

Family Law Reform
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Submission to Family Law Amendment Bill 2023 Draft

Thank you for the opportunity for the Australian Catholic University's Institute of Child Protection Studies to contribute to a review of the [Family Law Amendment Bill 2023](#) Draft.

The Institute is committed to improving the lives of children, young people, and their families. We conduct quality research, evaluation, training, consultation and knowledge translation for policy makers and practitioners. Nationally recognised for our expertise in child protection, we aim to make a real impact on critical social issues, child-centred practice, service systems and public policy.

The proposed amendments to the Bill aim to put children's safety and rights at the centre of family law. Their safety and their views are rightly placed as the guiding principles. It is pleasing to see that the Bill aims to give greater prominence to children and young people and prioritises their safety concerns.

These changes reflect obligations recommended under the National Principles for Child Safe Organisations, an outcome of the Royal Commission into Institutional Responses to Child Sexual Abuse (to which the Institute contributed with research from children and young people about their sense of safety). The amendments also edge more closely towards Australia's human rights obligations, as a signatory to the UN Convention on the Rights of the Child.

Shifting the prime focus — from the automatic right of the parent to have access, to the safety and wellbeing of the child — offers a unique opportunity. We propose that a new body, separate from either state child protection services or the federal family law system, is established with highly qualified experts independently assessing parenting capability and safety of children. This would have the benefit of producing evidence of risk of harm and factors that may influence parenting arrangements to serve the best interest of a child.

These are our key messages in response to the amendments:

- Most cases within the family law system involve allegations and cross-allegations of family violence and child abuse with children directly involved. Many of those cases have a history of engagement with a statutory child protection system. Clearly these families with complex and multiple problems who are coming to the attention of the family law system must have their needs met.
- An independent body should be established to assess parenting capabilities and to assess the way parental responsibility is shared. The body should provide this assessment not only to the family law system, but also to state child protection authorities.
- An independent body should take a child-centred trauma-informed approach that acknowledges and responds to the high risk of trauma for children in the system.
- Children's advocacy centres could be used as a model for independent assessments for the family law system in Australia.

We invite you to read a more detailed explanation of our position outlined below.

The Institute of Child Protection Studies agrees to making our submission a public document.

Yours sincerely



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Response to Selected Schedules

Schedule 1: Amendments to the framework for making parenting orders

This amendment abandons the presumption of “shared parental responsibility”, which has been widely misunderstood to mean care shared equally between parents. Shared care is unsuitable for families with the complex needs and risk factors that come before the court.

There is indisputable evidence about the complexity of cases coming into the family law system, that includes domestic abuse and family violence, child sexual abuse, drug and alcohol addiction, and serious mental health concerns.

Kaspiew et al. (2022) recently published a report looking at compliance with and enforcement of Family Law Parenting Orders in 300 files involving matters that went to Contravention Applications¹. In these families at the ‘pointy end’ of the family law system, they found that most (+90% of matters) involved allegations of family violence and child abuse with children directly involved in most cases. More than half of cases (55%) involved cross-allegations, as each party had made allegations of family violence against the other. More than a quarter had a history of engagement with a statutory child protection system. Matters typically dragged on, with one-third taking more than five years in the court from the start of the parenting matter. Clearly, some of the most complex and multi-problem families are coming to the attention of the family law system².

A parenting matter before a family law court focusing on the safety and wellbeing of children needs information not only about the “current risks that the child faces, but also the likely consequence of any change to the current patterns of residence/contact³”. In a paper assessing evidence of child abuse in family law cases, Higgins (2010) wrote:

“Evidence and informed opinion is needed about the future wellbeing of children, and safety risks that they may face, depending on what arrangements are made regarding spending time with both parents. Ultimately, this has to rely on the professional judgment of experts, trained in investigating cases of children at risk who can provide their expert opinions. Without a separately funded and empowered national child protection service (as proposed by the Family Law Council, 2002), such information from existing sources is vital to ensuring that children are neither placed at risk, nor unnecessarily denied time with a parent when it is safe to do so (i.e., that the future safety needs of children are reasonably met). ...

“Family law proceedings involving parenting disputes should not be seen as a second opportunity to achieve justice in relation to past events, when it is not the role of family courts to determine the guilt or innocence of the alleged person. The focus is on ensuring children's best interests; in particular, their future safety and security⁴.”

Currently there is no independent system that measures the capacity of parents to do a good job of parenting and to care safely for their children. Family courts do not independently

¹ Kaspiew, R., Carson, R., Rhoades, H., Qu, L., De Maio, J., Horsfall, B., & Stevens, E. (2022). Compliance with and enforcement of family law parenting orders: Views of professionals and judicial officers (Research report, 01/2022). ANROWS. <https://aifs.gov.au/sites/default/files/2022-04/Compliance-enforcement-of-FL-PO.pdf>

² Higgins, D. (2023). Child safety in a ‘systems void’: Addressing the gaps and overlaps between family law and child protection systems. Chapter accepted for forthcoming publication in D. Tunstan (Ed.) ‘Psycho-legal concepts for parenting in child custody and child protection’.

³ Higgins, D. J. (2010). “Sex, Lies and Videotapes”: Gathering and assessing evidence of child abuse in family law cases. *Psychiatry, Psychology and Law*, 17(3), 398–411. <https://doi.org/10.1080/13218710903566938>

⁴ Higgins 2023

make parenting assessments – they just arbitrate between two competing claims based on external evidence that the two parties present. A new independent authority would be best placed to provide assessments and give evidence about the safety of children.

Young people need to have their voices heard away from the court system, which is inherently adversarial with two parties battling each other. It is not a good place for children to be the ‘meat in the sandwich’. We need to have a more preventive system that could, as part of its function, conduct assessments of children’s capacity to decide, and provide hearings in a much calmer and less adversarial way that children can participate in about what is going to be in their best interests⁵.

We need a more robust way to understand the dynamics in the family, to understand children in the context of their homes, to see who is most in need of protection, to assess the safety needs of all members. Records from police and child welfare authorities can clarify the family’s history and the needs of children, but they are not sufficient, given the limitations of the respective roles of those two systems and their respective burdens of proof.

Since the report of the Royal Commission into Institutional Responses to Child Sexual Abuse (2017)⁶, we know that children who are silenced are not protected. Therefore, it is imperative that we find ways to allow children to safely participate in matters that have huge implications on their immediate daily lives, and of course for their long-term future⁷.

Reviews of the current system have consistently identified the need for an independent investigative authority to assess not just facts of past events, but more importantly, to provide independent advice about the potential for future risks (e.g., Australian Law Reform Commission, 2019⁸; Family Law Council, 2002⁹; Higgins, 2022¹⁰)¹¹. Currently, the system is too reliant on the capacities of parties to provide their own evidence – of their capability, and of the unsuitability of the other party. This is inherently at odds with what is in children’s best interest, when we want parents to be cooperating to the best of their ability.

Taking the process of assessing, and bringing evidence to the court, away from parties, and indeed, taking it out of the jurisdiction of the court, and making it an independent body with its own terms of reference and obligations, will allow for the strongest focus on what the strengths and limitations are of either party, what children’s needs and wishes are, and whether there are safety concerns – not only under current arrangements, but also the likely consequence of any change to the current patterns of residence/contact.

We highly recommend an investigative function that takes a child-centred trauma-informed approach. This approach is conducive to hearing children’s views about where they feel they will be safe, and how they are going to best be parented. A child-centred trauma-informed approach acknowledges and responds to the high risk of trauma for children in the system.

An independent body would be able to assess the way parental responsibility is shared and to assess parenting capabilities. Highly skilled professionals would look at the skills parents have and their attachment processes. The assessment would provide evidence to help the Court decide the extent of future parental responsibilities and consider specific time

⁵ Higgins 2023

⁶ <https://www.childabuseroyalcommission.gov.au/>

⁷ Higgins 2023

⁸ Australian Law Reform Commission. (2019). *Family Law for the Future — An Inquiry into the Family Law System*. <https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/>

⁹ Family Law Council (2002). *Family law and child protection: Final report*. <https://www.ag.gov.au/families-and-marriage/publications/family-law-and-child-protection-final-report>

¹⁰ Higgins, D. J. (2010). “Sex, Lies and Videotapes”: Gathering and assessing evidence of child abuse in family law cases. *Psychiatry, Psychology and Law*, 17(3), 398–411. <https://doi.org/10.1080/13218710903566938>

¹¹ Higgins 2023

arrangements that are in the child's best interests. A decision-making process informed by evidence would be more focused on the best interests of the child when considering equal or shared parental responsibility.

In some instances, having continued contact and shared responsibility is appropriate and is in children's best interests. But in other instances, ongoing parent-child contact is not in a child's best interests. An independent assessment would be helpful in differentiating these cases.

Currently, Australia does not have a reliable instrument or system to provide an assessment in a gentle and child-centred way. Such a system operates in a number of jurisdictions across the US, which has a much more robust system of children's advocacy centres¹². These centres interface between the criminal justice system and the child protection system, so the police and child protection workers can jointly investigate concerns about children. The children's advocacy centres could be used as a model for independent assessments for the family law system in Australia as well.

We need a separately funded and empowered national child protection service, as proposed by the Family Law Council, 2002¹³. Cases are likely to be ones where no criminal or child protection investigations have proceeded to court or clearly resolved the evidence. Without such evidence from an independent specialist service, family courts are 'flying blind' and children's safety at risk of being subject to whichever party can best play the game in the 'he vs she' private law system.

This is likely to continue unless we have an investigative service that is independent and skilled, and that functions for allegations that can sit across criminal, child protection, and family law jurisdictions. This applies not just to child sexual abuse allegations, but to the even more prevalent issue of children's exposure to family violence and other forms of child abuse and neglect¹⁴.

Schedule 4: Independent Children's Lawyers

Currently, Independent Children's Lawyers (ICLs) act on the best interests of children, but are not obliged to meet them directly, and do not take direct instructions from a young person or child. The proposed Bill introduces new requirements that ICLs meet with children over the age of five and give the child an opportunity to express a view.

This Schedule could also introduce a direct instruction model for young people, where a lawyer acts on the request of young people in the same way that adult parties 'instruct' a lawyer. However, a direct instruction model would not serve the interests of very young children well, or children who are preverbal, children with disability, or children who feel trapped because they love both parents but recognise inadequacies on both sides¹⁵. Our proposal, of a separately funded, independent assessment service, would assist ICLs in their role, as they would be able to rely on, and use evidence from highly experienced welfare professionals to guide their advocacy work.

¹² Herbert, J. L., & Bromfield, L. (2020). Worker perceptions of the Multi-Agency Investigation & Support Team (MIST): A process evaluation of a cross-agency response to severe child abuse. *Journal of Child Sexual Abuse*, 29, 638–658. <https://doi.org/10.1080/10538712.2019.1709241>

¹³ Family Law Council 2002

¹⁴ Higgins 2023

¹⁵ Higgins 2023