

18 December 2019

Committee Secretary
Joint Select Committee on Australia's Family Law System
PO Box 6100
Parliament House
Canberra ACT 2600

By email to: familylaw.sen@aph.gov.au

Dear Committee Secretary

Re: Australia's Family Law System Inquiry

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) welcomes the opportunity to provide a submission to the Inquiry into Australia's Family Law System (the Inquiry).

The RANZCP is the principal organisation representing the medical specialty of psychiatry in Australia and New Zealand and is responsible for training, educating and representing psychiatrists on policy issues. The RANZCP represents more than 6700 members in Australia and New Zealand, and is guided on policy matters by a range of expert committees, including the Faculty of Forensic Psychiatry, the Faculty of Adult Psychiatry, the Faculty of Child and Adolescent Psychiatry and the Family Violence Psychiatry Network Committee. The RANZCP is well positioned to provide assistance and advice about this issue due to the breadth of academic, clinical and service delivery expertise it represents.

Please see attached for the RANZCP's submission, which responds to a number of the Inquiry's terms of reference. This submission highlights a number of areas in which Australia's Family Law System could be improved to protect the mental health and wellbeing of adults and children who are involved in family law disputes.

If you would like to discuss any of the feedback provided, please contact Rosie Forster, Executive Manager, Practice, Policy and Partnerships via rosie.forster@ranzcp.org or by phone on (03) 9601 4943.

Yours sincerely



Associate Professor John Allan
President

Ref: 1621



The Royal
Australian &
New Zealand
College of
Psychiatrists



Joint Select Committee
Inquiry into Australia's Family Law System

December 2019

Improve the mental health of communities

Royal Australian and New Zealand College of Psychiatrists' submission

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About the Royal Australian and New Zealand College of Psychiatrists

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) is a membership organisation that prepares doctors to be medical specialists in the field of psychiatry, supports and enhances clinical practice, advocates for people affected by mental illness and advises governments on mental health care. The RANZCP is the peak body representing psychiatrists in Australia and New Zealand and as a bi-national college has strong ties with associations in the Asia-Pacific region.

The RANZCP has more than 6700 members including more than 5000 fully-qualified psychiatrists and 1600 members who are training to qualify as psychiatrists. Psychiatrists are clinical leaders in the provision of mental health care in the community and use a range of evidence-based treatments to support a person in their journey of recovery.

Key findings

- The mental health of adults and children is negatively impacted by relationship separation and family law proceedings.
- The nature of the family law system exacerbates difficulties experienced by families during proceedings, particularly families with complex needs.
- Family law professionals should receive training in relation to family violence, mental illness and disability and their relationship to family law matters.
- Clearer pathways should be developed between the family law system and mental health services to ensure that individuals and families can access the support and treatment they need during and after family law proceedings.
- To protect the mental health and wellbeing of individuals and preserve the therapeutic relationship between the individual and their medical practitioner, medical and, in particular, psychiatric records should be more rigorously protected from being released by subpoena.

Introduction

The RANZCP welcomes the opportunity to contribute to the Joint Select Committee's Inquiry into the Australian Family Law System (the Inquiry). The recommendations contained within this submission are based on extensive consultation with the following RANZCP Committees:

- Faculty of Forensic Psychiatry
- Section of Child and Adolescent Forensic Psychiatry
- Faculty of Child and Adolescent Psychiatry
- Faculty of Adult Psychiatry
- Community Collaboration Committee
- Section of Youth Mental Health
- Family Violence Psychiatry Network Committee.

The RANZCP is well positioned to provide assistance and advice about issues relevant to this Inquiry due to the breadth of academic, clinical and service delivery expertise it represents.

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Previously, the RANZCP has provided submissions to the following related inquiries:

- [the Australian Law Reform Commission's Review of the Family Law System](#)
- [the Standing Committee on Social Policy and Legal Affairs Committee's Parliamentary Inquiry into a better family law system to support and protect those affected by family violence](#)
- [the Senate Legal and Constitutional Affairs Committee's Inquiry into the Family Law Amendment \(Family Violence and Cross-examination of Parties\) Bill 2018](#)
- [the Senate Legal and Constitutional Affairs Committee's Family Law Amendment \(Family Violence and Other Measures\) Bill 2017](#)
- [the Senate Finance and Public Administration Committee's Inquiry into the Delivery of National Outcome 4 of the National Plan to Reduce Violence Against Women and their Children](#)

The RANZCP has also developed relevant guidance materials, including a professional practice guideline on [Australian Family Court Proceedings](#) and [Position Statement 89: Patient-psychiatrist confidentiality: the issue of subpoenas](#) for psychiatrists who are working in the family law area.

This submission will address the following of the Joint Committee's terms of reference:

- The impact of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings
- 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 disputes resolution practitioners
- Any related matters.

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

Mental health and wellbeing of adults

The RANZCP acknowledges that many adults who experience a relationship breakdown and subsequent family court proceedings experience psychological distress. Separation and/or family law proceedings may exacerbate existing mental health issues or contribute to the development of a mental health issue.

A significant proportion of parents experience mental health issues prior to separation. Separation 'is associated with increased rates of depression, suicidal behaviour and overall high levels of mental health problems' [1]. In 2014, 39% of parents reported having mental health problems before separation and 25.2% of parents identified as having experienced alcohol and drug use difficulties before separating from their partner [2]. Research has demonstrated that there is a bidirectional relationship between separation and mental health issues, indicating that 'separation leads to increased rates of mental health problems but also that mental health problems lead to increased risks of separation' [1]. Therefore, many individuals come to separation and subsequently family law proceedings with existing mental health issues. As a result of existing mental health issues, these individuals may be more vulnerable to the stressors associated with family law proceedings.

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Mental health issues and associated vulnerability may be compounded by factors such as family violence, child protection issues, migration, housing stress and involvement in the criminal law system [3]. These complex social and economic factors and their interaction with mental health are challenging for the family law system to address [4] and can exacerbate separation-related needs [5]. Individuals and families with complex needs may also have difficulties understanding the processes, terminology and rules associated with the family law jurisdiction and repeating their 'story' many times [6]. Navigating these challenges may aggravate existing mental health issues, particularly for individuals who are self-represented or change their legal representative multiple times.

To combat the impact that family law proceedings have on the mental health of adults, the RANZCP considers that relationships between the family law and mental health sectors should be strengthened to provide those with mental health issues with the support they need during and after family law proceedings [7].

Mental health and wellbeing of children

In addition to experiencing feelings of loss, guilt, fear and anger as a result of their parents separating [8], family law proceedings may have consequences for children's mental health.

The degree to which a child is able to share their views about family law proceedings, and in particular arrangements in relation to how and when they spend time with their parents, can impact their wellbeing. Currently, while the Court can consider a child's views in relation to parenting arrangements, their views (and especially the views of younger children) may not be adequately sought by family law professionals or given due weight by the Court. In many cases, children want to express their views in relation to parenting and care arrangements [9]. Some children have expressed that 'the court processes needed to better focus on the children and young people [involved] as they are the ones experiencing the impact of the court's decisions' [10]. There is also evidence which indicates that being inclusive of children's views in the course of parenting proceedings results in better outcomes for children, including children feel less distressed about their parents' conflict [11]. Specialist child and adolescent forensic psychiatrists can play an important role in children voicing their views in the context of a family law dispute. They can give the child an opportunity to express their wishes and assess the child for any mental health issues, while also being aware of how best to assist the Court with independent expert evidence. The RANZCP recognises that while parenting arrangements should be made in the best interests of the child, and protect their safety, the need to protect children should be balanced with their wishes (where present) to participate in proceedings [9]. However, the RANZCP also emphasises that care should be taken to ensure that children are not re-traumatised through participating in family law matters, especially where family violence is a factor [10].

Facilitating this shift in practice may require amendments to section 60CC of the Family Law Act 1975 (Cth) as suggested by the Australian Law Reform Commission (ALRC). Recommendation 5 of the ALRC Report sets out that 'the court may consider...any relevant views expressed by the child' in determining matters relating to children [9]. The RANZCP endorses this recommendation and believes that 'best interest' factors should include consideration of the child's 'developmental, psychological and emotional needs', as set out in that recommendation [9]. In the RANZCP's view, the recommended amendments more strongly promote the best interests of the child, prioritise their needs and wellbeing and encourage their participation in proceedings where appropriate. Implementing Recommendation 5 would also more adequately protect children under the age of three, who are unlikely to be able to express their views in relation to parenting arrangements as older children can.

Children have also identified that they find it helpful to speak to an understanding, independent professional about the impact that their parents' separation and subsequent proceedings have had on

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them, but expressed that they were not necessarily aware of mental health and support services available to them [10]. Children who did speak to mental health professionals, including psychiatrists, were able to 'build the confidence needed to express their views to their parents, to process their emotional state and to accept their parents' separation by facilitating coping strategies' [10]. The RANZCP believes that more work needs to be done to publicise services which are available for children in the post-separation context to ensure that children can access services which would benefit their mental health.

Additionally, the mental health workforce needs to be appropriately equipped and specialised in order to provide support appropriate for children and adolescents. There is currently a shortage of child and adolescent psychiatrists, with approximately only 15% of the psychiatry workforce providing child, adolescent, perinatal and infant and youth services [11]. Therefore, the RANZCP strongly encourages adequate funding needs being allocated to training for specialist child and adolescent psychiatrists, and to establish more supervisor positions to ensure that there are enough specialist psychiatrists to meet the needs of children, especially children involved in family law proceedings.

The nature of the family law system

The RANZCP considers that the extended duration of family law proceedings and current court backlogs, coupled with the complexity of proceedings and the uncertainty of entitlements and outcomes, negatively impact the mental health of both the adults and children involved in the proceedings [7]. Navigating the family law system 'can be re-traumatising for families who have experienced family violence', especially where individuals are required to tell their 'story' a number of times [4] or where a family has complex needs [6].

Family law proceedings are often adversarial in nature, and as such 'exacerbate conflict and trauma and are not in the best interests of children' [9], nor adults. With 62.4% of parents in 2014 reporting that they did not attempt to use non-adversarial family dispute resolution to resolve their dispute and with only 41.3% of parents in the same year reaching an agreement through family dispute resolution [2], more efforts need to be made to increase genuine non-adversarial attempts to resolve family law disputes in the interests of preventing further psychological trauma to parents and children.

To shorten the duration of proceedings and encourage the use of non-adversarial options, the RANZCP endorses the ALRC's recommendation that:

'The *Family Law Act 1975* (Cth) should include an overarching purpose of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony to as to minimise harm to children and their families' [9].

The RANZCP also endorses the Parliamentary Inquiry's recommendation that the Australian Government allocate additional resources to relieve the courts of this backlog so that family law disputes may be more quickly resolved [4]. We consider that adopting and implementing these recommendations will assist in minimising psychological harms and further trauma for children and adults involved in family law proceedings.

While moving towards more non-adversarial dispute resolution, it is also important to ensure that alternative dispute resolution models cater to the needs of families who have psychological issues and experiences of family violence, as well as Aboriginal and Torres Strait Islander communities, those with disabilities [9] and culturally and linguistically diverse populations. Any guidelines or service models

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should be informed by a trauma-informed approach, and incorporate pathways to mental health and support services.

Avenues to improve the performance and monitoring of professionals involved in family law proceedings

Family violence and training

Family violence can be a significant factor in family law proceedings, particularly matters relating to parenting [12]. There is a strong relationship between family violence and mental health issues and those who are mentally ill are more likely to experience family violence [13]. Experiencing family violence can result in a person developing post-traumatic stress disorder, major depressive illness, generalised anxiety disorder, substance abuse and self-harm behaviours. Children who are exposed to family violence can experience poorer educational and academic outcomes, impaired cognitive functioning, behavioural problems, depression, poor mental wellbeing and low self-esteem [14]. Family violence therefore has a lasting effect on the health and wellbeing of both adults and children who experience it. Interaction with the family law system may result in the re-traumatisation of individuals who have experienced family violence, due to family law professionals demonstrating a lack of sensitivity and/or specialised knowledge in dealing with family violence and the trauma borne from it.

Given the adverse psychological consequences which may flow from family violence, the RANZCP believes that it is crucial that the family law system protects individuals who have been exposed or subjected to such violence. We consider that it is important that there are clear pathways from the family law system to mental health services, and other services which can support social needs, to provide assistance to victims and their children. In the RANZCP's view, family law legal practitioners, court officers, Family Court report writers and other family law professionals should be required to complete training in relation to family violence and understanding the pathways for seeking mental health and support service referrals.

Such training has been recommended in a number of recent reports concerning the family law system and family violence [6]. It is important that this training incorporates trauma-informed practice principles [4]. Psychiatrists are well-equipped to provide guidance and advice in relation to how best trauma-informed practice can be incorporated into training modules.

Mental illness and stigma

The RANZCP is concerned that biases and stigma in relation to mental illness may operate within the family law system to negatively impact those who are parenting with mental illnesses and/or disabilities. The *Family Law Act 1975* (Cth) allows the Court to consider a parent's capacity to 'provide for the needs of the child' in making parenting orders. However, courts may equate mental illness [15] or disability with an incapacity to properly parent [9], due to misconceptions about the nature of a particular mental illness or disability [16]. This can affect parenting orders made, and reduce the time that a parent experiencing mental illness or a disability spends with their child, despite the mental illness or disability having no effect on the parent's parenting capacities or adversely affecting the child's best interests.

The RANZCP considers that appropriate training should be available to family law professionals in relation to mental health issues [16] and disabilities so that proper assessments can be made in relation to whether the parent's mental illness affects their capacity to parent. This training would decrease the tendency to equate mental illness with a lack of capacity, or with dangerous behaviours, eventually allowing more parents with a mental illness to care for and spend time with their children in a meaningful and safe way. Such training may also assist legal practitioners to assess whether a mentally ill client has capacity to instruct them, which may lead legal practitioners to better support their clients in accessing

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relevant decision-making supports or disability and mental health services throughout the family law process where they are needed.

The RANZCP is willing to provide advice to assist in developing such training, drawing on the expertise of its numerous committees.

Other related matters

Patient confidentiality and the use of subpoenas

The RANZCP has consistently advocated for the need to protect patient confidentiality through limiting parties' use of subpoenas to access medical and, in particular, psychiatric, records. The RANZCP's [position statement entitled Patient-psychiatrist confidentiality: the issues of subpoenas](#) comprehensively sets out the RANZCP's view in relation to this issue, and advocates for legislative reform which would permit the Court to use discretion when making an order to allow procurement of psychiatric records by subpoena.

The RANZCP is concerned that the release of medical and psychiatric records, particularly during family law proceedings, may cause trauma and distress for patients, and that the information uncovered in psychiatric records could be used to create a stigmatising narrative about the other parent in order to limit the time they spend with their children. This information could also disrupt the therapeutic relationship between the patient and their mental health professional, halting the progress of their mental health treatment and potentially having adverse effects for the patient's mental health. We are concerned that this medical information is 'weaponised' by other parties in efforts to 'win' the family law dispute, which could also cause further trauma.

As such, the RANZCP endorses the ALRC's recommendation that "the *Family Law Act 1975 (Cth)* should be amended to provide courts with an express statutory power to exclude evidence of 'protected confidences' [9]. We also endorse the ALRC's proposal that the Commonwealth Attorney-General's Department establish a working group, involving judicial, legal and social and medical bodies, including the RANZCP, to develop guidelines in relation to the use of sensitive medical records in family law proceedings [9]. The introduction of a 'protected confidences' discretion and guidelines are important in protecting the mental health and wellbeing of individuals throughout the family law process and safeguarding their privacy.

Conclusion

The RANZCP is concerned that the current family law system does not adequately safeguard the mental health of the adults, children and families who are involved in proceedings or work to prevent further trauma or harm to their mental health. To protect the safety and wellbeing of those parties, the RANZCP encourages the Australian Government to institute training for family law professionals in relation to family violence, mental illness and disability, establish an integrated system which links the family law system to health and social services and make amendments to the *Family Law Act 1975 (Cth)* as suggested throughout this submission. The RANZCP is willing to provide the Joint Committee and Commonwealth Government with further expert advice from its members to assist in the development and implementation of these protective measures in the interests of improving the mental health and wellbeing of the families and children affected by family law proceedings.

Should you wish to discuss this submission further, please contact Ms Rosie Forster, Executive Manager, Practice, Policy and Partnerships by phone on (03) 9601 4943 or at rosie.forster@ranzcp.org.

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