



Law Council
OF AUSTRALIA

Improving the competency and accountability of family report writers

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council is grateful to its Family Law Section in the preparation of this submission. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development.

The Law Council also appreciates input received from the Queensland Law Society, the New South Wales Bar Association and Law Society Northern Territory, throughout the preparation of this submission.

General comments

1. Appropriately skilled family report writers are one of the essential elements of a properly functioning family law system and critical to the administration of justice for families before the Federal Circuit and Family Court of Australia (Division 1 and Division 2) (**the Courts**). Family reports are a critical component of evidence in family law matters and are highly influential in informing parenting arrangements following separation.² Judicial officers, parties and Independent Children's Lawyers (**ICLs**) are entitled to place significant weight on the observations and views expressed in family reports throughout the litigation process.
2. The Law Council also notes the use of family reports in negotiation between parties, both in formal mediation and informal settlement processes. In this regard, there can be significant reliance on family reports to inform settlement discussions and attempts to finalise matters outside of judicial determination, particularly in matters where ICLs are engaged.
3. It is therefore essential that family reports are prepared by highly skilled and appropriately qualified practitioners and the Law Council supports measures to achieve and maintain a high standard of engagement around and in the preparation of quality family reports and the competency of family report writers.
4. However, issues relating to competency and accountability of family report writers cannot be addressed in a vacuum. Rather, the issues raised in the Consultation Paper must be considered within the context of the broader family law system and rules of evidence applicable to litigation.
5. While the Law Council acknowledges there is some variation in the quality of reports and relevant expertise from certain family report writers within the current framework, there is clearly insufficient funding of in-house services and Regulation 7 family consultants³ to meet the current demand. This funding shortage is central to the creation of many of the perceived problems with the output of some family report writers and has reduced the number of experts prepared to undertake this work.
6. As previously submitted to the Australian Law Reform Commission,⁴ the Law Council considers that problems with the quality of some family reports are caused by:
 - a significant shortage in the number of psychologists, psychiatrists and other qualified social scientists who are prepared to do this work;
 - a diminution in funding, over time, of the Court's in-house family consultants service (and consequent pressures upon recruitment and retention of highly experienced practitioners); and
 - a diminution in funding, over time, for Regulation 7 family consultants (with the same impacts).

² Rachael Field, Samantha Jeffries, Zoe Rathus and Angelia Lynch, 'Family reports and family violence in Australian family law proceedings: What do we know?' Good Evidence, Safe Outcomes in Parenting Matters Involving Family Violence: *Analysing Current Family Report Writing Practice* (June 2016) <<https://www.researchgate.net/publication/304520692> Family reports and family violence in Australian family law proceedings What do we know>.

³ Private practitioners who hold a statutory appointment from the Chief Executive Officer(s) of the Federal Circuit and Family Court of Australia under regulation 7 of the *Family Law Regulations 1984*.

⁴ Law Council of Australia submission, *Review of the Family Law System: Discussion Paper* (16 November 2018), <<https://www.lawcouncil.asn.au/resources/submissions/review-of-the-family-law-system-discussion-paper>>.

7. The Law Council is aware that many experienced family report writers will no longer do the work – a result of many factors, but including, the poor rate of remuneration offered to Regulation 7 family consultants compared to the remuneration in other areas of psychiatry and psychological practice, vexatious complaints and threats made against them by litigants.
8. As set out in this submission the Law Council is concerned that an unintended risk of an accreditation scheme will be that it creates a further disincentive for qualified practitioners to engage in this work (a further barrier to entry) and the numbers of qualified social scientists willing to do this difficult work will reduce even further, placing more pressure on the system. Any new system which increases the costs of compliance for social scientists, and which opens them up to yet another complaint mechanism, is likely to cause many to choose not to do this work.

Responses to consultation themes

Definitions of family report and family report writer

9. The Law Council is not opposed to defining the terms ‘family report’ and ‘family report writer’ within family law legislation to clarify their purpose and application. There may be some value in defining these terms to improve understanding of the role of the family report writer for litigants (and in particular, those who are self-represented). However, there is a risk that a narrow legal definition, that prescribes which specific social science professionals may prepare a family report, will result in the exclusion of experienced and qualified professionals, and the inclusion of less appropriate professionals.
10. If a legal definition of family report writer is adopted, this should include competency bases rather than only linked to a particular tertiary qualification, and should not overrule the need for proper and careful consideration of which particular skills and qualifications are necessary in a particular case.
11. The Law Council supports the general view that family report writers ought to hold relevant tertiary qualifications, in addition to relevant professional experience. There is also support for a requirement that family report writers undertake appropriate professional supervision, including through their relevant professional body organisations.
12. While many family report writers hold a psychology or social work degree, the types of skill and expertise necessary to competently prepare reports may be gained through other tertiary qualifications and professional experience. An experienced and appropriately qualified family therapist, for example, may be well-placed to understand family systems, family dynamics, child development and how to engage with people experiencing trauma.
13. The Law Council would welcome the opportunity to further discuss the appropriateness of any proposed legislative definition of family report and family report writer.

Content of a family report

14. Section 62G of the *Family Law Act 1975* (Cth) (**the Act**) requires a family consultant, who is directed to give the Courts a report, to ascertain the views of the child and include these in the report, except where this would be inappropriate. A family consultant may also include matters which relate to the care, welfare or development

of the child. Section 60CC of the Act provides guidance on how the Courts determine what is in a child's best interests.⁵ The Consultation Paper outlines other ways in which family report writers are provided direction on the matters to be addressed in a family report, including letters of instruction.⁶

15. The specific matters which family report writers should consider in the preparation of a report will necessarily vary, depending on the circumstances of the case. The Law Council has some concern that legislating content requirements for family reports may limit the discretion of family report writers to consider matters which are important to a particular case and may result in a 'cookie cutter' approach to the preparation of reports and the expression of any recommendations.
16. In relation to Aboriginal and Torres Strait Islander families and children, the Law Council is concerned with a lack of consideration around cultural issues and a lack of available culturally competent family report writers generally. There are also few family report writers with appropriate expertise in working with culturally and linguistically diverse families. As set out further below, the Law Council supports measures which improve the capacity of family report writers to properly consider cultural issues, which may be restricted under legislated content requirements.

Competencies and skills

17. The Consultation Paper identifies stakeholder concern with some family report writers having an insufficient understanding of family violence, child abuse and the impact of trauma on both parents and children. Concern has also been expressed in relation to some family report writers not appropriately engaging with or listening to children. While most family report writers are highly skilled and competent professionals, the Law Council acknowledges that there is some variation in the competencies of family report writers, and in the quality of family reports produced (even allowing for the impact of subjectivity).
18. Family violence is considered core business of the Courts,⁷ with over half of the matters before the family law courts involving allegations of domestic and family violence. It is critical, therefore, that family report writers have the skill and expertise necessary to identify and appropriately respond to matters involving domestic and family violence, including non-physical violence and coercive control.
19. At all times, family reports should be prepared by professionals who demonstrate the skill and expertise necessary to undertake this important work, particularly with respect to the facts and circumstances of the individual matter. The Law Council understands that family report writers engaged to provide family reports are a small and well-known cohort, whose expertise is generally not in dispute. Experts who are engaged outside the Courts are jointly appointed by the parties. As the rules of evidence apply to proceedings in the Courts, this is the appropriate forum for any challenge to the expertise or conclusions reached by a family report writer, if necessary.
20. Importantly, as noted above, the Law Council suggests that increasing regulation for family report writers will have little impact on outcomes for families if broader systemic

⁵ *Family Law Act 1975* (Cth), section 60CC.

⁶ Attorney-General's Department, *Improving the competency and accountability of family report writers' Consultation Paper*, <https://consultations.ag.gov.au/families-and-marriage/family-report-writers/>, 7.

⁷ Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* Standing Committee on Social Policy and Legal Affairs
<https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVLawreform/Report/section?id=committees%2Freportrep%2F0241Q9%2F25166#footnote16target>.

issues remain unaddressed. For example, even where family report writers have an excellent understanding of domestic and family violence, they may feel unwilling or unable to provide a frank opinion on the basis of allegations in the context of a pro-contact culture which has historically minimised the significance of domestic and family violence.⁸ Other criticism can arise from the misplaced expectation that the family report writer will make findings about disputed facts, however, this remains the role of the Courts and not the family report writer.

21. The Law Council supports the competencies set out in the *Australian Standards of Practice for Family Assessments and Reporting (the Standards)*, which include appropriate training, qualifications and experience to:
 - form views about the parenting capacity, children’s relationships with their parents and family relationship dynamics;
 - understand and be sensitive to mental and physical health issues;
 - assess risk, especially for family violence, child abuse, neglect and substance abuse;
 - engage with children in a developmentally appropriate manner to obtain and accurately represent their views; and
 - interview parents about sensitive and emotional issues in a trauma informed way.
22. The expanded use of such guidelines to apply to family reports produced externally to the Courts may address some of the concerns in relation to the quality of family reports.
23. In addition, some matters may benefit in engaging a family report writer with particular specialisation where these matters are relevant to the case, for example, working with children with Autism Spectrum Disorder or adults with addiction and substance abuse issues.
24. Finally, family report writers who undertake family reports involving Aboriginal and Torres Strait Islander families and children should be culturally competent and demonstrate a particularly high degree of skill in understanding and assessing sensitivity and awareness of matters of cultural importance for First Nations families accessing the family law system. This extends to the requirement for cultural safety when engaging in family report processes addressing cultural factors. As set out in the Standards, this should include understanding of matters such as:
 - connection to community and extended family, including cultural concepts of family; and
 - the capacity of both parents to provide the support and opportunity for the child to explore the full extent of their cultural heritage.⁹
25. Law Society of the Northern Territory has provided the Law Council with specific examples of where it sees room for improvement for family report writing in the context of Aboriginal and Torres Strait Islander families and children, including:
 - (a) Greater consideration given to cultural matters in family reports. Family report writers are unlikely to be able to verse themselves in the cultural requirements of each cultural group, so measures should be put in place to seek cultural reports or interview cultural authorities to delve into more complex cultural

⁸ Consultation Paper, 9.

⁹ *Australian Standards of Practice for Family Assessments and Reporting* (February 2015), 35 and 36.

needs. A broad approach to cultural competence would be inappropriate due to the highly varied cultural practices followed across Australia. The issue of cultural (men's/women's) ceremony has historically been poorly dealt with in the family law context, noting limited evidence can be provided by the parents due to the highly sensitive nature of ceremony.

- (b) A deeper understanding by family report writers of social determinants of family violence in Aboriginal communities. The national dialogue towards family violence is often not applicable to Aboriginal communities, and in particular remote communities, where a more trauma-informed approach needs to be taken. There is evidence that the gendered argument of family violence is less applicable in Aboriginal communities as it does not factor in two-way violence and reciprocal fighting.¹⁰ This contradicts the national approach, which is often applied in family court matters regardless of the cultural background of the parents.
 - (c) A need for more face-to-face access to family report writers, particularly in remote areas. Phone appointments are often inappropriate and unhelpful for Aboriginal parents who do not speak English as a first language and rely on other language cues, such as body language. Conducting interviews by phone is likely to result in a breakdown of communication which may result in ineffective reports.
26. While cultural reports are infrequently used, the Law Council is of the view that these reports would, in some cases, be of immeasurable assistance to the Courts in matters involving Aboriginal and Torres Strait Islander children.¹¹ Consideration of a first nations' child's right to their culture is expressly required under paragraph 60CC(3)(h) of the Act. Expert evidence about these mandatory considerations is frequently required.

Training to meet competency requirements

- 27. The Law Council supports ongoing education and training on relevant matters, including domestic and family violence, for all family law professionals, including legal practitioners, family report writers, mediators, judicial registrars and judicial officers.
- 28. The in-house training provided to Court Child Experts and, according to the Consultation Paper, available to Regulation 7 family consultants should be available to all professionals who prepare family reports.
- 29. If compulsory training is developed which covers relevant skills and competencies, consideration would need to be given as to how this could be appropriately funded, delivered by suitable professionals and reflect up to date research and practice.
- 30. In relation to training on cultural competency, Law Council reiterates its view provided to the ALRC that more funding be allocated to provide culturally-informed training to family consultants and judicial officers and other report writers so that they more

¹⁰ ANROWS '*Innovative models in addressing violence against Indigenous women*' (January 2018), <<https://www.anrows.org.au/publication/innovative-models-in-addressing-violence-against-indigenous-women-final-report/>>.

¹¹ K Ruska and Z Rathus, 'Backford v Backford', in N Watson and H Douglas (eds), 'Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision-Making', *Routledge*, 2021.

readily accept the notion that mainstream Anglo-Saxon based social sciences may not be reliably applied to Aboriginal and Torres Strait Islander families.¹²

Professional registration and membership

31. The professional registration or membership options outlined in the Consultation Paper are unlikely to neatly fit or reflect the cohort of professionals who undertake family reports, and the Law Council does not support a requirement that family report writers be registered with or hold membership with specific institutions.
32. Family report writing is a niche undertaking which requires a highly specialised set of skills. While there is likely some overlap with the skills ordinarily required in the practice of psychology, psychiatry or social work, as noted above, some of the skills family report writers require extend beyond this.
33. For example, as noted in the Consultation Paper, members of the Australian Association of Social Workers who complete 30 hours of Continuing Professional Development (**CPD**) can apply to become Accredited Social Workers. Of the 30 hours of CPD required for accredited social workers, 20 hours must be linked to their area of accreditation. However, none of the endorsed areas of practice, subspecialties or credentials are specific to family report writing.¹³
34. As stated at the outset, the Law Council does not support the implementation of a mandatory national accreditation scheme or registration/membership requirements at this time. Such a scheme may adversely contribute to the existing significant issue of the shortage of family report writers and involve further costs, delays and barriers to entry for interested practitioners.
35. However, if such a scheme were to progress, consideration would need to be given to whether or not appropriate resources could be provided for an accreditation body to undertake the various roles the Consultation Paper contemplates, including properly assessing each applicant on their experience, qualifications, competencies and skills, and providing all necessary administration and support to accredited professionals.
36. Again, the process of accreditation would likely represent an additional cost for family report writers, and has the potential to create additional barriers that may exacerbate shortage concerns.

Requiring and demonstrating competencies

37. All professionals who undertake family reports are likely to benefit from the ability to access and undertake CPD. In relation to private family report writers, this is likely to be in addition to the professional development the report writer undertakes as part of their broader occupation. A period of mentorship for professionals new to family report writing may also assist in supporting best practice.

Screening

38. The Law Council does not support additional suitability screening of family report writers. This is particularly the case as private family report writers are jointly appointed and the qualifications and expertise of these professionals are generally

¹² Law Council of Australia submission, 'Review of the Family Law System – Issues Paper 48' (7 May 2018), 23 <<https://www.lawcouncil.asn.au/resources/submissions/review-of-the-family-law-system-issues-paper-48>>.

¹³ Consultation Paper, 15.

not in dispute (by the parties choosing to engage their services). In-house Court Child Experts are employed by the Courts and will have demonstrated their suitability as part of the employment processes. That does prevent, however, in particular circumstances, a challenge being taken to the views expressed by the court consultant/report writer, if their actual experience/qualifications/expertise do not in fact permit them to have expressed the opinions contained in the report (that is, outside their expertise).

39. The Law Council agrees that family report writers occupy a position of trust in the family law system, however our members have not indicated knowledge of widespread or systemic problems in relation to the withholding of criminal histories or disciplinary information in relation to family report writers.

Public sources of information on family report writers

40. While there is currently no central and publicly available list of family report writers, the Law Council has not received any expression of concern with regard to the process of ascertaining the skills and qualifications of family report writers. As the Consultation Paper notes, family report writers are required to include a short resume or summary of their qualifications and experience with the family report.¹⁴
41. Further, information about private family report writers' skills and qualifications are generally publicly accessible. Information about in-house Court Child Experts is less accessible, however there are likely safety and privacy considerations which would make the public release of this information difficult.
42. If a central public register of family report writers were developed, this would require adequate resourcing to ensure the site is well-maintained and information provided is reliable and up to date.

Complaints mechanisms

43. The Law Council supports the proper regulation of all professionals working in the family law system, and acknowledges that, currently, complaints mechanisms are at times confusing and disjointed. A clear and transparent complaints handling process could improve litigants' perceptions of family report writers. However, the Law Council maintains its concern with a scheme designed to facilitate complaints about family report writers. Specifically, complaints may be used by some litigants as a means to frustrate the timely resolution of matters and to exert inappropriate pressure upon a report writer (particularly pending a hearing). In addition, vexatious and malicious complaints, as well as personal threats by litigants also serve as a disincentive for family report writers to undertake this work.
44. Further, the use of cross-examination, as discussed on page 26 of the Consultation Paper is not, and cannot be, seen as a complaint mechanism for improper practice by family report writers. The purpose of cross-examination is to adduce evidence which directs the Courts toward the remedies sought by a party. It is very often adverse to the interests of a party (and not effective) to use cross-examination as a platform for a global critique of the practice, professionalism or capacity of the family report writer. Judicial officers will manage the process within their court room and are unlikely to allow questioning which is irrelevant, disrespectful or malicious.
45. Family law is a fraught and highly emotionally area of practice. In many matters, there will be one or two unrepresented parties. In the experience of our members, it is not

¹⁴ Ibid, 21.

uncommon for family law litigants to experience frustration and dissatisfaction throughout the legal process. The volume of vexatious or malicious complaints which are likely to arise in circumstances where litigants can more easily raise a complaint in relation to a family report writer should not be underestimated.

46. While the Law Council does not have a settled position on whether the existing complaints process should be amended, it is clear that any new complaints body would need to possess a robust understanding of family law processes and must be able to recognise instances of vexatiousness and systems abuse and be designed in close consultation with the Courts, family report writers and the legal profession. The Law Council would, however, support improvements to the availability of information to litigants in the Courts as to their current rights to complain through existing structures.
47. The Law Council is not aware of any evidence to support the assertion that, if family report writers are not subject to a robust complaints review process, there is a risk that some may be able to practice at 'a low or dangerous standard'.¹⁵ As set out in the Consultation Paper, there are a range of ways in which a family report can be challenged and various professional oversight bodies already receive and consider complaints in relation to family report writers. In addition, the Courts maintain discretion to assign appropriate weight to the evidence provided by the family report writer. If a report is unhelpful to the judicial officer, it is usual and proper for the reasons for that to be made clear in the judgment.
48. In the case of practitioners holding social work qualifications, the absence of a professional regulatory body to which all must be members creates some difficulty. To limit report writers to only those who are members of an association which, by reason of membership, enables its members to be sanctioned, may unreasonably limit the pool of available report writers.

Publicly identifying a family report writer

49. Section 121 of the Act prevents the publication of any personal identifying information in relation to a family law proceeding or part of a proceeding. The Law Council does not support amending section 121 to enable the names of family report writers to be published. This legislative amendment would be both excessive and unwarranted and again would likely act as a disincentive for engagement of report writers in this field.
50. Again, the Law Council is not aware of any widespread issues around family report writers who have been convicted of an offence and/or subject to an adverse finding by a regulator. In the experience of our members, the reputational damage which would arise in these circumstances would likely exclude such professionals from preparing family reports in future.

Further comments

51. As noted from the outset, family report writers are a vital component of a functioning family law system, and in the view of the Law Council, perceived problems with the quality of some family reports may be the result of a shortage in the number of experts prepared to undertake this work and diminution of funding of both in house and private family report writers.
52. Increasingly few family report writers are willing to undertake Legal Aid funded family reports, as the fee does not adequately reflect the expertise of the family report writer

¹⁵ Ibid, 35.

and the significant work required in the preparation of the report. In our view, more appropriate funding would facilitate the engagement of appropriately experienced family report writers. In relation to in-house Court Child Experts, adequate funding must also be provided to attract and retain professionals at rates of remuneration commensurate with the level of skill and expertise this work requires.

53. Finally, the Law Council has been made aware of long delays in obtaining family reports. The demand for family reports is significant, while the pool of professionals who prepare family reports is relatively small. As a result, the availability of family report writers is limited, and parties often wait several months (and longer) before family interviews can take place. Measures aimed at improving the accountability and competency of family report writers must be carefully considered so as to avoid further reducing the pool of professionals willing and able to undertake this work.