

# Queensland Family and Child Commission Submission

To: Australian Law Reform Commission

Date: 4 May 2018

Topic: Review of the Family Law System

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The Queensland Family and Child Commission (QFCC) was established on 1 July 2014, following the Queensland Child Protection Commission of Inquiry (QCPCI), to:

- promote the safety, wellbeing and best interests of children and young people
- promote and advocate the responsibility of families and communities to protect and care for their children and young people, and
- improve the child protection system.

The QFCC is pleased to provide a submission to the Australian Law Reform Commission's *Review of the Family Law System: Issues Paper*.

The QFCC supports reform of the Australian family law system to meet the needs of contemporary Australian families, particularly those experiencing vulnerability. The QFCC has provided feedback targeted in relation to specific areas of the family law system, including to promote the safety, wellbeing and best interests of children as paramount.

The QFCC also strongly recommends obtaining the views of children and young people to inform the review.

## Queensland Family and Child Commission

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## Objectives and principles

### Recommendation

The QFCC recommends:

- the role and objectives of the modern family law system should have the best interests of children at the centre and, for Aboriginal and Torres Strait Islander children, do so in a way which is culturally appropriate and meets their cultural needs
- a set of principles to guide the redevelopment of family law system should be underpinned by the best interests of children.

### Role and objectives

The QFCC supports modernising the role and objectives of the family law system to effectively and flexibly respond to families from diverse cultures and structures, and those with complex needs.

The importance of the family unit is recognised under the *International Covenant on Civil and Political Rights* which asserts that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.<sup>1</sup>

While this human right is important to the *Family Law Act 1975* (Cth), the notion of the family unit as a mother, father and children has evolved and does not reflect the diversity of family structures, such as Aboriginal and Torres Strait Islander families and same-sex couples.<sup>2</sup> In addition, the law does not necessarily accord with children’s views of the notion of family.<sup>3</sup>

The *Review of the Family Law System: Issues Paper* (the issues paper) recognises this shift in the family structures since the Family Law Act was introduced.<sup>4</sup> While family structures continue to evolve, families remain fundamental to health and wellbeing, particularly of children and young people.<sup>5</sup>

Family relationships may break down, with particularly detrimental effects for children and young people. The critical role for the family law system should therefore ensure the safety, wellbeing and best interests of children are protected and advanced.

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<sup>1</sup> United Nations Human Rights Office of the High Commissioner, *International Covenant on Civil and Political Rights*, 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, accessed 18 April 2018.

<sup>2</sup> Commonwealth of Australia, *Family Violence —A National Legal Response: Final Report*, Vol.1, 2010, [https://www.alrc.gov.au/publications/4.%20Purposes%20of%20Laws%20Relevant%20to%20Family%20Violence/family-law#\\_ftn77](https://www.alrc.gov.au/publications/4.%20Purposes%20of%20Laws%20Relevant%20to%20Family%20Violence/family-law#_ftn77) accessed 18 April 2018

<sup>3</sup> Rodes, H., ‘Children, families and the law: A view of the past with an eye to the future’, in Australian Institute of Family Studies (ed.) *Families, policy and the law: Selected essays on contemporary issues for Australia*, May 2014, <https://aifs.gov.au/sites/default/files/fpl17.pdf>, accessed 18 April 2018, pp. 172-173.

<sup>4</sup> Commonwealth of Australia (Australian Law Reform Commission), *Review of the Family Law System: Issues Paper*, 2018, <https://www.alrc.gov.au/publications/family-law-system-ip>, accessed 20 April 2018, p.17

<sup>5</sup> Weston, R. and Qu, L., ‘Trends in family transitions, forms and functioning: Essential issues for policy development and legislation’, in Australian Institute of Family Studies (ed.), *Families, policy and the law: Selected essays on contemporary issues for Australian Families*, May 2014, <https://aifs.gov.au/sites/default/files/fpl2.pdf>, accessed 28 March 2018, p. 17.

This accords with Semple and Bala's recognition of the state's three policy goals when family relationships break down:

- advancing children's interests
- protecting adults' rights
- cost-effectiveness.<sup>6</sup>

The focus on protecting and advancing the safety, wellbeing and best interests of children and young people should be universal to all who have contact with family law system. It is important that for Aboriginal and Torres Strait Islander children and young people, the role is undertaken in a culturally appropriate way with consideration to their particular cultural needs.

For example, the need for a holistic approach to advance the best interests of Aboriginal and Torres Strait Islander children is recognised in Queensland's strategy for Aboriginal and Torres Strait Islander children, *Our Way: A generational strategy for Aboriginal and Torres Strait Islander children and families 2017-2037*.<sup>7</sup>

## Principles

The QFCC supports the development of an overarching set of principles for the family law system. These should be underpinned by Australia's human rights obligations.

In 1990, Australia ratified the *Convention on the Rights of the Child* (the CRC), meaning Australia has a responsibility for children to experience their rights under the treaty.<sup>8</sup> The key principles of the CRC are the rights for children to:

- enjoy their rights without discrimination (article 2)
- have their best interests respected (article 3)
- survival and development (article 6)
- express their views (article 12).<sup>9</sup>

The report, *Out of the Maze: Pathways to the future for families experiencing separation*, takes the position that family law system reforms should be based upon the principle of the best interests of the child. This report advises 'reforms to the family law system should start from this foundation and

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<sup>6</sup> Semple, N. and Bala, N., *Reforming Ontario's Family Justice System: An Evidence-Based Approach*, Association of Family and Conciliation Courts, Ontario Chapter, 2013, <https://scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1003&context=lawpub>, accessed 20 April 2018, pp. 4-5.

<sup>7</sup> The State of Queensland (Department of Communities, Child Safety and Disability Services), *Our Way: A generational strategy for Aboriginal and Torres Strait Islander children and families 2017-2037*, 2017, <https://www.communities.qld.gov.au/resources/campaign/supporting-families/our-way.pdf>, accessed 20 April 2018.

<sup>8</sup> Australian Human Rights Commission, *Australia's commitment to children's rights and reporting to the UN*, October 2007, <https://www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un>, accessed 20 April 2018.

<sup>9</sup> Australian Human Rights Commission, *Australia's commitment to children's rights and reporting to the UN*, 2007, <https://www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un>, accessed 6 April 2018; Mitchell, M., *Child Protection: Every Child's Right*, National Child Protection Week Breakfast Launch, 9 September 2014, <https://www.humanrights.gov.au/news/speeches/child-protection-every-child-s-right>, accessed 6 April 2018.

attempt to build processes and services that would reinforce these rights and support parents in achieving the best outcomes for their children'.<sup>10</sup>

Support for the best interests of children is also provided under the *National Framework for Protecting Australia's Children 2009–2020* (the National Framework). The National Framework provides a collaborative approach to shift the response to the protection of children to one of promoting children's safety and wellbeing under a public health model.<sup>11</sup> The National Framework aims to drive reform across all systems in Australia and emphasises everyone's role to protect children, including that of the family law system.<sup>12</sup>

The National Framework has adopted a set of principles to drive its actions that accord with the CRC. Some of these principles include:

- the children's right to be free from neglect and abuse
- the children's best interests are paramount
- the participation of children and families in decisions, and
- children's rights are upheld by systems and institutions.<sup>13</sup>

The National Framework is a significant piece of national policy developed in collaboration with state, territory and Commonwealth governments to drive reform to protect Australia's children. It is therefore important that reform to the family law system, including the development of principles, is supported by the National Framework.

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<sup>10</sup> Commonwealth of Australia (Family Law Pathways Advisory Group), *Out of the Maze: Pathways to the future for families experiencing separation*, 2001, <https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/Out%20of%20the%20Maze%20report%20.pdf>, accessed 5 April 2018, p. 7.

<sup>11</sup> Commonwealth of Australia, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020*, 2009, <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>, accessed 23 April 2018, pp. 6-9.

<sup>12</sup> *Ibid.*, p. 12.

<sup>13</sup> *Ibid.*, p. 12.

## Recommendation

The QFCC recommends information about the family law system be:

- provided in plain English
- targeted at different audiences, including children, people who speak languages other than English, Aboriginal and Torres Strait Islander peoples and people with disabilities
- provided to meet the needs of a range of families, including culturally and linguistically diverse families
- made easily accessible and promoted to community and professionals.

## Accessible information

Where vulnerable groups of people are required to navigate complex legal systems, it is crucial they receive information which is targeted to them and meets their needs.

### Children and parents

This issue has been identified in reviews of the child protection system. In 2014, the QCPCI revealed that although the Childrens Court can hear the views of children when making decisions, ‘in reality the views of children and young people are not always sought or well presented to the court during proceedings’.<sup>14</sup>

Children should have an audible voice in proceedings where possible. This is in keeping with article 12 of the United Nations Convention on the Rights of the Child, which states a child has a right to ‘the opportunity to be heard in any judicial or administrative proceedings affecting the child’.<sup>15</sup>

There is an opportunity here to support children to express their views during proceedings by providing information to children, in child-friendly formats, about their rights and what they can expect at court.

This was a key recommendation of the QCPCI, which the QFCC has implemented in the form of a booklet and poster available online and distributed to hospitals, Child Safety Service Centres and legal centres across Queensland. The book and the poster are written and presented in child-friendly ways, outlining children’s rights, how the child protection system works, and what children can expect at court.<sup>16</sup>

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<sup>14</sup> Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection*, 2013, [http://www.childprotectioninquiry.qld.gov.au/\\_data/assets/pdf\\_file/0017/202625/qccpi-final-report-web-version.pdf](http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0017/202625/qccpi-final-report-web-version.pdf), accessed 18 April 2018, p. 472.

<sup>15</sup> United Nations Office of the High Commissioner of Human Rights, *Convention on the Rights of the Child*, 1989, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>, accessed 18 April 2018.

<sup>16</sup> State of Queensland (Queensland Family and Child Commission), *Finding out about child protection in Queensland*, 2016, <http://www.qfcc.qld.gov.au/finding-out-about-child-protection-queensland>, accessed 18 April 2018; State of Queensland (Queensland Family and Child Commission), *Did you know? Key facts for children and young people*, 2016, <http://www.qfcc.qld.gov.au/did-you-know-key-facts-children-and-young-people>, accessed 18 April 2018.

The QFCC has also worked with the South West Brisbane Legal Centre to produce a broader *Information kit on child protection for parents*, to help parents to understand their rights in the child protection system and navigate the legal process.<sup>17</sup>

Similar information resources for children and parents engaging with the family law system could help children to express their views, and parents to understand the legal process and seek help where required.

In consultations with stakeholders, the QFCC heard the booklet was particularly useful to support adults explaining concepts and processes to children. This suggests the booklets may be helpful if the family law system adopts case workers or ‘navigators’ to help families with multiple needs to navigate the family law system.

There are also opportunities to develop future resources to meet the targeted needs of particular vulnerable groups. For children, it may be beneficial to prepare information online and promote these through child and community platforms.

### **Culturally and linguistically diverse communities**

To reach culturally and linguistically diverse groups, resources could be published in multiple languages, targeted to meet the needs of people who lack a broad understanding of the family law system. In 2012, the Family Law Council revealed that ‘parents who have recently arrived in Australia may be surprised to learn that the subject of parenting is governed by law’.<sup>18</sup> Family relationships may be considered a private matter, and people may not understand the legal underpinnings of these relationships in Australia.<sup>19</sup>

Some recently-arrived families may have low levels of English proficiency, but may also have limited literacy in any language. This means translated documents may not be enough to adequately inform these communities about their rights, particularly where Australian law and processes are complex and differ substantially from their previous experience.<sup>20</sup>

For these groups, it may also be beneficial to provide information in the form of podcasts or audio-visual presentations, in different languages. The information should be presented in clear and culturally responsive language, should provide an overview of the rights of families and children, and should not assume familiarity with the Australian legal system.

### **Aboriginal and Torres Strait Islander peoples**

Among the *Our Way* strategy’s priorities is to ensure families have access to information, advice and support to enable them to deal with life challenges.<sup>21</sup>

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<sup>17</sup> State of Queensland (Queensland Family and Child Commission), *Information kit on child protection for parents*, 2016, <http://www.qfcc.qld.gov.au/information-kit-child-protection-parents>, accessed 18 April 2018.

<sup>18</sup> Family Law Council, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, 2012, <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/ImprovingtheFamilyLawSystemforClientsfromCulturallyandLinguisticallyDiverseBackgrounds.PDF>, accessed 18 April 2018, p. 32.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid., p. 6.

*Our Way* was developed in partnership with Family Matters, a national campaign led by more than 150 Aboriginal, Torres Strait Islander and non-Indigenous organisations across Australia.

An important aspect of the *Our Way* strategy is connection to culture. Aboriginal and Torres Strait Islander peoples in Australia are very culturally diverse,<sup>22</sup> and culture differs in different locations across the continent.

Connection to culture is known to help protect Aboriginal and Torres Strait Islander children from abuse,<sup>23</sup> and contributes to health outcomes in Aboriginal and Torres Strait Islander communities.<sup>24</sup>

The *Our Way* strategy states Aboriginal and Torres Strait Islander children and families are more likely to succeed when they are empowered by services that are 'accessible, culturally respectful and safe, and the importance of culture and connection is deeply understood'.<sup>25</sup>

This includes support which understands the importance of complex kinship systems. Aboriginal and Torres Strait Islander kinship systems extend beyond immediate family, including members of linguistic groups and sometimes neighbouring groups as relatives.<sup>26</sup> These complex kinship systems place 'each person in relationship to every other person in the group'.<sup>27</sup>

Within some kinship systems, people in kinship networks are viewed 'in many important respects as being no different from one's 'actual' father, mother, son or daughter'.<sup>28</sup> This is central to the functioning of traditional and contemporary Aboriginal and Torres Strait Islander communities, within urban as well as remote regions.<sup>29</sup>

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<sup>22</sup> Bourke, E. and Bourke, C., 'Aboriginal families in Australia', in Australian Institute of Family Studies (ed.) *Families and cultural diversity in Australia*, December 1995, <https://aifs.gov.au/publications/families-and-cultural-diversity-australia/3-aboriginal-families-australia>, accessed 6 March 2018.

<sup>23</sup> Anderson, P., Bamblett, M., Bessarab, D., Bromfield, L., Chan, S., Maddock, G., Menzies, K., O'Connell, M., Pearson, G., Walker, R., Wright, M. (2017) *Aboriginal and Torres Strait Islander children and child sexual abuse in institutional settings*, report for the Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, [https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research\\_report\\_-\\_aboriginal\\_and\\_torres\\_strait\\_islander\\_children\\_and\\_child\\_sexual\\_abuse\\_in\\_institutional\\_contexts\\_-\\_causes.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research_report_-_aboriginal_and_torres_strait_islander_children_and_child_sexual_abuse_in_institutional_contexts_-_causes.pdf), accessed 6 March 2018.

<sup>24</sup> Freeman, T., Edwards, T., Baum, F., Lawless, A., Jolley, G., Javanparast, S. and Francis, T., 'Cultural respect strategies in Australian Aboriginal primary health care services: beyond education and training of practitioners', *Australian and New Zealand Journal of Public Health*, Vol. 38, Iss. 4, 2014.

<sup>25</sup> State of Queensland (Department of Communities, Child Safety and Disability Services), *Our Way: a generational strategy for Aboriginal and Torres Strait Islander children and families 2017-2037*, 2016, <https://www.communities.qld.gov.au/resources/campaign/supporting-families/our-way.pdf>, accessed 18 April 2018, p. 12.

<sup>26</sup> Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Volume 1*, Commonwealth of Australia, Canberra, p. 183, accessed 25 January 2018, <https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-1.pdf>.

<sup>27</sup> Dugdeon, P., Wright, M., Paradies, Y., Garvey, D and Walker, I 2014, 'Aboriginal social, cultural and historical contexts' in Dugdeon, P., Milroy, H., and Walker, R. eds. *Working together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice*, Commonwealth of Australia, p. 5.

<sup>28</sup> Morphy, F 2007, 'Uncontained subjects: 'population' and 'household' in remote Aboriginal Australia', *Journal of Population Research*, Vol. 24, No. 2, p. 178.

<sup>29</sup> Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Volume 1*, Commonwealth of Australia, Canberra, p. 183, accessed 25 January 2018, <https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-1.pdf>.

Recruitment of culturally-competent staff with skills and knowledge about culture may also help to provide support to Aboriginal and Torres Strait Islander peoples. To use correctional services as an example, the Western Australian Office of the Inspector of Custodial Services has shown that:

Aboriginal prisoners will seek out Aboriginal staff for support and assistance. This has many benefits, including building communication, bridging the gap between staff and prisoners, reducing risks to both prisoners and staff, and improving the prospects of rehabilitation.<sup>30</sup>

It follows that recruitment of an Aboriginal and Torres Strait Islander workforce would be beneficial to Aboriginal and Torres Strait Islander peoples interacting with the family law system.

The *Our Way* approach suggests improvements to the family law system aimed at supporting Aboriginal and Torres Strait Islander peoples should be co-developed in true partnership with Aboriginal and Torres Strait Islander organisations and communities.

As the *Our Way* strategy states, ‘when Aboriginal and Torres Strait Islander peoples are given the opportunity to decide, design, and deliver services in their communities, it is more likely these services will be culturally safe and responsive’.<sup>31</sup>

## Legal principles in relation to parenting and property

### Recommendation

The QFCC recommends:

- obtaining the views of children and young people
- maintaining the best interests of children as a paramount principle
- prioritising the protection of children as an overarching principle
- establishing a consistent definition of family violence.

### Views of children and young people

Children and young people can be adversely affected by the outcomes of the Family Law Act and should be asked for their views about how to produce the best outcomes for them.

The best interests of the child is the paramount consideration for the court in deciding parenting orders.<sup>32</sup> The best interests of the child is supported by Australia’s human rights obligations under

<sup>30</sup> Office of the Inspector of Custodial Services (WA) 2016, *Recruitment and retention of Aboriginal staff in the Department of Corrective Services*, p. i, [http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3914190a9bae86fbfde800b348257fd20032c279/\\$file/4190.pdf](http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3914190a9bae86fbfde800b348257fd20032c279/$file/4190.pdf).

<sup>31</sup> State of Queensland (Department of Communities, Child Safety and Disability Services), *Our Way: a generational strategy for Aboriginal and Torres Strait Islander children and families 2017-2037*, 2016, <https://www.communities.qld.gov.au/resources/campaign/supporting-families/our-way.pdf>, accessed 18 April 2018, p. 12.

<sup>32</sup> *Family Law Act 1975* (Cth), s. 60CA; Commonwealth of Australia (Australian Law Reform Commission), *Review of the Family Law System: Issues Paper*, 2018, <https://www.alrc.gov.au/publications/family-law-system-ip>, accessed 2 May 2018, p.41



the CRC, specifically under Article 3.<sup>33</sup> The CRC also holds a right for children to express their own views under Article 12:

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.<sup>34</sup>

The Family Law Act also allows for consideration of children's views.<sup>35</sup> To understand what is best for children and young people in the family law system, the QFCC recommends asking children and young people themselves.

For example, the QFCC is currently seeking the views of children and young people to inform its Growing up in Queensland project. This project aims to hear the views of children and young people aged 4 to 18 about their opportunities, challenges and supports needed to live safely and succeed.<sup>36</sup> Through focus groups being held for this project to learn about young people's worries and hopes, some young people have provided their views about how to improve the family system for children and young people. Children and young people have said:

- all children need to have a say in where they live
- there should not be a presumption for children and young people to live with their mother, and
- more support is needed for young people involved in the court process and information needs to be provided to them about the outcomes of the court process and what the decisions mean for them.

Children and young people are being consulted in relation to family law matters under a current project being undertaken by the Australian Institute of Family Studies (AIFS), *Children and young people in separated families*. The AIFS describes this project as:

designed to build on the existing empirical base on separated families and to develop a better understanding of the experiences of children and young people after the separation of their parents and the extent to which their needs are met by the existing family law system services.<sup>37</sup>

The project will involve in-depth, semi-structured individual interviews with children and young people aged 10-17 years of age. A short separate interview will also be undertaken with one parent of the child or young person.<sup>38</sup>

In addition, the National Children's Commissioner explains in her *Children's Rights Report 2017* that the AIFS interviews will explore issues such as:

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<sup>33</sup> United Nations Office of the High Commissioner of Human Rights, *Convention on the Rights of the Child*, 1989, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>, accessed 2 May 2018

<sup>34</sup> Ibid., accessed 18 April 2018.

<sup>35</sup> *Family Law Act 1975* (Cth), s. 60CC(3)(a).

<sup>36</sup> Queensland Family and Child Commission, *Frequently asked questions*, 2018, <https://www.qfcc.qld.gov.au/frequently-asked-questions>, accessed 3 May 2018

<sup>37</sup> Australian Institute of Family Studies, *Children and young people in separated families*, <https://aifs.gov.au/projects/children-and-young-people-separated-families>, accessed 23 April 2018.

<sup>38</sup> Ibid.

- ‘the services and supports that children find to be of assistance in dealing with parental separation
- the issues of importance from the perspective of children when parenting arrangements are made
- the nature of children’s experiences where their families have used family law system services (including their acknowledgement and participation in decision-making)
- the characteristics of effective professional practice from the perspective of children.’<sup>39</sup>

Additionally, the National Children’s Commissioner herself has sought the views of children impacted by family and domestic violence in relation to their experience with the family law system. The National Children’s Commissioner reported that the children’s issues included:

- ‘they felt they had no rights, they were not properly listened to, and their voice wasn’t important
- they didn’t feel they were believed, and they felt an adult’s word was taken over theirs
- court processes and the ways that they could participate were not properly explained to them
- they felt that being involved with courts over many years is really bad for children.’<sup>40</sup>

The QFCC encourages this review of the family law system to use the findings from both the AIFS and the National Children’s Commissioner’s discussions to inform its considerations. As well as using the findings from these particular projects, the QFCC encourages the review itself to seek out the views of children and young people. This may be by way of establishing a specific committee attached to the review comprising children and young people with lived experience of the family law system, or undertaking planned interviews with children and young people to obtain their views.

Whichever process is adopted to hear the views of children and young people and enable them to participate in this review, the views of children and young people must be heard, taken seriously and acted upon.

### **Best interests of children**

There has been some criticism that the best interests principle lacks certainty.<sup>41</sup> This is understandable given that the concept of ‘best interests’ can be subjective.

Despite this criticism, the QFCC supports maintaining the best interests principle. The QFCC agrees with stakeholder feedback to the ALRC that the principle is valuable as a core decision making tool for matters in relation to children and it ensures the interests of children over others.<sup>42</sup>

The QFCC acknowledges the analysis noted in paragraph 130 of the issues paper in relation to the best interests decision-making framework.<sup>43</sup> The QFCC supports the continued use of a framework to determine best interests in order to provide guidance for judicial officers.

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<sup>39</sup> Australian Human Rights Commission (National Children’s Commissioner), *Children’s Rights Report 2017*, [https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_CRR\\_2017.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2017.pdf), 2017, accessed 19 April 2018, p. 34.

<sup>40</sup> Ibid., p.34

<sup>41</sup> Commonwealth of Australia (Australian Law Reform Commission), *Seen and heard: priority for children in the legal process*, ALRC 84, 1997, <https://www.alrc.gov.au/publications/report-84>, accessed 18 April 2018.

<sup>42</sup> Ibid.

<sup>43</sup> Commonwealth of Australia (Australian Law Reform Commission), *Review of the Family Law System: Issues Paper*, 2018, <https://www.alrc.gov.au/publications/family-law-system-ip>, accessed 20 April 2018, p. 42.

## Prioritising the protection of children

It is also acknowledged that the courts must give greater weight to the need to protect children from harm over the child having a meaningful relationship with both parents.<sup>44</sup> However, the QFCC supports the suggestion in the issues paper to prioritise the protection of children from harm.<sup>45</sup>

In its submission to the Review of the *Domestic and Family Violence Protection Act 2012* in 2016, the QFCC advocated for resolving ‘inconsistencies between state and Commonwealth legislative instruments’.<sup>46</sup> This was to ensure the protection of aggrieved parties from domestic and family violence.

Furthermore, the *Not Now, Not Ever* report of the Special Taskforce on Domestic and Family Violence in Queensland (the Taskforce) recognised the complexity of the connection of domestic and family violence with family law.<sup>47</sup> Concerns raised by individuals to the Taskforce included the high importance placed by the family law courts on the parent and child relationship, with less consideration for the best interests of the child.

The QFCC holds the view that the primary consideration for determining what is in the child’s best interests should be the need to protect the child from harm. The legislation should be drafted in such a way to make this explicitly clear. While there is a benefit to the child having a meaningful relationship with both parents, this should not be placed above a child’s protection.

## Consistent definition in relation to domestic and family violence

The QFCC recommends exploring a consistent definition of family violence, which was raised as a concern in the Issues Paper.<sup>48</sup> For example, the meaning of domestic violence under section 8 of the *Domestic and Family Violence Protection Act 2012* (Qld) includes the element of ‘fear’, which is not present in the definition of ‘family violence’ under the *Family Law Act 1975*.<sup>49</sup> The Queensland legislation defines domestic violence to be behaviour that ‘in any other way controls or dominates the second person and causes the second person to fear for the second person’s safety or wellbeing or that of someone else’.<sup>50</sup>

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<sup>44</sup> Ibid., p. 41.

<sup>45</sup> Ibid., p. 44.

<sup>46</sup> State of Queensland (Queensland Family and Child Commission), *Submission to the Review of the Domestic and Family Violence Protection Act 2012*, 2016, <http://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/submissions/qfcc-submission290216-domestic-family-violence-act2012.pdf>, accessed 19 April 2018, p. 6.

<sup>47</sup> Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*, 2015, <https://www.communities.qld.gov.au/gateway/end-domestic-family-violence/about/not-now-not-ever-report>, accessed 23 April 2018, pp. 269-278.

<sup>48</sup> Commonwealth of Australia (Australian Law Reform Commission), *Review of the Family Law System: Issues Paper*, 2018, <https://www.alrc.gov.au/publications/family-law-system-ip>, accessed 20 April 2018, p. 43.

<sup>49</sup> *Domestic and Family Violence Protection Act 2012* (Qld), s. 8.

<sup>50</sup> *Domestic and Family Violence Protection Act 2012* (Qld), s. 8(1)(f).

## Recommendation

The QFCC recommends:

- developing ways to prevent already vulnerable families being subjected to unnecessary further (and potentially duplicative) service provision and intervention
- ensuring parents are connected with the right services in a timely manner and improving court timeframes to prevent devastating affects to children and young people
- adopting a culturally appropriate approach and providing culturally safe environments.

## Problem solving decision-making processes

The QFCC supports approaches to improve a parent's capacity to parent their child and improve the lives of children and young people. An approach to alleviate the risk to children and young people within families experiencing vulnerability, where there is the additional pressure of conflict, is warranted. In particular, the QFCC supports connecting parents to appropriate services to improve a parent's safe parenting capacity and reducing risk to their child, as suggested in the Issues Paper.<sup>51</sup>

In its submission to the Family Law Council in relation to *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, the QFCC recommended that the Family Law Council provide advice to the then Attorney-General, that 'ensures families experiencing vulnerability are provided with access to appropriate secondary services to address pre-existing risk factors identified in, or prior to, progressing a family law matter.'<sup>52</sup> The QFCC agrees with stakeholder feedback in the issues paper regarding the importance to support parents in circumstances where the threshold for state child protection intervention has not been reached. This has been a focus of reform for the Queensland child protection system, stemming from the QCPCI's final report in 2013.

Queensland's child protection system is focused on preventing unnecessary intervention with families by supporting families earlier to receive services at the right time.<sup>53</sup> This occurs by connecting families, who are at risk of entering or re-entering the child protection system, to secondary support services to care for their child in the home. At present, this is achieved in Queensland through the Family and Child Connect and Intensive Family Support Services programs.

Family and Child Connect provides advice to families, as well as members of the community concerned for families, and connects families to appropriate services to support them.<sup>54</sup>

Intensive Family Support Services provide support for families experiencing vulnerability with more complex needs 'to strengthen the protective factors within the family to ensure children can

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<sup>51</sup> Commonwealth of Australia (Australian Law Reform Commission), *Review of the Family Law System: Issues Paper*, 2018, <https://www.alrc.gov.au/publications/family-law-system-ip>,

<sup>52</sup> <http://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/submissions/qfcc-submission-270415.PDF>, accessed 19 April 2018, p. 6.

<sup>53</sup> Queensland Government, *Supporting families earlier*, <https://www.communities.qld.gov.au/gateway/reform-and-renewal/child-and-family/supporting-families-earlier#s-2-intensive-family-support-services>, accessed 19 April 2018

<sup>54</sup> Family and Child Connect, *Family and Child Connect*, <http://familychildconnect.org.au/>, accessed 19 April 2018.

safely live at home.<sup>55</sup> Intensive Family Support Services supports families by providing in-home support, brokerage and connection to specialist services and case management.<sup>56</sup> A mix of services are offered including:

- personal support and development, such as parenting skills
- practical services, such as establishing daily routines or transport to medical appointments
- enabling services which connect the family to other supports, such as assistance with child care or housing, and
- clinical or therapeutic services, such as domestic violence intervention programs, counselling, family mediation and casework.<sup>57</sup>

The QFCC promoted in its submission to the Family Law Council in relation to *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* for families experiencing vulnerability to be connected with secondary services, particularly when risks or concerns are identified for the safety of a child in the family law system.<sup>58</sup>

In developing an approach which enhances parenting capacity, the QFCC recommends factors for consideration in connecting families with relevant services. Approaches need to be developed to prevent families being subjected to unnecessary further (and potentially duplicative) service provision and intervention, where the family has been connected with secondary services through Child Safety Services. This may mean, for example, the family law system considering the outcomes of the service provision already provided by Child Safety Services, such as through the Family and Child Connect and Intensive Family Support Services programs in Queensland.

In addition, it is essential parents are connected with the right services in a timely manner. While families with complex needs form the minority of families who access the family law system, the outcome of these families not being able to access the right services at the right time can have immense and devastating consequences, particularly for children and young people. Accordingly, sufficient resources should be invested to effectively connect parents with the right services in a timely manner to prevent delays and 'backlogs'.

People who work in family law, including lawyers, should be empowered and encouraged to refer families to secondary services at the start of and throughout a family's experience with the legal system. There may be benefit in building professional relationships between family law professionals and secondary service providers in areas such as child protection, domestic and family violence, housing and health in each state.

The QFCC also recommends that the approach adopted and relevant services provided should be culturally appropriate, offering culturally safe environments.

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<sup>55</sup> Queensland Government, *Role and functions of intensive family support services*, <https://www.communities.qld.gov.au/childsafety/child-safety-practice-manual/chapters/10-general/10-14-referrals-to-family-and-child-connect-or-intensive-family-support-services/key-steps/2-roles-and-functions-of-intensive-family-support-services>, accessed 19 April 2018.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> State of Queensland (Queensland Family and Child Commission), *Submission to the Family Law Council on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, 2015, <http://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/submissions/qfcc-submission-270415.PDF>, accessed 19 April 2018, p. 7.

## Recommendation

The QFCC:

- notes the Family Law Council's 2015 interim report, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, refers to the possibility of Family Law Court and children's courts exercising each other's powers in certain circumstances to provide a comprehensive legal avenue to protect the safety and wellbeing of children
- supports streamlining family law and child protection processes to limit the negative impacts of court proceedings on children and families.

## Intersection between the family law system and child protection

The separation of the family law and child protection systems is known to cause difficulties for some families, particularly those with complex needs. While child protection authorities often recommend families seek orders through the family law system where family members are seen to be viable carers for a child, research shows not all of these referrals are followed through.<sup>59</sup> The complexity of navigating two separate systems may account for this.

The Family Law Council's 2015 interim report, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* considers in detail the possibility to allow family law courts, and state and territory children's courts, to exercise each other's powers to protect children. These possibilities come with jurisdictional and resource implications, as the courts would need to exercise powers within different legal frameworks and with different responsibilities.

The QFCC supports streamlining family law and child protection processes to limit the negative impacts of court proceedings on children and families. The review should look at ways to strengthen protective action for families by navigating around the family's needs, rather than rely on families to navigate complex systems.

Any changes to the way these systems interact should be applied consistently across Australia to the fullest extent possible, keeping the safety, wellbeing and best interests of a child as the paramount principle.<sup>60</sup>

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<sup>59</sup> Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Interim Report*, 2015, <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>, accessed 19 April 2018.

<sup>60</sup> *Child Protection Act 1999* (Qld), s.5A.

## Recommendation

The QFCC recommends:

- staff working with children should be trained in trauma-informed approaches.

## Competence of professionals in the family law system

The QFCC recommends staff working with children in the family law system should be trained in trauma-response approaches.

Trauma-responsive programs aim to do no further harm by re-traumatising individuals. The approach should be a strengths-based framework responsive to the effects of trauma, understanding the way in which a young person's behaviour can adapt to trauma.<sup>61</sup> This is particularly important where children and young people in a family law matter are also involved in the child protection system.

Working with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), Quadara and Hunter suggest principles for a trauma-informed system of care include:

- having a sound understanding of the prevalence and nature of trauma arising from interpersonal violence and its impacts on other areas of life and people's functioning
- ensuring that organisational, operational and direct service-provision practices and procedures promote, not undermine, the physical, psychological and emotional safety of consumers and survivors
- adopting service cultures and practices that empower consumers in their recovery by emphasising autonomy, collaboration and strength-based approaches
- recognising and being responsive to the lived, social and cultural contexts of consumers (for example, recognising gender, race, culture and ethnicity), which shape their needs as well as recovery and healing pathways
- recognising the relational nature of both trauma and healing.<sup>62</sup>

In its final report, the Royal Commission recommended governments ensure policy frameworks for the delivery of human services recognise the benefits of implementing trauma-informed approaches

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<sup>61</sup> Wall, L, Higgins, D and Hunter, C 2016, *Trauma-informed care in child/family welfare services*, Child Family Community Australia paper no. 37, accessed 23 January 2018, <https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca37-trauma-informed-practice.pdf>.

<sup>62</sup> Quadara, A and Hunter, C 2016, *Principles of trauma-informed approaches to child sexual abuse: a discussion paper*, Australian Institute of Family Studies, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, pp. 5-6, accessed 23 January 2018, <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20Principles%20of%20trauma-informed%20approaches%20to%20child%20sexual%20abuse%20A%20discussion%20paper%20-%20Treatment%20and%20support%20needs.pdf>.

(recommendation 9.8).<sup>63</sup> Workers trained in trauma-informed approaches could also help to reduce the impact of proceedings on children and young people in the family law system.

The QFCC is currently completing the *Career and Capability Framework*, which aims to inform efforts in the child protection sector to attract, recruit and develop people with the right skills, knowledge and attributes. As part of this, the QFCC has released frameworks for frontline workforce positions that define functional and strategic requirements at all levels of the workforce.<sup>64</sup>

A similar framework could help the family law system identify the skills and attributes required to ensure staff have skills to support children and young people to participate in proceedings in ways that are trauma-informed and culturally safe.

### Recommendation

The QFCC recommends:

- meaningful participation by children in decisions that affect them
- effective risk management
- feedback from children and young people to inform and improve participation.

## Children's participation in the family law system

Children and young people have a right to participate in decisions made about them, as expressed in article 12 of the CRC.<sup>65</sup> This means children should be given an opportunity to meaningfully engage with court proceedings, in ways that are trauma-informed and culturally safe.

To make sure children's participation in family law matters is meaningful, the family law system could consider the child participation ladder, which moves from 'manipulation' and 'decoration' through to 'child initiated and directed' and 'child-initiated, shared decisions with adults'.<sup>66</sup>

To make sure children can participate safely in decisions, it is important to effectively manage risk. Participation should not take place where it could result in harm to the child. The Queensland Government has released a practice resource for children's participation in child protection proceedings, which states in some circumstances the capacity for children and young people to actively participate may be diminished or not appropriate.

These circumstances include:

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<sup>63</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report - Recommendations*, 2017, [https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_recommendations.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf), accessed 20 April 2018, p. 32.

<sup>64</sup> State of Queensland (Queensland Family and Child Commission), *Career and Capability Framework*, <https://www.qfcc.qld.gov.au/working-sector>, accessed 20 April 2018.

<sup>65</sup> United Nations Office of the High Commissioner of Human Rights, *Convention on the Rights of the Child*, 1989, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>, accessed 18 April 2018.

<sup>66</sup> Hart, R., *Children's Participation: From Tokenism to Citizenship*, 1992, [https://www.unicef-irc.org/publications/pdf/childrens\\_participation.pdf](https://www.unicef-irc.org/publications/pdf/childrens_participation.pdf), accessed 20 April 2018.



- when the risk of significant harm indicates the need for statutory intervention, irrespective of the child's, young person's or parent's wishes
- when the child or young person is unable to participate fully in decision-making (e.g. due to factors such as drug or alcohol abuse, or severe disability)
- when the child's or young person's age or ability prevents them from understanding and actively contributing to the decision-making process.<sup>67</sup>

It may also be useful to consider confidentiality, informed consent, suitable locations, ethical frameworks and procedures to support any children or young people who experience distress or negative consequences as a result of their participation.<sup>68</sup>

Finally, when assessing the success of participation activities, it can be useful to seek the feedback of children and young people who have participated in proceedings, and discuss how their participation could have been improved. This can be done at the same time as providing feedback to young people about the outcomes of their participation.<sup>69</sup>

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<sup>67</sup> Queensland Government, *Practice resource: participation of children and young people in decision-making*, <https://www.communities.qld.gov.au/resources/childsafety/practice-manual/practice-resource-participation-of-children-young-people-decision-making.pdf>, accessed 20 April 2018, p. 1.

<sup>68</sup> Advocate for Children and Young People (NSW), *Ethical considerations*, <https://www.acyp.nsw.gov.au/participation-resources/ethical-considerations>, accessed 20 April 2018.

<sup>69</sup> Queensland Government, *Practice resource: participation of children and young people in decision-making*, <https://www.communities.qld.gov.au/resources/childsafety/practice-manual/practice-resource-participation-of-children-young-people-decision-making.pdf>, accessed 20 April 2018, p. 5.