

Australian Government Attorney-General's Department
Family Law Amendment Bill 2023 (exposure draft)
February 2023

Improve the mental health of communities

About the Royal Australian and New Zealand College of Psychiatrists (RANZCP)

The 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 7900 members including more than 5600 qualified 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.

Introduction

The RANZCP welcomes the opportunity to provide a submission to the Australian Attorney-General's Department (the Department) [public consultation](#) on the exposure draft of the [Family Law Amendment Bill 2023](#).

The RANZCP shares the Government's aim for the development of legislation to make the Family Law Act (the Act) simpler and safer for families and their children. The [RANZCP's submission](#) to the [Joint Select Committee's Inquiry into the Australian Family Law System](#) (December 2019)(the Joint Select Inquiry) details the impact of family law proceedings on the health, safety and wellbeing of children and families involved, noting that:

- 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.
- The provision of training in relation to mental illness and their relationship to family law matters is required for family law professionals.
- The development of clearer pathways between the family law system and mental health services is key to ensuring that individuals and families can access the support and treatment they need during and after family law proceedings.
- The mental health of individuals and their therapeutic relationship with their medical practitioner, should be more rigorously protected from being released by subpoena.

Following RANZCP concern that the 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, we welcome the amendments as a thorough response to such concerns.

The submission provides the RANZCP's response to certain amended schedules, informed by feedback from a range of members from our expert committees and our [earlier response](#) to the Joint Select Inquiry.

Schedule 1 - Amendments to the framework for making parenting orders.

As identified in the RANZCP's [submission](#) on the [Joint Select Inquiry](#), the RANZCP supports the amended section 60CC (2)(c) – “the court must consider... the developmental, psychological and emotional needs of the child”). We note this follows the recommendation of the [Australian Law Reform Commission's \(ALRC\) Family Law Inquiry Report](#). Family law proceedings can impact the health, safety and wellbeing of children

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and families involved in those proceedings, in addition to experiencing feelings of loss, guilt, fear and anger as a result of their parents separating (see [RCPSYCH - Divorce or separation](#)).

Whilst the RANZCP welcomes the amended section 60CC to give primacy to the safety of children and protection from family violence (FV), a thorough implementation of the amendments must encompass support that recognises the long-term mental health impacts of FV.[1]

The RANZCP recognises the evidence that the memories of past FV and associated fear/lack of safety impact the developing brain and can be laid down even in nonverbal children. Research into adverse childhood events (ACE) conclusively demonstrates that exposure to emotional, sexual abuse and physical violence are associated with a range of several co-occurring mental and somatic disorders such as post-traumatic stress disorder, depression, borderline personality disorder, obesity and diabetes.[1]

ACE-related disorders are associated with enduring effects on the structure and function of neural stress-regulatory circuits (for example the hippocampus, the amygdala or the anterior cingulate cortex) and promote alterations in stress sensitivity and emotion regulation in later life, including hypersensitivity to any threat or stress in the future.[1] Post separation abuse (exercising control through childcare arrangements, technological abuse, pressuring children to communicate with the abusive parent) also produce ongoing conditions that promote fear and heightened negative emotional arousal. This reinforces long term harmful consequences for the child's brain development.

Based on this impact to neural structures, the most sensitive age periods for sexual abuse are 3-5 years old and 13-15 years for emotional abuse, with boys are more strongly impacted than girls (oestrogens are considered to have some protective effect).[1]

It is critical to provide safe and supportive environments, including training in FV matters for those involved in family law proceedings, for children during and after the family law process to address issues of ACEs and their mental health impacts. This must also coincide with early intervention efforts to ensure society prioritises preventing ACEs from occurring in the first place. Please see RANZCP Position Statement 102: [Family violence and mental health](#), and our professional practice guideline on [Australian Family Court Proceedings](#).

Schedule 4: Independent Children's Lawyers (ICL)

The RANZCP highlight that the degree to which a child can share their views about family law proceedings, in particular parenting arrangements, can ameliorate distress about their parents' conflict. While the Court can currently consider a child's views in relation to parenting arrangements, their views (especially those of younger children) may not be adequately sought by family law professionals and given due weight. In many cases, children want to express their views in relation to parenting and care arrangements.[2] Children have expressed that 'the court processes needed to better focus on the children and young people as they are the ones experiencing the impact of the court's decisions'.[3]

The RANZCP therefore support the amendments for ICL to directly meet with subject children, allowing children to meet with legal professionals to share their views. These promote the best interests of the child, prioritising their needs and wellbeing and encouraging their participation in proceedings where appropriate.

Schedule 6: Protecting sensitive information

In our [submission](#) to the [Joint Select Inquiry](#), the RANZCP noted concerns that the release of medical and psychiatric records as admitted evidence during family law proceedings may cause trauma and distress for patients, and that the information uncovered could be used to create a stigmatising narrative about the

other parent to limit the time they spend with their children (leading to further trauma). This information could also disrupt the therapeutic relationship between the patient and their mental health professional, halting the progress of their treatment and having adverse effects for their mental health.

The RANZCP advocates for the protection of patient confidentiality through limiting parties' use of subpoenas to access medical and psychiatric records through legislative reform which would permit the Court to use discretion when making an order to allow procurement of psychiatric records by subpoena. Please see RANZCP [Position Statement 89: Patient-psychiatrist confidentiality: the issues of subpoenas](#).

In keeping with the [Joint Select Inquiry's](#) recommendation that the Family Law Act should be amended to provide courts with an express statutory power to exclude evidence of 'protected confidences', the RANZCP welcome the proposed amendments as a means to provide courts with this power. This will guard against both patient harm and maintain public confidence in the family law system.

The RANZCP also welcomes the amendments' efforts to "provide clarity to parties, lawyers, judicial officers and protected confidants about the scope of the court's power". However, we note that the amendments do not include the proposal of the [ALRC Report](#), that the Department establish a working group, involving judicial, legal and social and medical bodies, to develop guidelines in relation to the use of sensitive medical records in family law proceedings. Guidelines would be an important inclusion to protect the mental health and wellbeing of individuals throughout the family law process, and the RANZCP offers our expertise for the creation of these.

Schedule 8: Establishing regulatory schemes for family law professionals

The RANZCP shares the Department's position on the merits of a regulatory scheme to recognise, monitor and enforce requirements and standards, and establish the consequences for non-compliance. This position is also supported by recommendations from both the [Joint Select Inquiry](#) and the [ALRC report](#) (recommendations 53, 9 and 30 respectively).

Whilst the RANZCP welcomes the establishment of regulatory schemes, we stress that they must not be onerous for child and/or forensic psychiatrists. It is important not to exclude the wealth of expertise in relevant subject content that psychiatrists have. The RANZCP contend that child and/or forensic certification (formal RANZCP certification) is sufficient for any regulatory scheme. The RANZCP offers its expertise to the development of these regulations would be developed following further consultation with stakeholders.

Other Related Matters

The RANZCP welcomes the amendments as the beginning of definitive reform using the recommendations of the both the [Joint Select Inquiry](#) and the [ALRC Family Law Inquiry Report](#). The RANZCP strongly recommends the continual review these amendments, alongside the development of adjacent policy initiatives to support their implementation. Key issues for consideration include:

The role of the psychiatrist and workforce shortages

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 children 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. 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'⁴.

Children have 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 them, but expressed that they were not necessarily aware of mental health and support services available to them.[1] More work needs to be done to publicise mental health services which are available for children in the post-separation context to ensure they can access services.

Additionally, the mental health workforce needs to be appropriately equipped and specialised to provide this support to children and adolescents. There is a shortage of child and adolescent psychiatrists, with approximately only 15% of the psychiatry workforce providing child, adolescent, perinatal and infant and youth services.[4] The RANZCP strongly encourages that adequate funding is allocated to training for specialist child and adolescent psychiatrists (including more supervisor positions) to ensure that there are enough specialist psychiatrists to meet the needs of children involved in family law proceedings. Please see the RANZCP Discussion Paper - [Child and adolescent psychiatry: meeting future workforce needs](#).

Mental illness and stigma

The RANZCP is concerned that biases and stigma in relation to mental illness operate within the family law system to negatively impact those who are parenting with mental illnesses and/or disabilities. The Family Law Act 1975 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 or disability with an incapacity to properly parent, due to misconceptions about the nature of a particular mental illness or disability.[5-6] 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.

Appropriate training should be available to family law professionals in relation to mental health issues, 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. The RANZCP is willing to provide advice to assist in developing such training, drawing on the expertise of its numerous committees.

References

- [1] Herzog JI, Schmahl C. Adverse Childhood Experiences and the Consequences on Neurobiological, Psychosocial, and Somatic Conditions Across the Lifespan. *Front Psychiatry*. 2018 Sep 4;9:420.
- [2] Australian Law Reform Commission. Family Law for the Future- An Inquiry into the Family Law System: Final Report. Queensland: Commonwealth of Australia; 2019. Report no. 35. Available at: <https://www.alrc.gov.au/inquiry/review-of-the-family-law-system/>
- [3] Carson R, Dunstan E, Dunstan J, Roopani D. Children and young people in separated families: Family law system experiences and needs: Final Report 2018. Melbourne: Australian Institute of Family Studies; 2015. Available at: https://aifs.gov.au/sites/default/files/publication-documents/1806_children_and_young_people_in_separated_families_report.pdf
- [4] Royal Australian and New Zealand College of Psychiatrists. Discussion Paper prepared by the Faculty of Child and Adolescent Psychiatry- Child and adolescent psychiatry: meeting future workforce needs. Royal Australian and New Zealand College of Psychiatrists; 2019. Available at: <https://www.ranzcp.org/files/resources/reports/fcap-workforce-discussion-paper-board-approved-may.aspx>
- [5] Pascoe J. Litigants with Mental Illness. *Australian Family Lawyer*. 2013; 23(2): 21-26.

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[6] Ryan J. Mental Health and Family Law - A Question of Degree. Federal Judicial Scholarship. 2006; 2.
Available at: <http://www.austlii.edu.au/au/journals/FedJSchol/2006/2.html>