for up to 25% of parents they see due to family violence. Around one in five parents reported safety concerns about ongoing contact with the child's other parent while 26% of mothers and 17% of fathers reported their partner had physically hurt them before or during separation. Sixteen percent of children from separated families are in shared care-time arrangements (i.e., 35-65% of time is spent with both parents) with 27% of fathers and 10% of mothers proposing equal time arrangements when going to court.

The evaluation found evidence that many parents misunderstand the changes to the Family Law Act, believing that equal shared parental responsibility (decision making and financial support) means equal shared care - or 50/50 time. This has made it difficult for parents, relationship service professionals, lawyers and the courts to get parents to focus on the best interests of the child.

While not making specific recommendations for change the AIFS Evaluation implies the need for some improvements to legislation and the service system.

Specifically, the Evaluation suggests the need for wider use of assessment and screening mechanisms across the service system as well as appropriate training across relevant disciplines, including legal and family relationship service practitioners. The Evaluation also calls for information about child safety and family violence to be more effectively shared between professionals in family relationship services, lawyers and the courts.

The Chisholm Review

Professor Chisholm finds that just as family violence happens throughout the community, it is especially likely to be present among families that separate and resort to the family law system. The review found that more than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, including those associated with substance abuse and mental ill-health. Professor Chisholm acknowledges that while violence is bad for everyone, it is particularly dangerous for children, whether or not it is directed specifically at them.

Professor Chisholm reported a recurring theme during the review was that family violence must be disclosed, understood, and acted upon. He believes this theme is helpful whether thinking as a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, the work of a counter clerk at a family court, or of a judicial officer of the court. Professor Chisholm believes the family law system, and each component of it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding.

In his Report Professor Chisholm calls for a number of legislative changes that would impact on family relationship services. One of the most significant is an amendment of the provisions relating to the confidentiality of information held by agencies outside the court, including dispute resolution agencies, so that information relevant to the assessment of the risks from violence or other causes could be more readily available to the courts.

Other recommendations are that the Government consider the desirability of providing additional funding that would support the work of contact centres, family dispute resolution agencies, legal aid, and family consultants in reducing the risk of family violence. Also, that the Government, the family law courts, and other agencies and bodies forming part of the family law system consider ways in which those working in the family law system might be better educated in relation to issues of family violence.

The FLC Family Violence Report

The Family Law Council calls for a number of reforms to improve co-ordination and collaboration between the state and territory child protection agencies, and the federal Family Law Act, including: the transportability of state family violence injunctive orders; the establishment of a national register of family and violence orders; and the establishment of a network data base which records family violence orders, and a residual family court power to require state Child Protection Agencies to become parties to Family Law Court proceedings about children.

This report focuses on family violence in the Family Law system across Australia. The report contends that according to current research, this visible pattern is only the tip of the iceberg of family violence, alcoholism, drug addiction and mental illness which is entrenched in Australia. The report provides advice on practical strategies to improve the coordination between family law and State and Territory family violence service systems and

In summary the report recommends that potentially impact on service delivery includes widening the definition of "family violence" in the Family Law Act to include a range of threatening behaviour.

The Family Law Council Report calls for the establishment of an expert panel under the direction of AIFS to create an easy-to-understand "common knowledge base" on the known patterns and effects of family violence under this wider definition to provide common and up-to-date information to all those involved in the family relationship and legal systems, including parents, relatives, counsellors, mediators, FRCs, legal aid officers, lawyers and courts.

The Council recommends a further report be prepared on whether FDRP should be required to provide a report to the Family Law Courts or other bodies in some or all structure where family violence is admitted or suspected and finally that consideration is given on how to educate the Australian public about certain widespread misunderstandings of the Family Law Act including the 'Unfriendly parent' clause, the meaning of equal parental responsibility and other common misconceptions.